ISSUE

The issue presented for determination:

Whether the Claimant proved by a preponderance of the evidence that the thoracic outlet surgery as proposed by Dr. Annest is reasonable, necessary and related to her admitted injury of August 29, 2021?

FINDINGS OF FACT

1. The Claimant is a police officer for the [Redacted, hereinafter CG] Police Department. She sustained an admitted compensable injury on August 29, 2021 to her right wrist, her right arm, extending into her chest, her right shoulder, with pain extending into the back of her right shoulder and neck. She sustained these injuries when she attempted to stop a suspect's unattended vehicle rolling downhill. It started rolling backward and she positioned herself in its way to keep it from rolling into traffic with her arms outstretched pushing against the rolling vehicle to stop it.

2. After conservative care including physical therapy and diagnostic testing, Claimant saw the authorized treating physician, Dr. Kurz on December 14, 2021. Dr. Kurz released her to full duty, and placed her at MMI with no impairment and no restrictions.

3. Claimant objected and requested a Division IME. The DIME doctor, William Watson diagnosed CRPS Type I, possible thoracic outlet syndrome (TOS) possible impingement of the C-6 nerve root, possible rotator cuff tear and anterior subluxation of the proximal right clavicle. Dr. Watson opined that the Claimant was not at MMI and needed further diagnostic workup for CRPS and possible thoracic outlet syndrome. He recommended that she continue to treat with Dr. Leggett. The DIME occurred on May 17, 2022.

4. Following the Division IME, Claimant underwent diagnostic testing performed by Dr. Schakaraschwili, which confirmed CRPS type I. Dr. Schakaraschwili noted: "The patient had a somewhat unusual response to sympathetic block reporting no pain relief at all for 2 days and then approximately 50% pain relief for two weeks. Both the autonomic testing battery and thermogram were positive for complex regional pain syndrome. Later, in February of 2023, and based upon Dr. Goldman's IME report of January 16, 2023, the City paid for the claimant to be evaluated for a possible spread of her CRPS into her right lower extremity. Dr. Schakaraschwili's report of February 17, 2023, indicates that the QSART testing and thermogram were negative for the spread of CRPS.

5. The Claimant continues to have constant pain since the injury, which she measures as a nine out of ten, most days. She has headaches, neck pain, right arm pain, right chest and right shoulder pain, swelling of the right arm, discoloration the arm, excessive sweating and palm of the right hand and the arm is hot. She is in pain continuously and gets very little sleep due to the pain.

6. The Claimant saw Dr. Stephen Annest on April 25, 2022 at the referral of Dr. Leggett. The Claimant had severe weakness in her right arm, sensitivity, hyperhidrosis, positive pectoralis stretch and positive limb tension testing. She had sharp pains and was set up for referral to Dr. Gary Morris for consideration of a C5-6 block, and stellate ganglion block. Referrals were made by Dr. Annest to Dr. Schnur and Dr. Hatzidakis for evaluation of the wrist and shoulder issues.

7. Claimant saw Dr. Goldman via telehealth interview on November 8, 2022 and in person on November 10, 2022. In addition to a report on December 4, 2022, Dr. Goldman issued a supplemental report on January 25, 2023. Dr. Goldman is of the opinion that the Claimant met the criteria under the MTGs for clinically probable CRPS but thought that the Claimant had a myogenic as opposed to a neurogenic TOS. Dr. Goldman stated that he had "very rarely seen good outcomes with thoracic outlet decompression. Dr. Goldman noted that he thought the EMG performed by Dr. Sparr on December 15, 2022 was borderline at best. Dr. Goldman does not recommend that Claimant undergo the thoracic outlet decompression surgery.

8. Dr. Leggett's opinion is that Claimant has neurogenic TOS, which is consistent with Dr. Annest's opinion. Both opined that this condition is amenable to surgery. Dr. Annest describes the surgery in great detail in his report of May 9, 2023.

9. The Claimant differentiates the pain that she has due to CRPS and the pain due to TOS. The TOS pain is constant and limits any movement of her right arm. She has pain on the top of her shoulder and in her brachial plexus that is constant and worsens with any movement of her arm.

10. The Claimant fully understands that the TOS surgery may make her CRPS spread or that surgery may not resolve her symptoms, but she has been in unrelenting pain for over two years and has tried all the conservative measures including therapy, massage, injections, block and medication. The only thing that has given her relief for the suspected TOS was the pectoralis and scalene blocks that Dr. Annest performed.

11. Dr. Leggett and Dr. Goldman both agree that the requested surgery does not meet the Medical Treatment Guidelines. However, the Guidelines are not required to be adhered to without exception. I am more persuaded by the testimony that Claimant received relief from pain after receiving the pectoralis and scalene blocks from Dr. Annest. That, combined with an informed understanding that the proposed surgery has the possibility of not working or causing the spread of the CRPS leans in favor of granting the surgery. As explained by Dr. Leggett in his testimony, the two blocks

"mimic what the potential outcome of surgery is going to be". Claimant had reported that she had 60% benefit following the blocks. (Exhibit 15, p. 177).

12. As part of his preoperative assessment, Dr. Annest recommended a repeat electrodiagnostic study, a psychological evaluation and a physical examination.

CONCLUSIONS OF LAW

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).

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

The Division's Medical Treatment Guidelines, which are contained in Dep't of Labor & Employment Rule XVII, 7 Code Colo. Regs. 1101-3, were established by the director pursuant to an express grant of statutory authority. *See* § 8-42-101(3.5)(a)(II).

The Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. Section 8-42-101(3)(b), C.R.S.2002. Thus, the Division's Medical Treatment Guidelines are to be regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hall v. Industrial Claim Appeals Office of State*, 74 P.3d 459 (Colo. App. 2003); *Rook v. Industrial Claim Appeals Office of State*, 111 P.3d 549 (Colo. App. 2005). However, the Division also recognizes that acceptable medical practice may include deviations from these guidelines. *Hall* at p. 461. Moreover, while the Medical Treatment Guidelines are a reasonable source for identifying diagnostic criteria, nothing in the Guidelines requires an ALJ to make determinations based on the Guidelines. *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (I.C.A.O. April 27, 2009). Determinations as to a claimant's industrial injury are not controlled by the application of the Guidelines. Indeed, in making determinations regarding a claim, an ALJ is not bound by any medical opinion, even if it is unrefuted. *Cahill v. Patty Jewett Golf Course and City of Colorado Springs*, W.C. No. 4-729-518 (February 23, 2009), citing, *Indus. Commission v. Riley, 165* Colo. 586, 591, 441 P.2d 3, 5 (1968); *Davison v. Industrial Claim Appeals Office of State* 84 P.3d 1023 (Colo. 2004).

Medical Benefits–Reasonably Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, 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 Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165

Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

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. Industrial 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). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Here, Doctors Annest and Dr. Leggett, both authorized treating physicians, have recommended thoracic outlet surgery for Claimant’s neurogenic thoracic outlet syndrome. The Claimant’s documented symptoms, and her response to the scalene and pectoralis minor establish a reasoned basis for the diagnosis of neurogenic TOS that is amenable to surgery. That is assuming Claimant qualifies for the surgery following the electrodiagnosic study and psychological evaluation, as determined by Dr. Annest. I conclude that the opinions of Dr. Annest and Dr. Leggett are more persuasive that that of Dr. Goldman with respect to the nature of the TOS and the need for surgery to alleviate Claimant’s pain that she is experiencing.

ORDER

It is therefore ordered that:

1. The Claimant proved by a preponderance of the evidence that the proposed TOS surgery recommended by Dr. Annest is reasonable, necessary and related. As such, the surgery proposed by Dr. Annest is granted including the preoperative assessment.

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, 633 17th Street, Suite 1300, Denver, Colorado, 80202. 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 petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 2, 2024

Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Dr. Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-143-226-003

STIPULATION

- The Claimant's average weekly wage (AWW) is $641.44.

ISSUES

- Did Claimant prove that he sustained a compensable injury on July 13, 2020?
- Did Claimant prove entitlement to temporary disability benefits?
- Is Dr. Berens the authorized treating physician?

FINDINGS OF FACT

1. Claimant worked for Employer as a truck driver picking up loads from [Redacted, hereinafter TG] distribution in Pueblo and delivering the goods to various stores, out of state. He was hired on January 11, 2019 by the Employer. After he started working, he began to have anxiety when driving. This happened in approximately June 2020. After that, the Claimant was not working since he took an extended leave of absence due to anxiety. Specifically, he had anxiety while commercial driving in construction zones. On the date of injury, July 13, 2020, Claimant was beginning to work again after his leave of absence. He testified that on that date, the Claimant's anxiety symptoms were under control. He felt ready to return to work driving the semi-tractor trailer for [Redacted, hereinafter ST].

2. Claimant was loading personal items in his cab including food and water in preparation for his over the road trip, which he believed was to Salt Lake City, Utah. As he was exiting the cab, he missed the top step of the cab and fell backwards, hitting his head and injuring his left shoulder and left hand. He estimated that the distance he fell was three and half feet. His head was bleeding after he hit his head on the asphalt. He attempted to stand up and felt dizzy. He went to the dispatch office and reported the incident to [Redacted, hereinafter JB], his supervisor. JB[Redacted] provided him with wet paper towels for the blood from his head.

3. JB[Redacted] was too busy to take the Claimant to receive medical care, so Claimant called his son to take him to Parkview Emergency Room. He was diagnosed with an acute closed head injury and was prescribed oxycodone. Following his initial treatment, he went to CCOM[1] for further treatment on July 16, 2020. He had a couple

[1] According to Respondents' Counsel in his opening statement, CCOM is now Concentra.

visits at CCOM. He reported that he had dizziness, memory and concentration issues. After these two initial visits, the claim was denied and Claimant was unable to continue treating at CCOM. At the time CCOM would no longer see the Claimant, he was restricted from commercial driving. Since he was not able to treat at CCOM, the Claimant began treatment with his personal physician, Dr. Berens. Neither the physicians at CCOM nor the Claimant notified the Insurer of CCOM's refusal to treat for non-medical reasons as provided in C.R.S. §8-43-404(10). As such, the Insurer never had the opportunity to designate a new Authorized Treating Provider.

4. Claimant's neck and shoulder injuries mostly resolved with care, but his head injury did not. He continued to experience dizziness with memory and concentration difficulties.

5. At Claimant's request, due to Claimant's financial concerns, Dr. Berens released the Claimant to return to work without any restrictions on June 21, 2021. On that date, the Claimant felt well enough to return to work. Respondents' Exhibits p. 116. However, the Claimant testified that the Safety Department at ST[Redacted] would not approve him to return to work as a driver. Prior to this release to return to work, the Employer did not offer the Claimant any modified work.

6. At the request of Respondents, Claimant was seen by Dr. Cebrian for an independent medical evaluation on July 12, 2023. Dr. Cebrian issued a written report on August 1, 2023. Dr. Cebrian diagnosed mild traumatic brain injury, left shoulder contusion/strain and left hand contusion, all due to the work injury. Dr. Cebrian opined that the PTSD and anxiety symptoms were non-work related.

7. Claimant returned to work for another employer on October 4, 2023. He works for [Redacted, hereinafter CL] and drives disabled people in wheelchairs and takes them for appointments such as dialysis.

CONCLUSIONS OF LAW

A. Compensability

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

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

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

After consideration of all the evidence, I conclude that the Claimant proved by a preponderance of the evidence he suffered a compensable injury to his head, left shoulder and left hand.

B. Medical benefits/Authorization

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

In addition to proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Although the Claimant selected CCOM as the authorized provider, I conclude that based on Claimant's credible testimony that CCOM stopped treating him when the claim was denied with a notice of contest. Thereafter, the Claimant selected his personal physician, Dr. Berens, to treat him for his work injury. However, since the Carrier was not notified by either CCOM or the Claimant, Claimant was not free to select another Authorized Treating Physician. The physicians at CCOM remain authorized.

C. Temporary Disability Benefits

The parties have indicated that in addition to the issues of compensability and authorized treatment, the third issue to be determined is temporary total disability. Based on the Claimant's testimony and the initial medical records restricting the Claimant from commercial driving, the Claimant is entitled to temporary disability benefits beginning on the date of injury. Claimant's inability to drive commercially was due to his cognitive symptoms and dizziness caused by his work related injury. I also conclude that the Claimant's symptoms associated with preexisting PTSD and anxiety were not aggravated by the work injury. Since no authorized attending physician released the Claimant to full duty work or placed the Claimant at MMI, Claimant is entitled to TTD from the date of injury to October 4, 2023, when he returned to work for another employer.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his head, left shoulder and left hand.

2. The doctors at CCOM are the authorized treating physicians.

3. Claimant is entitled to temporary disability benefits from the date of injury until October 4, 2023.

4. Any issues not determined by this order, including offsets, 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: January 4, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-190-786-002

ISSUES

1. Whether Claimant's permanent partial disability (PPD) benefits are limited to twelve weeks of combined temporary disability and PPD benefits pursuant to Section 8-41-301(2)(b), C.R.S.

2. Whether Claimant is entitled to temporary partial disability (TPD) benefits for the period from May 27, 2022, through her date of maximum medical improvement (MMI).

FINDINGS OF FACT

1. On Friday, December 10, 2021, Claimant, a classroom paraprofessional, was instructing a sixteen-year-old student who closed-fist punched her above her left eye on the side of the head. Claimant experienced a headache and later developed neck pain, dizziness, and nausea.

2. Claimant had a history of treating for neck pain as well as complaints of chronic headaches and migraines. She also participated in physical therapy for the issues since at least January 2017. She had scheduled a Botox injection for her headaches that happened to be scheduled for her date of injury. She proceeded with the Botox injections that same day with Dr. Lawrence Meredith. Claimant reported to Dr. Meredith that she had been struck in the head by a student. Dr. Meredith noted a normal physical examination with no observations of a physical injury.

3. On December 13, 2021, the Monday after Claimant's work injury, Claimant began treating under her workers' compensation claim at WorkWell where she was attended by Teresa Ayandele, PA-C. Claimant reported to PA Ayandele that she had been hit in the head by a student, that over the weekend she experienced nausea, headache, dizziness, and photo- and phonosensitivity. Claimant also reported that her neck was mildly stiffer and more painful than usual. Claimant also reported that she had a prior history of fibromyalgia, as well as two prior concussions, the most recent being three years prior to her date of injury.[1] On physical examination, PA Ayandele noted Claimant's face was without signs of injury, though Claimant reported some tenderness on the left side of her forehead. Neurologically, PA Ayandele noted Claimant was logical and coherent with normal finger-to-nose testing, quick to respond appropriately to questions, and with adequate memory recall. PA Ayandele diagnosed Claimant with a concussion without loss of consciousness. Despite Claimant's negative neurological

[1] Coincidentally, that concussion also resulted from being punched by the same student.

presentation, PA Ayandele referred Claimant for physical therapy for vestibular training.

4. The parties entered into a stipulation on December 19, 2022. In it, the parties stipulated that Respondents would file a general admission of liability admitting for TPD benefits beginning January 10, 2022, and ending on May 26, 2022. The parties left unresolved whether Claimant was entitled to TPD benefits after May 26, 2022. They stipulated: "The period beginning May 27, 2022 to ongoing will be evaluated for temporary partial disability benefits by the parties upon review of wage records."

5. Surveillance video was taken of Claimant on January 8, 2023. In the footage, Claimant was walking her dog. Claimant was not wearing sunglasses despite it being bright and sunny outside with snow on the ground. Claimant walked her dog with ease and without apparent issues.

6. On February 27, 2023, Claimant underwent a neuropsychological evaluation with Dr. Gregory Thwaites. Dr. Thwaites took Claimant's prior history, noting that Claimant had two prior concussions: an incident in 2000 when she hit her head on a door with a brief loss of consciousness and no post-concussive symptoms; and a second incident where Claimant was punched in the head by a student with no loss of consciousness but some subsequent postconcussive complaints and vestibular therapy. Claimant reported that the second concussion ended with a full recovery. Claimant also reported to Dr. Thwaites that she had a pre-accident history of complex migraines, which had begun when she was twelve years old, and that she had been receiving Botox treatment and other medications prior to the work injury. Claimant also reported having been diagnosed with fibromyalgia, though she denied any associated cognitive symptoms.

7. Claimant reported to Dr. Thwaites that during the weeks and months leading up to the work injury, Claimant had been experiencing migraines monthly, with some lightheadedness and disequilibrium. Claimant also indicated that she had suffered psychological trauma during her youth, for which she had received counseling as recently as a year prior to the work injury.

8. Regarding the work injury, Claimant reported that the student who punched her was about five and a half feet tall and approximately 250 pounds. She reported that she had felt a little dizzy and slightly dazed with a slight headache. Claimant obtained the pre-scheduled Botox treatment that same day, attended a work party, and then went home. Claimant reported that she woke up the next day with some nausea and bruising as well as with sensitivity to sound.

9. Upon examination, Dr. Thwaites noted that Claimant exhibited some balance disturbance. Claimant also reported to Dr. Thwaites that she was experiencing some residual problems with auditory verbal comprehension, including declining

vocabulary and word knowledge. She complained of a number of other cognitive deficits, including working memory and sustained attention.

10. Dr. Thwaites ultimately noted that the neuropsychological tests indicated performance validity issues, making it challenging to assess her current neuropsychological status objectively. Dr. Thwaites suggested potential psychological factors contributing to her presentation and deferred differential psychological diagnosis to the evaluating psychologist. He did not find evidence of ongoing cognitive impairment associated with the concussion and recommended further work-up for non-specific neurologic complaints outside the workers' compensation case. Dr. Thwaites planned to discuss test results, concussion pathophysiology, and discharge Claimant from neuropsychological care with no follow-up, emphasizing the positive prognosis for cognitive recovery from concussion.

11. Claimant later underwent a psychological evaluation with Dr. Kevin Reilly on April 21, 2023. Through testing, he found that Claimant had intact neurocognitive capacities. While she reported extended symptoms related to a potential concussion, the symptoms were not consistent with the expected pattern of recovery. Neuropsychometric testing indicated symptom magnification combined with acceptable effort, which indicated emotional factors were heavily influencing testing. Dr. Reilly concluded psychosocial factors were likely playing a significant role in her reported cognitive difficulties.

12. On May 22, 2023, Claimant's authorized treating provider, Dr. Robert Dupper, placed Claimant at maximum medical improvement. He prefaced his impairment analysis with the following:

> "[W]hen she was evaluated by neuropsychology near the conclusion of her treatment the findings indicated the remaining symptoms were more likely related to psychosocial factors, some of which were preexisting but were exacerbated by the head injury. It is my opinion, after reading the reports by Dr. Thwaites and Reilly, the current symptoms are less likely to be related to the head injury than they are related to the psychosocial factors. Therefore the impairment rating done today focuses on the mental health diagnosis of Adjustment Disorder with anxiety and depression."

13. Based on his assessment, Dr. Dupper assigned Claimant a 9% psychological rating, which corresponded to a 9% whole-person impairment rating.

14. Respondents ultimately admitted for PPD benefits consistent with the impairment rating in their July 5, 2023 final admission of liability. However, Respondents limited the PPD award to twelve weeks of combined temporary disability and PPD benefits pursuant to § 8-41-301(2)(b), C.R.S. Respondents admitted for temporary disability benefits only up through May 26, 2022.

15. Claimant testified at hearing largely consistent with the above findings, as did Dr. Dupper. Claimant also testified that she had a wage loss up until May of 2023, the end of school year, due to her restrictions. The Court finds Claimant's testimony credible insofar as it concerns the recounting of the assault by the student and insofar as she had wage loss resulting from her work restrictions. The Court also finds Dr. Dupper's testimony credible.

16. The Court also finds that the manner in which the student used his hand in punching Claimant was such that his hand was capable of producing an injury which posed a substantial risk of protracted loss or impairment of the function of the brain and neck. The Court also finds that as a result of the student punching Claimant in the head, Claimant suffered an injury, which included a headache, nausea, dizziness, and neck pain.

17. The Court finds that Claimant did in fact sustain a wage loss from May 27, 2022, to her date of MMI, resulting from her temporary work restrictions.

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).

Permanent Partial Disability Benefits

The Workers' Compensation Act provides that PPD benefits for mental impairments shall be limited to "Twelve weeks of medical impairment benefits, which shall be in an amount not less than one hundred fifty dollars per week and not more than fifty percent of the state average weekly wage, inclusive of any temporary disability benefits." Section 8-41-301(2)(b), C.R.S. However, "this limitation shall not apply to any victim of a crime of violence, without regard to the intent of the perpetrator of the crime . . . ." *Id*.

A "crime of violence" is defined at § 16-1-104(8.5)(a), C.R.S., as:

> "a crime in which the defendant used, or possessed and threatened the use of, a deadly weapon during the commission or attempted commission of any crime committed against an elderly person or a person with a disability or a crime of murder, first or second degree assault, kidnapping, sexual assault, robbery, first degree arson, first or second degree burglary, escape, or criminal extortion, or during the immediate flight therefrom, or the defendant caused serious bodily injury or death to any person, other than himself or herself or another participant, during the commission or attempted commission of any such felony or during the immediate flight therefrom."

Claimant argues that her injury resulted from the student's use of a deadly weapon in the commission of one of the crimes listed in the crime-of-violence statute.[2] Section 18-1-901(d)(II), C.R.S., defines "deadly weapon" as any "weapon, device, instrument, material, or substance, whether animate or inanimate, that, *in the manner it is used or intended to be used*, is capable of producing death or serious bodily injury." (Emphasis added.)

"Serious bodily injury" is defined at § 18-1-901(p), C.R.S., to include in relevant part "bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the

[2] Though, Claimant does not specify which of the listed crimes was committed at the time of her injury.

body . . . ." In contrast, "bodily injury" without the "serious" modifier means "physical pain, illness, or any impairment of physical or mental condition." Section 18-1-901(c), C.R.S.

When determining whether a device is a deadly weapon, the court must consider whether such device was used in a manner that could have caused death or serious bodily injury. *See People in Interest of J.R.*, 867 P.2d 125 (Colo.App.1993). Thus, fists may be considered to be deadly weapons if they are used or intended to be used in a manner in which they are capable of producing death or serious bodily injury. *See People v. Ross*, 831 P.2d 1310 (Colo. 1992).

The question as to whether the weapon in fact caused death or serious bodily injury is not dispositive as to whether the weapon constitutes a "deadly weapon." *People v. Saleh*, 45 P.3d 1272 (Colo. 2002). However, the question is simply whether the weapon was used in such a manner so as to be capable of producing death or serious bodily injury, thus constituting a "deadly weapon."

Here, as found above, the student closed-fist punched Claimant above her left eye on the side of the head. The student was a sixteen-year-old male weighing approximately 250 pounds. The manner in which the student used his hand in punching Claimant was such that his hand was capable of producing serious bodily injury which involved a substantial risk of protracted loss or impairment of the function of her brain and neck. Therefore, the student's hand, as used, was a "deadly weapon." As a result of the student punching Claimant in the head, Claimant suffered an injury, which included a headache and neck pain. Therefore, Claimant's injury in this case was the result of a crime of violence, namely second-degree assault, which requires that a person cause an injury to another person with a deadly weapon. *See* § 18-3-203, C.R.S. *But see* 8-41-301(2)(b), C.R.S. (Court to disregard intent of perpetrator for purposes of the psychological impairment statute).

Because Claimant's injury resulted from her being the victim of a crime of violence, Claimant's PPD award is not subject to the twelve-week limitation set forth in § 18-3-203, C.R.S.

Temporary Partial Disability Benefits

Temporary disability benefits are designed to compensate an injured worker for wage loss while employee is recovering from work-related injury. *Pace Membership Warehouse v. Axelson*, 938 P.2d 504 (Colo. 1997). Temporary disability benefits are calculated at 66 $^{2}/_{3}$% of the difference between the claimant's average weekly wage at the time of injury and her average wages at the time of reduced work hours. Section 8-42-106, C.R.S.

"To obtain temporary disability benefits, the claimant bears the burden to prove a direct causal relationship between the wage loss and the industrial injury." *Torres v. State of Colorado*, W.C. No. 5-096-951-001 (Mar. 26, 2020).

Here, Claimant credibly testified and argues that she worked reduced hours due to her work restrictions from May 27, 2022, up until she was placed at MMI. Respondents appear to concede this point as well, as in their position statement they state that "Claimant has demonstrated that she worked less hours and earned less due to the work restrictions. The wage statements demonstrate that Claimant worked less hours consistent with her work restrictions. As such, she is entitled to temporary partial disability benefits for the time she missed work and/or worked less due to the work incident." Respondents presented evidence consisting of surveillance demonstrating Claimant engaging in behavior inconsistent with photophobia in January 2023. However, Respondents made no argument that Claimant's temporary work restrictions at that time were inappropriate.

Therefore, as found above, Claimant did in fact sustain a wage loss from May 27, 2022, to her date of MMI, resulting from her temporary work restrictions. Therefore, Claimant is entitled to TPD benefits for that period of time.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant PPD benefits without regard to the twelve-week limitation set forth in § 8-41-301(2)(b), C.R.S.

2. Respondents shall pay Claimant TPD benefits for the period from May 27, 2022, up until she was placed at MMI.

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: January 4, 2024.

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the left shoulder surgery recommended by Dr. Armodios Hatzidakis is reasonable, necessary, and related to his admitted industrial injury of July 8, 2021.

PROCEDURAL HISTORY

This matter proceeded to hearing before this ALJ previously and this ALJ issued Findings of Fact, Conclusions of Law and Order on March 23, 2022 finding the claim compensable for the July 8, 2021 date of injury and finding that Claimant had sustained compensable injuries to his neck, left shoulder, elbow and wrist.

On April 12, 2022 Respondents filed a General Admission of Liability, admitting for the injuries as well as temporary total disability benefits.

FINDINGS OF FACT

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

1. Claimant was 36 years old at the time of the hearing.

2. Claimant was a drywall and metal work installer for drywall when he was injured on July 8, 2021. He was standing on a step ladder when reaching out with a staple gun to install a metal corner at the top, he fell off, and onto his left side injuring his neck, left shoulder, left elbow, and left wrist.

3. Claimant had been working for this employer for approximately five months and for other dry wall companies for approximately nine to ten years, performing the same kind of drywall and metal work. He had experience in commercial building construction, including drywall installation, ceiling and acoustic tile work, metal work and various other sorts of construction labor. Claimant's job was physically demanding and required constant repetitive heavy lifting and working with both arms extended away from his body and overhead.

4. Claimant had no prior history of injuries to his neck or left upper extremity or issues performing is regular job. Since the injury, Claimant experienced significant left shoulder pain and symptoms, which limited his ability to perform daily tasks and prevented him from getting consistent sleep.

5. Claimant was attended at Denver Health Medical Center - Federico Peña Family Health Center Urgent Care on July 8, 2021 by Mi Tran, M.D. with shoulder and arm pain as well as neck pain from whiplash since he hit the back of his head. Claimant reported he was having pain on the left side of his neck and left distal arm with some numbness and tingling. On Exam she found Claimant was tender to palpation (TTP) of left clavicle, left anterior chest, left AC joint, left shoulder, left subacromial bursa, and left proximal humerus. He was positive for left upper extremity weakness. He had limited

abduction and internal rotation of left shoulder with pain elicited during both passive and active ROM, was positive for empty can test and Neer's test and x-ray of the left shoulder showed no fracture or dislocation. Dr. Tran recommended use of ice, Tylenol/ibuprofen as needed and twice daily range of motion exercises. She advised that if Claimant had no improvement after 4-6 weeks, he should consider additional imaging studies such as MRI and a PT referral. She provided a letter stating that Claimant could return to modified duty with no lifting or vigorous activities to avoid re-injury to the left shoulder.

6. Claimant was again seen on July 9, 2021 for the left wrist due to tenderness on the ulnar aspect of the wrist but found no scaphoid tenderness, no effusion or swelling. They took x-rays, which were positive for a moderate ulnar variance with the ulnar styloid nearly abutting the pisiform, otherwise there was no fracture or dislocations. They provided Claimant with a wrist brace and ibuprofen.

7. Claimant returned to Urgent Care on August 13, 2021 and was evaluated by PA Angela Smith. Claimant was complaining about continuing problems with his wrist and left shoulder. Claimant continued to use the wrist splint without relief. He continued to have pain and crepitus in the left shoulder and stated that the pain increased when trying to lift it. PA Smith documented that Claimant had attempted to obtain help from his employer for workers' compensation without success. They took additional wrist x-rays and they were negative for an occult scaphoid fracture but they could not exclude an internal derangement of the left shoulder. They stated that Claimant's injury was suspicious for possible rotator cuff injury.

8. Claimant was evaluated by Dr. Tashof Bernton on January 6, 2022 at Respondents' request. Dr. Bernton reviewed the available medical records, took a history and performed a physical exam. On exam, he found no evidence of pain behavior, tenderness over the anterior left shoulder, and limited range of motion. He had a negative empty beer can test, good strength within the range of motion demonstrated with intact sensation. With regard to the left wrist, Dr. Bernton found limitations of range of motion and pain with extension as well as over the ulnar aspect of the wrist. With regard to the left elbow,[1] Dr. Bernton stated that there was a palpable subluxation in the ulnar groove with flexion and extension of the elbow. He noted that Claimant had some diffuse tenderness to palpation of the left ankle but otherwise had a normal exam. Dr. Bernton stated that based on exam of the left shoulder, the differential diagnosis could possibly be rotator cuff tear as evidenced by the tenderness and loss of range of motion. He recommended an MRI to better assess the diagnosis. He also stated that further diagnostic testing was needed for the left wrist as triangular fibrocartilage complex (TFCC) or ligamentous tear were also possible but could not be detected upon exam or x-rays. He related both the left wrist and left shoulder injuries to the July 8, 2021 work related accident. He opined that the left elbow and ankle conditions were not related. He specifically cited to lack of documentation in the urgent care records for the latter mentioned conditions.

[1] It is inferred Dr. Bernton misstated the shoulder in his report, since he referenced the ulnar groove, which is at the elbow, especially in light of the fact that he addressed the left shoulder first in his report.

9. This matter proceeded to hearing before this ALJ previously and this ALJ issued Findings of Fact, Conclusions of Law and Order (FFCLO) on March 23, 2022 finding the claim compensable for the July 8, 2021 date of injury and finding that Claimant had sustained compensable injuries to his neck, left shoulder, elbow and wrist.

10. On April 12, 2022 Respondents filed a General Admission of Liability, admitting for the injuries as well as temporary total disability benefits.

11. Claimant first started receiving treatment under the admitted claim in May 2022, after the order came out stating that Claimant had thirty days to select an authorized treating physician (ATP). Claimant selected Dr. Kristin Mason as his ATP.

12. On May 10, 2022 Dr. Mason, a physical medicine and rehab specialist of Rehab Associates of Colorado, took a history, noted that Claimant had not had any treatment since his injury ten months prior. She read the FFCLO regarding the compensable injuries. On exam, she noted a strongly positive impingement sign, a weak positive for Hawkins, positive Crossed adduction test, positive speed's test, prominent myofascial triggering in the trapezius, cervical paraspinal muscles, levator scapula, rhomboids, supraspinatus, infraspinatus, and latissimus dorsi on the left. He was tender at the clavicle and the AC joint and had a mild deformity at the sternoclavicular joint. Claimant reported high levels of anxiety and depression as well as irritability. She diagnosed probable left rotator cuff tear and ordered an MRI of the left shoulder, agreeing with Dr. Bernton in that respect. There was some delays in authorizing the recommended MRIs.

13. The MRI arthrogram performed on June 16, 2022 showed a type II acromial morphology[2], a low grade partial thickness longitudinal tear of the subscapularis tendon with mild underlying tendinosis, mild acromioclavicular osteoarthritis and mild nonspecific cystic changes and bone marrow edema in the posterolateral bare area of the humeral head.

14. On June 23, 2022 Dr. Mason referred Claimant to Dr. Craig Davis for Claimant's complaints related to his wrist and to Dr. Hatzidakis for Claimant's complaints related to his shoulder, planning to see him back in three weeks.

15. Dr. Craig Davis attended Claimant on July 14, 2022 and examined his left shoulder elbow and wrist. He noted that Claimant had difficulty with shoulder range of motion, especially with forward elevation and internal rotation against resistance and had positive impingement signs. He viewed the MRI films and noted the partial subscapularis tear and possible abnormal biceps tendon following the fall. He recommended a subacromial injection, which he proceed with and Claimant obtained at least partial relief from the lidocaine. He provided meloxicam and a topical anesthetic. He noted that should the injection not provide relief, that a glenohumeral injection may be more effective for relieving pain referable to the subscapularis and the biceps. He also discuss the conditions and treatment of the elbow and wrist.

16. Claimant saw Dr. Mason on July 21, 2022. Initially he reported he did not find the injection for the shoulder helpful, but upon further questioning by Dr. Mason,

[2] This ALJ infers that this increases the risk of impingement on the rotator cuff tendons.

Claimant disclosed he had had five days of total pain relieve for the shoulder and 3 to 4 days of relief for the wrist which then gradually returned to baseline, so she determined Claimant did have a diagnostic response to his injections. Dr. Mason continued to diagnose left rotator cuff partial thickness tear of the subscapularis tendon, left TFCC irritation, scapholunate ligament tear and possible ulnar abutment, subluxation of the elbow and ulnar nerve versus myofascial, and cervical scapular myofascial pain. She continued to keep him off work.

17. On August 10, 2022 Dr. Davis injected the glenohumeral join via the bicipital groove with half the medication placed in the anterior subacromial space.

18. Dr. Mason reviewed Dr. Davis' notes on September 1, 2022 noting that Dr. Davis determined Claimant was not a good candidate for left shoulder surgery, as he was unable to properly identify the pain generator in the left shoulder as he believed that symptoms were out of proportion to objective findings. Dr. Mason also discusses that the elbow issues were a disputed body part. However, the FFCLO issued by this ALJ included compensability of the left elbow. Dr. Mason was concerned that the left shoulder was developing some elements of adhesive capsulitis shown by the limited and painful motion and ordered physical therapy for the shoulder.

19. Jordan Eisler, DPT, of Colorado Orthopedic Rehab Specialists, (Thornton) noted on September 13, 2022 that Claimant's signs and symptoms were consistent with a left rotator cuff tear, subscapularis tear, causing shoulder pain and dysfunction. Claimant was complaining of left shoulder pain, decreased mobility, inability to perform overhead movements, numbness and tingling and significant decreased in functional use. Claimant was presenting with impairments including "shoulder pain, decreased PROM and AROM, impaired strength, TTP, (+) special tests and decreased functional mobility." Claimant reported a decrease in left shoulder signs and symptoms following passive range of motion, grade II joint mobilizations, and active assistive range of motion. She recommended skilled physical therapy to return Claimant to normal function and activity level. Therapy continued until October 11, 2022 when she noted that Claimant still had minimal tolerance to PROM due to pain, numbness, tingling and weakness in the left UE.

20. By September 22, 2022 Dr. Mason had reviewed the order and noted that the elbow was included in the compensability determination. She also discussed Claimant's progress with Dr. Davis and agreed that he proceed with the elbow and wrist surgeries. With regard to the shoulder he continued with physical therapy and recommended Claimant ice the areas of the neck and shoulder after PT. She also continued the work restrictions.

21. As of September 28, 2022 Dr. Davis proceeded to treat Claimant for the left elbow and wrist, including an elbow scope and a TFCC repair with an ulnar nerve transposition. He continued to diagnose traumatic incomplete tear of left rotator cuff and TFCC tear, as well as ulnar neuropathy at the elbow. (Left elbow possible triangular fibrocartilage tear of the wrist and subluxing ulnar nerve, medial elbow.) Three months post op and Claimant's physical therapy had not yet been authorized. PA Timothy Abbott noted that the delay in having therapy approved was causing significant delay in recovery and in Claimant's ability to return to work.

22. Dr. Mason saw Claimant on October 13, 2022 and Claimant reported that the PT had been helpful for the shoulder and neck. She noted that Claimant was having fairly high levels of depression and anxiety so they discussed a referral to Dr. Ledezma, a Spanish speaking psychologist, which would take place prior to his surgery.

23. Claimant proceeded with surgery with Dr. Davis on October 24, 2022 for the left elbow ulnar nerve subcutaneous transposition. Excision of hypertrophic tissue of the medial border of the triceps, as well as the left wrist radiocarpal arthroscopy with partial synovectomy and triangular fibrocartilage complex repair (TFCC), and midcarpal diagnostic arthroscopy.

24. On November 3, 2022 Claimant again questioned Dr. Mason about his shoulder and was advised that they would discuss it further once he was further recovered from his elbow and wrist surgeries.

25. Claimant participated in a psychological intake with Lupe Ledezma, Ph.D., of Mind-Body Connections, LLC on November 8, 2023. She took a history consistent with Claimant's prior testimony, the FFCL and the medical records. Claimant reported increased sadness and frustration, irritability and short-temper, which he takes out on others, including family so he has isolated himself. He has variable appetite, and difficulty with sleep. She diagnosed him with moderate major depression and generalized anxiety disorder. Dr. Ledezma recommended psychotherapy, continued medical intervention, and antidepressant medication. Dr. Ledezma had the following impressions:

> Given, his current depression symptoms and general lethargy, it may be difficult for him to exert the motivation and effort to engage in activities and behaviors that may improve his situation. It will be important to provide him with strategies to maintain his motivation so that he can be proactive about his own recovery. While he is not resistant to treatment recommendations, he may appear to be noncompliant because he is afraid of additional discomfort. Also, he is concerned that different treatment options will fail and he will be disappointed. He will require assistance overcoming these concerns and focusing on being proactive, as well as patient with the process of recovering. Likewise, he will require assistance developing motivation to participate in his own recovery rather than passively waiting for providers to "fix'' him.

26. On December 15, 2022 Dr. Ledezma wrote:

> [Claimant] reported aching and tingling in his left elbow, weakness in his left wrist, difficulty moving his left hand, and burning pain in his left shoulder. He continues to wear a brace on his left hand and elbow following the recent surgery. It is frustrating and troubling to him that he has not yet been able to start physical therapy.
>
> …
>
> It is especially frustrating to him that there has been a delay in getting physical therapy for his hand and elbow started because he knows that once he is cleared from these issues, he is still facing the possibility of shoulder surgery. As such, he does not want to be delayed any further.
>
> …
>
> There are times that he ruminates about this situation and feels overwhelmed by stress. Suggestions were made for cognitive behavioral strategies to decrease

> rumination and focus on being proactive rather than being overwhelmed by negative thoughts. He also acknowledged fear of engaging in many activities. His fear is that he is going to injure himself. It was pointed out that once he starts physical therapy, he may have more information on what he can do and how he can do it. Meanwhile, he was provided with breathing and relaxation strategies to avoid tensing and guarding that can exacerbate pain levels. Diagnoses: Major Depression, Generalized Anxiety Disorder. Additional sessions will focus on pain and stress coping strategies, relaxation strategies, mood management strategies, and improving his confidence in his physical functioning.

27. Dr. Mason noted on January 5, 2022 that Claimant's left shoulder was not as painful in the recent weeks because his elbow and wrist were so painful that he was not moving the extremity very much and was on hydrocodone through Dr. Davis. He was also not yet in physical therapy. Claimant continued to improve with treatment with Dr. Ledezma. On January 30, 2023 Dr. Mason addressed Respondents' unresponsiveness to allowing what was considered the standard of care medical treatment in accordance with the Medical Treatment Guidelines, which does not require prior authorization.

28. Claimant's initial exam with Mountain States Hand and Physical Therapy following his October 24, 2022 surgeries was on February 9, 2023. Megan Brunnel, OTR, CHT, noted that Claimant presented with left sided wrist and elbow pain after left ulnar nerve transposition and TFCC debridement over three months prior. He continued to have ulnar sided pain and presented with mild sympathetic symptoms in the hand. The ulnar nerve was stable and not subluxing. He was having ROM and strength limitations. He was limited with functional use on the left hand due to pain. She noted that Claimant was still expecting to proceed with shoulder surgery.

29. By March 1, 2023 Dr. Davis, frustrated with Claimant's lack of care and physical therapy, as well as progress, released him from his care, back to Dr. Mason.

30. Dr. Stephen A. Moe of Lawry Psychiatry evaluated Claimant for an Independent Medical Examination at Respondents' request on March 6, 2023. At the beginning of his report he provided his opinions that he did not believe Claimant suffered from a mood or anxiety disorder, but probably had a psychiatric condition of somatic symptom disorder. Dr. Moe specifically stated that the diagnosis of SSD required the input from a physical medicine specialist.

31. Claimant returned to Dr. Mason on March 9, 2023 noting that Claimant continued to have questions about his left shoulder pain, most of which was centered over the deltoid. On exam, Dr. Mason noted that impingement signs and crossed adduction were positive but he was not particularly tender over the AC joint that day. He had quite a bit of spasm and tightness in his deltoid middle head and anterior head. She again referred Claimant to Dr. Hatzidakis as Dr. Davis no longer wished to address the problems regarding the left shoulder. She diagnosed left partial-thickness subscapularis tear, left TFCC repair and wrist arthroscopy, left ulnar nerve subluxation with transposition, cervicoscapular myofascial pain, major depression and generalized anxiety disorder, and agreed with the therapist that Claimant had some sympathetic findings currently in the left hand.

32. Dr. Armodios M. Hatzidakis of Western Orthopedics evaluated Claimant on April 18, 2023. He took a history that is roughly consistent with other histories in the medical records, including that Claimant had no history of shoulder injuries prior to July 8, 2021. On exam he found moderate tenderness over the AC joint, TTP over the bicipital groove, fairly good active ROM, positive impingement arc in forward flexion and abduction. Positive O'Brien's and cross-arm abduction test with the left shoulder, diffuse acne over his left shoulder and upper back. Dr. Hatzidakis recommended home exercises, physical therapy, cortisone injection into the AC joint while in his office, with 70% relief after 5 minutes. He was given a prescription for BenzaClin for the acne. They also discussed the possibility of left shoulder arthroscopic distal clavicle excision if symptoms persisted, and referred Claimant to a dermatologist to improve the acne. The notes were completed by PA Tyler Holm.

33. Claimant returned to Dr. Hatzidakis' office on June 20, 2023 and continued to have abnormal ROM, positive impingement, Neer's, cross-arm adduction, O'Brien's with the left side. They discussed surgery and he recommended an arthroscopic debridement, subacromial decompression, distal clavicle resection, and if necessary, biceps tenodesis and rotator cuff repair. Claimant was provided information about the surgery scheduler and information for the dermatology evaluation to clear up Claimant's left shoulder acne before surgery.

34. On June 22, 2023 Dr. Mason noted that Claimant's main problem continued to be the left shoulder and that Dr. Hatzidakis was recommending shoulder surgery. However, by July 13, 2023 she remarked that the surgery had been denied because the "proper channels were not followed for prior authorization request for his shoulder surgery," an arthroscopic debridement, subacromial decompression, distal clavicle resection, and if necessary, biceps tenodesis and rotator cuff repair. Dr. Mason submitted the re-request the same day. Dr. Mason remarked that she received a formal written denial from Respondents regarding the surgery and notice that there would be an IME in September with Dr. Fall. She observed that Claimant was getting stronger with therapy for the elbow and the wrist but the shoulder continued to have impingement signs, positive crossed adduction and tenderness over the AC joint. She also commented that Claimant was getting very frustrated.

35. Claimant started PT for his left shoulder at Mountain States PT on June 5, 2023. On June 29, 2023, Ms. Kathleen Cunningham, PTL, continued to have severe stabbing pain in his shoulder, pain in the anterior shoulder but less pain that day in the scapula. He was awaiting the recommended surgery. However, she noted that Claimant continued to have severe trigger points in mid back along inferior angle of scapula and lower trap, including spinalis muscle at this level. She stated that Claimant would continue to benefit from skilled PT services to maximize function to prior level of function. By August 22, 2023 Claimant was doing somewhat better in his motion, increased tolerance to weight and good tolerance to progressive resistive exercises. Therapy stopped again at this point.

36. On September 21, 2023 Dr. Allison M. Fall performed a Rule 16 IME at Respondent's Request upon receipt of Dr. Hatzidakis' request for pre-authorization of left shoulder surgery. Dr. Fall took history and reviewed medical records. Ultimately, Dr. Fall

agreed with Dr. Moe in that Claimant had a somatic symptom disorder which was extending Claimant's symptoms of pain and dysfunction. That, like his prior injury to his low back, once he was release from care without restrictions his symptoms resolved, that was likely what would once Claimant was placed at MMI and released in this matter. She found no reason for apportionment of the left elbow, wrist, shoulder or ankle complaints but did insist that Claimant had preexisting degenerative conditions of the wrist, shoulder and subluxation of the elbow.

37. Dr. Mason critiqued Dr. Fall's Rule 16 IME that was based on the findings of Dr. Moe of somatoform pain disorder. Dr. Mason made specific findings that, certainly, when Claimant's treatment was initially delayed first by the denial of the claim for many months, and then the denial of standard post-operative care for many months which need not be pre-authorized per the Medical Treatment Guidelines, Claimant was not improving. Once Claimant received the needed care, including the surgery for the elbow and the wrist, and eventually obtained the physical therapy, he slowly improved as expected and continued to improve with regard to both of those areas. Claimant did continue with depression, for which he was receiving appropriate care, continued the require treatment for the shoulder as recommended by Dr. Hatzidakis, which she found was reasonably necessary and related to the injury. She strenuously disagreed with Dr. Fall's findings.

38. Therapy with Mountain States reinitiated with Ms. Cunningham in October, 2023. Claimant presented with stiffness and pain contributing to weakness and limiting activity. He had poor tolerance for activity and noted that pain set on suddenly and would not be relieved. Kinesiotape above the acromioclavicular joint provided mild relief and a delay in onset of pain with movement.

39. Claimant testified at hearing. He continues to experience significant left shoulder pain. Prior to July 8, 2021, he had no left shoulder issues and could perform his physically demanding job without issue. He received three to four days relief from the first left shoulder injection. He experienced six to seven days pain and symptom relief following the second left shoulder injection. Claimant has completed physical therapy and maintains a home exercise plan, but he continues to have left shoulder pain and symptoms. He has been doing physical therapy and at home therapy without improvement. Currently, Claimant experiences constant left shoulder pain. He has pain showering, dressing, extending his arms, or reaching above shoulder level. Claimant wants the surgery recommended by Dr. Hatzidakis so that he can return to work and be able to better provide for his family.

40. Dr. Fall, Respondents' expert, testified at hearing, consistent with her report. Dr. Fall opined Claimant's pain complaints were out of proportion with objective findings. Dr. Fall opined Claimant's ongoing left shoulder issues were psychological. Dr. Fall stated some people with the same objective MRI findings as Claimant have no symptoms whatsoever. Dr. Fall continued, "Claimant says he had no shoulder issue or issue working prior to the injury and yet these findings are most likely degenterative in nature, and most likely majority of them were likely there before." Dr. Fall suggested Claimant had pre-existing shoulder issues that were asymptomatic prior to his work injury. Dr. Fall opined Claimant's left shoulder MRI did not show any acute findings, which were apparent from "things like is there a lot of inflammation or swelling, joint effusion." However, Dr. Fall went

on to state that it was unlikely Claimant's left shoulder MRI would have revealed any acute findings because the MRI was done almost one year following Claimant's work injury. She stated, "just because there are some degenerative findings shown on his MRI, that in no way means that those findings are symptomatic and it certainly doesn't mean that by doing something surgically to those changes is going to address his symptoms." Finally, when asked about PA-C Holm's positive physcial exam findings, Dr. Fall stated PA-C Holm did not differentiate between those maneuvers that were positive v. negative.

41. As found, there are multiple credible and persuasive reasons that prove why the recommended left shoulder surgery is reasonable, necessary, and related to Claimant's work injury. For example, Claimant consistently reported left shoulder pain, loss of function and inability to work to his providers, including Dr. Tran, PA Smith, Dr. Mason, PT Eisler, Dr. Ledezma, OT Brunnel, PT Cunningham, Dr. Davis, and Dr. Hatzidakis as well as IME, Dr. Bernton. Further, Claimant was credible in his testimony that he has consistently had pain in his shoulder, loss of motion, and has been unable to return to work at this time due to his continuing inability to function in his previous job which involved installing drywall, metal corners, and drop ceilings with acoustic tiles, most of which involved overhead reaching, since his work injury on July 8, 2021.

