ISSUES

I. Whether Claimant proved by a preponderance of the evidence she sustained a compensable work injury on June 23, 2022.

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

III. Determination of long-term disability benefit offsets against any TTD to which Claimant is entitled.

IV. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant is a 60-year-old woman who has worked for Employer for approximately six years as an Institution Food Stewart. Claimant is responsible for preparing and serving food to [Redacted, hereinafter IE]. Claimant's job description indicates her position requires the ability to lift no more than 50 lbs., and includes standing, walking, carrying, pulling, pushing, and performing repetitive motions.

2. Claimant alleges she sustained a work injury on June 23, 2022. While performing her regular work duties, Claimant picked up a heavy pan, turned and felt a sharp pain in her right shoulder. She finished the food service and reported the incident to her supervisor and Employer's "Ouchline."

3. Claimant presented to the emergency department at Presbyterian St. Luke's Medical Center on June 23, 2022 with complaints of right-sided neck and shoulder pain radiating down her right arm and into her right chest. A chest x-ray was normal. A cervical spine x-ray revealed moderate degenerative disc disease at C5-C6, mild degenerative disc disease at C6-C7 and mild diffuse facet arthritis. There was no evidence of fracture or dislocation.

4. On June 24, 2022 Claimant presented to Cynthia Rubio, M.D. at Concentra. She reported feeling a sharp pain in her right shoulder while turning with a 20-30 lb. pan at work. Claimant further reported she experienced a needle sensation in her arm and pain in her chest, and later developed a headache and pain in her right lateral neck, as well as numbness in her fingers. Dr. Rubio assessed Claimant with a cervical strain and referred her for physical therapy. She released Claimant to modified duty. The medical note admitted into the record does not specify the specific restrictions imposed on this date.

5. On June 28, 2022 Dr. Rubio placed Claimant on modified duty restrictions of lifting/carrying/pushing/pulling no more than 20 lbs., no repetitive lifting, and no repetitive activity with the right arm more than five times per hour. Objective findings were noted to be consistent with history and/or work-related mechanism of injury.

6. Claimant spoke to Eric Chau, M.D. at Concentra by telephone on July 5, 2022. Claimant reported that she had been unable to work July 3-4, 2022 due to headaches, dizziness and pain. Dr. Chau removed Claimant from work July 3-5, 2022. Objective findings were noted to be consistent with history and/or work-related mechanism of injury.

7. Claimant presented to Nancy Strain, D.O. at Concentra on July 8, 2022 for a recheck of her right shoulder and neck. Claimant complained of stiffness in her neck and shoulder, with sharp shooting pain into her right arm and intermittent numbness into the 4th and 5th digits of her right hand. Claimant also complained of headaches and dizziness. Claimant reported that she saw Jason Gridley, D.C. for her knee and he did some acupuncture on her neck and it helped. Dr. Strain noted, "They put her on night duty which she has never done since working there for 5 yrs. She feels uncomfortable to drive at night with her stiff neck and dizziness." (Cl. Ex. 4, p. 31). She diagnosed Claimant with a cervical strain and right shoulder strain. She released Claimant to modified duty with restrictions of lifting no more than 20 lbs., pushing and pulling no more than 40 lbs., and 50% seated duty with no night shift work. Objective findings were noted to be consistent with history and/or work-related mechanism of injury.

8. Respondent filed a Notice of Contest on July 11, 2022.

9. On July 15, 2022 Claimant underwent MRIs of the cervical spine and right shoulder. The impression of the cervical spine MRI was, in relevant part: multilevel degenerative changes with no high-grade spinal canal stenosis and mild left neural foraminal stenosis at C3-C4. The findings noted small disc protrusions at C2-C3 and C3-C4 and C4-C5, C5-C6, C6-C7. The right shoulder MRI demonstrated a partial thickness tear of the distal supraspinatus and mild to moderate degenerative joint changes of the AC joint.

10. On July 26, 2022 Claimant saw Dr. Chau, who reviewed the neck and shoulder MRIs. He noted the results indicated tendinosis, a partial tear of the supraspinatus with degenerative changes, degenerative changes of the neck, and mild foraminal narrowing. He continued Claimant on modified work restrictions.

11. Claimant returned to Dr. Chau on September 27, 2022. Dr. Chau's assessment was right shoulder strain and cervical strain. Dr. Chau renewed Claimant's medications and referred her for acupuncture, massage therapy and evaluation by an orthopedic specialist. Claimant's work restrictions were lifting no more than 20 lbs., pushing and pulling no more than 40 lbs., and no reaching overhead.

12. A Concentra massage therapy note dated October 11, 2022 documents that Claimant was under prior treatment for a different, unrelated injury to her low back and knee.

13. On October 18, 2022 Claimant presented Cary Motz, M.D. at Concentra for an orthopedic evaluation of her right shoulder. Dr. Motz noted that the July 15, 2022 right shoulder MRI showed a small partial thickness interstitial tear of the supraspinatus tendon with some AC joint degenerative changes and subacromial bursitis. On examination, Dr. Motz noted full range of motion of the neck, tenderness about the trapezius and parascapular muscles, mild AC joint tenderness, limited right shoulder range of motion, and positive impingement and Hawkins tests. Her impression was: right shoulder impingement, partial thickness interstitial supraspinatus tear and acromioclavicular joint arthritis. Dr. Motz opined that it was reasonable to consider a steroid injection.

14. On November 29, 2022, J. Tashof Bernton, M.D. performed an independent medical examination ("IME") at the request of Respondent. Claimant reported being about 40% better with continued complaints of right shoulder pain radiating into the right neck and down the right arm, with numbness into all five fingers on the right hand. He noted, "The patient states that she tried to return to work and asked to move 'back to [Redacted, hereinafter DJ],' which has fewer IE[Redacted] than the other position she had previously been in and thus was, by her report, lighter work." (R. Ex. B, p. 9). On examination, Dr. Bernton noted fairly marked decreased range of motion and marked weakness on rotator cuff testing, with some collapse characteristic consistent with potential poor effort. There was non-dermatomal decreased sensation throughout the entire right upper extremity and generalized weakness on testing of the right upper extremity which Dr. Bernton noted was likely non-physiologic. Claimant had diffuse tenderness over the anterior shoulder without specific focal anatomic landmark tenderness.

15. Dr. Bernton opined that Claimant clearly had a significant functional overlay to her persistent symptoms. He remarked,

> There is no objective basis that would explain the patient's reports of decreased sensation for the entire right arm, certainly no objective physiologic basis that could explain such a finding on a work-related basis. The differential for non-dermatomal numbness of the entire right upper extremity is either neuropathy (which appears unlikely and in any case would not be a work-related issue), central nervous system issues (for which there is no evidence in the history or examination, or functional (nonphysically based) symptoms. While there is some remote possibility of a non-work related issue such as Parsonage-Turner resulting in this type of sensory distribution and weakness, it is most likely that this represents functional overlay.
>
> The patient's persistent decrease in range of motion and apparent weakness on multiple muscle testings in the upper extremity again could

> be consistent with an idiopathic acute-onset plexopathy such as Parsonage-Turner (which would be non-work related). The weakness that the patient has is not really consistent with a partial tear of the rotator cuff such as was noted on MRI, but if there was progression to a complete rotator cuff tear, the patient's decreased range of motion and weakness could be understandable on that basis. (Id. at p. 11).

16. Dr. Bernton concluded that the cervical spine MRI demonstrated no findings of nerve root compression that explain Claimant's symptoms and there is no evidence of a cervical injury that is responsible for her persistent symptoms. He recommended that Claimant undergo a repeat right shoulder MRI to rule out a complete rotator cuff tear as well as an EMG to rule out acute idiopathic plexopathy, which would be non-work related. Dr. Bernton noted that, if the EMG results are normal and the repeat MRI showed only the presence of the partial tear of the rotator cuff previously noted, Claimant's diagnosis is a partial rotator cuff tear and associated symptoms magnification. In that event, Dr. Bernton recommend PRP injection of the partial tear and a period of up to a maximum of six weeks of further physical therapy, at which point he opined Claimant would be at maximum medical improvement ("MMI").

17. On January 30, 2023 Dr. Bernton issued an addendum to his IME report after reviewing a repeat right shoulder MRI performed on January 24, 2023. Dr. Bernton noted that the repeat MRI did not demonstrate the presence of a complete rotator cuff tear and essentially revealed the same findings from the previous MRI, including some mild tendinitis and AC joint arthritis and a small partial tear of the distal supraspinatus tendon. He opined that the MRI findings, including the small partial tear, are degenerative and do not explain Claimant's reported symptoms including sudden severe right-sided neck pain radiating down her right arm to her right fingers and into her right chest. He reiterated that if EMG results were negative, a single PRP injection and brief period of physical therapy may be appropriate.

18. Claimant returned to Dr. Chau on February 1, 2023, who noted he was awaiting Claimant's decision regarding undergoing a right shoulder injection. He continued Claimant's work restrictions.

19. On February 24, 2023 Claimant presented to John Sacha, M.D. at Concentra for evaluation and EMG/NCV testing. The EMG/NCV was normal with no evidence of radiculopathy, plexopathy or neuropathy. Dr. Sacha's impression was rotator cuff tendinitis with no evidence of cervical radiculopathy or brachial plexopathy. He remarked that Claimant's testing, history, mechanism of injury and examination demonstrated no evidence of neuropathic process. Dr. Sacha recommended that Claimant undergo a corticosteroid injection of the shoulder and some strengthening and conditioning.

20. Claimant testified she continues to undergo massage therapy, for which she pays. Claimant testified she has not been placed at MMI.

21. Claimant has continued on modified work restrictions. Claimant remains employed by, but is not currently working for Employer. As of the date of injury, Claimant had concurrent employment as a caregiver with [Redacted, hereinafter SC]. Claimant has worked for SC[Redacted] for approximately 10 years. The work injury did not affect Claimant's concurrent employment. Subsequent to the injury Claimant continued to work her concurrent employment with SC[Redacted] and did not incur any lost wages from such employment.

22. Claimant testified she earns $24.25 per hour from Employer, plus overtime, and works an average of 40 hours per week. Claimant testified Employer also provided her one free meal a day, which she values at $8.00 per meal. Claimant calculates her AWW for Employer to be $1,010.00, including meals. Claimant calculates her AWW with SC[Redacted] as $332.40.

23. Claimant's pay records from Employer reflect that, at the time of the injury, she earned $24.62 per hour. Claimant's wage records indicate Claimant's total earnings per pay period varied based on hours worked. From June 6, 2021 to June 18, 2022 Claimant earned an average of $2,220.10 per biweekly pay period, corresponding with average weekly earnings of $1,110.05.

24. Claimant submitted three paystubs from SC[Redacted], indicating she earned gross pay of $2,513.52 from October 1, 2022 to October 31, 2022; $2,325.38 from November 1, 2022 to November 30, 2022; and $2,501.60 from December 1, 2022 through December 31, 2022.

25. Claimant is receiving long-term disability benefits in the amount of $2,556.56 per month ($589.74 per week) through [Redacted, hereinafter SI] under a disability insurance policy. Claimant's pay records demonstrate the insurance premiums under the policy were contributed to 100 percent by Respondent. Claimant did not make any contributions to the SI[Redacted]. SI[Redacted] specified a date of disability of July 2, 2022.

26. The ALJ credits the opinions of Drs. Rubio, Chau, Strain, Motz, Sacha and Bernton, as supported by the medical records and Claimant's credible testimony, and finds Claimant proved it is more probably true than not she sustained a compensable work injury to her right shoulder and neck on June 23, 2022. Claimant is entitled to reasonable necessary, and related medical treatment to cure and relieve the effects of the June 23, 2022 work injury.

27. Claimant proved it is more probably true than not she is entitled to TTD benefits from July 3, 2022 and ongoing, until terminated by operation of law.

28. Based on Claimant's pay records, an AWW of $1,110.05 (with a TTD rate of $740.03) represents a fair approximation of Claimant's wage loss and diminished earning capacity.

29. Respondents are entitled to offset Claimant's TTD award by $589.74 per week for long-term disability payments.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant

demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of 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. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

As found, Claimant proved it is more probably true than not she sustained a compensable work injury to her right shoulder and neck on June 23, 2022. Claimant was in the course of her employment performing her regular work duties when she experienced an onset of symptoms. Each of Claimant's providers at Concentra have diagnosed Claimant with a work-related right shoulder condition and opined Claimant requires right shoulder treatment. Even Respondent's IME physician, Dr. Bernton, opined Claimant sustained a work-related partial rotator cuff tear, for which he recommended a PRP injection and some physical therapy prior to being placed at MMI. Additionally, Drs. Chau, Rubio and Strain credibly diagnosed Claimant with a work-related cervical strain. To the extent the record references lumbar or bilateral knee conditions, the preponderant evidence does not establish any causal nexus between such claimed disability and the June 23, 2022 work injury.

Medical Treatment

Respondents are liable for medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As Claimant met her burden to prove she sustained a compensable work injury to her right shoulder and neck, Claimant is entitled to reasonable and necessary treatment to cure and relieve the effects of such injury.

TTD

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

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

Claimant testified she is not currently working for Employer, but offered no evidence regarding what date she specifically stopped working for Employer and began incurring lost wages. Claimant's position statement states Claimant ceased working for Employer on June 25, 2023. In its position statement, Respondent alleges Claimant worked modified duty until July 2, 2023 and then subsequently elected to "keep herself off" of work for Employer because she wanted to go back to the DJ[Redacted] with fewer IE[Redacted] and lighter work. SI[Redacted] determined a date of disability of July 2, 2022.

The medical records indicate Claimant was released to modified duty on June 24, 2022 and returned to working modified duty for Employer on a night shift until July 3, 2022. Dr. Chau subsequently removed Claimant from work from July 3-5, 2022 due to symptoms associated with her June 23, 2023 work injury. Subsequently, on July 8, 2022, Dr. Strain released Claimant to modified duty but restricted her from working night shifts. The totality of the evidence demonstrates Claimant ceased working for Employer on July 3, 2022 due to a disability caused by the June 23, 2022 work injury, resulting in lost wages. Claimant has missed more than three work shifts due to her disability. Accordingly, Claimant is entitled to TTD benefits from July 3, 2022 and ongoing, until terminated by operation of law. The reference in Dr. Bernton's IME report to Claimant asking to move back to the DJ[Redacted] for lighter work does not, in light of the totality of the evidence, establish Claimant is not entitled to TTD.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. 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. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc.*, WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

Claimant asserts an AWW of $1,342.40, consisting of an AWW for Employer of $1,010.00 and SC[Redacted] of $332.40. Subsequent to the work injury, Claimant continued working her concurrent employment and did not sustain any lost wages from SC[Redacted]. Accordingly, including wages from such concurrent employment would not be a fair approximation of Claimant's wage loss and diminished earning capacity. As found, Claimant's AWW is $1,110.05, based on her employment for Employer.

Offsets

Section 8-42-103(1)(d)(I), C.R.S. provides,

In cases where it is determined that periodic disability benefits are payable to an employee under a pension or disability plan financed in whole or in part by the employer, hereinafter called "employer pension or disability plan", the aggregate benefits payable for temporary total disability, temporary partial disability, and permanent total disability pursuant to this section shall be reduced, but not below zero, by an amount equal as nearly as practical to the employer pension or disability plan benefits, with the following limitations:

(A) Where the employee has contributed to the employer pension or disability plan, benefits shall be reduced under this section only in an amount proportional to the employer's percentage of total contributions to the employer pension or disability plan.

(B) Where the employer pension or disability plan provides by its terms that benefits are precluded thereunder in whole or in part if benefits are awarded under articles 40 to 47 of this title, the reduction provided in this paragraph (d) shall not be applicable to the extent of the amount so precluded.

As found, the record demonstrates Respondent paid 100 percent of total contributions to Claimant's SI[Redacted] disability plan. The pay records do not indicate Claimant made any contributions to the disability premiums. Claimant is receiving disability benefits from SI[Redacted] in the amount of $2,556.56 per month, or $589.74 per week. Respondent is thus entitled to offset Claimant's TTD award by $589.74 per week.

ORDER

It is therefore ordered that:

1. Claimant proved by a preponderance of the evidence she suffered a compensable work injury within the course and scope of employment on June 23, 2022.

2. Respondent shall pay for reasonable, necessary and causally related medical care from authorized providers.

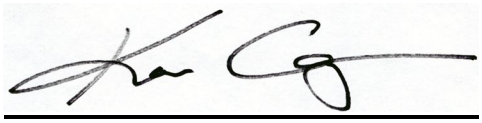
3. Claimant's AWW is $1,110.05, with a corresponding TTD rate of $740.03.

4. Respondent shall pay Claimant TTD benefits beginning July 2, 2022 and ongoing, until terminated by operation of law, subject to applicable offsets, including an offset of $589.74 per week for benefits paid through SI's[Redacted] long-term disability plan.

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

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

DATED: April 26, 2023



Kara R. Cayce
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. 5-176-476-001

ISSUES

I. Whether Claimant is entitled to a change of physician to Dr. Dupper.

FINDINGS OF FACT

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

1. On June 17, 2021, the claimant suffered a compensable back injury while working for the employer.
2. The next day, June 18, 2021, the caimant presented to the University of Colorado Health Emergency Department. He complained of low back pain that radiated down his left leg and down to his foot. He also complained of some numbness in his left foot and upper thigh. Based on his symptoms, an MRI was performed. The MRI demonstrated disc pathology at the L2-L3 level with a 1.7 cm free disc fragment that appeared to be from the L2-L3 disc. Based on the findings and the claimant's symptoms, the emergency room physician discussed the case with the on-call neurosurgeon.
3. On approximately June 18th or 19th, Physician Assistant Nicois, who appears to be from Dr. Tracey Stefanon's office, called the emergency department to discuss the case and arrange for a follow-up appointment for the claimant.
4. On June 21, 2021, the claimant was evaluated Dr. Stefanon. Based on her findings, Dr. Stefanon consulted a neurosurgeon and then referred the claimant to be seen by a neurosurgeon within the next few days.
5. On June 25, 2021, the claimant was seen by Sheree Bower, M.D., a neurosurgeon. Based on the MRI, Dr. Bower concluded that the claimant had an extruded disc fragment at the L2-L3 level. Therefore, based on the claimant's symptoms and the MRI findings, Dr. Bower recommended a microdiscectomy to reduce and decompress the disc, which was causing nerve root impingement. The claimant was agreeable to undergoing surgery. As a result, surgery was tentatively scheduled for July 20, 2021.
6. On June 28, 2021, the claimant followed up with Dr. Stefanon. At this appointment, he still had weakness, numbness, and tingling in his left leg. It was noted that he had seen a neurosurgeon and they discussed surgery. Dr. Stefanon stated that the plan was to proceed with surgery by July 20, 2021. There is no indication Dr. Stefanon was against the surgery recommended by Dr. Bower.
7. On July 20, 2021, the claimant underwent back surgery, with Dr. Bower. Dr. Bower performed a left microdiscectomy at the L2-L3 level.

8. On August 10, 2021, the claimant returned to see Dr. Bower. At this visit, the claimant stated that he initially had some improvement, but over the last week he started to develop worsening left-sided low back pain and left lower extremity pain. Dr. Bower noted that if there was no improvement, she would get a new MRI.

~~9.~~ On August 16, 2021, the claimant saw Dr. Stefanon and complained of continuing pain and radicular symptoms in his left leg. Therefore, a new MRI was ordered. ~~The claimant did not appear to report symptoms in his right leg at this time.~~

10. On August 28, 2021, about two months after his work injury and the first MRI, the claimant underwent the second MRI. The second MRI demonstrated:

    i. Interval discectomy at L2-3 with decreased left lateral recess stenosis compared with the June 18, 2021 MRI, and

    ii. New right central disc extrusion with superior migration at L3-L4 with worsened right-sided spinal canal and right lateral recess stenosis compared with the June 18, 2021, MRI.

    Thus, the claimant appeared to have new, or progressive, findings at the L3-L4 level, in the form of an extrusion or herniation, that developed over 2 months.

11. On September 7, 2021, the claimant returned to Dr. Bower. Dr. Bower reviewed the second MRI and compared it to Claimant's preoperative MRI. Dr. Bower noted that the most recent MRI showed that the prior L2-3 disc herniation was gone, with the lateral recess decompressed, but yet showed a new right sided disc herniation at the L3-4 level causing right lateral recess stenosis. She also noted that the nerve appears to be just past the disc and may not be fully compressed by the disc. Dr. Bower then noted that the claimant did not get any relief from the prior surgery-microdiscectomy. Because the claimant did not get any pain relief from the surgery, Dr. Bower concluded that the claimant's pain might be coming from his sacroiliac joint or his hip. She also stated that pain from the sacroiliac would overlap with the pain expected from the L2-3 disc. And while she did not think Claimant's pain complaints were coming from the L3-4 disc herniation, she could not say for sure. Thus, she recommended physical therapy and a referral to a pain specialist for another opinion about the pain generator as well as the provision of diagnostic and therapeutic injections.

12. On September 8, 2021, the claimant returned to Dr. Stefanon. At this visit, the claimant stated that his symptoms had still not improved after the surgery. Thus, the claimant was directed to follow up with Dr. Bower to determine whether she had any other recommendations.

13. On October 12, 2021, after attending several physical therapy appointments, the claimant returned to Dr. Stefanon. At this appointment, the claimant stated that his symptoms were stable. Dr. Stefanon did, however, note objective improvement.

14. On October 26, 2021, Dr. Stefanon notes indicate that the claimant has "left lower extremity weakness in the right side." The ALJ finds that this finding relates to the right side of the left leg, and not the right leg.

15. On November 9, 2021, the claimant returned to Dr. Stefanon. At this appointment, it was noted that the claimant had been consistent with his home exercises and

demonstrated improvement, but yet he still had left lower extremity weakness in the right side.

16. On November 23, 2021, the claimant reported to Dr. Stefanon that his left lower extremity was about 10% worse and that he still had pain in his thigh, leg, and knee.

17. On December 14, 2021, the claimant returned to Dr. Stefanon. At this visit, it was noted that he continued to improve functionally, and she thought the claimant would reach MMI by the next visit.

18. On January 25, 2022, Dr. Stefanon placed the claimant at MMI, even though Dr. Bower had recommended Claimant consult a pain management physician for possible injections and Claimant had not consulted one yet.

19. On June 10, 2022, the claimant underwent an IME with Anjmun Sharma. Dr. Sharma evaluated the claimant and determined that he was not at MMI. Dr. Sharma concluded that the new disc herniation/extrusion at the L3-L4 level was a direct result of the first surgery. Dr. Sharma was clear that the new herniation/extrusion was not due to any error on behalf of the surgeon, Dr. Bower, but that it was merely a common complication from surgery.

20. On August 24, 2022, Claimant underwent a Division Independent Medical Examination with Alicia Feldman, M.D. Dr. Feldman addressed the claimant's new L2-3 disk herniation and left sided complaints. She noted that after Dr. Stefanon placed claimant at MMI on January 25, 2021, the claimant continued to have pain and functional limitations. She also noted that his neurosurgeon, Dr. Bower, recommended that the claimant should consult a pain management specialist and possibly undergo some injections. After evaluating the claimant, she concluded that he was not at MMI for his left sided complaints. It was her opinion that the claimant would benefit from a consultation with a pain management specialist for evaluation for possible injections to locate the source of the claimant's pain and symptoms. Lastly, she concluded that if the claimant did not improve, he should return to his surgeon for further evaluation before being placed at MMI. While Dr. Feldman did note the claimant's new right sided disc herniation at the L3-4 level, and right sided symptoms, she did not address the cause of the herniation and his right sided symptoms.