42. As found, the MRI arthrogram ordered by Dr. Mason showed objective findings sufficient to establish that Claimant had an aggravation of his asymptomatic underlying preexisting degenerative condition. The objective findings were sufficient for his providers to make recommendations regarding treatment of the shoulder including ordering physical therapy, which was not authorized for months on end and which delayed Claimant's treatment and likely affected the outcome of the treatment. Dr. Davis ordered injections into the shoulder, including a subacromial injection, which Claimant credibly testified helped him for approximately three days before symptoms returned. The second injection also helped him approximately six to seven day. Both of these injections were diagnostic and confirmatory of the diagnosis according to Dr. Mason's persuasive opinion and continued to diagnose left rotator cuff partial thickness tear of the subscapularis tendon. Claimant had a third injection with Dr. Hatzidakis, which provided an immediate 70% relief within 5 minutes of the injection. This is also a positive response to the injection. However, Claimant's symptoms returned shortly thereafter. That is when Dr. Hatzidakis recommended the arthroscopic debridement, subacromial decompression, distal clavicle resection, and if necessary, biceps tenodesis and rotator cuff repair.

43. As found, Dr. Davis was frustrated by Claimant's verbal response when questioned about the injection. While Claimant told Dr. Davis the injections did not help him, what he likely meant was that they did not provide him lasting relief. When questioned at length by Dr. Mason, she was able to glean Claimant's actual response to the injections and note that they were, in fact diagnostic. This caused Dr. Davis to make a hasty determination that he could not find the pain generators in Claimant's shoulder.

44. As found, Dr. Davis was also frustrated by Claimant's failure to respond to surgeries of the elbow and wrist, and even dismissed Claimant from his practice before he had even secured the needed physical therapy for Claimant to reach MMI for the condition which he was treated Claimant, namely the elbow and the wrist.

45. As found, Claimant credibly and persuasively testified that he did not have any problems with his left shoulder before the July 8, 2021 events and this claimant was previously was found compensable. Nothing in the evidence presented has changed this ALJ's opinion in this matter. Claimant was also clearly frustrated by the pace and progress of his treatment, which was documented by Dr. Ledezma, as there were so many delays, first in starting treatment as the claim was initially contested, and then, treatment that was a gold standard of care and need not be preapproved pursuant to the Medical Treatment Guidelines, was being denied, as opined by Dr. Mason.

46. As found, Claimant's treating physicians made multiple positive findings, including, positive for weakness, empty can tests, Neer's test, impingement sign, Hawkins, crossed adduction test, speed's test, O'Brien's.

47. As found, Dr. Hatzidakis credibly and persuasively opined that Claimant has exhausted all conservative treatment and determined that Claimant's next step is to proceed with surgery of the left shoulder, specifically an arthroscopic debridement, subacromial decompression, distal clavicle resection, and if necessary, biceps tenodesis and rotator cuff repair.

48. As found, Claimant has proved by a preponderance of the evidence that the left shoulder surgery, recommended pursuant to the persuasive and credible opinions of Drs. Mason and Hatzidakis, is reasonable, necessary, and related to his admitted industrial injury of July 8, 2021.

49. Further as found, Dr. Fall is not found persuasive in her opinion that Claimant's symptoms and condition are either caused by a preexisting condition or by somatic symptom disorder. Dr. Fall relies on Dr. Moe's assessment that Claimant has this condition. However, Dr. Ledezma did not diagnose this condition even though she was able to directly, in person, converse in Spanish with Claimant during her treatment sessions. Dr. Ledezma credibly and persuasively opined that Claimant had a moderate major depression and generalized anxiety disorder over the contrary opinion of Dr. Moe, who interviewed Claimant by video through an interpreter in "suboptimal" conditions.

50. 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. Authorized Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial*

Claim Apps. Office, 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The issue of whether medical treatment is necessary for a compensable aggravation or a worsening of Claimant's pre-existing condition is also one of fact for resolution by the ALJ based upon the evidentiary record. See *University Park Care Center v. Industrial Claim Appeals Office,* 43 P.3d 637 (Colo. App. 2001); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The Act places full responsibility on the employer for benefits as a result of a work injury when there is an aggravation of an underlying dormant condition. *United Airlines, Inc. v. ICAO*, 993 P.2d 1152 (Colo. 2000). Expert medical opinion is not needed to prove causation where circumstantial evidence supports an inference of a causal relationship between the injury and the claimant's condition. *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). When expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992).

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical treatment for this compensable July 8, 2021 work-related injury. As found, Claimant's work-related injury resulted in harm that included damage to Claimant's rotator cuff and an aggravation of his preexisting acromioclavicular joint arthritis, which requires further surgical repair as recommended by Dr. Hatzidakis and Dr. Mason. The sole dispute in this case is whether the recommended left shoulder surgery is reasonable, necessary, and related to Claimant's industrial injury. Respondents argued that Claimant's subjective complaints were disproportionate to his objective findings, the findings were degenerative and not acute, Claimant's symptoms were widespread, and Claimant had somatic symptom disorder. However, this ALJ does not find Dr. Fall's opinions credible or persuasive as she relied on Dr. Moe's somatic symptom disorder diagnosis and stated that all of Claimant's conditions were preexisting. However, no ATP diagnosed Claimant with somatic symptom disorder. Dr. Fall is neither a psychologist nor a psychiatrist. Claimant's treating psychologist, who was Spanish speaking and saw Claimant in person, did not diagnose Claimant with somatic symptom disorder. Respondents' expert witness, Dr. Moe, evaluated Claimant through an

interpreter by video conference in suboptimal conditions. Dr. Mason, Claimant's authorized treating physician, reviewed Dr. Fall's IME report and specifically addressed the somatic symptom disorder. Dr. Mason opined Claimant did not have this disorder and did not show evidence of this disorder. Claimant responded to treatment when it was eventually provided to him, though significantly delayed. Claimant's wrist improved since his surgery. It is clear that Claimant's recovery was delayed/limited due to Respondents' repeated denial of post-surgery physical therapy. Once Claimant started physical therapy treatment, his condition improved.

Claimant had diagnostic responses to all three injections into the shoulder, as well as consistent, positive findings on physical exam with multiple providers. Even Dr. Davis found positive findings on physical exam, including positive impingement signs, positive speed test, and loss of range of motion. Further, Dr. Fall made it clear that it was unlikely the left shoulder MRI, which was performed almost one year after Claimant's injury, would show any evidence of an acute injury. No dispute exists that Claimant's left shoulder MRI showed objective evidence of injury. The issue was whether those findings were acute or degenerative. Here, it is undisputed that Claimant's left shoulder was not symptomatic before the July 8, 2021 work related injury and that he became symptomatic from the time of July 8, 2021 work related injury. Claimant had no problems performing his demanding job prior to his July 8, 2021, work injury. As found and concluded, Claimant suffered an acute injury on July 8, 2021, resulting in a tear to his left shoulder tendon, and aggravated his underlying pre-existing shoulder acromioclavicular osteoarthritis causing it to become symptomatic on July 8, 2021. As found and concluded, Claimant has shown by a preponderance of the evidence that the proximate cause for the need for the proposed surgery recommended by Dr. Hatzidakis, including the arthroscopic debridement, subacromial decompression, distal clavicle resection, and if necessary, biceps tenodesis and rotator cuff repair, was the July 8, 2021 work related injury.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall authorize and pay for the reasonably necessary surgery proposed by Dr. Armodios Hatzidakis, including the arthroscopic debridement, subacromial decompression, distal clavicle resection, and if necessary, biceps tenodesis and rotator cuff repair, that is causally related to the July 8, 2021 work related injury.

2. All medical costs are subject to the Colorado Workers' Compensation Fee Schedule.

3. 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 4th day of January, 2024.

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. 5-217-317-004

ISSUES

- Did Claimant prove she suffered a compensable injury to her left knee arising out of her employment?
- If Claimant proved a compensable injury, did she prove entitlement to temporary total disability benefits?
- The parties stipulated to an average weekly wage (AWW) of $695.45
- The parties stipulated that Concentra is the primary authorized treating provider.

FINDINGS OF FACT

1. Claimant works for Employer as a certified nursing assistant (CNA). She has been a CNA for approximately 30 years, and has worked for Employer since August 2020.

2. Claimant's regular schedule was 6:00 AM to 6:00 PM on Monday, Tuesday, and Wednesday.

3. Claimant suffered a dislocated left patella at work on September 19, 2022. Respondents do not dispute that Claimant suffered the dislocation but deny that the injury arose out of her employment.

4. The injury occurred shortly after Claimant entered a room occupied by [Redacted, hereinafter ON], a resident of the facility. ON[Redacted] is bedbound and receives various services in her room, including meals and bathing. It appears ON[Redacted] lives in a nursing home because of physical impairments, and there is no persuasive evidence to suggest any limitation of her ability to perceive or recall events.

5. ON[Redacted] was lying on her side facing away from the doorway when Claimant entered the room. Claimant was speaking to her, so ON[Redacted] turned over to face Claimant directly. Claimant approached the in-room sink, and ON[Redacted] saw Claimant fall to the floor. Claimant immediately exclaimed in pain and began clutching her knee. ON[Redacted] observed a small amount of water on the floor near where Claimant fell, and testified "that's what she caught, was that water." When asked to describe her observations more specifically, ON[Redacted] credibly testified, "like when you hit water or something similar, and your feet kind of go out from under you, and that's what happened." When asked on cross-examination if it was possible that Claimant's knee gave out and caused her to fall, ON[Redacted] replied unequivocally, "no."

6. Claimant's patella was dislocated but she was able to reduce it herself. She then went to the nurse's station to request assistance. She told her supervisor, Pamela

Fields, RN, that she had fallen in ON's[Redacted] room and landed on her left knee. Claimant did not mention slipping. Claimant was limping and appeared to be in pain. Her left knee was visibly swollen. Ms. Fields wrapped Claimant's knee with an ACE bandage.

7. Claimant missed work on September 20 and 21 because of the injury. Claimant was not scheduled to work Thursday, September 22, or Friday, September 23.

8. Claimant dislocated her left patella in approximately 1996 when she struck her knee while making a bed at home. She recovered from the injury and had no further problems with the left knee until the September 19, 2022 work accident.

9. Claimant went to the Parkview Medical Center emergency department the morning of September 21, 2022, with complaints of left-sided knee pain and a recent dislocation. The triage nurse documented, "Patent states that she was walking and felt her knee 'go out of place.' Patent states approx. 20 years ago she dislocated her knee." A similar history of injury was documented by PA-C Donna Lynn Oliver, who wrote, "[Claimant] was at work yesterday, as a CNA, and states that she walked into a patient's room and turned feeling her left knee 'pop out of place.' . . . [S]he did have this knee dislocate approximately 20 years ago but has not had any problems with it since that time." On examination, Claimant's knee remained swollen, and x-rays showed a "very large" effusion. was placed in a knee immobilizer, given crutches, and advised to follow up with providers outside of the ER setting.

10. Claimant left the ER and went to Employer's facility to report the injury to the Director of Nursing, [Redacted, hereinafter HS]. HS[Redacted] completed an accident report based on their conversation. The report describes the accident as, "Walking into resident's room and then was on the floor and kneecap pop[ped] out of place." The form contained the question, "If incident occurred from slipping on the floor, was there a wet floor sign present?" to which HS[Redacted] indicated "N/A." Claimant signed the accident report under the line stating, "I have read this report, and it is correct."

11. Employer referred Claimant to Concentra. Claimant saw PA Tara Guy at Concentra on September 22, 2022. Claimant described the injury as, "walking in a patient's room and ended up on the floor and my kneecap popped out of place." However, Ms. Guy subsequently paraphrased the injury mechanism as, "Walking into patients room, patella dislocated while walking, fell to the floor." The report further notes Claimant had a prior dislocation 26 years before, but "no problems since then." Ms. Guy gave Claimant a Toradol injection, ordered an MRI, and referred Claimant for an orthopedic evaluation. She released Claimant to modified duty with no standing or walking, and the requirement to elevate her leg every 20 minutes.

12. Claimant returned to modified duty on September 26, 2022, and was paid her regular pre-injury wages.

13. Claimant had an orthopedic evaluation with Dr. David Weinstein on October 12, 2022. Regarding the history of injury, Dr. Weinstein wrote, "The patient is a 49-year-old CNA, who on 09/19/2022, was at work, she was walking when her left patella

dislocated. She denied any specific _____ and did not have any twisting injury." He further noted the prior patella dislocation healed uneventfully, with "no symptoms since." Claimant was still having difficulty bearing weight on the left leg and using a cane to assist with ambulation. Her patella felt "extremely unstable." Dr. Weinstein opined "her mechanism of injury of just walking and dislocating her patella is unusual in somebody that does not have a history of recurrent instability, but by her history, she has only had one dislocation 26 years ago. She clearly has evidence of patella instability [now] and had an acute injury as there is an effusion on her x-rays from 09/19/2022." Dr. Weinstein advised Claimant the injury should resolve with conservative treatment.

14. Claimant saw Jennifer Livingston, NP at Concentra on October 14, 2022. Because this was the first time Ms. Livingston had seen Claimant, she revisited the question of how the injury occurred. Claimant stated, "she was walking into a patient's room, her left foot slipped on water/urine and she fell. Left patella dislocated."

15. A left knee MRI was completed on October 26, 2022. It showed edema and bone contusions consistent with a recent lateral patellar dislocation, a patellar cartilage tear, possible injury to the articular cartilage of the medial femoral condyle, retinacular strains, an ACL strain, and an MCL strain.

16. Claimant saw Dr. Kathryn Murray at Concentra on November 8, 2022. Dr. Murray documented the mechanism of injury as "Walking into patient's room, left foot slipped on water and she fell, dislocated left knee cap." Dr. Murray opined the objective findings were consistent with the history and a work-related mechanism of injury.

17. Claimant followed up with Dr. Weinstein on November 9, 2022. He administered a steroid injection and recommended additional PT.

18. Dr. Gretchen Brunworth performed an IME for Respondents on September 14, 2023. Dr. Brunworth noted the earliest medical records state Claimant's patella dislocated while walking, with no mention of slipping on any substance. Dr. Brunworth opined Claimant suffered no occupational injury because there was no trauma or specific work-related factor that caused the patellar dislocation. She agreed treatment was reasonably needed, but not related to Claimant's work.

19. Claimant's testimony regarding the accident is generally credible.

20. ON's[Redacted] testimony is credible.

21. Claimant proved she suffered a compensable injury to her left knee on September 19 2022.

22. Claimant failed to prove entitlement to TTD benefits prior to September 26, 2022. Claimant only missed two scheduled shifts and did not satisfy the waiting period.

CONCLUSIONS OF LAW

A. Compensability

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

As found, Claimant proved she suffered a compensable injury to her left knee on September 19, 2022. Several factors lead to this conclusion, including the following: Claimant was described by Ms. Fields as a reliable and conscientious worker, and she continues to work for Employer. Therefore, it is doubtful she would commit perjury and insurance fraud by fabricating a story about slipping on water. Claimant experienced one prior patellar dislocation over 26 years ago triggered by a specific inciting event of striking her knee on a bed. She healed uneventfully, with no residual instability or other problems despite performing a physically demanding occupation for many years. As Dr. Weinstein noted, it would be "unusual" for Claimant's patella to spontaneously dislocate while walking without some external catalyst, which decreases the likelihood that the dislocation resulted from a purely personal condition. The accident report states Claimant walked into ON's[Redacted] room and "then" was on the floor and her kneecap popped out. This phrasing implies the fall preceded the dislocation, rather than the other way around. Claimant's testimony regarding the accident was generally credible. Finally, N[Redacted] credibly corroborated Claimant's testimony about slipping on water, and refuted Respondents' assertion that Claimant's knee simply "gave out." Admittedly, reports from multiple providers state the dislocation occurred while Claimant was walking, and her failure to tell HS[Redacted] she slipped on water is puzzling. However, none of those reports were completed by Claimant personally, but instead reflect paraphrasing of her statements. While it is certainly *possible* that Claimant's patella simply dislocated while walking as opined by Dr. Brunworth, the only persuasively *probable* explanation is that Claimant slipped on a wet substance, which caused the fall and patella dislocation.

B. TTD from September 20, 2022 through September 25, 2022

To recover TTD benefits, the claimant must prove the injury caused a disability, the disability caused them to leave work, and they missed more than three regular working days. Section 8-42-103(1)(a); 8-42-105(1); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Once commenced, TTD benefits "shall continue" until the occurrence of a terminating event enumerated in § 8-42-105(3)(a)-(d).

As found, Claimant failed to prove entitlement to TTD from the date of injury through September 25, 2022. Claimant's regular work schedule was Monday, Tuesday, and Wednesday of each week. She missed work on Tuesday, September 20, and

Wednesday, September 21, but was not scheduled to work the remainder of that week, regardless of the injury. Therefore, she suffered no injury-related wage loss after September 21, 2022. She returned to work the following Monday, September 26, 2022. Because Claimant only missed two shifts, she failed to satisfy the statutory three-day waiting period for an award of TTD.

ORDER

It is therefore ordered that:

1. Claimant's claim for a left knee injury on September 19, 2022 is compensable.

2. Claimant's average weekly wage is $695.45.

3. Insurer shall cover treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable knee injury.

4. Claimant's claim for TTD benefits from September 20, 2022 through September 25, 2022 is denied and dismissed.

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

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

DATED: January 5, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

HEARING ISSUES

I. Whether Claimant produced clear and convincing evidence to overcome the maximum medical improvement (MMI) determination of Dr. Thomas Higginbotham?[1]

II. Whether Claimant established, by a preponderance of the evidence, that he is entitled to a maintenance medical appointment to be "evaluated" by a neurologist to determine what treatment options would be reasonable, necessary and related to the injuries associated with his January 5, 2020 work-related slip and fall.

III. Whether Claimant established, by a preponderance of the evidence, that he is entitled to a disfigurement benefit and if so, the amount of such award.

IV. Whether Claimant is entitled to an increase in his average weekly wage (AWW) based on his contention that he would have been promoted within Employer's company had he not been injured or whether the issue of AWW has been previously litigated and thus, subject to dismissal based upon the doctrine of issue preclusion?

PRELIMINARY DETERMINATION

Respondents' Request for Reconsideration of the November 8, 2023 Order of ALJ Patrick Spencer Denying Their Motion for Summary Judgment

At the outset of hearing, Respondents moved for reconsideration of the November 8, 2023, Summary Judgment Order of ALJ Patrick Spencer. In their September 28, 2023, Motion for Summary Judgment and during oral argument in support of their request for reconsideration, Respondents urged the ALJ to dismiss Claimant's request for an increase in his AWW because the extent of his AWW was previously litigated and decided in a final order issued by ALJ Spencer on February 8, 2022. (Resp. Ex. K). Because the claimed increase in Claimant's AWW has been litigated and a final order exists regarding that issue, Respondents contend that Claimant is collaterally estopped from raising issues surrounding his AWW.

In response, Claimant asserts that ALJ Spencer properly denied Respondents' Motion for Summary Judgment, including the request to dismiss the current claim for an increase in his AWW, because the AWW issue presented to ALJ Spencer on December 16, 2021 was not identical to the one currently before the Court. (Resp. Ex. J). Following oral argument, the undersigned ALJ elected to take the evidence concerning the current dispute surrounding Claimant's AWW and allow the parties to address both

[1] Claimant concedes that he is currently at MMI but believes that Dr. Higginbotham erred when he affixed the day of MMI as 10/18/2021. Claimant contends the proper MMI date is April 28, 2022.

the sufficiency of that evidence and the assertion that Claimant is estopped from raising AWW as an issue for hearing in post hearing position statements. The ALJ requested that briefing concerning the application of collateral estoppel to the facts of the case be raised at the beginning of the parties' post-hearing submissions so that a determination regarding Respondents' motion for reconsideration could be made before addressing the merits of the issues before the ALJ..

The relevant facts surrounding Respondents' assertion that Claimant's current request for an increase in his AWW should be summarily denied and dismissed were initially raised in their September 28, 2023 Motion for Summary Judgment and debated further during oral argument (Resp. Ex. K). The pleadings and statements of Counsel support the following findings of fact:

1. On December 16, 2021, the parties proceeded to hearing before ALJ Spencer. (Resp. Exs. P, Q). Among the issues for determination was whether Claimant was entitled to an increase in what had been calculated to be a $311.89 AWW. Claimant sought the increase based upon the theory that his work injury prevented him from the opportunity to take a high wage full time job with a prior business associate in Florida after his date of injury. Although ALJ Spencer cited some precedent for increasing an injured workers AWW for a post-injury pay increase he/she would have received "but for" the injury[2], Judge Spencer was persuaded that the evidence Claimant presented at hearing was too speculative to provide him that increase. (Resp. Ex. P). Accordingly, Claimant's request to increase his AWW was denied and dismissed. *Id*. ALJ Spencer issued his order denying and dismissing Claimant's request for an increase in his AWW on February 8, 2022. *Id*. at p. 194. Claimant did not appeal Judge Spencer's determination and the February 8, 2022 order became final.

2. Approximately 18 months later, on August 3, 2023, Claimant filed a new Application for Hearing. This application endorsed multiple issues upon which the current hearing is based, including a request for an increase in Claimant's AWW.

3. Respondents filed a Motion for Summary Judgment on September 28, 2023. (Resp. Ex. K). In their motion, Respondents requested the issuance of an order denying and dismissing Claimant's request for an increase in his AWW with prejudice, based upon the principles of collateral estoppel given that Claimant's request for an increase in his AWW had been litigated and the order addressing the issue was final. *Id*. at p. 142.

4. Claimant filed a response objecting to Respondents' Motion for Summary Judgment and the motion was denied based upon this objection. (Resp. Exs. J, I). In support of his request that the motion be denied, Claimant stated:

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[2] See *Tibbs v. Mariner Post-Acute Network*, W.C. No. 4-422-333 (April 12, 2001); *Wheeler v. Archdiocese of Denver Management Corp*., W.C. No. 4-669-708 (December 21, 2010).

> If the Claimant was asking this Court to increase his AWW based upon the job offer from [Redacted, hereinafter GB], who testified at the previous hearing, then Respondents would have a point. However, since the AWW issue now involves whether the Claimant would have been promoted from within the company he was working for at the time he was hurt, and we even have a different witness who will testify on this issue, the issues regarding AWW are far from being "identical." (Resp. Ex. J, pp. 127-128).

Claimant noted that "the current issue regarding AWW is based on the Claimant having lost a likely job promotion to a higher paying position due to his injuries from this claim", which is "different from the AWW issue raised before Judge Spencer." *Id*. at p. 126. Claimant attached his interrogatory responses which stated "[Redacted, hereinafter JB], is expected to testify to the fact that I was going to become a route driver and that I would have been paid about $70,000 or more per year." *Id.*

5. Claimant argued further that he was not seeking an increase in his AWW for the same time period he had sought in the prior hearing. Instead, Claimant noted that he was seeking an increase "around the time he was placed at maximum medical improvement, which [would] affect his permanent partial disability benefits." (Resp. Ex. J, p. 127). Because Claimant was seeking an AWW determination for a date that differed from the date he had sought an increase for during the December 16, 2021 hearing, Claimant argues that the current AWW issue is not identical to that presented at hearing on December 16, 2021. Accordingly, Claimant contends that the doctrine of issue preclusion (collateral estopple) does not apply to the current AWW issue raised for determination.

6. In contrast, Respondents assert that "identical issues, identical facts, and identical parties were before the court at the prior hearing" and that Claimant failed to bring JB[Redacted] to that hearing despite knowing the content of his anticipated testimony. According to Respondents, Claimant's "choice" not to bring JB[Redacted] to hearing or make an argument for an increased AWW based upon his being promoted to a route driver at the December 16, 2021 hearing does not negate the fact that this issue was before the court and that Claimant had a full and fair opportunity to litigate the increase in his AWW at the prior proceeding. Accordingly, Respondents assert generally that the "issue of an increase in AWW because of lost opportunity after the date of injury has been previously litigated and should be denied and dismissed on that basis." (See generally, "Respondents Proposed Findings of Fact, Conclusions of Law and Order").

The Law Regarding the Applicability of the Doctrine of Collateral Estopple to the Evidence Presented

A. Although developed in the context of judicial proceedings, issue preclusion, frequently referred to as collateral estopple may be applied to administrative proceedings in workers compensation claims. *Sunny Acre Villa Inc. v. Cooper*, 25 P.3d 44 (Colo.App.). Issue preclusion is an equitable doctrine that works to preclude the

relitigation of matters that have already been decided by a court in a prior action. *Argus Real Estate, Inc. v. E-470 Pub Highway Auth.,* 109 P.3d 604, 608 (Colo. 2005); *Bebo Construction Co. v. Mattox & O'Brien*, 990 P.2d 78, 84 (Colo. 1999).

B. The doctrine is intended to promote judicial economy and to confirm the finality of judgments by preventing inconsistent decisions. *Argus,* 109 P.3d at 608, 611. Collateral estopple bars re-litigation of an issue if all of the following elements are satisfied: (1) The issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) The party against whom estoppel is asserted has been a party to or in privity with a party to the prior proceeding; (3) There is a final judgment on the merits in a prior proceeding; and (4) The party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in a prior proceeding. *Sunny Acre Village, Inc., supra*. As noted in this case, Respondents allege that Claimant is barred from litigating a requested increase in his AWW because the issue presented, i.e. an increase in AWW because of lost job opportunity after the date of injury is identical to the issue he raised during the December 16, 2021 hearing before ALJ Spencer and he had a full and fair opportunity to litigate the issue previously.

C. Based upon the evidence presented, the ALJ is not convinced that the AWW issue presented at the December 16, 2021 hearing and the basis for the current request for an increase in Claimant's AWW are identical. In the present hearing, the issue is whether Claimant is entitled to an increase in his AWW because he "lost a likely job promotion to a higher paying position due to his injuries from this claim" whereas the question presented at the December 16, 2021 hearing was whether Claimant was entitled to an increase in his AWW based on a post-injury job offer from another employer. Citing the decision announced in *Sunny Acre Village, Inc.,* the Industrial Claim Appeals Panel has held that for the doctrine of issue preclusion to apply, there "must be an exact identity between the two issues" being litigated. *Gamble v. Wal-Mart Stores, Inc*., W.C. No. 4-836-519 (ICAO, February 4, 2013). Here, there are subtle but important differences between the AWW issues presented for determination. These differences persuade the ALJ that the AWW issues are not identical as required to prove that Claimant is barred from litigating the current claim for an increase in his AWW.

D. Insofar as Respondent has failed to meet an element required to be established for the doctrine of issue preclusion to apply in this case, the ALJ agrees with Claimant that ALJ Spencer properly denied the Motion for Summary Judgment when he determined that disputed issues of material fact existed as to whether Claimant's current request to adjust his AWW was "identical" to the AWW issue decided by Order on February 8, 2022. Accordingly, Respondents request for reconsideration of ALJ Spencer's November 8, 2023 Order Denying (Respondents') Motion for Summary Judgement is hereby denied.

REMAINING HEARING ISSUES

FINDINGS OF FACT

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

The Prior December 16, 2021 Hearing

1. As referenced above, this claim has been the subject of a prior hearing. Following that hearing, ALJ Spencer set forth specific findings of fact in a February 8, 2022 Order, some of which are pertinent to the issues presented at the current hearing. This ALJ adopts the following factual findings of ALJ Spencer as set forth in his February 8, 2022 Order:

- Claimant has worked for Employer as a part-time lead merchandiser since October 4, 2018. Claimant's duties primarily involved delivering and stocking product at retail stores. On occasion, Claimant also delivered broken down vehicles to repair facilities.

- Claimant suffered an admitted injury on January 5, 2020 when he slipped and fell on ice. Insurer filed a General Admission of Liability (GAL) on February 6, 2020, admitting for an AWW of $311.89, and commencing TTD benefits as of January 24, 2020.

- Claimant conceded the AWW from his work with Employer was correctly calculated at $311.89.

- Claimant was put at MMI on August 10, 2020 by his ATP, Dr. Thomas Centi. He was given permanent work restrictions of no lifting or carrying greater than 30 pounds, no pushing and pulling greater than 30 pounds, sitting 10% of the time, and no standing and walking greater than 50 minutes per hour.

- Claimant requested a DIME[3], which was performed by Dr. Timothy Hall on January 6, 2021. Dr. Hall determined Claimant was not at MMI and recommended additional treatment. He also recommended work restrictions including no standing or walking more than 30 minutes per hour, no lifting more than 25 pounds, no walking on uneven surfaces, no shoulder or above shoulder level work activities, and a quiet work environment with limited distractions.

- Insurer filed an Amended GAL[4] on February 23, 2021, accepting the DIME's MMI determination and reinstating TTD benefits.

(Resp. Ex. P).

[3] Division Independent Medical Examination.
[4] General Admission of Liability.

2. The further testing and evaluation recommended as necessary by Dr. Hall for Claimant to reach MMI consisted of a neuropsychological and vision evaluation. Claimant returned to treatment following the filing of the Amended GAL; however, Claimant's authorized treating provider (ATP) was changed to Dr. Scott Primack. Dr. Primack did not agree that neuropsychological and vision testing were reasonable or necessary; however, he did coordinate additional treatment. Dr. Primack ultimately placed Claimant at MMI on October 18, 2021. He assigned a combined 22% whole person rating for the lumbar spine, cervical spine and the right knee. His maintenance recommendations included an additional Hyalgan injection and 6 sessions of chiropractic treatment. There was no need for further follow-up, according to Dr. Primack. (Resp. Ex. F).

Additional Findings Following Claimant's December 16, 2021 Hearing

3. Following his placement at MMI by Dr. Primack, Claimant returned for a follow-up DIME with Dr. Thomas Higginbotham.[5] Dr. Higginbotham completed a follow-up DIME on February 16, 2022. (Resp. Ex. A). During this appointment, Dr. Higginbotham became aware that the additional neuropsychologic and neurooptomerty testing/evaluation as requested by Dr. Hall had not been completed. Consequently, Dr. Higginbotham concluded that Claimant was not at MMI. *Id.* at p. 25.

4. Respondents arranged for neuropsychological and visual testing. Dr. Suzanne Kenneally, a clinical neuropsychologist, completed neuropsychological testing on April 27, 2022. (Resp. Ex. D). Following her evaluation, which included a variety of cognitive testing batteries, Dr. Kenneally concluded that Claimant's testing results did not "fit a pattern indicative of concussion or mild traumatic brain injury. *Id*. at p. 75. Rather, Claimant's testing revealed that his impaired testing scores were internally inconsistent and not the result of a "brain-based impairment." *Id.* According to Dr. Kenneally, "[t]here was no indication on current testing that [Claimant] has any residual cognitive impairments resulting from the 01/05/2020 work-related injury." *Id*.

5. Visual testing was completed by Dr. Lauren Zimski on April 28, 2022. (Resp. Ex. C). Following her examination, Dr. Zimski opined that Claimant did not have any objective findings consistent with post-traumatic vision syndrome. She noted that such changes would occur immediately after an injury and would not have a significantly delayed onset. According to Dr. Zimski, Claimant's only exam finding was early evidence of cataracts, which were not related to his slip and fall injury. Thus, she opined that Claimant did not have any visual injury/condition related to his fall and did not have visual impairment or the need for "further evaluation, treatment or maintenance care from an ophthalmologic perspective". *Id*. at p. 69.

6. Claimant returned to Dr. Higginbotham for a follow-up DIME upon completion of his neuropsych and visual testing. Dr. Higginbotham reevaluated Claimant on June 20, 2022. (Resp. Ex. A, pp. 36-53). Dr. Higginbotham accepted the report from Dr. Zimski noting: "Over the days, there has been obvious contention between the

[5] Dr. Hall had retired, so Dr. Higginbotham became the physician to complete the requested DIME.

ophthalmology field and the neurooptometry field as to the recognition, evaluation and treatment of vision sequela from a traumatic head injury." *Id*. "This Division examiner accepts the present ophthalmologic independent medical examination opinions." *Id*. "If a neurooptometry evaluation is to be performed and is grossly different than that of the ophthalmologic evaluation of Dr. L Zimski, then this Division examiner would reconsider opinions regarding traumatic brain injury sequela from this WC injury event." *Id*. at p. 45. Accordingly, Dr. Higginbotham concluded that Claimant was at MMI. He adopted the MMI date provided by Dr. Primack: October 18, 2021. Id. at pp. 43-44).

7. Dr. Higginbotham declared that, although Claimant needed a total knee replacement, that was not related to the work injury and should be "performed outside the worker's compensation claim." (Resp. Ex. A, p. 46). Dr. Primack opined similarly when he noted: "In no way shape or form would this work injury necessitate a knee replacement. His tear is so small that it would not even respond to a meniscectomy." (Resp. Ex. F, p. 85). Outside of the specific surgical recommendation for the right knee, Dr. Higginbotham opined that maintenance care would consist primarily of "self-care." (Resp. Ex. A, p. 46).

8. An FAL[6] was filed on July 6, 2022. (Resp. Ex. M). Maintenance medical care was admitted. *Id*. Moreover, an overpayment in temporary total disability benefits of $11,147.73, due to the retroactive application of MMI, was claimed. *Id.*

9. GB[Redacted] testified as Employer's former District Manager and Claimant's supervisor. GB[Redacted] retired from Employer on January 5, 2020, the same date as Claimant's work injury. In his capacity as District Manager, GB[Redacted] had the power to hire and fire employees. He testified that Employer preferred to promote from within the company ranks. However, he added that he had no power or influence over hiring and firing after his retirement.

10. GB[Redacted] testified that route positions or vacation relief positions could have become available, and he thought Claimant could be a good candidate for these positions. Nonetheless, he could not say what the salary would be and he testified that it was hard to say when these positions would open up. He testified that he did not offer one of these positions to Claimant between the time Claimant was hired on October 4, 2018 and January 5, 2020, when he retired and Claimant was injured.

11. GB[Redacted] was presented with the statement of Claimant to his medical provider on December 6, 2019, wherein Claimant noted a history of longstanding low back pains that he felt were getting worse, at times creating severe incapacitation affecting his ability to work. By this date, Claimant had worked for Employer for a little over a year and GB[Redacted] testified that Claimant did not share this information with him. GB[Redacted] testified he would not consider Claimant for a route driver job or vacation relief driver if that were the truth, because of the heavy nature of job duties associated with these positions.

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[6] Final Admission of Liability.

12. Medical records admitted into evidence support a finding that Claimant's back/hip and right knee were symptomatic prior to January 5, 2020. Indeed, Claimant sought treatment from a chiropractor for hip and right knee pain and dysfunction in the immediate pre-work-incident timeframe. (Resp. Ex. E, 78, 81). On December 6, 2019, a month before the claimed work injury in this case, Claimant was evaluated by Dr. Hynes. Claimant at that time noted a history of longstanding low back pains that seemed to be getting worse, at times creating severe incapacitation "which affected his ability to work." He noted chronic right knee pain for years, which would give out, instability in the knee and tenderness to palpation about the medial joint line. (Resp. Ex. A, p. 9). Recommendations were made to refer claimant to anesthesia and neurosurgery, PT and chiropractic intervention. Between this visit and his date of injury, Claimant had 5 chiropractic treatments for his neck, mid back, low back and right knee. *Id. 9-10.* Dr. Mark Failinger stated, "[t]he patient's symptoms were pre-existing and ongoing for years prior to the work incident. There is no evidence on the MRI scan, nor the x-rays, that any acceleration, or permanent aggravation, or pre-existing disease occurred in the work incident of 01-05-2020. In fact, the medical records support the chronic nature of the patient's right knee arthritis symptoms in the timeframe just prior to the work incident of 01-05-2020." (See also, Resp. Ex. A, pp. 6-10, Resp. Ex. B, pp. 57-58). Claimant presented no credible evidence to the contrary. Based upon the content of Claimant's medical records and the testimony of GB[Redacted], the ALJ finds it probable that Claimant would have had trouble performing the full range of duties associated with the position of route driver. Regardless, there is scant evidence to support a finding that Claimant had a reasonable expectation that he would have been promoted to the position despite the condition of his back, hip and knee.

13. Claimant testified at hearing. He reported persistent short term memory loss, headaches, neck pain, concentration issues, word finding issues and daily dizziness. He testified that he occasionally experiences photophobia and used to be "sharp as a tack." He enjoyed reading but claims that he can no longer do that. He is prescribed migraine medication by his primary care provider, Dr. Hynes. Claimant would like to be evaluated by a neurologist for these persistent symptoms. Nonetheless, careful review of the available medical record fails to support a finding that any of Claimant's authorized treating providers are recommending such evaluation. Indeed, the record submitted for review persuades the ALJ that Claimant's maintenance treatment needs are limited to self-directed care. He provided no medical records that included current recommendations for treatment of the complaints he described to the court.

14. Claimant testified that his knee bothers him and his foot turns out when he walks. Claimant testified that he has not undergone the left total knee replacement surgery that had been recommended outside of the workers' compensation claim. Claimant indicated that sometimes he uses a cane when ambulating. He estimated that he uses a cane to aid with his ambulation approximately 50 percent of the time.

15. As his request for disfigurement involved an altered gait, Claimant was asked ambulate approximately 40 feet for the ALJ. During this demonstration, Claimant

appeared very reliant upon his cane and ambulated with his left foot turned out. He was observed to step forward very deliberately, and then meet that foot with the other foot as he moved across the floor in semi-shuffling manner. There was no reciprocating movement demonstrated.

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. Higginbotham's MMI Determination

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 reports of Dr. Hall and Dr. Higginbotham persuades the ALJ that they felt it necessary to obtain neuropsych and visual testing in an effort to determine whether Claimant's condition was stable and unlikely to improve with further treatment. Based upon the evidence presented, the ALJ rejects Respondents' suggestion that the request for neuropsych and visual testing was made for reasons other than diagnostic and treatment related purposes. Indeed, the ALJ is convinced that both Dr. Hall and Dr. Higginbotham requested such testing to assess the extent of any damage to Claimant's brain and subsequently ameliorate any effects that this damage was having on Claimant's cognitive and visual capabilities. As such, this ALJ is convinced that this testing represented a reasonable prospect of diagnosing and/or further defining Claimant's condition so as to suggest a course of restorative treatment. Accordingly, the evidence presented persuades the ALJ that Claimant could not be at MMI until such time that this diagnostic testing was completed, which renders Dr. Higginbotham's backdated MMI determination to October 18, 2021, as opined by Dr. Primack, highly probably incorrect. *Nelson v. Fitzgerald's Casino*, W.C. No. 4-374-519 (November 15, 2001). Since no one knows what the result of the diagnostic testing will be before the tests are completed, whether the results are positive or negative, the ALJ concludes that Claimant should not have been placed at MMI before the requested diagnostic testing was done. Because the testing results were not known until April 28, 2022, the ALJ finds/concludes it was erroneous for Dr. Higginbotham to backdate Claimant's MMI date to October 18, 2021.

E. After considering the totality of the evidence presented, including Dr. Higginbotham's DIME reports and the claim of error regarding MMI, the ALJ concludes that Claimant has produced clear and convincing evidence establishing that Dr. Higginbotham's October 18, 2021 date of MMI is highly probably incorrect. Based upon the evidence presented, the ALJ concludes that Claimant reached MMI upon completion of the requested diagnostic testing on April 28, 2022.

Claimant's Entitlement to an Appointment with a Neurologist

F. A claimant's need for medical treatment may extend beyond the point of maximum medical improvement where he/she requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). It is well settled that where respondents file a final admission admitting for maintenance medical benefits pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988), they are not precluded from later contesting liability for a particular treatment. *Snyder v.*

Industrial Claim Appeals Office, supra; *Rizo v. Monfort, Inc*., W.C. No. 4-310-241 (ICAO June 16, 1999). Moreover, when respondents contest liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *Grover v. Industrial Commission*, *supra; Snyder v. Industrial Claim Appeals Office*, *supra.*

G. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). The Court stated "before an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." Thus, while a claimant does not have to prove the need for a specific medical benefit, he/she must prove the probable need for some treatment after MMI related to the work injury. The question of whether specific medical treatment is related to and reasonably necessary to cure and relieve a claimant from the effects of a work-related injury is a question of fact for resolution by the ALJ. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo.App. 1984).

H. In *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337, 1339 (Colo. App. 1997), the court held that "in a dispute over medical benefits after the filing of a general admission of liability, an employer can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment." *Snyder,* 942 P.2d at 1339. An ALJ may not order an authorized treating physician to provide a particular form of treatment that has not been prescribed by anyone or that has been prescribed only by a physician unauthorized to treat. *Torres v. City and County of Denver*, W.C. No. 4-917-329-03 (May 15, 2018) and *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (May 4, 1995); *Shaw v. Multiquip, Inc,* W.C. 5-080-599-001 (January 23, 2020); *Rascon v. Hach Company,* W.C. No. 5-082-650-002 (March 4, 2020)(overturning ALJ order for surgery given that no ATP recommended it, finding no jurisdiction for such order, citing *Short, Torres, and Potter, all supra.).* In this matter, claimant's attorney spoke in terms of treatment that Claimant felt he wanted, including an evaluation with a neurologist for his headache symptoms. Claimant himself did not testify that any particular treatment was desired nor did he present any medical evidence that any specific evaluations/treatment associated with a condition related to his slip and fall injury was recommended/requested. Rather, he simply described his complaints. Indeed, Claimant's maintenance treatment needs appear limited to self-directed care. As presented, the evidentiary record fails to support a conclusion that Claimant has proven his probable need for some treatment after MMI and that this treatment is related to the work injury.

I. 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." This includes gait disturbances;

however, the question of whether a claimant carries his burden to establish a right to disfigurement benefits is one of fact for the ALJ. *See Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo.App. 1995). This includes whether the claimant proves that displayed disfigurement is due to an industrial condition, or instead is due to a non-industrial condition. *Delon v. Environmental Restoration*, W.C. 4-902-368 (December 13, 2013) (finding that claimant suffered a disfigurement to his eye, but that the disfigurement was due to a non-industrial condition upheld). As noted above, the ALJ conducted a disfigurement viewing in this case. As part of that viewing, Claimant was observed to ambulate with a significantly altered gait. Nonetheless, the ALJ is not convinced that Claimant's altered gait is causally related to his 1/5/2020 work-related slip and fall. Here, the industrial injury to Claimant's knee was minimal and superimposed over significant pre-existing problems. As Dr. Primack stated, "In no way shape or form would this work injury necessitate a knee replacement. His tear is so small that it would not even respond to a meniscectomy." (Resp. Ex. F, p. 85). Dr. Higginbotham agreed noting that a total knee arthroplasty was needed, but that this was not work related. Claimant has sought treatment for his right knee and hip since 2013 on an ongoing basis. Based upon the evidence presented, the ALJ concludes that the limp Claimant displayed at hearing was probably not the result of a small work related meniscal tear but more probably than not caused by the progression of his non-industrial degenerative knee condition. Accordingly, the ALJ is not convinced that Claimant established that his limp is related to his 1/5/2020 industrial injury.

Claimant's Request for an Increase in his AWW

J. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo.App. 1993)[7]; *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo.App. 1997).

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

L. The discretionary exception is not limited to cases involving reopening but can also be applied during the initial stages of a claim to account for wage increases the claimant actually received. *E.g., Marr v. Current Inc.*, W.C. No. 4-407-504 (September

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

20, 2000) (AWW recalculated to include a pay raise the claimant received approximately one month after the injury). The discretionary exception can be used even if the higher wages were earned with a different employer than the one on the claim. *E.g., Avalanche Industries, supra*; *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo.App. 2001) (AWW increased based on higher wages the claimant was actually earning with a subsequent employer). Most pertinent to Claimant's case, the discretionary authority extends to post-injury pay raises a claimant "would have" received but for the injury. *Tibbs v. Mariner Post-Acute Network*, W.C. No. 4-422-333 (April 12, 2001); *Wheeler v. Archdiocese of Denver Management Corp*., W.C. No. 4-669-708 (December 21, 2010). But An ALJ may not base an award on speculation or conjecture. *Nanez v. Industrial Claim Appeals Office*, 444 P.3d 820 (Colo. 2018); *Upchurch v. Industrial Commission*, 703 P.2d 628 (Colo. App. 1985). To that end, the alleged post-injury wage increase must be "sufficiently definite" to support an increase in the AWW. *Tibbs, supra; Ebersbach v. UFCW Local No. 7*, W.C. No. 4-240-475 (May 5, 1997); *Romero v. Cub Foods*, W.C. No. 4-218-823 (September 28, 2000).

M. Here, the evidence presented fails to contain the hallmarks necessary to support the requested increase. As with his previous request for an increase, the evidence Claimant presented in support of his case for an increase is speculative and relies on supposition. There is no documentation of the alleged likelihood of a promotion, its terms, or the anticipated duties associated with any such position. Indeed, the only evidence offered to support the alleged chance of promotion is Claimant's self-interested contention and the conjecture offered by GB[Redacted], who subsequently admitted that he had no power to offer Claimant any job after his date of injury, and who indicated, upon learning of Claimant's complaints to his physicians, he would not have offered any such higher paying job to Claimant. Increasing Claimant's AWW based upon a potential promotion that may or may not exist, for which Claimant never applied, for which he may or may not be qualified simply requires too much speculation as to what Claimant could have earned in other another position but for his work injury. Accordingly, his request for an increase in his AWW must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Respondents request to set aside the October 18, 2021, MMI determination of Dr. Higginbotham is GRANTED. Claimant reached MMI upon completion of his diagnostic testing on April 28, 2022.

2. Claimant's request for a neurology evaluation is denied and dismissed as he failed to establish that need for such evaluation is reasonable, necessary or causally related to his 1/5/2020 industrial injury.

3. Claimant's claim for disfigurement is denied and dismissed.

4. Claimant's request for an increase in his AWW is denied and dismissed.

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

DATED: January 5, 2024

/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. 5-090-379-008

ISSUE

1. Did Claimant prove by a preponderance of the evidence that two sessions of diagnostic left medial branch blocks at C5-T2 are reasonable, necessary and related to her October 18, 2018 work-related injury?

FINDINGS OF FACT

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

1. Claimant is a 56 year-old female who suffered an admitted work-injury on October 18, 2018. Claimant is a paramedic, and on October 18, 2018, she are her partner were returning from a call when a semi-truck struck their ambulance. (Tr. 13:14-22).

2. John Hughes, M.D. conducted an initial Division Independent Medical Examination (DIME) on February 2, 2021. He opined that Claimant was not at maximum medical improvement (MMI) and endorsed further surgical treatment as recommended. (Ex. 2).

3. At Respondents' request, Claimant underwent an IME with John Raschbacher, M.D. on February 18, 2022. Dr. Raschbacher completed a comprehensive examination and interview with Claimant. As relevant here, Claimant told Dr. Raschbacher she had neck pain that varied based on her activity, but was overall stable. Claimant was getting neck injections every five months. Radiofrequency ablations had been authorized. She had one medial branch block injection, and had the second one scheduled. (Ex. A at 9). Dr. Raschbacher also conducted an extensive record review, and he outlined those records in his comprehensive 28-page IME report. Dr. Raschbacher concluded, "the progression of her symptoms, or the reported progression of her symptoms, does not make medical sense. . . . It does not appear that the application of medical resources has produced significant functional gain or benefit and in fact her function appears worse than she was within the day or two after the accident." (*Id*. at 32).

4. Claimant continued to treat with multiple medical providers, including her ATP, Danielle McDonald, D.O. Dr. McDonald placed Claimant at MMI as of August 29, 2022 and recommended maintenance care. (Ex. F).

5. Dr. Hughes conducted a follow-up DIME on November 29, 2022. He agreed with Dr. McDonald, that Claimant was at MMI as of August 29, 2022, and also noted that Dr. McDonald recommended maintenance care to include ketamine infusions, maintenance care for vision and unspecified cervical spine injections. Dr. Hughes concluded by saying that some maintenance care may be helpful, but he shared Dr. Raschbacher's concerns about overtreatment. (Ex. 2).

6. Respondents filed a Final Admission of Liability (FAL) on January 5, 2023. Per the FAL, Claimant reached MMI on August 29, 2022, and Respondents admitted to reasonable, necessary and related medical treatment by an authorized treating physician. (Ex. 2).

7. ATP, Jan Gillespie Wagner, M.D. (Dr. Gillespie), of Northern Colorado Pain Management, began treating Claimant in December 2020. Over the multiple years of treating Claimant, Dr. Gillespie performed various injection procedures on Claimant. (Exs. YY and 3).

8. Claimant credibly testified that she has received epidural steroid injections (ESI) to treat the radiculopathy in her left arm, and medial branch blocks (MBB) and radiofrequency ablations (RFA) on the right side to treat her neck pain. Claimant credibly testified that right-sided MBBs gave her tremendous relief. (Tr. 16:2-17:11).

9. On January 16, 2023, Dr. Gillespie performed a second RFA on Claimant's right side at C5-T2. The previous RFA, performed on March 30, 2022, improved Claimant's right-sided neck pain. Dr. Gillespie noted that the procedure was to address facet joint pain in Claimant's cervical spinal region from the work-related injury. Dr. Gillespie noted Claimant had cervical facet joint arthropathy, and diagnosed her with spondylosis of the cervical region without myelopathy or radiculopathy. (Ex. 3 at 175-190).

10. Claimant saw Dr. Gillespie again on February 16, 2023. Dr. Gillespie noted that Claimant had a "noticeable 50% improvement of her chronic right sided neck pain. . . . Since right side is improved she has noticed increasing intensity of left sided pain approx. C5-T2 levels – worst at approx. C7 area." Dr. Gillespie further noted "[l]eft sided lower neck/upper TSPINE pain consistent with facet driven pain, which is supported by MRI imaging. She is a candidate for medial branch block procedure LEFT C5-T2 to prove this diagnosis and determine candidacy for radiofrequency ablation treatment." (*Id.* at 192).

11. On February 16, 2023, Dr. Gillespie's office requested authorization for two separate session of diagnostic MBBs at the left levels of C5-T2 on Claimant. The request noted that Claimant had persistent left neck pain in the spinal levels of C5-T2, and the provisional diagnosis was that her symptoms are of facet joint spondylosis in nature. (Ex. YY at 1584).

12. Dr. Raschbacher conducted a follow-up IME of Claimant on March 20, 2023, and authored an addendum report. He examined Claimant and reviewed additional medical records. According to his addendum report, Dr. Raschbacher reviewed Northern Colorado Pain Management medical records from August 16, 2021 through November 15, 2022. (Ex. at 37). Dr. Raschbacher testified, on cross-examination, that it was fair to say at the time he authored his addendum report, he did not have any records from Dr. Gillespie after November 15, 2022. (Tr. 46:17-21). While Dr. Raschbacher could not say when he would have seen the January 16, 2023 medical record, he testified that he reviewed it prior to the hearing. (Tr. 56:4-13).

13. In his addendum report, Dr. Raschbacher opined "it appears that [Claimant] wants to have more procedures done, and the injectionist, unsurprisingly, assents. Experience dictates that injectionists will offer and do procedures to the extent that they are authorized, quite commonly. . . . It is not clear how she went from having disc disease to cervical facet disease, but in any event, it is not reasonable, nor medically necessary, nor appropriate to authorize or to do radiofrequency ablation procedures on the left side." (Ex. A at 35-38).

14. Dr. Raschbacher further testified that he reviewed the entire records from Northern Colorado Pain Management, and going back a year in the clinical notes there was no consistent documentation of symptoms consistent with a left cervical facet joint syndrome. (Tr. 40:22-41:1). He also testified that he reviewed over 2,000 pages of Claimant's medical records as part of his evaluation. (Tr. 27:19-28:1).

15. Prior to seeing Dr. Gillespie, Claimant received treatment from John Shultz, M.D. She first saw Dr. Schultz on May 17, 2019. One of Claimant's chief complaints was neck pain. He noted that Claimant presented with a seven-month history of neck pain that is constant, 3/10, right equal to left. (Ex. L at 494-96). Dr. Shultz continued to treat Claimant, and on August 14, 2020, he diagnosed her with cervical facet arthropathy. The plan was to proceed with diagnostic bilateral C5 through 7 facet injections. If that provided relief, he would proceed to MBBs. If those provided a benefit, he would recommend RFAs. (*Id.* at 549). There is no objective evidence in the record that Dr. Raschbacher did not have these medical records.

16. The ALJ finds that Claimant reported neck pain on both the left and right sides of her neck since at least May 2019.

17. Claimant credibly testified that she has had left-sided neck problems since the accident, and when she talked to Dr. Gillespie about neck pain she talked about it generally. Claimant further testified that she pain in the left and right sides of her neck. (Tr. 21:2-24).

18. Dr. Raschbacher testified that he did not have any of Dr. Gillespie's records detailing February 16, 2023 request for left-sided MBBs, he just knew that Claimant wanted to do the diagnostic blocks on the left side and suggested this to Dr. Gillespie. (Tr. 48:7-12).

19. Dr. Raschbacher further testified that Dr. Gillespie's request to perform left-sided MBBs occurred at Claimant's January 16, 2023 appointment, and that Claimant suggested the treatment and Dr. Gillespie acquiesced. (Tr. 33:20-34:5). Dr. Raschbacher testified that after he evaluated Claimant on March 20, 2023, "it reinforced the belief that the injectionist [Dr. Gillespie] is going to continue to do injections as long as they might." (Tr. 29:5-19).

20. The ALJ reviewed the audio recording of Dr. Raschbacher's March 20, 2023 follow-up IME with Claimant. During the interview, Claimant stated on multiple occasions that Dr. Gillespie thought the left-sided MBB would be a good idea because the RFA

worked so well on the right side. Claimant also said she asked Dr. Gillespie why they had not done RFA on the left side because of the success she had on the right side. (Ex. 6).

21. The ALJ finds Dr. Raschbacher's opinion that Dr. Gillespie requested the authorization for left-sided MBBs solely because Claimant suggested the treatment, is neither credible, nor persuasive.

22. Respondents assert, in their position statement, that the office visit Claimant had with Dr. Gillespie just prior to the request for authorization of MBBs occurred on January 16, 2023. (Respondents' Position Statement at ¶ 8). Dr. Raschbacher testified that nowhere in the January 16, 2023 clinical note, does Dr. Gillespie even give a diagnosis of Claimant having left-sided cervical facet joint spondylosis (Tr. 38:2-39-3). In Dr. Gillespie's January 16, 2023 clinical note, she identified the areas of pain that Claimant was reporting (Ex. YY at 1571-1572). Specifically, Dr. Gillespie's clinical note documents that Claimant was reporting right-sided neck pain, and radiating pain into the left arm and fingers. As Dr. Raschbacher noted, these reports of symptoms in these areas of the cervical spine are not consistent with the diagnosis of left-sided cervical facet joint spondylosis. Dr. Raschbacher, however, did not have this medical record at the time of his March 20, 2023 review, nor did he have any of Dr. Gillespie's records after November 15, 2022.

23. As found, Claimant's January 16, 2023 appointment with Dr. Gillespie involved Claimant having a repeat RFA on the right side at C5-T2. (Ex. YY at 1568 and Ex. 4 at 175). This is why the diagnosis and treatment on this date are related to Claimant's right side. The February 16, 2023 request for authorization, for Claimant to have two separate left-sided MBBs at C5-T2, was not based upon the January 16, 2023 appointment, as Dr. Raschbacher testified. As found, Claimant had an appointment with Dr. Gillespie on February 16, 2023, the same date as the request for authorization at issue, and Claimant's ***left-sided*** neck pain was her primary concern. The record specifically notes that since the right side has improved, Dr. Gillespie noticed increasing intensity of Claimant's ***left-sided*** neck pain. Dr. Gillespie concluded that Claimant's ***left-sided*** lower neck/upper TSPINE pain was consistent with facet driven pain supported by MRI imaging. Dr. Gillespie found that Claimant was a candidate for MBB left C5-T2 to prove her diagnosis and to see if Claimant was a candidate for RFA on the ***left side***. (Ex. 4 at 191-92). There is no objective evidence in the record that Dr. Raschbacher ever reviewed the February 16, 2023 medical record.

24. The ALJ finds that Dr. Raschbacher did not have all of Claimant's medical records from Dr. Gillespie, and he specifically did not have the February 16, 2023 medical record where Dr. Gillespie diagnosed Claimant with facet driven left-sided neck pain. Dr. Raschbacher's opinion is neither credible nor persuasive.

25. The ALJ finds that Dr. Gillespie's recommended treatment of left cervical MBBs constitutes maintenance treatment recommended by an ATP.

26. The ALJ finds the opinion and recommendations of Claimant's ATP, Dr. Gillespie to be credible and persuasive. The ALJ finds that the recommended left cervical MBBs are reasonable, necessary and related to Claimant's July 18, 2018 work 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). 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).

Maintenance Care

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim*

Appeals Office, 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Cntr. v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Elec.*, WC 4-471-818 (ICAO, May 16, 2002). There is no bright line test to distinguish treatment designed to cure an injury from treatment designed to relieve the effects of the injury.

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover,* 759 P.2d at 710-13; *Stollmeyer v. Indus. Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso Sch. Dist. No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters* 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Cntr.* 919 P.2d at 704.

As found, Dr. Raschbacher did not have copies of Dr. Gillespie's records after November 15, 2022. While he reviewed numerous medical records regarding Claimant's treatment, he did not review any of the records pertinent to Dr. Gillespie's diagnosis of facet driven left-sided neck pain and the subsequent request for authorization. He relied upon a January 16, 2023 medical record that predates the request for authorization by a month. While there is no objective evidence in the record as to when Dr. Raschbacher reviewed the January 16, 2023 medical record, he was able to review the record at the hearing, and testified accordingly. He credibly testified that there was nothing in the January 16, 2023 medical record to support Dr. Gillespie's February 16, 2023 request for authorization. Dr. Raschbacher, however, never reviewed the February 16, 2023 medical record that the request for authorization is based upon. The ALJ finds that ATP, Dr. Gillespie, has treated Claimant for several years, and is very familiar with Claimant's diagnoses and required treatment. Claimant has reported neck pain, on both the left and right side of her neck, as far back as May 2019. Further, in August 2020, Dr. Schultz diagnosed Claimant with cervical facet arthropathy and recommended diagnostic bilateral C5 through 7 facet injections. The ALJ finds that Dr. Gillespie's opinion and recommendation that Claimant receive left MBBs at C5-T2 is credible and persuasive. As found, Claimant has proven by a preponderance of the evidence that the left MBBs recommended by Dr. Gillespie are reasonable, necessary and related.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the proposed two sessions of diagnostic left medial branch block at C5-T2 as requested by ATP, Dr. Gillespie.

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: January 8, 2024

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

ISSUES

The parties agree that an offset should be taken to reflect Claimant's receipt of Social Security Disability Insurance (SSDI) benefits. The dispute primarily lies in the actual amount of the offset to be taken, and the manner in which an overpayment, if any, shall be recovered. Therefore, the ALJ has delineated the issues to be adjudicated as follows:

1. What is the amount of the offset to accurately reflect Claimant's SSDI benefits?

2. If the calculation of the offset results in an overpayment, have Respondents demonstrated, by a preponderance of the evidence, that they are entitled to cease all indemnity payments to recover the overpayment pursuant to Section 8-42-113.5(1)(b), C.R.S. for Claimant's failure to timely report his receipt of Social Security Disability Insurance (SSDI) benefits?

3. Has Claimant demonstrated, by a preponderance of the evidence, that the recovery of any overpayment should be made at a different rate than the full amount of his weekly TTD benefits?

4. If the ALJ determines that a different rate is appropriate for recovery, what is that rate?

FINDINGS OF FACT

1. Claimant suffered a compensable work injury on June 25, 2019. The ALJ takes administrative notice that all appeals regarding the compensability of the injury were exhausted as of March 3, 2023. Thereafter in April 2023, Respondents began paying temporary total disability (TTD) benefits to Claimant.

2. For the period of June 25, 2019 through July 31, 2019 the TTD rate was $952.28 per week.[1] Beginning on August 1, 2019, Claimant's TTD rate was increased to $1,022.56[2] due to COBRA benefits.

3. After requesting information from the Social Security Administration, in July 2023, Respondents learned that Claimant had been awarded SSDI benefits. Specifically, on May 1, 2020, the Social Security Administration sent Claimant notification that he was found to be eligible for SSDI benefits beginning December 2019.

[1] Based on an average weekly wage (AWW) of $1,482.42.

[2] Based on an AWW of $1,536.88.

The benefit amount for 2019 was $1,394.80 per month. The benefit amount for 2020 was $1,437.40 per month. Claimant was paid a lump sum amount in May 2020 to reflect his SSDI benefits from December 2019 through April 2020.

4. Claimant did not report his receipt of SSDI benefits to Respondents.

5. On October 4, 2023, Respondents filed a General Admission of Liability (GAL) in which Claimant's TTD benefits were reduced to $856.76 per week. This reduction was due to an offset for SSDI benefits. The Respondents calculated a weekly offset amount of $165.80,[3] resulting in weekly TTD payment of $856.76.

6. Respondents began applying the offset amount as of the week of May 1, 2020, when Claimant was notified of his SSDI award. The GAL also noted that as of October 4, 2023, Claimant had been paid TTD benefits totalling $182,161.91, but with the SSDI offset beginning May 1, 2020, the amount Claimant was due was $148,586.17. Therefore, the Respondents calculated an overpayment amount of $33,575.74.

7. The October 4, 2023 GAL also provided notice to Claimant that Respondents intended to recover the overpayment amount by withholding his weekly TTD benefit amount of $856.76. In taking this position, Respondents cited Section 8-42-113.5(1)(b), C.R.S.

8. On October 27, 2023, the Colorado Division of Workers' Compensation (DOWC) notified Insurer that the SSDI offset amount should be calculated based upon the 2019 award of 1,394.80 per month. In addition, because Claimant became eligible to receive SSDI as of December 2019, the offset should have begun on December 1, 2019.

9. Based upon the notice from the DOWC, on November 6, 2023, Respondents filed a GAL reflecting a reduced SSDI offset beginning December 1, 2019. Respondents calculated the appropriate weekly offset to be $160.93.[4] This would result in a TTD rate of $861.63; ($1,022.56 - $160.93). The FAL also stated that as of November 6, 2023, Claimant had received total benefits of $195,570.23, but was entitled to $149,432.69. Respondents calculated the total overpayment to be $46,137.34.

10. Finally, the November 6, 2023 FAL stated that Claimant's TTD benefits of $861.63 per week would be withheld until the overpayment was recovered in full.

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[3] In reaching this calculation, the Respondents multiplied the monthly SSDI benefit of $1,437.00 by 12 months and then divided by 52 weeks in a year, and then divided that by 50 percent; ($1,437.00 x 12 = $17,244/52 = $331.62/2 = $165.81 per week).

[4] (50% of [$1,394.80 x [12/521).

11. Upon learning of the overpayment, on December 6, 2023 Claimant mailed a check in the amount of $10,000.00 to Insurer. Claimant testified that he sent this payment in an effort to pay down the overpayment. As of the December 12, 2023 hearing, Claimant did not know if the check had been received by Insurer and/or if the check had been cashed.

12. Based upon the records admitted into evidence, the last TTD payment issued to Claimant was on September 22, 2023 in the amount of $2,045.12. That payment was for the TTD period of September 16, 2023 through September 29, 2023.

13. Claimant does not dispute that an overpayment exists due to his receipt of SSDI benefits. Claimant questions the amount of the overpayment. In addition, Claimant requests that Respondents withhold a lower amount in repaying the overpayment.

14. The ALJ has reviewed all of the evidence admitted at hearing and performed her own calculations in determining the amount of the appropriate offset and resulting overpayment.

15. Beginning December 1, 2019, Claimant's TTD benefits of $1,022.56 per week should be offset by his receipt of SSDI benefits. The ALJ finds that the correct amount of the weekly offset is $160.94, resulting in a TTD rate of $861.62. The ALJ calculated this rate as follows:

SSDI rate of $1,394.80 per month multiplied by 12 equals $16,737.60 per year.

$16,737.60 divided by 52 weeks in a year equals $321.876 per week.

One half of $321.876 is $160.938, (which rounds to $160.94 per week).

The TTD rate of $1,022.56 less the offset of $160.94 equals $861.62 per week.

16. Claimant has received payments of TTD and interest totalling[5] $195,570.23. In April 2023, Claimant received an initial payment of $168,983.67 for unpaid TTD benefits and related interest. Beginning April 11, 2023, Respondents paid Claimant $2,045.12 every two weeks (this reflected the TTD amount of $1,022.56 per week). Claimant received 13 payments of $2,045.12; for a total of $26,586.56. This total reflects the TTD period of April 1, 2023 through September 29, 2023.[6]

17. After the initial payment of TTD benefits and interest in April 2023, As noted above, Claimant's AWW was increased in August 2019 due to COBRA benefits. Therefore, one cannot simply calculate the TTD rate by the number of weeks between

[5] There is an additional payment of $54.00 that was issued to Claimant on June 20, 2023. The "reason for payment" identified on that check is "MA: 6/26/23". The ALJ infers that this was a mileage reimbursement for June 26, 2023. Therefore, the ALJ has elected not to include this $54.00 payment in her overpayment calculations.

[6] $2,045.12 x 13 = $26,586.56.

June 25, 2019 and the November 6, 2023 GAL. Rather, four distinct time periods must be reviewed to address the correct amount of TTD and related interest Claimant was entitled to receive.

18. In making the following calculations, the ALJ determined the amount of interest by utilizing the DOWC Benefits Calculator[7] and the statutory interest rate of eight percent.

19. For the period of June 25, 2019 through July 31, 2019, Claimant was entitled to TTD benefits totalling $5,033.48, and interest of $1,730.83. During that period Claimant's TTD rate was $952.28 per week.

20. For the period of August 1, 2019 through November 30, 2019, Claimant was entitled to TTD benefits totalling $17,821.76, and interest of $5,715.82. During that period Claimant's TTD rate was $1,022.56 per week.

21. For the period of December 1, 2019 through March 31, 2023, Claimant was entitled to TTD benefits totalling $149,798.79, and interest of $21,580.67. During that period, Claimant's TTD rate was $861.62 to reflect the SSDI offset.

22. For the period of April 1, 2023 through September 29, 2023, Claimant was entitled to TTD benefits totalling $22,402.12. During that period, Claimant's TTD rate was $861.62 to reflect the SSDI offset. There is no interest calculation for this period, as these payments were not late.

23. The following table summarizes these amounts:

Dates	TTD	Interest
6/25/19-7/31/19	$5,033.48	$1,730.83
8/1/19-11/30/19	$17,821.76	$5,715.82
12/1/19-3/31/23	$149,798.79	$21,580.67
4/1/23-9/29/23	$22,402.12	$0.00
Totals:	$195,056.15	29,027.32

24. Based upon the ALJ's calculations, for the period of June 25, 2019 through September 29, 2023, Claimant was entitled to receive a grand total of $224,083.47 in TTD and related interest.

[7] The Benefits Calculator can be found online at: https://dowc.cdle.state.co.us/Benefits/tab/interest.aspx.

25. In addition, between June 2019 and March 2023, Claimant received short term disability (STD) benefits and long term disability (LTD) benefits from Unum. These benefits totaled $64,714.25. On August 28, 2023, Insurer issued a check to Unum in the amount of $64,714.25 in reimbursement for the STD and LTD benefits paid to Claimant.

26. Therefore, the ALJ calculates that Claimant received total TTD, STD, LTD benefits and interest of $260,284.48; ($195,570.23 plus $64,714.25 equals $260,284.48).

27. When the total amount Claimant was entitled to receive is deducted from the total amount paid, it results in an overpayment of $36,201.01. ($260,284.48 less $224,083.47 equals $36,201.01 overpaid).

28. The ALJ finds that Claimant should have notified Respondents of his SSDI benefits by March 23, 2023 as this was 20 days after all appeals became final on March 3, 2023. Therefore, the ALJ finds that Respondents have successfully demonstrated that it was appropriate for them to cease payment of Claimant's TTD payments to recover an overpayment pursuant to Section 8-42-113.5(1)(b), C.R.S.

29. However, the ALJ also finds that Respondents should withhold less than Claimant's weekly TTD amount. The ALJ finds that an appropriate amount to withhold is $300.00 per week. Therefore, Respondents shall withhold $300.00 per week of Claimant's TTD benefits until the overpayment has been recovered in full. The remaining weekly amount of TTD of $561.62, shall be paid to Claimant.

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. Section 8-42-103(1)(c)(I), C.R.S. provides that if a claimant is receiving Federal benefits, such as SSDI, then a claimant's workers' compensation indemnity benefits (including TTD) shall be reduced by an amount equal to 50 percent of the Federal benefit.

5. Section 8-42-113.5(1)(a), C.R.S. provides that if a claimant receives other benefits (such as SSDI) they must report that award, in writing, to the respondents within twenty calendar days. If a claimant fails to provide such notification, Section 8-42-113.5(1)(b), C.R.S. provides that the respondents are "authorized to cease all disability or death benefit payments immediately until the overpayments have been recovered in full."

6. The Colorado Court of Appeals has held that ALJs have discretion to determine if recovery of an overpayment should be done at a reduced rate. *Turner v. Chipotle Mexican Grill,* W.C. No. 4-893-631-07 (I.C.A.O. Feb. 8, 2018), *citing Simpson v. /CAO,* 219 P.3d 354 (Colo. App. 2009); *Arenas v. /CAO,* 8 P.3d 558 (Colo. App. 2000); *Louisiana Pacific Corp v. Smith,* 881 P.2d 456 (Colo. App. 1994).

7. As found, Claimant is receiving SSDI benefits. Therefore, Respondents may reduce Claimant's TTD benefits by an amount equal to fifty percent of his SSDI benefits. As noted above, the amount of the weekly offset is $160.94.

8. As found, Respondents had the authority to cease all TTD payments to recover the overpayment that resulted from Claimant's receipt of SSDI benefits. As found, the stoppage of benefits was appropriate because of Claimant's failure to report the SSDI benefits within 20 days.

9. As found, recovery of the overpayment shall occur at a rate less than Claimant's full TTD rate. The ALJ orders that Respondents shall withhold $300.00 per week from Claimant's TTD benefits, until the overpayment is recovered in full.

ORDER

It is therefore ordered:

1. A weekly offset of $160.94 is appropriate to reflect Claimant's receipt of SSOI benefits.

2. The offset has resulted in a total overpayment amount of $36,201.01.

3. Respondents shall withhold $300.00 per week from Claimant's TTD benefits, until the overpayment is recovered in full.

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

Dated January 9, 2024.

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. **It is recommended that you send a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable injury with Respondent-Employer on November 16, 2022.

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to medical benefits for her November 16, 2022 injury.

3. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability benefits pursuant to § 8-42-105, C.R.S., for her November 16, 2022 injury.

FINDINGS OF FACT

1. Claimant is a fast-food worker for [Redacted, hereinafter SS] who, on November 16, 2022, fainted and fell forward while working in the kitchen, striking her face on the kitchen floor. At the time of the accident, Claimant was seventeen years old. She had been assigned to work at the bun-preparation station in the kitchen for Respondent-Employer. She had been working at the bun-preparation station for approximately fifty-three minutes prior to the fall. It was eighty-five degrees in the kitchen during those fifty-three minutes preceding Claimant's fall.

2. Claimant was taken to the emergency room at Sky Ridge Medical Center. Claimant reported to the doctor that she had been standing at work when she suddenly passed out and fell to the floor hitting her face and chin. She did not recall the events leading to the episode. Claimant complained of abdominal pain and jaw pain. She had a laceration on her chin as well as a chipped tooth. Blood tests showed blood sugar was slightly elevated at 200 mg/dL and her potassium was slightly low. A CT scan of Claimant's face showed left mandible body and right mandibular condyle fractures, and a fracture through the posterior margin of the right temporal mandibular joint extending into the bony external auditory canal.

3. Claimant followed up with her dentist who noted that she had fractured the crowns of teeth numbers three, fifteen, and thirty, and that there was a root fracture noted at tooth number twenty-seven and possibly number ten.

4. Claimant also sought treatment associated with mood swings, a headache, and brain fog. Claimant was referred to the Children's Hospital Concussion Clinic.

5. Claimant underwent an independent medical examination (IME) on April 28, 2023, with Dr. W. Rafer Leach, M.D. Dr. Leach reviewed Claimant's medical records, examined Claimant, and took Claimant's history. Upon physical examination, Dr. Leach noted that Claimant exhibited tenderness, spasm, and crepitus in the right temporomandibular joint, as well as some discomfort in the cervical spine. Dr. Leach recommended a variety of further treatments and evaluations to address Claimant's various symptoms. However, in his report, Dr. Leach did not provide a causation analysis.

6. Claimant underwent an IME with Dr. Carlos Cebrian on August 21, 2023, at Respondents' request. Dr. Cebrian took Claimant's history. Claimant reported that following the incident, she faced cognitive challenges, depression, and anxiety, for which she received psychiatric care and was prescribed Lexapro. She also reported that her headaches persisted almost daily, primarily in the afternoon, accompanied by neck pain at the base of her skull. Her academic performance was initially impacted, and she would occasionally struggle with focus and brain fog. Claimant's mother noted that Claimant had occasional difficulty finding words. Regarding her prior history, Claimant reported that she had stomach issues in 2022 and that she suffered from depression and anxiety several years earlier.

7. Dr. Cebrian reviewed Claimant's medical records and history, reviewed the video of the injury, and performed a physical examination of Claimant. Dr. Cebrian diagnosed Claimant with a facial laceration, jaw fractures, multiple dental fractures, cervical spine pain, and a mild traumatic brain injury as revealed by a CT scan. He attributed none of these symptoms to Claimant's November 16, 2022 injury. Dr. Cebrian concluded that Claimant experienced a classic syncopal episode unrelated to her work at Respondent-Employer. In his opinion, the injury did not arise from employment conditions or unusual circumstances at work. Despite Claimant reporting an eighty-five-degree temperature in the kitchen at the time of injury, Dr. Cebrian deemed this insufficient to trigger a syncopal episode over the approximately fifty minutes during which Claimant would have been exposed to it. He opined that Claimant's irregular eating habits, documented weight loss, and abdominal complaints were probable contributors to the syncopal episode. He noted that the blood work did not indicate dehydration as the cause. Dr. Cebrian felt that a combination of insufficient food intake and ongoing abdominal issues as medically probable causes for the syncopal event, dismissing any work-related causation.

8. Dr. Leach reviewed Dr. Cebrian's IME report and issued a rebuttal report on September 28, 2023. Dr. Leach questioned Dr. Cebrian's conclusion that the syncopal episode was not work-related. Dr. Leach pointed out that the syncopal event occurred while Claimant was standing near the grill, emphasizing the proximity to heat as a plausible cause. Dr. Leach disagreed with Dr. Cebrian's assertion that not eating and weight loss were the primary contributors, stating that these factors would have likely resulted in multiple syncopal episodes over the preceding ten months, which had not occurred. Furthermore, he noted that the net

effects of not eating and weight loss required to cause syncope would be decreased glucose and gross electrolyte abnormality and dehydration. He observed that Claimant's blood results showed increased glucose and potassium within a normal range. Dr. Leach concluded that the syncopal episode was more likely caused by exposure to heat from the grill at the workplace within the context of "pre-disposing conditions that may have been present."

9. Claimant testified at hearing that she had been working at Respondent-Employer for about seven months prior to the accident. On that day, around 6:00 p.m., while working at the bun station in the kitchen, she began feeling lightheaded and experienced a vision fade. Concerned, she arranged for a coworker to take over and went on a break. However, she had no memory of what happened next until waking up at the emergency room, where she was informed that she had passed out, resulting in a broken jaw, a broken right condyle on her jaw, and five broken teeth. She also suffered a concussion and a chin cut from the fall.

10. Claimant testified that before the accident, Claimant felt hot, overheated, and stuffy, with sweating and hot skin. The kitchen temperature, as measured by a thermometer, was in the mid-80s. She normally coped by stepping away, drinking water, or briefly entering the walk-in freezer to cool off. Despite these measures, she still found the kitchen consistently hot. She usually ate dinner around 6:00 p.m. during her break but had not eaten that day since lunch due to the accident occurring just before her intended mealtime.

11. Claimant also testified that she had experienced gastritis in 2022, with symptoms stopping around the time of the accident. She did not recall feeling like she would pass out during gastritis-related stomach pain.

12. The Court finds Claimant's testimony credible.

13. Dr. Leach testified at hearing as an expert in emergency medicine and physical occupational medicine. In his testimony, he outlined a multifactorial diagnosis, including posttraumatic headache primarily from cervical sources, concussion, temporomandibular joint issues, and vision problems associated with mild traumatic brain injury and concussion syndrome.

14. He noted specific injuries such as fractures in the left mandibular body and right mandibular condyle, temporomandibular joint syndrome, dental fractures, cervical axial pain, and muscular spasm in the head, neck, and upper back. Dr. Leach also identified contributions by the work injury to Claimant's pre-existing depression, anxiety, and sleep intrusion.

15. Dr. Leach opined to a reasonable degree of medical probability that these injuries were a consequence of the accident, with a preexisting psychological component exacerbated by the trauma. In disagreement with Dr. Cebrian's report from September 8, 2023, Dr. Leach felt the syncopal episode was more likely than not

attributable to the physical environment and proximity to a heat source on the day of the accident.

16. On cross examination, Dr. Leach acknowledged that Claimant had prior conditions that included weight loss, gastric problems, and depression and anxiety. However, Dr. Leach did not have a clear understanding of Claimant's pre-injury baseline for sleep patterns. He opined that Claimant's weight loss was likely the result of eating insufficient calories.

17. Dr. Leach testified that if somebody is eating insufficient calories, and it reaches the level of severity of anorexia or bulimia, there will be electrolyte abnormalities shown on lab results. However, the emergency department lab results did not show anything substantial. Claimant's potassium levels were 3.1 mmol/L, which Dr. Leach opined was not significant. Although Claimant had a high glucose level, Dr. Leach felt that it would not be a cause of syncope. When one discusses potassium levels in the context of syncope, it is in reference to cardiac dysrhythmia. Claimant's potassium levels were not consistent with levels indicative of cardiac dysrhythmia.

18. Dr. Leach had no hypothesis as to the cause of Claimant's abdominal pain at the emergency department on the date of injury. It was not Dr. Leach's opinion that dehydration caused Claimant's syncopal episode, as Claimant's lab results at the emergency department were not consistent with dehydration.

19. Dr. Leach's hypothesis as to the cause of Claimant's syncopal episode was that the heat caused a parasympathetic response, resulting in a lower heart rate and vasodilation, and, in turn, resulting in decreased perfusion of the brain and loss of consciousness. Dr. Leach referred to this as vasodepressor syncope.

20. Dr. Cebrian testified at hearing as well. He testified that he is a physician specializing in occupational medicine with a level-two accreditation with the Colorado Division of Workers' Compensation. Dr. Cebrian discussed Claimant's prior condition, including Claimant's prior suspected eating disorders and weight loss. He also pointed out that Claimant had been suffering from anxiety and depression prior to the injury and had stopped taking her antidepressant medications in mid-2022. Dr. Cebrian noted that Claimant had experienced significant weight loss in the months leading up to the injury, opining that Claimant was undernourished.

21. Dr. Cebrian explained that significant weight loss can result in certain blood and electrolyte abnormalities and potentially abnormal glucose responses in an individual. He pointed to Claimant's blood work at the emergency room, which showed a blood-glucose level of 200, which he opined was almost diagnostic for diabetes mellitus. He felt that the high glucose levels were an indication that Claimant's liver was likely breaking down glycogen and releasing glucose into the body to provide nourishment in the absence of sufficient food. Dr. Cebrian also

found the potassium level of 3.1 to be significant as well, though he acknowledged that it was only a little bit low.

22. Dr. Cebrian agreed with Dr. Leach's testimony about the physiology of a vasovagal syncopal attack. However, he disagreed about the cause of Claimant's syncopal episode. He felt it was not due to the heat in the kitchen. He first pointed out that the time during which Claimant was exposed to heat was only fifty-three minutes. Second, the temperature of eight-five degrees Fahrenheit was "warm," but "not a significantly elevated temperature."

23. The Court finds the testimony and opinions of Dr. Leach to be more credible and persuasive than those of Dr. Cebrian.

24. Dr. Cebrian insinuated that a typical person standing at a bun station for fifty-three minutes at a temperature of eighty-five degrees would not suffer vasodepressor syncope. Instead, Dr. Cebrian points to Claimant's pre-existing conditions as predisposing her to loss of consciousness. However, the issue in this case is not whether a typical person would have suffered a syncopal episode when subjected to the relatively minor stresses of fifty-three minutes standing in a kitchen that is eighty-five degrees, but rather whether Claimant's syncopal episode and subsequent fall would have occurred but for her exposure to those physical stressors of the workplace—without regard to how minor those stressors would be to the average person.

25. While the Court finds Dr. Leach's opinion that Claimant "Claimant's irregular eating habits, documented weight loss, and abdominal complaints were probable contributors to the syncopal episode," the Court also finds Dr. Leach's opinion that the heat caused a parasympathetic response, resulting in a lower heart rate and vasodilation, and, in turn, resulting in decreased perfusion of the brain and loss of consciousness to be persuasive. Therefore, the Court finds that the syncopal episode and fall to the floor would not have occurred but for Claimant's having stood in a kitchen for that duration and under those conditions.

26. The Court finds that Claimant's November 16, 2022 hospital visit was reasonably needed to cure and relieve Claimant of the effects of her work injury of that same day.

27. The parties stipulated on the record that Claimant's average weekly wage is $528.42 with a temporary total disability rate of $352.28. This corresponds with a daily temporary disability rate of $50.33. The parties stipulated on the record that if the claim is deemed compensable, temporary total disability benefits are owed in the amount of $1,207.92. The Court adopts this stipulation as its own finding and notes that it corresponds with seven and three sevenths weeks of temporary total disability.

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

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*.

As found above, notwithstanding Claimant's pre-existing conditions, Claimant's November 16, 2022 syncopal episode and fall to the floor would not have occurred but for Claimant's having been working in an eighty-five-degree kitchen for fifty-three minutes. Therefore, the Court concludes that the injuries Claimant sustained when she fell to the floor on November 16, 2022 arose out of and in the course of her employment and therefore resulted in a compensable injury.

Medical Benefits

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.

As found and concluded above, Claimant sustained a compensable injury on November 16, 2022. Respondents are responsible for providing that medical treatment that is reasonably needed to cure and relieve Claimant of the effects of her injuries, including, but not limited to, Claimant's November 16, 2022 hospital visit.

Temporary Total Disability Benefits

Temporary total disability benefits pursuant to § 8-42-105, C.R.S., are designed to compensate an injured worker for wage loss while the employee is recovering from work-related injury. *Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson*, 938 P.2d 504 (Colo. 1997). A claimant bears the burden of establishing three conditions before qualifying for temporary total disability 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).

Here, as found above, the parties stipulated to an average weekly wage of $528.42 with a temporary total disability rate of $352.38. The parties stipulated on the record that if the claim is deemed compensable, temporary total disability would be owed in the amount of $1,207.92. The Court notes that this corresponds with three and three-

sevenths weeks of temporary total disability benefits. Respondents therefore owe temporary total disability consistent with the parties' stipulation.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury on November 16, 2022, while working for Respondent-Employer.

2. Respondents shall pay for Claimant's November 16, 2022 hospital visit and all other treatment reasonably needed to cure and relieve Claimant of the effects of her November 16, 2022 injury.

3. Respondents shall pay Claimant three and three sevenths weeks of temporary total disability at a rate of $352.28 per week per the parties' stipulation.

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: January 10, 2024

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. 5-234-768-001

ISSUE

1. Whether the partial medial meniscectomy recommended and performed by David Walden, M.D., was reasonable, necessary, and related to Claimant's admitted injury.

FINDINGS OF FACT

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

1. Claimant is a 37 year-old male who works for Employer as a delivery driver. Claimant stared working for Employer on January 16, 2023.

2. Claimant credibly testified that prior to the events of March 22, 2023, he never had any pain, limitations, or issues with his knees.

3. Claimant credibly testified that on March 22, 2023, while in the course and scope of his employment for Employer, he was walking backward on a truck ramp pulling a loaded dolly (about 70 pounds) when he stepped back with his right leg, planted his right foot, and felt a pop in the right calf with immediate pain.

4. Claimant reported to the Concentra facility in Englewood, Colorado that same day, March 22, 2023. He was evaluated by authorized treating physician ("ATP") Dan Garner, D.O. Claimant reported walking backward down a truck ramp with a load, and when he stepped backward with his right leg and planted his right foot, he felt a "pop" in his right calf with immediate pain. Claimant denied pain in the Achilles tendon, but reported pain with weight bearing and ambulation. Dr. Garner diagnosed Claimant with a likely right gastrocnemius tear, and ordered an MRI. Dr. Garner opined the injury was work-related, and placed Claimant on temporary work restrictions. Claimant was referred to physical therapy. (Ex. 7 at 55-56).

5. Claimant returned to Concentra on March 24, 2023, for a follow-up visit. He was experiencing the same level of pain and was using crutches to ambulate. Claimant's care was transferred to Colorado Springs, where he lives. Claimant's diagnosis and restrictions remained the same. (*Id.* at 59-61).

6. Kimberly Shenuk, PA-C, a provider in Colorado Springs, evaluated Claimant on April 3, 2023. He was still using crutches and had begun physical therapy. Ms. Shenuk noted that Claimant's healing was in the beginning stages. He was allowed to be weight bearing as soon as he was comfortable doing so. (*Id.* at 65-68).

7. Claimant had a follow-up appointment with Ms. Shenuk a week later, on April 10, 2023, for a recheck of his right lower leg. She noted Claimant complained of soreness and tightness, with intermittent pain behind the right knee. Ms. Shenuk also noted that

Claimant was walking without crutches. Claimant was still waiting for authorization for an MRI. (*Id*. at 69-71).

8. The ALJ finds that the first time there is a reference in the medical record of Claimant complaining of right knee pain, is on April 10, 2023.

9. On April 14, 2023, Claimant's physical therapist at Concentra, Katie Peterson, PT, noted that physical therapy was causing Claimant more pain in his right knee, so she placed Claimant's physical therapy on hold and referred him back to his physician. She noted: "[h]is pain is not only the medial calf like originally reported, but now he has medial knee pain/hamstring pain, and pain radiating up the entire leg (this has been previously reported)." (*Id*. at 75).

10. Ms. Shenuk evaluated Claimant on April 17, 2023. She noted that most of Claimant's pain continued to be in the posterior knee area and down into the calf. Ms. Shenuk also noted that Claimant has not had an MRI because it has not yet been approved. She reordered the MRI and noted it was necessary to evaluate Claimant as he was not improving. (*Id.* at 77).

11. On April 23, 2023, Claimant underwent an MRI of his right lower leg. The MRI indicated Claimant had edema in the medial head of the gastrocnemius muscle, representing an intermediate grade strain. Additionally, Claimant had a possible oblique tear of the posterior horn of the medial meniscus with a small joint effusion. (Ex. 8).

12. Marcie Wilde, D.O., evaluated Claimant at Concentra on April 28, 2023. Dr. Wilde explained that the MRI indicated an intermediate grade strain of the gastrocnemius. At this visit, Claimant complained of increased pain in his right knee. Claimant told Dr. Wilde he felt he had been babying his right leg. Claimant reported that his calf was feeling better, but he was noticing more pain in his right knee. Dr. Wilde noted that Claimant did not have knee pain prior to the work injury, and that the MRI findings indicated a possible oblique tear of the posterior horn of the medial meniscus. Dr. Wilde ordered an MRI of Claimant's right knee, and instructed Claimant to continue physical therapy. Dr. Wilde included a diagnosis of a meniscus tear in Claimant's right knee, and affirmatively found that his objective findings were consistent with history and/or work-related mechanism of injury. (Ex. 7 at 81-84).

13. Claimant underwent an MRI of his right knee on May 17, 2023. The MRI revealed a faint oblique tear of the posterior horn and body segment medical meniscus. There was no meniscal extrusion. (Ex. 9).

14. On May 22, 2023, Claimant had a follow-up appointment with Dr. Wilde and they reviewed the May 17, 2023, MRI. Dr. Wilde referred Claimant to an orthopedist to address the tear of the medial meniscus. Dr. Wilde noted in Claimant's medical record, "I feel his calf injury was distracting from knee issues. Please add knee to claim." (*Id*. at 90-94).

15. Orthopedist, David Walden, M.D., evaluated Claimant on June 12, 2023. Claimant explained his mechanism of injury. He further explained that as his calf seemed to

improve, his knee became more painful. Claimant told Dr. Walden that he did not have any of the symptoms with his knee prior to the injury. Dr. Walden diagnosed Claimant with an acute medial meniscus tear of the right knee. Dr. Walden further noted "[h]is mechanism of injury could have produced both the calf injury as well as the knee injury (medial meniscus tear)." He recommended a right knee arthroscopic partial medial meniscectomy and/or a medial meniscus repair. (Ex. 10).

16. The request from Dr. Walden was reviewed by Hilary Alpert, M.D. on June 26, 2023. Dr. Albert noted that the May 17, 2023 MRI revealed a faint oblique tear of the medial meniscus. She opined, however, that there was "no evidence of mechanical symptoms," and Claimant only had minimal conservative care. Dr. Albert concluded the request for right knee arthroscopic partial medial meniscectomy and/or medial meniscus repair was not medically necessary. (Ex. C).

17. On July 12, 2023, Claimant underwent a successful arthroscopic partial medial meniscectomy. (Ex. 10). Claimant returned to work on September 5, 2023.

18. Respondents filed a Final Admission of Liability on September 13, 2023. (Ex. 4).

19. Respondents retained orthopedic surgeon, Mark Failinger, M.D., to perform an Independent Medical Examination (IME). On September 20, 2023, Dr. Fallinger examined Claimant. Based upon his examination and records review, Dr. Fallinger opined that the July 12, 2023 right knee medial meniscus surgery, was reasonable and necessary, but was not related to Claimant's March 22, 2023 work injury. Dr. Fallinger noted there was no reference to Claimant experiencing knee pain or discomfort on the day of his injury. Dr. Fallinger opined:

> backing down a ramp, without a slip, a twist, or a fall on a weighted (weightbearing) knee would not reasonably, nor with medical probability, result in creating nor accelerating a prior meniscus tear. That is to say, a medial head of the gastrocnemius tear could occur, without a slip or a fall occurring while walking backwards down a ramp (due to eccentric forces in the gastroc tendon). However, with no fall even after the medial head of the gastroc was torn, and with no slipping nor twisting of the knee, there is not a reasonable mechanism by which the medial meniscus would have reasonably been torn, at least not with medical probability, in the work incident of 03-22-2023 (after hearing [Redacted, hereinafter PS]' description of the mechanism of injury at this Independent Medical Examination). His symptoms are classic symptoms for pathology in a patellofemoral arthritic joint, which undoubtedly was already present in PS'[Redacted] knee, and which pre-existed the 03-22-2023 incident. However, description of the mechanism of injury is not a mechanism to explain medial meniscus tearing occurring. He had symptoms that could be consistent with chondromalacia of the patella (including catching or locking).

(Ex. D).

20. Dr. Failinger testified, via deposition, on October 16, 2023. He testified consistent with his IME report, and opined that Claimant's mechanism of injury was not reasonable to create a meniscus tear. (Dep. Tr. 6:16-7:1). The ALJ finds Dr. Fallinger's opinion regarding causation to be credible, but not persuasive.

21. As found, Claimant credibly testified that he did not experience any pain, discomfort, or limitations in his right knee prior to the work injury on March 22, 2023.

22. Claimant's ATPs, Dr. Wilde and Dr. Walden, were aware of Claimant's mechanism of injury, and they both concluded that Claimant's knee injury was causally related. Dr. Wilde specifically noted that she believed Claimant's calf injury was distracting him from his knee issues. Dr. Walden concluded the mechanism of injury could have caused the calf injury and meniscus tear. The April 26, 2023 and May 17, 2023 MRI reads, both reflect possible tears in the medial meniscus which, if present, were undiagnosed and asymptomatic prior to Claimant's admitted industrial injury. The ALJ finds the opinions of Claimant's treating providers to be credible and persuasive.

23. The ALJ finds that the medical records show Claimant's ATPs, Dr. Wilde and Dr. Walden diagnosed a meniscal tear that was causally related.

24. The ALJ finds that the arthroscopic surgery performed by Dr. Walden on July 12, 2023, was causally related to Claimant's admitted work injury on March 22, 2023, and it was reasonable and necessary.

25. The ALJ finds that Claimant has proven by a preponderance of the evidence that the July 12, 2023 arthroscopic surgery to repair his right torn meniscus was reasonable, necessary and related.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Medical Treatment

A respondent is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." § 8-42-101(1)(a), C.R.S.; *Colo. Comp. Insur. Auth. v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Parker v. Iowa Tanklines*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

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

No benefits flow to the victim of an industrial accident unless the accident causes a compensable injury. A compensable injury is one that causes a disability or the need for medical treatment. *Boulder v. Payne*, 426 P.2d 194 (1967). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, 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. Although a preexisting condition does not disqualify a claimant from receiving workers' compensation benefits, the claimant must prove a causal relationship between the injury and the medical treatment claimant is seeking. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002).

Factual determinations related to this issue must be supported by substantial evidence in the record. § 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence that a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving & Storage v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995).

Dr. Fallinger opined that Claimant's surgery was reasonable and necessary, but was not causally related to Claimant's March 22, 2023, admitted work injury. Specifically, Dr. Fallinger opined that the mechanism of injury would not explain the meniscus tearing. Dr. Fallinger's opinion is credible, but not persuasive.

As found, there is no objective evidence in the record that Claimant had any pain complaints in his right knee prior to the events of March 22, 2023. Claimant credibly testified that he started working for Employer on January 16, 2023, and was able to complete that job without any issues. Claimant was initially diagnosed as having a tear in his calf. At Claimant's April 10, 2023 appointment with Ms. Shenuk, he complained of intermittent pain behind his right knee. As found, Claimant also suffered a tear of the right medial meniscus. Dr. Wilde opined that Claimant's calf injury distracted from Claimant's knee issues, and this delayed a diagnosis of the right knee from occurring. Dr. Walden concluded Claimant's mechanism of injury could have caused his meniscus tear. Dr. Wilde's description of how the knee was torn in combination with Dr. Walden's findings, which are supported by objective evidence of the MRI reads reflecting an "acute tear," supports a determination that Claimant suffered a meniscus tear in his right knee in the course and scope of his employment on March 22, 2023. Despite the discrepancies between Dr. Failinger's opinion and that of the treating physicians, the ALJ is persuaded that the surgery recommended by and performed by Dr. Walden on July 12, 2023, was reasonable, necessary and related.

The ALJ finds that Claimant has proven by a preponderance of the evidence that the request for arthroscopic surgery of the right knee with a repair of the medial meniscus was reasonable, necessary and related to his admitted March 22, 2023 work injury.

ORDER

It is therefore ordered that:

1. The surgery performed by Dr. Walden on July 12, 2023 was reasonable, necessary and related to Claimant's March 22, 2023 work injury.

2. Respondents shall pay the cost of the surgery performed on July 12, 2023.

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: January 10, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-230-998-002

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that left knee surgery in the form of an arthroscopy and debridement of cartilage as recommended by Wayne Gershoff, M.D. Is reasonable, necessary and causally related to his February 14, 2023 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Lead Ramp Worker at [Redacted, hereinafter DA]. On February 14, 2023 Claimant slipped while exiting a van. He specifically was putting weight on his right knee, but landed awkwardly on his left foot.

2. Claimant initially obtained medical treatment at University of Colorado Health Emergency Room on February 14, 2023. He reported left knee pain. A physical examination did not reveal any appreciable or significant swelling. The examination was otherwise normal with no ligamentous instability and a negative McMurray test. The medical report specified that Claimant did not fall from a height and there was "no severe mechanism of trauma."

3. Claimant was referred to Authorized Treating Provider (ATP) Concentra Medical Centers for additional treatment. On February 14, 2023 Claimant visited Physician's Assistant Hanna Bodkin at Concentra. Claimant reported a prior history of left knee ACL reconstruction. PA Bodkin diagnosed Claimant with a right knee contusion and a sprain of the left knee. She determined that Claimant's objective findings were consistent with history and/or work-related mechanism of injury/illness. Claimant subsequently underwent physical therapy.