21. On October 4, 2022, after the DIME physician determined the claimant was not at MMI, the claimant returned to Dr. Stefanon. At this appointment Dr. Stefanon reviewed the DIME report of Dr. Feldman as well as the IME from Dr. Sharma. Dr. Stefanon concluded that the claimant's ongoing back tightness and left leg symptoms were related to his June 17, 2021, work injury. She also noted that the claimant's ongoing symptoms could be sciatica, SI involvement, facet involvement, piriformis syndrome, or a combination of those conditions. Therefore, she agreed with the DIME physician that the claimant was not at MMI and required additional treatment. As a result, Dr. Stefanon recommended physical therapy, an MRI, and a referral to a pain management specialist to determine whether injections might be appropriate.

22. At the October 4, 2022, evaluation, Dr. Stefanon also evaluated the claimant's new disc herniation at the L3-4 level and his right sided leg complaints. She did not think the new disc herniation, and associated symptoms, were related to his June 17, 2021,

work injury because the herniation and symptoms occurred after (or "remote" from) his work injury. She stated that "the patient did not develop any right-sided symptoms throughout the course of his treatment for his work-related condition and not until 3-4 months after MMI determination."

23. On October 12, 2022, the claimant underwent a third MRI. Interestingly, the MRI demonstrated that at the L3-4 level there was resorption or resection of the small disc herniation at that level seen on the second MRI. But there was now a disc protrusion at the L5-S1 level that had become more prominent. Thus, there appeared to be improvement at the L3-L4 level and worsening, or more degeneration, at the L5-S1 level.

24. On October 14, 2022, the claimant started the physical therapy that had been recommended.

25. On October 25, 2022, Dr. Stefanon evaluated the claimant and went over his most recent-third-MRI findings with him. She noted that the MRI demonstrated multilevel degenerative changes and that the findings seemed to be unchanged since the second MRI, except for the interval progression of a central and right disc protrusion at the L5-S1 level. She again concluded that the claimant's right-side leg problems were unrelated to his work injury. She stated that:

> I did review the MRI results with the patient using an anatomical model. He has multilevel degenerative changes which are mild to moderate in nature and appear to be unchanged since the prior MRI with the exception of interval progression of central and RIGHT central disc protrusion at L5-S1. We did discuss how this may be contributing to his current, new onset, right leg symptoms. I did again discuss with the patient that I do not feel that his right leg symptoms are related to his work injury of 6/17/2021. Please refer to discussion at prior evaluation on 10/4/2022. I do feel that this is likely the natural progression of his chronic underlying condition with multilevel degenerative changes. I did discuss with the patient that any further evaluation and/or treatment should be pursued through his primary insurance/primary care manager for this new abnormality and right leg symptoms as again my opinion is that it is not related to his work injury of 6/1 7/2021.

26. On January 19, 2023, the claimant was seen by a pain management specialist, Dr. Pouliot, and underwent an L5-S1 transforaminal epidural steroid injection. Based on Dr. Pouliot performing an epidural steroid injection at the L5-S1 level, it appears that he thinks the claimant's right sided symptoms are coming from the L5-S1 level, which was not seen until the third MRI taken on October 12, 2022.

27. The claimant contends that he does not believe Dr. Stefanon has his best interests in mind. He also contends that it is his opinion Dr. Stefanon's attitude towards him changed after the DIME physician reversed Dr. Stefanon's MMI finding. As a result, the claimant contends that it is his opinion that Dr. Stefanon merely wants to get him off workers' compensation.

28. While Dr. Stefanon did place the claimant at MMI before he was evaluated by a pain specialist, which was recommended by Dr. Bower, based on the totality of the evidence submitted at hearing, the ALJ finds that Dr. Stefanon is providing the claimant adequate as well as reasonable and necessary medical treatment. This is based on the following factors. First, based on Dr. Stefanon's evaluation of the claimant and reviewing his MRI findings, she immediately referred the claimant to a neurosurgeon, Dr. Bower, who saw the claimant within about a week of his accident. Second, after Dr. Bower recommended surgery, Dr. Stefanon did not disagree with the surgical recommendation made by Dr. Bower. Third, although Dr. Stefanon prematurely placed the claimant at MMI, she reviewed the findings of the DIME physician and has followed many of the recommendations of the DIME physician by restarting physical therapy and referring claimant to a pain specialist. Fourth, Dr. Stefanon ordered a third MRI, even though that was not recommended by the DIME physician. Fifth, while the second MRI demonstrated findings at the L3-L4 level, the claimant did not have the onset of right sided symptoms at the time of the MRI, but according to Dr. Stefanon, he developed the right sided symptoms after being placed at MMI. Based on the timing of the onset of the claimant's right-sided symptoms, Dr. Stefanon's opinion seems reasonable. Thus, Dr. Stefanon has not restricted the claimant from receiving the care that she thinks is reasonably necessary to treat the conditions she thinks are work related.

29. The ALJ finds that the primary reason the claimant wants to change physicians is because he disagrees and is dissatisfied with Dr. Stefanon's opinion that the new MRI findings and his right sided pain complaints are unrelated to his work injury. The ALJ, however, finds that this is a reasonable conclusion by Dr. Stefanon under the facts and circumstance of this case.

30. The ALJ finds that the claimant's disagreement with Dr. Stefanon's conclusion about causation, and thus his dissatisfaction with her, under the facts and circumstances of this case, does not support a finding that the claimant is entitled to a change of physician at this time.

31. The ALJ further finds and concludes that this disagreement of causation has not resulted in the breakdown of the relationship between the claimant and the treating physician to warrant a change of physician.

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 Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant is entitled to a change of physician to Dr. Dupper.[1]

Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* WC 4-597-412 (ICAO, July 24, 2008). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary

[1] In his proposed order, the claimant also contends that because he believes the subsequent disc herniation(s) are related and because Dr. Stefanon does not believe they are related, she is refusing to treat for non-medical reasons and therefore the right to select a physician has passed to the Claimant. However, it appears that the claimant is putting the cart before the horse. Before the claimant can request a change of physician under those circumstances, the claimant has to establish the subsequent disc herniation(s) and right leg symptoms are related. But the compensable nature of the subsequent disc herniation(s) and need for treatment is not before this ALJ. The only issue before this ALJ is the claimant's request to change physicians based on his contention that he does not think Dr. Stefanon has his best interests in mind and is trying limit his workers' compensation benefits by prematurely placing him at MMI because she does not think the claimant's subsequent disc herniation(s) and right sided leg symptoms are related to his industrial injury. Therefore, a change of physician based on the claimant's contention that Dr. Stefanon refused to treat a related condition for non-medical reasons is not before this ALJ.

medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.*

Moreover, an ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, WC 4-570-904 (ICAO, June 19, 2006). On the other hand, the claimant can be entitled to a change of physician based on the breakdown of the relationship between the claimant and the treating physician. *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 16, 1995).

But because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretion to determine whether the circumstances justify a change of physician. *Gutierrez Lopez v. Scott Contractors*, WC 4-872-923-01, (ICAO Nov. 19, 2014).

The ALJ finds that Dr. Stefanon is providing the claimant adequate, reasonable and necessary medical treatment for his work injury. This is based on the following factors. First, based on Dr. Stefanon's initial evaluation of the claimant and reviewing his MRI findings, she immediately referred the claimant to a neurosurgeon, Dr. Bower, who saw the claimant within about a week of his accident. Second, after Dr. Bower recommended surgery, Dr. Stefanon did not disagree with the surgical recommendation made by Dr. Bower, and claimant underwent surgery. Third, although Dr. Stefanon prematurely placed the claimant at MMI, she reviewed the findings of the DIME physician and has followed many of the recommendations of the DIME physician by restarting physical therapy and referring claimant to a pain specialist. Fourth, Dr. Stefanon ordered a third MRI, even though that was not recommended by the DIME physician. Fifth, while the second MRI demonstrated findings at the L3-L4 level, the claimant did not have the onset of right sided symptoms at the time of the MRI, but appears to have developed those symptoms after being placed at MMI. Thus, it is found and concluded that Dr. Stefanon has provided adequate as well as reasonably necessary medical treatment for the conditions she thinks are work related.

As found, the primary reason the claimant wants to change physicians is because he disagrees and is dissatisfied with Dr. Stefanon's opinion that the new MRI findings and his new right sided pain complaints are unrelated to his work injury. A disagreement regarding causation between a physician and claimant can support a change of physician. (*See Clark v. Excel*, WC 4-437-891, (ICAO June 23, 1999),(Change of physician allowed when claimant disagreed with physician regarding the cause of the osteoarthritis and the close relationship between the physician and employer). But a disagreement regarding causation between a claimant and their physician does not automatically warrant a change of physician.

The ALJ finds and concludes that the disagreement and dissatisfaction, under the facts and circumstances of this case, does not support a finding that the claimant is entitled to a change of physician. The ALJ further finds and concludes that this disagreement of causation has not resulted in the breakdown of the relationship between the claimant and the treating physician to warrant a change of physician.

As a result, the ALJ finds and concludes that the claimant has failed to establish by a preponderance of the evidence that he is entitled to a change of physician.

ORDER

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

1. The claimant's request for a change of physician is denied.
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: April 4, 2023.

/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. 5-199-498-001

ISSUES

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

II. Whether Claimant established, by a preponderance of the evidence, that he is entitled to reasonable and necessary medical treatment, including treatment provided by Parker Adventist Hospital, Sky Ridge Medical Center, and Wake Forest Baptist Medical Center.

III. Whether the Claimant established, by a preponderance of the evidence, that he is entitled to an award of TTD/TPD benefits from February 17, 2021, and ongoing.

IV. Whether the Respondents established, by a preponderance of the evidence, that the Claimant was responsible for the termination of his employment.

STIPULATIONS

- In their position statements the parties stipulated that if the claim is deemed compensable the Claimant's average weekly wage is $1,082.32.

FINDINGS OF FACT

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

1. The Claimant is a 41-year-old man with a June 16, 1981, date of birth. The Claimant was hired by the Respondent Employer on November 10, 2020, to work as a coax splicer foreman. **RHE B, Bates 2.**

2. After being hired by the Employer, the Claimant underwent an onboarding process with a company provided laptop. As a part of the Employer's onboarding process, the Claimant reviewed the Employer's employee handbook and electronically acknowledged receipt and review of the same. **December 9, 2022, Tr. 38, 9-22.** The Employer's employee handbook includes the Employer's policies and procedures relating to reporting a workplace injury. **December 9, 2022, Tr. 38, ll. 23-25, Tr. 39, l. 1.** The Employer's accident and injury reporting policy includes six bullet point topics, the first of which requires the employee to immediately report the accident to their supervisor. **December 9, 2022, Tr. 39, ll. 21-25, Tr. 40, ll. 1-15.** The Claimant's direct supervisor, splicing manager, [Redacted, hereinafter DS], testified at the December 9, 2022, continuation

hearing. DS[Redacted] credibly testified the Claimant would not have been permitted to work in the field if he had not completed the Employer's onboarding process, including acknowledging review of the employee handbook. **December 9, 2022, Tr. 40, ll. 16-22.** The Employer also has posted in the Employee breakroom, Colorado's required poster advising workers of their obligation to report any work injury, in writing, within four business days.[1] **December 9, 2022, Tr. 41, l.25, Tr. 42, ll. 1-6.**

3. On May 7, 2022, the Claimant filed his Worker's Claim for Compensation, alleging a January 6, 2021, date of injury. The Claimant described the injury as occurring when, "[H]e went to work hit the ground on [his] knees and a little lump appeared on his abdomen." **RHE A, Bates 2.**

4. The Claimant testified to his work duties at the Employer as splicing coax, carrying tools back and forth from [electrical] pedestal to pedestal, putting in taps, using drills, corers, hand tools, bolts and nuts. The Claimant described using a 30 to 40 pound tool belt in his work, as well as carrying buckets full of taps and other items, with the bucket weighing up to 30 pounds. **September 8, 2022, Tr. 34, ll. 21-23, Tr. 35, ll. 11-21, Tr. 36, ll. 1-18.**

5. At 10:44 a.m., on January 6, 2021, the Claimant presented to Parker Adventist Hospital Emergency Room complaining of bilateral flank pain at a level 10/10, which started "about an hour ago while at work". The Claimant gave a history of multiple prior kidney stones. **RHE D, Bates 84.** The Claimant was treated with IV fluids, IV Toradol, and IV Dilaudid. The treating provider noted the Claimant had been seen at the Parker Adventist ER eight times in the last year for various complaints, including flank pain. **RHE D, Bates 104.** The discharge diagnosis was flank pain. The Claimant's labs and ultrasound were read as normal. There was no evidence of an obstructing kidney stone. **RHE D, Bates 96.**

6. At the time of hearing, the Claimant testified he was confused about the date of injury when completing his Worker's Claim for Compensation. According to his testimony, the Claimant remembered, "all too well," the February 17, 2021, date of injury, and could easily distinguish the pain of kidneys stones from hernia pain. **September 8, 2022, Tr. 39, ll. 18-20, Tr. 40, ll. 22-25, Tr. 41, l 1.** In his testimony, the Claimant reiterated the injury occurred when he was "hitting the ground in front of a pedestal, on [his] knees . . . and [he] felt a pain in [his] right lower abdominal area. And when [he] stuck [his] hand underneath the tool belt, it felt like a little egg had popped out of [his] ab." **September 8, 2022, Tr. 42, ll. 14-21.** After the alleged injury, the Claimant went back to work and finished the four to five hours remaining in his shift. **September 8, 2022, Tr. 45, ll. 11-13.** The Claimant testified the next day, he showed DS[Redacted] the hernia. However, he "couldn't recollect" whether he told DS[Redacted] the hernia was work-related. **September 8, 2022, Tr. 46, ll. 14-19.** After February 17, 2022, the Claimant kept working his regular job.

7. The Claimant returned to the Parker Adventist ER on February 21, 2021, with three complaints, pain in his left thumb, with mild numbness, right inguinal pain, and right lower quadrant abdominal pain at a level 6/10. The Claimant reported the inguinal pain began

[1] On February 17, 2021, the statute, which was subsequently amended, included the four-business day reporting requirement.

a week prior and was intermittent. He felt a bulge and was concerned he had a hernia. The evaluating provider noted, "Potentially there is a mild reducible hernia on palpation. CT scan of the abdomen was notable for a small, reducible fat-containing hernia. The CT scan was discussed with radiology over the telephone. The radiologists believed there was a very mild to minimal fat containing hernia, that they would not have commented on unless they were aware of the doctor's concern. **RHE D, Bates 107.** The final CT result was read as, "No acute CT abnormality…small bilateral fat containing hernias, nonobstructing left renal stones measure up to 0.4 in diameter." **RHE D, Bates 110.** No mechanism of injury is included in the February 21, 2021, treatment note. The Claimant testified that his "pain was too excruciating" on February 21, 2021, to give the providers a mechanism of injury. **September 8, 2022, Tr. 48, ll. 24-25, Tr. 49, ll. 1-2.** After leaving the ER on February 21, 2021, the Claimant returned to work, as the pain "wasn't that bad that [he] couldn't continue working". **September 8, 2022, Tr. 49, ll. 3-10.**

8. The Claimant again presented at the Parker Adventist ER on March 2, 2021. The evaluating physician noted, "This is a 39-year-old male who presents to the Emergency Department for evaluation of continued right groin pain. Patient has had intermittent pain in his groin ***for some time*** and was last seen one week ago at which point in time he had an ultrasound that showed a fat-containing right inguinal hernia. . . ." The Claimant reported his pain was worse with urinating and sometimes with bowel movements. The Claimant presented for "further evaluation and in hopes of having surgery to have this fixed. Patient has not seen surgery in follow-up, yet he did see his primary care physician". **RHE D, Bates 139.** The March 2, 2021, discharge instructions were provided by Allison W. Stroh, PA-C. PA Stroh noted the Claimant was evaluated for recurrence reducible right fat-containing inguinal hernia. Regarding the Claimant's bloody stools, PA Stroh believed they were coming from the Claimant's hemorrhoids, caused by constipation." **RHE D, Bates 148-149.** RN Allyson R. Agerton also educated the Claimant on discharge instructions and the need to consult with surgery to help alleviate the hernia discomfort. She inquired of the Claimant whether he had any further questions regarding discharge instructions. The Claimant responded, "So she's not going to give me any prescriptions for pain?" RN Agerton responded that the PA had instructed the Claimant to take over-the-counter Tylenol and Ibuprofen, as needed. The Claimant responded, "Well, what the hell am I supposed to do? I don't have any insurance. I can't go to my job with this pain. I'm gonna *(sic)* lose my job and then my kid because I won't be able to pay my child support". The Claimant then leapt up from the bed, "with ease and proceeded to get dressed easily without any signs of discomfort nor difficulty moving around as he said, 'So, great! I'm just gonna *(sic)* die from this, I guess! That's a great solution!'" **RHE D, Bates 148.** There is no mechanism of injury documented in the March 2, 2021, treatment note. However, Dr. Nathan Scherer provided the Claimant with a note restricting the Claimant from working from March 2, 2021, through March 8, 2021, and limiting him to light duty, avoiding heavy lifting. **RHE D, Bates 147.** When the Claimant returned to work on March 9, 2021, the Employer accommodated the Claimant's restrictions imposed by Dr. Scherer. **September 8, 2022, Tr. 52, ll. 13-16.**

10. The Claimant returned to Parker Adventist Hospital on March 18, 2021, for the same complaints reported on March 2, 2021, when he had "unremarkable imaging studies", an indirect fat-containing hernia was appreciated, the Claimant was referred to

Denver Health. The physician opined emergent imaging studies were not warranted as the Claimant had a nonsurgical abdomen. Control of constipation was discussed. The provider declined to complete the requested form outlining the Claimant's work restrictions and advised the Claimant he must follow-up with a surgical provider or PCP for completion of the form. **RHE D, Bates 154.** No mechanism of injury is given in the March 18, 2021, treatment note.

11. On March 30, 2021, the Claimant sought treatment at the Sky Ridge Hospital Emergency Room for a worsening right inguinal hernia. The Claimant expressed concern that he would lose his job because he cannot work secondary to pain. **RHE E, Bates 163, 164.** The provider noted the Claimant would eventually need a surgical consult, but he did not then have any insurance. The Claimant was put in the process for Medicaid. **RHE E, Bates 166.** There is no mechanism of injury documented in the March 30, 2021, Sky Ridge treatment note.

12. DS[Redacted], the Claimant's supervisor, credibly testified that the Claimant did show him a lump on his abdomen. Shortly after being shown the lump, DS[Redacted] pulled the Claimant aside and asked him whether it was work related. The Claimant did not say it was work related. The Claimant did not tell DS[Redacted] that he injured himself at work in either January or February 2021 and that he needed medical treatment. DS[Redacted] credibly testified he specifically asked the Claimant if his hernia was work-related, on more than one occasion, and the Claimant did not say it was work-related. **December 9, 2022, Tr. 32, ll. 3-21, Tr. 33, ll. 4-11.** DS[Redacted] credibly testified that, had the Claimant related his hernia to his work activities, he would have:

- Immediately had the Claimant fill out an employee injury report, which is in each employee's vehicle, to provide him the details of the accident/injury.
- Immediately call his manager, the safety manager, and the HR manager to advise them of the injury.
- Taken the Claimant to Concentra for a urinalysis.
- Visited the site of the accident and performed his own investigation.
- Provided his investigative report to the safety manager.

December 9, 2022, Tr. 33, ll. 12-25.

13. The extent of the Employer's procedure for handling work injuries, as described by DS[Redacted], which indicates the actions that would have been taken had the Claimant reported a work injury, are credible. Thus, had the Claimant reported a work-related injury, the Employer would have followed the procedure outlined by DS[Redacted] and there would be documentation of the Claimant's alleged injury consistent with the Employer's procedure for handling work injuries. As a result, the ALJ finds that the Claimant did not report a work injury to DS[Redacted].

14. The Claimant was provided work restrictions due to his hernia. DS[Redacted] credibly testified that the Employer was able to accommodate the Claimant's work restrictions, and modified employment was offered to the Claimant within those restrictions. **December 9, 2022, Tr. 34, ll. 12-25.** The Claimant initially accepted the modified employment offered to him by the Employer.

However, after two days of modified work, the Claimant stopped presenting for work. When the Claimant stopped presenting to work, he was in possession of Employer property including a company bucket truck, a company laptop, a company phone, and company tools. Once the Claimant stopped appearing for work, the Employer made multiple attempts to contact him. **December 9, 2022, Tr. 35, ll. 1-25.** The Employer's Human Resources Manager was finally able to contact the Claimant. On April 9, 2021, the Claimant returned the Employer's property and advised DS[Redacted]he was leaving for North Carolina to be with his parents. **December 9, 2022, Tr. 36, ll. 10-22.** Although the Employer never advised the Claimant his employment was terminated, the Employer had moved to terminate the Claimant's employment on April 5, 2021, for no call/no show. DS[Redacted] credibly testified that had the Claimant returned to work before April 5, 2021, the Employer would have continued to accommodate the Claimant's work restrictions. **December 9, 2022, Tr. 37, ll. 1-14.**

15. After returning to North Carolina, the Claimant sought treatment at the Wake Forest Medical Center on April 14, 2021, with a complaint of right lower abdominal pain worsening over the past five days, after being diagnosed with a hernia in Colorado, "about one month ago". On physical exam, the provider noted swelling and tenderness to the right pelvis, but no appreciable hernia. **RHE F, Bates 182, 183.** The April 14, 2021, treatment note does not set forth any alleged mechanism of injury.

16. The Claimant again presented to Wake Forest Medical Center on March 29, 2022. On physical exam, the Claimant had a large right inguinal hernia descending into the scrotum. CT of the abdomen showed a right inguinal hernia containing minimal fat but appearing mildly inflamed. No herniated bowel was detected. **RHE F, Bates 190, 195.** The Claimant was referred for a surgical consult. Dr. Chandler Cox took a history of the Claimant's injury, documenting the Claimant was a 40-year-old male with a past medical history of kidney stones and IV drug use on suboxone. The Claimant stated he had a known inguinal hernia for the past two years, which is normally easily reducible. The Claimant provided no mechanism of the development of the hernia. **RHE F, Bates 199.** The Claimant was taken to surgery at 8:15 p.m., March 29, 2022, for an open right hernia repair with mesh. Surgical findings included right inguinal hernia with no contents and moderate size cord lipoma. **RHE F, Bates 203.** The surgeon dictated her operative report and subsequently signed the transcribed report at 9:59 p.m., March 29, 2022. **RHE F, Bates 204.**

17. Dr. J. Carlos Cebrian performed a review of the Claimant's pre- and post-accident medical records and prepared a July 15, 2022, report, at the Respondents' request included in the record as **RHE G**. In his report, he concluded that the Claimant's contention that he suffered a work-related hernia on January 6, 2021, was not supported by the medical records he reviewed. Dr. Cebrian also indicated that the fact that a hernia was not diagnosed until February 21, 2021, is contrary to a finding that the Claimant suffered a hernia at work on January 6, 2021. Dr. Cebrian also concluded that the medical records do not support a work-related hernia because the Claimant's medical records he reviewed from January 6, 2021, forward do not mention a work-related mechanism of injury. The ALJ finds Dr. Cebrian's opinions and conclusions, as set forth in his July 15,

2022, report, to be credible and persuasive. The judge is most persuaded by the fact that the Claimant's medical records do not document that the Claimant injured himself at work.