4. On February 27, 2023 Claimant underwent a left knee MRI.

5. Claimant was subsequently referred to orthopedist Mark S. Failinger, M.D. for treatment. On March 9, 2023 Dr. Failinger reviewed the left knee MRI scan and noted it demonstrated evidence of an intact ACL but likely some laxity and edema consistent with a partial tear. There was also significant loss of the medial meniscus with minimal fraying of the lateral meniscus, a small area of chondromalacia of the lateral tibial plateau and moderate patellofemoral chondromalacia. Dr. Failinger diagnosed Claimant with left knee status post previous ACL reconstruction with laxity of the graph, left knee chondromalacia of the patellofemoral joint and lateral compartment, and left knee status post previous medial menisectomy. He recommended physical therapy.

6. On April 13, 2023 Claimant visited Dr. Failinger for an examination. Dr. Failinger's impressions included left knee incompetency, significant loss of the medial meniscus of the left knee, left knee chondromalacia lateral tibial plateau, and

patellofemoral chondromalacia. He remarked that the cartilages were deteriorating on both the left and right knees. The right knee appeared worse than the left. Dr. Failinger referred Claimant to Wayne Gershoff, M.D. for cartilage restoration-type procedures given his young age.

7. On April 19, 2023 Claimant visited Dr. Gershoff for bilateral knee pain. Dr. Gershoff reviewed the left knee MRI scan and noted it demonstrated an intact ACL graft with mild chondromalacia. He stated surgery would be considered but not until additional conservative measures had been exhausted. Dr. Gershoff recommended bilateral knee injections.

8. Claimant returned to Dr. Gershoff on July 5, 2023. Dr. Gershoff summarized that Claimant was a 32-year-old male who reported the sudden onset of pain in both knees at work on February 14, 2023. Claimant described constant, aching pain. The symptoms were exacerbated by motion at the knee, weight bearing, walking, running, kneeling and squatting. Past treatment has included application of ice, physical therapy, exercise, activity modification, knee brace, nonsteroidal anti-inflammatory drugs and intra-articular injection of corticosteroids. Dr. Gershoff diagnosed Claimant with left knee chondromalacia.

9. On July 28, 2023 Claimant returned to Dr. Gershoff for an examination. Dr. Gershoff recounted that, despite injections, therapy and bracing, Claimant continued to experience significant pain and discomfort as well as functional limitations in his left knee. Dr. Gershoff recommended surgical intervention involving arthroscopy and debridement of any damaged cartilage.

10. On July 28, 2023 Dr. Gershoff also assigned work restrictions. He detailed that Claimant could return to "sedentary work only at this time due to deterioration of his left knee joint that will require surgery."

11. Timothy S. O'Brien, M.D. conducted a medical records review and authored a report dated August 10, 2023. After reviewing the records and diagnostic reports, Dr. O'Brien determined Claimant's diagnoses included: (1) a minor self-limited and self-healing left knee strain/sprain, healed; and (2) a minor self-limited and self-healing right knee strain/sprain, healed. Dr. O'Brien concluded that the mechanism of injury on February 14, 2023 did not result in any meniscal or ligamentous pathology. There was no tearing of either the right or left knee. He reasoned that Claimant's left knee findings were all degenerative and pre-existing in nature. Dr. O'Brien further explained that Claimant's February 14, 2023 work accident did not result in any aggravation or acceleration of his pre-existing, bilateral knee chondromalacia and degenerative arthritis.

12. Dr. O'Brien explained that Claimant's pre-existing left knee surgery included an arthroscopic menisectomy and an ACL reconstruction involving removal of meniscal tissue. The surgery permanently altered the biomechanics of the knee joint, and predisposed Claimant to premature osteoarthritis that was evidenced on the MRI

scan. Notably, Dr. O'Brien commented that Claimant's bilateral knee MRI scans demonstrated no evidence of an acute injury. There was no accumulation of post-traumatic fluid in the form of an effusion, no bleeding into either knee joint, no tissue yielding and no swelling. He further remarked that Dr. Gershoff's examinations verified the MRI scan readings because he documented the absence of any anterior cruciate ligament incompetence, there were stable ligamentous structures of both knees, and there were intact meniscal structures of both knees. Therefore, Dr. O'Brien concluded the February 14, 2023 work accident did not result in a meniscal or ligamentous injury of either knee that would require surgery.

13. Dr. O'Brien determined that Dr. Gershoff's recommendation for a left knee arthroscopy was designed to address a pre-existing, personal health issue that was neither caused, aggravated or accelerated by the February 14, 2023 work incident. He detailed that numerous pivotal studies revealed arthroscopic technology had no role in the treatment of osteoarthritic knee pain and strongly cautioned against use of an arthroscopy to treat the condition. Thus, Dr. O'Brien testified that, in addition to not being causally related, the proposed surgery was not reasonable or necessary. Accordingly, Dr. Gershoff's request for arthroscopic left knee surgery with debridement was not reasonable, necessary, or causally related to Claimant's February 14, 2023 industrial accident.

14. Claimant has failed to demonstrate it is more probably true than not that left knee surgery in the form of an arthroscopy and debridement of cartilage as recommended by Dr. Gershoff is reasonable, necessary and causally related to his February 14, 2023 admitted industrial injury. Initially, on February 14, 2023 Claimant suffered a left knee sprain while working for Employer. Claimant had previously undergone left knee surgery in the form of an arthroscopic menisectomy and an ACL reconstruction involving removal of meniscal tissue. After receiving conservative treatment, Claimant underwent a left knee MRI on February 27, 2023. The MRI revealed evidence of an intact ACL but likely some laxity and edema consistent with a partial tear. There was also significant loss of the medial meniscus with minimal fraying of the lateral meniscus, a small area of chondromalacia of the lateral tibial plateau and moderate patellofemoral chondromalacia. On July 28, 2023 Dr. Gershoff recounted that, despite injection therapy and bracing, Claimant continued to experience significant pain and discomfort as well as functional limitations in his left knee. Dr. Gershoff recommended surgery including arthroscopy and debridement of any damaged cartilage.

15. Despite Dr. Gershoff's surgical recommendation, the record reflects that Claimant's need for left knee surgery is not causally related to his work activities for Employer. Notably, Dr. O'Brien persuasively explained that Claimant's left knee MRI did not reveal any acute injury, but instead demonstrated that Claimant suffers from chronic, longstanding, degeneration and osteoarthritis. Specifically, the MRI did not show any accumulation of post-traumatic fluid in the form of an effusion, there was no bleeding into either knee joint, and there was no tissue yielding or swelling. Moreover, all treating physicians, including Dr. Gershoff and Dr. Failinger, diagnosed Claimant with the degenerative condition of chondromalacia of the left knee and noted only chronic

findings on the left knee MRI.

16. Dr. O'Brien summarized that Dr. Gershoff's recommendation for a left knee arthroscopy was designed to address a pre-existing, personal health issue that was neither caused, aggravated or accelerated by the February 14, 2023 work incident. He persuasively concluded the work accident did not result in a meniscal or ligamentous injury that required surgery. Based on the medical records and persuasive opinion of Dr. O'Brien, Claimant's work activities on February 14, 2023 did not cause, aggravate or accelerate his need for left knee surgery in the form of an arthroscopy and debridement of damaged cartilage. The proposed surgery was designed to address the natural progression of Claimant's pre-existing left knee degenerative condition. Accordingly, Claimant's request for left knee surgery as proposed by Dr. Gershoff 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 left knee surgery in the form of an arthroscopy and debridement of cartilage as recommended by Dr. Gershoff is reasonable, necessary and causally related to his February 14, 2023 admitted industrial injury. Initially, on February 14, 2023 Claimant suffered a left knee sprain while working for Employer. Claimant had previously undergone left knee surgery in the form of an arthroscopic menisectomy and an ACL reconstruction involving removal of meniscal tissue. After receiving conservative treatment, Claimant underwent a left knee MRI on February 27, 2023. The MRI revealed evidence of an intact ACL but likely some laxity and edema consistent with a partial tear. There was also significant loss of the medial meniscus with minimal fraying of the lateral meniscus, a small area of chondromalacia of the lateral tibial plateau and moderate patellofemoral chondromalacia. On July 28, 2023 Dr. Gershoff recounted that, despite injection therapy and bracing, Claimant continued to experience significant pain and discomfort as well as functional limitations in his left knee. Dr. Gershoff recommended surgery including arthroscopy and debridement of any damaged cartilage.

7. As found, despite Dr. Gershoff's surgical recommendation, the record reflects that Claimant's need for left knee surgery is not causally related to his work activities for Employer. Notably, Dr. O'Brien persuasively explained that Claimant's left knee MRI did not reveal any acute injury, but instead demonstrated that Claimant suffers from chronic, longstanding, degeneration and osteoarthritis. Specifically, the MRI did not show any accumulation of post-traumatic fluid in the form of an effusion, there was no bleeding into either knee joint, and there was no tissue yielding or swelling. Moreover, all treating physicians, including Dr. Gershoff and Dr. Failinger, diagnosed Claimant with the degenerative condition of chondromalacia of the left knee and noted only chronic findings on the left knee MRI.

8. As found, Dr. O'Brien summarized that Dr. Gershoff's recommendation for a left knee arthroscopy was designed to address a pre-existing, personal health issue

that was neither caused, aggravated or accelerated by the February 14, 2023 work incident. He persuasively concluded the work accident did not result in a meniscal or ligamentous injury that required surgery. Based on the medical records and persuasive opinion of Dr. O'Brien, Claimant's work activities on February 14, 2023 did not cause, aggravate or accelerate his need for left knee surgery in the form of an arthroscopy and debridement of damaged cartilage. The proposed surgery was designed to address the natural progression of Claimant's pre-existing left knee degenerative condition. Accordingly, Claimant's request for left knee surgery as proposed by Dr. Gershoff 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 left knee surgery as proposed by Dr. Gershoff 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: January 11, 2024.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-232-739-001

ISSUES

I. Whether the claimant established, by a preponderance of the evidence, that he suffered a compensable injury.

II. Whether the claimant established, by a preponderance of the evidence, that he is entitled to reasonable and necessary medical treatment.

III. Whether the claimant established, by a preponderance of the evidence, that the right to select a treating physician passed to the claimant.

IV. Whether the claimant established, by a preponderance of the evidence, that he is entitled to temporary disability benefits.

V. The claimant's average weekly wage.

VI. Whether the claimant established, by a preponderance of the evidence, that he is entitled to penalties for the employer's alleged failure to provide notice of the injury to the Division within 10 days after notice or knowledge of the injury.

VII. Whether the claimant established, by a preponderance of the evidence, that he is entitled to penalties for the employer's alleged failure to admit or contest liability within 20 days after the claimant filed his Workers' Claim for Compensation with the Division of Workers' Compensation.

FINDINGS OF FACT

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

1. On April 28, 2022, the claimant was employed by [Redacted, hereinafter IS] (the employer), which is owned by [Redacted, hereinafter LF].
2. The claimant's job duties included installing, polishing, and cutting stone. The claimant was paid $200 per day and worked five to six days per week. Thus, the claimant worked an average of 5.5 days per week.
3. The claimant was sometimes paid by check and sometimes paid in cash.
4. On April 28, 2022, while the claimant was installing stone, LF[Redacted] was operating a stone cutter. The blade of the stone cutter broke, and shards of the blade flew into the claimant's face and right eye. Thus, LF[Redacted] had notice of the injury.
5. Immediately after the accident, LF[Redacted] took the claimant to the hospital. The claimant was initially taken to Centura Health Lakewood Emergency - Urgent Care.

However, after an initial assessment, he was transported by ambulance to Porter Adventist Hospital for treatment.

6. The claimant underwent a CT scan of his face. The scan revealed a ruptured globe and likely a foreign body in his right eye. Thus, an ophthalmology consultation was requested. The claimant was evaluated the same day by Dr. Michael Solomon. Dr. Solomon performed emergency surgery to repair the claimant's ruptured globe of his eye and determine the extent of the injury to the claimant's right eye. Based on the surgery, he noted the claimant had a ruptured scleral eyewall with total vitreo-retinal contents streaming out of a 7.0 mm scleral laceration as well as other injuries to the eye. After the surgery, Dr. Solomon noted that the prognosis was poor for the return of the claimant's vision in his right eye.
7. After undergoing surgery, the claimant was discharged from the hospital the next day, April 29, 2022. The plan at discharge was for the claimant to return within 10-14 days to have his sutures removed and to assess his eye for further treatment.
8. Upon his discharge, the claimant was provided a "Return to Work Letter" that excused him from work from April 28th through May 1, 2022. Thus, the claimant missed at least three days of work due to his eye injury.
9. Based on his injury, and need to follow up for more treatment within 10-14 days to assess the condition of his eye, the ALJ finds that the work injury precluded the claimant from performing his regular job duties.
10. At no time did the employer provide the claimant with a list of medical providers to treat the claimant from the effects of his work injury.
11. The claimant testified that he returned to work for the employer but was forced to stop sometime in 2022 because he was afraid that his eye would get infected. The claimant did not, however, indicate with any specificity when he returned to work for the employer and when he quit working for the employer.
12. The claimant also testified that after he stopped working for the employer sometime in 2022, he worked for a cousin for about two weeks. However, he had to quit because he was unable to work at heights due to losing sight in his eye. Again, the claimant did not provide the specific dates of employment with his cousin or the amount that he earned each week.
13. The claimant also testified that since quitting the job with his cousin, he started working part time, performing odd jobs, and earning approximately $350 to $500 per week. The decrease in his earnings is evidence that the claimant cannot perform his regular job duties. That said, the Claimant did not provide reasonably specific information regarding when he started this work or the wages he earned each week since he started working part time and performing odd jobs.
14. On March 4, 2023, the claimant, through counsel, completed a Workers' Claim for Compensation.
15. On March 9, 2023, the Division of Workers' Compensation issued a letter to the employer enclosing the claimant's claim for compensation. The letter stated that the employer did not appear to be insured. The letter also stated that employer must

either admit or deny liability for the claim within twenty days of the date of the letter and copy the claimant with their admission or denial. Based on this letter, the ALJ finds that the employer was not insured on the date of injury and had not yet filed an admission or denial as of March 9, 2023.

16. The claimant did not provide any testimony or credible evidence about whether the employer reported the injury to the Division within 10 days of the injury.

17. On or about June 28, 2023, the claimant filed an Application for Hearing. Claimant asserted penalties for the employer's alleged failure to report the injury to the Division of Workers' Compensation within 10 days of his injury. Claimant also asserted penalties for the employer's alleged failure to admit or deny liability within 20 days from when the claimant filed his claim for compensation.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

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

I. Whether the claimant established, by a preponderance of the evidence, that he suffered a compensable injury.

The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Off.,* 12 P.3d 844 (Colo. App. 2000).

In this case, the claimant established that he was working for the employer on April 28, 2022, when the blade of a stone cutter his boss was using broke into pieces and the pieces flew into the claimant's face and right eye. The accident caused a significant injury to the claimant's right eye and resulted in the total loss of vision in his right eye.

As a result, the ALJ finds and concludes that the claimant established by a preponderance of the evidence that he suffered a compensable injury on April 28, 2022.

II. Whether the claimant established, by a preponderance of the evidence, that he is entitled to reasonable and necessary medical treatment.

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

In this case, the claimant suffered a significant injury to his right eye. The injury to his right eye caused the need for medical treatment, which included eye surgery. As a result, the ALJ finds and concludes that the claimant established by a preponderance of the evidence that he is entitled to medical treatment to cure and relieve him from the effects of the work injury.

III. Whether the claimant established, by a preponderance of the evidence, that the right to select a treating physician passed to the claimant.

Under § 8-43-404(5), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith," or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Off.*, 746 P.2d 565 (Colo. App. 1987). To properly exercise its right of selection, the employer must give the claimant a list of at least four providers from which he can choose. Section 8-43-404(5)(a)(I)(A).

In this case, the employer did not provide the claimant with a list, at any time, of at least four providers from which the claimant could choose to treat for his work injury. As a result, the claimant has established by a preponderance of the evidence that he may select a physician to treat him from the effects of his work injury.

IV. Whether the claimant established, by a preponderance of the evidence, that he is entitled to temporary disability benefits.

i. TTD Benefits

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Elec.*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Off., supra*.

The existence of disability presents a question of fact for the ALJ. The claimant need not produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

Here, the claimant was injured on April 28, 2022, and was immediately hospitalized and underwent emergency surgery the same day. Thereafter, on April 29, 2022, the claimant was discharged from the hospital. Upon discharge, the claimant was provided formal work restrictions that precluded him from working from April 28, 2022, through May 1, 2022. The claimant suffered a serious eye injury resulting in the loss of vision in his right eye and required ongoing treatment and precluded him from performing his regular job duties. As a result, the ALJ finds and concludes that the claimant established by a preponderance of the evidence that he missed more than three shifts of work and is entitled to temporary total disability benefits as of April 29, 2022.

The claimant did return to work for the employer. The claimant did not, however, indicate when he returned to work for the employer. As a result, the record is insufficient to determine the specific time period, or periods, for which the claimant is entitled to temporary total disability benefits. Therefore, the time period, or periods, for which the claimant is entitled to temporary total disability benefits is reserved.

ii. TPD Benefits

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson*, 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

In this case, the claimant established that his eye injury precluded him from performing his regular job duties. But the claimant did return to work and was working odd jobs earning approximately $350 to $500 per week. Thus, the claimant is entitled to temporary partial disability benefits. However, the claimant did not establish when he started working and earning these wages. Thus, the ALJ is unable to set forth the date, or dates, temporary partial disability benefits are payable. Therefore, the time period for which temporary partial disability benefits are payable, and the amount of temporary partial disability benefits payable, are reserved.

V. The claimant's average weekly wage.

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82.

In this case, the claimant was paid $200 per day and worked 5-6 days per week. The ALJ finds and concludes that a fair approximation of the claimant's wage loss is to calculate his average weekly wage by taking his daily rate of $200 and multiplying it by 5.5 days. Therefore, the ALJ finds and concludes that the claimant's average weekly wage is $1,100 per week.

VI. Whether the claimant established, by a preponderance of the evidence, that he is entitled to penalties for the employer's alleged failure to provide notice of the injury to the Division within 10 days after notice or knowledge of the injury.

Section 8-43-101, C.R.S. requires every employer to report injuries for lost time or injuries resulting in permanent physical impairment to the Division within ten days after notice or knowledge of the same. Because there is no specific penalty provided for violation of § 8-43-101, penalties are to be assessed under § 8-43-304 C.R.S. based on the employer's failure to file a first report of injury as required by § 8-43-101(1) and Rule of Procedure 5-2. Section 8-43-304 authorizes an ALJ to impose a penalty of up to $1,000 per day for each day a party violates any provision of the Workers' Compensation Act, fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director, or refuses to obey any lawful order made by the director or the panel. A minimum

of 25% of the penalty shall be apportioned to the claimant and the remainder shall be payable to the uninsured employer fund.

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 Bus. Products v. Industrial Claim Appeals Off.*, 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 conduct or inaction at issue constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether the conduct or inaction at issue, constituting the violation was objectively unreasonable. The reasonableness of the action or inaction 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 a party 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 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 the party violated a statute or 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.*

Here, the claimant did file an application for hearing asserting a penalty for the employer's failure to provide notice of the injury to the Division within 10 days. Moreover, the claimant's attorney did argue that penalties were appropriate for the employer's failure to provide notice to the Division within 10 days. But attorney argument is not evidence. The claimant did not submit any credible evidence to establish that the employer failed to provide notice of the injury to the Division within 10 days. All the claimant provided was the Application for Hearing and a letter from the Division indicating that a workers' claim for compensation was filed and that the employer had 20 days to either admit or deny liability for the claim in writing.

As a result, the claimant failed to establish by a preponderance of the evidence that he is entitled to penalties for the employer's alleged failure to report the injury in writing to the Division within 10 days.

VII. Whether the claimant established, by a preponderance of the evidence, that he is entitled to penalties for the employer's alleged failure to admit or contest liability within 20 days

after the claimant filed his Workers' Claim for Compensation with the Division of Workers' Compensation.

Section 8-43-203(1)(a), C.R.S. provides that the employer or insurance carrier shall notify in writing the division and the injured employee within 20 days after a report is, or should have been filed, pursuant to Section 8-43-101, C.R.S., whether liability is admitted or contested.

Section 8-43-203(2)(a), C.R.S. specifies that, if such notice is not filed, "the employer, or if insured, the employer's insurance carrier, may become liable to the claimant, if successful on the claim for compensation, for up to one day's compensation for each failure to so notify." The statute also provides that if a penalty is awarded, fifty percent shall be paid to the subsequent injury fund and fifty percent shall be paid to the claimant.

The claimant bears the burden of proof to establish the circumstances justifying the imposition of the penalty. *See Pioneer Hospital v. Industrial Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005). Moreover, fifty percent of any penalty paid shall be paid to the subsequent injury fund, created in section 8-46-101, and fifty percent to the claimant.

In this case, the claimant did file an application for hearing asserting a penalty for the employer's alleged failure to admit or deny liability within 20 days and submitted the March 9, 2023, letter from the Division indicating that the employer had 20 days to either admit or deny liability. Based on the March 9, 2023, letter, the ALJ finds and concludes that the employer did not admit or deny liability within 20 days from when the employer filed, or should have filed, a first report of injury with the Division.

The ALJ finds and concludes that the first report of injury should have been filed with the Division within 10 days of the injury, which would have been May 8, 2022. Thus, the employer had until May 28, 2022, to either admit or deny liability for the injury in writing. Based on the March 9, 2023, letter from the Division, the ALJ finds and concludes that the employer did not either admit or deny the claim in writing from May 8, 2022, through March 9, 2023.

Because the employer failed to timely admit or deny liability, the employer may be liable for penalties under Section 8-43-203(2)(a). The phrase "may become liable" means imposition of penalties under Section 8-43-203(2)(a) is discretionary. *E.g., Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of requiring the employer to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise its administrative oversight over the claim process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties in general are to punish the violator and deter future misconduct. *May v. Colorado Civ. Rts. Comm'n*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Associated Bus. Products v. Industrial Claim Appeals Off.*, 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found and the ability of the penalized party to pay should also be considered. *Dami Hospitality, LLC v. Industrial Claim Appeals Off.*, 442 P.3d 94 (Colo. 2019). The claimant bears the burden of proof to establish circumstances justifying the imposition of a penalty under § 8-43-

203(2)(a). *Pioneer Hospital v. Industrial Claim Appeals Off.*, 114 P.3d 97 (Colo. App. 2005).

In this case, the claimant presented no evidence about the harm incurred by the employer's failure to either admit or deny liability for the claim. That said, the purpose of awarding penalties is to punish the violator, deter future misconduct, and to notify the Division as to the status of the claim. As a result, the ALJ finds and concludes that the employer should be penalized for its failure to timely admit or deny liability.

Moreover, in this case, the employer did not appear. Thus, no evidence was submitted by the employer to help the court determine the ability, or inability, of the employer to pay a penalty.

Based on the facts and circumstances of this case, the ALJ finds and concludes that a penalty of ½ of the claimant's daily compensation rate is appropriate. The penalty shall run from May 8, 2022, to March 9, 2023, the date of the letter from the Division, which is 305 days.

Since the claimant's average weekly wage is $1,100, his weekly compensation rate is $733.33. Thus, his daily compensation rate is $104.76. Fifty percent of his daily compensation rate is $52.38. Therefore, the total penalty is $52.38 x 305 days = $15,975.90. Pursuant to the statute, fifty percent of the penalty is payable to the subsequent injury fund and fifty percent is payable to the claimant. As a result, $7,987.95 is payable to the subsequent injury fund and $7,987.95 is payable to the claimant.

ORDER

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

1. The claimant suffered a compensable injury on April 28, 2022.
2. The employer shall pay for the claimant's reasonable and necessary medical treatment to cure and relieve him from the effects of his work injury.
3. The right to select a treating physician has passed to the claimant. Therefore, the claimant is free to select a treating physician.
4. The claimant is entitled to temporary total disability benefits. However, the period for which the benefits are payable is reserved for future determination.
5. The claimant is entitled to temporary partial disability benefits. However, the period for which they are payable, and the amount payable, are reserved for future determination.
6. The claimant's average weekly wage is $1,100.
7. The claimant's request for penalties for the employer's alleged failure to timely report the injury to the Division is denied.

8. The claimant's request for penalties for the employer's failure to either admit or deny liability in a timely manner is granted in the amount of $15,975.90.

    a. The employer shall pay fifty percent of the penalty, $7,987.95, to the claimant.

    b. The employer shall pay fifty percent of the penalty, $7,987.95, to the subsequent injury fund.

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

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

DATED: January 12, 2024

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-228-376-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable fracture of his right femur/hip arising out of the course of his employment with Employer on December 1, 2022.

FINDINGS OF FACT

1. Claimant has been a courier/delivery driver for Employer for approximately eleven years, and has worked for Employer for approximately twenty years.

2. Claimant has a history of osteoporosis and inflammatory arthritis. During the Covid pandemic, Claimant began running for exercise, and started developing left hip pain. In May 2020, Claimant was standing and felt a "pop" in his left hip, and was subsequently diagnosed with a left femoral neck fracture. Claimant then underwent an open reduction, internal fixation surgery of the left hip. (Ex. DD).

3. On Thursday, December 1, 2022, Claimant testified he was performing his usual duties delivering packages for Employer. After a delivery, Claimant was returning to his truck at a slow jog when his right foot struck a raised piece of concrete on a sidewalk or driveway. Claimant stumbled but did not fall and felt immediate pain in his right leg. Claimant testified he reported the incident to his manager over his lunch hour. Claimant continued to experience pain in his right leg, and took the following day off work.

4. On December 2, 2022, Claimant saw his primary care physician Adam Palazzari, M.D., reporting pain in his right lateral buttock and right groin after stumbling on a crack the previous day. Dr. Palazzari diagnosed Claimant with trochanteric bursitis of the right hip, and performed a steroid injection. He indicated if Claimant's pain did not resolve with the injection, he would order a hip x-ray due Claimant's history of "somewhat unprovoked hip fracture on the left." (Ex. RR).

5. Over the weekend, Claimant's hip pain did not resolve, so Dr. Palazzari ordered a right hip x-ray that was performed on Monday, December 5, 2022. The x-ray was interpreted as showing mild degenerative changes in both hips, with no evidence of fracture or dislocation. (Ex. 5).

6. On December 6, 2022, Claimant was ascending stairs at his home and felt a severe "pop" in his right hip, and sat down onto the stairs. Claimant saw Dr. Palazzari the following day (December 7, 2022), and reported he had been unable to bear weight on his right leg and had been experiencing frequent "shocks" in his right buttock. Claimant reported the pain was similar to his experience of breaking his left hip in 2020. (Ex. TT). A right hip x-ray performed on December 7, 2022 (which was compared to the December 5, 2022 x-ray) showed a "displaced transcervical fracture of the right femoral neck with

slight superior subluxation," with a small ossific fragment along the interior margin of the femoral head neck junction." (Ex. SS). Dr. Palazzari opined that Claimant's x-rays showed "a new fracture from two days ago (and likely happened last night)." He then referred Claimant to the emergency room, noting that Claimant had experienced "two spontaneous hip fractures in two years. We will have to examine this more closely to see if he has a bone disorder." (Ex. TT).

7. Later that day, Claimant was admitted to Good Samaritan Hospital, and underwent right total hip arthroplasty on December 8, 2022. Claimant was discharged on December 9, 2022. (Ex. JJ).

8. On January 31, 2023, Employer filed a first report of injury, indicating Claimant first reported an injury on January 29, 2023. (Ex. 4).

9. On February 10, 2023, Claimant began seeing providers at Concentra. Claimant reported that his pain began when he tripped on an uneven section of a driveway on December 1, 1022. Claimant reported that his pain became worse on December 7, 2022, leading to his hip replacement surgery. Claimant attended multiple visits at Concentra through March 2023, and was placed at maximum medical improvement on March 24, 2023. On March 21, 2023, Nicholas Olsen, D.O., at Concentra, assigned Claimant a 30% lower extremity permanent impairment rating. (Ex. VV). Although several providers indicated in records that Claimant's injury was consistent with his reported history and work-related, the Concentra records do not document Claimant reporting the December 6, 2022 incident in which Claimant experienced a "pop" while ascending stairs. None of Claimant's treating providers at Concentra provided a causation analysis which considered the December 6, 2022 incident. (Ex. 8, 9, 10, 11, & VV). The ALJ does not find the causation statements contained in the Concentra records persuasive.

10. On February 17, 202, Respondents filed a Notice of Contest, contesting liability for further investigation related to causation. (Ex. 3).

11. On October 11, 2023, Claimant underwent an independent medical examination (IME) with Carlos Cebrian, M.D., at Respondents' request, and prepared a report dated October 11, 2023 and supplemental report dated November 10, 2023. Dr. Cebrian was admitted as an expert in occupational medicine and testified at hearing. Dr. Cebrian reviewed Claimant's x-ray reports from December 5, 2022 and December 7, 2022, and opined that based on these studies, Claimant's right hip fracture occurred after December 5, 2022. He explained that the fracture described in the December 7, 2022 x-ray report was a complete fracture of the proximal portion of the femur and that due to the fracture Claimant's femur was offset or misaligned. Dr. Cebrian testified, credibly, that it was not likely that the radiologist would have missed the displaced femoral neck fracture if it were shown on the December 5, 2022 x-ray. Dr. Cebrian further opined it was unlikely Claimant would have suffered a fracture of the femoral neck as a result of striking a raised piece of concrete with his foot on December 1, 2022. He opined that it was not medically probable that Claimant's December 1, 2022 incident resulted in microfractures that were missed on x-ray. Dr. Cebrian further testified that Claimant's pre-existing inflammatory arthritis,

osteopenia and osteoporosis placed him at a higher risk of fractures, similar to the spontaneous fracture of his left hip in 2020.

12. Claimant testified that on December 1, 2022, he struck his right foot on a raised section of concrete, causing him to stumble, but not fall, and felt immediate pain in his right leg. He indicated that the pain caused him to stop for a few minutes, and he then returned to work. He indicated that he called his manager over his lunch hour and reported the incident, and still felt pain after several hours. The following day, Claimant took the day off work due to his pain. He indicated that the injection performed by Dr. Palazzari on December 2, 2022 did not provide relief of his symptoms. When the pain did not subside over the weekend, Claimant called Dr. Palazzari and requested an x-ray. With respect to the December 6, 2022 incident, he testified he walked up the basement stairs in his home and felt a "jolt" in his right hip upon reaching the first floor. This caused him to fall back and sit down on a flight of stairs running from the first floor to the second floor. Claimant testified that this was not the first time he had felt that type of "jolt." Claimant's testimony at hearing was consistent with his medical records, and 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 proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting

interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

COMPENSABILITY

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold*, WC 4-960-513-01, (ICAO, Oct. 2, 2015). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable fracture of his right femur or hip arising out of the course of his employment with Employer. Claimant experienced pain in his right leg as a result of striking a raised piece of concrete with his foot on December 1, 2022. However, x-rays taken on December 5, 2022 x-rays did not demonstrate any fractures. No credible evidence was admitted indicating that the December 5, 2022 x-rays were misinterpreted or misread, or that Claimant sustained a fracture on December 1, 2022.

The following day, while at home, Claimant experienced a "jolt" in his hip followed by significant pain. On December 7, 2022, Claimant underwent x-rays which showed a displaced transcervical fracture of the right femoral neck. After reviewing the December 7, 2022 x-rays, Dr. Palazzari characterized the injury as a "new fracture" that likely occurred the night before. No credible evidence was offered to contradict Dr. Palazzari's opinion. The ALJ finds credible Dr. Cebrian's testimony that it is unlikely that the fracture demonstrated on the December 7, 2022 x-ray occurred on December 1, 2022. Although several of Claimant's treating providers at Concentra indicated that Claimant's objective findings were consistent with a work-related mechanism of injury, none of these providers offered any explanation for these opinions, and did not address the December 6, 2022 incident that occurred at Claimant's home. No credible evidence was presented

indicating that the fracture demonstrated on the December 7, 2022 x-ray was causally-related to the December 1, 2022 incident or otherwise arose out of the course of Claimant's employment with Employer.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained compensable a right femur/hip fracture arising out of the course of his employment with Employer on December 1, 2022.

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: January 12, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-213-806-002

ISSUES

I. Whether the catheterizations and stent surgery are reasonable, necessary, and related, to treat Claimant from the effects of his work injury.

FINDINGS OF FACT

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

1. The claimant suffered a compensable injury to his right shoulder in May 2022.
2. On July 27, 2022, Dr. Oscar Noel recommended the claimant undergo right shoulder surgery to treat his work-related rotator cuff tear.
3. On March 29, 2023, claimant's right shoulder surgery was approved. Then, Dr. Noel referred claimant to his PCP for a preoperative medical clearance evaluation to make sure it was safe for the claimant to undergo the work-related shoulder surgery.
4. On April 4, 2023, Claimant saw his PCP, William Cooper, M.D. for his preoperative clearance evaluation. Dr. Cooper noted that the claimant has never had a heart attack or symptoms of a heart attack. On the other hand, he noted that the claimant had an abnormal EKG. Because of the abnormal EKG, Dr. Cooper recommended the claimant undergo a cardiology evaluation to determine whether the claimant could be cleared for his shoulder surgery.
5. On April 18, 2023, the claimant was seen by Mircea Petrina, M.D. Dr. Petrina noted that the claimant has a significant cardiovascular history that includes hypertension, acid reflux, hyperlipoidemia, obesity, and an abnormal EKG, suggestive of a prior MI. Dr. Petrina also noted the claimant has a strong family history of early coronary artery disease with his mother having her MI at age 50 and his sister, who is younger than the claimant, has already had two MIs. Despite having an abnormal EKG, the claimant denied any episodes of chest pains, shortness of breath, or anything else that would suggest a silent MI. Based on her assessment, she recommended another EKG. On the same day, the claimant underwent another EKG. The EKG findings were abnormal and also noted an old anterior infarct.
6. On June 7, 2023, the claimant underwent a stress echocardiography examination and stress test that was evaluated by Dr. Petrina. Dr. Petrina concluded that the test findings were positive based on the claimant's EKG criteria and by the echocardiographic criteria, which were suggestive of a mild LAD lesion. Based on the results of the testing, Dr. Petrina recommended the claimant undergo an angiogram to evaluate the claimant's coronary anatomy prior to undergoing shoulder surgery.
7. On July 3, 2023, Dr. Petrina wrote a letter outlining her findings and recommendations.

8. Dr. Petrina indicated that she performed an EKG and concluded that it was abnormal. She also indicated that based on the abnormal EKG, she recommended the claimant undergo an echocardiogram and a stress test - which he did. Based on the findings of the EKG, echocardiogram, and stress test, Dr. Petrina concluded the claimant needs to undergo a left heart catheterization and possible stent placement before the shoulder surgery in order to safely undergo the shoulder surgery.

9. The ALJ finds Dr. Petrina's findings and opinions regarding the need for the claimant to undergo the heart catheterization and possible stent placement – before having shoulder surgery - to be supported by the underlying test results. As a result, the ALJ finds her opinions to be highly credible and persuasive.

10. On July 27, 2023, the claimant returned to Dr. Noel. Dr. Noel indicated that he is still recommending right shoulder surgery pending preoperative clearance.

11. On August 31, 2023, the claimant was seen by Dr. Matthew McDiarmid. He also noted that the claimant's EKG, as well as the echocardiogram and stress test were abnormal and that the workers' compensation carrier was still denying the coronary angiogram.

12. On September 18, 2023, Dr. McDiarmid performed an angiogram/catheterization. According to his report, the test was based on the claimant having an abnormal stress test that demonstrated an anterior Apical wall motion. Based on his findings during the angiogram/catheterization procedure, Dr. McDiarmid recommended the claimant undergo a stent procedure.

13. Dr. McDiarmid's findings supported Dr. Petrina's assessment that the claimant would most likely require a stent.

14. On October 18, 2023, Dr. McDiarmid performed another catheterization with the placement of the stent.

15. Michael Ptasnik, M.D., performed a records review on behalf of the respondents regarding the claimant's need for the angiogram and stent and issued two reports. In both of his reports, Dr. Ptasnik focused on whether the claimant's work injury, in which he fell and injured his shoulder, contributed to the claimant's coronary artery disease. In both of his reports, he concluded that the work injury did not contribute to the claimant's coronary artery disease. He did not, however, focus on whether the treatment at issue was reasonably necessary in order for the claimant to safely undergo the shoulder surgery.

16. Dr. Ptasnik did state in one of his reports that although there was one abnormal EKG, there was one normal EKG, which was done pre-catheterization. Thus, he concluded that the initial EKG that was found to be abnormal was overzealously interpreted and has resulted in care that is not reasonable or necessary. On the other hand, he does not account for the possibility that the normal EKG reading could be wrong. Nor does he mention the abnormal findings on the echocardiogram and stress test and how those findings also support the need for the catheterization and stent placement before undergoing the shoulder surgery. In the end, Dr. Ptasnik seems to be cherry-picking the data that supports his opinion.

17. Dr. Ptasnik also testified at the hearing. At the hearing, Dr. Ptasnik testified that in his opinion, the angiogram/catheterization and stenting was not reasonable and necessary.

In his opinion, the claimant's coronary artery disease could be treated conservatively with medication and lifestyle changes. Thus, it was his opinion that the catheterization and stenting was not reasonable and necessary. As a result, he concluded that the treatment was not required, or incidental, to treat claimant from the effects of his work injury. But, even though he thought the claimant could be treated conservatively, he did not appear to conclude that catheterization and stenting fell below the standard of care. It was primarily just a difference of opinion regarding treatment options.

18. Overall, the ALJ does not find Dr. Ptasnik's opinions to be persuasive. As found, Dr. Ptasnik seems to select only that data that supports his opinion, and excludes data that might not support his opinion.

19. The catheterization/angiogram and stent placement were required to treat the claimant's preexisting coronary artery disease in a manner that would allow claimant to safely undergo the shoulder surgery. As a result, the ALJ finds that the angiogram/catheterization and stent placement are reasonable and necessary medical treatment to treat the claimant from the effects of his work injury.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

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

I. Whether the catheterizations and stent surgery are reasonable, necessary, and related, to treat Claimant from the effects of his work injury.

The duty to furnish medical treatment includes furnishing treatment for conditions representing a natural development of the industrial injury, as well as providing compensation for incidental services necessary to obtain the required medical care. *Employers Mut. Ins. Company v Jacoe*, 81 P. 2d 389 (1938); *Country Squire Kennels v Tarshis*, 899 P. 2d 362 (Colo. App. 1995). The duty has been construed to also include paying for treatment of unrelated conditions when such treatment is necessary to achieve optimum treatment of the industrial injury. *Pub. Serv. Co. v. ICAO,* 979 P. 584 (Colo. App. 1999). *Merriman v. ICAO*, 210 P. 2d 448 (1949). For example, in the *Public Service* case, the court emphasized the factual nature of this determination and the Court of Appeals affirmed the ICAO decision requiring the respondent-employer to pay medical benefits for treatment of a bipolar disorder to stabilize that condition before surgery was performed on Claimant's injured neck.

In this case, the claimant was sent for a preoperative medical evaluation to make sure it was safe for him to undergo the work-related shoulder surgery. The preoperative evaluation included determining the condition of his heart. During the preoperative testing, the claimant had an abnormal EKG. Based on the abnormal EKG, additional testing was ordered. Thereafter, the claimant underwent an echocardiogram and stress test, which was also abnormal. Based on the test results, his treating physicians, which included Dr. Petrina, concluded that the claimant should undergo heart catheterization, and probably the placement of a stent, before being cleared for shoulder surgery. As found above, the ALJ found Dr. Petrina's conclusion regarding the need for the claimant to have the heart catheterization and stent placement – in order to clear him for shoulder surgery – to be credible and persuasive. As found, Dr. Petrina's recommendation was based on the abnormal EKG, as well as the abnormal echocardiogram and stress test, and is therefore consistent with the underlying medical record. Moreover, once Dr. McDiarmid performed the catheterization, he found severe left PDA stenosis, intermediate to severe proximal LAD stenosis, and diffuse flow across all vascular territories suggestive of microvascular dysfunction. Thus, he also recommended stenting and ultimately performed the stenting procedure. In the end, the ALJ finds the opinions of the claimant's treating physicians to be consistent regarding the status of the claimant's coronary disease and persuasive regarding the need for the catheterization and stent placement before claimant could safely undergo shoulder surgery.

The respondents' expert, Dr. Ptasnik, indicated that he did not think the catheterization and stent placement were reasonable and necessary to treat the claimant's coronary disease. According to Dr. Ptasnik, it was his opinion that there were more conservative treatment options available such as weight loss, lifestyle changes, and trials of different

medications. However, the ALJ does not find his opinions to be persuasive. As found above, Dr. Ptasnik, seemed to cherry-pick the data that supported his findings and disregard the data that did not. For example, Dr. Ptasnik noted that one of the EKGs was normal, and thus established that they were overzealous in treating claimant's coronary disease via catheterization and the placement of a stent. However, such statement does not negate the fact that the claimant did have an abnormal EKG as well as an abnormal echocardiogram and stress test. In the end, Dr. Ptasnik failed to adequately and persuasively explain why those findings did not support the catheterization and stent placement recommended by the claimant's treating physicians to treat claimant's coronary disease and clear claimant for shoulder surgery.

In this case, the claimant's heart condition was not caused or aggravated by his work injury. However, the question is whether the claimant's catheterizations and stent procedure were reasonable and necessary medical treatment that would enable the claimant to be treated for his work injury – via shoulder surgery.

The ALJ finds and concludes that the claimant established by a preponderance of the evidence that the catheterizations and stent placement were reasonable, necessary, and related medical treatment that were required to be performed so that the claimant could be treated for his work injury – via shoulder surgery.

ORDER

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

1. The respondents shall pay for the catheterizations, and stent placement, that was required to be performed in order for the claimant to be cleared for shoulder surgery.
2. Issues not expressly decided herein are reserved to the parties for future determination.

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

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

DATED: January 16, 2024.

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-236-873-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable industrial injuries during the course and scope of his employment with Employer on February 21, 2023.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his February 21, 2023 industrial injuries.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period April 4, 2023 until terminated by statute.

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

FINDINGS OF FACT

1. Claimant was employed as a maintenance worker for Employer. On February 21, 2023 Claimant was replacing a component in a towel folding machine. Because the cover of the machine would not remain open, Claimant used a mop handle to partially prop open the machine. However, the mop handle slipped and the cover impacted the back of Claimant's neck. He testified that he immediately suffered pain in the back of the neck and shoulders as well as headaches and dizziness. Claimant stayed home from work on the following day. At the time of the incident Claimant's hourly pay rate was $29.00 for 40 hours each week for an Average Weekly Wage (AWW) of $1,160.00.

2. Claimant testified that on the day of the accident he reported his injuries to supervisor [Redacted, hereinafter SR]. Claimant remarked that he inquired whether he had to file any paperwork. SR[Redacted] responded that Claimant's reporting sufficed for compliance with company policy.

3. In contrast, Employer's Human Resources Supervisor [Redacted, hereinafter GV] testified Claimant did not report a work injury on the day of the accident. Notably, he did not mention a work injury until after his hospitalization for a hypertensive emergency on April 14, 2023.

4. GV[Redacted] explained that in order to clock out at the end of a work shift, every employee must respond "yes" or "no" whether they sustained a work injury. Whenever an employee chooses "yes," an e-mail is sent to the employee's direct supervisor, general manager, and safety operations managers at the corporate office. When there is an alert of an employee injury, the corporate office asks the branches about their awareness of the incident and any pending investigation. Despite the reporting

procedure at the conclusion of each shift, Claimant never documented that he had suffered any injuries. Notably, Claimant worked full duty from February 23, 2023 until April 5, 2023 without mentioning the February 21, 2023 incident.

5. On April 5, 2023 Claimant presented to the Rose Medical Center Emergency Room (ER) complaining of intermittent numbness in his left leg, left arm, and left side of his face. ER notes reflect that he related his symptoms to a work incident that had occurred "three weeks prior." Claimant did not mention any headache, vertigo, visual disturbances or other associated symptoms. His neck was non-tender with full range of motion. Providers determined Claimant was hypertensive with high blood pressure of 240/110 and admitted him to the hospital. ER notes reflect Claimant initially denied a prior history of hypertension but later admitted he had been prescribed blood pressure medication that he ceased taking.

6. Following an extensive work-up and after successfully reducing Claimant's blood pressure, Claimant was discharged on April 10, 2023. His discharge summary specified the following diagnoses: (1) "hypertensive emergency with right vertebral artery dissection, chronic;" (2) "hypertensive encephalopathy, resolved;" and (3) "a right simple CVA, remote appearing."

7. After Claimant's discharge from Rose Medical Center, he began treatment with Authorized Treating Provider (ATP) Concentra Medical Centers on April 14, 2023. After conducting a physical examination, Nurse Practitioner Deana Halat diagnosed Claimant with the following: (1) a cervical strain; (2) facial paralysis on the left side; (3) hordeolum of right upper eyelid and; (4) a stroke of uncertain pathology. She remarked that, "[b]ased on the information available to me, it is greater than 51% probable that this is a work related injury due to a piece of heavy machinery falling on his head, causing an arterial bleed and stroke symptoms. Additional information that is available would be nice to review and assist with any further treatment decisions."

8. On April 18, 2023 Claimant again visited Concentra for an examination. He returned to the clinic for a recheck of his arterial bleed after being struck in the back of the neck by a piece of machinery at work. Claimant recounted that, about two weeks after the work accident, he was not feeling well and forgetting things. He was then admitted into Rose Medical Center for five days.

9. On May 5, 2023 Claimant returned to Concentra for an evaluation. Nurse Practitioner Nicole McPhee reviewed Claimant's medical records from Rose Medical Center and conducted a physical examination. She remarked that hospital documentation presented the question of causality. NP McPhee explained that, after reviewing the Rose medical records, it was unclear that the vertebral artery dissection was directly related to a strike on the back of the neck by a cover at work on February 21, 2023. She summarized that "the relationship between the two is possible, not probable." Importantly, NP McPhee discussed the matter with Drs. Chau and Robinson. They agreed that causality was questionable. When NP McPhee attempted to address causality with Claimant, he became angry and shouted. NP McPhee remarked that she would likely administratively discharge Claimant from the clinic because the staff was very uncomfortable.

10. In an addendum dated May 8, 2023 Eric Chau, M.D. recounted that he discussed Claimant's case with NP McPhee. He reasoned that, based on the available records, Claimant likely had uncontrolled hypertension prior to his work injury. After a three week delay he presented to Rose with stroke-like symptoms. Dr. Chau remarked that Claimant could appeal the decision and would follow-up with his PCP and/or neurology.

11. Claimant subsequently obtained medical treatment from the UCHealth Heart and Vascular Center. On July 26, 2023 Claimant visited Alex Franklin Grubb, M.D. for an examination. Claimant recounted that, in the beginning of April, a metal door struck the back of his head and he suffered a vertebral artery dissection. He then began experiencing numbness in his face, left upper extremity and left lower extremity. Claimant sought emergency care on April 5, 2023 and was diagnosed with hypertension of 240/110. Evaluation revealed a right occipital CVA or stroke "that was remote appearing and appeared distal to the area of his vertebral artery dissection." After conducting a physical examination and diagnostic/lab testing, Dr. Grubb adjusted Claimant's blood pressure medications because of continuing side effects. He did not perform a causation analysis to ascertain the relationship between Claimant's February 21, 2023 work accident and subsequent neurological event.

12. On August 2, 2023 Eric K. Hammerberg, M.D. performed a records review of Claimant's claim. In reviewing Claimant's medical records, Dr. Hammerberg recounted that Claimant visited Rose Medical Center on April 5, 2023 after being struck on the back of his neck three weeks earlier by a piece of metal. After undergoing imaging studies, Claimant was diagnosed with a hypertensive emergency and admitted to the hospital. Dr. Hammerberg noted that on April 7, 2023 the radiologist dictated an addendum to the CT angiogram of the blood vessels in Claimant's neck and commented that the narrowed right vertebral artery may have been caused by arterial dissection "in lieu of the right occipital cerebral infarction seen in the MRI scan." A neurological consultation revealed that the cerebral infarction was chronic. Claimant subsequently received treatment through Concentra and Dr. Aschberger questioned the causality of the work accident based on the chronic nature of the cerebral infarction.

13. Dr. Hammerberg explained that Claimant's neurological problems could not be causally related to his February 21, 2023 work activities. He reasoned that vertebral artery hypoplasia is congenital and a well-known risk factor for a stroke in conjunction with hypertension. When Claimant suffered his work injury on February 21, 2023 he had none of the symptoms of an acute arterial dissection and the CT angiography showed no findings suggestive of an arterial dissection. Instead, the imaging revealed a narrowed lumen in the intracranial segment. Because individuals may not initially perceive small, occipital infarctions, Claimant's stroke may have been present for a long period of time. Therefore, it was unlikely that the February 21, 2023 work accident caused Claimant's neurological condition.

14. Dr. Hammerberg also testified at the hearing in this matter. He maintained that the diagnosis of a vertebral arterial dissection was erroneous and Claimant's injuries were not likely causally related to the February 21, 2023 work incident. He agreed with

the Concentra physicians who had significant questions about the causal relationship between a metal door striking Claimant on the neck and a subsequent neurological event several weeks later. Dr. Hammerberg expressed causation concerns because Claimant suffered high blood pressure long before the work accident and ceased taking his blood pressure medication. Accordingly, the February 21, 2023 work accident did not likely cause an industrial injury in the form of a stroke.

15. Claimant has failed to establish that it is more probably true than not that he suffered compensable industrial injuries during the course and scope of his employment with Employer on February 21, 2023. Initially, Claimant testified that he was struck in the back of the neck by a door cover at work. He noted neck pain, headaches and dizziness immediately after the accident. Claimant commented that he reported his injuries to supervisor SR[Redacted]. However, despite Claimant's testimony, the record reveals that he continued to perform his job duties and did not report any injuries until after his hospitalization for a hypertensive emergency on April 14, 2023. Moreover, Claimant has failed to prove the work accident on February 21, 2023 was causally connected to a neurological event that occurred several weeks later.

16. GV[Redacted] credibly remarked that Claimant did not report a work injury on the day of the accident. In fact, he did not mention a work injury until after his hospitalization for a hypertensive emergency on April 14, 2023. Importantly, GV[Redacted] explained that, in order to clock out at the end of a work shift, every employee must respond "yes" or "no" whether he sustained a work injury. Whenever an employee chooses "yes," an e-mail is sent to the employee's direct supervisor, general manager, and safety operations managers at the corporate office. Despite the reporting procedure at the conclusion of each shift, Claimant never documented that he had suffered any injuries. Notably, Claimant worked full duty from February 23, 2023 until April 5, 2023 without mentioning any February 21, 2023 incident. Based on multiple opportunities to report work accidents, the preceding chronology reflects it is unlikely that Claimant suffered compensable injuries on February 21, 2023.

17. The medical evidence also reveals it is unlikely Claimant suffered a neurological event as a result of his work activities. On April 5, 2023 Claimant presented to the Rose ER complaining of intermittent numbness in his left leg, left arm, and left side of his face. Following an extensive work-up and after successfully reducing Claimant's blood pressure, Claimant was discharged on April 10, 2023. His discharge stated "hypertensive emergency with right vertebral artery dissection, chronic; hypertensive encephalopathy, resolved; and right simple CVA (stroke), remote appearing."

18. Claimant subsequently obtained medical treatment through ATP Concentra. On April 14, 2023 NP Halat determined Claimant's February 21, 2023 work accident caused an arterial bleed and stroke symptoms. However, she also sought to review additional information. On May 5, 2023 NP McPhee explained that, after reviewing the Rose medical records, it was unclear that the vertebral artery dissection was directly related to being struck on the back of the neck by a machine cover on February 21, 2023. She summarized that "the relationship between the two is possible, not probable." Importantly, Drs. Chau and Robinson agreed that causality was questionable.

Furthermore, on May 8, 2023 Dr. Chau issued an addendum report in which he attributed Claimant's stroke-like symptoms to uncontrolled high blood pressure.

19. Dr. Hammerberg also determined that Claimant's neurological problems could not be causally connected to his February 21, 2023 work activities. He reasoned that vertebral artery hypoplasia is congenital and a well-known risk factor for a stroke especially in conjunction with hypertension. When Claimant suffered his work injury on February 21, 2023 he had none of the symptoms of an acute arterial dissection and the CT angiography showed no findings suggestive of an arterial dissection. Moreover, Dr. Hammerberg persuasively testified that he agreed with the Concentra physicians who had significant concerns about the causal relationship between a metal door striking Claimant on the neck at work and a subsequent neurological event several weeks later. Notably, Claimant had previously been diagnosed with high blood pressure but ceased taking his blood pressure medication. The persuasive medical opinions thus reveal it is speculative to attribute Claimant's neurological event on April 5, 2023 to a work accident on February 21, 2023. Therefore, Claimant has failed to demonstrate that his work activities on February 21, 2023 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

8. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered compensable industrial injuries during the course and scope of his employment with Employer on February 21, 2023. Initially, Claimant testified that he was struck in the back of the neck by a door cover at work. He noted neck pain, headaches and dizziness immediately after the accident. Claimant commented that he reported his injuries to supervisor SR[Redacted]. However, despite Claimant's testimony, the record reveals that he continued to perform his job duties and did not report any injuries until after his hospitalization for a hypertensive emergency on April 14, 2023. Moreover, Claimant has failed to prove the work accident on February 21, 2023 was causally connected to a neurological event that occurred several weeks later.

9. As found, GV[Redacted] credibly remarked that Claimant did not report a work injury on the day of the accident. In fact, he did not mention a work injury until after his hospitalization for a hypertensive emergency on April 14, 2023. Importantly, GV[Redacted] explained that, in order to clock out at the end of a work shift, every employee must respond "yes" or "no" whether he sustained a work injury. Whenever an employee chooses "yes," an e-mail is sent to the employee's direct supervisor, general manager, and safety operations managers at the corporate office. Despite the reporting procedure at the conclusion of each shift, Claimant never documented that he had suffered any injuries. Notably, Claimant worked full duty from February 23, 2023 until April 5, 2023 without mentioning any February 21, 2023 incident. Based on multiple opportunities to report work accidents, the preceding chronology reflects it is unlikely that Claimant suffered compensable injuries on February 21, 2023.

10. As found, the medical evidence also reveals it is unlikely Claimant suffered a neurological event as a result of his work activities. On April 5, 2023 Claimant presented to the Rose ER complaining of intermittent numbness in his left leg, left arm, and left side of his face. Following an extensive work-up and after successfully reducing Claimant's blood pressure, Claimant was discharged on April 10, 2023. His discharge stated "hypertensive emergency with right vertebral artery dissection, chronic; hypertensive encephalopathy, resolved; and right simple CVA (stroke), remote appearing."

11. As found, Claimant subsequently obtained medical treatment through ATP Concentra. On April 14, 2023 NP Halat determined Claimant's February 21, 2023 work accident caused an arterial bleed and stroke symptoms. However, she also sought to review additional information. On May 5, 2023 NP McPhee explained that, after reviewing the Rose medical records, it was unclear that the vertebral artery dissection was directly related to being struck on the back of the neck by a machine cover on February 21, 2023. She summarized that "the relationship between the two is possible, not probable." Importantly, Drs. Chau and Robinson agreed that causality was questionable. Furthermore, on May 8, 2023 Dr. Chau issued an addendum report in which he attributed Claimant's stroke-like symptoms to uncontrolled high blood pressure.

12. As found, Dr. Hammerberg also determined that Claimant's neurological problems could not be causally connected to his February 21, 2023 work activities. He reasoned that vertebral artery hypoplasia is congenital and a well-known risk factor for a stroke especially in conjunction with hypertension. When Claimant suffered his work injury

on February 21, 2023 he had none of the symptoms of an acute arterial dissection and the CT angiography showed no findings suggestive of an arterial dissection. Moreover, Dr. Hammerberg persuasively testified that he agreed with the Concentra physicians who had significant concerns about the causal relationship between a metal door striking Claimant on the neck at work and a subsequent neurological event several weeks later. Notably, Claimant had previously been diagnosed with high blood pressure but ceased taking his blood pressure medication. The persuasive medical opinions thus reveal it is speculative to attribute Claimant's neurological event on April 5, 2023 to a work accident on February 21, 2023. Therefore, Claimant has failed to demonstrate that his work activities on February 21, 2023 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

ORDER

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

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

DATED: January 17, 2024.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-219-383-002

ISSUES

- Did Claimant prove entitlement to Temporary Disability Benefits?
- Did Respondents prove Claimant was responsible for termination of her employment?
- The Claimant's Average Weekly Wage.
- Whether Respondents proved any Offsets?

FINDINGS OF FACT

1. Claimant was employed by the Employer as an Onsite Residential Services Coordinator. In that position, she would assist the Home Owners Association with the employer portal. She was also an Event Planner for the employer. Due to the nature of the job, the position of Onsite Residential Services Coordinator could only be performed in person at the [Redacted, hereinafter CA] location in Edwards, Colorado.

2. On June 1, 2022, Claimant was cleaning the patio which included moving an outdoor table and chairs which required lifting from 25 to 60 pounds. This was at the request of a homeowner. At the time of the incident, no one else was present. As she was cleaning and moving tables, her right ankle rolled and she extended her arm to brace against the fall and she fell on her left knee. She had immediate pain in her right ankle, right shoulder and left knee. Her left knee was bleeding. She had sharp pain radiating from right shoulder and pain in her right ankle. Claimant's ankle was swollen. She reported the injury to [Redacted, hereinafter MW] when she came out of a meeting. She was not referred for medical treatment.

3. Claimant sought medical treatment on June 24, 2022 at Colorado Mountain Medical, LLC. The physician took a history which included "The patient is a 55 year old female who presents with a shoulder problem, over the winter she was walking her daughters 100 pound dog, the dog bolted, right shoulder did something never really recovered. 4 weeks ago fell, when she fell 4 weeks ago was pulling a table, rolled ankle, pulled arm out then fell onto elbow, shoulder pain is definitely worse now". Claimant's diagnosis was right shoulder injury. She was given restrictions of lifting up to 10 pounds, carrying up to 10 pounds and pushing and pulling up to 10 pounds. The Claimant continued to perform her normal work duties, albeit with pain, including pain in her shoulder.

4. Claimant was next seen by Dr. Sterrett at Vail-Summit Orthopedics on July 6, 2022. She was there for an evaluation and treatment plan. She was complaining of

anterior right shoulder pain that can be a 9 out of 10 at its worst. Based on the evaluation, a MRI was ordered to further evaluate the rotator cuff, biceps tendon and loose bodies/ ossification seen on x-rays. Dr. Sterret imposed work restrictions of no overhead lifting or lifting more than 15 pounds.

5. An MRI of the right shoulder was taken on July 21, 2022. The radiologist's impression was an 11 x 8 mm globular calcification adjust to the bursal surface of the subscapularis tendon. There was no evidence of a rotator cuff tear or long biceps tear. There was mild diffuse rotator cuff tendinosis and mild intra-articular long head biceps tendinosis. There was a focal superior labral tear at 12:00 and an anteriorinferior labral tear at 5:00 – 6:00. Finally there was moderate acromioclavicular osteoarthosis.

6. Upon review of the MRI with Claimant on July 22, 2022, Dr. Sterett recommended conservative care including physical therapy, home exercises, meloxicam and activity modification. Restriction were imposed of no lifting greater than 25 pounds, carrying up to 25 pounds and pushing and pulling up to 25 pounds. She was also restricted from lifting overhead.

7. On July 18, 2022, Claimant sent an email to MW[Redacted] that her last day would be on August 5, 2022. The Claimant did not provide a reason for why she was terminating her employment with the Employer.

8. Claimant did testify that the reason she resigned was to take care of her father in California who contracted COVID and had dementia and diabetes, who was unable to care for himself. According to Claimant's testimony, she did in fact move to Clovis, California to take care of her father.

9. Claimant's wages were included in both Claimant's Exhibits and Respondent's Exhibits. Both parties concluded that the total gross wages for the period from December 23, 2021 to May 7, 2022 is $22,495.26. Utilizing Respondents calculation of dividing this amount by 19 weeks results in an Average Weekly Wage (AWW) of $1,183.96. I find that this amount is a fair calculation of Claimant's AWW.

10. Subsequent to moving to California, Claimant was able to secure jobs with [Redacted, hereinafter MT] and then with [Redacted, hereinafter JN]. She resigned from MT[Redacted] to take the job at JN[Redacted]. Claimant testified that she resigned the job from JN[Redacted] due pain in her shoulder and ankle with extended driving.

11. The Claimant resumed treatment in California with Sports and Wellness Physical Therapy. She started treatment there on September 14, 2022 and listed the referring physician as Dr. William Sterett at Vail-Summit Orthopedics.

12. The claim was admitted by Respondents on October 28, 2022.

13. The Claimant continued to treat intermittently with Sports and Wellness. Apparently the Claimant was treated on September 26, 2022 for pain in her right upper arm. Claimant was discharged on November 17, 2023. However, there is a P.T. note from

December 27, 2022, which appears to be a phone call to the Claimant where the physical therapist left a message for the Claimant to call back with any questions or concerns.

14. Claimant also went to United Health Center of the San Joaquin Valley on December 15, 2022 to establish care/physical. The assessment/plan included several non-work related issues. There was no mention of right shoulder pain, ankle pain or knee pain.

15. The last treatment note is from Concentra in Madera California dated June 26, 2023.After noting the prior MRI of the shoulder, X-ray of the ankle and prior diagnosis of a SLAP legion in the shoulder, Dr. Hatcher ordered another MRI with contrast and CT scan of the right ankle in order to obtain a more accurate and affirmative diagnosis. Although this imaging was approved, at the time of the hearing, Claimant had not obtained the imaging. Dr. Hatcher imposed restrictions of sitting 50% of the time, no squatting, no kneeling and no lifting or reaching above the shoulder level.

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).

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. Temporary Total Disability

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

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." A claimant's responsibility for termination not only provides a basis to terminate temporary disability benefits, but also limits the initial eligibility for TTD. Section 8-42-103(1)(g); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Valle v. Precision Drilling*, W.C. No. 5-050-714-01 (July 23, 2018). The respondents must prove the claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to moral turpitude or culpability but merely requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

It is well established that a claimant who voluntarily resigns his job is "responsible for termination" unless the resignation was prompted by the injury. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2008); *Kiesnowski v. United Airlines*, W.C. No. 4-492-753 (May 11, 2004); *Bonney v. Pueblo Youth Service Bureau,* W.C. No. 4-485-720 (April 24, 2002). Although Claimant had a good reason to resign and relocate to California to care for her father, the resignation was volitional and had nothing to do with her work injury. I conclude that on Claimant's testimony, which is credible, Claimant did voluntarily resign her job*. See Reyes v. Swift Beef* WC 4-586-550 (ICAO 2007) citing to *Cole v. Industrial Claim Appeals Office 964 P.2d 617* (Colo. App. 1998) (dealing with termination in the context of unemployment). Respondents have proven by a preponderance of the evidence that Claimant was responsible for termination as contemplated by the statute and the Claimant is not entitled to TTD following the termination.

ORDER

It is therefore ordered that:

1. Claimant's request for TTD is denied. Based on this ruling, the issue of offsets is moot.

2. Claimant's Average Weekly Wage is $1,183.96.

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: January 18, 2024

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

ISSUES

I. Whether Respondents have proven by a clear and convincing evidence that the DIME of Dr. Stanley Ginsburg has been overcome by clear and convincing evidence with respect to the determination of Maximum Medical Improvement (MMI);

II. Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled to reasonably necessary and related medical benefits recommended by his authorized providers.

IF CLAIMANT IS FOUND TO BE AT MMI:

III. Whether the right upper extremity impairment rating should be converted to a whole person; and

IV. Whether Claimant has met his burden of proof by a preponderance of the evidence that he is entitled to medical maintenance care.

PROCEDURAL HISTORY

Respondents filed a General Admission of Liability on May 24, 2021.

Respondents filed an Application for Hearing on June 28, 2023 in order to overcome the determination of the DIME physician that Claimant had not reached MMI. Additionally, other issues listed were Respondents' assertion that Claimant had reached MMI, permanent impairment, whether Claimant was entitled to conversion, apportionment, surgeries and treatment, and overpayment or offsets. Also listed were issues of preexisting condition, intervening injury, subsequent aggravation, all of which were withdrawn by Respondents.

Claimant filed a Response to Application for Hearing on July 14, 2023 listing additional issues of ongoing temporary total disability benefits since the authorized treating physician (ATP) and the DIME physician opined Claimant was not at MMI, and medical benefits, including *Grover* medical benefits if Claimant was found to be at MMI. The issues of disfigurement was reserved at the time of the hearing.

The parties also agreed to hold the issue of permanent total disability benefits in abeyance and an order was issued on August 15, 2023 by the Office of Administrative Courts.

At hearing Respondents objected to Exhibit 2 and Exhibit 4, bates 77-77, which were letters from Respondents counsel, written on behalf of Employer and Insurer to Claimant's authorized treating physician. Respondents' counsel did not deny she and co-counsel had written the letters in question. These exhibits come in under C.R.E. 801(d)(2)(C) and/or (D).

At hearing Claimant advised that they would be taking the post hearing deposition of the DIME physician on December 14, 2023. Respondents also ordered a copy of the written transcript on October 26, 2023 through [Redacted, hereinafter VT].

On January 10, 2024, Claimant advised the OAC that no deposition would be taken and Respondents provided a copy of the transcript of the hearing upon which the parties relied when submitting proposed orders. This case is now ready for an order.

FINDINGS OF FACT

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

1. Claimant was working for Employer on November 23, 2020. He and his boss were installing some siding, which also required handling windows. They had forgotten to place one of the nails to secure a window they were installing and his boss had to go out to his truck to get the missing screws, while Claimant remained holding the window. However, handling the windows was a two person job. Claimant was standing on a ladder, trying to hold on to the window and keep control of it, because he did not want his boss to be charged for a broken window. But he lost it and hit his shoulder on the edge of the wall, injuring his right shoulder and, as he was falling off the ladder, his left leg got tangled in a rung of the ladder. He hit the dirt ground and the ladder fell on top of him. He had immediate pain in his right shoulder and left knee. His boss hurried to his side but only gave him some pills for the pain and nothing else.

2. That same day Claimant called his primary care provider and they were unable to see him that day. They gave him an appointment for November 24, 2020, the day after the accident. They referred him to get an x-ray, which he did not obtain due to the cost. He complained to the provider about his left knee pain, and that he felt a fire sensation in his back but his right shoulder pain was worse than his other complaints, and that was what they focused on. He continued to have pain in the shoulder and was unable to lift the right arm above shoulder level due to the pain. He had numbness and tingling going into his arm. He had left knee pain and had to constantly keep moving or it became tender and as if it were swelling with something in the back of the leg. Moving calmed his symptoms. He did not have any of these symptoms prior to the work injury.

3. After that initial visit, he had no medical care until he was seen by his authorized treating physician, Dr. David Yamamoto on January 12, 2021. His symptoms increased in the period of waiting, especially if he wanted to touch his hair or head, the pain would increase in his right shoulder. The left knee pain also increased in the back side of his knee and on both sides of his knee. Claimant also stated that he had pain in his low back, for which he was successfully treated and his neck, which he continued to have. The pain typically went from about 2 inches behind the right ear, into the neck, trapezius muscle, the shoulder blade and traveled from the neck down into his shoulder.

4. When he started treatment with Dr. Yamamoto, he was referred to physical therapy, mainly for his low back and right shoulder complaints. The therapy really helped the low back but not the right shoulder. He was also provided with some medications, some of which was very strong and helped his pain significantly but wore off and the pain would come back, and others which made him very sleepy. While sleeping, if he turned

onto his right side, the pain would wake him up and he could not go back to sleep. He also could no longer reach his wallet in his right back pocket with his right hand. If he was on level ground, the symptoms in his left knee were minimal. But going up stairs increased his symptoms significantly.

5. Claimant recalled that he was examined by Dr. Stanley Ginsburg, the Division IME. He recalled Dr. Ginsburg examining his right shoulder and his left knee, they discussed his symptoms from the date of his injury until the date of the examination, the treatment he had received from his ATPs, and the recommendations of the surgeons.

6. Claimant stated he continued to wish to proceed with the surgeries proposed by this treating surgeons, Dr. Hatzidakis for the right shoulder and Dr. Baran for the left knee surgery also recommended by Dr. Yamamoto and DIME physician, Dr. Ginsburg.

7. On October 15, 2018 Claimant was examined at Aim High Chiropractic. They ordered x-rays for the cervical spine and the lumbar spine and provided treatment through November 26, 2018, at which time notes indicated that Claimant had a good prognosis and was improving. He was released from care at that time.

8. Rachel Laaff, R.N., of Clinica Family Health attended Claimant on November 6, 2018 and noted Claimant's neck and middle back pain complaints as well as his resolved low back pain, and was prescribed a muscle relaxant.

9. The next visit to a medical provider was on the day following Claimant's work injury, November 24, 2020 to see Nurse Laaff. Claimant reported constant pain in his right shoulder that radiated towards his elbow and to his back. Claimant was tender over the whole shoulder.

10. David Yamamoto, M.D. of Peak to Peak Family Practice, Claimant's authorized treating physician, evaluated Claimant on January 12, 2021 for the first time. Dr. Yamamoto obtained a history of mechanism of injury, including that he fell off a ladder onto his right side and that as he fell his left leg got stuck in the ladder, which was consistent with Claimant's testimony at hearing and other medical provider's records. Claimant complained of immediate right shoulder pain and knee pain, as well as developing bilateral arm pain and low back pain a few days following the fall. Claimant explained that the provider required him to pay for ordered care and that he could not.

11. On exam, Dr. Yamamoto noted that claimant had a positive Spurling's and a positive Neer's test of the right arm with limited range of motion and Claimant could not raise his right arm overhead. He had normal range of motion of the left knee but with pain, tenderness and no swelling. Claimant reported constant pain in his right shoulder, with worsening pain with movement and intermittent numbness going into his fingers. He had bilateral arm pain and left knee pain which was worse with walking, lower back pain improved with standing and neck pain that radiated into his face on the right side. The pain diagram demonstrates the same. Dr. Yamamoto ordered x-rays and prescribed a muscle relaxer. Dr. Yamamoto also provided work restrictions of 5 lbs. lifting and up to 10 lbs. pushing and pulling, no walking greater than five hours, no standing greater than three hours per day and no crawling, kneeling, squatting or climbing.

12. The x-ray of the left knee was read as unremarkable by Patrick Moore, M.D. of Health Images on January 18, 2021. The right shoulder x-ray was read as showing a subtle malalignment at the acromioclavicular joint suggesting a grade 1 AC joint separation, and moderate degenerative spurring at the AC joint.

13. Claimant returned to see Dr. Yamamoto on January 25, 2021 with continuing right shoulder blade burning pain, and shoulder pain at an eight out 10 on a pain scale. He reported he could not lift the arm because of the pain. The pain diagram also showed pain on the back side of his left knee and in his low back. Dr. Yamamoto was still awaiting the x-ray results.

14. Claimant was again seen by Dr. Yamamoto on February 9, 2021 with similar complaints. At the time, Claimant was still having neck and low back pain complaints, along with bilateral shoulder pain and left knee complaints, with loss of range of motion and tenderness in the left knee anteriorly. Claimant was referred to physical therapy. Dr. Yamamoto noted that he would order an MRI of the shoulder if he saw no improvement.

15. On March 9, 2021, Claimant was still reporting right shoulder pain, left shoulder pain, left knee pain, low back pain, and neck pain. On Exam, Dr. Yamamoto noted decreased range of motion in both shoulders, the left knee tenderness, as well as the lumbar spine tenderness. Dr. Yamamoto noted that Claimant showed a probable AC first degree separation, he increased medications and ordered Claimant continue with physical therapy.

16. Claimant returned to see Dr. Yamamoto on April 2, 2021, was still having limited active range of motion in both shoulders, as well as low back pain and left knee pain, specifically tenderness anteriorly. Dr. Yamamoto ordered an MRI's of the right shoulder and lumbar spine, and Claimant was to continue with physical therapy.

17. Claimant returned to Dr. Yamamoto on April 20, 2021. Claimant's right shoulder pain was at a 5/10. He noted that the left shoulder pain was doing better than it had been with medications and therapy. He noted that there was difficulty getting the MRIs approved and scheduled with Health Images.

18. The MRI of the right shoulder performed on April 21, 2021 and read by Clinton Anderson, M.D. of Health Images, showed mild supraspinatus and subscapularis tendinosis, and a mild irregularity of the bursal surface. The report did not show evidence of a full thickness or deep partial tear. It also showed a type I acromion with moderate acromioclavicular joint arthropathy, reactive subcondral bone marrow edema of the distal clavicle and distal acromion, small inferiorly directed acromial and clavicular spurs and a mild extrinsic compression of the supraspinatus complex compatible with the presence of impingement.

19. Dr. John Burris conducted an Independent Medical Examination (IME) at Respondents' request on April 27, 2021. He took a history and reviewed available medical records, which did not include the Clinica records. On exam he found slightly abnormal range of motion, positive impingement sign with anterior shoulder pain, positive Yergason's sign, positive resistive Jobe's, though other tests were negative. He assessed a right shoulder contusion, right arm contusion and low back contusion. He opined that Claimant had sustained only soft tissue contusions to the right shoulder, arm

and low back, which were "likely very minor," and had resolved by the time of the exam. He opined that Claimant had reached MMI.

20. On May 19, 2021 Dr. Yamamoto noted Claimant had right shoulder pain at 4/10, which was constant and worse with movement. He noted that the MRI report showed mild supraspinatus and subscapularis tendinosis and no evidence of rotator cuff tear. The medications help him, especially with sleep. He continued to have decreased range of motion of the right shoulder and was tender anteriorly with a negative impingement sign at that time. The left knee was also tender anteriorly, and Claimant was able to squat but with pain. Dr. Yamamoto continued to diagnose right shoulder strain and left knee contusion.

21. Dr. Yamamoto continued to treat the Claimant with physical therapy and medications, which were benefiting Claimant. He continued to have a mildly positive Hawkins sign on the right shoulder. Claimant continued to report he had pain of his left knee mostly with going up and down stairs.

22. On October 27, 2021, the Claimant was still complaining of right shoulder pain at a 3/10, trapezius pain at a 3/10, and left knee pain anteriorly. Claimant reported that there was a misunderstanding in filling out the pain diagram. He had a positive Hawkins test, limited range of motion, and some tenderness to the anterior right shoulder; and anterior left[1] knee pain and mild tenderness. Dr. Yamamoto lists both the right shoulder strain and left knee contusion as well as myofascial pain as diagnosis. He provided work restrictions of 20 lbs. maximum lifting, pushing and pulling, repetitive lifting and carrying to 15 lbs., limited squatting and climbing. Dr. Yamamoto referred Claimant to Dr. Hatzidakis for a right shoulder evaluation.

23. On November 9, 2021 Dr. Yamamoto answered inquiries from Respondents regarding MMI and future medical treatment. He responded that Claimant continued to suffer from unresolved right shoulder and left knee symptoms that needed to be addressed and treated. Dr. Yamamoto stated that he required Claimant to be evaluated at Western Orthopedics by Dr. Hatzidakis or another associates in order for Claimant to reach MMI for those conditions.

24. Dr. Yamamoto documented on November 30, 2021 that Claimant continued to have left knee pain anteriorly which ranged from 0-4/10 on the pain scale. The pain diagram for this date clearly shows the left knee complaints and it appears to be written by the interpreter and signed by Claimant, based on the handwriting. The pain is principally when he bears weight or tries to squat. Claimant reported right shoulder pain, which was then a 4/10 and constant, worse with movement. Dr. Yamamoto stated as follows:

> He had a RIME from John Burris, MD. Dr. Burris recommended DENIAL of the right shoulder eval at Western Orthopedics. Dr. Burris stated in his report that his AROM of the right shoulder was nearly equal to the left, and also noted he had decreased AROM of the left shoulder which the patient does not have.
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> …

[1] This ALJ infers and concludes that listing the right knee was simply a clerical error based on review of the totality of the report.

> Flexion 125 degrees, abduction 120 degrees, moderately positive Hawkins test, mild tenderness to anterior right shoulder. The uninvolved left shoulder shows 155 degrees of abduction and 160 degrees of flexion.[2]

Dr. Yamamoto again referred Claimant to Dr. Hatzidakis.

25. Dr. Yamamoto recorded that Claimant continued to have symptoms in his left knee and ordered an MRI on March 29, 2022. Claimant continued to have loss of range of motion of the right shoulder, moderately positive Hawkins test, tenderness to the anterior shoulder. He noted that the referral to Western Orthopedics was denied based on Dr. Burris' opinion.

26. The MRI of the left knee was performed on April 14, 2022, and was read by Michael Kershen, M.D., of Health Images. It showed a full-thickness delaminating cartilage fissure of the median patellar ridge and medial patellar facet, a small joint effusion, horizontal tearing of the posterior horn and body of the medial meniscus, a suspected nondisplaced free edge tear of the lateral meniscal body, and quadriceps and patellar mild tendinosis without tendon tearing.

27. On April 29, 2022 Dr. Yamamoto reported that the MRI for the left knee had been authorized and completed, showing a medial meniscal tear and patellar fissuring. He noted that Claimant continued to have symptoms in the right shoulder of loss of range of motion, moderately positive Hawkins test, tenderness to the anterior shoulder, and the left knee had anterior and medial tenderness though Claimant could still squat to 90 degrees. Dr. Yamamoto noted that he was finally to see the orthopedic specialist regarding the right shoulder but put in another referral for an orthopedic evaluation regarding the left knee.

28. On five consecutive occasions, Dr. Yamamoto compared the right shoulder measurements with the left shoulder measurements and he disputed that they were equal as reported by Dr. Burris, including right before Dr. Burris' examination on May 3, 2022.

29. A second IME was conducted by Dr. Burris on May 3, 2022 with the complaints of continuing right shoulder and arm pain, left arm pain and left knee pain. Dr. Burris was provided with additional records to review including the Clinica records from 2018 and 2020. He reviewed both the MRIs of the right shoulder and low back. On exam he documented abnormal right shoulder range of motion but an otherwise normal exam and made comment that Claimant's complaints of pain were nonspecific, anatomically diffuse and nondescript. He opined that based on the lack of objective findings no further treatment was necessary.

30. Claimant was evaluated on May 19, 2022 by both Armodios M. Hatzidakis, MD. and Tyler Holm, PA-C, (the latter documented the evaluation) at Western Orthopedics, pursuant to Dr. Yamamoto's referral for his right shoulder pain. Claimant reported constant anterior right shoulder pain, which was worse with movement, driving, showering, reaching behind his back and with other activities. The pain radiated to the posterior shoulder and the scapula as well as to the right trapezius at times. He

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[2] While the left uninvolved shoulder's range of motion is not at full range, it is only very mildly limited according to the AMA Guides to the Evaluation of Permanent Impairment, *Third Edition (Revise*d*)*, pp. 35-36.

documented approximately 20 PT sessions that provided a small amount of relief and continued to be quite symptomatic. At that time he rated his shoulder pain as 8/10 in severity. They documented loss of range of motion, motion with pain, positive impingement arc, positive Hawkins and Neer's on the right. The MRI images from April 2021 showed calcific deposits over the greater tuberosity within the supraspinatus rotator cuff tendon, moderate AC joint arthrosis, and a type 2 acromion with a lateral acromial bone spur. They assessed a right shoulder strain with calcific tendinitis, stiffness in elevation. They discussed treatment options and proceeded with corticosteroid injection and a referral to physical therapy. However, he stated "[W]e discussed the possible need for an arthroscopic debridement of the calcific deposit and possible rotator cuff repair if his symptoms are persistent."

31. On June 7, 2022 Dr. Yamamoto reviewed the May 19, 2022 evaluation, noting that they had planned to order physical therapy but it was not done, so he ordered it. He found loss of range of motion of the right shoulder, moderately positive Hawkins test and mild tenderness to the anterior shoulder. He was to follow up with PT. He had anterior and medial tenderness of the left knee. He was to follow up with the orthopedist which was now authorized. His work restrictions were increased to 25 lbs. maximum lifting, pushing and pulling, 20 lbs. repetitive lifting and carrying, minimum overhead reaching with the right arm, limited squatting and climbing and no crawling or kneeling.

32. Dr. Yamamoto noted on August 5, 2022 that he had reached out to the physical therapist to get it started but she declined to schedule it unless Insurer provided her with a call or an authorization letter. Further, he noted that Claimant's left knee needed to be addressed because Claimant had an acute tear and he had made an initial referral on October 27, 2021 but would make a new one to have Claimant see Dr. Baran.

33. Claimant returned to see Dr. Hatzidakis on August 30, 2022. PA Holm documented that Claimant reported he had received very little relief from the injection but now rated his pain at a 4/10. On exam he did not have any AC joint tenderness, but loss of ROM, positive impingement arc in forward flexion and abduction and positive Neer's on the right side. He assessed that Claimant had a partial-thickness supraspinatus rotator cuff tear, calcific tendinitis, subacromial impingement, long head biceps tendinitis and strain. They discussed Claimant's persistent pain, lack of improvement, and Dr. Hatzidakis recommended an arthroscopic debridement with possible rotator cuff repair, subacromial decompression, and possible long head of the biceps tenodesis, with which Claimant advised he wished to proceed. He was also given a prescription for PT in the meantime, as well as home strengthening and stretching exercises.

34. On September 2, 2022 Dr. Yamamoto noted that Dr. Hatzidakis was recommending right shoulder surgery.

35. Claimant was evaluated by Sean Baran, M.D. of Western Orthopedics on September 16, 2022 with regard to the left knee pain. Claimant provided a mechanism of injury and describe he had pain across the anterior aspect of his knee as well as medially. It was associated with occasional clicking and popping as well as give-away. Claimant report significant discomfort going up and down stairs and some swelling that seemed to come and go. Dr. Baran noted a mildly antalgic gait on the left, a trace of effusion of the left knee, had full range of motion, tenderness along the medial joint line

as well as the medial peripatellar facet. He reviewed the MRI films from April 14, 2022 which showed a horizontal cleavage tear in the posterior horn and body of the medial meniscus with overall good preservation of the cartilage. In the medial compartment, there was a full-thickness fissure of the medial patellar facet. Dr. Baran opined that both the patellar and the meniscus conditions were contributing to Claimant's symptoms. He diagnosed left knee contusion with medial meniscus tear and patellar chondromalacia. Dr. Baran recommended a course of physical therapy and an intra-articular corticosteroid injection, with which he proceeded that day. Dr. Baran also provided a prescription for physical therapy.

36. On October 5, 2022 Dr. Yamamoto noted that the plan was for Dr. Hatzidakis to proceed with right shoulder surgery, which had been denied and an IME was scheduled. Dr. Baran also prescribed physical therapy for Claimant's left knee which was to take place at Western Orthopedics, but would likely require surgery.

37. Claimant returned to see Dr. Baran on October 21, 2022 and Claimant reported that the injection had helped some, particularly with the pain in the front of this knee going up and down the stairs, but had persistent pain in the medial aspect of the knee that bothers him with twisting. Claimant had not started PT because it had not been approved by workers' compensation until that week and was scheduled for the following week. Dr. Baran observed that Claimant did not have effusion but continued to have tenderness along the medial joint line and pain with McMurray test medially. He noted that Claimant looked a lot better just from the injection. He wanted Claimant to proceed with the PT before broaching possible surgery.

38. A third IME was performed by Dr. Burris on October 25, 2022. Claimant continued to report the same conditions and pain, including pain between 3-5/10, which were burning, stabbing, and tightness. Medication improved his symptoms and movement caused increased in his symptoms. He reviewed some new records from the chiropractor Claimant was treated by in 2018, and MRIs of the left knee and cervical spine. He also reviewed the new records from treating providers. His exam was normal other than diffuse tenderness in the trapezius and the medial and lateral poles of the patella. Dr. Burris vaguely opined that Claimant's "complaints (two years later) cannot be causally related to the 11/23/2020 workplace event." He also stated that Claimant's "clinical course has not followed a typical physiologic pattern associated with an acute injury." He further opined that "any potential injury associated with the reported 11/23/2020 workplace event has resolved. Any current symptoms are, more likely than not, associated with independent and unrelated conditions or associated with psychosocial and/or secondary gain issues." He relied on "negative x-rays and MRIs, and the lack of objective findings on examination." He opined that Claimant was at MMI.

39. On December 9, 2022 Claimant returned to see Dr. Baran and Claimant had made some improvement with PT but continued to have persistent anterior based pain as well as medially based pain, particularly with twisting. He continued to have a catching sensation medially as well, though the swelling had decreased. On exam, he had discrete tenderness along the medial joint line, which reproduced some of the symptoms. He had pain with McMurray test, and mild peripatellar tenderness to palpation. He diagnosed left knee contusion with medial meniscus tear and patellar chondromalacia cause by the November 23, 2020 work injury. Dr. Baran noted that

Claimant had not improved despite therapy, intra-articular injection, activity modification, and over-the-counter anti-inflammatories. He recommended a left knee arthroscopy with medial meniscectomy. He explained to Claimant that the surgery would not resolve his anterior pain and chondromalacia. He explained that PT postoperatively would be important to continue to improve the anterior knee symptoms. Claimant requested to move forward with the proposed surgery.

40. Through December 9, 2022 Dr. Yamamoto continued to report Claimant had constant right shoulder pain from 3-4/10 and worse with movement, with loss of range of motion, moderately positive Hawkins test and mild tenderness to palpation. Dr. Hatzidakis recommended surgery for the right shoulder, which was being denied. Dr. Yamamoto also reported that Claimant continued to have mild pain in the left knee which ranged from 0-4/10, was worse with weight bearing and going up stairs or tried to squat, with loss of range of motion, and anterior and medial tenderness of the left knee. Dr. Baran recommended surgery of the left knee. Dr. Yamamoto stated that Claimant needed both surgeries as recommended by Dr. Hatzidakis and Dr. Baran.

41. Dr. Hatzidakis saw Claimant again on February 16, 2023 noting that he continued to have right shoulder pain related to his November 23, 2020 work related injury that had not responded to conservative care. Claimant continued to have pain that would go up to a 5/10 and sudden movements caused pain. On exam, Dr. Hatzidakis found loss of ROM of the right shoulder, with point tenderness over the AC joint and greater tuberosity and tenderness over the long-head of the biceps in its groove. Dr. Hatzidakis assessed that Claimant had a right shoulder strain with significant calcific tendinitis of the rotator cuff and possible partial-thickness tear in that location, and long-head biceps tendinitis with symptomatic AC arthrosis from a work related injury on November 23, 2020. Both he and Dr. Yamamoto agreed that Claimant had organic pathology that required cuff repair, which was often needed with a calcium deposit, long-head biceps treatment as well as subacromial decompression. He noted that Claimant's AC joint tenderness was significant but not as much as his greater tuberosity pain. They discussed injecting his AC joint, with which they proceeded on that day and had a 25% improvement of his overall symptom complex so Dr. Hatzidakis opined that proceeding with a distal clavicle excision was reasonable as well at the time of the surgery. Dr. Hatzidakis mentioned that Workers' Compensation had "repeatedly denied" surgeries requests.

42. On March 1, 2023 Dr. Hatzidakis wrote a letter to Claimant's counsel in response to specific interrogatories. He explained that he reviewed the MRI films personally noting some abnormalities in the films that the radiologist did not describe in his report. There were some very distinct findings on some of the images that revealed significant calcific deposits of the supraspinatus and just lateral to the deposit was a small defect in the bursal side of the cuff consistent with a partial-thickness rotator cuff tear, which was not even addressed in Dr. Anderson's report. The MRI also revealed cystic degeneration of the distal clavicle and inflammation of the AC joint.

43. Next, Dr. Hatzidakis specifically disagreed with Dr. Burris and his report as there was evidence of a partial thickness rotator cuff tear. And even if the calcific tendinitis was present prior to the injury, it became symptomatic due to the work related injury and Claimant continued to have symptoms consistent with rotator cuff injury including pain

and weakness with abduction and positive impingement signs. He noted that Claimant denied any symptoms prior to the injury and Claimant's symptoms were not inconsistent with his type of injury. Dr. Hatzidakis also stated that the MRI also showed evidence of inflammation at the AC joint and a down sloped acromion, which may be causing him subacromial impingement.

44. Dr. Hatzidakis has recommended surgery in order to treat the Claimant's conditions and noted that, while there were other preexisting conditions, they became symptomatic as a consequence of the injury. He believed that there was a reasonable chance for Claimant to benefit from the proposed arthroscopic surgical management being proposed in this matter and opined it was the reasonable next option. He anticipated that a successful surgery would offer Claimant improved range of motion in all planes as well as decreased pain with activities. He further stated that, if Claimant could improve from his other injuries that he had a reasonable chance of returning back to work following the surgery, and that arthroscopic surgical management was an important part of comprehensive medical care which Claimant had not been allowed to date. Dr. Hatzidakis opined that Claimant required an arthroscopic debridement with rotator cuff repair, subacromial decompression, possible long head of the biceps tenodesis and distal clavicle excision. Dr. Hatzidakis' opinions are found to be credible and persuasive over the contrary opinions of Dr. Burris.

45. Claimant was seen by Jesus Santana, PA-C at Clinica on March 9, 2023 with cervical pain. He suspected cervicalgia. He noted Claimant's right shoulder and left knee limitations.

46. By March 20, 2023 Dr. Yamamoto documented that the left knee surgery had been denied as well. He made similar examination findings as previously. The right shoulder had somewhat increased pain at a 6/10 which was constant and increased with movement. He found loss of range of motion, moderately positive Hawkins test, positive Neer's test, and mild tenderness of the anterior right shoulder. He found Claimant had loss of range of motion, and anterior and medial tenderness of the left knee, noting that Claimant was able to squat but had pain and difficulty getting up to a standing position. Dr. Yamamoto continued to diagnose tendinosis of the right shoulder, impingement of the right shoulder, acute medial meniscus tear of the left knee and patellofemoral syndrome of the left knee. He prescribed lidocaine topical ointment and again noted that Claimant required both surgeries.

47. On May 23, 2023 Dr. Yamamoto described that Claimant's pain in his right shoulder had been worsening to a 7/10 over the past month. He discussed Dr. Hatzidakis' March 1, 2023 diagnosis of tendinosis, impingement and likely rotator cuff tear and his recommendation for surgery, which was not authorized. On exam he noted that Claimant continued to have decreased range of motion, positive Hawkins tests, positive Neer's test, mild tenderness of the anterior right shoulder, and decreased strength versus resistance in all planes. Left knee symptoms and exam remained consistently the same. Claimant continued to await surgery and it had not been approved. He also noted that Claimant was proceeding to a DIME.

48. At Respondents' request, Claimant was examined by Stanley Ginsburg, M.D., the Division of Workers' Compensation Independent Examining Physician (DIME) on May 25, 2023. He took a history consistent with Claimant's testimony as follows:

> On 11/23/2020 he was working in construction. He was preparing to install a window and was at the top of a ladder, but he and his supervisor noted they had left the screws to attach the window behind. He was holding the window at the top of the ladder, it was quite heavy, and he lost his balance. He fell to the ground below. "It was dirt." As he fell he hit his shoulder vigorously against the side of the house, and he did not hit his head as he had a helmet on. As he landed the ladder hit his left knee. He felt his right shoulder and left knee were injured. He was taken home where he spent the night. He was in pain in his back shoulder and knee. The next day he was taken to Clinica Campesina. It was where his primary care physician was located. He was examined, and he was told, according to the patient, that he would have to pay for x-rays, and the patient could not do that. He was given some medication but does not recall what that was. His employer was contacted, a file was claimed and finally four months later he was seen in the Workman's Compensation system.

Dr. Ginsburg took a history of the medical treatment Claimant had received, his symptoms and noted the recommendations for surgery. Claimant reported that he had right shoulder pain as 4/10 but worse with movement and driving or at night. Dr. Ginsburg documented Claimant had burning and throbbing pain in the left shoulder with pain that extended to the proximal arm and periscapular area. He reported that he avoids any rapid movements in order not to make his shoulder worse. Claimant's left knee pain was 3/10, but depending on various positions it may be significantly higher, and was constant and daily. He had to be careful how he walked in order to not increase the pain.

49. Dr. Ginsburg reviewed the medical records starting with the chiropractic notes from 2018, noting Claimant had complaints of prior back pain and right shoulder pain from a motor vehicle accident as well as records from Clinica which documented an exam consistent with muscular strain. Then he reviewed the Clinica records for November 24, 2020. He also reviewed Dr. Yamamoto's records, Dr. Hatzidakis', Dr. Burris' and diagnostics, among others. Specifically, he noted that Claimant was seen by both Tyler Holm, PA-C and Dr. Hatzidakis who assessed right shoulder strain, calcific tendonitis, and stiffness with elevation. He noted treatment options being discussed including injections, the right subacromial space being injected targeting the calcific deposit and given a prescription of physical therapy. Dr. Ginsburg noted that they "discussed the possible need for arthroscopic debridement of the calcific deposit and possible rotator cuff repair if his symptoms are persistent." He noted Claimant having had another injection, after which an "arthroscopic debridement with possible rotator cuff repair, subacromial decompression on possible long head of the biceps tenodesis" was discussed and to which surgery Claimant agreed. Dr. Ginsburg also went into a lot of details with regard to Dr. Baran's records. Specifically, he initially recommended physical therapy and an intraarticular corticosteroid injection, which was accomplished on the same day and after which Dr. Baran found Claimant improved, but later recommended surgery and Claimant wished to proceed.

50. Dr. Ginsburg performed an examination, which he found within normal limits, other than right parathoracic tenderness and abnormal range of motion. He

concluded that Claimant's diagnosis were for a right shoulder injury and a left knee injury which were thoroughly outlined in his report.

51. The DIME physician specifically opined "I do not believe that MMI has been accomplished from the clinical information that has been presented. I believe this is in agreement with the providers who are treating the patient." Dr. Ginsburg further opined that apportionment was not appropriate and provided an 8% whole person provisional impairment rating. He determined that there was no impairment to the right hand, wrist or elbow. He provided restrictions of no climbing ladders, no holding objects with the right upper extremity weighing over 10 lbs. and could not return to construction at this time. Lastly, he noted that maintenance care would only be addressed if Claimant did not proceed with the treatment recommended by the treating providers.

52. Division of Workers' Compensation issued a Notice DIME Report "Not at MMI" on June 14, 2023 noting that the DIME Unit was in receipt of the DIME physician's report stating that Claimant was not at MMI. It gave instructions that when a follow-up examination was scheduled or if the case was settled, the parties were to inform the DIME Unit.

53. Dr. Yamamoto reviewed Dr. Ginsburg's report of not at MMI on August 15, 2023 stating Claimant should return to his providers for the recommended treatment.

54. Dr. Burris performed a record review on October 1, 2023. He stated he received no new records but it is apparent that he did receive the records through June 9, 2023, including Dr. Ginsburg's DIME report. He noted that Dr. Baran was recommending left knee surgery and Dr. Hatzidakis was recommending right shoulder surgery. He specifically mentioned that Dr. Ginsburg stated Claimant was not at MMI as he needed surgery and cited to the language the "*the decision regarding further care has not been made*." (Emphasis added by Dr. Burris.) This language was under the heading of "Maintenance Care." This ALJ interprets this to mean that a decision on maintenance care was premature. Here, Claimant had not been given the chance to make the decision to proceed with the surgeries that both surgeons had recommended and submitted for authorization, which had been previously denied. Ultimately, Dr. Burris' opinion was unchanged from his prior reports and not found persuasive.

55. Claimant's pain diagrams were generally consistent where Claimant marked that he continued to have symptoms in the right shoulder and left knee from the first time he saw Dr. Yamamoto to the last.

56. John Burris, M.D. testified as Respondents' board certified expert in occupational medicine. He examined Claimant on three different occasions for independent medical evaluations. The first on April 27, 2021 when Claimant was complaining of shoulder pain, pain in his right upper arm and forearm as well as his low back, together with numbness in his right index, middle and little finger. He explained, on examination, that the provocative maneuvers and positive signs of the shoulder were consistent with impingement syndrome. Dr. Burris was unable to explain the subjective complaints to the low back and fingers.