18. Dr. Cebrian subsequently prepared a December 16, 2022, supplemental report included in the record as **Deposition Exhibit 1.** In his report, he addressed the fact that the Claimant changed the date of injury from January 6, 2021, to February 18, 2021. **Deposition Exhibit 1**. In light of the Claimant changing the date of injury, Dr. Cebrian issued additional opinions as to whether the Claimant's work caused his hernia. In his report, he concluded the following:

- The mechanism of injury is not consistent with a work-related hernia.
- The wearing of a tool belt does not affect the intraabdominal pressure. A tool belt is worn on the hips, which takes the pressure off of the abdomen.
- Although [Redacted, hereinafter MF] did some lifting of buckets of tools/supplies, this lifting was not done constantly, and although he may have carried his supplies to the different job areas, the primary work that he was doing was splicing and using tools at the pedestals between houses.
- The mechanism of going down on his knees would not cause or aggravate a hernia.
- MF[Redacted] indicated that as soon as he went down on his knees on the ground, he felt a lump in his right groin area. Hernias do not present immediately, as once the weakness in the abdominal wall and inguinal canal has developed, the passage of the abdominal contents can take several weeks to be obvious as a lump.
- Hernias develop due to congenital weakness in the abdominal wall muscles. Although problems may present early in life, it may take many decades for the hernia to develop. There was nothing particularly strenuous about the lifting that MF[Redacted] engaged in, the frequent up and down, or going down onto his knees. The mechanisms as described would not cause a hernia.

Deposition Exhibit 1.

19. Dr. Cebrian also discussed medical literature that he contends supports his opinion that a single lifting event is unlikely to cause a hernia. Dr. Cebrian stated that:

> Medical literature has reviewed whether the frequent patient claim of a single lift or event resulting in a hernia is accurate. Patterson et al in 2018 performed a systematic review of multiple studies to determine whether there was an association between a single strenuous event and the development of an inguinal hernia. They indicated that evidence for causation regarding occupational and physical exposures is limited. They determined that only 4% of patients who reported an acute inguinal hernia actually had an inguinal hernia which could be attributed to a strenuous event. They concluded that although patients associate hernias to a single episode, upon application of stringent criteria, a much smaller

percentage are deemed to be actually attributable to a single strenuous event.

Deposition Exhibit 1.

20. Dr. Cebrian also testified at both hearings and in a February 17, 2023, post-hearing evidentiary deposition. Dr. Cebrian testified that the Claimant's described mechanism of injury, hitting the ground on his knees with the immediate onset of pain, and an egg-shaped lump appearing on his abdomen, is inconsistent with a traumatically induced inguinal hernia. Dr. Cebrian testified the reason a lump does not present immediately, or within a very short period of time, is because when there is a traumatically induced hernia, you have to tear through abdominal wall layers, fascia layers, and go through the inguinal canal. That process is "essentially impossible" to happen in an immediate situation if there has been a traumatically induced hernia. The ALJ finds this testimony to be persuasive. **Dr. Cebrian Depo. Tr. 4, ll. 14-25, Tr. 5, ll. 1-5.**

21. Dr. Sander Orent reviewed the Claimant's medical records and issued a report on January 27, 2023. In his report, Dr. Orent addressed Dr. Cebrian's opinions set forth in his December 16, 2022, report. Dr. Orent provided literature that was allegedly contrary to the literature cited by Dr. Cebrian. For example, Dr. Orent stated that he found an article from 2007 by Sanjay that concluded that "this study supports the hypothesis that the appearance of inguinal herniation may be attributed to a single strenuous event. Indirect hernias are more likely to present following such an event." Dr. Orent also cited another article. In his report he stated that "In addition, from the European Journal of Epidemiology in 1992, they discuss the risk factors that physical effort is "closely related to the appearance of inguinal hernias. A person whose work involves lifting or other strenuous exertion is at a higher risk than those whose jobs are less strenuous." In the end, Dr. Orent concluded that the most likely cause of the Claimant's hernia was either the repetitive lifting of his job or what occurred right before the single event described by the Claimant, which Dr. Orent described as when the Claimant was lifting and suspending the bucket just before he dropped to his knees. **CHE 19, Bates 665-669; Dr. Cebrian Depo. Tr. 16,17.**

22. In his testimony, Dr. Cebrian relied on the fact that on October 19, 2020, the Claimant was diagnosed with small bilateral hydroceles and a small left varicocele. **RHE D, Bates 41.** Dr. Cebrian testified that hydroceles are known risk factors for the development of hernias. Dr. Orent did not dispute Dr. Cebrian's opinion that hydroceles are a risk factor for hernias as the hernia travels down the same location that the fluid travels in a hydrocele. **Dr. Cebrian Depo. Tr. 10, ll. 12-25, Tr. 11, ll. 1-10.** Dr. Cebrian and Dr. Orent agree that increased intra-abdominal pressure is a risk factor for the development of hernia. Dr. Cebrian testified that straining to defecate or urinate causes increased intra-abdominal pressure. **Dr. Cebrian Depo. Tr. 14, ll. 1-22.** Dr. Cebrian testified it is not medically probable the Claimant's inguinal hernia was caused by his work activities on February 17, 2021. **Dr. Cebrian Depo. Tr. 18, ll. 6-9.**

23. Dr. Cebrian also commented on the Sanjay article relied upon by Dr. Orent. Dr. Orent relied on the Sanjay article to support his opinion that the appearance of inguinal hernias may be attributed to a single traumatic event. However, Dr. Cebrian testified that the findings of the study were based on the self-reports of the patients. In other words,

the patients were asked whether they thought their hernias were caused by a single traumatic event and then their opinions were used to conclude that they were. On the other hand, Dr. Cebrian relied on a 2018 study where they did a systematic review of the literature for single strenuous events leading to hernias and such study determined only 4% of hernias are due to an acute traumatic event. **Dr. Cebrian Depo. Tr. 16,17.**

24. Both doctors provide opinions that are reasonably supported by their interpretation of the record, which includes the statements of the claimant, the medical records, and the medical literature. That said, in the end, the ALJ finds Dr. Cebrian's opinions and conclusions to be more persuasive based on the underlying facts of this case and the articles he cites.

25. A co-worker, [Redacted, hereinafter WW] also testified at the hearing. He did remember the Claimant stating at work that he had abdominal pain and that he had a bulge in his abdomen. He did not, however, recall the Claimant telling him it happened at work and that it was due to work on the day of the alleged accident. On the other hand, he did remember the Claimant calling him just before he spoke with the Claimant's attorney. During this conversation, which occurred on July 5, 2022, WW[Redacted] remembers the Claimant telling him during this phone call that he injured himself at work. Therefore, WW[Redacted] told the Claimant's attorney on July 5, 2022, after the phone call with the Claimant, that the Claimant said he injured himself at work. As a result, the ALJ finds that the Claimant called WW[Redacted] to get him to tell his attorney that the Claimant said he hurt himself at work-insinuating the Claimant said it on the day of the alleged accident. In essence, the Claimant was telling WW[Redacted] what to tell the Claimant's attorney, regardless of what happened or what WW[Redacted] remembered. The ALJ credits WW's[Redacted] testimony regarding the call that he received from the Claimant and finds that the Claimant tried to get WW[Redacted] to testify that an incident happened at work and that the Claimant hurt himself at work, even though WW[Redacted] does not remember the Claimant stating that he got hurt at work while they were working together. In other words, the ALJ finds that the Claimant was trying to shape WW's[Redacted] testimony in his favor. **September 8, 2022, Tr. 76-79.**

26. Overall, the ALJ does not find the Claimant's testimony to be credible, reliable, or persuasive for several reasons. First, the ALJ finds that the Claimant called WW[Redacted] to get him to testify that the Claimant injured himself at work, even though WW[Redacted] did not remember the Claimant injuring himself at work. Second, the Claimant previously had a workers' compensation claim in North Carolina and admitted that he knew he had to file a workers' compensation claim to receive benefits. But even though he knew he had to file a claim, the claimant did not file his claim until March 7, 2022, which is over a year after his injury and after seeking medical treatment, including surgery, for his alleged work injury. **RHE A, Bates 2.** Third, the initial medical records from the emergency departments do not document the Claimant stating that he injured himself at work. The ALJ finds that the lack of such information reflects that the Claimant did not believe he injured himself at work when he was seeking treatment and therefore did not mention such to his medical providers. Fourth, the Claimant testified that DS[Redacted] did not ask him if his hernia was work related. But DS[Redacted] credibly testified that he pulled the Claimant aside and asked him if it was work related and the Claimant did not say it was work related.

27. Based on the totality of the evidence, the ALJ finds insufficient evidence to establish that it is more likely than not Claimant suffered a right inguinal hernia due to his work activities.

28. Claimant failed to prove by a preponderance of the evidence that he suffered a right inguinal hernia due to his employment.

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 Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

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

A compensable injury is one which requires medical treatment or causes a disability. It is well established that it is the claimant's initial burden to prove a compensable injury. *City of Boulder v. Payne, supra; Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). The determination of whether the claimant proved an injury which required medical treatment or resulted in disability is one of fact for the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). Moreover, the ALJ's findings may be based on reasonable inferences from circumstantial evidence. *Ackerman v. Hilton's Mechanical Men, Inc.*, 914 P.2d 524 (Colo. App. 1996).

It is the claimant's burden to prove a causal connection between his employment and the resulting condition for which medical treatment and indemnity benefits are sought. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The determination of whether the claimant sustained that burden of proof is factual in nature. The claimant bears the burden of proof, by a preponderance of the evidence, to establish that an injury arising out of, and in the course of the employment, was the cause of the disability and need for treatment.

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 or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

In this claim, the Claimant alleges he developed a right inguinal hernia from very specific work activities performed on February 17, 2021 (initially reported as January 6, 2021). At hearing, the Claimant testified:

> Q. [By [Redacted, hereinafter MP]: At any point, was there ever a doubt in your mind as when this hernia first occurred? And I don't mean the specific date, but I mean when you first noticed it and what caused it?
>
> A. [By Claimant]: There's no doubt in my mind what caused it.
>
> Q. And what was that?
>
> A. When I hit the ground to go to work.

As found, Dr. Cebrian credibly and persuasively testified it is not medically probable the Claimant developed a traumatically induced inguinal hernia when the Claimant dropped to his knees at work, felt the immediate onset of pain, and noted an egg-shaped lump in his abdomen.

Dr. Orent's report does not challenge Dr. Cebrian's opinion that the described mechanism is inconsistent with causation of a traumatically induced hernia. Instead, Dr. Orent offers other potential mechanisms of injury, such as the repetitive nature of his work or carrying the buckets. Moreover, some of the medical literature relied upon by Dr. Orent to support his contention that hernias are caused by single events seems to be of questionable quality since the findings and conclusions appear to rely on the opinions of the patients. Thus, the ALJ does not find the opinions of Dr. Orent to be persuasive.

Lastly, and most importantly, the ALJ does not find the Claimant's testimony to be credible, reliable, or persuasive. As addressed above, the Claimant called WW[Redacted] to get him to testify that the Claimant injured himself at work, even though WW[Redacted] did not remember the Claimant injuring himself at work. In addition, the Claimant previously had a workers' compensation claim in North Carolina and admitted that he knew he had to file a workers' compensation claim to receive benefits. But even though he knew he had to file a claim, the claimant did not file his claim until March 7, 2022, which is over a year after his injury and after seeking medical treatment, including surgery, for his alleged work injury. Furthermore, the initial medical records from the emergency departments do not document the Claimant stating that he injured himself at work. The ALJ finds that the lack of such information reflects that the Claimant did not believe he injured himself at work when he was seeking treatment and therefore did not mention such to his medical providers. Lastly, the Claimant testified that DS[Redacted] did not ask him if his hernia was work related. However, DS[Redacted] credibly testified that he pulled the Claimant aside and asked him if it was work related and the Claimant did not say it was work related. The ALJ finds the testimony of DS[Redacted], that he asked the Claimant on multiple occasions if his injury was work-related, without receiving a direct response, credible and persuasive. DS's[Redacted] testimony is bolstered by the Claimant's own testimony that he "could not recollect" if he told DS[Redacted] his injury happened at work. Thus, the ALJ finds and concludes that the Claimant did not report a work-related injury to DS[Redacted] because he did not think his hernia was caused by his work activities.

An ALJ might reasonably conclude the evidence is so conflicting and unreliable that the claimant has failed to meet the burden of proof with respect to *causation*. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (weight to be accorded evidence on question of causation is issue of fact for ALJ). *See also, In the Matter of the Claim of Tammy Manzanares, Claimant*, W. C. Nos. 4-517-883 and 4-614-430, 2005 WL 1031384 (Colo. Ind. Cl. App. Off. Apr. 25, 2005).

In this case, the ALJ finds and concludes that the Claimant has failed to prove, by a preponderance of the evidence, that he suffered a hernia as a result of his work activities with this Employer.

ORDER

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

1. Claimant's claim is denied and dismissed.

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: April 10, 2023

/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. 5-064-370-003

ISSUES

I. Whether the claimant overcame the opinion of the Division Examiner and established by clear and convincing evidence that she is not at maximum medical improvement.

II. Whether the respondents are responsible for the CRPS testing, consisting of a QSART and thermogram, that was performed by Dr. Reinhard.

III. Whether the respondents are responsible for stellate ganglion blocks.

IV. Temporary total disability benefits if the claimant is not at maximum medical improvement.

V. Whether the respondents may offset previously paid permanent partial disability benefits against temporary disability benefits if the claimant is not at MMI. (See stipulation)

VI. If the claimant is at maximum medical improvement, whether her scheduled impairment rating should be converted to a whole person impairment rating.

VII. Disfigurement benefits.

STIPULATION

1. Following the hearing, and as set forth in the claimant's proposed order, the respondents' counsel advised claimant's counsel that they would not be seeking an order compelling claimant to pay the alleged overpayment. The parties further agreed that any alleged overpayment would act as a credit against future indemnity benefits and the parties would be able to properly calculate and apply the claimed overpayment or credit.[1]

[1] As set forth in the claimant's proposed order, any overpayment will be offset or credited against future indemnity benefits. Therefore, the ALJ has not addressed the overpayment, offset, or credit issue against any indemnity benefits awarded under this order since the parties will calculate such. If for some reason the parties cannot resolve the issue, either party may file an application for hearing to resolve the matter.

FINDINGS OF FACT

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

1. The claimant suffered an admitted work-related injury to her right upper extremity on July 13, 2017.
2. The claimant was injured while repetitively using an iron press at work. At the time of the injury, the claimant developed pain in her right biceps, right shoulder, and neck. (Resp. Ex., p. 249)
3. On July 31, 2017, the claimant was evaluated by Michael Dietz, PAC. At this appointment, she complained of pain in her right biceps, right shoulder, and the right side of her neck. Based on his assessment, Mr. Dietz assessed the claimant as suffering from a right shoulder strain, with a possible rotator cuff tear, and a biceps strain, with a possible full tear. Therefore, Mr. Dietz recommended an MRI of the claimant's right biceps and shoulder. (Resp. Ex., pp. 249-253)
4. On August 4, 2017, the claimant underwent an MRI. The MRI revealed the presence of mild insertional supraspinatus tendinosis, a small amount of fluid in the subacromial region, and a non-displaced tear of the labrum. Thus, the claimant's pain complaints were supported by objective findings on the MRI.
5. On September 8, 2017, the claimant was evaluated by Dr. James Rafferty. During this visit, she stated that her pain was about 50% better. But she still had pain over the anterolateral portion of her shoulder that radiated into her arm and sometimes her forearm. Based on her presentation, the claimant was referred to Dr. Snyder for a subacromial injection, which she had on September 15, 2017. (Resp. Ex., p. 272)
6. On November 7, 2017, the claimant returned to Dr. Rafferty. The subacromial injection reduced her symptoms by about 50%. She had also undergone about 15 physical therapy appointments. That said, the claimant still had mild to moderate shoulder pain over the anterolateral shoulder when she elevated her arm. (Resp. Ex., p. 272)
7. On December 19, 2017, the claimant returned to Dr. Rafferty. At this appointment, his assessment included right sided shoulder impingement syndrome and a right sided labrum tear. Since the claimant failed to improve, Dr. Rafferty referred her back to the surgeon, Dr. Snyder. Dr. Snyder ultimately concluded that the claimant was a surgical candidate.
8. On January 22, 2018, and due to ongoing pain and symptoms, the claimant underwent surgery with Dr. Snyder. He performed a biceps tenotomy with superior labral debridement and subacromial decompression. (Resp. Ex., p. 284)
9. On March 13, 2018, the claimant was seen by Dr. Rafferty. At this appointment, the claimant stated that her condition had improved since the surgery and that she was very happy with her overall progress. (Resp. Ex., p. 288)
10. In any event, on June 12, 2018, the claimant went to Dr. Rafferty and still had shoulder pain with some cramping over the anterior aspect of her shoulder, the biceps region, and her AC joint. Due to her ongoing symptoms, the claimant wanted to see Dr. Snyder one

last time for further evaluation and consideration of an AC joint steroid injection. (Resp. Ex., pp. 297-298)

11. On July 10, 2018, the claimant was seen by Dr. Snyder for her ongoing symptoms. At that appointment, the claimant received a steroid injection into the bicipital groove and the subacromial space. Although the claimant did well for two days, her symptoms returned. (Resp. Ex., p. 301)

12. On July 24, 2018, the claimant returned to Dr. Rafferty. At this time, her symptoms persisted, and she also had right sided pain over the base of her neck. Therefore, Dr. Rafferty referred her to have another MRI. (Resp. Ex., pp. 301, 306)

13. On August 16, 2018, the claimant saw Dr. Snyder. At that time, the only additional treatment he recommended was a PRP injection. (Resp. Ex., p. 309)

14. The claimant returned to see Dr. Rafferty on August 28, 2018. Dr. Rafferty noted that based on her new MRI, the claimant suffered from a high-grade bursal surface tear as well as a longitudinal split tear of the biceps tendon. He noted that the claimant would proceed with the PRP injection recommended by Dr. Snyder. Thus, the PRP injection was scheduled for September 5, 2018. (Resp. Ex., pp. 309-312)

15. On September 19, 2018, the claimant saw Dr. Sanders. At this appointment, Dr. Sanders noted that the due to ongoing shoulder complaints and the MRI findings, it was recommended that the claimant undergo another orthopedic evaluation for surgery, but that the claimant wanted to try to avoid undergoing a second surgery. It was also noted that the PRP injection was denied. Based on the denial of the PRP injection, and the claimant's desire to avoid a second surgery, Dr. Sanders appealed the denial of the PRP injection. (Resp. Ex., pp. 314, 315, 324, 325)

16. On October 22, 2018, the claimant returned to Dr. Sanders. Because of ongoing shoulder pain, the claimant decided that she would consider undergoing another surgery. Therefore, Dr. Sanders referred the claimant to Dr. Hatzadakis for a second opinion about possible surgery. (Resp. Ex., p. 331)

17. On December 13, 2018, Dr. Hatzadakis stated that additional diagnostic testing was needed to determine the etiology of the claimant's shoulder pain. This included an advanced MRI to evaluate the claimant's labrum, lab work, and an EMG to evaluate the claimant's suprascapular and axillary nerves. (Resp. Ex., pp. 359, 360)

18. On January 29, 2019, the claimant was evaluated by Dr. Hatzidakis for her ongoing shoulder pain. At this appointment, the claimant had sensitivity to very light touch across the superior, posterolateral, and anterior regions of her shoulder, paraspinal muscles, and her neck. She also had tenderness over the greater tuberosity and intertubercular groove. The claimant did, however, have full active range of motion and full strength, but with diffuse pain in all planes. Based on his evaluation, he assessed the claimant with possible complex regional pain syndrome (CRPS) and a possible low-grade infection. Therefore, he referred claimant to Dr. "Checa or Brone" (most likely Dr. Brown) for a CRPS consultation. (Clamant Ex. 1, p. 3)

19. On March 6, 2019, the claimant was evaluated by Robert Brown, M.D. at Rocky Mountain Pain Solutions for her chronic shoulder pain. At this appointment, the claimant rated her pain at 8/10. Dr. Brown evaluated the claimant and diagnosed her with CRPS 1 of the

right upper extremity. He prescribed Lyrica and recommended additional testing that included a triple phase bone scan and a QSART. He also considered a stellate ganglion block depending on the test results of the bone scan and QSART testing. (Resp. Ex., pp. 32-33)

20. On March 25, 2019, the claimant returned to Dr. Sanders. At this visit, it was noted that Dr. Brown was concerned that the claimant suffered a nerve injury secondary the interscalene nerve block she received during shoulder surgery. (Resp. Ex., p. 395)

21. On April 30, 2019, the claimant returned to Dr. Hatzidakis. At this appointment she rated her shoulder as being 20% of normal. He noted that the EMG performed by Dr. Feldman was normal. His assessment at that time was persistent right shoulder pain, post-surgery, with recent diagnosis of CRPS, and a possible low-grade infection. At this point, he recommended an MRI and aspiration of her right shoulder, which might result in debridement or actual biopsies and cultures to assess for infection. He also concluded that she might need a distal clavicle resection. (Claimant's Ex. 1, pp. 4-5)

22. On June 19, 2019, an MRI of the claimant's right shoulder was taken. It showed a "New large focal intermediate lesion – mass - as the axillary recess within the glenohumeral joint that could relate to focal nodular synovitis or possibly secondary to other debris, including hemorrhage." The radiologist also concluded that the lesion – mass - was most likely new because it was not present in the July 2018 study.

23. On August 15, 2019, the claimant returned to Dr. Hatzidakis. At this appointment he noted that the claimant had undergone an MRI and it demonstrated a supraspinatus tendinopathy without tear but yet a possible full-thickness tear in the biceps tendon, as well as synovitis within the glenohumeral joint. He also noted that he could not assess her shoulder strength due to pain. His assessment at that time was persistent right shoulder pain, post-surgery, with recent diagnosis of CRPS with tendinosis. He recommended either continuing with conservative treatment or proceeding with surgery, which included an arthroscopic debridement, possible subacromial decompression with biopsies for cultures, a distal clavicle resection with possible long head biceps tenodesis, and a synovectomy. At the appointment, the claimant stated that she wanted to proceed with surgery. Thus, authorization for surgery was requested.

24. On September 6, 2019, Dr. Erickson reviewed the request for surgery. Based on his review, the surgery recommended by Dr. Hatzidakis was denied, pending a psychological evaluation. As a result, the claimant was referred to Health Psychology Associates for a psychological evaluation. Soon after, the claimant was evaluated by Dr. Bruns, a psychologist. (Resp. Ex., pp. 427-437)

25. On September 21, 2019, Dr. Bruns' diagnostic impression was adjustment disorder with depression and a chronic pain disorder that were attributable to the claimant's work injury. (Resp. Ex., p. 611)

26. On October 1, 2019, the claimant returned to see Dr. Brown. However, rather than seeing Dr. Brown, she saw Shannon Bock, PA-C. At this visit, the claimant rated her pain at 4/10. Ms. Bock noted that the claimant's shoulder range of motion was limited in all planes due to pain. She also noted that the claimant had significant pain complaints and behaviors upon inspection and to very light touch of her right upper extremity. At this appointment,

Ms. Bock could not tell if the triple phase bone scan and QSART had been performed. Regardless, she diagnosed the claimant with CRPS and recommended the claimant proceed with a stellate ganglion block. (Claimant's Ex. 3, pp. 34-36)

27. On February 21, 2020, Dr. Erickson performed an internal review for the respondents of Dr. Hatzidakis' authorization request for surgery. Dr. Erickson concluded that the surgery recommended by Dr. Hatzidakis was not indicated at this time given the reported findings noted on the claimant's psychological evaluation by Dr. Bruns. It was noted that Dr. Hatzidakis' primary concern was regarding a potential occult infection and as a result, Dr. Erickson recommended the claimant only undergo additional aspiration cultures of the shoulder joint at this time. (Resp. Ex., p. 467)

28. On May 7, 2020, Dr. Hatzidakis evaluated the claimant and noted that she had been diagnosed with CRPS and recommended repeating the evaluation for a potential low-grade infection with repeat lab work. He also recommended proceeding with another MRI, which was scheduled for June 2, 2020. (Resp. Ex., p. 468) Claimant underwent another MRI. The new MRI showed a chronic full-thickness intra-articular long head biceps tear, mild tendinosis of the supraspinatus and subscapular without tearing, plus some other findings that were uncertain. (Resp. Ex., p. 476)

29. On September 9, 2020, the claimant underwent an independent medical examination with Dr. Erickson where he physically evaluated the claimant. In essence, he was asked to address several questions, which included the claimant's current work-related diagnoses, the actual pain generator(s), and whether additional treatment was reasonable and necessary to treat the claimant from the effects of her work injury. Dr. Erickson concluded the following:

    a. There did not appear to be any objective findings in the medical records to support claimant's ongoing pain complaints.

    b. A specific pain generator has not been identified.

    c. The claimant does not have an infection in her shoulder.

    d. There is no basis to support another MRI.

    e. Referral to a specialist to perform an excisional biopsy of the axillary lesion is appropriate and related at this time, until proven otherwise.

    f. There is not a chronic full thickness tear of the long head of the biceps. Instead, the finding is the result of the surgery performed by Dr. Snyder.

    g. Claimant's ongoing shoulder pain is likely due to her underlying psychological condition, which Dr. Erickson described as a "factitious pain disorder." Thus, he stated that he agreed with Dr. Bruns that any surgical procedures should be undertaken with caution, especially to address subjective pain complaints.

    (Resp. Ex., pp. 201-224)

30. In the end, Dr. Erickson used the psychological report from Dr. Bruns to characterize the claimant's pain complaints as being unreliable and being psychologically based instead of physically based.

31. On October 13, 202, Dr. Kelly evaluated the claimant for assessment of the lesion-mass - in her right shoulder. She did state that after reviewing the MRI the claimant had a soft tissue mass in the inferior recess of the glenohumeral joint that appeared to be synovial based. She did not, however, indicate that the mass was related to the claimant's work injury or shoulder surgery. (Resp, Ex., p. 74)

32. On November 13, 2020, the claimant underwent surgical resection of the mass in her shoulder with Dr. Kelly. The biopsy was unremarkable. (Resp. Ex., p. 508)

33. On February 15, 2021, the claimant saw Dr. Sanders. At this appointment, Dr. Sanders explained that the surgery performed by Dr. Kelly was to remove a fatty mass and that it had no histopathologic abnormalities. He also stated that although Dr. Hatzidakis has recommended a repeat arthroscopy, the procedure has been denied by the insurer. Thus, he concluded that the claimant was approaching MMI. Dr. Sanders did not discuss the cause of the fatty mass that was removed. (Resp. Ex., p. 520)

34. On April 19, 2021, Dr. Sanders evaluated the claimant and stated that he was concerned the claimant may have developed CRPS. At this visit, he noted the claimant's persistent symptomatology that included hypersensitivity, decreased range of motion, and numbness. Based on the claimant's symptoms, and his evaluation, he referred her to Dr. Reichhardt. He also noted that the claimant had developed dysesthesias of the right hand that may be secondary to carpal tunnel syndrome. (Resp. Ex., p. 526)

35. On April 26, 2021, Dr. Erickson performed a medical record review. Dr. Erickson was asked to supplement his prior opinion that the lesion, or mass, in the claimant's shoulder was unrelated to her work injury. In his report, he concluded that since the mass has been removed and it has been identified as a benign mass, the mass is unrelated to her work injury. (Resp, Ex., p. 229)

36. On May 3, 2021, per a referral from Dr. Sanders, the claimant was evaluated by Dr. Reichhardt. Dr. Reichhardt evaluated the claimant. He noted the claimant had allodynia throughout the right upper extremity. Based on his examination of the claimant, he was concerned that the claimant might have CRPS. In order to rule out CRPS, he recommended bilateral shoulder x-rays, QSART, and a thermogram. He added that if the tests were negative, it was unclear whether it would be medically advisable for the claimant to have a stellate ganglion block or a bone scan. Thus, he wrote a prescription, and sought authorization, for the claimant to undergo a QSART and thermogram with Dr. Schakaraschwili (Resp. Ex., pp. 91-98)

37. On May 28, 2021, Dr. Reichhardt reevaluated the claimant. He noted that his request for a QSART and thermogram were denied. He also noted that the claimant did meet the Budapest criteria set forth in the Colorado Medical Treatment Guidelines and was therefore a candidate for additional diagnostic testing for CRPS - a QSART and thermogram. (Resp. Ex., p. 100).

38. The Complex Regional Pain Syndrome / Reflex Sympathetic Dystrophy Medical Treatment Guideline, (Guidelines), is set forth in Rule 17, Exhibit 7. The Guidelines indicate that the diagnosis of CRPS continues to be controversial. (Guidelines, p.18) Regardless, the Guidelines set forth a framework to help diagnose and treat CRPS. The first part of the framework contains the Budapest criteria. If the claimant meets the

Budapest criteria, then it is presumed that the claimant meets the clinical components of CRPS. Once the clinical components of CRPS are met, the Guidelines set forth testing that can be done to help confirm a diagnosis of CRPS. The additional testing that can be done to confirm a diagnosis of CRPS includes, but is not limited to, a QSART and a thermogram. Under the Guidelines, if the claimant meets the Budapest criteria, and also has a positive QSART and thermogram, then the claimant has a confirmed diagnosis of CRPS under the Guidelines. Then, once the claimant has a confirmed diagnosis of CRPS, additional treatment can be provided. The additional treatment can include a sympathetic block such as a stellate ganglion block-which can also be diagnostic. (Guidelines, p. 24)

39. On June 24, 2021, Dr. Reichhardt evaluated the claimant and performed another physical examination. He noted on physical examination that the claimant had a tremor of her right upper extremity. He also noted mild swelling of her right hand, which was not noted in a prior examination, but he did not find any color changes that day. He also did not notice any sweat, hair, or nail trophic changes. Dr. Reichhardt stated that, despite his findings, the QSART and thermogram were still being denied based on the opinion of Dr. Fillmore, a [Redacted, hereinafter PL] Advisor. According to Dr. Reichhardt, the primary reason the testing was denied was based on Dr. Fillmore's interpretation of Dr. Bruns' psychological assessment, which purportedly indicated that the claimant is at significant risk for poor treatment response. Thus, Dr. Reichhardt called Dr. Bruns to discuss whether there would be any psychological contraindications to proceeding with the QSART and thermogram. (Resp. Ex., pp. 104, 105)

40. On August 12, 2021, Dr. Reichhardt evaluated the claimant and again noted swelling in her right hand as well as an intermittent tremor of her right arm. He also noted that the QSART and thermogram continued to be denied. (Resp. Ex., pp. 117, 118)

41. On August 23, 2021, Dr. Reichhardt discussed the matter with Dr. Bruns and Dr. Bruns said that there were no psychological contraindications to proceeding with the QSART and thermogram and workup for CRPS. (Resp. Ex., p. 121). Then, on September 1, 2021, Dr. Reichhardt again requested authorization for the QSART and thermogram based on his conversation with Dr. Bruns.

42. On September 9, 2021, Dr. Reichhardt evaluated the claimant. At this visit he noted that he discussed the claimant's case with Dr. Bruns and Dr. Bruns did not think her psychological condition is a contraindication for the QSART and thermogram and also indicated that a referral had been put in for it. (Resp. Ex., p.125)

43. On September 21, 2021, Dr. Bruns issued a report indicating that his initial evaluation has been taken out of context and misused to deny the claimant medical treatment. Dr. Bruns rebuked Dr. Erickson's conclusion that Dr. Bruns diagnosed claimant with a factitious pain disorder. In his report, Dr. Bruns stated that he has never diagnosed claimant with a factitious pain disorder. He specifically noted that factitious disorders are severe characterological disturbances, characterized by "primary gain" of being a patient and that there is no indication the claimant is suffering from a factitious disorder. (Resp. Ex., p. 611)

44. On October 6, 2021, the claimant was evaluated by Dr. Primack. Dr. Primack physically evaluated the claimant and reviewed her medical records. Based on his assessment, he stated and concluded that:

> There is no need whatsoever for a thermogram and QSART. The patient does not meet Budapest criteria. In fact, her tremor would go away with easy distraction. There are also profound nonphysiologic findings. Her perceptions of her shoulder pain are such that if there is pressure on her right leg, she has referred pain to the shoulder. When one pushed on her left shoulder, causing no encroachment to the right shoulder, she would have "right shoulder pain." In fact, when touching the top of her ears, she would have referred pain going into the trapezius muscles. There is also some diffuse pain at the level of the right scapula. This can be seen with cervical spondylosis, which again is not work related.

Dr. Primack also stated in his report that:

> The patient has been through 2 EMGs. The 2nd EMG did demonstrate components of carpal tunnel syndrome. This would not be considered work related. This in and of itself can give numbness, tingling, and pain ascending to the shoulder. It can also be the etiology of the periodic "tremor." However, as [Redacted, hereinafter MH] points out, she has good range of motion. She just has "pain." She has reached a stable and stationary level of functioning where further [treatment] will not alter her outcome. Therefore, her MMI status is reasonable and appropriate.

(Resp. Ex., pp. 67-82)

45. In his October 6, 2021, report. Dr. Primack also addressed the cause of the mass in the claimant's shoulder. He concluded that the mass was not work-related because the biopsy demonstrated mature adipose tissue and synovial tissue with no histopathologic abnormalities. It was one of synovial proliferation. Thus, Dr. Primack concluded that the mass was unrelated to the claimant's work injury.

46. On October 8, 2021, the claimant returned to Dr. Reichhardt. At this visit, the claimant's right hand was not swollen, as in prior visits, but yet she still had a tremor. She also had tenderness to palpation of the hand, but no true allodynia. Still, Dr. Reichhardt still recommended the QSART and thermogram, but did not think additional diagnostic testing for CRPS would be warranted if those tests were negative. (Resp. Ex., pp. 131,132)

47. On November 23, 2021, the claimant returned to Dr. Reichhardt. At this appointment, the claimant stated that her condition seems to have gotten worse. She reported intermittent swelling of her hand, tremors, and increased warmth. She also noted intermittent increased sensitivity to light touch of her hand and forearm. Dr. Reichhardt examined the claimant and noted a tremor, right hand swelling, and mild allodynia of the right upper extremity. (Resp. Ex., pp. 134-136)

48. On January 9, 2022, Dr. Erickson again reviewed the request for the QSART and thermogram testing. In his report, he relied on Dr. Bruns' psychological report which he concluded demonstrated that the claimant's pain is somatic, and thus psychologically based. He therefore concluded that the claimant's complaints, which could support a finding of CRPS, were not supported by any pathology. (Resp. Ex., pp. 234, 235).

49. On February 1, 2022, the claimant was evaluated by Dr. Sanders. At this visit, he mentioned the claimant's ongoing hypersensitivity and swelling. Based on his assessment, he continued to conclude that the claimant should undergo the CRPS testing recommended by Dr. Reichhardt and that she was not at MMI because she still required the CRPS testing. (Resp. Ex., pp. 657, 664)

50. On February 24, 2022, the claimant underwent a Division of Workers' Compensation Independent Medical Examination, which was performed by Brian Mathwich, M.D. On physical examination Dr. Mathwich noted that due to the claimant's inconsistent behaviors, he could not adequately evaluate the claimant. For example, he stated that on initial palpation of the anterior of her shoulder, the claimant jerked her shoulder away crying out in pain. At the same time, once he talked with her and distracted her, he could palpate more deeply and touch/rub her entire shoulder and arm without any reaction from her. He also noted that every test he tried to perform resulted in the claimant crying out in pain and pulling away. However, again, with distraction, he stated that he could elicit 5/5 strength in all shoulder muscle groups as well as the biceps and triceps. Dr. Mathwich also indicated that on physical examination he did not notice any color changes in her right upper extremity when compared to the left. Nor did he see any skin changes, temperature differential, nail changes, or hair changes.

51. Dr. Mathwich also applied the Budapest criteria set forth in the Colorado Medical Treatment Guidelines. The Budapest criteria is basically broken down into two categories. The first category involves primarily the subjective symptoms of the claimant, and the second category involves primarily objective findings or signs noted by the examiner. Dr. Mathwich concluded that the symptoms reported by the claimant were not reliable, therefore, he rejected the claimant's self-reported symptoms in determining whether the claimant met the Budapest criteria. He also concluded that the claimant did not have CRPS and was at MMI as of October 6, 2021.

52. On March 16, 2022, after the claimant was placed at MMI by Dr. Mathwich as of October 6, 2021, the respondents filed a Final Admission of Liability (FAL). The respondents admitted for temporary total disability (TTD) benefits from January 20, 2018, through October 5, 2021. The respondents also admitted for $3,094.62 for the claimant's 5% scheduled impairment rating. The respondents also asserted an overpayment of $4,319.59.

53. On April 14, 2022, the claimant returned to Dr. Reichhardt. At this appointment he noted that the claimant had undergone a Division IME with Dr. Mathwich and that Dr. Mathwich did not think the claimant met the Budapest criteria and concluded that the claimant was at MMI. Based on Dr. Reichhardt's assessment, he again concluded that the claimant met the Budapest criteria based on her subjective complaints and his examination and that the QSART and thermogram were still reasonably necessary. He also noted that

since the tests continued to be denied, the claimant said she would pursue those tests on her own. (Resp. Ex., pp. 138, 139)

54. On May 2, 2022, Dr. Sanders continued to recommend the claimant undergo the QSART and thermogram to rule out CRPS. (Resp. Ex., p. 714.)

55. On May 18, 2022, Dr. Reichhardt again evaluated the claimant and again concluded that she met the Budapest criteria and that the QSART and thermogram were still appropriate. (Resp. Ex., pp. 141, 142)

56. On May 27, 2022, Dr. Sanders referred the claimant to Dr. Schakaraschwili for QSART and thermogram testing.

57. On June 21, 2022, the claimant saw Dr. Reichhardt. At this appointment, Dr. Reichhardt noted that Dr. Schakaraschwili would not perform the QSART and thermogram for the claimant because she would be paying for it herself, a self-pay patient, since it appears the respondents denied the testing. Therefore, Dr. Reichhardt referred her to CROM for the testing. (Resp. Ex., pp. 145,146; Resp. Ex., p. 20)

58. On July 21, 2022, and pursuant to a referral from Dr. Reichhardt, the claimant underwent a QSART and thermogram testing with David Reinhard, M.D., at CROM. Because the respondents would not pay for this testing, the claimant paid for this testing. Dr. Reinhard performed the thermogram. The thermogram demonstrated significant thermal asymmetry involving the lateral arm, dorsal and volar forearm, dorsal wrist and hand, and dorsal aspect of digits 2, 3, and 4. Thus, he concluded that the thermogram demonstrated diffuse thermal asymmetry that was present in a non-dermatomal distribution and was consistent with CRPS. According to Dr. Reinhard, this was "a positive thermogram for CRPS type 1." (Resp. Ex., pp. 20-25)

59. Dr. Reinhard also performed the QSART – Autonomic Testing Battery. He examined the claimant, performed the test, and found the following:

    a. Moderate swelling in the distal right upper extremity that was unexplained.

    b. Visible asymmetry of skin coloration.

    c. Asymmetrical sweat output with the use of acetylcholine. He found that there was a 141% asymmetry measured at the proximal sensors and a 60% asymmetry at the distal sensors.

60. Based on his examination and testing, Dr. Reinhard concluded that both the autonomic testing battery (QSART) and the cold stress test thermography were positive for CRPS. Therefore, he also concluded that the claimant was a candidate for additional medications as well as a sympathetic blockade with a right stellate ganglion block. (Resp. Ex., pp. 20-26)

61. The ALJ finds that the QSART and thermogram results from the tests performed by Dr. Reinhard provide highly persuasive objective evidence that the claimant might have CRPS and that the testing was reasonably necessary to determine the extent of the claimant's work injuries and to define the need for future diagnostic treatment, and therapeutic treatment, such as a stellate ganglion block. The ALJ further finds that the

tests and results, which support a stellate ganglion block, are inconsistent with a finding that the claimant is at MMI.

62. On July 27, 2022, Dr. Reichhardt evaluated the claimant after she underwent her QSART and thermogram with Dr. Reinhard at CROM. He noted that the testing was positive, and that the claimant has a diagnosis of "probably complex regional pain syndrome." Thus, he prescribed additional medication and referred claimant to UC Health Pain Medicine for a stellate ganglion block. (Resp. Ex., pp. 149,150)

63. On July 29, 2022, Dr. Orent issued a short report. In his report, he concluded that based on his review of some of the claimant's medical records, he disagreed with Dr. Mathwich, the DIME physician, that the claimant was at MMI and did not have CRPS. Dr. Orent concluded that the claimant did meet the Budapest criteria and has CRPS.

64. On August 1, 2022, Dr. Sanders also recommended the claimant have a stellate ganglion block. (Resp. Ex., p. 725)

65. On September 13, 2022, after the positive results of the QSART and thermogram performed by Dr. Reinhard, the respondents requested the claimant to undergo the same testing with Dr. Schakaraschwili. Thus, Dr. Schakaraschwili examined the claimant and performed the QSART and thermogram testing. His physical examination did not find any swelling, skin discoloration, trophic, skin, hair, or nail changes. The thermogram found mild relative hypothermia at the lateral shoulder, but otherwise no significant areas of temperature asymmetry. Thus, he concluded that there were no diffuse temperature asymmetries consistent with a diagnosis of CRPS. He also concluded that while the autonomic QSART testing indicated that there was greater than 50% stimulated sweat output symmetry at the proximal site, overall findings were low for the presence of CRPS. In his assessment, he also stated that based on his examination, the clinical findings were not consistent with the Budapest criteria. In the end, he concluded that the test results were consistent with a "low probability" of CRPS. Thus, the testing could not rule out the claimant did not have CRPS. He could only state that there was a low probability of CRPS. (Resp. Ex., pp. 4-8)

66. Dr. Schakaraschwili also testified at the hearing. Although he testified consistently with his report, he did indicate that CRPS can wax and wane and that people can look different on different days. Thus, the fact that Dr. Reichhardt and Reinhard saw swelling and/or skin color differences when others did not, and that the claimant met the Budapest criteria when they evaluated the claimant is consistent with a diagnosis of CRPS and provides highly persuasive evidence that the claimant met the Budapest criteria and had positive test results with Dr. Reinhard that supports a diagnosis of CRPS. In other words, the findings of Dr. Schakaraschwili are not inconsistent with a finding or CRPS since the symptoms can vary from day to day.

67. On September 26, 2022, Dr. McCranie performed a medical records review to determine whether the request for a stellate ganglion block was reasonably necessary. Based on her review of some of the medical records, which included the QSART and thermogram findings of Dr. Schakaraschwili, which only found a low probability of CRPS, and doctor Mathwich's findings that the claimant did not meet the Budapest criteria, she concluded that the claimant "clearly does not have CRPS" and because "CRPS has been definitely been ruled out, a stellate ganglion block is not indicated." Dr. McCranie did not, however,

adequately address the positive QSART and thermogram findings of Dr. Reinhard, nor the findings that the claimant did meet the Budapest criteria when evaluated by Drs. Reichhardt and Reinhard. Thus, she did not consider all of the relevant data when rendering her opinion. As a result, the ALJ does not find her opinion to be persuasive. (Resp. Ex., pp. 182, 183)

68. On October 3, 2022, Dr. Reichhardt reviewed the findings of the QSART and thermogram that were performed by Dr. Schakaraschwili. He noted that Dr. Schakaraschwili's testing revealed a low probability of CRPS. Despite Dr. Schakaraschwili's findings, Dr. Reichhardt still concluded that the claimant probably had CRPS. He also concluded that even if the claimant did not meet the criteria for CRPS under the testing, he still thought, and recommended, the stellate ganglion block for diagnostic and therapeutic purposes. (Resp. Ex., pp. 160, 161) As a result, the ALJ finds that the stellate ganglion block is reasonably necessary to continue to help diagnose whether the claimant has CRPS and provide therapeutic relief of the claimant's chronic pain.

69. On November 8, 2022, the claimant returned to see Dr. Reichhardt. At this appointment, he noted that the stellate ganglion block had been denied. But he again noted that the claimant still met the Budapest criteria for CRPS and that she also met the Division of Workers' Compensation Criteria (Guidelines) for CRPS as she had two positive tests. While he noted that some of her symptoms have partially normalized, he still recommended the stellate ganglion block as another diagnostic, and possibly therapeutic, procedure. The ALJ finds that the waxing and waning of the claimant's symptoms aligns with the testimony of Dr. Schakaraschwili and Dr. Orent - that the findings and symptoms of CRPS can vary. (Resp. Ex., p. 165, 166)

Testimony of Dr. Schakaraschwili:

70. Dr. Schakaraschwili testified at the hearing. His testimony tracked with his report. That said, he did add that the signs and symptoms of CRPS can wax and wane and look different on different days. The ALJ finds his testimony to be credible and reliable. The ALJ finds that he honestly reported his findings and provided an honest opinion about his conclusion. But his opinion that the signs and symptoms of CRPS can wax and wane supports Dr. Reinhard's findings-which include the claimant's physical signs of CRPS and the positive QSART and thermogram test results that were performed by Dr. Reinhard. Thus, Dr. Schakaraschwili's testimony provides the missing link that explains why Dr. Reinhard's testing for CRPS was positive and his was not. It also explains why some doctors, such as Dr. Erickson, did not see objective signs of CRPS, but yet others, like Drs. Reichhardt and Reinhard did.

Testimony of Dr. Primack:

71. Dr. Primack also testified at the hearing and testified consistent with his report. Dr. Primack testified that he does not think you can have two diametrically different QSART and thermograms. But in this case, the claimant did.

72. The ALJ has considered Dr. Primack's report and testimony. On the one hand, Dr. Primack says in his report that the claimant's responses to his physical examination are nonphysiologic and therefore the claimant's subjective complaints should not be taken into consideration when determining whether the claimant meets the Budapest criteria,

whether she might have CRPS, and whether additional testing in the form of the QSART or thermogram were reasonable and necessary. Yet on the other hand, he states that many of the claimant's symptoms could be due to carpal tunnel syndrome, which he concludes is an unrelated condition. Thus, the ALJ finds that Dr. Primack has concluded that some of the claimant's symptoms are not physiologically based, but yet some are physiologically based. Moreover, Dr. Primack failed to consider that even if the claimant might be overstating her symptoms, she could still have CRPS. In other words, they are not mutually exclusive. Both can be true. As a result, the ALJ does not find Dr. Primack's opinions to be persuasive as it relates to whether the QSART and thermogram were reasonable and necessary to treat the claimant from the effects of her work injury and whether she has CRPS. But the ALJ does credit his opinion that the lesion/mass that was removed is unrelated to her industrial injury.