57. The second visit was on May 3, 2022 and Dr. Burris did not find any signs of impingement syndrome. He noted that Claimant was now complaining of knee pain,

when he had not previously. He noted some diffuse tenderness of the patella consistent with the findings on MRI. Claimant also demonstrated full range of motion at the shoulder but he remarked that it was common to have waxing and waning of symptoms to some degree when dealing with impingement syndrome. However, he opined that Claimant only had a soft tissue injury that should have resolved with time. He stated that the distal symptoms into the forearms and hands did not make physiological sense because a shoulder injury could not cause those kinds of symptoms in his opinion.

58. The third IME was conducted on October 25, 2022 when he examined Claimant's shoulder and upper extremity. He noted that Claimant had tenderness of the trapezius muscles, good range of motion, negative impingement signs and was neurologically intact. He explained that the MRI showed calcific tendinitis and he opined that both it and impingement syndrome were not typically associated with trauma.

59. Dr. Burris testified that he opined Claimant had reached MMI as of April 27, 2021 because there were no signs of trauma identified, Claimant had a minor soft-tissue, contusion/strain injury and the knee complaints were not documented in the medical records until sometime after the accident. He did not, however explain, Claimant's positive findings on exam during that first examination despite having found Claimant's injury as "resolved."

60. Dr. Burris also agreed that if there is abnormal pathology in a shoulder, such as a rotator cuff tear, impingement can be an effect of that if it is caused by the work injury as well as that medical treatment is intended to relieve a work injured patient of the effects of the injury. He stated that there was objective findings on the initial x-ray performed on Claimant, though would not state whether it was acute or not. Dr. Burris, however, did not review the actual films that Dr. Hatzidakis reviewed, from which Dr. Hatzidakis identified pathology that the radiologist did not document in his report. Dr. Burris agreed that Dr. Hatzidakis had more knowledge about the pathology in Claimant's right shoulder and that, if there is calcific tendinosis present in the right shoulder, then it would be reasonable to proceed with surgery as recommended by Dr. Hatzidakis. Dr. Burris did not dispute that Claimant sustained a work related injury to his right shoulder.

61. Dr. Burris agreed that Dr. Hatzidakis also found inflammation of the acromioclavicular joint, which was consistent with the radiologist's reading of the MRI, could cause pain and was an objective finding, that was not present prior to Claimant's work injury. Dr. Burris answered as follows:

> Q: So -- and would the -- assuming that the injury did make the pathology symptomatic, would those symptoms correlate with the objective findings found[3] by some of the other providers on their exams, such as the Neer's test and the Hawkins test and other provocative maneuvers?
>
> A. Yes.

62. Dr. Burris agreed that it was important to have all of the medical records when making a determination of MMI, which he did not have initially including the MRI report and the physical therapy notes, and that the surgery proposed by Dr. Hatzidakis

[3] While the transcript states "done" this ALJ's notes showed the word "found" as the word used by counsel.

was intended to relieve Claimant of the symptoms he claimed were caused by the work related injury.

63. In discussing the left knee injury, Dr. Burris stated that, if Claimant caught his leg in the rungs of the ladder when he fell, it could have either caused a meniscal tear or aggravated an underlying pathology, and that he had no reason to doubt Dr. Baran regarding whether surgery was reasonably necessary to alleviate the pain caused by the meniscal tear. Dr. Burris agreed that the MRI showed joint arthritis and some small three-edge tears in the meniscus.

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

CONCLUSIONS OF LAW

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. *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." *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. *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *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. *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.

Overcoming DIME on MMI

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. A DIME physician's findings of MMI are binding on the parties unless overcome by "clear and convincing evidence." Sec. 8-42-107(8)(b)(III), C.R.S. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 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." *Leming v. ICAO,* 62 P.3d 1015 (Colo. App. 2002); *Adams v. Sealy, Inc*., W.C. No. 4-476-254, ICAO, (Oct. 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*.

A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Gutierrez v. Startek USA, Inc.,* W.C. No. 4-842-550-01, *ICAO,* (March 18, 2016); *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 ICAO, (July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 ICAO, (Nov. 17, 2000); *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356, ICAO, (March 22, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on

the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments for the condition are inherent elements of determining MMI.

If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion regarding MMI. Section 8-42-107(8)(b), C.R.S.; see *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175, ICAO, (May 25, 2005) [aff'd, *Resources One, LLC v. Industrial Claim Appeals Office* 148 P.3d 287 (Colo. App. 2006)]; *Leprino Foods Co. v. ICAO*, *134 P.3d 475 (Colo. App. 2005); In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

Respondents have failed to establish by clear and convincing evidence that Dr. Ginsberg's opinion that Claimant is not at MMI is incorrect. Dr. Ginsburg took a full history, analyzed the mechanism of injury, reviewed the ATP records, the imaging and diagnostic testing, the IME opinions, and examined Claimant, concluding that Claimant had work related conditions to the right shoulder and the left knee. He reviewed the assessments of the surgeons and agreed with them, over the contrary opinions of Dr. Burris, and concluded that Claimant had not reach maximum medical improvement. Dr. Ginsburg discussed the records prior to Claimant's injury as well. Dr. Ginsburg made a determination that Claimant was not at MMI after considering all the information at his disposal. Simply because Dr. Ginsburg did not complete and fill out every section of the template provided and the information is not in a particular section of a report, does not imply that the DIME physician did not consider the information and this ALJ declines to interpret the report in that manner.

Dr. Ginsburg arrived at the conclusion, after thoroughly considering all the information in the record, finding Claimant was not at MMI. While Dr. Ginsburg, who is a neurologist according to the Division of Workers' Compensation DIME Accredited

Provider Directory, may have, to some extent, respected and accepted the Claimant's specialists' opinions as more authoritative or knowledgeable in Claimant's case whether surgery was the most appropriate course of treat for Claimant's right shoulder and left knee, this does not mean he did not make an independent assessment of Claimant's conditions and reach his unbiased conclusions and this ALJ declines to make any inferences to the contrary. Since his initial injury, Claimant had continued to exhibit symptoms in his right shoulder and left knee. Claimant advised his specialists that he would like to proceed with both the right shoulder surgery and the left knee surgery as proposed by Dr. Hatzidakis and Dr. Baran, respectively. Claimant also testified that he continued to wish to proceed with both surgeries and Dr. Ginsburg agreed with these decisions. Any contrary opinion of Dr. Burris', is simply that, a mere difference of opinion, and a mere difference of opinion between physicians does not constitute an error or rise to the level of clear and convincing evidence that is required to overcome Dr. Ginsburg's opinion regarding MMI.

Respondents relied on two main argument in alleging that the DIME physician was incorrect. The first, that Dr. Ginsburg did not spell out his full examination of Claimant in his report and was required to do so in order to be correct according to Dr. Burris. The second that Dr. Ginsburg did not make recommendations for medical care. This ALJ is persuaded by neither argument. It is found that Dr. Ginsburg did perform a physical exam, including obtaining range of motion findings. Dr. Ginsburg relied on more than just an examination to reach his decision. He reviewed the medical records, documented that the experts had documented multiple times the positive objective findings as well as trusting in the experts' opinions and the findings on diagnostic testing. Dr. Ginsburg made recommendations for treatment. He stated that he was returning Claimant to his authorized treating physicians to provide the care they had recommended, specifically the surgical treatment recommended by Dr. Hatzidakis and Dr. Baran if Claimant continued to wish the care, otherwise he was likely at MMI.

Dr. Burris' opinions and testimony critiquing Dr. Ginsburg and his report are not persuasive, as his opinions were based mainly on the underlying pathology and whether the conditions of Claimant's right shoulder and left knee were caused by preexisting conditions. But the rife medical record and specifically, Dr. Ginsburg's opinions, are supported by all the records, opinions and other testimony. Although Claimant's PCP evaluated the shoulder the day following the admitted November 23, 2020 work injury, the nurse performed no significant testing or provocative maneuvers during her examination and issued an extremely limited note that is specifically found not persuasive. Claimant credibly and persuasively testified that he had been working for employer without difficulty, hanging heavy windows and installing siding on buildings and Dr. Ginsburg's assessment of causation of the right shoulder and left knee are persuasive and supported by the extensive records of the ATPs, Drs. Yamamoto, Dr. Hatzidakis, PA Holm, and Dr. Baran, who are credible and persuasive, including their full examinations of Claimant's right shoulder and left knee. Since the accident, Claimant was continuously symptomatic and required significant ongoing treatment, including medications, injections, physical therapy, and surgery, some of which was delayed and denied. He continues to suffer substantial range of motion deficits that interfere with his ability to perform routine activities such as going up stairs, driving and sleeping. Dr. Hatzidakis' and Dr. Baran's recommendations for additional surgical

treatment are reasonable. Even Dr. Burris agreed that Claimant's need for additional surgical treatment was reasonably necessary, but he believed it should be provided outside the workers' compensation system under the theory that it was all from preexisting conditions. But Ginsburg was correct and persuasive in his causation determination that Claimant's right shoulder and left knee conditions and subsequent need for treatment were proximately caused by the November 23, 2020 admitted work injury and this is supported by Dr. Hatzidakis' persuasive analysis and Claimant's credible and persuasive testimony.

Following the November 23, 2020 admitted work related accident, there are innumerable records of positive provocative tests that show that Claimant was positive for ongoing pathology, including impingement signs, Hawkins test, Neer's test, loss of ROM among other testing with regard to the right shoulder and loss of ROM, persistent anterior and medial pain, a catching sensation, pain with McMurray test and tenderness to palpation of the left knee. Further, there are objective diagnostic tests such as the x-ray and MRIs of both body parts as explained by the providers. At his examinations with Dr. Yamamoto and Dr. Hatzidakis, Claimant was found to have symptoms consistent with impingement and rotator cuff pathology. While the radiologist did not explain the complete existing pathology in his MRI report of the right shoulder, Dr. Hatzidakis went into great detail about the pathology he found on the films. Dr. Hatzidakis fully, credibly and persuasively explained that, despite any facts that Claimant may have had any underlying pathology prior to the injury to his right shoulder, he did not have any symptoms or limitations prior to the work injury and opined that the November 23, 2020 accident proximately caused the Claimant's need for treatment of his right shoulder in this matter.

Dr. Yamamoto consistently documented Claimant's ongoing left knee pain and findings on exam as well in this case. The MRI findings, including a meniscal tear, as well as Dr. Baran's opinion that Claimant requires the surgery for the left knee support the DIME's conclusions of causation. This, together with the fact that there was no history of prior left knee problems before Claimant's fall from the ladder, catching his left leg in the rung of the ladder before he fell to the ground with the ladder landing on him, were persuasive evidence that Claimant's need for ongoing care, including the left knee surgery was proximately caused by the November 23, 2020 work related accident.

Therefore, Respondents have failed to prove that it was highly probable that Dr. Ginsburg's opinion that Claimant has not reached MMI was incorrect and Respondents' request to set aside Dr. Ginsburg's MMI determination must be denied and dismissed.

Because Respondents' have failed to establish by clear and convincing evidence that Dr. Ginsburg's MMI opinion is incorrect, the issue of whether his provisional impairment rating was appropriate or whether Claimant was entitled to maintenance care is not ripe for determination.

Medical Benefits

The Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S.; *Colorado Comp. Ins. Auth. V. Nofio*, *supra* at 716 (Colo. 1994). The claimant bears the

burden of demonstrating a causal connection between his industrial injuries and the need for medical treatment. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

The DIME physician, Dr. Ginsburg, opined that Claimant was not at MMI because Claimant required the reasonably necessary surgical care recommended by his authorized treating providers for his right shoulder and left knee, medical care which is proximately caused by the admitted November 23, 2020 work related injury. Dr. Hatzidakis opined that Claimant required an arthroscopic debridement with rotator cuff repair, subacromial decompression, possible long head of the biceps tenodesis and distal clavicle excision which was supported by the extensive medical records in order for Claimant to gain further range of motion and potentially be able to return to work. Dr. Baran recommended Claimant proceed with a left knee arthroscopy with medial meniscectomy as well as post-surgical physical therapy in order to achieve further range of motion and functional gains. The opinions of all three physicians were credible and persuasive over the contrary opinions of Dr. Burris. Claimant has proven by a preponderance of the evidence that Claimant is entitled to reasonably necessary and related medical care.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents' request to overcome the DIME's determination of "Not at MMI" is *denied* and *dismissed.*

2. Respondents shall pay for the medical care recommended by Claimant's authorized treating providers, specifically the surgery proposed by Dr. Hatzidakis for the right shoulder, the surgery proposed by Dr. Baran for the left knee as well as the subsequent physical therapy, are reasonably necessary and related to the November 23, 2020 work related injury. All medical care costs shall be in accordance with the Colorado Medical Fee Schedule.

3. All issues not decided herein 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 19th day of January 2024.

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. 5-238-235-002

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the left knee arthroscopic medial meniscectomy recommended by authorized treating surgeon, Dr. Cary Motz, is reasonably necessary and related to the admitted April 5, 2023 work injury.

PROCEDURAL HISTORY

1. Respondents filed a General Admission of Liability on May 8, 2023 admitting for medical benefits.

Claimant filed an Application for Hearing on October 24, 2023 on issues of medical benefits that were reasonably necessary and related.

On November 22, 2023 Respondents filed a Response to Application for Hearing listing additional issues of preexisting, causation, relatedness. Other issues were withdrawn.

FINDINGS OF FACT

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

2. Claimant was 48 years old at the time of the hearing in this matter and was Spanish speaking. A professional interpreter was contracted to assist with interpretations services.

3. Claimant worked as a laborer in a heavy duty job, where they installed large concrete pipes in the ground. This required digging out ditches with excavators and shovels to accommodate the pipes, moving large amounts of dirt, laying stone, gravel and cement as a bed for the pipes, making sure they had the right incline for the water to run through the pipes, and positioning the concrete water pipes, and sometimes plastic pipes, among other duties. Claimant had been working for Employer since approximately November 2022, four to five months before his accident happened. He worked five days a week, ten hours a day, for approximately 50 hours a week and most of the hours he worked were performing heavy duty work.

4. Prior to April 5, 2023 Claimant had no prior problems or injuries with his left knee, and he had no problems with performing his heavy duty work prior to the April 5, 2023 admitted work related accident.

5. On April 5, 2023 Claimant was digging in a ditch. He stopped, was standing to check the light of the mixer machine, when he heard his co-worker that was operating the excavator, call out. He did not even have time to turn around to check what he was calling about when a large clump of dirt fell from above and struck Claimant on the head and back, knocking him to his knees. It happened very fast, because he felt that one

minute he was standing, the next he was on the ground. This claim was admitted for medical benefits. His manager took some pictures, which were offered in evidence. Claimant identified the picture, the site, the clump of dirt that hit him, his helmet and his shovel next to the clump of dirt.

6. After the injury, Claimant stated he was taken by his manager to Concentra, and reported to the doctor how he was injured. The manager filled out all the paperwork for him and answered any questions from the doctor. He accompanied Claimant throughout the exam to interpret. While the first medical reports may not have included anything regarding the left knee, Claimant stated that the reports should have mentioned the left knee because he reported his left knee pain and showed the doctor where the pain was on his left knee.

7. On April 5, 2023 Claimant was immediately taken by his supervisor to Concentra Medical Center and was seen by Patrick Antonio, D.O. within the hour of his injury. His supervisor, or coworker as described by the physician, witnessed the accident and acted as his interpreter. Dr. Antonio documented that Claimant was hit by a "chunk" of dirt to his upper neck and back and "was knocked to his knees." He noted that Claimant was wearing a helmet that was knocked off with the dirt impact. He was unable to move his neck from side to side. He complained of posterior neck pain, soreness, worse with movement, radiating to the posterior head. He also denied any prior history of head or neck pain.

8. On exam, Dr. Antonio noted that Claimant had tenderness in the left paraspinal and right paraspinal, bilateral muscle spasms and painful and limited range of motion. He did not evaluate Claimant's left knee. He assessed cervical strain and ordered medications, cold packs, physical therapy for the neck, an x-ray of the cervical spine and requested authorization for a professional interpreter. Dr. Antonio provided work restrictions of no lifting, pushing greater than 5 lbs., no climbing, crawling, or overhead reaching, ground level work only and that he could not drive a company vehicle.

9. On April 10, 2023, Claimant returned to Concentra and was seen by Cynthia Rubio, M.D., and reported an improvement in neck pain since the initial injury. Dr. Rubio decreased his work restrictions.

10. Claimant returned to see Dr. Rubio on April 17, 2023. Claimant reported a significantly increased neck pain of 9/10 on a pain scale. He had spasms, decreased motion, tenderness, and positive cervical compression test. Dr. Rubio ordered a cervical spine MRI and made other referrals.

11. When Claimant returned to Concentra on April 26, 2023, Claimant was seen by Nurse Practitioner Amy Nieberlein, and reported left wrist and left knee pain from the accident of April 5, 2023. On physical examination, NP Nieberlein noted tenderness over the medial aspect of Claimant's left knee and pain with range of motion. She assessed left knee pain, acute pain of left wrist, and cervical strain. NP Nieberlein prescribed medications and physical therapy.

12. On May 5, 2023, Claimant was evaluated by Nurse Practitioner Nicole McPhee and reported persistent anteromedial left knee pain at the joint line with increased pain with walking on uneven surfaces. On physical examination of Claimant's

left knee, NP McPhee noted tenderness over the medial joint line and crepitus. NP McPhee maintained Claimant's treatment plan.

13. On May 22, 2023, Claimant treated at Concentra with Angela Giampaolo, M.D., who asked Claimant where his knee pain was located, and Claimant pointed to the anterior and medial aspects of his left knee. Claimant reported persistent left knee pain/symptoms. Dr. Giampaolo diagnosed left knee pain and stated that the objective findings were consistent with the history and work related mechanism of injury on April 5, 2023. Dr. Giampaolo continued the same treatment plan and work restrictions provided by Nurse Practitioner McPhee.

14. Claimant returned to see NP McPhee on May 26, 2023. He reported minimal left knee improvement with physical therapy and that his progress had plateaued. Claimant reported he was following the treatment plan and work restrictions. NP McPhee ordered a left knee MRI. She also referred Claimant to John Sacha, M.D., for cervical spine treatment.

15. On June 2, 2023, Claimant underwent a left knee MRI at Health Images, which revealed a mildly complex oblique undersurface medial meniscus tear of the posterior horn extending into the posterior body segment. There was mild irregularity of the meniscal femoral ligament along the medial joint line. There was also chondral degeneration of the inferior medial trochlea of the medial and patellofemoral compartments. Dr. Bridget Lauro also reported a small joint effusion.

16. Claimant was evaluated by John Sacha, M.D. on June 7, 2023 primarily for the cervical spine but noted that Claimant was awaiting an orthopedic evaluation of the left knee. He did a physical examination of Claimant's left knee and noted mild crepitus with range of motion and positive patellar grind. Regarding Claimant's cervical spine, Dr. Sacha recommended injections for the cervical spine.

17. On June 8, 2023, Claimant treated with NP McPhee and reported persistent left knee pain and symptoms. On physical examination of Claimant's left knee, she noted tenderness over the medial joint line and crepitus, anterior crepitus. NP McPhee referred Claimant to an orthopedic surgeon for his ongoing left knee issues, specifically for an acute medial meniscus tear of the left knee. She stated that the objective findings were consistent with the history and work related mechanism of injury on April 5, 2023.

18. On June 20, 2023, Claimant was seen and evaluated by Cary Motz, M.D. at Concentra, an orthopedic surgeon from Advanced Orthopedic and Sports Medicine Specialists. He took a history which was consistent with Claimant's testimony and the histories taken by other medical providers. Claimant reported he had fallen on his knees in the trench and continued with mild swelling, difficulty with standing, kneeling and squatting, and had persistent pain since his work injury which was causing limitation of function. He noted that Claimant had not responded to conservative care including physical therapy. Dr. Motz noted trace effusion, moderate medial joint tenderness, and a positive McMurray test. He diagnosed left knee medial meniscus tear and chondromalacia of medial and patellofemoral compartments. He further stated:

> The patient's MRI does show a fairly complex large medial meniscal tear. I suspect this is the source of most of his discomfort. I had a discussion with him today through the interpreter, discussing consideration of an arthroscopy with partial

> medial meniscectomy and chondroplasty. I think there is an excellent chance it will significantly improve his symptoms, although he may have some chronic discomfort due to chondromalacia.
>
> The patient has reached a point in the treatment plan where the determination is to now proceed with knee surgery. This decision is based upon the complex nature of the injury, how it is impacting the patient's bodily function, as well as the fact that we have exhausted all conservative treatment options, which included bracing, therapy and/or injections.
>
> At this stage, the patient will require surgical intervention in order to retain/regain their bodily function and process toward pre-injury functionality.

Lastly, Dr. Motz noted that Claimant wished to proceed with the recommended surgery of the left knee and his office would contact Claimant when they had obtained authorization from the carrier.

19. On June 23, 2023, Dr. Motz requested authorization to perform a left knee arthroscopy and partial medial meniscectomy which was to take place at MileHigh Surgery Center.

20. Respondents agreed authorization for the surgery was denied, alleging that the injury to the left knee was not caused by the April 5, 2023 accident.

21. Claimant was examined by David Reinhard, M.D., on June 27, 2023, at Claimant's request, for the possibility of a transfer of care. He took a history of Claimant's accident consistent with Claimant's testimony and the prior medical records. He noted that Claimant was being treated at Concentra but had not improved. He reviewed the left knee MRI and noted the mild complex medial meniscus tear. Claimant reported pain over the anteromedial aspect of his left knee, which would worsen with walking on uneven surfaces. Dr. Reinhard also observed on exam, cracking and popping of the left knee, and tenderness along the medial joint line. He noted decreased range of motion of the left knee, tenderness to palpation along the medial joint line, a mildly increased laxity with varus and valgus stress. Dr. Reinhard diagnosed Claimant with an "acute medial meniscus tear of left knee."

22. On June 30, 2023, Respondents had William Ciccone, M.D., of ProSpective Consult, LLC, perform a medical record review. Dr. Ciccone reviewed the medical records available and summarized them. He stated that "getting hit with an object and falling could potentially cause a knee injury," but he ultimately opined Claimant did not sustain a left knee injury as Claimant failed to report any left knee symptoms until three weeks after the April 5, 2023 admitted work injury. Dr. Ciccone opined the findings on Claimant's left knee MRI were preexisting and degenerative. He also opined Claimant's alleged mechanism of injury did not aggravate or accelerate Claimant's chronic left knee condition.

23. On September 6, 2023, Claimant underwent an independent medical examination with Dr. Ciccone, who maintained his prior opinions. Dr. Ciccone did not review the MRI films. He stated that it was more likely than not Claimant's meniscus tear was degenerative and unrelated to any trauma. Dr. Ciccone stated patients with acute

meniscus tears had consistent pain along the joint lines and increased pain/crepitus with McMurray's tests. Dr. Ciccone stated Claimant had inconsistent physical exams and pain complaints.

24. Dr. Ciccone testified by deposition on October 24, 2023 as a board certified orthopedic surgeon, on behalf of Respondents. He stated that he was Level II accredited physician and on the DIME panel. The Division showed he was accredited through January 26, 2026 but was not a DIME panel physician. His IME was limited to the left knee problem. He reviewed the medical records and took a history. He noted that Claimant reported his boss had filled out all the paperwork when he was first seen at Concentra.

25. Dr. Ciccone conveyed, that when he had examined Claimant, he had loss of range of motion, but no other abnormalities. He reviewed only the MRI report, not the films, and recounted Claimant had a complex medial meniscal tear with moderate degenerative changes along the patella and medial femoral condyle. Dr. Ciccone continued to opine as he had previously, that Claimant failed to report any left knee complaints until three weeks after the work injury and the lack of reporting showed that no acute injury occurred. He opined that Claimant's meniscal tears were degenerative in nature. However, he agreed that none of Claimant's authorized providers raised concerns about the work-related nature of the left knee condition, including Dr. Motz and Dr. Reinhard.

26. Claimant testified that prior to April 5, 2023, he had no left knee issues and could perform his physically demanding job without issue. He stated that he would not have been able to perform his job had he had the kind of problems he has had since his left knee injury. Claimant continued working light duty, since the work injury, not really doing much, other than using a machine and doing packing of the dirt.

27. During his testimony, Claimant was asked to identify where on his left knee he had pain/discomfort. Claimant stood and pointed to the medial (inside) aspect of his left knee, consistent with where he had reported his pain to his treating providers, and consistent with his medial meniscal tear. He showed the pain in a small "C" line around the knee cap on the medial side.

28. Claimant continues to experience significant left knee pain and feels he is not the same person. Claimant continues to have pain with walking, especially if he stumbles.

29. Claimant continues to want to proceed with the left knee surgery proposed by Dr. Motz, as he wishes to improve, not have pain, hopes to continue working normally, support his family, because he prefers to work and do a good job.

30. Claimant did clarify that, even if the left knee surgery was performed, he may not be able to return to his regular job due to his other injuries if not yet resolved by the time he healed from the surgery. But he would be able to walk better and that would be good.

31. The Exhibit 10 pictures depicted a large clump of compacted dirt/clay, next to which was both a helmet and a shovel. The size of a helmet generally measures approximately 12 inches long or 1 foot. When comparing the helmet to the large clump,

the clump beside it, the clump likely measured approximately 2.5 foot long, by 1.5 foot wide by 1 foot tall which converted to approximately 3.75 cu. ft. This ALJ considered that the clump had significant rough and rounded edges which would modify this number by approximately 30%, for a total of 2.62 cu. ft. Considering that compacted clay and dirt weighed approximately 80[1] to 100 lbs. per cubic foot, then the clump weighed at least 200 lbs. to 260 lbs. This kind of force falling on an individual is significant and would have caused Claimant to fall hard on his knees and hands.

32. As found, Claimant injured his left knee when the significant force of the fall caused him to hit the ground hard, causing damage and a tear to his medial meniscus. Claimant was credible and persuasive in his testimony that he had not had any problems prior to the April 5, 2023 fall and that he was able to carry out his duties without any pain. Further, he credibly and persuasively testified that he had the pain in his left knee since the April 5, 2023 fall and had mentioned it to the first provider he had seen. As found, medical professionals were initially more likely than not preoccupied by the more significant injury and complaints to Claimant's neck and head. As found, Claimant now requires surgery to repair the medial meniscus as recommended by Dr. Motz and the Concentra providers. Dr. Motz and the Concentra providers are credible and persuasive over the contrary opinions of Dr. Ciccone. As found, Claimant has proven by a preponderance of the evidence that he sustained a left knee injury on April 5, 2023 which was proximately caused by the fall of April 5, 2023.

33. 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,

[1] A cubic foot of top soil weighs approximately 80 lbs.

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. *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. Reasonably Necessary and Related Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). All results flowing proximately and naturally from an industrial injury are compensable. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A compensable aggravation can be a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition, or a combination with the condition to produce disability. 17 Douglas R. Phillips & Susan D. Phillips, *Colo. Practice Series: Colorado Workers' Comp. Practice & Procedure* § 3.13, at 125; *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990); *Indus. Comm'n v. Pacific Employers Insurance Co.,* 128 Colo. 411, 262 P.2d 926 (1953); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo.App. 1990); *Subsequent Injury Fund v. State Compensation Insurance Authority*, 793 P.2d 580 (Colo. 1990); *In re Claim of Bryant*, W.C. No. 5-102-109-001, I.C.A.O. (March 18, 2020)

The issue of whether medical treatment is necessary for a compensable aggravation or a worsening of Claimant's pre-existing condition is also one of fact for resolution by the ALJ based upon the evidentiary record. *University Park Care Center v. Industrial Claim Appeals Office, supra*; *Standard Metals Corp. v. Ball*, *supra*; *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The Act places full responsibility on the employer for benefits as a result of a work injury when there is an aggravation of an underlying dormant condition. *United Airlines, Inc. v. ICAO*, 993 P.2d 1152 (Colo. 2000). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03, I.C.A.O. (September 9, 2016).

Expert medical opinion is not needed to prove causation where circumstantial evidence supports an inference of a causal relationship between the injury and the claimant's condition. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, at 295-296; *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). When expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission, supra*; *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992). Likewise, the ALJ need not credit the medical evidence or testimony of the respondents' IME physician. *In re Claim of Bryant*, *supra*.

The issue in this case was whether the left knee surgery recommended by Dr. Motz was reasonable, necessary, and causally related to Claimant's admitted industrial injury of April 5, 2023. Claimant credibly and persuasively testified that he had fallen after being hit from behind by a very large clump of dirt that struck him on the back of his head and back, knocking him to the ground, which caused him to hit and injure his left knee on the ground on April 5, 2023, at the same time he injured his neck. Clamant had no history of prior left knee injuries, pain, symptoms, or limitations. Although Claimant's medical records did not reference any left knee issues until his fourth visit, it is not likely that Claimant's left knee coincidentally became symptomatic following his admitted work

injury. Rather, it is more likely than not that Claimant injured his left knee when the large clump of dirt struck him on the back and he hit the ground with his knees with the force of the hit. Claimant is found credible and persuasive in this matter.

Respondents denied the recommended knee surgery and, in support of that denial, relied on Dr. Ciccone's opinion that Claimant failed to report knee symptoms within the first three doctor visits and that Claimant's knee condition was preexisting. Dr. Ciccone's testimony or reports are not persuasive. The ALJ finds the reports of Drs. Motz, Reinhard, and all other Concentra treating providers credible and persuasive that Claimant's left knee injury is related to the April 5, 2023 admitted injury. Claimant consistently reported pain and tenderness along the medial aspect of his left knee, where his tear is located, and the same location he indicated at hearing. Claimant's pain, symptoms and limitations have been consistent. Claimant's treating providers have identified left knee crepitus, and Dr. Motz found a positive McMurray test, all of which are consistent with the medial meniscal tear identified in the MRI and by Dr. Motz. Their opinions are more credible and persuasive than the contrary opinions of Dr. Ciccone.

Further, Dr. Ciccone opined Claimant's mechanism of injury could have caused the left knee injury, but for the failure of providers to document it in the first visits. As found, Claimant did report he had pain in his knee. However, his supervisor completed all the paperwork and interpreted for him and the initial providers likely concentrated on the major problem of Claimant's head and neck symptoms. At many of the Concentra visits, Claimant was treated with a different provider. None of Claimant's treating providers called into question the relatedness of his left knee injury. In fact, the Concentra providers listed the left knee injury as related and specifically stated that they found that objective findings were consistent with the history and work related mechanism of injury on April 5, 2023. Neither Drs. Motz nor Reinhard questioned the relatedness of Claimant's left knee injury and need for treatment related to his admitted work injury. Claimant has objective evidence of a complex medial meniscus tear along with subjective reports of pain/symptoms and functional limitations. It is undisputed that prior to the work injury, Claimant had no left knee injuries and had no issue performing his heavy-duty job. Claimant's left knee injury was asymptomatic prior to April 5, 2023. Claimant's left knee is now symptomatic and affecting his ability to perform his job.

Based on the totality of the evidence, Claimant has proven by a preponderance of the evidence that Claimant's work-related injury resulted in harm that included damage to Claimant's left knee when the large clump of compacted dirt and clay fell on him and Claimant fell to the floor onto his knees, injuring that left knee. Claimant has been consistent in his reporting of pain along the medial aspect of his left knee, was asymptomatic prior to April 5, 2023, and he has since become symptomatic. Even if Claimant had an asymptomatic preexisting condition, that preexisting condition was aggravated by the fall of April 5, 2023. Claimant has proven by a preponderance of the evidence that it was more likely than not the mechanism of Claimant's left knee injury was consistent with a complex medial meniscal tear caused by the fall on April 5. 2023, which requires surgical repair as recommended by Dr. Motz and his other authorized medical providers at Concentra. As found, the left knee surgery recommended by Dr. Motz is reasonable, necessary, and proximately caused by Claimant's admitted industrial injury

of April 5, 2023 and Claimant is entitled to that reasonable necessary and related medical treatment for his compensable April 5, 2023 work-related injury.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for the left knee surgery recommended by Dr. Cary Motz subject to the Colorado Medical Fee Schedule.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts** 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 25th day of January, 2024.

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. 5-163-898-002

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that she should be permitted to reopen her February 4, 2020 Workers' Compensation claim and receive additional medical treatment, including L4-5 decompression and fusion with MIDLF surgery, based on a change in condition pursuant to §8-43-303(1), C.R.S.

FINDINGS OF THE FACT

1. Claimant is a 65-year-old female who worked for Employer as a wastewater laboratory coordinator. Her job duties included working out of a pickup truck, hauling equipment, obtaining samples from a river, and gathering samples within the plant.

2. Claimant testified that on February 4, 2020 it had snowed and there was "snow-covered ice" on the sidewalk. When she was walking to obtain samples, she slipped on the sidewalk and fell on her back. Claimant suffered back, neck, right wrist and right hip pain as a result of the accident.

3. Claimant explained that she received conservative medical treatment for her work-related injuries from Authorized Treating Providers (ATPs) Bryan T. Alvarez, M.D. and Nicholas K. Olsen, D.O. On February 24, 2021 Dr. Alvarez determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned an 18% whole person permanent impairment for the lumbar spine. Dr. Alvarez noted Claimant could return to work without restrictions and recommended medical maintenance care.

4. On July 1, 2021 Claimant and Respondents filed a *Stipulation of the Parties Regarding Permanent Impairment and Order*. The parties agreed that Claimant had sustained a 16% whole person permanent impairment rating. Upon receipt of an order approving the parties' stipulation, Respondents would file a Final Admission of Liability (FAL) consistent with the stipulation and order. The Division of Workers' Compensation issued an order approving the stipulation on July 2, 2021.

5. On July 7, 2021 Respondents filed a FAL acknowledging a 16% whole person impairment rating and medical maintenance care. Claimant did not object to the FAL. The claim thus closed by operation of law.

6. On April 25, 2022 Claimant visited Dr. Olsen for an examination. Dr. Olsen documented that Claimant had undergone a medial branch block for the bilateral L4-5 and L5-S1 facets on April 19, 2022. Claimant did not experience significant pain relief and the block was nondiagnostic for facet arthrosis. Dr. Olsen commented that he would submit a request for authorization for bilateral L4-5 transforaminal epidural steroid

injections (TFESIs) and schedule the procedure. On April 28, 2022 Dr. Olsen FAXed the authorization request to Insurer.

7. On May 5, 2022 Elena C. Antonelli, M.D. reviewed Dr. Olsen's request for bilateral L4-5 TFESIs in a Peer Review Report. Dr. Antonelli explained that the procedure was not medically necessary.

8. On August 17, 2022 Claimant returned to Dr. Olsen for an evaluation. Claimant reported pain levels of 6/10 in her right leg and 4/10 in her left leg. Dr. Olsen reviewed Insurer's denial of his recommended bilateral L4-5 TFESIs with Claimant. He explained that the "injection was essential in allowing Claimant to return to her exercise program and maintain her full work duties." Dr. Olsen did not document any change or worsening of Claimant's lumbar spine condition. He also did not mention any complaints of decreased functional ability or assign work restrictions. Instead, Dr. Olsen referred Claimant to Gary Ghiselli, M.D. for a surgical consultation. He explained:

> [Claimant] is frustrated with her persistent pain. She remains interested In the epidural steroid injection but now would consider possible surgery to address her symptoms. She does not feel like she can live like this. I have recommended that she consult Gary Ghiselli, M.D. for a surgical opinion. She is to see Dr. Ghiselli and return to the office for a reexamination in four weeks.

9. On September 20, 2022 Claimant presented to Renee Kirschner, PA-C at Orthopedic Centers of Colorado in consultation with Dr. Ghiselli. PA Kirschner reviewed Claimant's history, including diagnostic lumbar spine x-rays and an MRI from personal physician Kaiser dated August 13, 2022. She diagnosed mobile near grade II spondylolisthesis at L4-5 with severe stenosis. PA Kirschner determined that "[o]ur recommendation is an L4-5 decompression and fusion with MIDLF." Dr. Ghiselli noted that Claimant "has done a great job over the past couple of years working non-operatively but unfortunately has failed improvement." However, neither PA Kirschner nor Dr. Ghiselli considered whether the recommended surgery was causally related to Claimant's work-related incident of February 4, 2020.

10. On October 3, 2022 Respondents denied Dr. Ghiselli's surgical request. They scheduled an Independent Medical Examination (IME) with Brian Reiss, M.D.

11. On December 21, 2022 Dr. Reiss performed an IME of Claimant. He conducted a physical examination, interviewed Claimant, and reviewed medical records. Dr. Reiss also documented Claimant's significant pre-existing lumbar spine condition and medical care. Despite the documented medical history, Claimant reported that prior to the February 4, 2020 work incident she did not recall any leg symptoms. She advised Dr. Reiss that when she reached MMI, she suffered pain levels of 5-8/10 across her back and down her legs that had not changed. Claimant specifically noted lower back, buttock, posterior thigh and occasional calf symptoms. Dr. Reiss' diagnosed Claimant with chronic back pain, degenerative disc disease, lumbar spinal stenosis and spondylolisthesis.

12. Dr. Reiss determined Claimant had not suffered a worsening of condition since reaching MMI on February 24, 2021. He explained that Claimant had chronic pain in her lower back including bilateral lower extremity symptoms prior to her slip and fall at work on February 4, 2020. Dr. Reiss concluded that Claimant's lumbar degeneration, spondylolisthesis and lumbar stenosis constituted pre-existing conditions. Notably, they were documented as symptomatic one week prior to the work incident. Dr. Reiss remarked that Claimant's work injury caused a minor, temporary aggravation of her pre-existing condition that likely returned to baseline within a couple of months without residual effects. He determined that Claimant was properly placed at MMI on February 24, 2021 and subsequent medical care was related to her pre-existing condition instead of the effects of her work injury. Claimant remained at MMI. Dr. Reiss acknowledged that, although the proposed lumbar surgery might be reasonable and necessary, it was not causally related to Claimant's work injury because it was directed at her pre-existing condition.

13. Claimant's medical records prior to her February 4, 2020 industrial injury document significant pre-existing lower back and leg pain. On January 8, 2019 Claimant presented to primary care physician (PCP) Kaiser Permanente reporting a long history of lower back pain with "multiple accidents/traumas." Claimant was diagnosed with lower back pain including right-sided sciatica. The assessment documented, "Pt presents with LBP and R sciatica consistent with combination of lumbar ext-rotation dysfunction, and GTPS."

14. On August 22, 2019 Claimant returned to Kaiser. She reported right lower extremity pain after pulling her right shoe off at the airport in June. The movement caused a loud pop and sudden, intense pain in the back of the right leg. On a positive extension test Claimant exhibited lower back pain, but was negative for right knee pain.

15. On November 14, 2019 Claimant presented to Kaiser with continued right knee pain. However, she also noted some possible back issues and planned to follow-up with chiropractic.

16. On January 29, 2020, or about one week prior to her work injury, Claimant visited Sarah A. Wear, D.O. at Kaiser. Dr. Wear noted that Claimant is a 65-year-old female who reported bilateral leg pain and weakness. She also addressed Claimant's lumbar spine condition. Notably, Dr. Wear documented the following lower back degenerative conditions:

> X-rays showed a lot of degenerative changes in her low back. It showed severe loss of disk height, which could lead to a pinched nerve. It shows advanced facet degenerative changes, which could also pinch nerves. It also showed that there is mild slipping of vertebrae on each other (retrolisthesis). When she is ready, we should do a MRI.

Dr. Wear concluded that Claimant "was seen today for leg pain, weakness…Will rule out lumbar spine issue, could consider MRI lumbar if symptoms worsening. Continue Physical Therapy, Chiro, massage."

17. Claimant testified at the hearing in this matter. She explained that when Dr. Alvarez determined she had reached MMI she expected to receive additional treatment. However, Claimant remarked she did not receive any additional treatment through Workers' Compensation but obtained care through PCP Kaiser. She explained that her condition has deteriorated since she reached MMI on February 24, 2021. Claimant commented that she worked without restrictions until her industrial injury, but now constantly suffers pain.

18. Dr. Reiss also testified at the hearing in this matter. He maintained that Claimant's condition has not worsened since she reached MMI on February 24, 2021. He reviewed Claimant's medical records documenting her pre-existing lumbar spine condition with leg pain. Dr. Reiss commented that Claimant's medical records from 2018 through early 2020 included evidence of sciatica, back pain, and bilateral lower extremity pain up to one week prior to her slip and fall at work. He described Claimant's lumbar spine condition one week prior to her February 4, 2020 work injury as follows:

> definitely a lot of degenerative change. And she had continuation of back pain. And she had bilateral lower extremity pain…they're considering an MRI. An MRI is not something to consider unless you believe that you have nerve root irritation…So if they're considering having an MRI to evaluate her lower extremity symptoms, that would be to determine further evaluation, which would be to think about things like injections and surgery.

19. Dr. Reiss compared the x-rays of Claimant's January 29, 2020 lumbar spine to those from Health Images on February 5, 2020. He explained that the imaging studies were very similar. Dr. Reiss specifically commented "[w]ell, taking into account these imaging studies were performed at different institutions, they were virtually the same. No new findings on these imaging studies." Dr. Reiss confirmed that "[m]ore likely than not the slip and fall caused a minor temporary aggravation of her preexisting condition that probably settled back to baseline within a couple of months without residual secondary to the affects of the work injury." He explained that his opinion was based upon all available information including the imaging studies completed immediately before and after the work incident.

20. In specifically addressing a worsening of condition, Dr. Reiss explained that the work injury did not alter or accelerate Claimant's condition. Any future worsening of her condition was thus related to her pre-existing symptoms and not her slip and fall at work. Claimant's worsening constituted a natural progression or advancement of her pre-existing condition. Notably, Dr. Reiss specified that Claimant "was complaining of significant symptoms to me that she said hadn't changed since MMI at the time that I saw her." Even if Claimant's lumbar spine condition had changed

since MMI, any worsening was the result of the natural progression of her pre-existing condition.

21. Claimant has failed to demonstrate it is more probably true than not that she should be permitted to reopen her February 4, 2020 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, Claimant has not proven that the L4-5 decompression and fusion with MIDLF surgery requested by Dr. Ghiselli is causally related to her admitted work accident of February 4, 2020. Despite Dr. Ghiselli's opinion that the recommended lumbar spine surgery is necessary, the record reveals that Claimant's present condition is not causally related to the temporary aggravation of her pre-existing lumbar spine condition sustained on February 4, 2020. Dr. Reiss persuasively explained that Claimant's present lumbar spine condition is most likely the result of the natural progression of her pre-existing condition. In specifically addressing a worsening of condition, Dr. Reiss explained that the work injury did not alter or accelerate Claimant's condition. Although Dr. Reiss agreed with Dr. Ghiselli's opinion that Claimant may require lumbar spine surgery, he reasoned that the need for surgery was not causally related to the admitted work injury. Rather, Claimant's present symptoms constitute a natural progression of her underlying and pre-existing degenerative lumbar spine condition. In the absence of Claimant's pre-existing condition, she would not require the recommended surgery. Therefore, any worsening of Claimant's condition cannot be causally related to Claimant's work injury.

22. Because Claimant has failed to demonstrate a change or worsening of her lumbar spine condition as a result of her industrial injury, she has not provided a basis to reopen her Workers' Compensation claim. Claimant filed her Application for Hearing dated September 26, 2023 in which she endorsed the issue of Petition to Reopen predicated on "worsening of condition" and supported by Dr. Ghiselli's medical report recommending lower back surgery. However, Dr. Ghiselli's records do not reflect any change in Claimant's condition after she reached MMI. Moreover, there is a lack of a causal relationship between the work injury and Dr. Ghiselli's recommended medical treatment. Furthermore, Dr. Olsen did not document a change or worsening of Claimant's condition. He referred Claimant to Dr. Ghiselli for a surgical consultation only after Respondents denied his recommendations for injections and Claimant expressed her frustration. Notably, Claimant's symptoms have remained stable since she reached MMI. Claimant reported similar pain levels to her medical providers when she reached MMI, after MMI and when she underwent an IME with Dr. Reiss. Importantly, Dr. Reiss commented that Claimant advised him that her symptoms had not changed since she reached MMI. Finally, to the extent Claimant's symptoms have worsened since she reached MMI, the changes are attributable to the natural progression of her pre-existing condition.

23. Based on the medical records and persuasive opinion of Dr. Reiss, Claimant has not suffered a worsening of condition since reaching MMI on February 24, 2021. Claimant's degenerative lumbar spine condition preceded her industrial injury. Her work accident did not alter or accelerate the degenerative process. Claimant's symptoms returned to baseline when she reached MMI. The proposed lumbar spine

surgery is intended to address the natural progression of Claimant's pre-existing condition. Any changes in Claimant's symptoms are not related to the work incident of February 4, 2020. Accordingly, Claimant's request to reopen her Workers' Compensation claim based on a change in condition is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. At any time within six years of the date of injury, an ALJ may reopen an award on the grounds of fraud, overpayment, error or mistake, or change in condition. §8-43-303(1) C.R.S. In seeking to reopen a claim based on a change in condition, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Off.,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Off.,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained his burden of

proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she should be permitted to reopen her February 4, 2020 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, Claimant has not proven that the L4-5 decompression and fusion with MIDLF surgery requested by Dr. Ghiselli is causally related to her admitted work accident of February 4, 2020. Despite Dr. Ghiselli's opinion that the recommended lumbar spine surgery is necessary, the record reveals that Claimant's present condition is not causally related to the temporary aggravation of her pre-existing lumbar spine condition sustained on February 4, 2020. Dr. Reiss persuasively explained that Claimant's present lumbar spine condition is most likely the result of the natural progression of her pre-existing condition. In specifically addressing a worsening of condition, Dr. Reiss explained that the work injury did not alter or accelerate Claimant's condition. Although Dr. Reiss agreed with Dr. Ghiselli's opinion that Claimant may require lumbar spine surgery, he reasoned that the need for surgery was not causally related to the admitted work injury. Rather, Claimant's present symptoms constitute a natural progression of her underlying and pre-existing degenerative lumbar spine condition. In the absence of Claimant's pre-existing condition, she would not require the recommended surgery. Therefore, any worsening of Claimant's condition cannot be causally related to Claimant's work injury.

6. As found, because Claimant has failed to demonstrate a change or worsening of her lumbar spine condition as a result of her industrial injury, she has not provided a basis to reopen her Workers' Compensation claim. Claimant filed her Application for Hearing dated September 26, 2023 in which she endorsed the issue of Petition to Reopen predicated on "worsening of condition" and supported by Dr. Ghiselli's medical report recommending lower back surgery. However, Dr. Ghiselli's records do not reflect any change in Claimant's condition after she reached MMI. Moreover, there is a lack of a causal relationship between the work injury and Dr. Ghiselli's recommended medical treatment. Furthermore, Dr. Olsen did not document a change or worsening of Claimant's condition. He referred Claimant to Dr. Ghiselli for a surgical consultation only after Respondents denied his recommendations for injections and Claimant expressed her frustration. Notably, Claimant's symptoms have remained stable since she reached MMI. Claimant reported similar pain levels to her medical providers when she reached MMI, after MMI and when she underwent an IME with Dr. Reiss. Importantly, Dr. Reiss commented that Claimant advised him that her symptoms had not changed since she reached MMI. Finally, to the extent Claimant's symptoms have worsened since she reached MMI, the changes are attributable to the natural progression of her pre-existing condition.

7. As found, based on the medical records and persuasive opinion of Dr. Reiss, Claimant has not suffered a worsening of condition since reaching MMI on February 24, 2021. Claimant's degenerative lumbar spine condition preceded her industrial injury. Her work accident did not alter or accelerate the degenerative process.

Claimant's symptoms returned to baseline when she reached MMI. The proposed lumbar spine surgery is intended to address the natural progression of Claimant's pre-existing condition. Any changes in Claimant's symptoms are not related to the work incident of February 4, 2020. Accordingly, Claimant's request to reopen her Workers' Compensation claim based on a change in condition 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 to reopen her Workers' Compensation claim based on a change in condition is denied and dismissed.

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

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

DATED: January 25, 2024.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

- Did Claimant prove she suffered a compensable injury on April 10, 2023?
- If Claimant proved a compensable injury, did Claimant prove entitlement to treatment from authorized providers reasonably needed to cure and relieve the effects of an injury, including the May 31, 2023 appointment with Dr. Bradley?