Testimony of Dr. Orent:

73. Dr. Orent was qualified as an expert in internal medicine as well as occupational and environmental medicine. He is also Level II accredited. During his deposition, Dr. Orent was asked several questions about CRPS. Based on his answers to several questions, the ALJ finds that Dr. Orent is familiar with the assessment, diagnosis, and treatment of CRPS. Dr. Orent also testified that diagnosing CRPS can be difficult based on the transient nature of the symptoms. He stated that:

> [T]he trouble with CRPS is it's an extremely variable disease in its manifestations. On one day, a patient can be extremely symptomatic with profound allodynia, hyperpathia, swelling, and color changes. And another day, it might be much calmer and not manifest in that way. So, it is often a serial kind of clinical diagnosis, because these change literally hour to hour, even minute to minute sometimes, the swelling. CRPS can change, so it is a serial kind of diagnosis.
>
> I think it's real important, and I think one of the things that I encourage patients to do with CRPS is I want to see them in the middle of a flare. I want to know what they look like. I want to see what their hand or foot looks like when they are flaring because CRPS calms and it flares. And so it's very instructional to see a patient who is having a CRPS flare. You will see both the subjective and objective findings of CRPS frequently in those situations.
>
> (Deposition, p. 11)

74. The ALJ finds Dr. Orent's testimony to be highly persuasive. Dr. Orent's testimony about the transient nature of CRPS persuasively explains, and also provides the necessary link, to explain why the QSART and thermogram testing performed by Dr. Reinhard was positive for CRPS, but yet the same testing performed by Dr. Schakaraschwili was not. Plus, his testimony about the transient nature of CRPS symptoms is consistent with Dr. Schakaraschwili, who also stated that CRPS symptoms can wax and wane.

Whether Claimant is at MMI:

75. Before Dr. Mathwich, the DIME physician, placed the claimant at MMI, as of October 6, 2021, numerous medical providers thought the claimant had CRPS due to her work injury.

76. Before being placed at MMI by Dr. Mathwich, Dr. Reichhardt concluded that the claimant needed diagnostic treatment, in the form of a QSART, thermogram, and possibly a stellate ganglion block, to help determine whether she has CRPS and therefore needed additional treatment to cure and relieve her from the effects of her work injury.

77. The QSART and thermogram are objective diagnostic procedures that offered a reasonable prospect for defining the claimant's condition – whether she has CRPS - as well as suggesting further diagnostics and/or treatment, such as a stellate ganglion block, to cure and relieve the claimant from the effects of her work injury.

78. At the time Dr. Mathwich placed the claimant at MMI - on October 6, 2021 - the QSART and thermogram – which had not been provided - were reasonable and necessary medical treatment to help define the scope of the claimant's work injury and to suggest future medical treatment to cure and relieve the claimant from the effects of her work injury.

79. The need for diagnostic treatment that is intended to define the scope of a work injury and help determine future medical treatment to cure and relieve the claimant from the effects of the work injury is inconsistent with a finding of MMI.

80. The positive QSART and thermogram provides a quality of evidence that makes it highly probable and free from serious or substantial doubt that the claimant was not at MMI on October 6, 2021, which is before the testing was performed. As a result, the positive test results further establish that it is highly probable the DIME physician's finding concerning MMI is incorrect.

81. After the claimant was placed at MMI by Dr. Mathwich, the claimant underwent the QSART and thermogram with Dr. Reinhard. The QSART and thermogram were positive. The positive findings of the QSART and thermogram that were performed after the claimant was placed at MMI by Dr. Mathwich provide clear and convincing evidence that the claimant was not at MMI as of October 6, 2021. Again, the QSART and thermogram were tests to determine the extent of the claimant's work injury and also help define future treatment to cure and relieve the claimant from the effects of her work injury. Thus, Dr. Mathwich was mistaken about the claimant's MMI status and erred when he placed the claimant at MMI as of October 6, 2021.

82. As a result, the ALJ finds and concludes that the Claimant has established by clear and convincing evidence that Dr. Mathwich, the DIME physician, erred by placing the claimant at MMI on October 6, 2021, before the QSART and thermogram were performed.

Whether the QSART and thermogram are reasonable and necessary.

83. The ALJ credits the opinions of Drs. Reichhardt and Reinhard as explained in their reports that the claimant may have CRPS and that the QSART and thermogram were needed to help provide a diagnosis and guide future treatment for the claimant's chronic shoulder pain and upper extremity symptoms. The ALJ also credits their opinions that the claimant met the Budapest criteria for a clinical diagnosis of CRPS under the Guidelines.

84. The Guidelines indicate that if a claimant meets the Budapest criteria, then a QSART and thermogram are reasonable tests that can be used to determine whether a claimant has CRPS. The ALJ finds that based on the opinions of Dr. Reichhardt, and the findings of Dr. Reinhard, the thermogram and QSART were reasonable and necessary medical

treatment meant to diagnose the extent of the claimant's work injuries and determine future treatment to cure and relieve the claimant from the effects of her work injury. As a result, the ALJ finds that the QSART and thermogram are reasonably necessary and related to the claimant's work injury.

85. Moreover, even if the claimant did not meet the Budapest criteria, the ALJ still finds that the QSART and thermogram were reasonable and necessary to treat the claimant from the effects of her work injury based on the positive findings obtained by Dr. Reinhard.

Whether the stellate ganglion block is reasonable and necessary.

86. Dr. Reichhardt referred the claimant for a stellate ganglion block for diagnostic and therapeutic purposes. The Guidelines also provide that a stellate ganglion block can also assist in the diagnosis and treatment of CRPS. Based on the disagreement as to whether the claimant has CRPS, the ALJ finds that the stellate ganglion block is reasonably necessary to diagnose the extent of the claimant's work injury - whether she has CRPS – and may also be therapeutic. Therefore, the stellate ganglion block is reasonable and necessary as well as related to the claimant's work injury.

Disfigurement benefits.

87. The ALJ finds that the claimant failed to establish that the lesion/mass that was surgically removed by Dr. Kelly is related to her work injury, or that the surgery was ancillary care that was reasonably necessary to treat her work injury or was required to achieve optimum treatment of her compensable work injury. As a result, the surgery to remove the lesion/mass was not reasonably necessary to treat the claimant from the effects of her work injury. The fact that the respondents paid for this surgery does not make the lesion/mass a compensable and related condition or procedure for which the respondents are liable for the scar from the surgery.

88. The ALJ credits Drs. Primack and Erickson's opinion that the lesion/mass is unrelated to the claimant's work injury. Thus, the surgery that was performed, and paid for by the respondents, was for an unrelated condition and was not ancillary to treating the work injury. As a result, the scar from the surgery to remove the lesion/mass is unrelated to the work injury and is not a compensable consequence of the work injury. Thus, the claimant is not entitled to a disfigurement award for the scar, which is approximately 2 inches long and ¼ of an inch wide, associated with that surgery.

89. The claimant did, however, undergo surgery for her work-related shoulder injury. As a result of that surgery, the claimant has sustained scarring, a visible disfigurement to the body, on her right shoulder that consists of three arthroscopic surgical port scars. Each scar is approximately ¼ inch in diameter.

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 Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether the claimant overcame the opinion of the Division Examiner and established by clear and convincing evidence that she is not at maximum medical improvement.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of 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 finding that a party has or has not reached MMI is binding on the parties

unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute 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). 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 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 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 or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

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. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. 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 question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

As found, before Dr. Mathwich, the DIME physician, placed the claimant at MMI, on October 6, 2021, numerous medical providers thought the claimant had CRPS due to her work injury and needed additional medical treatment in the form of additional diagnostic testing for CRPS. For example, Dr. Reichhardt concluded that the claimant needed diagnostic treatment in the form of a QSART, thermogram, and possibly a stellate ganglion block, to help determine whether the claimant had CRPS and needed additional treatment to cure and relieve her from the effects of her work injury.

As found, the QSART and thermogram are objective diagnostic procedures that offered a reasonable prospect for defining the claimant's condition – whether she had CRPS - as well as suggesting further diagnostics and/or treatment, such as a stellate ganglion block, to cure and relieve the claimant from the effects of her work injury.

At the time Dr. Mathwich placed the claimant at MMI - on October 6, 2021 - the QSART and thermogram – which had not been provided - were reasonable and necessary medical treatment to help define the scope of the claimant's work injury and determine future medical treatment to cure and relieve the claimant from the effects of her work injury. The need for diagnostic treatment that is intended to define the scope of a work injury and is reasonably expected to help determine future medical treatment to cure and relieve the claimant from the effects of the work injury is inconsistent with a finding of MMI.

After the claimant was placed at MMI by Dr. Mathwich, the claimant underwent the QSART and thermogram with Dr. Reinhard. The QSART and thermogram were positive. The positive findings of the QSART and thermogram that were performed after the claimant was placed at MMI by Dr. Mathwich provide clear and convincing evidence that the claimant was not at MMI as of October 6, 2021. Again, the QSART and thermogram were tests to determine the extent of the claimant's work injury and were reasonably expected to help define future treatment to cure and relieve the claimant from the effects of her work injury. Thus, Dr. Mathwich was mistaken about the claimant's MMI status and erred when he placed the claimant at MMI as of October 6, 2021.

The ALJ has considered the opinion of Dr. Primack that the claimant did not meet the Budapest criteria and does not have CRPS. The ALJ has also considered the findings by Dr. Schakaraschwili in which the claimant did not have a positive QSART or thermogram test results. That said, this conflict is resolved based on the testimony of Dr. Schakaraschwili and Dr. Orent in which they both said the signs and symptoms of CRPS can wax and wane. Thus, the waxing and waning nature of CRPS explains the different findings of the various physicians involved here.

Thus, the ALJ finds and concludes that the positive QSART and thermogram provides a quality of evidence that makes it highly probable and free from serious or substantial doubt that the claimant was not at MMI on October 6, 2021, which is before the testing was performed. As a result, the positive test results establish that it is highly probable the DIME physician's finding concerning MMI is incorrect.

As a result, the ALJ finds and concludes that the claimant has established by clear and convincing evidence that Dr. Mathwich erred when he placed the claimant at MMI as of October 6, 2021.

II. Whether the respondents are responsible for the CRPS testing, consisting of a QSART and thermogram, that was performed by Dr. Reinhard on July 21, 2022.

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

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation

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

The ALJ credits the opinions of Drs. Reichhardt and Reinhard as stated in their reports that the claimant met the Budapest criteria for a clinical diagnosis of CRPS under the Guidelines. In essence, the Guidelines indicate that if a claimant meets the Budapest criteria, then a QSART and thermogram are reasonable tests that can be used to help determine whether a claimant has CRPS. The ALJ finds that based on the opinions of Dr. Reichhardt, and the findings of Dr. Reinhard, the thermogram and QSART were reasonable and necessary medical treatment meant to diagnose the extent of the claimant's work injuries and determine future treatment to cure and relieve the claimant from the effects of her work injury. Even if the claimant did not meet the Budapest criteria, the ALJ finds and concludes that the fact that the tests were positive independently establishes that the tests were reasonably necessary to treat claimant from the effects of her work injury in order to cure and relieve the claimant from the effects of her work injury.

As a result, the ALJ finds and concludes that the claimant established by a preponderance of the evidence that the QSART and thermogram were reasonable and necessary and related and that the respondents are responsible for paying for the tests the claimant underwent with Dr. Reinhard.

III. Whether the respondents are responsible for a stellate ganglion block.

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

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

In this case, Dr. Reichhardt has recommended the claimant undergo a stellate ganglion block to help confirm whether the claimant has CRPS as well as for therapeutic purposes. Such treatment is also supported by the Guidelines which specify that such blocks are generally accepted procedures to aid in the diagnosis and treatment of CRPS. Therefore, since it is still not clear whether the claimant has CRPS, the block is found to be reasonable and necessary treatment to cure and relieve her from the effects of her injury. Thus, the ALJ finds and concludes that the claimant has established by a preponderance of the evidence that the stellate ganglion block is reasonably necessary and related to treat the claimant from the effects of her work injury.

IV. Temporary total disability benefits if the claimant is not at maximum medical improvement.

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.

In this case, the claimant's TTD benefits were terminated on October 6, 2021, because she was placed at MMI by the DIME physician. However, because the claimant has overcome the DIME opinion, and is thus not at MMI, the claimant is entitled to TTD until terminated by law. Thus, the claimant's TTD shall be reinstated as of October 6, 2021.

V. Disfigurement benefits.

A respondent can be required to provide ancillary treatment for non-industrial conditions if the evidence establishes that such ancillary care is a reasonably necessary prerequisite to achieve optimum treatment of the compensable injury. *Public Service Co. v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999).

The claimant failed to establish by a preponderance of the evidence that the lesion/mass that was surgically removed by Dr. Kelly is related to her work injury, or that the surgery was ancillary care that was reasonably necessary to treat her work injury or was required to achieve optimum treatment of her compensable shoulder injury.

As found, the claimant's larger scar is due to the removal of the unrelated lesion/mass that was in her shoulder. The ALJ finds and concludes that the claimant is not entitled to a disfigurement award due to scarring from a surgery done for an unrelated condition – even if the respondents paid for the surgery.

As further found, the claimant underwent surgery for her work-related shoulder injury. As a result of that surgery, the claimant has sustained scarring, a visible disfigurement to the body, on her right shoulder that consists of three faint arthroscopic surgical port scars. Each scar is approximately ¼ inch in diameter.

Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles claimant to additional compensation under Section 8-42-108 (1), C.R.S., in the amount of $375.00.

ORDER

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

1. The claimant is not at MMI.

2. The respondents shall reimburse the claimant for the cost of the QSART and thermogram testing performed by Dr. Reinhard.

3. Respondents shall pay for claimant to undergo the stellate ganglion block.

4. The respondents shall reinstate the claimant's TTD benefits as of October 6, 2021.

5. The respondents shall pay the claimant $375.00 for her disfigurement.

6. All 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: April 11, 2023

/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 5-201-294-001

ISSUES

1. Whether Claimant established by a preponderance of evidence that a C5-6 transforaminal epidural steroid injection recommended by Dr. Pehler is reasonable and necessary to cure or relieve the effects of Claimant's March 9, 2022 industrial injury.

FINDINGS OF FACT

1. Claimant was employed by Employer for approximately three years. On March 9, 2022, Claimant slipped and fell on a snow and ice-covered bridge while leaving Employer's facility and walking into the parking lot.

2. Claimant testified that he has a history of lumbar and cervical conditions, and underwent surgery on his cervical spine in March 2020. Claimant credibly testified that he was not experiencing active cervical symptoms before March 9, 2022. He testified that he had no recent treatment for his neck, was not taking pain medications for his neck and felt good. He credibly testified that following the injury, he experienced pain in his neck and into his shoulder blades and left arm. He further testified, credibly, that he is currently experiencing pain in his neck, shoulder blades and numbness and tingling into his left arm and thumb, that he was not experiencing immediately prior to March 9, 2022. Claimant's testimony was credible.

Claimant's Medical History Before March 9, 2022

3. Claimant has a significant medical history, including prior injuries to his neck and lower back, dating to at least 1998, including an automobile accident in October 2019 which necessitated surgery on his lower back in March 2020.

4. For several years prior to his March 9, 2022 fall, Claimant was under the treatment of John Serak, M.D., at CarePoint for chronic lower back and cervical pain. On or before February 2020, Claimant was diagnosed with cervical radiculopathy and cervical disc disorder following a motor vehicle accident. A January 7, 2020 MRI demonstrated C5-6 foraminal stenosis due to a disc herniation compressing the C6 nerve root, and causing left-sided cervical radiculopathy. Claimant underwent a C5-6 left foraminotomy in March 2020, which resulted in significant improvement of pain, but some continued tingling and numbness. (Ex. C).

5. After surgery, Claimant had multiple follow-ups with Dr. Serak during 2020. During these visits, Claimant reported his left-sided radiculopathy had improved significantly. From August through November 2020, Claimant had no documented complaints of neck or cervical pain.

6. In December 2020, Claimant suffered a fall, and his neck pain and radicular symptoms returned. (Ex. C). An MRI performed on December 29, 2020 showed no new changes in the cervical spine compared to the January 7, 2020 MRI. (Ex. E). Claimant underwent a cervical epidural steroid injection on January 21, 2021 at Mountain View Pain Specialists (MVPS), which temporarily relieved his cervical pain. (Ex. F).

7. On February 26, 2021, Dr. Serak performed an L5-S1 decompression and foraminotomy for Claimant's lower back pain and lumbar radiculopathy. (Ex. G). Claimant received physical therapy and follow-up evaluations with Dr. Serak over the following two months, and did not report cervical pain during this time. (Ex. C & D).

8. Claimant's next documented report of cervical pain was on May 5, 2021, at MVPS when he reported minimal (1-2/10) cervical pain radiating into his left arm. (Ex. F).

9. On May 20, 2021, Claimant underwent a sacroiliac radiofrequency ablation procedure at MVPS. He followed up with MVPS on June 2, 2021, when he reported minimal (1-2 out of 10) cervical pain at MVPS, and improved lumbar pain at 3-4/10. (Ex. F).

10. Claimant's next documented medical visit was on October 26, 2021, when he saw Larry Lee, M.D., a neurosurgeon at CarePoint, who had assumed Claimant's care from Dr. Serak. At that visit, Claimant reported sacroiliac joint pain, and had no current neck or upper extremity complaints. Dr. Lee documented Claimant's prior history of neck pain and C5-6 foraminotomy, and his previous fall. He documented Claimant's neck range of motion, and included diagnoses of cervical radiculopathy, neck pain, and cervical disc disorder. However, he did not recommend treatment for Claimant's cervical spine. (Ex. C).

11. Over the following month, Claimant received hip and sacroiliac injections at MVPS, and underwent a lumbar MRI. During this time, no complaints of cervical or neck pain were documented. (Ex. F &E).

12. Claimant returned to Dr. Lee on December 1, 2021 for follow up on his lower back pain. No active complaints of cervical symptoms were documented. Dr. Lee's documentation of Claimant's neck and cervical symptoms on December 1, 2021 is a verbatim repetition of his documented exam on October 26, 2021. Dr. Lee recommended a right SI joint fusion, and made no treatment recommendations for Claimant's cervical spine. (Ex. C).

13. On February 4, 2022, Claimant saw Larry Lee, M.D., for a post-surgical evaluation following a right SI joint fusion surgery.[1] Claimant did not report active cervical symptoms, and Dr. Lee's documented neck examination was a verbatim repetition of his neck examinations on October 26, 2021 and December 1, 2021. Although Dr. Lee's record included within his assessment "cervical radiculopathy," neck pain and cervical disc disorder, the record does not indicate these were then-active diagnoses. (Ex. C).

[1] No surgical report of the Claimant's right SI joint fusion surgery was offered into evidence.

Claimant's Medical Treatment After March 9, 2022

14. On March 11, 2022, Claimant returned to Dr. Lee who noted Claimant had fallen backward and landed with his rear end on his left foot two days earlier. Claimant reported tailbone pain, but did not report cervical pain. Dr. Lee's documented neck evaluation was identical to his previous three examinations. (Ex. C).

15. Claimant's next evaluation was at Concentra on March 25, 2022, when he saw Michael Pete, P.A. Claimant reported a burning sensation into his right posterior leg and discomfort in the tail bone area. Examination of Claimant's cervical spine was normal, with the exception of tenderness in the left trapezius muscle. He was diagnosed with a neck strain, coccyx injury, and lumbar back pain with radiculopathy, and referred for physical therapy. (Ex. H).

16. Claimant began physical therapy at Concentra on March 25, 2022. Claimant reported increased radicular symptoms in his right leg, pain in his back and neck, and tingling into his left thumb. (Ex. I). Claimant continued physical therapy through April 6, 2022. (Ex. I & 2).

17. On March 28, 2022, Claimant saw Kathryn Bird, D.O., at Concentra. Claimant reported pain radiating from his tailbone to lateral right thigh, and a left shoulder strain with some tingling into his left thumb. On exam, Dr. Bird noted left trapezius tenderness, with muscle spasms, and slight altered mechanics when flexing and extending. She diagnosed Claimant with a neck strain, and lumbar back pain with radiculopathy. (Ex. H).

18. On April 14, 2022, Claimant saw Hanna Bodkin, PA-C at Concentra and reported his neck had "flared" since his March 9, 2022 fall, and that he was continuing to experience numbness and tingling into the radial forearm and thumb. On exam, Ms. Bodkin noted tenderness and spasms in the left paraspinal and trapezius muscles, but not the cervical spine. She also noted that flexion increased the numbness and tingling into the left arm. Ms. Bodkin referred Claimant for a physiatry consultation. (Ex .H).

19. On April 20, 2022, Claimant saw John Sacha, M.D., at Concentra for a physiatry evaluation. Dr. Sacha indicated that Claimant reported his cervical symptoms had resolved. He also noted that Claimant had cervical pain with Spurlings' testing[2] and some limited range of motion bilaterally. Dr. Sacha noted that Claimant's prior injuries and surgeries increased the risk of further injuries, and referred Claimant for a cervical MRI. (Ex. H).

20. Claimant also saw Dr. Lee on April 20, 2022, however, Dr. Lee's evaluation focused on Claimant's lumbosacral spine, and his neck evaluation was identical to his previous documented examinations. (Ex. C).

[2] Spurlings' test is a test for possible radiculopathy. See W.C.R.P. Rule 17, Ex. 8, p. 11.

21. Claimant returned to Dr. Bird on April 26, 2022. Dr. Bird did not document any complaints of neck or upper extremity pain, and her diagnosis included only lumbar back pain with radiculopathy. (Ex. H).

22. On May 5, 2022, Claimant had a cervical MRI, which showed "multilevel chronic degenerative disc disease and degenerative facet arthropathy resulting in multilevel foraminal narrowing at C3-C4, C4-C5, C5-C6 levels." (Ex. E).

23. On May 11, 2022, Claimant saw Dr. Sacha again. On examination of Claimant's cervical spine, Dr. Sacha noted cervical paraspinal spasms, segmental dysfunction, and pain with extension and extension rotation. He diagnosed Claimant with cervical facet syndrome, but did not recommend any specific cervical spine treatment. He did recommend a right L5-S1 transforaminal epidural injection for Claimant's continued lumbosacral pain, which was performed on June 9, 2022. (Ex. H).

24. Claimant returned to Dr. Sacha on June 22, 2022, reporting ongoing neck and left arm pain. Dr. Sacha documented that he "felt this was a preexisting problem and not work-related and not compensable." He indicated Claimant felt his neck pain was work-related, and Dr. Sacha decided to perform EMG testing of the neck and left arm to assist in determining causality. Dr. Sacha documented his thought process as follows: "With the fall, usually this will cause a cervical facet syndrome, not a cervical radiculopathy, so we will do the EMP of the left upper extremity too and then I will comment on what I think is going on with this gentleman and also compensability, but at this point, does not appear to be compensable." (Ex. H).

25. On July 29, 2022, Dr. Sacha performed an EMG of Claimant's left upper extremity, which he interpreted as showing chronic changes in the left C6 distribution, and no evidence of acute or subacute findings. Dr. Sacha concluded that Claimant's cervical radiculopathy was not work-related, stating "patient has pre-existing cervical spine surgery with ongoing symptoms up to the time of the injury." (Ex. K). Dr. Sacha also referred Claimant for an orthopedic spine evaluation for his lower back condition, which he deemed work-related. Dr. Sacha's opinion on causation of Claimant's spine condition is not persuasive. No credible evidence was admitted that Claimant was having ongoing cervical spine symptoms at the time of his injury. Claimant's medical records indicate his last report of active neck pain prior to his March 9, 2022 injury was on June 2, 2022 when he was seen at MVPS, and was not "ongoing" at the time of his injury.

26. On August 19, 2022, Claimant saw orthopedic spine surgeon Stephen Pehler, M.D., at Concentra. Dr. Pehler is an authorized treating physician within the chain of referral. Dr. Pehler evaluated Claimant's lumbar and cervical spine. As relevant to the present issues, Dr. Pehler noted Claimant had decreased sensation in the left C-6 distribution, and a positive Spurlings' test. Dr. Pehler indicated it was reasonable to perform a left-sided C5-6 transforaminal epidural steroid injection (TFESI) for diagnostic and therapeutic purposes. He indicated that Claimant has "very real and significant foraminal stenosis on his left-hand side at the C5-6 level. The patient is adamant that his symptoms did increase and change following his work-related injury in March 2022." Dr. Pehler further noted that the "EMT that shows chronic left-sided radiculopathy does not

make him immune from having a potential aggravation of a pre-existing degenerative condition after his work-related injury in March 2022." Dr. Pehler referred Claimant for a C5-6 TFESI to be performed by Robert Kawasaki, M.D. (Ex. M & N).

27. Alicia Feldman, M.D., performed a review of Claimant's medical records at Respondents' request and issued a report dated September 2, 2022, in which she addressed the reasonableness, necessity and relatedness of the request for cervical epidural injections. Dr. Feldman was admitted as an expert in physical medicine and rehabilitation, and epidural steroid injections, and testified at hearing. Dr. Feldman opined that while the C5-6 TFESI may be reasonable and necessary, she did not believe it was related to his March 9, 2022 injury. Dr. Feldman reasoned that Claimant had nearly identical symptoms on May 5, 2021, when he saw Ms. Bailey, and that he had received a cervical epidural steroid injection in January 2021 for this condition. She further stated in her report that "Should he need ongoing epidurals for his cervical spine, this would be related to his pre-existing condition for which he was actively treating prior to the work-related injury and not the work-related injury." Dr. Feldman's opinions are not persuasive.

28. While Dr. Feldman is accurate that Claimant reported similar symptoms from his cervical spine in May 2021, the medical records indicate Claimant was not actively treating for his cervical spine at the time of his March 9, 2022 injury. Claimant's last documented report of active neck pain prior to March 9, 2022 was on June 2, 2021. However, after June 2, 2021 Claimant saw multiple health care providers and did not report cervical or neck pain again until being seen at Concentra on March 25, 2022.

29. Dr. Feldman's testimony that Dr. Lee's records demonstrate an active cervical spine condition is not credible or supported by the medical records. She testified that Dr. Lee's February 4, 2022 medical record, which included diagnoses of cervical radiculopathy, neck pain, and cervical disc disorder was evidence Claimant had active neck pain, at that time, and that the diagnoses would not be included in the medical record if Claimant was not having neck pain. However, she also testified that Claimant's medical records from Dr. Lee for March 11, 2022, and April 20, 2022 did not demonstrate any evidence of neck pain, despite the fact that both records contain identical references to Claimant's cervical condition, including identical range of motion findings, and including cervical radiculopathy, neck pain, and cervical disc disorder in the assessment section of the record. No explanation was offered to explain this inconsistency in her testimony.

30. Claimant credibly testified that he was not experiencing active cervical symptoms before March 9, 2022. He testified that he had no recent treatment for his neck, was not taking pain medications for his neck and felt good. He credibly testified that following the injury, he experienced pain in his neck and into his shoulder blades and left arm.

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. 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 Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Specific Medical Benefits (TFESI Recommended by Dr. Pehler)

The Act imposes upon respondents the duty to furnish medical treatment "as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury." § 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App.

2002). *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Claimant has established by a preponderance of the evidence that the C5-6 cervical transforaminal epidural steroid injection recommended by Dr. Pehler is reasonably necessary to cure, or relieve the effects of Claimant's industrial injury. Although Claimant has a significant history of cervical pain and radicular symptoms, Claimant had no documented report of active cervical symptoms in the nine months preceding his March 9, 2022 work injury. Claimant's last documented report of cervical pain was on June 2, 2021 when he reported minimal (1-2/20) pain at MVPS. During the intervening nine months, Claimant saw multiple health care providers for lumbosacral issues, but did not report active cervical symptoms. The admitted medical records are consistent with Claimant's testimony that he was not experiencing cervical symptoms prior to March 9, 2022. Although Dr. Lee included neck pain and cervical radiculopathy in his medical records, there is no documentation of active cervical complaints, and the documentation of cervical symptoms is listed under the heading "Previous Complaints Include," Dr. Lee's documented cervical examinations (if actually performed), are each identical and do not document active problems.

As found, both Dr. Sacha and Dr. Feldman based their opinions on the incorrect notion that Claimant was actively experiencing cervical radicular symptoms as of March 9, 2022, or was in active treatment for those symptoms at that time. The ALJ finds more persuasive Dr. Pehler's opinion that a C5-6 TFESI is reasonable, and related to Claimant's March 9, 2022 work injury. The ALJ concludes it is more likely than not that the TFESI recommended by Dr. Pehler is causally related to Claimant's March 9, 2022 injury, and that such treatment is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of the left C5-6 transforaminal epidural steroid injection recommended by Dr. Pehler is granted.

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

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

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

DATED: April 27, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-126-362-001 & 5-165-280-001

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she is entitled to a general award of maintenance treatment after maximum medical improvement (MMI) under W.C. 5-126-362-001 and/or W.C. 5-165-280-001.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of [Redacted, hereinafter ERL], the ALJ enters the following findings of fact:

Workers' Compensation Claim No. 5-126-362

1. On October 28, 2019, Claimant was working for Respondent-Employer as a Correctional Officer when she injured her neck during a training exercise. According to Claimant, she was participating in defensive tactics training when an instructor, who was demonstrating a takedown technique forcefully slammed her onto a training mat. The incident was reported and assigned Workers' Compensation Claim No. 5-126-362.

2. Claimant initiated treatment with Dr. Thomas Centi at the Southern Colorado Clinic (Clinic) on November 5, 2019. During her initial visit on this date, Claimant reported a chief complaint of "pain in [her] neck, shoulder and spine" along with numbness in her arm and hand. (Ex. 9, p. 74). Claimant was diagnosed with a "[s]prain of ligaments of cervical spine, given a prescription for Naproxen and Flexeril, referred to physical therapy (PT) and returned to modified work duty with a 5 pound weight restriction, no management of inmates/offenders and no lifting overhead. *Id.* at p. 73, 75. A Comprehensive Outcome Management Technologies (COMT) assessment, to include psychological testing, was completed and demonstrated Claimant to have "good function" and no need for psychological counseling. *Id*. at p. 77. Nonetheless, Claimant's Distress Risk Assessment Method (DRAM) testing placed her in the "At risk" psychological category regarding the Modified Zung Depression Index and the Modified Somatic Pain Questionnaire. *Id.*

3. Claimant returned to the Clinic on December 19, 2019 where she was evaluated by Nurse Practitioner Valerie Joyce. During this encounter, Claimant reported a worsening of her symptoms which she attributed to "looking up at monitors frequently and repetitively for modified duties". (Ex. 9, p. 80). She also reported back pain with radiation into the leg and feeling as though her shoulders were "dislocated" in addition to "lots" of neck pain. *Id*. An MRI of the cervical spine had been completed and the results were noted as "pending". *Id.* at p. 80-81. Claimant was noted to have a "negative" attitude towards the provider's recommendation for continued PT and was

"difficult" with staff and the PT scheduler when attempting to schedule future appointments. *Id*. at p. 82.

4. The results of Claimant's December 18, 2019 MRI revealed "mild reversal of the normal cervical lordosis" but otherwise normal vertebral body and disc height space, anatomic posterior alignment and normal signal intensity in the cervical spinal cord. (Ex. 9, p. 84).

5. Claimant was seen in follow-up by Dr. Centi on January 9, 2020 during which appointment, Dr. Centi documented that Claimant continued to report neck and low back pain without improvement from medications; however, she did note some improvement with PT. Dr. Centi commented further that Claimant's MRI was normal and that she felt her problem was "stable". (Ex. 9, p. 88). Claimant was placed at maximum medical improvement without impairment on this date and released to full duty work. *Id*. at p. 87, 89. Dr. Centi recommended that Claimant "continue her physical therapy to completion" and continue her home exercise program. *Id.* at p. 89. He did not recommend additional maintenance care after MMI. *Id*. at p. 87.

6. On February 4, 2020, Claimant presented to the Emergency Room (ER) at Evans Army Medical Center requesting a second opinion regarding her chronic neck pain and paresthesias. (Ex. 12, p. 193). Claimant was evaluated by Dr. Jessica Walsh. During this encounter, Claimant reported that since she was taken down forcefully on October 28, 2019, she had "neck pain, bilateral shoulder pain and intermittent paresthesias to both arms". *Id.* She also reported that for the three days prior to her presentation to the ER, she had a warm sensation to the lateral aspect of her right hand which she informed Dr. Walsh felt "swollen". She complained that her right shoulder had been "rotated in and dropped for over a month". *Id*. According to Dr. Walsh's ER note, Claimant advised Dr. Walsh that she notified her workman's compensation physician (Dr. Centi) about these problems, but "nothing was done". *Id*. Claimant stated she was requesting a second opinion regarding her condition "because she [did] not feel like she should be cleared to return to work as a corrections officer. *Id.*

7. Claimant's February 4, 2020, physical examination revealed "no evidence of weakness to the fingers, hand, wrist, elbow or shoulder. (Ex. 12, p. 195). Dr. Walsh could not explain the posture of Claimant right arm/shoulder noting: "As far as holding her right shoulder in a slightly internally rotated, dropped position, it is unclear if this is a position of comfort versus intentional positioning". *Id.* According to Dr. Walsh, [w]ith pure shoulder extension, [Claimant] appeared to have significant difficulty [with] both arms, right greater than left and was very tremulous". *Id*. However, when asked by Dr. Walsh to "reach over her head as though she were scratching her back, [Claimant] was easily able to do this with each hand and had a fully extended shoulder during this maneuver". *Id.* Claimant was discharged in stable condition with instructions to follow-up with her primary care physician and/or her workers' compensation doctor. *Id.*

8. Claimant requested a Division Independent Medical Examination (DIME) and was evaluated by Dr. Dwight Caughfield on June 23, 2020. (Ex. 13). Physical

examination revealed diffuse guarding of the cervical paraspinal musculature but no localized spasms. *Id*. at p. 204. Active trigger points were present in the trapezius muscles extending into the neck and outward to the shoulder and Claimant demonstrated "very guarded" cervical range of motion during observation and range of motion testing. *Id.* Shoulder examination was positive for soft tissue tenderness and Hawkins testing revealed "some anterior shoulder pain bilaterally but no subacrominal pain. *Id.* Active range of motion of the shoulders was limited and passive range of motion was constrained by guarding. *Id.*

9. Dr. Caughfield provided a clinical diagnosis of "cervicalgia with myofascial pain. (Ex. 13, p. 205). He did not feel that Claimant's low back, thoracic and shoulder pain were injury related. *Id*. Noting that Claimant's initial COMT assessment scores placed her in the "at-risk" category and that her January 9, 2020 COMT anxiety/depression score suggested worsening anxiety/depression (Ex. 9, p. 90), Dr. Caughfield opined that Claimant had not reached MMI. (Ex. 13, p. 205). He recommended formal psychological testing/treatment before consideration of MMI. Indeed, Dr. Caughfield noted:

> Cervical treatment guidelines section E.2.c state "Formal psychological or psychosocial evaluation should be performed on patients not making progress within 6 to 12 weeks following injury and whose subjective symptoms do not correlate with objective signs and tests." [Claimant's] increasing pain complaints, escalating anxiety scores, as well as conflict with PT noted in the record suggests potential underlying psychosocial issues that need evaluation and potential treatment if deemed related to her injury. The presence of anxiety/depression and potential somatization may explain her escalating pain complaints and reports of functional impairments. I recommend formal psychosocial testing be completed and any injury related treatment be addressed before placement at MMI. I do not feel any further imaging studies, analgesics, or physical therapy is appropriate based upon her past responses.

(Ex. 13, p. 205).

10. Approximately one year after being evaluated in the ER on February 4, 2020, Claimant followed up with her personal physician, Samantha Uriguen-Ashby on February 10, 2021. (Ex. G, p. 73). During this visit, Claimant reported that her symptoms had continued since the time of her 2019 on the job injury and that she wanted to "pursue [an] evaluation for pain that radiates in both upper extremities and causes numbness and tingling (beginning in shoulders and radiating down to hands). *Id*. Claimant reported 7/10 pain in both arms and her upper neck. Physical examination revealed tenderness and an abnormally anteriorly rotated right shoulder. There was pain on movement of the arms/shoulder bilaterally but no tenderness of the left shoulder. *Id.* Bilateral shoulder strength was documented as normal as was strength of

the forearms. *Id*. Claimant was assessed with "cervicalgia". *Id*. A discussion was had about "anatomy and potential actions that may have caused pain. Id. Claimant was "[e]ncouraged to keep a symptom journal – with symptoms and potential triggers". *Id.* Moreover, "[a]larm signs/symptoms" were discussed with Claimant and she verbalizing her understanding to obtain immediate re-evaluation if such signs/symptoms became apparent. *Id*. Finally, Claimant was instructed to follow up with her PCM as needed. *Id*. at p. 76. There is no reference in the treatment record from this visit that Claimant was informed that she could not treat with her primary care manager (PCM) or that future care would be denied because Claimant's symptoms were associated with a work-related injury. This record appears to contain the last reference to Claimant seeking assistance from her primary care physician to evaluate/treat the symptoms she associated with her October 28, 2019 work injury.

11. Claimant returned to Dr. Centi's care on February 16, 2021. (Ex. 9, pp. 95-105). Dr. Centi referred Claimant for mental health counseling. *Id*.

12. Before she could initiate counseling, Claimant sustained injuries to her low back on February 20, 2021, after falling from a chair when the seat back unexpectedly broke off causing the chair to roll forward and Claimant to fall to the floor. The incident was reported and assigned Workers' Compensation Claim No. 5-165-280. The details surrounding this claim number are outlined below.

13. Claimant initiated counseling with SABABA Health Group on March 16, 2021. She was felt to have "some emotionality associated with her pain". (Ex. 11, p. 116). A treatment program to develop "concrete skills to reduce intensity and frequency of reported pain and distress" related to her injuries was proposed as a means to help Claimant's ability to relax and reduce stress and improve her physical functioning. *Id*.

14. Claimant completed 12 counseling sessions and was discharged from care on June 1, 2021 after "successfully" completing her treatment program. (Ex. 11, p. 184). At discharge, Claimant recognized that she had made improvement and was able to "identify areas that would require continual time and attention". Id. at p. 188. Moreover, Claimant was able to "discuss tools and techniques she learned and those she would continue to use as need". *Id.*

15. Upon completion of her counseling program, Claimant returned to Dr. Caughfield for a follow-up DIME on August 30, 2022. Dr. Caughfield noted that Claimant had been discharged from her psychological counseling program with a diagnosis of "mood disorder with known physiological condition with improvement across all scales". (Ex. 14, p. 212). Nonetheless, he did not find any support for a "functionally impairing mood disorder". *Id.* He placed Claimant at MMI noting that the final therapy session documented that Claimant had been "trained in appropriate self management skills and did not recommend further active treatment". *Id.* at p. 213. He did not recommend maintenance counseling. Indeed, Dr. Caughfield did not recommend any maintence care. *Id.* Rather, he simply noted: Having completed the appropriate diagnostic studies and treatment [Claimant] is at MMI but with persisting

neck pain and referred paraesthesia meriting impairment. Accordingly, Dr. Caughfield assigned a 19% whole person impairment for Claimant's cervical spine condition. Id. at pp. 214-215.

16. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Caughfield's opinions concerning MMI and impairment on October 4, 2022. (Ex. 1) The FAL specifically denied liability for maintenance care after MMI pursuant to Dr. Caughfield's August 30, 2022 DIME report. *Id*. at p. 2.

17. Claimant objected to the October 4, 2022 FAL and requested a hearing to adjudicate her entitlement to maintenance care after MMI. The objection and Application for Hearing were filed on November 2, 2022. (Ex's. 3 & 5).

Workers' Compensation Claim No. 5-165-280

18. As noted at ¶ 11 above, Claimant suffered injuries to her low back on February 20, 2021, when the back of a chair she was sitting in failed and she was cast to the floor. Following this incident, Claimant proceeded to the ER at St. May Corwin Hospital where she was evaluated by Physician Assistant (PA-C) Andrew James Kretovic. Upon presentation, the following history was obtained from Claimant:

> Patient is a 31 year old female that presents with injuries from a fall. She reports today she went to sit on a chair at work and the back broke, causing her to fall backwards. She reports she hit the middle of her back on the ground and on a screw. She reports she somehow hit the front her (sic) of (sic) forehead but denies significant headache and denies LOC, nausea, vomiting, neck pain or speech/vision changes. She reports back [pain] that radiates up into shoulder blade area. She denies bowel/bladder incontinence/retention, saddle paresthesias, weakness in legs or difficulty ambulating.

(Ex. 10, p. 108).

19. X-rays of the lumbar spine were obtained and revealed "[n]o definite acute fractures". (Ex. 10, p. 112). Claimant was subsequently discharged home in stable condition. *Id*. at p. 107.

20. Following her ER visit, Claimant established care with Concentra Medical Centers (Concentra) on February 22, 2021. While a significant portion of the medical reports outlining Claimant's early care at/through Concentra for this incident are missing from the record, the available records support the following:

- Claimant established care at Concentra on February 22, 2021 when she was evaluated by PA Michael Gottus.

- Claimant was evaluated by Dr. Daniel Peterson on February 24, 2021. Dr. Peterson noted that Claimant was hurting across her low back and while she had bruising on her back, there was no evidence of a puncture wound. Dr. Peterson also noted a large bruise on the medial side of the right elbow.

- On March 1, 2021, PA Gottus noted that Claimant was reporting persistent low back pain with radiation into the left leg.

- Dr. Peterson evaluated Claimant on March 8, 2021 during which appointment he noted that Claimant had seen Dr. Finn who recommended an MRI of the lumbar spine to rule out a lumbar transverse process fracture. The MRI was ordered.

- Claimant returned to Dr. Peterson for reevaluation on March 24, 2021. Dr. Peterson noted that Claimant had her first chiropractic appointment and that her MRI was "totally" normal.

(Ex. 8, pp. 62-63).

21. Claimant was seen by her chiropractor on April 20, 2021. Dr. Knoche noted that Claimant demonstrated essentially "full" range of motion during thoracolumbar movements, lateral bending, bilateral rotation and extension and forward flexion. (Ex. 8, p. 58). While Claimant was mildly tender to the left of midline at T7 and T10 and in the quadratus lumborum musculature, her thoracolumbar flank pain had resolved and as noted, she exhibited full range of motion in the lumbar spine. Moreover, Claimant had a negative Kemps and straight leg raising test result. *Id.* Dr. Knoche discharged Claimant from treatment noting that she had reached MMI. *Id.*

22. On April 28, 2021, Claimant was examined by Dr. Leah Johansen at Concentra. (Ex. D, pp. 37-43). During this encounter, Claimant reported that her back was "doing awesome." *Id.* at pp. 37, 38. She denied any pain or radiculopathy, and reported that she was "[r]eady to go back to work full time." *Id.* at p. 38.

23. Dr. Johansen's physical examination of Claimant was unremarkable. (Ex. D, pp. 40-41). Claimant's cervical, thoracic, and lumbosacral spine all presented as normal with full range of motion. *Id.* at p. 41.

24. Dr. Johansen determined that Claimant was at her functional goal but not yet at the end of healing. (Ex. D, p. 41). Accordingly, Dr. Johansen instructed Claimant to follow up in one week, but released her to return to work full-duty without restriction as of April 28, 2021. Dr. Johansen opined that Claimant would be at MMI one-week later *without need for maintenance care*. *Id.* at p. 42 (emphasis added).

25. Claimant failed to follow up with her authorized treating physicians after her April 28, 2021 appointment with Dr. Johansen. Consequently, Claimant was

returned to Concentra on February 22, 2022 for a demand appointment with Dr. Peterson. (Ex. D, pp. 32, 44).

26. Included in the note from the demand appointment is a notation by Dr. Peterson that Claimant had failed to follow-up on her injury after her April 28, 2021 visit with Dr. Johansen. Dr. Peterson noted further that Claimant was "working full duty with no issues". (Ex. 8, p. 67). He also documented that Claimant reported that her back felt "fine" and that her MRI was "normal". *Id*. Dr. Peterson deemed Claimant to be at MMI as of February 22, 2022. *Id*. at p. 66. He released Claimant from care without impairment and without maintenance care needs. *Id.*

27. Following her placement at MMI without impairment by Dr. Peterson, Claimant requested a DIME and the same was performed by Dr. John Tyler on August 19, 2022. Dr. Tyler issued his DIME report on August 22, 2022. As part of his DIME, Dr. Tyler obtained and documented the following history regarding Claimant's February 20, 2021 injury: "On the date of injury, [Claimant] was sitting in a swivel chair that had no arm rests. [Claimant] states that when she leaned backwards, the back support broke off and she fell backwards and landed on her lower and mid back regions". (Ex. 15, p. 218).

28. Dr. Tyler recognized the lengthy gap between Claimant's last documented appointment from April 28, 2021 and the February 22, 2022 demand appointment. He asked Claimant why there had been a long gap in the continuum of care to which Claimant reportedly responded that she had contacted Concentra prior to her scheduled follow-up appointment (to occur one week after her April 28, 2021 visit) and reported that she was symptom free with regard to the injuries she sustained on February 20, 2021. According to Dr. Tyler's report, Claimant was then informed by Concentra that it was not then necessary to follow-up with them. (Ex. 15, p. 218).

29. Following his physical examination, Dr. Tyler concluded that Claimant had reached MMI as of February 22, 2022, without impairment or maintenance treatment needs. (Ex. 15, pp. 219-220).

30. Respondents filed a FAL consistent with Dr. Tyler's opinions concerning MMI and impairment on October 4, 2022. (Ex. 2) The FAL specifically denied liability for maintenance care after MMI pursuant to Dr. Tyler's August 22, 2022 DIME report. *Id*. at p. 21.

31. Claimant objected to the October 4, 2022 FAL and requested a hearing to adjudicate, her entitlement to maintenance care after MMI. Claimant's objection and her Application for Hearing were filed on November 2, 2022. (Ex's. 4 & 6).

The Deposition Testimony of ERL[Redacted]

32. ERL[Redacted] testified as a long time Correctional Officer for Employer. She has worked for the [Redacted, hereinafter DC] for approximately 12 years.

(ERL[Redacted] Depo. Tr., p. 5, ll. 24-25, p. 6, line 1). ERL[Redacted] testified that she and Claimant met while they were working the swing shift. (ERL[Redacted] Depo. Tr., p. 6, ll. 8-12). While they have worked together, ERL[Redacted]l testified that Claimant is currently working in "visiting" while she works in security so they don't currently see each other or work together, unless Claimant is assigned to work a security post. (ERL[Redacted] Depo. Tr., p. 6, ll. 19-24).