FINDINGS OF FACT

1. Claimant worked for Employer as a "stower," which involved removing consumer products from a bin sent to her station and placing them into a robot. The items typically weighed 5 to 10 pounds or less.

2. On April 10, 2023, Claimant was re-assigned for one day to the "stow case" station. This position entailed removing heavier boxes from pallets. Claimant alleges she injured her right shoulder and neck while moving one or more boxes weighing approximately 40 pounds.

3. The record contains multiple conflicting accounts of Claimant's alleged mechanism of injury. At hearing, Claimant testified she felt a pull in her right shoulder when she moved the first box of the day, which she estimated weighed approximately 45 pounds. She took a few steps and placed the box on a waist-high shelf. Claimant testified she did this two or three times and then reported shoulder pain to her supervisor. She testified she went to the on-site wellness center, where she was given an ice pack and a small tennis ball to massage and exercise the shoulder area. Claimant was sent back to work but left early because of shoulder pain.

4. Claimant testified she awoke the following day with increased shoulder pain and called off work. She returned to her regular "stowing" job on April 12, 2023.

5. Claimant testified she went to the wellness center several times after the alleged injury. However, no corresponding records were provided.

6. The medical records in evidence are not consistent with Claimant's testimony. For example, the initial report from Dr. Heather West at Matthews Vu Urgent Care, dated May 8, 2023, describes the history of illness as, "Right sided neck pain radiates down right arm x1 month. States fingers on right hand feel numb and cold. **No known injury**." (Emphasis added). Claimant's neck was nontender, but she had decreased ROM turning her head to the right and left. Grip strength was reduced and there was decreased sensation in the C5-C7 dermatomes. Dr. West suspected cervical radiculopathy and recommended electrodiagnostic testing. Dr. West stated, "This should be a workman's comp case. Pt needs to talk to her HR about it." The basis for this statement is unclear, because the report documents no connection to Claimant's work.

7. Claimant followed up with her PCP, Holly Downing, NP on May 12, 2023. She reported the pain was "mostly" on the right side, but "sometimes" affected the left. She stated, "symptoms started about a month ago, suspected due to working at [Redacted, hereinafter AN]—grabbing customer items and packing into slots. Some items are heavy up to 40 pounds." The report makes no mention of moving boxes. Cervical ROM was full but caused pain in the right side. Motor strength was decreased in both arms. X-rays showed moderate degenerative disc disease at C5-6 and C6-7, but no acute pathology. Ms. Downing gave Claimant a work excuse and referred her for a neurological evaluation.

8. Claimant was referred to Employer's authorized provider, Dr. J. Douglas Bradley. Her initial evaluation with Dr. Bradley took place on May 22, 2022. The history documented by Dr. Bradley is dramatically different than Claimant's testimony. Claimant reported a "gradual" onset of pain "over time and while lifting weight." Claimant further stated, "she was taking heavy (up to 45 lbs.) boxes off the shelf, putting them on the ground, opening them and pulling the items out of the boxes and put them in stow. That day she did not really notice any particular problems. However, the next day she was quite stiff in her left neck that traveled to her left shoulder (trapezius). The pain radiated down her left lateral arm to dorsal forearm and then left hand. Her left middle and ring fingers were aching, numb, burning with pins-and-needles. She tried to work through this but ultimately [ ] went to her primary care physician." (Emphasis added). Claimant completed a pain diagram indicating pain in the left upper shoulder, the left lateral neck, the posterior neck, across both shoulders, and radiating down to both arms and hands. Dr. Bradley diagnosed a cervical strain, a right shoulder strain and upper extremity radiculopathy. Relying on Claimant's description of her activities and the onset of symptoms, Dr. Bradley opined Claimant suffered a work-related injury. He recommended PT, prescribed NSAIDs and a muscle relaxer, and imposed work restrictions of no lifting more than five pounds.

9. Claimant started PT on May 24, 2022. The initial report contains yet another inconsistent history of injury: "Patient reports that after lifting heavy boxes, the next day felt R shoulder aching. This has progressed to neck pain, radiating arm pain . . . . Was initially not aware that this was a workers comp issue."

10. A cervical MRI on June 1, 2023 showed multilevel spondylosis with some flattening of the anterior spinal cord, most severe at C5-6 and C6-7, facet joint arthropathy, and left foraminal stenosis at C4-5.

11. Dr. Carlos Cebrian performed an IME for Respondents on August 31, 2023. The history Dr. Cebrian obtained is the closest to what Claimant described in her testimony. Claimant told Dr. Cebrian she moved only two 40-pound boxes on April 10, 2022, near the beginning of her shift. She said she felt a pulling sensation in the right shoulder, right neck, and left arm when she moved the first box. Claimant specifically denied injuring herself from "repetitive activity" and attributed the injury to "the specific lifting of the first box." Claimant stated she reported the symptoms to her supervisor, and thereafter did not return to the "stow case" activity. Dr. Cebrian noted the history Claimant described was different than documented in the records of other providers. Dr. Cebrian

opined that Claimant suffered no work-related injury. He opined her neck pain and radicular symptoms are related to the degenerative changes shown on MRI, which were neither caused nor aggravated by her work. He did not believe the minor incident Claimant described of moving a box a few feet at waist-level was sufficient to cause an acute injury to Claimant's neck to account for her reported symptoms.

12. Claimant saw Dr. Rook for an IME at her counsel's request on October 2, 2023. In contrast to what she told Dr. Cebrian, Claimant told Dr. Rook the injury occurred after working in the stow case position for several hours. Claimant said she first noted aching in her right shoulder region "as the shift progressed." Later in the shift, she described an episode of acute pain while lifting a 45-pound box. Dr. Rook diagnosed cervical myofascial pain syndrome and aggravation of cervical degenerative disc disease, myogenic thoracic outlet syndrome, and probable C7 radiculopathy. He opined these diagnoses were causally related to Claimant's work activity on April 10, 2023. Dr. Rook emphasized the lack of evidence suggesting any pre-injury shoulder or neck issues and Claimant's subjective history of developing acute pain while lifting a 45-pound box. He was under the impression that Claimant continued lifting heavy boxes for the remainder of her shift and opined the "repeated lifting beyond what she was accustomed to had the effect of repeatedly straining the already injured muscles in her neck, upper back, and shoulder." As a result, Dr. Rook opined Claimant suffered an acute cervical strain superimposed on an occupational disease from repetitive heavy lifting.

13. At hearing, Dr. Rook conceded that Claimant gave him a different history at the IME than she described at hearing or to other providers, including Dr. Cebrian. Dr. Rook expressed puzzlement about the discrepant histories because he had specifically discussed work activities with Claimant in some detail. Nevertheless, he maintained his opinion that Claimant suffered an acute cervical strain. He further opined that muscle spasms associated with the now-chronic strain are probably causing Claimant's upper extremity symptoms.

14. In his testimony, Dr. Cebrian opined that Claimant suffers from multilevel degenerative disc disease with multilevel spinal stenosis. These conditions were neither caused nor aggravated by her work. Dr. Cebrian cited the progression of Claimant's symptoms to include the left side as additional evidence of a noninjury-related condition. Dr. Cebrian disagreed with Dr. Rook that muscle spasm would be severe enough to cause radiculopathy, and the much more likely explanation is simply the natural progression of the pre-existing multilevel degenerative changes.

15. Claimant's testimony regarding the onset and progression of symptoms is not credible.

16. Dr. Cebrian's causation opinions and conclusions are credible and more persuasive than the contrary opinions offered by Dr. Rook.

17. Claimant failed to prove she suffered a compensable injury on April 10, 2023.

CONCLUSIONS OF LAW

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

A pre-existing condition does not disqualify a claim for compensation where the industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the mere fact that an employee experiences symptoms while working does not compel an inference the work caused an injury or aggravated a pre-existing condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). The claimant must prove by a preponderance of the evidence that their work proximately caused the need for treatment.

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 they were injured. *Washburn v. City Market*, W.C. No. 5-109-470 (June 3, 2020). A referral to a medical provider may be made so that the respondent does not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id*. Although a physician provides diagnostic evaluations, treatment, and work restrictions based on a claimant's reported symptoms, it does not necessarily follow that the claimant sustained a compensable injury. *Fay v. East Penn Manufacturing Co., Inc*., W.C. No. 5-108-430-001 (April 24, 2020).

As found, Claimant failed to prove she suffered a compensable injury on April 10, 2023. Claimant's testimony is not credible. Although Claimant reported neck and upper extremity pain beginning around April 10, 2023, her description of the alleged injury changed multiple times, with no consistency regarding the actual job duties she allegedly performed on the date of injury or the progression of symptoms. Claimant gave different accounts to multiple providers, including her own IME. Such discrepancies show Claimant is an unreliable historian and prevent a "probable" determination of causation based on her testimony or documented statements. Dr. Cebrian's analysis and conclusions are credible and more persuasive than any contrary opinions in the record. As Dr. Cebrian explained, the relatively innocuous incident Claimant described at hearing, even if it occurred, would not reasonably account for prolonged and progressive symptoms affecting her neck and bilateral upper extremities. There is no persuasive injury-related explanation for the dramatic progression of Claimant's symptoms in the months after the alleged accident. Instead, Claimant's symptoms and any need for treatment reflect the natural progression of her underlying, pre-existing degenerative disc disease, without substantial contribution from her work.

ORDER

It is therefore ordered that:

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

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

DATED: January 26, 2024

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 NOS. 5-194-483-002 and 5-203-582-002

ISSUES

1. Did Claimant suffer a compensable injury on August 24, 2021?

2. Did Claimant suffer a compensable injury on September 8, 2021?

FINDINGS OF FACT

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

1. Claimant is a 67 year-old male who has worked for Employer since 1982. He has worked in the Road and Bridge Department, and is the Team Leader for the Loveland District. Claimant's responsibilities include operating heavy machinery, maintaining the roads, removing snow, and making sure the roadsides are cleaned of debris. (Tr. 14:18-15:25). His regular summer work schedule is four, 10-hour days, Monday through Thursday. (*Id.* at 87:5-8).

2. Claimant injured his back at work on November 16, 1998, and he underwent a right L4-5 lumbar laminectomy and discectomy in January 2001. He was placed at MMI on September 23, 2004 with a 16% whole person impairment rating. In 2004, he returned to work with permanent work restrictions and ongoing maintenance care. (Ex. WW).

3. Claimant continued treating his low back over the following years for maintenance care and various flare-ups. Claimant testified that he would see his authorized treating physician (ATP) at Concentra about every month and then about every six months for routine blood work due to the prescribed medications. Additionally, he continued his home exercise program. (Tr. 17:8-18). Claimant testified he was never pain free. (*Id*. at. 21:2-14).

4. In 2004, Claimant saw surgeon Hans Coester, M.D., and reported persistent back pain and intermittent right leg pain. Claimant had an MRI that showed a disc protrusion at L3-4, post-operative changes at L4-5, and degenerative disc disease at L5-S1. Conservative care was recommended. (Ex. B).

5. In November 2019, Claimant reported to Urgent Care following a work incident where his foot slipped off a piece of machinery, and he felt a jarring sensation in his back. He reported pain in his right lower back with radiation into the upper portion of his thigh and groin. Claimant told the provider that he would occasionally tweak his back and have flare-ups of pain, usually with radiation into the right lower leg. (Ex. E).

6. On August 29, 2020, Claimant sought treatment with his family medical clinic, and reported acute right-sided low back pain with tingling and numbness in both feet and great toes. Claimant attributed his symptoms to shoveling that morning. (Ex. F). Two weeks

later, he confirmed similar symptoms, as well as episodes of back spasms, to his ATP, Jeffery Baker, M.D., of Concentra. Dr. Baker recommended an MRI. (Ex. G).

7. A January 14, 2021 MRI, showed multilevel degenerative changes with mild canal stenosis and mild left foraminal stenosis at L2-3; mild-moderate canal stenosis at L3-4; and postoperative changes on the right at L4-5. The radiologist also reported severe right lateral recess and foraminal narrowing, with mild effect upon the exiting right L4 nerve root. There was also mild left and moderate right foraminal stenosis at L5-S1, with subtle effect upon the exiting nerve root, particularly on the left. (Ex. H). On January 28, 2021, Claimant told Dr. Baker his condition was improving, but he was still experiencing numbness into his great toes. (Ex. I).

8. Dr. Baker referred Claimant to physiatrist Greg Reichhardt, M.D., who first saw Claimant on March 1, 2021. Claimant reported a recent increase in pain, to the point that minor things would cause flare-ups. He described intermittent pain down the right anterior thigh, as well as numbness into both great toes. Dr. Reichhardt suspected involvement of the L4 and L5 nerve roots based on Claimant's presentation, with more predominant symptoms at L5. (Ex. J).

9. On July 23, 2021, Claimant saw his family provider, Zachary Devilbiss, D.O., for chronic low back and right lower extremity pain. The pain would occur without any specific triggers. He complained of one month of intermittent right lower extremity pain, with sharp, shooting pain in the right shin. The pain was described as being "different" than before. (Ex. L).

10. On August 4, 2021, Claimant saw Dr. Reichhardt. He reported being about 25% worse than when he last saw him in May 2021. He complained of "significant right leg pain," extending down his anterior thigh and lower leg into the first and second toes of the right foot. Dr. Reichhardt noted Claimant was experiencing "more significant radicular involvement" than he had previously. (Ex. N.) Dr. Reichhardt testified that Claimant's symptoms on August 4, 2021, raised questions about an L4 or an L5 radiculopathy. (Dep. Tr. 7:1-9).

11. Claimant testified that three weeks later, on August 24, 2021, he was scheduled to do road blading at County Road 62. His supervisor, [Redacted, hereinafter JK], told him there was a report of trash along County Line Road between Vine and Highway 14, which was on the way to the scheduled job. Claimant and his crew stopped on the way, to pick up the trash, even though it was not a scheduled job. Claimant explained that there were so many bags of trash that they completely filled the truck, and the bags had to be strapped down to keep them in the truck. Claimant testified the bags were full of landscaping material (mulch), each weighing about 25-30 pounds. Claimant testified that his "back went out" when throwing a particularly heavy bag in the back of the truck. (Tr. 21:15-22:12).

12. There is no objective evidence in the record that Claimant notified Employer of the alleged injury to his back from throwing a trash bag into the truck on August 24, 2021.

13. [Redacted, hereinafter JH], the Assistant Road and Bridge Director for Employer, testified that it was not unusual, from time to time, for a crew to be dispatched to pick up trash alongside the road. (Tr. 82:5-7). JH[Redacted] testified that such activity should have been coded. (*Id*. 77:21-25). The August 24, 2021 Activity Log for Claimant's crew, does not document any time put toward loading a truck full of trash bags. (Ex. TT). As JH[Redacted] testified, if the activity requires a trip to a facility for dumping, as this incident would, it was required to be coded on the log. (Tr. 77:21-25). By Claimant's own testimony, this would have been a minor trash pickup.

14. Claimant testified that following the August 24, 2021 trash incident, he experienced low back pain that went into his right hip and thigh. Claimant testified the pain that he experienced following this incident was more severe than the pain he experienced at any point in the past years, yet he did not report the incident to Employer. Claimant testified that he thought he could handle this incident like all the setbacks of the past several years. Claimant testified that the pain from the August 24, 2021 incident, eventually lessened. (Tr. 23:8-23 and 25:4-8).

15. Claimant testified that two weeks later, on Wednesday, September 8, 2021, he was working at County Road 56 where road blading was being done. Claimant was working with a co-worker, [Redacted, hereinafter RW], rolling up a large hose to get it on the pump. Claimant thought RW[Redacted] was going to get hit by the coiling hose, so Claimant grabbed the hose, and ended up twisting his back. Claimant testified that the hose incident happened at the end of the day on September 8, 2021. (Tr. 24:10-25:3). Claimant's 10-hour shift on September 8, 2021, ended at 5:30 p.m. (Ex. TT).

16. Claimant testified he experienced immediate pain in his low back as well as pain, tingling and numbness in his groin. He further testified that he also experienced right hip and leg pain and numbness down his leg. (Tr. 40:24-41:13). Claimant testified that he did not have all these symptoms prior to September 8, 2021, and he believes the September 8, 2021 hosed incident, is the reason for his current symptoms. (*Id.* 27:20-22). He testified that his back had improved from the August 24, 2021 trash incident. (*Id.* 25:4-8). Claimant testified that he reported the incident to his supervisor, JK[Redacted], "at that point in time," but Claimant thought he could work out the pain, so he did not fill out a formal report. (*Id.* 25:9-23).

17. The morning[1] of September 9, 2021, Claimant had a scheduled appointment with Dr. Baker at Concentra. This was less than 24 hours after the hose incident. Dr. Baker noted under "Chief Complaint" that Claimant was there for a recheck of his lower back. He further documented "[p]atient states he has been having constant tingling in his foot and states lower back pain increased about 2 weeks ago." Under "History of Present Illness," and with respect to Claimant's back pain, Dr. Baker wrote, "pain is now worse after picking up garbage 2 weeks ago. He is now having pain down the right leg and some in the scrotum." Dr. Baker noted that Claimant's symptoms were worsening. The pain in Claimant's lower back was greater on the right side, radiated to his thighs, right

[1] According to the medical record, Claimant's vitals were recorded at 10:33 a.m. (Ex. O).

calf and great toes. Dr. Baker completed a physical examination and ordered an MRI of the lumbar spine for new/worsening symptoms. Dr. Baker noted that he would close the case again,[2] and Claimant was to follow up with Dr. Reichhardt. (Exs. O and 37).

18. Dr. Baker called Dr. Reichhardt on September 9, 2021, after seeing Claimant, and they spoke for over 10 minutes. According to Dr. Reichhardt's records, Dr. Baker told him that Claimant reported lifting a light bag of garbage four weeks ago, and had an increase in back and leg pain, along with tingling in the groin. Dr. Baker wanted to order an MRI, and Dr. Reichhardt agreed with this plan, particularly given Claimant's groin numbness. Dr. Reichhardt noted, "if he has a disc herniation at a level other than the L4-5 level, I would raise concerns about this not be [sic] related to his original work-related injury." (Ex. P).

19. Claimant never told Dr. Baker, at the September 9, 2021 appointment, that he had allegedly injured his back the previous day. Claimant testified that he wanted to tell Dr. Baker about the hose incident the day before, but Dr. Baker interrupted him and said Claimant was not supposed to be there and he was Dr. Reichhardt's patient. Claimant further testified that Dr. Baker told him he could no longer come to Concentra. (Tr. 26:23-25). The ALJ does not find Claimant's testimony credible.

20. Dr. Baker ordered an MRI for Claimant because of his concern with groin numbness. He also had a detailed conversation with Dr. Reichhardt regarding Claimant's symptoms and the alleged trash incident. It is not credible that Dr. Baker would interrupt Claimant and not allow him to tell him about his mechanism of injury, particularly in light of discussing the trash incident. Additionally, by Claimant's own testimony, his back had improved from the trash incident on August 24, 2021. It is illogical that Claimant would tell Dr. Baker about an incident he recovered from, instead of the hose incident that allegedly occurred less than 24 hours prior. Claimant's explanation for not telling Dr. Baker about the hose incident on September 9, 2021 is not credible.

21. Claimant also saw C. Dana Clark, M.D. for a scheduled visit on September 9, 2021. Claimant's chief complaint was right hip pain. He reported a three-week history of right hip pain. Claimant said nothing about the alleged hose incident the day before, or the alleged trash incident on August 24, 2021. Dr. Clark diagnosed Claimant with trochanteric bursitis of the right hip and gave him a cortisone injection. (Ex. Q).

22. According to the activity log, Claimant worked 10 hours on Monday, September 13, 2021. (Ex. TT). Towards the end of the day, Claimant filed an injury report with Employer for the alleged September 8, 2021 work injury involving the hose. (Tr. 47:5-14). According to the injury report, Claimant notified Employer of the injury on September

[2] According to the medical records in evidence, Dr. Baker "released" Claimant from care on or about, August 12, 2019, but Claimant was to return in six months for a follow-up appointment. (Ex. 40). Based on the medical records in evidence, Claimant saw Dr. Baker, after being "released" on at least four occasions (January 16, 2020, September 11, 2020, January 28, 2021, and May 14, 2021) prior to the September 9, 2021 appointment. (Exs. 38-40, G and I). In multiple records, Dr. Baker notes that Claimant's case is closed, or that he will close the case again.

13, 2021, and he received treatment at Concentra.[3] (Ex. SS). Claimant, however, testified he told his supervisor, JK[Redacted], of his alleged injury on September 8, 2013.

23. Claimant credibly testified that while at home after work on September 13, 2021, he began experiencing severe tingling in the groin area, so he went to Urgent Care. (Tr. 27:23-8). According to the Urgent Care records, Claimant's chief complaint was back pain related to the hose incident on Wednesday, September 8, 2021. Claimant reported having progressive symptoms. Over the last week he experienced low back pain, and radiation of pain into his right leg, with numbness down his right leg to his foot. That day, however, Claimant had numbness and tingling in his penis, so the doctor sent him to the Emergency Room for an MRI because of possible cauda equine syndrome. (Ex. R).

24. The MRI demonstrated multiple areas of degenerative disease with foraminal stenosis. The radiologist reported the following from his review of the September 13, 2021 MRI:

- Multilevel disc and facet degenerative changes in the lumbar spine which have progressed compared with the previous examination from 1/2/2004;
- Multilevel spinal canal narrowing is greatest at the L2-3 and L3-4 level where there is moderate spinal canal stenosis;
- Multilevel neural foraminal stenosis is greatest on the right at L4-5 and L5-S1 where there is severe neural foraminal stenosis. There is moderate to severe left neural foraminal stenosis at L4-5 and L5-S1.; and
- Severe right lateral recess stenosis along an inferiorly migrated disc extrusion at L3-4.

(Ex. T).

25. Claimant saw Dr. Reichhardt for a follow-up appointment on September 15, 2021. Dr. Reichhardt testified, via deposition, that Claimant reported having an incident at work that involved a hose that recoiled, causing him to torque his back. (Dep. Tr. 8:19-9:2). There is no objective evidence in the record that Claimant told Dr. Reichhardt about the alleged trash/mulch incident on August 24, 2021.[4] Claimant told Dr. Reichhardt that the numbness in the penile and groin region had resolved. Dr. Reichhardt reviewed the MRI and noted it did not explain Claimant's groin/penile symptoms. (*Id.* 37:7-38:14). Dr. Reichhardt found that the onset of Claimant's leg numbness was due to a new work

[3] The ALJ infers Claimant was referring to his appointment with Dr. Baker on September 9, 2021, the day after the alleged injury, because there is no objective evidence in the record that Claimant had another appointment scheduled with Concentra as of September 13, 2021.

[4] Dr. Reichhardt testified that he was unaware of the alleged August 24, 2021 work injury, until being informed of such by Claimant's attorney. (Dep. Tr. 23:24-24:8).

activity – the hose incident. He noted that Claimant's lumbar MRI demonstrated significant changes in relation to his 2004 study, 17 years prior. (Ex. U).

26. On November 12, 2021, Dr. Reichhardt performed an electrodiagnostic evaluation. The results were consistent with right L4 radiculopathy. (Ex. W). He later described this as being an acute radiculopathy. (Dep. Tr. 12:12-24).

27. Claimant saw orthopedic surgeon William Biggs, M.D. on December 9, 2021. Dr. Biggs noted the disc herniation at L3-4, which he felt was compressing the L4 nerve root. He thought the last treatment option would be a discectomy. (Ex. 36). On December 17, 2021, in a telephone conversation with Claimant and his wife, Dr. Biggs explained that the majority of Claimant's leg symptoms were coming from the large extruded fragment disc herniation at L3-4. (Ex. X).

28. On January 24, 2022, Dr. Reichhardt diagnosed Claimant with probable discogenic pain and possible L4 radicular involvement. (Ex. Y). On February 24, 2022, Dr. Reichhardt felt that Claimant's L5 symptoms were more predominant than any L3 symptoms. (Ex. 21).

29. Claimant saw Kathy McCranie, M.D. for a RIME on March 15, 2022. Dr. McCranie was asked whether the L3-4 discectomy recommended by Dr. Biggs, and the L3-4 TFESI recommended by Dr. Reichhardt were related to the 1988 work injury. Claimant told Dr. McCranie that the hose incident occurred on September 13, 2021, not September 8, 2021. Further, Claimant made no mention of injuring his back lifting mulch on August 24, 2021. Dr. McCranie concluded that Claimant's disc herniation at L3-4, was at a different level than his prior injury and was unrelated to the November 1998 injury. (Ex. AA). Dr. McCranie testified, via deposition, that the new disc herniation at the L3-4 level, happened sometime between January 2021 and September 2021. She further testified that disc herniations can occur with or without injury when somebody has longstanding degenerative disc disease. (Dep. Tr. 10:23-11:14).

30. On March 30, 2022, Claimant saw Dr. Reichhardt for a follow-up appointment. They discussed Dr. McCranie's opinion that the L3-4 TF ESI and discectomy were not related to Claimant's 1998 work-related injury, and that the September 2021 MRI was indicative of new pathology. This prompted Dr. Reichhardt to ask Claimant about the mechanism of injury in September 2021. Dr. Reichhardt noted that they had previously discussed the injury, but he had not documented anything. According to the medical record, Claimant reported "[o]n or about 9/13/21, he was rolling up a five inch diameter 40 foot long hose. He notes that as the hose is rolled up, it builds energy. It recoiled on him, torqueing him to the side as he was holding the hose." (Ex. BB). Notably, they discussed a September 13, 2021 incident, when the injury allegedly occurred on September 8, 2021. Additionally, Claimant never mentioned the alleged trash/mulch incident on August 24, 2021.

31. Less than a month later, on April 25, 2022, Claimant filed a Workers' Claim for Compensation, claiming an injury from lifting bags of mulch on August 24, 2021. (Ex. ZZ).

Notably, Claimant testified that he believes the September 8, 2021 incident is the reason for his current symptoms. (Tr. 27:20-22).

32. Claimant told both Dr. McCranie and Dr. Reichhardt that he injured himself with a hose on September 13, 2021, not September 8, 2021. Further, Claimant did not tell either Dr. McCranie or Dr. Reichhardt about the alleged trash/mulch incident on August 24, 2021.

33. Claimant saw Dr. Biggs on October 10, 2022, and explained his condition had not changed much since he last saw him in December 2021. Dr. Biggs thought that an L3-4 discectomy was becoming likely, but he wanted an updated MRI. After reviewing the October 28, 2022 MRI, Dr. Biggs noted that the L3-4 disc herniation had resolved, and he recommended additional electrodiagnostic testing. (Ex. JJ).

34. Dr. McCranie reviewed additional records, and prepared a supplemental report, dated November 4, 2022. In her supplemental report, Dr. McCranie concluded that Claimant's medical chronology included vacillating dates of injury and vacillating mechanisms of injury, making it medically improbable that an injury occurred on September 8, 2021. Dr. McCranie noted Claimant's longstanding complaints in the L5-S1 distribution, including low back pain and numbness in the bilateral feet. She opined that Claimant's back condition was more likely attributed to his longstanding, chronic degenerative disc disease, which was naturally progressing with age. (Ex. II). The ALJ finds Dr. McCranie's opinion to be credible and persuasive.

35. Dr. Reichhardt performed electrodiagnostic testing on December 19, 2022. The findings were consistent with an old/chronic right L4 radiculopathy without acute denervation. (Ex. KK). After reviewing the test results, Dr. Biggs changed his diagnosis, and began suggesting that a possible option would be decompression and fusion at L4-5 and L5-S1. (Ex. LL). Claimant asked Dr. Reichhardt for a second surgical opinion, and he referred Claimant to orthopedic surgeon, David Blatt, M.D. (Ex. NN).

36. On March 28, 2023, Dr. Blatt questioned the necessity of surgery, and referred Claimant to David Columbus, M.D. for interventional pain management and a right sacroiliac joint (SIJ) injection. (Ex. OO). On June 23, 2023, Dr. Columbus administered bilateral SIJ injections to Claimant. On July 13, 2023, Claimant reported to Dr. Reichhardt that the injections gave him 100% relief of back pain and lower extremity tingling for nine days. (Ex. 2)

37. Dr. Reichhardt testified that he felt Claimant's presentation in December 2022 was consistent with an acute radiculopathy at L4-5 occurring in the September 2021 timeframe, which was also consistent with the first EMG of November 12, 2021. (Dep. Tr. 13:4-11). The follow-up electrodiagnostic testing on December 19, 2022 was consistent with a chronic radiculopathy at L4-5. (Ex. KK). Dr. Reichhardt testified that he felt Claimant's likely primary pain generators were around the L4-5 level or the SI joint. (Dep. Tr. 46:18-23).

38. If Claimant's problem stems from the SI joint, Dr. McCranie did not believe that an injury to that area would have occurred in August or September 2021. She found no findings of SI problems in her examination, and she saw no indication of an SI problem throughout the records. She opined this was a new finding, and would not be related to the claimed work injuries. (Dep. Tr. 12:17-13:3).

39. Dr. McCranie testified that Claimant's long history of flare-ups and waxing and waning of symptoms, even with no inciting event, is fairly typical of degenerative disc disease. (Dep. Tr. 29:8-12). She further testified that changes seen on MRIs do not necessarily implicate an inciting event, but are part of the degenerative process. Claimant's October 28, 2022 MRI was a case in point. It showed a new disc protrusion at L1-2 with no report of an intervening event. As explained by Dr. McCranie, a lifting incident is not necessary to explain flare-ups or changed MRI findings, especially in an individual with a chronic longstanding degenerative back condition. (*Id.* at 30:25-31:17). The ALJ finds Dr. McCranie's opinion to be credible and persuasive.

40. Dr. Reichhardt, however, opined that the September 8, 2021 hose incident, caused Claimant to twist his back, and this is an accepted mechanism of injury to discs or other structures in the lower back. (Dep. Tr. 9:17-20:3). Dr. Reichhardt testified that it is more likely than not that an injury occurred sometime between August 4, 2021, and September 15, 2021, to explain the claimant's change in presentation, his overall pain presentation, and neurologic changes. (*Id.* 34:16-23). Dr. Reichhardt opined that based on a probability of medical evidence, Claimant sustained a worsening of his back condition, due to the September 8, 2021 hose incident. (*Id.* 20:3-6). He concluded that it is more probable than not that Claimant had an intervening injury that caused the additional pain problems. (*Id.* 49:2-21). The ALJ finds Dr. Reichhardt's opinions to be credible, but not persuasive.

41. As found, Claimant told both Dr. Reichhardt and Dr. McCranie that he was injured on September 13, 2021, not September 8, 2021. Claimant testified that he told JK[Redacted] he was injured on September 8, 2021, but the first report of injury states he first reported the injury to his Employer on September 13, 2021. When Claimant saw Dr. Baker on September 9, 2021, he did not mention the alleged hose incident the day before. Claimant also saw Dr. Dana that same day, and again did not mention the hose incident. Instead, on September 9, 2021, Claimant told Dr. Baker about the alleged trash/mulch incident on August 24, 2021, but he never told Dr. Reichhardt or Dr. McCranie about this alleged work injury.

42. Based on the totality of the evidence, the ALJ finds that Claimant has a long history of back issues, and has a longstanding degenerative back condition. Claimant has a history of back pain radiating down his leg and into his toes, and a history of flare-ups, with no triggering event. Claimant's testimony regarding the alleged work injuries on August 24, 2021 and September 9, 2021, and his reports to the medical providers, is inconsistent and not credible.

43. The ALJ finds that Claimant failed to prove by a preponderance of the evidence that he sustained an injury arising out of, or in the course and scope of, his employment on August 24, 2021 or September 8, 2021.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of, and

within the course and scope of, employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998).

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. *Boulder v. Payne*, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

Claimant alleges that he injured his back on August 24, 2021, within the course and scope of his employment, when throwing a heavy bag of mulch into the back of the truck. Claimant did not report this alleged injury to his Employer, nor did he seek medical care. Claimant alleges that he twisted his back in the course and scope of his employment on September 9, 2021, when the hose recoiled. Claimant testified that he told his supervisor, about the September 9, 2021 incident, but he did not fill out a form because he thought he would improve. Claimant had two scheduled medical appointments on September 9, 2021. Claimant saw his ATP, Dr. Baker, on September 9, 2021, but he did not mention the alleged hose incident the day before. Instead, he told Dr. Baker his lower back pain increased after picking up garbage a few weeks prior. By his own testimony, Claimant's pain from the alleged August 24, 2021 incident had lessened, by September 9, 2021. Claimant testified that Dr. Baker cut him off during the September 9, 2021 appointment, and did not allow Claimant to tell him about the hose incident. As found, this testimony is not credible. As the evidence shows, Dr. Baker ordered an MRI and contacted Dr. Reichhardt. Dr. Baker and Dr. Reichhardt had a lengthy conversation regarding Dr. Baker's concerns regarding Claimant's symptoms, particularly the tingling in his scrotum. None of this is indicative of Dr. Baker cutting off Claimant and not allowing him to tell him about the September 8, 2021, hose incident. As found, Claimant's testimony is not credible.

As found, Claimant told both Dr. Reichhardt and Dr. McCranie that he was injured on September 13, 2021, not September 8, 2021. Claimant testified that he told JK[Redacted] he was injured on September 8, 2021, but in the first report of injury, he asserts that he first reported the injury to his Employer on September 13, 2021. Claimant told Dr. Baker about the alleged trash/mulch incident on August 24, 2021, but he never told Dr. Reichhardt or Dr. McCranie about this alleged work injury. Claimant's testimony is inconsistent and not credible.

While Dr. Reichhardt and Dr. McCranie are both credible, the ALJ finds Dr. McCranie's opinion to be more persuasive. The ALJ finds that Claimant has a long history of back issues, and has a longstanding degenerative back condition. Claimant has a history of back pain radiating down his leg and into his toes. Claimant also has a history of flare-ups, with no triggering event. Claimant failed to prove by a preponderance of the

evidence that he sustained an injury arising out of or in the course of his employment on August 24, 2021 or September 8, 2021.

ORDER

It is therefore ordered that:

1. Claimant did not suffer a compensable injury on August 24, 2021, and his claim for workers' compensation benefits is denied and dismissed.

2. Claimant did not suffer a compensable injury on September 8, 2021, and his claim for workers' compensation benefits is denied.

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: January 26, 2024

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

ISSUES

I. Whether the claimant overcame the Division IME opinion of Dr. John Hughes as to MMI and impairment by clear and convincing evidence.

II. Whether the claimant is permanently and totally disabled and unable to earn any wages.

III. Whether the claimant is entitled to medical benefits beyond the general award of maintenance medical benefits admitted in the Final Admission of Liability.

FINDINGS OF FACT

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

1. The claimant sustained a compensable work injury while working as a Special Education Paraprofessional for the employer, [Redacted, hereinafter DS], on October 2, 2020, when a first-grade student ran by her and hit her on the left wrist.

2. The claimant was initially assessed at an urgent care clinic by physician assistant Derek Miller on October 3, 2020. He documented her history of a contusion to the wrist and obtained x-rays, which were negative. He diagnosed pain in the left wrist and also noted symptoms consistent with an acute stress reaction. Due to her stress reaction, he prescribed alprazolam for anxiety for a week, and referred the claimant to a counselor, Hans Sieber.

~~3.~~ On October 6, 2020, the claimant treated at Concentra with Dr. Stephan Danahey. He documented the claimant reported being under the care of Dr. Joan Shapiro for unspecified psychiatric conditions and noted that she was on clonazepam and Lamictal as of October 6, 2020. At this appointment, the claimant stated that she grew up with chronic trauma and that the incident with the student hitting her wrist triggered her trauma. Dr. Danahey diagnosed the claimant with a contusion of the left wrist along with posttraumatic stress disorder.

4. On October 9, 2020, the claimant was seen by Hans Sieber, MC, LPC. At this appointment, the claimant stated that she had been working one-to-one with a first-grade boy with developmental disabilities. And according to the claimant, the child had a history of being physically aggressive the year before while in kindergarten. Because of the incident, the claimant stated that she was overwhelmed emotionally and since the incident she was experiencing extreme anxiety, including feelings of being in danger, physical agitation, hypervigilance, recurrent thoughts, vivid memories of the event, being easily startled, and avoidance of certain situations. Mr. Sieber noted that the claimant was shaky and tearful while thinking about the incident at

school. Mr. Sieber also noted that the claimant had a history of undergoing therapy for 10 years, starting in 2001, with Leslie Jordan, Ph.D. Mr. Sieber then stated that the claimant stated that the incident at school brought up thoughts about the past and has been a trigger for traumatic memories from her childhood. Mr. Siber noted that the claimant's father was physically abusive and that the claimant has a history of PTSD. But, according to the claimant, she has gone about 5 years without PTSD symptoms. The claimant, however, stopped seeing Mr. Sieber in November 2020, because it was not a good fit.

5. Claimant, however, continued treating with Dr. Danahey who requested the claimant's prior psychiatric records from Dr. Shapiro, with whom the claimant previously treated. It is not, however, clear from the record when Dr. Shapiro provided the claimant's medical records to any of the claimant's treating providers or the parties.

6. On December 3, 2020, the claimant started treating with Dr. Adam Ovadia, a psychiatrist. He documented her past medical history of treatment under the direction of Dr. Joan Shapiro inclusive of medications over a course of ten years as outlined in his report. He noted prior psychiatric history of a hospitalization and suicide attempt. In his assessment, Dr. Ovadia concluded that claimant had a history of bipolar disorder, major depression, generalized anxiety, and that she had recently worsened anxiety in the context of a difficult experience at work. Dr. Ovadia initiated medication adjustments and recommended a course of cognitive behavioral therapy.

7. Claimant started cognitive behavioral therapy with authorized counselor Joanna Lippert on December 8, 2020. Other records from Dr. Ovadia document multiple medication adjustments during the rest of 2020 and into the year 2021 for anxiety.

8. The claimant underwent a psychiatric consultation with Dr. Gary Gutterman on March 16, 2021. Dr. Gutterman concluded the claimant had experienced an anxiety disorder as a result of being punched in her left wrist on October 2, 2020. He recommended that claimant start a trial of propranolol. Dr. Gutterman did not recommend that he follow-up with the claimant because she was already in treatment with two psychiatrists and a social worker.

9. On March 31, 2021, the claimant returned to Dr. Ovadia, who commented on how the claimant had been diagnosed in the past with bipolar disorder, major depression and general anxiety. Claimant reported fatigue, difficulty sleeping and concentrating due to anxiety surrounding the student who hit her. The treatment plan was to advance clonazepam taper, continue lamotrigine, trazodone, escitalopram, and follow-up. The claimant agreed with the taper.

10. On April 6, 2021, the claimant returned to Ms. Lippert, LCSW. The claimant reported decreased anxiety symptoms but reported depressive symptoms. The focus of the session was the claimant expressing uncertainty about returning to a public-school setting because of the trauma and "not feeling safe." Claimant expressed a great deal of anxiety about working in a public setting with strangers and seemed to prefer a more regular setting with familiar coworkers. The treatment plan was to continue therapy.

11. Dr. Allison Fall completed a physical medicine specialty consultation and left upper extremity electrodiagnostics on April 12, 2021. She noted normal physical examination findings and an unremarkable upper extremity EMG.

12. The claimant underwent a hand surgical evaluation with Dr. Craig Davis who reviewed an MRI scan of the left wrist. The MRI noted findings of a cyst and he concluded that it did not correlate with her symptoms. Dr. Davis recommended a trial of acupuncture.

13. On April 27, 2021, the claimant returned to Dr. Davis. At this visit, she reported pain from her elbow all the way to her fingertips in a diffuse distribution. The pain was not well localized, but it could variable depending on activities. She reported numbness on the palmar side of her entire hand involving all of her fingers. She had tried using a brace, but it made her symptoms worse. Dr. Davis noted how her nerve study came back normal. His impression was diffuse myofascial pain of the left arm from the elbow to the hand. The pisotriquetral cyst noted on the MRI did not correlate with her symptoms. At this point, Dr. Davis felt there was not much more he could do other than release her from care. A handful of acupuncture visits were prescribed.

14. Ms. Lippert continued to follow claimant and in her note of May 4, 2021, she did not document the claimant's report of any type of intervening injury. Similarly, Dr. Ovadia evaluated the claimant on June 23, 2021, and as stated in Dr, Kleinman's report, it does not appear that there is any record of any intervening events other than medication adjustments that had been done over the preceding interval of time.

15. On June 10, 2021, the claimant returned to Dr. Danahey. She reported that her wrist was 50% better, but still had significant anxiety with a startle response at home to loud noises.

16. The claimant treated with a personal neurologist nurse practitioner Megan Murgel beginning on June 24, 2021. She documented the claimant's history at the hospital for a follow-up evaluation for concussion in the setting of a prior concussion in 2019. Ms. Murgel documented the claimant's report of sustaining a head injury on April 29, 2021, where she hit her head on a tree branch and was thrown to the ground without a loss of consciousness. The claimant was evaluated at the Rose Hospital Emergency Department where she had an emergency medical evaluation and MRI of the brain.

17. Ms. Murgel treated claimant on August 4, 2021, documenting ongoing daily headaches, cognitive changes, and noted claimant had a great deal of cognitive difficulty that she attributed to post-concussive syndrome. She recommended that the claimant proceed with a neuropsychological evaluation.

18. Claimant's personal neuropsychologist, Dr. Tina Rose conducted a neuropsychological evaluation on September 21, 2021, in response to the concussion injuries. Dr. Rose did not review all of the medical records related to this claim when issuing her opinions. She merely noted reviewing the records from Denver Internal Medicine, Psychiatry, and Neurology, progress notes from May 11, 2021, to July 19, 2021, and the progress notes from Blue Sky Neurology. As a result, she appears to have based her opinions primarily on the claimant's self-reported history and symptoms, and the assessments that were performed, which appear to be self-report

assessments. As set forth in the report, the claimant presented histories of trauma including a "student punching her" in October 2020 as well as her son almost dying from cancer and losing a limb. Dr. Rose concluded that the claimant has sustained a major neurocognitive disorder due to traumatic brain injury, generalized anxiety, and PTSD. That said, because of the limited nature of the records reviewed by Dr. Rose, and that a lot of her findings appear to be based on the self-reporting of the claimant, the ALJ does not find her report to be persuasive as to the extent of any work-related conditions or the claimant's work restrictions.

19. Claimant treated at Blue Sky Neurology Clinic on November 15, 2021. It was noted that the claimant sustained an additional closed head injury while hiking - slipping and hitting her head on a tree on May 30, 2021. It was noted that the claimant sustained a similar injury in the bathroom two weeks previously. On examination, the provider documented the claimant had manifested right sided facial twitching involving the right mouth and with both eyes having conjugate vision.

20. Respondent retained psychiatrist Dr. Robert Kleinman to perform an IME on December 2, 2021. Dr. Kleinman was asked to address the claimant's current psychological diagnoses and which, if any, are related to her work accident. He was also asked to address any permanent impairment due to the work accident. He said that the claimant's diagnoses included "psychological factors affecting medical condition, other specified trauma and stress-related disorder, chronic and related to childhood abuse, and unspecified mood disorder, preexisting." He also stated that the claimant's "psychological factors affecting medical condition" diagnosis relates to the claimant's "preexisting and persistent depression and anxiety, as well as other specified trauma and stress-related disorder, chronic and related to childhood abuse, is responsible for the lingering physical complaints that are without an objective basis." Dr. Kleinman also concluded that the claimant had preexisting psychiatric conditions that were "temporarily exacerbated" by her work injury and that there is no indication that she has a permanent aggravation of any preexisting condition. Based on the ALJ's interpretation of his report, the ALJ finds that Dr. Kleinman concluded that none of the claimant's current psychiatric diagnoses relate to her work injury and the ALJ finds such opinion to be persuasive.

21. Dr. Kleinman was also asked to address whether the claimant suffered any permanent medical impairment due to the work injury. However, despite finding that she does not have a work-related psychiatric diagnosis, he then provided a rating for permanent mental impairment. Dr. Kleinman stated that the claimant would have a mental health impairment rating for "sleep disorder, sexual relations, recreational activities, and adaption to stress." He concluded that the claimant has a 4% impairment rating related to her industrial accident. Based on the lack of a permanent work-related diagnosis, the ALJ does not find Dr. Kleinman's conclusion that the claimant suffered permanent psychiatric impairment to be persuasive.

22. Dr. Kleinman was also asked to address the claimant's work restrictions. Dr. Kleinman concluded that the claimant does not have any mental health restrictions or limitations due to her work injury. He concluded that any limitations are basically self-imposed and that any anxiety she feels regarding working should be dealt with by being exposed to working environments. Based on his finding that the claimant does not

have a current permanent work-related diagnosis, the ALJ does find persuasive his conclusion that the claimant does not have any mental health work restrictions or limitations due to her work accident.

23. On January 24, 2022, Dr. Danahey placed the claimant at maximum medical improvement. He noted normal physical examination findings and that the claimant did not have any left wrist complaints. The claimant reported continued anxiety with poor sleep. Dr. Danahey noted in this report that claimant sustained two subsequent non-work-related concussive injuries, was diagnosed with a traumatic brain injury, underwent a neuropsychological evaluation based on these injuries, was hospitalized, underwent home and speech therapy, but yet the claimant failed to timely disclose these subsequent injuries and treatment. Dr. Danahey noted that he would refer the claimant for a neuropsychological evaluation but the claimant had already had one completed with Dr. Rose based on these subsequent non-work related injuries.

24. Dr. Danahey also assessed the claimant for an impairment rating. Like Dr. Kleinman, the basis and methodology of his calculation of the claimant's mental impairment rating is unclear. For example, in his January 24, 2022, report, he assessed the claimant with anxiety and PTSD. He did not, however, explain in sufficient detail how those conditions were caused by her work injury. Nor did he demonstrate that any work-related psychological diagnosis met all of the specific criteria for a Diagnostic and Statistical Manual (DSM) diagnosis, as is required by the Colorado Division of Workers' Compensation Permanent Work-Related Mental Impairment Rating Report Worksheet (Worksheet). Then, on the Worksheet, he listed the claimant's DSM diagnosis as a "mood disorder." Again, there is insufficient evidence to establish that he concluded the claimant's mood disorder met all of the criteria in the DSM. Thereafter, without setting forth how he concluded that the claimant has a "mood disorder" as defined by the DSM, and that the mood disorder was caused by the work injury, he proceeded to provide the claimant a 6% mental impairment rating, and then apportioned out 2%. Thus, he provided the claimant a 4% mental impairment rating for a mood disorder - which he did not demonstrate was supported by the DSM. As a result, the ALJ does not find his provision of an impairment rating to be persuasive evidence as to whether the claimant suffered a permanent mental impairment due to her work injury.

25. On July 7, 2022, the claimant underwent a Division Independent Medical Exam (DIME) with Dr. John Hughes. Dr. Hughes reviewed various medical records, obtained a history from the claimant, performed a physical examination, and also performed a mental status examination. Despite the brevity of his report, Dr. Hughes' did a very good job of culling out the pertinent information contained in the claimant's medical records. His report also demonstrates that he provided the claimant with an opportunity to provide the history of her injury as well as her symptoms. Based on the history he obtained from the claimant, Dr. Hughes noted that the claimant had a lot of frustration and anger towards her employer.

26. After reviewing her medical records, obtaining a history, and performing an examination, Dr. Hughes placed Claimant at Maximum Medical Improvement (MMI) as of January 24, 2022, and assigned a 0% whole person impairment.

27. Dr. Hughes wrote of Claimant's mental health symptoms, "[w]hile it is clear that [Redacted, hereinafter DY] sustained increasing degrees of anxiety subsequent to October 2, 2020, it is equally clear that the inciting event "assault by a child" with a documented blow to the left wrist is insufficient to cause post-traumatic stress disorder." He then wrote, "In summary regarding psychological permanent impairment, I am unable to provide an impairment rating for a psychiatric condition stemming from the child assault event of October 2, 2020." The ALJ finds Dr. Hughes' opinions to be credible and highly persuasive as to the date of MMI and the lack of any permanent mental impairment due to the work accident.

28. Claimant submitted the January 31, 2023, letter from Brandy Frazao at Centura. The document contains a statement that the claimant could not work at that time and may not ever be able to work. The document, however, does not provide the qualifications of Ms. Frazao or the underlying information she used to reach her conclusions. The ALJ therefore does not find her conclusory statements or conclusions to be persuasive regarding the claimant's ability to work.