33. ERL[Redacted] testified that she was present during both of the incidents leading to Claimant's injuries. (ERL[Redacted] Depo. Tr., p. 9, ll. 7-13). According to ERL[Redacted], Claimant's first injury occurred when they were partners during PPCT class (defensive tactics) and were not getting a maneuver right. (ERL[Redacted] Depo. Tr., p. 9, ll. 16-20). ERL[Redacted] testified that the PPCT instructor then demonstrated the maneuver on Claimant causing her injury. *Id.* Regarding Claimant's second injury, ERL[Redacted] testified that she was with Claimant in a conference room when Claimant fell off a chair. *Id*. at p. 9, ll. 21-22.

34. ERL[Redacted] testified that she has not witnessed any conduct to suggest that Claimant is having difficulty performing her job duties since her October 28, 2019 or February 20, 2022 injuries. (ERL[Redacted] Depo., p. 11, ll. 16-23). Nonetheless, ERL[Redacted] admitted during cross examination that Claimant's current position with Employer is less strenuous. *Id*. at p. 26, l. 25; p. 27, ll. 1-2.

Claimant's Hearing Testimony

35. Claimant testified that on October 28, 2019, she and Officer ERL[Redacted] were partners during defensive tactics training. According to Claimant, Officer ERL[Redacted] was having trouble understanding a particular defensive maneuver so the instructor demonstrated the movement on her. Claimant testified that the instructor grabbed her by the back of the neck, pulled her into his chest and forcibly "slammed" her down to the floor mat.

36. Claimant testified that she developed bruising and pain in her neck on the evening of October 28, 2019. She also testified that her right shoulder "fell and rolled inwards." Despite her condition, Claimant testified that she did not miss much time from work after this injury. Moreover, she continued to work in her regular capacity as a Corrections Officer.

37. Claimant testified that she subsequently developed shoulder pain and has constant "numbing" through her arms and has recently developed sharp pain on the left side of her neck radiating up into her skull similar to her right sided neck pain.

38. Claimant testified that at the time she last saw Dr. Caughfield, i.e. during her follow-up DIME she was experiencing continued symptoms including "severe" neck and shoulder pain. She testified that her persistent neck pain and numbness in her arms combined with the apprehension she had about her ability to use a shotgun or handle use of force situations lead to her decision to change positions from a security

officer to a housing officer. According to Claimant, her current housing office position is mostly clerical in nature and has helped "control" her pain.

39. Concerning the February 20, 2021 injury, Claimant testified that as she leaned backward in a chair the seat back fell off causing her to fall backwards and hit her head on another chair and land on the left side of her low back.

40. Claimant testified that she proceeded through treatment for the injuries she sustained as a consequence of falling from the chair. She testified that she was ultimately seen by Dr. Tyler who spent approximately 10 minutes with her. Accordingly to Claimant, Dr. Tyler palpated her low back which caused "discomfort". She testified that he also showed her some stretches to help correct some postural distortion in her low back. Claimant testified that she did not tell Dr. Tyler that she was having ongoing pain/problems with her low back.

41. Claimant testified that the symptoms related to the injuries she sustained in the October 28, 2019 incident have worsened with the passage of time; however, she did not quantify how or to what extent her symptoms have worsened. Instead, she simply testified that it was her "desire" to seek additional treatment for her ongoing symptoms. Claimant conceded that she has not sought treatment for her work related injuries/symptoms at Concentra in the past year. She also confirmed that her primary care provider ("PCP") is Evans Army Medical Center/Hospital (Evans) and that she has not secured treatment for her neck through Evans in the past year. Accordingly, Claimant admitted that she has not seen any provider, i.e. either her PCP or her authorized treating providers under her work related neck injury for the past year. Finally, Claimant confessed that she has not sought treatment for her low back through Evans.

42. During redirect, Claimant clarified that she attempted to secure treatment for her neck at Evans but was denied because the injuries arose out of an open workers' compensation case. While Claimant testified that she tried to get treatment for her neck complaints at Evans, she did not specify when she made such attempt. Instead, she simply testified that she "initially" attempted to obtain treatment at Evans, but was refused because her injuries/symptoms were related to an open workers' compensation claim. In this case, the only evidence suggesting that Claimant tried to obtain treatment through Evans for her neck complaints is contained in the reports from Claimant's February 4, 2020 and February 10, 2021 visits through Evans when she requested a second opinion and an evaluation concerning the condition of her neck/shoulders after being placed at MMI by Dr. Centi on January 9, 2020. Outside of these reports, there is a dearth of persuasive evidence to support any suggestion that Claimant attempted to secure additional treatment for her neck complaints through Evans in the months following her February 10, 2021 appointment/evaluation with Dr. Uriguena-Smith, even though she was instructed during her February 10, 2021 appointment that she should follow-up with her PCM on an as needed basis. (See Ex. G, p. 76).

43. Careful review of the Evans records reveals that after Claimant's February 10, 2021, appointment, she was seen at Evans on the following dates, for the following conditions/reasons:

- Claimant visited her the Evans emergency room on June 19, 2022 after being involved in a high-speed motor vehicle collision. (Ex. G, pp. 57-63). While traveling at 75 miles per hour, Claimant swerved to avoid hitting a deer on the highway and instead struck the guardrail. *Id.* at p. 57. Although the vehicle's airbags deployed, Claimant was able to extricate herself from the vehicle and get to the ER. *Id.* Upon arriving in the emergency department, Claimant reported that she was sore all over but "had no particular neck pain . . . ." *Id.* Physical examination revealed that her neck was "supple and without particular pain. *Id*. at pp. 57-58. Claimant reported history of a great toe fracture which occurred while she was "working out" otherwise she reported taking no medications on a daily basis and "no underlying medical issues", specifically denying asthma, hypertension [and] diabetes. Based upon the content of the record, the ALJ finds that outside of her toe fracture, Claimant probably did not mention neck, shoulder or low back injuries related to the present claims, or other underlying medical issues. (*See id.*).

- Claimant was seen by her PCP for a "well women exam" on September 22, 2022, during which it was discovered that she had an elevated blood-pressure reading without having a diagnosis of hypertension. Claimant was advised to limit her dietary sodium and caffeine and monitor her blood-pressure outside of the clinic. Despite her current complaints of persistent and worsening neck symptoms, the record from this encounter notes that Claimant had "no other concerns" and "no complaints were offered". (Ex. G, p. 66). Careful review of the noted from this date of visit reveals that Claimant had no reports of headache or back pain. *Id*. at p. 67. Physical examination revealed a "Well-appearing" individual with a normal appearing neck without tenderness. *Id.*

CONCLUSIONS OF LAW

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

Generally

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

is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. In accordance with C.R.S. § 8-43-215, 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). 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).

C. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant's current pain complaints are likely emanating from both an injury to the rotator cuff and an aggravation of a pre-existing cervical spine condition caused directly by Claimant's fall to a concrete floor on August 6, 2020 after slipping in a puddle of water.

Claimant's Entitlement to Maintenance Medical Care

D. 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 deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). An award for maintenance 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 Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo.App. 1999); *Hastings v. Excel Electric*, W.C. No. 4-471-818 (ICAO, May 16,

2002). Rather, 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, supra.* The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the Claimant reaches this threshold, the Court in *Milco* stated that the ALJ should then, as a second step, enter a "general order similar to that described in Grover." 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 due to the work injury. *Milco Construction v. Cowan*, *supra*. The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for future medical treatment is reasonable, necessary and related to the compensable injury. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

E. In this case, the record evidence persuades the ALJ that Claimant has failed to prove she needs/requires maintenance care. Here, none of Claimant's authorized treating physicians, under either claim, have indicated that she requires further care to relieve her from the effects of her injuries or prevent deterioration of her condition. Moreover, both Dr. Caughfield and Dr. Tyler specifically opined that Claimant does not require maintenance care. Claimant's contrary testimony that she requires ongoing care for persistent and worsening neck and back symptoms is unpersuasive. Indeed, Claimant's testimony that her symptoms have worsened is uncorroborated and her claim that she needs treatment is largely contradicted by the content of her medical records and her actions. Indeed, there is a lack of evidence indicating that Claimant has attempted to secure treatment with her PCP since February 10, 2021. Finally, the record is replete with admissions from Claimant which support a finding that any back or neck pain related to her work injuries has resolved. In fact, Claimant has been evaluated by her PCP at least twice since her most recent date of MMI (2/22/22), but she *never* during either appointment reported pain or ongoing complaints related to either of her work injuries (neck or low back), despite having no treatment for her work injuries in the years since being discharged by Dr. Centi and evaluation by Dr. Johansen on 4/28/21. (*See* Ex. G). Even after enduring a car crash on June 19, 2022, while traveling 75 miles per hour, Claimant's ER records from Evans noted, "[n]o particular neck pain (sic) back pain (sic) rib pain (sic) arm pain with the exception of the left distal forearm." *Id.* at p. 57. In addition, when Claimant visited her PCP on September 22, 2022, a review of her musculoskeletal system indicated neither back pain nor neck tenderness. *Id.* at p. 67. This supports a reasonable inference that Claimant's work-related neck and low back injuries are stable, despite not having any treatment for years. Claimant has presented no evidence that any physician, including her PCP, has recommended future or ongoing treatment for her neck strain or low back

strain injuries. Accordingly, the ALJ concludes that Claimant has failed to establish a need for future or ongoing medical treatment related to either her October 28, 2019 or February 20, 2021 work injuries.

F. Although Claimant testified at hearing that she began to experience numbing in her arms sometime after the first 10/28/19 injury, Dr. Caughfield, repeatedly found no evidence to connect Claimant's reported shoulder pain to her admitted neck injury and twice opined it was not work-related. Section 8-42-107(8), C.R.S. provides that a DIME's findings concerning MMI are binding unless overcome by clear and convincing evidence. The determination of MMI inherently requires a DIME to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are causally related to the work injury. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo.App. 1998). As such, a DIME's opinions regarding causation are entitled to presumptive weight. *See Laprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 482 (Colo.App. 2005); *see also Egan v. Indus. Claim Appeals Office*, 971 P.2d 664 (Colo.App. 1998). Absent a timely objection to the DIME physician's findings, an ALJ lacks jurisdiction to resolve a dispute as to those findings. *Leprino Foods Co. v. Indus. Claim Appeals Office*, *supra.*; *see also Schneider Nat'l Carriers, Inc. v. Indus. Claim Appeals Office*, 969 P.2d 817 (Colo.App. 1998).

G. To the extent that Claimant seeks maintenance care for injuries/conditions that have been determined to be unrelated by a DIME, and considering that Claimant has not timely challenged Dr. Caughfield's MMI/causality opinions, the Court views Claimant's position as an unripe, constructive challenge to the DIME's binding opinion. Since the Court lacks jurisdiction to resolve such disputes, this order does not address Claimant's entitlement to continued treatment for her shoulders/arms.

ORDER

It is therefore ordered that:

1. Claimant's request for additional maintenance medical in both WC 5-126-362 and WC 5-165-280 is denied and dismissed.

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

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

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

DATED: April 26, 2023

/s/ Richard M. Lamphere

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-177-356-001

ISSUES

1. Did Claimant prove by a preponderance of the evidence that specific maintenance treatment in the form of vestibular therapy and visual therapy is reasonable, necessary and related to her admitted work injury?

2. What is Claimant's average weekly wage (AWW)?

FINDINGS OF FACT

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

1. Claimant is a 29 year-old woman who worked part-time for Employer, which was her mother's company. Claimant testified she cleaned and painted properties after a tenant moved out.

2. Claimant was paid $18.00 per hour, and $27.00 per hour, for overtime. (Ex. J). Claimant testified she only worked a few days a week. There is no objective evidence in the record as to what constituted overtime work for Claimant.

3. On July 13, 2021, Claimant suffered an admitted work injury. Claimant credibly testified she was seated on the floor painting floor boards. When she stood up, she hit her head on an open cabinet door. Claimant did not lose consciousness, did not fall, and she had no immediate nausea or vomiting, but felt dazed and foggy. Claimant reported that she cleaned her paint brushes, as she would always do, and then drove home. (Ex. A).

4. Later that day, Claimant went to CareNow Urgent Care (CareNow) and presented with a chief complaint of a headache. Claimant reported having light sensitivity and nausea. Claimant did not present with vomiting, dizziness, syncope, slurred speech, weakness, muscle pains, numbness or tingling. Claimant was diagnosed with a mild concussion without loss of consciousness. She was to follow up in three days for a recheck, but she was to return sooner if she suffered new or worsening symptoms. (Ex. H).

5. Claimant returned to CareNow on July 16, 2021 for a follow-up visit. She reported no longer having nausea, but having ringing in her ears. (Ex. H). On July 21, 2021, Claimant had a CT scan of her brain. The impression was "normal CT of the head." (Ex. G).

6. Jennifer Tetrault, PA-C, referred Claimant to Yusuke Wakeshima, M.D., for a comprehensive physiatric consultation. Dr. Wakeshima evaluated Claimant on August 4,

2021. Claimant reported suffering a closed head injury on July 13, 2021. She further reported experiencing intermittent headaches, dizziness with mild balance issues, sensitivity to bright lights and noise, photophobia, phonophobia, emotional lability and forgetfulness. She was not reporting any tinnitus. Dr. Wakeshima explained he would refer Claimant for a neuropsychological assessment if she continued to have cognitive issues. He also told Claimant she should proceed with the vestibular rehabilitation arranged by the providers at CareNow. (Ex. F).

7. Claimant returned for a follow-up appointment with Dr. Wakeshima on August 13, 2023. According to Dr. Wakeshima's medical records, Claimant found vestibular therapy beneficial. She reported having continued issues with focusing and concentrating, so Dr. Wakeshima referred Claimant to Suzanne Kenneally, M.D., for a neuropsychological assessment. (Ex. F).

8. On or about, August 19, 2021, Claimant suffered a second head injury, and she sought emergency treatment three days later, on August 22, 2021. Claimant told the medical providers she slightly lost her balance, and struck the right side of her head on a wooden post. She reported experiencing a slight worsening of her symptoms and had some new symptoms. The ER triage notes state Claimant complained of "tingling all over after hitting her head 72 hours ago." Claimant was concerned because her sister noted her left pupil looked slightly larger than the right. According to the medical records, Claimant's "pupils are unequal (very subtle but left pupil is < 1mm larger than right, but both reactive and round). (Ex. E).

9. On September 29, 2021, Dr. Kenneally conducted testing on Claimant to determine if she suffered a traumatic brain injury on July 13, 2021. Dr. Kenneally concluded, based on the testing, that there was "no residual brain-based cognitive impairment association with the 07/13/2021 work-related injury." (Ex. D).

10. On October 22, 2021, Dr. Wakeshima discharged Claimant due to a "breakdown in doctor patient relationship." (Ex. F).

11. Brian Mathwich, M.D., conducted an IME on behalf of Respondents on November 23, 2021. He obtained a history from Claimant and reviewed her CT scan and neuropsychological testing results. He noted that Claimant's CT scan was normal, and her neuropsychological results indicated she had no cognitive impairment. Dr. Mathwich also noted that Claimant's injury did not include loss of consciousness, retrograde or anterograde amnesia. He concluded Claimant was at MMI as of August 13, 2021, and no further medical treatment was medically reasonable or necessary to cure and relieve the effects of the work injury. He believed that the mechanism of injury was not consistent with Claimant's ongoing subjective complains or with the diagnosis of mild traumatic brain injury/concussion. In his opinion, Claimant did not meet the diagnostic criteria for mild traumatic brain injury within the Colorado Division of Workers' Compensation Traumatic Brain Injury Medical Treatment Guidelines. (Ex. C).

12. Elizabeth Rosenberg, M.D., was Claimant's ATP. Dr. Rosenberg evaluated Claimant on December 3, 2021, and recorded Claimant's diagnoses as a concussion

without loss of consciousness and bilateral tinnitus. Dr. Rosenberg noted in Claimant's medical record that she disagreed with Dr. Mathwich's conclusion that Claimant had no objective findings of impairments. She noted Claimant's objective deficits in eye and vision function. Dr. Rosenberg, however, described Claimant's injury as minimal, and of a very mild nature. She further explained Claimant was "slowly but steadily" improving with vestibular and visual therapy, and Claimant was to "continue vestibular and vision therapy as scheduled for now." On the December 3, 2021, M164 Form, Dr. Rosenberg marked "therapy" in the treatment plan, and specifically listed vestibular and vision therapy. (Ex. 2).

13. Claimant saw Dr. Rosenberg a few weeks later, on December 16, 2021, for a follow-up appointment. According to the medical record, Claimant was "doing really well [with] lots of improvement." Dr. Rosenberg placed Claimant at MMI as of December 16, 2021. She also opined Claimant had no permanent impairment. In the medical record, Dr. Rosenberg stated "[f]rom my medical standpoint, you are still benefitting objectively from visual and vestibular therapy, I would recommend you continue with these therapies." Dr. Rosenberg completed another M164 form. Unlike the prior M164, Dr. Rosenberg did not mark that therapy was necessary. Further, she marked "no" for maintenance care, and wrote nothing in the section "if yes, specify care." (Ex. H).

14. The ALJ finds that while Dr. Rosenberg ***recommended*** Claimant continue with vestibular and vision therapy, Dr. Rosenberg did not opine Claimant needed this therapy to remain at MMI, and she found that no maintenance care was necessary.

15. On January 3, 2022, Respondents filed a Final Admission of Liability (FAL) based upon Dr. Rosenberg's December 16, 2021, evaluation of Claimant and the completed M164 Form. Respondents did not admit to medical treatment and/or medications after MMI. (Ex. P).

16. Claimant objected to the FAL and requested a DIME. The specific regions to be evaluated in the DIME were "Traumatic Brain Injury, Hearing, Vestibular Disorder and Visuals". Thomas Higgenbotham, M.D., conducted a DIME evaluation of Claimant on May 12, 2022. (Ex. A).

17. Dr. Higgenbotham agreed with Dr. Rosenberg that Claimant reached MMI on December 16, 2021. He provided an 8% whole person impairment rating based upon a 5% rating for a traumatic brain injury manifesting as persistent headaches, and a 3% rating for tinnitus. With respect to a vestibular disorder, Dr. Higgenbotham noted he could not objectively assess disturbances of equilibrium. Claimant had no abnormality of gait, and her balance was reasonable on examination. He did not give Claimant a rating for a vestibular disorder. Similarly, Dr. Higgenbotham did not give Claimant a rating for a visual impairment. According to his report, he could not objectively assess disturbances of the vision system for impairment purposes from the medical records. Claimant's pupils were of equal size and reactivity, extraocular muscles were intact and there were no visual midline deficits. (Ex. A).

18. Even though Dr. Higgenbotham did not give Claimant impairment ratings for vestibular or visual disorders, under maintenance care he wrote "[t]he vestibular and visual therapies since the date of MMI are considered maintenance care. The vestibular and visual therapies are to continue for another 4 sessions each, whereby a self-directed care program should be undertaken." (Ex. A).

19. Respondents filed another FAL on June 14, 2022, based upon Dr. Higgenbotham's DIME opinion. Respondents admitted to the December 16, 2021 MMI date and a whole person impairment rating of 8%. Respondents denied maintenance treatment based upon the M164 form completed by Dr. Rosenberg. (Ex. O).

20. Claimant testified she received about 31 vestibular therapy treatment sessions before December 16, 2021, and she still receives occasional vestibular therapy.

21. Claimant testified she received multiple visual therapy treatment from Alexandra Talaber, O.D., before December 16, 2021. Claimant testified she completed her visual therapy with Dr. Talaber. Claimant had a six month evaluation pending.

22. Claimant further testified she finds the vestibular and visual therapy helpful and does not feel like she has fully recovered. The ALJ finds Claimant's testimony to be credible, but not persuasive.

23. Dr. Mathwich credibly testified that neither vestibular therapy nor visual therapy are reasonable or necessary for Claimant to maintain maximum medical improvement. Dr. Mathwich's opinion is consistent with Dr. Rosenberg's opinion that maintenance treatment was not reasonable or necessary. The ALJ finds this testimony of Dr. Mathwich to be credible and persuasive.

24. Based on the totality of the evidence, the ALJ finds that vestibular therapy is not reasonable nor necessary for Claimant to maintain MMI. The ALJ also finds that visual therapy is not reasonable nor necessary for Claimant to maintain MMI.

25. Respondents admitted to an AWW of $94.57. (Ex. O). But in 2021, Claimant's gross wages between January 7, 2021 and to July 8, 2021 (a 27-week period), were $2,842.20. This equates to an average weekly wage of $105.27 ($2,842.20 / 27 = $105.27).

26. Claimant seeks an increase in her average weekly wage based upon other income, outside of her work with Employer. Claimant credibly testified that she is a self-published author, selling her books on [Redacted, hereinafter AN], and she spends 25-30 hours per week writing.

27. Claimant received royalties from AN[Redacted] in the amount of $2,418.99 in 2020, and $2,977.42 in 2021. (Ex. 4). But according to Claimant's tax records, she claimed negative income from her writing in 2020 of <$2,656.00> and in 2021 of <$1,598.00>. (Ex. K). There is no objective evidence in the record to increase Claimant's AWW based upon Claimant's self-published books during the relevant periods of time.

28. The ALJ finds that Claimant's AWW was $105.27.

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 Treatment

Claimant has the burden of proving entitlement to medical treatment after MMI by a preponderance of the evidence. Claimant must prove that maintenance benefits are related to her work injury and that they are reasonable and necessary to maintain MMI. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Claimant seeks specific maintenance treatment of eight additional visual and

vestibular therapy appointments.[1] Claimant testified she finds vestibular and visual therapy helpful, and does not feel she has fully recovered. Claimant also testified she has completed visual therapy.

Claimant relies upon the DIME physician, Dr. Higginbotham, to support her claim for maintenance benefits. In his May 20, 2022 DIME report, Dr. Higginbotham concluded that vestibular and visual therapy should continue for another four sessions each. A DIME physician's opinions concerning MMI and permanent medical impairment are binding unless overcome by clear and convincing evidence. § 8-42-107(8), C.R.S. There are no disputes regarding Claimant's date of MMI or her impairment ratings. But a DIME physician's opinion regarding what medical treatment is reasonable, necessary, or related does not carry additional weight. *Yeutter v. ICAO,* 487 P.3d 1007 (Colo. App. 2019). When a party is not challenging a DIME physician's MMI determination or impairment rating, the Courts have held that the heightened burden of proof does not apply. *See Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002) (where issue was cause of worsened condition on reopening, DIME physician's opinion not entitled to presumptive effect); *Wilkinson v. Walmart Stores*, W.C. No. 4-674-582 (October 26, 2007)(DIME physician's causation opinion has no presumptive weight on the issue of *Grover* medical benefits); *Moore v. American Furniture Warehouse*, W.C. No. 4-665-024, (June 27, 2007)(the increased burden required by the DIME report did not apply to the claimant's entitlement to a particular medical treatment).

Dr. Higginbotham agreed with Claimant's ATP that Claimant reached MMI on December 16, 2021. He opined Claimant had 3% impairment rating for hearing (binaural tinnitus) and a 5% impairment rating related to persistent headaches. Dr. Higginbotham specifically found Claimant had no abnormality of gait, and her balance was reasonable, so he did not give her an impairment rating for a vestibular disorder. Similarly, Dr. Higgenbotham did not give Claimant a rating for a visual impairment. Despite these findings, Dr. Higgenbotham recommended vestibular and visual therapy on a very limited basis (four sessions each). Dr. Higginbotham's opinion regarding the need for limited additional therapy is credible, but not persuasive.