29. Respondent retained Donna Ferris, MA, as their vocational expert and she authored a vocational report regarding her observations and opinions of Claimant's ability to work on December 22, 2022.

30. The claimant reported to Ms. Ferris that she was not working because Respondent-Employer could not accommodate her restrictions. Of note, the claimant has no permanent restrictions from her work injury assigned by any of her workers' compensation treating physicians. Claimant reported that she was still suffering from some left wrist symptoms and mental illness. She stated to Ms. Ferris that she does not have many left wrist pain symptoms at this point, aside from when they are exacerbated by her anxiety and PTSD. Ms. Ferris' report indicated that the claimant reported that she "has pain [in her left wrist and hand] when she is anxious and rare, sharp pain [in her left wrist and hand] when she is 'super anxious.' She reported she does not have any other physical symptoms related to her injury."

31. Ms. Ferris noted in her report that the claimant said that her anxiety symptoms affect her memory and ability to concentrate. It is also noted in her report that the claimant was seeing a mental health counselor, Nancy Sherrod, and a psychiatric physician's assistant once every three weeks who prescribes her medication. The claimant further indicated that she is not currently receiving any treatment for her left wrist pain or symptoms.

32. Ms. Ferris concluded in her report:

> As DY[Redacted] has been placed at maximum medical improvement without restrictions for the physical and psychiatric conditions by each of the treating and evaluating physicians responsible for addressing these issues, it is my opinion she is capable of work activities for which she has direct or related experience or for which prior experience is not a hiring requirement despite her work-related injury. She is therefore, not permanently, totally disabled.

33. The ALJ finds the opinion of Ms. Ferris to be credible and highly persuasive because her conclusions are supported by the underlying medical records of the claimant's authorized treating providers as well as Dr. Hughes regarding the lack of any work restrictions flowing from her work injury.

34. On May 12, 2023, the deposition of Dr. Danahey was taken. Dr. Danahey testified that he assigned the apportioned impairment rating of 4% whole person based on the claimant's psychiatric medications prescribed at the time of the injury for personal conditions and the Division impairment rating apportionment guidelines. Dr. Danahey testified he assigned full duty to claimant on the MMI date of January 24, 2022. Dr. Danahey testified that based on claimant's mechanism of injury, which was relatively minor, the claimant did not adequately qualify for a diagnosis of post-traumatic stress disorder. Dr. Danahey testified as to the attempts he made to secure Dr. Shapiro's medical records and that he was able to adequately assess claimant's impairment rating without the records of Dr. Shapiro. He also testified that he saw nothing incorrect about DIME Dr. Hughes providing an opinion on impairment rating without Dr. Shapiro's medical records.

35. Claimant underwent an IME with Dr. Walter Torres on September 11, 2023. In response to a written questionnaire from the claimant's counsel on whether Dr. Hughes erred in a significant way when he found claimant was at MMI, Dr. Torres stated, "KY[Redacted] may not be at MMI because certain treatments for trauma conditions have not yet been attempted. These include EMDR and potentially ketamine therapy."

36. In response to a written questionnaire from the claimant's counsel as to whether Dr. Hughes erred in a significant way when he found that claimant had no mental impairment, Dr. Torres stated, "[t]he formulations of her injury that were presented in previous reports did not adequately characterize the full nature of the stressors or of the dynamics between those stressors and the claimant. As such, the determination reached by the DIME examiner erroneously found her to have no injury-related mental impairment." However, there is no indication that Dr. Torres is accredited and proficient in determining the proper methodology for determining medical impairment under the AMA Guides and the Division guidelines. As a result, the ALJ does not find Dr. Torres' report and opinions to be persuasive as it relates to whether Dr. Hughes properly determined that the claimant did not suffer any permanent medical impairment from the work injury.

37. Despite not being qualified as a vocational expert, Dr. Torres stated that the claimant could not return to gainful employment in her current condition. He also stated that she had marked impairment regarding her ability to adapt to job performance requirements and moderate impairment regarding interpersonal relationships. But, on the other hand, he also stated that the claimant had only mild impairment in sleep, managing conflicts with others, ability to maintain attention and concentrate on a specific task, and ability to perform complex or varied tasks. Thus, the ALJ finds that Dr. Torres' conclusion that the claimant cannot return to gainful employment is not supported by some of his own findings that demonstrate only mild impairment in certain areas, such as managing conflicts with others, ability to maintain attention and concentrate on a specific task, and her ability to perform complex or varied tasks.

Plus, he does not appear to be qualified to determine her capacity to obtain and maintain employment since he is not a vocational expert.

38. Claimant obtained a records review with her vocational expert Doug Prutting who authored a report on October 13, 2023. Mr. Prutting concluded that the claimant is "ill prepared currently to seek, obtain, or maintain employment in any capacity in the regular and competitive labor market in both the region and the country.

39. The ALJ does not find his opinions to be credible, reliable, or persuasive, for many reasons. First, as noted in the report, Mr. Prutting was not authorized to contact the claimant – and he did not. Because he did not contact or meet with the claimant, Mr. Prutting could not assess her demeaner, presentation, and other factors that might impact her ability to obtain and maintain employment. Second, Mr. Prutting indicates that medical records relevant to the vocational assessment were used. Mr. Prutting then documents the records he considered relevant. The first record he cites is the January 31, 2023, letter from Brandy Frazao. While this letter indicates Ms. Frazao has been treating the claimant for PTSD, a major depressive disorder, and a generalized anxiety disorder, the letter does not indicate the qualifications of Ms. Frazao. For example, is she a licensed clinical social worker, a counselor, a therapist, a psychologist, a physician's assistant, or a psychiatrist? Moreover, there does not appear to be any treatment records from Ms. Frazao or any other Centura provider supporting Ms. Frazao's conclusion. In essence, her letter is merely conclusory. Third, Mr. Prutting does not cite the report of Dr. Danahey that indicates the claimant does not have any work restrictions due to her work injury. Fourth, while Mr. Prutting references Dr. Hughes' opinion, in which he concluded the claimant does not have any work restrictions from the work injury, he appears to disregard Dr. Hughes' opinions. Fifth, he references the report from Dr. Rose, which indicates the claimant had three prior concussions and was diagnosed with a traumatic brain injury, and a neurocognitive disorder, but makes no reference as to whether those unrelated conditions are the proximate cause of the claimant's alleged inability to work in any capacity. Lastly, while the ALJ agrees that impairment and disability are different, he provides no meaningful analysis as to how he concluded that the claimant is disabled to such an extent that she cannot obtain or maintain employment in any capacity. In the end, his report is merely conclusory. Thus, the ALJ does not find his opinions to be credible or persuasive.

CONCLUSIONS OF LAW

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

General Provisions

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

true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

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

I. Whether the claimant overcame the Division IME opinion of Dr. John Hughes as to MMI and impairment by clear and convincing evidence.

A DIME physician's opinions concerning MMI and impairment of the whole person are binding unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S. 2015; *Meza v. Indus. Claim Appeals Office of Colo., 303 P.3d 158 (Colo. App. 2013)*. "Both determinations inherently require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. Therefore, a DIME physician's determinations concerning causation are binding unless overcome by clear and convincing evidence." *Leprino Foods Co. v. Indus. Claim Appeals Off.*, 134 P.3d 475, 482-83 (Colo. App. 2005).

In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (Oct. 4, 2001). Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004).

Here, the ALJ finds and concludes that the claimant did not meet the evidentiary burden of clear and convincing evidence to overcome the DIME opinions of Dr. Hughes. There is a lack of evidence, which this ALJ finds persuasive, supporting the claimant's argument that Dr. Hughes, the DIME physician, erred or made any significant mistakes in his opinions that the claimant is at MMI with a 0% impairment rating.

Even the claimant, in their proposed order, appears to concede that the claimant did not overcome Dr. Hughes' opinion that the claimant is at MMI. To the extent the claimant did not concede such, the ALJ finds and concludes that claimant's IME, simply stated the claimant may not be at MMI and may need additional treatment. Such evidence is insufficient to overcome the opinion of Dr. Hughes regarding whether the claimant reached MMI. Thus, the ALJ finds and concludes that the claimant failed to overcome the opinion of Dr. Hughes regarding MMI.

Regarding the claimant's impairment rating, the ALJ also finds and concludes that the claimant failed to overcome the opinion of Dr. Hughes that the claimant has no medical impairment due to her work accident. In this case, Dr. Danahey credibly testified in his deposition that Dr. Hughes simply had a difference of opinion with regard to the impairment rating and that Dr. Hughes was not incorrect in assessing impairment without Dr. Shapiro's medical records. In addition, although Dr. Kleinman concluded that the claimant suffered mental impairment, there is nothing persuasive in Dr. Kleinman's report indicating that Dr. Hughes erred in concluding the claimant has no impairment. Again, it is merely a difference of opinion between Dr. Kleinman and Dr. Hughes.

Moreover, the ALJ finds that Dr. Hughes' determination that the claimant suffered no impairment is a reasonable interpretation of the evidence in this case. Thus, the ALJ finds and concludes that the claimant failed to overcome by clear and convincing evidence the opinion of Dr. Hughes regarding the claimant's impairment.

II. Whether the claimant is permanently and totally disabled and unable to earn any wages.

Permanent total disability is defined by statute as, "unable to earn any wages in the same or other employment," and the claimant must prove this is the case by a preponderance of the evidence. C.R.S. §8-40-201(16.5). The term "any wages" means zero wages. Thus, claimants who are unable to earn a wage greater than zero are permanently totally disabled. *Williamson v. Ball Corp.,* W.C.No. 4-153-150 (Nov. 22, 2004). Conversely, claimants who are able to earn wages greater than zero are by definition not permanently totally disabled. *Williamson, supra*; *Christie v. Coors Transp. Co.*, W.C.No. 4-110-189 (Mar. 20, 1995); *but see Joslins Dry Goods Co. v. Indus. Claims Appeals Off.*, 21 P.3d 866 (Colo.App. 2001) (indicating that "permanent total disability benefits may be awarded even if a claimant holds some type of post-injury employment).

In order to refute a claim of permanent total disability, it is not necessary that the respondents show the existence of a specific, identifiable job. *Henneberg v. Valu-Rite Drugs, Inc.*, W.C.No. 4-148-050 (Sept. 26, 1995); *see also Rencehausen v. Denver*,

W.C.No. 4-110-764 (stating that a claimant's prima facie case can be rebutted even if respondents' vocational expert had not located a specific job).

C.R.S. 8-40-201(16.5)(a) defines "permanent total disability" as the inability to, "earn wages in the same or other employment." The claimant's ability to earn any wages is determined by a myriad of factors, including age, education, work experience, physical condition, mental capabilities and the availability of work which the claimant can perform. *Best-Way Concrete Company v. Baumgartner*, 908 P.2d 1194 (Colo. App. 1999).

The industrial injury must be a "significant, causative factor" in the claimant's disability in order to receive an award for PTD. *Seifried v. Industrial Comm'n of State of Colorado*, 736 P.2d 1262, 1263 (Colo. App. 1986). Additionally, if a non-industrial factor is adjudged an intervening cause of the claimant's permanent, total disability, its existence may support a finding that the industrial disability is insignificant to the claimant's overall disability. *Heggar v. Watts-Hardy Dairy*, 685 P.2d 235, 237 (Colo. App. 1984).

Moreover, the opinion of the DIME physician, Dr. Hughes, regarding the extent of the claimant's work restrictions that flow from her injury, or the cause of her condition, is not given presumptive weight. The only portion of his opinion that is given presumptive weight is his opinion regarding MMI and the claimant's medical impairment. *See Yeutter v. Indus. Claim Appeals Off.*, 487 P.3d 1007 (Colo. App. 2019).

In this case, the ALJ finds and concludes that the claimant did not meet her burden by a preponderance of the evidence and establish that she is permanently and totally disabled and unable to earn any wages due to her work injury.

The ALJ finds the reports and testimony of Dr. Danahey and vocational rehabilitation specialist Donna Ferris, as well as the DIME report of Dr. Hughes and IME report of Dr. Kleinman, to be persuasive evidence that the claimant does not have any work restrictions that flow from her work injury that would preclude her from earning any wages. It is concluded that the opinions of Ms. Ferris, Dr. Danahey, Dr. Kleinman and Dr. Hughes are more persuasive and compelling than those of claimant's IME Dr. Torres and vocational expert Mr. Prutting and the claimant's personal counselors/physicians, including some who are treating her for subsequent unrelated injuries where she hit her head on numerous occasions.

Of significance, the claimant's treating physician Dr. Danahey, IME Dr. Kleinman, and DIME Dr. Hughes all concluded that the claimant has no work restrictions applicable to the work accident. Moreover, Donna Ferris based her opinions that the claimant was able to secure employment in the local labor market on these "no work restriction" opinions, particularly Dr. Danahey's opinions where he had treated the claimant for an extensive period of time and was best equipped to opine on the claimant's physical and mental abilities and work restrictions, or lack thereof, attributable to the industrial accident.

As a result, the ALJ finds and concludes that the claimant has failed to establish by a preponderance of the evidence that her work injury has caused her to be permanently and totally disabled.

III. Whether the claimant is entitled to medical benefits beyond the general award of maintenance medical benefits admitted in the Final Admissions of Liability.

Once the claimant establishes the probability of a need for future treatment, the claimant is entitled to a general award of future medical benefits, subject to the respondent's right to contest the compensability of any particular treatment on grounds the treatment is not authorized or not reasonably necessary. *Holly Nursing Care Center v. Industrial Claim Appeals Off.,* 992 P.2d 701 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Off., supra.* 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 Off.*, 989 P.2d 251 (Colo. App. 1999);

After an award of post-MMI medical benefits, respondents retain the right to contest any future claims for medical treatment on the basis that such treatment is unrelated to the industrial injury. *Grover v. Industrial Comm'n*, *supra*. If a dispute over medical benefits arises after the filing of an admission of liability, respondents may assert that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment. *Snyder v. Industrial Claim Appeals Off.*, *supra*. This principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. *See Maestas v. O'Reilly Auto Parts*, W.C. 4-856-563-01 (ICAO Aug. 31, 2012).

Here, the respondent filed a Final Admission of Liability admitting for a general award of *Grover* medical benefits. The evidence submitted at the hearing did not establish that the respondent is denying any specific maintenance medical treatment or referrals at this time from an authorized treating physician. Thus, no disputed medical benefits are at issue. As a result, the claimant's request for additional specific medical treatment is denied.

ORDER

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

1. The claimant did not overcome the DIME opinion regarding MMI. Therefore, the claimant's date of MMI is January 24, 2022.
2. The claimant did not overcome the DIME opinion regarding her impairment rating. Therefore, the claimant's impairment rating is 0%.
3. The claimant is not permanently and totally disabled. Therefore, the claimant's claim for permanent total disability benefits is denied and dismissed.
4. The claimant's request for specific medical treatment is denied, since there is no treatment prescribed by an authorized treating physician that has been denied by the respondent.

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

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

DATED: January 30, 2024

s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-249-588-001

ISSUE

1. Whether Claimant was an employee or independent contractor, on August 2, 2023.

STIPULATION

The Parties stipulated that if Claimant is found to be an Employee on August 2, 2023, then his injury that date is compensable. The parties further stipulated that if Claimant's August 2, 2023 injury is compensable, Respondent is liable for the August 2, 2023, emergency room visit. (Tr. 2:20-4:5).

FINDINGS OF FACT

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

1. Claimant credibly testified that he began working for Employer, a general aviation mechanics shop, in June or July of 2021 as a plane mechanic. (Tr. 13:14-20). Claimant credibly testified that he was hired as an independent contractor. (*Id.* at 16:7-9).

2. Claimant further credibly testified his work had to be supervised. (*Id.* 19:14-15). He does not have a license to work independently as a plane mechanic, and he has to work under the supervision of others. Claimant credibly testified that three people at Employer have the requisite license to supervise him. (*Id.* at 14:17-16:3).

3. Claimant credibly testified that Employer paid him, via handwritten checks, when he was working as an independent contractor. (*Id.* at 16:14-22). Claimant testified that prior to July 2023, he paid his own taxes. (*Id*. at 18:23-25). Four handwritten checks, dated August 16, 2021, September 15, 2021, June 30, 2022, and July 14, 2022, from Employer to Claimant, were admitted into evidence. Each of these checks was made out to Claimant, personally. (Ex. 13, p. 143). Claimant testified this was how he was paid prior to July 2023. (Tr. 16:23-25). This testimony was uncontroverted.

4. Claimant credibly testified that he was told he would receive benefits like sick leave and vacation time when he was converted from an independent contractor to an employee. (Tr. 19:1-5).

5. In July 2023, Claimant began receiving paychecks from Employer that were processed by [Redacted, hereinafter JY] Payroll and HR. The paystubs indicate that Claimant is Employee No. 6. Claimant's payroll records for the July 1, 2023 period, list the check as Payroll No. 1, pay Claimant at an hourly rate for regular and overtime hours, withhold federal and state taxes, withhold Medicare contributions and OASDI, and list Claimant's name under the field for Employee Name. (Ex. 13, p. 139).

6. Claimant submitted an "invoice" to Respondent for his work from July 2, 2023 to July 14, 2023. The invoice reflected 82 hours of work for a total of $2,132.30, and requested that checks be payable to [Redacted, hereinafter AS] (Ex. B). Respondent, however, paid Claimant $1,961.98 for the time period, July 1, 2023 to July 12, 2023. This payment was for 82 hours of work (80 regular hours and 2 overtime hour). Claimant's gross pay was $2,490, and Respondent deducted $528.02, resulting in a net pay of $1,961.98. (Ex. 13).

7. There was no testimony regarding this "invoice." As found Respondent paid Claimant through its payroll system, they paid Claimant and not "AS[Redacted]," deducted taxes, and paid Claimant for 82 hours, and not the $2,132.30 on the invoice. The ALJ infers that the "invoice" was Claimant's manner of tracking the number of hours he worked.

8. Claimant's payroll records for Payroll Nos. 2, 3, and 4 also pay Claimant at an hourly rate for regular and overtime hours, withhold federal and state taxes, withhold Medicare contributions and OASDI, and list Claimant's name under the field for Employee Name through August 31, 2023. (*Id*. pp. 140-142).

9. Respondent's general payroll records, for the pay period July 1, 2023 to July 12, 2023, list eight individuals, including Claimant, as employees, all with varied rates of hourly pay and coded with different federal and state tax withholding classifications. (Ex. 9).

10. Claimant credibly testified that his Employer set his work schedule, and he worked 8:00 a.m. to 5:00 p.m., with a lunch break. Claimant further testified that in aviation, it is standard to have your own tools, but additional tools were provided by Respondent and were kept at the shop. (Tr. 19:9-20:9).

11. On August 2, 2023, employee, [Redacted, hereinafter AC], instructed Claimant to stop his inspection and help move sheet metal. Claimant was carrying sheet metal when he fell down the stairs. Claimant hit his head and suffered a laceration. One of the owners, [Redacted, hereinafter TC], had another employee take Claimant to the emergency room. (*Id.* at 20:10-21:17).

12. Claimant presented to the emergency room for an evaluation of a head injury. According to the medical records, Claimant was carrying a sheet-metal container walking down stairs when he tripped, fell, and hit his head. The records note that Claimant suffered a superficial laceration of the left parietal scalp. The laceration was not gaping, and did not need to be repaired. Additionally, the CT scan did not show an acute intracranial abnormality. Upon discharge, Claimant was ambulatory, and the providers discussed over-the-counter medications with him. Claimant was not prescribed any medications upon discharge. His After-Visit Summary noted he was taking Protonix for heartburn, and Coumadin for the prevention of blood clots. (Exs. 7 and 8).

13. Claimant testified that he has not received any follow-up care for his injury, and only received the emergency room treatment on August 2, 2023. (Tr. 21:21-23).

14. Claimant testified that his upper neck and head are injured. He testified that he has difficulty with his vision, and is affected by lights. Claimant further testified that he is on a daily dose of pain killers that make it impossible for him to work. (*Id.* 23:12-25:14). On cross-examination, Claimant testified that the medications he is taking include hydrocodone, cyclobenzaprine, and lorazepam, which were prescribed by the hospitals. (*Id.* 25:15-26:18). There is no objective evidence in the record that these medications were prescribed by the emergency department on August 2, 2023. The ALJ does not find Claimant's testimony regarding the source of his medications to be credible.

15. Following the accident on August 2, 2023, Respondent continued to pay Claimant his full wages through August 31, 2023, even though Claimant did not return to work. (Exs.12 and 13).

16. Respondent obtained workers' compensation insurance coverage effective September 1, 2023. (Ex. 12).

17. Respondent presented no testimony at the hearing, and did not submit a position statement.

CONCLUSIONS OF LAW

Generally

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

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

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

Employee v. Independent Contractor

An employer-employee relationship is established when the parties enter into a "contract of hire." §8-40-202(1)(b), C.R.S.; *Younger v. Denver*, 810 P.2d 647 (Colo. 1991). A contract of hire may be express or implied, and it is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman*, 307 P.2d 805 (Colo. App. 1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement and mutuality of obligation. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994); *Martinez Caldamez v. Schneider Farm*, WC 4-853-602 (ICAO, July 16, 2012). A contract of hire may be formed even in the absence of every formality attending commercial contracts. *Rocky Mountain Dairy Products v. Pease*, 422 P.2d 630 (1966); *In re Ritthaler*, WC 4-905-302-02 (ICAO, May 7, 2014).

According to the Act, "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document.

Section 8-40-202(2)(b)(II), C.R.S. enumerates nine factors to be considered in evaluating whether an individual is deemed an employee or independent contractor. To prove independence, it must be shown that the person for whom services are performed does not:

> (A) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;
>
> (B) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;
>
> (C) Pay a salary or at an hourly rate instead of at a fixed or contract rate;
>
> (D) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

(E) Provide more than minimal training for the individual;

(F) Provide tools or benefits to the individual; except that materials and equipment may be supplied;

(G) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

(H) Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

(I) Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

A business, however, may not be insulated from creation of an employment relationship in the workers' compensation system even with strict compliance with § 8-40-202(2)(b)(ii) C.R.S. *Pella Windows & Doors, Inc. v. Indus. Claim Appeals Off.,* 458 P.3d 128, 138 (Colo. App. 2020). An ALJ is not bound by a singular analysis of the nine criteria for independence under the statute and may make a broader inquiry into the elements of the parties' working relationship. *Id*.

As found, Claimant's work schedule was set by Respondent. Respondent maintained a shop on site and Claimant borrowed tools from Respondent, in addition to using his own tools. As evidenced by Claimant's testimony and the wage records, Respondent paid Claimant at an hourly rate with tax withholdings beginning on or about, July 1, 2023. Claimant credibly testified that his work was overseen, and in particular, on August 2, 2023, he was directed by another employee to move items out of a space, which is indicative of an employment relationship of control rather than an independent relationship. Claimant credibly testified that in July 2023, he was promised benefits concurrent with his employment in the form of sick leave and vacation time. This testimony was uncontroverted.

Respondent presented no objective evidence in support of an independent contractor relationship rather than an employment relationship. Based on the totality of the evidence, Claimant was under the direction and control of Respondent, and was an employee, not an independent contractor, at the time of his injury on August 2, 2023.

ORDER

It is therefore ordered that:

1. Claimant was an employee of Employer on August 2, 2023.

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: January 30, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-247-453-001

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that she sustained a compensable injury or occupational disease arising out of and in the course of her employment with Employer on June 5, 2023?

- If Claimant has proven she sustained a compensable injury or occupational disease while employed with Employer, whether Claimant has proven by a preponderance of the evidence that the medical treatment Claimant received was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury or occupational disease.

FINDINGS OF FACT

1. Claimant was employed by Employer performing laundry services. Claimant testified she began employment with Employer in 2017. Claimant testified that on June 5, 2023 while performing her laundry seivices, she experienced pain in her arm and elbow. Claimant testified she reported the onset of pain to her supeivisor, [Redacted, hereinafter BA], and her Employer scheduled a medical appointment for her. Claimant testified she has undergone treatment that includes over the counter medication (Advil) and physical therapy that has improved her symptoms, but she remains in a lot of pain.

2. Claimant was evaluated by her family physician, Dr. Benson with Mountain Family Health Centers, on July 11, 2023. Claimant reported to Dr. Benson that she had pain in her hands and back of her neck for years. Claimant reported working in laundry worsened her symptoms. Claimant reported to Dr. Benson that she had treated the symptoms with physical therapy along with gabapentin and meloxicam. Claimant reported the gabapentin and meloxicam no longer help much. Dr. Benson recommended Claimant decrease her work activity.

3. Claimant was examined on July 18, 2023 by Dr. Lorah with Glenwood Medical Associates. Dr. Lorah noted Claimant had a previous workers' compensation injury in 2019 which was felt to be left lateral epicondylitis. Dr. Lorah's medical records note a date of injury of June 2, 2019. Dr. Lorah noted Claimant reported having a lot more pain in her left elbow over the past six months. Dr. Lorah noted that Claimant felt that doing laundry was the most provocative work activity. Dr. Lorah ordered x-rays of the left elbow that showed traction spur at the lateral epicondyle consistent with chronic common extensor enthesopathy along with moderate osteoarthritis of the elbow with small joint effusion.

4. Dr. Lorah opined that a large component of Claimant's pain was related to osteoarthritis. Dr. Lorah noted the degenerative changes throughout her left elbow and

opined that some component may be related to overuse. Dr. Lorah recommended Claimant be referred back to physical therapy ("Pr') and released Claimant to return to work with restrictions of no lifting over 15 pounds with the left upper extremity and minimal pinching and grasping. Dr. Lorah recommended Claimant be taken off of laundry.

5. Claimant began physical therapy on August 1, 2023. Claimant eventually completed 13 physical therapy visits through September 11, 2023.

6. Claimant returned to Dr. Lorah on August 15, 2023. Dr. Lorah noted that at this time, Claimant had completed four physical therapy sessions and the physical therapist had noted some improvement with her work tolerance. Claimant reported to Dr. Lorah that the PT had provided some improvement, although she noted it was slow going. Dr. Lorah continued Claimant's work restrictions and again requested no laundry work for now and noted Claimant may need a referral to orthopedics. Dr. Lorah noted that if Claimant's pain was found to be primarily degenerative in nature, her treatment may need to be covered by Claimant's private insurance.

7. Respondents filed a notice of contest on August 28, 2023 indicating that Claimant's injury was not work related.

8. Claimant returned to Mountain Family Health Centers on September 20, 2023 after her claim was denied. Claimant was examined by Dr. Aguirre. The medical records from this visit relate primarily to Claimant's treatment for hypertension.

9. With regard to Claimant's 2019 injury, Claimant reported to Dr. Rieves with Glenwood Medical Associates on June 12, 2019 that she was in the laundry and washing and developed pain in both elbows that was constant for three days. Claimant reported her symptoms were worse with lifting laundry in and out of the washing machine. Claimant was diagnosed with lateral epicondylitis, provided a brace, a prescription for meloxicam and referred for physical therapy.

10. Claimant returned to Dr. Rieves on July 3, 2019 and reported she was better with physical therapy. Claimant reported her symptoms were worse after working, but she had some relief when taking breaks at work. Claimant was instructed to return in three weeks. Claimant completed six visits of physical therapy through July 16, 2019.

11. It does not appear from the filings that there was any documentation associated with the 2019 reported work injury other than the medical records from Glenwood Medical Associates.

12. Claimant sought treatment through her private physician, Mountain Family Health Centers on June 28, 2022. Claimant was examined by physicians' assistant ("PA") Hallin and reported issues with hypertension with a history of taking blood pressure medication daily. Claimant also reported she has chronic pain in her fingers and hands and has been told in the past that she has some sort of arthritis. PA Hallin noted that Claimant worked for many years with her hands and still works part time in laundry at a hotel. Claimant's medications were refilled.

13. Claimant to PA Hallin on July 8, 2022 with complaints of neck pain on the left side along with tingling in the left medial forearm area. PA Hallin noted a positive Spurling test on the left side. Claimant reported that she had chronic pain in her palm and fingers, especially after working. PA Hallin referred Claimant for PT and a cervical spine x-ray.

14. Claimant was again evaluated by PA Hallin on July 26, 2022 with reports of musculoskeletal pain. Claimant reported again that her hand pain was worst when working during the day. PA Hallin recommended a trial of meloxicam.

15. The medical records do not document any additional medical treatment until after Claimant reported her injury and was evaluated by Dr. Benson.

16. The ALJ notes that the medical records in this case document Claimant consistently reporting developing symptoms in her elbow and hands that she relates to ongoing laundry activities. The treating physicians responded by recommending work restrictions, medications, physical therapy and bracing.

17. The ALJ credits Claimant's testimony at hearing that her hand symptoms developed and became worse as a result of doing laundry at work. The ALJ notes that this testimony is consistent with Claimant's medical records that document Claimant complaining of symptoms related to her job duties with Employer. The ALJ further notes that the medical records document Claimant's symptoms improving when Claimant is provided with work restrictions and treatment designed to address her upper extremity symptoms.

18. The ALJ credits the Claimant's testimony at hearing along with the medical records entered into evidence in this matter and finds that Claimant has established by a preponderance of the evidence that the work duties involved by Claimant in doing laundry represent an occupational disease resulting in Claimant's development of symptoms that resulted in the need for medical treatment. The ALJ finds Claimant's testimony that the duties of her employment caused her symptoms to worsen to be credible and finds that Claimant has established that it is more likely true than not that the repetitive use of the upper extremities was more prevalent in her work duties than in her everyday life.

19. Respondents argue at hearing that if Claimant's condition is work related, her condition relates back to the 2019 injury when a different insurance carrier provided workers' compensation coverage for Employer. The ALJ is not persuaded.

20. Even presuming that the carrier providing coverage for Employer in 2019 would have been required to take a position with regard to the claim, Claimant continued to work for Employer and it was Claimant's continued work, after her symptoms improved following treatment in 2019, that resulted in Claimant needing medical treatment related to her occupational disease.

21. The ALJ credits the testimony of Claimant at hearing along with the medical records entered into evidence at hearing and finds that Claimant has

established that it is more probable than not that the medical treatment she received from Glenwood Medical Associated in July and August 2023 along with the referral for physical therapy is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the occupational disease.

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., 2013 The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

3. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of her employment. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 579. A work-related injury is compensable if it "aggravates, accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* Whether there is a sufficient "nexus" or relationship between the Claimant's employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988). The question of whether a claimant has proven that a particular disease, or aggravation of a particular disease, was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999).

4. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause.

Campbell v. IBM Corporation, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

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

5. This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff,* 859 P.2d 819 (Colo. 1993). The existence of a preexisting condition does not defeat a claim for an occupational disease. *Id.* A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.* Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992).

6. As found, the ALJ credits the testimony of the Claimant at hearing along with the medical records entered into evidence at hearing and finds that Claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease arising out of and in the course and scope of her employment with Employer.

7. 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).

8. As found, the medical treatment Claimant received from Glenwood Medical Associates along with the physical therapy is reasonable medical treatment necessary to cure and relieve Claimant from the effects of her occupational disease.

ORDER

It is therefore ordered that:

1. Respondent is liable for the reasonable and necessary medical benefits related to her compensable occupational disease, including the treatment from Glenwood Medical Associates and physical therapy.

2. All issues not herein decided 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; otherwiset the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 31, 2024.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-177-615-003

ISSUES

The hearing in this matter was set on Respondents' Application for Hearing to overcome the Division Sponsored IME determination that the Claimant is not at MMI and to dispute the provisional rating offered by the DIME doctor.

FINDINGS OF FACT

1. Claimant was employed as a store manager for a marijuana dispensary on the date of injury, March 23, 2021. Claimant was getting a 50 pound box off a shelf above a door. She was on a 3 step ladder and the 50 pound box fell on her right shoulder and neck. At the time of the incident, she experienced severe pain in her right arm and shoulder.

2. Claimant treated at Concentra beginning on the date of injury. She complained of right shoulder pain, right neck pain, upper back pain, numbness, and weakness in right arm and hand. The assessment from Dr. Johanson was right shoulder dislocation. She ordered an MRI for the right shoulder. Claimant was restricted from any lifting, pushing or pulling.

3. The MRI, without contrast, of the shoulder was taken on March 25, 2021.The impression was "[s]ignificant pathology is not detected".

4. The Claimant continued with conservative care with the primary treatment to the right shoulder. However, Claimant reported significant burning from her neck. (Exhibit D, p. 163).

5. A cervical MRI was ordered by Dr. Fitzpatrick on May 28, 2021. The MRI showed severe neural foraminal narrowing on the right at C3-C4 and on the left at C5-C6. The findings at C3-C4 are consistent with Claimant's reported symptoms of numbness and tingling in her right hand.

6. Claimant was referred to Dr. Rauzzino for a neurosurgical evaluation. He first saw Claimant on March 22, 2022. Claimant reported that her symptoms included radiation into the three middle digits of her right hand. Dr. Rauzzino noted a positive spurling's test. Based on his evaluation, Dr. Rauzzino recommended MRIs of the cervical spine, shoulder and brachial plexus. This imaging was completed on April 15, 2022. The MRI showed right posterolateral protrusion at C3-4 extending into the foramen and causing moderate right foramina narrowing. The right shoulder MRI showed an anterior inferior labral tear with a hypoplastic anterior superior labrum. After reviewing the MRIs, Dr. Rauzino recommended a fusion at C5-C6. In his note of April 19, 2022 he commented that

"She has significant kyphosis at this level and compression of the thecal sac and exiting nerve root".

7. Respondents sent a CCTV video to Dr. Rauzzino. The video was 1 hour, 12 minutes and 58 seconds in length and shows the Claimant standing at small table in the employer's pop-up store. According to the date stamp in the video, it was taken on November 26, 2021. Dr. Rauzinno commented that the Claimant was seen to engage in a number of activities and appeared to be quite comfortable. She was smiling and using both arms. She was lifting things and was bending, turning and twisting. He concluded that the Claimant's appearance in the video was inconsistent with her reported symptoms. After reviewing the video, Dr. Rauzzino did not believe that the proposed surgery would improve her condition. Dr. Rauzzino expressed these comments in a letter to Respondents' counsel dated May 2, 2022.

8. On May 5, 2022, Dr. Peterson discussed the video with Claimant and Claimant indicated that she had a cervical ESI from Dr. Chapman on 11/4/21 and was feeling much better. She also said she was pain free for 4 days. (Ex. D p. 549). This is a few weeks before the CCTV video was taken.

9. At the request of Respondents, Dr. Cebrian performed an IME on August 3, 2022 and issued a report on August 23, 2022.[1] His claim related diagnosis for the Claimant was right shoulder/trapezius strain.

10. Claimant was placed at Maximum Medical Improvement by Dr. Peterson and Nurse Practioner Jennifer Livingston on November 28, 2022 without impairment. A final admission of liability was filed on December 8, 2022.

11. A Division sponsored IME was scheduled with Dr. Castrejon. He issued a report dated April 24, 2023 wherein he opined that the Claimant was not at MMI. Dr. Castrejon recommended a psychological consultation to evaluate for barriers to recovery. He thought it would also be helpful to determine if Claimant was a candidate for cervical spine surgery. He also suggested a repeat cervical injection at C4 on the right side. Dr. Castrejon gave a provisional impairment of 17 percent whole person for the Claimant's cervical spine.

CONCLUSIONS OF LAW

A. Burdens and standards of proof

[1] Although the initial page of the report is dated August 23, 2022, the remaining pages carry a date of August 22, 2022.

Respondents must overcome the DIME's determination that the Claimant is not at MMI by clear and convincing evidence.

B. Respondents did not overcome the DIME's determination that the Claimant is not at MMI.

A DIME's determination regarding MMI 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).

Respondents failed to overcome the DIME's determination that the Claimant is not at MMI. Since the Claimant is not at MMI, the issue of permanent impairment is premature. Although Dr. Castrejon did not have access the CCTV video, I find his determination that the Claimant is not at MMI to be credible and persuasive since he considered the medical records which substantiates a physical injury to the cervical spine. Further, he determined that the Claimant's symptoms may be amenable to further evaluation and potential treatment which may improve the Claimant's symptoms. His recommendations are reasonable. I recognize that Dr. Rauzzino has a contrary opinion that essentially determined that the Claimant would not benefit from further treatment for the cervical spine. I am also persuaded by Dr. Rook's opinions based on his review of the video that the activities depicted on the CCTV video are innocuous and well within the Claimant's physical restrictions. I have also reviewed the video and agree with Dr. Rook's assessment.

ORDER

It is therefore ordered that:

1. Respondent's request to overcome the DIME's determination that the Claimant is not at MMI is denied and dismissed.

2. Claimant's request for medical benefits to achieve MMI is granted.

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: January 31, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-217-323-001

ISSUE

Although Claimant was responsible for his November 2, 2022 termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes"), whether he was entitled to receive Temporary Total Disability (TTD) benefits beginning November 9, 2022 based on a worsening of condition.

FINDINGS OF FACT

1. On September 20, 2022 Claimant sustained an injury to his lower back while at work breaking down freight. He was specifically transferring product from one pallet to another when he felt a pop in his lower back.

2. On September 21, 2022 Claimant spoke to Employer's Operations Manager [Redacted, hereinafter MM] about seeking medical attention. MM[Redacted] pulled up the Concentra Medical Centers clinic at Chambers Road and I-70 on his telephone and told Claimant to go there because the facility was close. The record reveals that Claimant did not receive a list of at least four designated medical providers.

3. On September 21, 2022 Claimant first visited the Concentra at Chambers Road and I-70 for an evaluation. Claimant reported he was lifting boxes when he injured his lower back. Nurse Practitioner Susan Bradshaw determined her objective findings were consistent with a work-related mechanism of injury. She assessed Claimant with a lumbar strain.

4. After receiving work restrictions from Concentra, Employer offered Claimant modified duty employment. Claimant had been working eight-hour shifts prior to his injury, but Employer reduced Claimant's schedule to four-hour shifts.

5. From September 21, 2022 through April 3, 2023, Claimant regularly received treatment with Eric Chau, M.D. at the Chambers Road and I-70 Concentra facility. Concentra providers continued to note that their objective findings were consistent with a work-related mechanism of injury. Providers referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy.

6. On October 7, 2022 Dr. Chau added an addendum to Claimant's medical records. He specifically decreased Claimant's maximum lifting restriction from 20 to 15 pounds, decreased his pushing and pulling ability from 30 to 20 pounds, and limited him to sitting 50% of the time. His restrictions also included limited bending at the waist and frequently changing positions. There was no provision about only working four hours per day.

7. On October 11, 2022 MM[Redacted] authored an e-mail regarding the status of Claimant's case. He recounted that on October 6, 2022 Claimant provided him with a doctor's note regarding work restrictions. MM[Redacted] explained that Claimant could return to full duty work and his only restrictions were no lifting in excess of 20 pounds and no pushing/pulling in excess of 30 pounds. Claimant responded that his physician would send an updated note stating that he could not work more than four hours per day.

8. On October 21, 2022 Concentra Nurse Practitioner Maryna Halushka decreased Claimant's lifting maximum to 15 pounds. She also noted that Claimant could not bend at the waist. NP Halushka did not assign any pushing/pulling restrictions.

9. On October 28, 2022 Employer notified Claimant they would abide by his work restrictions of no lifting in excess of 15 pounds and no bending at the waist. Effective Monday October 31, 2022, Claimant would be required to work eight hours each day. Employer noted they would work with Claimant as best as possible to enable breaks when necessary.

10. MM[Redacted] testified that he believed the last day of accommodating four-hour shifts for Claimant was October 28, 2022. Claimant then worked four-hour days on October 31, 2022 and November 1, 2022. He received his final occurrence point for failing to adhere to the work schedule on November 1, 2022 because he did not inform a manager he was leaving work after four hours. Claimant was thus terminated from employment on November 2, 2022.

11. MM[Redacted] explained that Employer used an occurrence point system to track Claimant's disciplinary violations. He testified the point system provided that failing to call-in or show-up for work was worth six points, a call-out with insufficient time to cover the absence cost two points, tardiness over six minutes was valued at one point, and failing to adhere to the schedule was worth one point.

12. Claimant accumulated 10 occurrence points prior to his September 20, 2022 date of injury. MM[Redacted] detailed that Claimant specifically accrued two points on July 12, 2022, August 11, 2022, August 16, 2022, August 25, of 2022 and September 19, of 2022 for a total of 10 points. He remarked that Claimant was informed of his point total on the day of his lower back injury or September 20, 2022.

13. Claimant obtained his eleventh occurrence point on October 19, 2022 for tardiness of eight minutes. His final point accrued on November 1, 2022 for failure to adhere to the eight hours per day work schedule. After accumulating 12 occurrence points, Claimant was aware that he could be terminated. Claimant was then released by Employer on November 2, 2022.

14. On November 9, 2022 Claimant visited NP Halushka for an evaluation of his lumbar strain. He reported no improvement and that he was having trouble sleeping. After conducting a physical examination, she prescribed medications and assigned more limiting work restrictions. NP Halushka specifically reduced Claimant's lifting maximum

from 15 down to 10 pounds. She also noted maximum pushing/pulling of 15 pounds and no crawling.

15. On December 19, 2022 Claimant visited Dr. Chau for an examination. Claimant reported a pain level of 7/10 in his lower back. Dr. Chau assigned a maximum lifting restriction of 10 pounds and a maximum pushing/pulling restriction of 15 pounds. He also noted no crawling, kneeling, squatting or climbing.

16. Claimant has been unable to return to any employment since November 2, 2022. He remarked that he continues to suffer from dull lower back pain. Claimant's mobility and functionality remain limited.

17. On March 4, 2023 Claimant underwent an independent medical examination with Alicia Feldman, M.D. Although Dr. Feldman determined that Claimant likely suffered a lumbar sprain/strain injury at work on September 20, 2022, she reasoned that the natural history of his injury is that it should resolve within weeks to months. Dr. Feldman attributed Claimant's medical care between September and December 2022 to his September 20, 2022 industrial injury. However, she explained that Claimant's lower back symptoms as of the date of the independent medical examination were no longer related to his work injury. Dr. Feldman reasoned that Claimant reached Maximum Medical Improvement (MMI) at his December 19, 2022 appointment with Dr. Chau.

18. On April 10, 2023 Dr. Chau reviewed Dr. Feldman's independent medical examination. Based upon the report, Dr. Chau back-dated Claimant's MMI date to December 19, 2022.

19. Although Claimant was responsible for his November 2, 2022 termination from employment, he has proven it is more probably true than not that he is entitled to receive TTD benefits starting on November 9, 2022 based on a worsening of condition. Initially, Claimant does not dispute the ALJ's determination that he was responsible for his November 2, 2022 termination from employment. Instead, Claimant contends that the ALJ erred in failing to consider whether he is entitled to receive TTD benefits after the worsening of his condition on November 9, 2022. Claimant specifically asserts that the present case is factually similar to *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004).

20. Claimant is entitled to receive TTD benefits starting on November 9, 2022 based on a worsening in condition. Notably, the record reveals that on November 9, 2022 NP Halushka assigned more limiting work restrictions to Claimant. She specifically reduced Claimant's lifting maximum from 15 down to 10 pounds. NP Halushka also noted maximum pushing/pulling of 15 pounds and no crawling. Furthermore, on December 19, 2022 Dr. Chau also assigned a maximum lifting restriction of 10 pounds and maximum pushing/pulling of 15 pounds. He further noted no crawling, kneeling, squatting or climbing. Claimant credibly explained that he has been unable to return to any employment since November 2, 2022. He continues to suffer from dull lower back pain and has limited mobility.

21. Similar to the present matter, the claimant in *Anderson* was working modified duty and resigned over a dispute. A few weeks later, his condition worsened and his ATP increased his physical restrictions. *Anderson,* 102 P.3d at 325. The Supreme Court determined that §8-42-105(4) bars TTD wage loss claims when the voluntary or for-cause termination of the modified employment causes the wage loss, but not when the worsening of a prior work-related injury causes the wage loss. *Id*. Because the record reveals that Claimant in the present matter suffered a worsening of condition subsequent to his termination from employment on November 2, 2022, his wage loss was attributable to his physical limitations as a result of his work-related injury. The record reflects that Claimant's post-termination wage loss was caused by a worsening that resulted in limitations or restrictions that did not exist at the time of termination and caused a decreased temporary earning capacity. Accordingly, Claimant is entitled to receive TTD benefits for the period November 9, 2023 until terminated by statute when he reached MMI on December 19, 2022.

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. To prove entitlement to TTD benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-

103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that 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. Indus. Claim Appeals Off.*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

5. Section 8-42-105(4), C.R.S. does not bar TTD wage loss claims after a termination for which the employee was responsible when the worsening of a work-related injury causes a subsequent wage loss. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004). This is limited to cases in which the “claimant's condition worsens after the termination of employment and prevents or diminishes the claimant's ability to work” rather than where the wage loss is the result of the voluntary or for-cause termination of the regular or modified employment. *Gilmore v. Indus. Claim Appeals Off.,* 187 P.3d 1129 (Colo. App. 2008); *Grisbaum v. Indus. Claim Appeals Off.*, 109 P.3d 1054, 1056 (Colo. App. 2005). Post-termination wage loss is “caused by a worsened condition” if the worsening results in limitations or restrictions that did not exist at the time of termination and cause a limitation on the claimant’s temporary earning capacity that did not exist when he caused the termination. However, a subsequent increase in work restrictions is not per se evidence of a worsening of condition. *See Apex Transportation, Inc. v. Indus. Claim Appeals Off.*, 321 P.3d 630, 632-33 (Colo.App.2014). The question of whether new restrictions resulting from a worsened condition have caused the claimant's wage loss following a termination from employment is a factual determination for the ALJ. *Hammack v. Falcon School Dist.*, WC 4-637-865 (ICAO Oct. 23, 2006). Proof of a causal connection between the injury and wage loss may be by lay or medical evidence. *Id.*

6. As found, although Claimant was responsible for his November 2, 2022 termination from employment, he has proven by a preponderance of the evidence that he is entitled to receive TTD benefits starting on November 9, 2022 based on a worsening of condition. Initially, Claimant does not dispute the ALJ’s determination that he was responsible for his November 2, 2022 termination from employment. Instead, Claimant contends that the ALJ erred in failing to consider whether he is entitled to receive TTD benefits after the worsening of his condition on November 9, 2022. Claimant specifically

asserts that the present case is factually similar to *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004).

7. As found, Claimant is entitled to receive TTD benefits starting on November 9, 2022 based on a worsening in condition. Notably, the record reveals that on November 9, 2022 NP Halushka assigned more limiting work restrictions to Claimant. She specifically reduced Claimant's lifting maximum from 15 down to 10 pounds. NP Halushka also noted maximum pushing/pulling of 15 pounds and no crawling. Furthermore, on December 19, 2022 Dr. Chau also assigned a maximum lifting restriction of 10 pounds and maximum pushing/pulling of 15 pounds. He further noted no crawling, kneeling, squatting or climbing. Claimant credibly explained that he has been unable to return to any employment since November 2, 2022. He continues to suffer from dull lower back pain and has limited mobility.

8. As found, similar to the present matter, the claimant in *Anderson* was working modified duty and resigned over a dispute. A few weeks later, his condition worsened and his ATP increased his physical restrictions. *Anderson,* 102 P.3d at 325. The Supreme Court determined that §8-42-105(4) bars TTD wage loss claims when the voluntary or for-cause termination of the modified employment causes the wage loss, but not when the worsening of a prior work-related injury causes the wage loss. *Id*. Because the record reveals that Claimant in the present matter suffered a worsening of condition subsequent to his termination from employment on November 2, 2022, his wage loss was attributable to his physical limitations as a result of his work-related injury. The record reflects that Claimant's post-termination wage loss was caused by a worsening that resulted in limitations or restrictions that did not exist at the time of termination and caused a decreased temporary earning capacity. Accordingly, Claimant is entitled to receive TTD benefits for the period November 9, 2023 until terminated by statute when he reached MMI on December 19, 2022.

ORDER

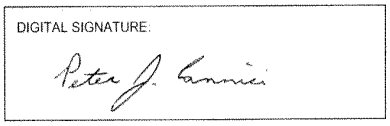
1. Claimant shall receive TTD benefits for the period November 9, 2023 until terminated by statute when he reached MMI on December 19, 2022.

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

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

Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.

DATED: January 31, 2024.



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