Claimant's ATP, Dr. Rosenberg, concluded Claimant was at MMI as of December 16, 2021, and that Claimant did not require maintenance medical care. This is evidenced by the December 16, 2021, M164 form, where Dr. Rosenberg specifically noted that maintenance medical care after MMI was ***not*** necessary. As found, Dr. Rosenberg's recommendation that Claimant continue with vestibular and visual therapy was simply that, a recommendation. (Findings of Fact § 14). The ALJ finds Dr. Rosenberg's opinion that maintenance treatment in not necessary to maintain MMI, to be credible and persuasive. Dr. Mathwich also opined that no maintenance treatment is reasonable or necessary to maintain MMI. The ALJ finds Dr. Mathwich's opinion regarding maintenance treatment to be credible and persuasive. Based on the totality of the evidence, neither vestibular nor visual therapy are reasonable or necessary for Claimant to maintain MMI.

[1] It is unclear from Claimant's position statement whether Claimant is seeking eight total treatments, or eight visual treatments and eight vestibular therapy treatments.

AWW

Respondents admitted to an AWW of $94.57. (Ex. O). As found, Claimant earned $2,842.20 between the dates of January 7, 2021 to July 8, 2021 (a 27-week period). This equates to an AWW of $105.27 ($2,842.20 / 27 = $105.27). Claimant's AWW with Employer was $105.27.

Claimant seeks to increase her AWW based upon her assertion that book sales from her self-published books should be included for a fair calculation of AWW. Section 8-42-102(2) of the Colorado Revised Statutes sets forth the method for calculating the average weekly wage. This section states that AWW shall be calculated upon the monthly, weekly, daily, hourly or other remuneration that the claimant was receiving at the time of the injury. The overall purpose of the statutory scheme is to calculate "a fair approximation of the claimant's wage loss and diminished earning capacity."

Section 8-42-102(3) of the Colorado Revised Statutes allows the ALJ to use discretion when the usual methods of calculating AWW "will not fairly compute the average weekly wage." If separate self-employment income is to be considered to increase AWW, the case law requires that the net income be the basis used in those calculations. In *Elliott v. El Paso Cnty*, 860 P.2d 1363 (Colo. 1993), the court held that depreciation claimed on a self-employed truck driver's tax return could be considered in calculating the driver's AWW. The court reasoned that the "cost of earnings must be considered in measuring those earnings." *Id.* at 1366; *see also Osman v. Colo. Cab Co.,* W.C. 4-905-869-01 (ICAO October 30, 2014) (a cab driver's net revenue after deductions for expenses should be the basis for his AWW calculation); *Hunterson v. Colo. Horseracing Assoc*., W.C. Nos. 4-552-585, 4-576-683 (Sept. 29, 2004) (if the ALJ determined the claimant was self-employed, then the ALJ may consider the claimant's expenses and include that reduction in calculating AWW).

A review of the decisions issued in other states are in conjunction with *Elliot, Osman,* and *Hunterson*. The cases consistently hold that a self-employed individual's average weekly wage should be based on gross income and the individual's business expenses, or "the cost of earnings." *See Vite v. Vite*, 377 S.W.3d 453 (Ark. App. 2010); *Appeal of Carnahan*, 821 A.2d 1122 (N.H. 2003); *Hull v. Aetna Ins.*, 541 N.W.2d 631 (Neb. 1996); *State ex rel. Richards v. Indus. Comm*., 673 N.E.2d 667 (Ohio App. 1996); *Meredith Construction Co. v. Holcombe*, 466 S.E.2d 108 (Va. App. 1996) *Christian v. Riddle & Mendenhall*, 450 S.E.2d 510 (N.C. App. 1994).

Here, Claimant received royalties in 2020 and 2021 from AN[Redacted] for her self-authored books, but claimed a negative income on her tax returns from this endeavor of <$2,656.00> in 2020, and <$1,598.00>, in 2021. (Ex. K). There is no objective evidence in the record to increase Claimant's AWW based upon her self-published books during the relevant periods of time. As found, Claimant's AWW is $105.27.

ORDER

It is therefore ordered that:

1. Claimant's claim for maintenance treatment in the form of vestibular therapy is denied and dismissed.

2. Claimant's claim for maintenance treatment in the form of visual therapy is denied and dismissed.

3. Claimant's AWW is $105.27.

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: April 19, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-162-468-004

PROCEDURAL HISTORY

The parties were provided through November 29, 2022 to submit post hearing positions statements, briefs or proposed orders. Respondents' Position Statement was timely filed. Claimant's brief was not available at the time this ALJ issued the Findings of Fact, Conclusions of Law and Order dated December 7, 2022 and was not considered.

Respondents timely filed a Petition to Review on December 27, 2022. The Transcript of the hearing was lodged with the OAC on February 10, 2023 and a Notice and Briefing Schedule was issued by the OAC on February 16, 2023. Respondents filed a Brief in Support of Petition to Review on March 8, 2023. Respondents' March 8, 2023 Brief in Support of Petition to Review presented two questions for determination, as follows:

> 1. Whether the determinations made in ALJ Tenreiro's (sic.) December 7, 2022 Findings of Fact, Conclusion of Law, and Order were supported by substantial evidence, and specifically, whether the "actual date of incident" of April 30, 2020 is supported by substantial evidence.
>
> 2. Whether ALJ Tenreiro erred as a matter of law in finding that Respondents were responsible for medical treatment obtained by Claimant in 2020, given that Claimant did not report a potential claim until February of 2021.

Claimant filed Claimant's Response to Respondents' March 8, 2023 Brief in Support of Petition to Review on March 28, 2023. This Supplemental Findings of Fact, Conclusions of Law and Order follows:

ISSUES

Issued heard for hearing on September 12, 2022 were as follows:

I. Whether Claimant has shown by a preponderance of the evidence he sustained a work related injury in the course and scope of his employment with Employer on April 30, 2020.

IF COMPENSABAILITY IS PROVEN, THEN:

II. Whether Claimant has shown by a preponderance of the evidence that Claimant is entitled to medical benefits that are reasonably necessary and related to the injury.

III. Whether Claimant has shown by a preponderance of the evidence who is the authorized treating physician.

IV. Whether Claimant has shown by a preponderance of the evidence he is entitled to a change of physician.

V. Whether Claimant has shown what is his average weekly wage.

VI. Whether Claimant has shown by a preponderance of the evidence that he is entitled to temporary disability benefits from May 27, 2020.

STIPULATION

The parties stipulated that Claimant's average weekly wage was $1,041.40. The stipulation of the parties was approved and incorporated in the Order.

FINDINGS OF FACT

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

1. Claimant was 68 years old at the time of the hearing. Claimant was the head of public works for Employer and started working there in 2019. He would care for the grounds, performing maintenance of machinery, and road and park maintenance with the machines he maintained. He had multiple different duties including maintenance of equipment and machinery, including a tractor, street sweeper (which was the biggest piece of equipment), dump truck, motor grader, and pickup with a plow. He was the only public works employee for Employer and used all of the machinery.

2. On or about April 30, 2020, it was springtime in the area and Claimant had to sweep the streets, to get rid of the sand and debris that had accumulated on the streets during the winter months. He was not certain of the exact day the incident occurred, but within a day or so on either side of April 30, 2020 is when the accident happened. He stated that, to the best of his recollection, April 30, 2020 was the correct date of his injury. The sweeper picked up the sand and dirt left over from the winter snow treatment of the roads. He had to do maintenance checks and adjust each machine before use and had to make sure the sweeper was ready to do the street sweeping. He had to perform preventative maintenance on the sweeper, including on the chains that held up the attachment, or hopper. Several parts needed lubrication because it had dried up over the winter, which was caused by the sand and dirt in the hopper (stores the sand and dirt). He also had to spray water on it to clear the filter of the clogged hoses. The sweeper would barely fit through the shop 12 foot doors. He would have to get on the ground to get under it. He had to sit on the ground because the machine was too big to use a mechanical lift to get to the underside.

3. On April 30, 2020, right before lunch when he was getting up from servicing the chain, he struck his head. He was on his side under the machine, he had just fastened the chain, and he tried to get up, from underneath. He struck his head on the metal bar of the car lift just proximal to the sweeper, about one foot away from the sweeper. It was a very solid strike, as he immediately had a headache, felt goofy, and dizzy. When he stood up, he was wobbly and could not walk in a straight line, feeling the pain. He was not paying attention to how he was walking. He sat for one or two minutes. But he had a lot of work on his schedule to do, so he pushed forward to get everything done despite the headache. At the time he said some curse words, but no one was in the shop to hear him. He worked alone.

4. He struck his head on the right temple, above his right ear. He thought he was wearing regular glasses, not his protective goggles, because they were bifocal, and he could not see without them. The glasses did not fall off of him. The area on his head felt bruised for one to two (1-2) days following the incident. While he continued working the full day, because he had a long list of machinery maintenance to complete, he had problems completing the work due to how he was feeling.

5. Following this accident, he started to have cognitive issues, difficulty with memory, word search problems. He did not notice right away, as he was by himself most of the time. At the end of day he would go into the office around quitting time. He did not recall reporting the injury to anyone that day, but did mention it to his wife who worked for Employer. After this accident, he would get dizzy and feel fuzzy, and had memory problems. The medical records mentioned cognitive issues, problems with cognition and memory. He first noticed the cognition problems because he was told by family members. Then he started seeing small things that he would normally do but he did not recall doing them.[1]

6. In the days following the accident Claimant noticed he had continual problems remembering things at work and at home. For example, he had to perform a sprinkler system job and could not work out how to get it done, though it was something he was very familiar with completing. He knew the controller wiring was off. He was also very frustrated that he could not get to the wires he needed to work on because his hands would tremble excessively. This was also after the accident.

7. Claimant ended up going to the hospital on May 26, 2020. That day, the office manager and Town Administrator[2] had sent Claimant home because of the memory problems and the shaking as well as dragging his foot. He remembered he had only wanted to go to his primary care provider at Franktown Family Health, but his wife took him to the emergency room (ER) at Parker Adventist instead.

8. Claimant knows he had a craniotomy. Now he cannot drive safely anymore, anywhere. He lives in a community of approximately 600 people, and few residents drive the roads. He had been driving to the store, but he had the shakes, sometimes severely, though some days were better than others. A lot of the time he simply went with his wife everywhere. His symptoms were multiple, such as his limbs shaking, right hand worse than the left; balance issues, would drag his left foot; serious attention issues, it was hard to focus and to stay focused; memory issues, he would forget what he would be doing on a regular basis and fail to complete tasks. Claimant emphasized that there was no way that he could return to work. He continued working after April 30, 2020, but from May 26, 2020 he stayed at home after his surgery. He did not recall what happened for some months following the surgery. He was frequently fatigued and would sleep a lot. He has not returned to work.

9. Claimant confirmed that either he or his wife likely reported to the emergency room personnel that there were three potential incidents that involved his head, though he did not specifically recall giving the information but they were

[1] The ALJ infers from this that he would complete everyday tasks and have no recollection of actually performing the tasks.

[2] The title of Town Administrator is noted on the unsigned designated provider list, Exhibit K.

documented in the medical records. In fact, he did not recall any of the conversations that happened that day at the emergency room on May 26, 2020. The first incident documented in the records was at work (Work incident) the month prior.[3]

10. The second one was approximately one week before going to the hospital, when he scraped his head on the door frame of his shed, which was approximately one inch shorter than he was. It scrapped his forehead at about the hair line. He had had the shed for 20 years and never hit or scraped his head before that time. The scrape on his head was not very serious as it did not cause any bleeding, it was just surprising. He did not recall exclaiming in pain, cursing or bleeding from the scrape but he did mention it to his wife. (Shed incident).

11. The third incident occurred the day before he was hospitalized. He was in the boat, in the process of getting out. He had one foot over the rail, or side of the boat, and felt very weak, he could barely get the other foot over. He recalled he was holding onto the side of the boat, could not push himself up, so he got kind of stuck. He had a grip on the edge of the boat and as he had a foot on the ground and could not stay up, though he thought he had a firm grip on the side of the boat. He did not recall hitting his head. (Boat incident).

12. Of the three incidents, the injury at work was a lot more serious by far. He had never had shaky hands before the April work incident. He had not suffered from any cognitive issues before, and had no prior problems with memory issues, loss of focus or attention.

13. There were no other significant incidents that he could recall. He stated that he had hit his head a work before as he had worked around heavy machinery in his early career, but it was a long time ago, long before he started working for Employer. There was certainly nothing in the last 5 years before this work incident. He had never been diagnosed with a hematoma before May 26, 2020.

14. Claimant did not recall immediately reporting the incident to Employer. If he did, he certainly did not complete any formal report himself. He did mention the incident to the Town Administrator but never received a list of doctors to see. His wife also worked for Employer and may have also mention the incident to the Town Administrator.

15. Claimant stated that he was foggy when he was admitted to the hospital, and he noted that his wife likely answered a good portion of the questions he was asked. He was having problems with thought process. He went to look for a bathroom in the hallway and was disoriented and urinated on himself. He was dragging his left foot too.

16. Claimant's wife (Wife) testified at the hearing. She noted that she and Claimant had been married for 33 years. She was employed by Employer as a Utility Clerk at the Town Hall, working part time, and part time as a realtor. Outside of work she would spend a significant amount of time with Claimant, and occasionally had lunch with

[3] There was mention of a fourth incident at work, three months prior to admission, which occurred when Claimant hit his head on the mirror of the motor grader as he was getting into the motor grater. Claimant had been using the motor grater to pop ice. This ALJ determines that this incident is inconsequential to the facts of the accident of April 30, 2020.

Claimant, while at work. She stated that she did not recall that Claimant reported the incident to Employer or when exactly Claimant told her about the incident. Around the beginning of May, 2020, she noted that Claimant was having shaking in his left arm. She noted that other strange things were happening to Claimant, such as he could not open a bag of chips. This ALJ infers that he did not have any problems doing that activity before. He could not find the light switch in his bedroom, and he was doing everyday things in a slow-motion kind of way. He was very tired and things just started progressively getting worse after that point. She kept telling Claimant he needed to go to a doctor as he was acting weird, but he insisted that he was fine. Claimant's wife stated that Claimant, prior to the injury at work, was very strong, and had a very high work ethic.

17. Claimant's wife stated that they had to remove their windmill, as Claimant was unable to pound the stakes into the ground, and she had to do it for him. This ALJ infers that it was an activity that he would perform frequently before. She journaled everything and put a timeline together of things that Claimant would not remember. She became very alarmed by what was happening to her husband as he had problems remembering things he had done or said. He had weakness of his limbs. On one occasion, they were out to breakfast with one of their daughters and his arm kept shaking so hard that it caused him to slam a glass full of juice on the table and it splashed everywhere.

18. On the day that Claimant went to the emergency room, May 26, 2020, Claimant's wife spoke with the Town Administrator as well as another coworker who did the financial matters for the town. The Town Administrator advised the wife Claimant had been sent home because the Town Administrator had noticed Claimant not doing well, was dragging his left foot, and was alarmed by the symptoms he was displaying. Claimant's wife told the Town Administrator that she was taking Claimant into the hospital emergency room. Wife thought that Claimant was having a stroke or something because his speech was impaired. She stated that she read the clinical notes from that day but did not think they were accurate. She personally witnessed the boat incident and denied that Claimant hit his head that day, stating that any clinical notes or medical records to the contrary were incorrect. She was aware of the four different incidents, but not when they happened. The work incident with the grader she may have been told while working in the Town Hall.

19. The day Claimant was admitted to the hospital on May 26, 2020, Wife spoke with several people at Employer about the hospital admission. She recalled that she did not formally report the claim in writing until January 28, 2021, including to the Town Manager and the Town Attorney. Wife understood from that conversation that she should consider filing a workers' compensation claim on behalf of Claimant.

20. She did not see any designated provider list and she did all the paperwork for Claimant as he was dealing with memory loss problems. Claimant continued to see his personal providers and the providers referred by the emergency room providers. She stated that Claimant attempted to return to work, but it was not successful and was against provider instructions. He was prohibited from driving, and she had to spend all her time with Claimant as he needed supervision. She had to quit her job because of Claimant's impairments and need for help.

21. Wife noted that she now had to go behind Claimant and finish his tasks because he was unable to focus and complete tasks. Even simple things like, flushing the toilet after going to the bathroom. She stated that Claimant was very good with math and now could not do math without help. She testified that Claimant, after the surgeries, would sleep a lot and was advised that it was because his brain was trying to heal. She also stated she took Claimant to all his medical appointments and none of the providers had suggested that alcohol had anything to do with the SDH.

22. When questioned about the date of injury, Claimant's wife explained that April 30, 2020 was probably a very accurate date. She noted that the Town offices were only open four days a week, and that maintenance ran on a schedule. It was a Thursday and the following week Claimant would probably have started the street sweeping.

23. Wife also started taking down notes in from early May 2020 on her phone when she started noticing things like Claimant's memory loss, physical weakness, walking slow, talking slow. Then, when they were in the hospital on May 26, 2020 she also started journaling a timeline. Further, Claimant's wife denied that Claimant was dependent on alcohol or that he drank every day prior to the SDH.

24. Claimant assumed that there would be a time of recovery, that would allow an occasional drink, but he had not had any alcohol since the hospitalization and brain surgery. Claimant stated he did not continue having his evening drinks after the initial admission to the hospital. This was confirmed by Claimant's wife.

25. The parties submitted over 2,200 pages of records in this matter, which are summarized below only in pertinent part, addressing only those records that might be relevant to the issues to be addressed in this matter.

26. Employer issued a First Report of Injury (FROI) completed by an administrative assistant for Employer on January 28, 2021. The FROI specifically noted that Claimant had reported the incident on April 30, 2020. It also noted that Claimant was inspecting the brushes of the street sweeper. He was getting up off the floor when he stood up, striking the right temple against the "A frame" steel dual post car lift.

27. Claimant stated that he was working for Employer as a salaried employee. He thought he was earning around $50,000.00 per year. The FROI indicated that Claimant was earning an average weekly wage of $1,014.40 and Claimant agreed that it was probably accurate.

28. Claimant filed a Workers' Claim for Compensation on February 4, 2021. It noted that, as he was standing up after leaning over to repair a chain, he hit his head on a car lift and reported it to the Town Administrator. It noted that Claimant was being treated at Franktown Family Medicine.

29. Employer issued a February 9, 2021 document entitled Employer's First Report of Injury.[4] This document also stated that Employer was notified on April 30, 2020 and that Claimant's disability began on May 26, 2020. This form also lists Insurer's information and notes that Insurer received notice of the claim from Employer on January 28, 2021.

[4] Not a Division of Workers' Compensation standard form.

30. Employer submitted Exhibit K, with a designated provider list (DPL), and a cover letter dated February 11, 2021 from Respondents' counsel to Claimant's counsel. The DPL was undated and unsigned.

31. Insurer filed a Notice of Contest on February 11, 2021, denying that Claimant's injuries were work related.

32. Claimant was attended by Reiner Kremer, PA-C of Franktown Family Medicine, LLC, (supervised by Paula Castro, M.D.) beginning October 14, 2015 for multiple conditions including cardiology issues, cervical spine issues, dizziness, myalgias and cervicalgia. On April 2, 2020 Claimant was seen for a regular follow-up. PA Kremer assessed hypercholesterolemia, hypertension, lumbalgia, hip pain, coronary arteriosclerosis, and aortic arteriosclerosis. Other prior records indicate maintenance and cardiology concerns as well as lifestyle concerns such as weight, regular exercise, diet and proper sleep.[5]

33. Claimant was admitted to Parker Adventist emergency room on May 26, 2020 with a history of headaches for the last week in the right parietal and base of his neck. The medical records highlighted that Claimant's wife noted that Claimant had bilateral arm weakness that was fairly equivalent and left leg weakness which was most prominent. She noted that over the last 3 days he would be dragging his left foot toward the end of the day though seems to be better in the morning. He had had some difficulty walking because of this. She noted that his speech was slow, and he seemed to be moving in "slow motion." Claimant denied vertigo or imbalance, but his wife reported his complaints of a sensation of lightheadedness and his tendency to fall towards the left.

34. The discharge notes noted that Claimant reported that he would drink two beers and one shot of whiskey daily before the hospital admission, but denied any withdrawal symptoms or seizures, and upon discharge, medical providers noted that there was no evidence of alcohol withdrawal. Claimant and his wife were cautioned with the risk of alcohol withdrawal which could dramatically complicate the course of his SDH. As found, no records after discharge, nor persuasive evidentiary testimony, showed any evidence of alcohol withdrawal.

35. The discharge records noted that "[I]n hindsight," Claimant and wife noted that Claimant had an injury at work "3 months ago" but did not make anything of it. Then a week ago "he had (sic.)[6] his forehead on the door of the shed." Symptoms may have started shortly thereafter. Then the day prior to admission, he rolled out of their boat, falling, one foot to the ground and hit the left side of his head but denied associated loss of consciousness (LOC). As found, Dr. Rauzzino's opinion that the history obtained by the emergency medical providers on May 26, 2020 while Claimant was under the influence of the severe SDH was not reliable. Following the surgery, Claimant had regained some of his cognitive function and explained a timeline to Dr. Rauzzino that made medical sense and this is more persuasive.

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[5] There was no mention of dizziness or other cognitive issues on April 2, 2020.

[6] There are several possibilities regarding this mistake, it could mean that a word was missing like "he had scrapped/hit/struck his forehead" or that that there was a typo as in "he hit his forehead." This ALJ declines to make any assumptions in this regard like Dr. Morgenstern in his report.

36. Dr. Michael Rauzzino performed a right craniotomy for evacuation of a subdural hematoma with microscopic technique on May 26, 2020. He stated that indications for the surgery were Claimant's right sided headaches and altered mental status. He noted that diagnostics showed a large right sided holohemispheric subdural hematoma with significant mass effect and midline shift without any unresolved problems. Claimant also had a speech and language evaluation as Claimant reported confusion when he awoke from a brief nap, not knowing where he was. He was able to reorient himself after a couple minutes. His wife noted slower processing than normal. Upon assessment of the Montreal Cognitive Assessment (MoCA) screening, Claimant had mild cognitive deficiencies overall with most significant deficits noted with immediate and delayed recall, verbal fluency, and calculations. During his stay, therapists noted that Claimant demonstrated decreased insight into deficits and mild impulsivity.

37. Claimant was discharged from Parker Adventist on May 29, 2020. The primary diagnosis was acute on chronic intracranial subdural hematoma, daily consumption of alcohol, coronary artery disease, tobacco use disorder, Class 1 obesity with a body mass index (BMI) over 32, benign prostatic hyperplasia and prediabetes. The discharge addressed in-hospital care, including physical therapy and occupational therapy evaluations with gait training and lower extremity strengthening, range of motion exercises and neuromuscular reeducation. As found, upon discharge on May 29. 2020, considering all the records from admission through discharge, there was no persuasive evidence of alcohol withdrawal and three days had passed from the May 26, 2020 admission.

38. The discharge note described the findings of the at least five CT scans performed while in the care of Parker Adventist. The comparison from the CT performed on May 26, 2020, which showed a large mixed attenuation nearly holohemispheric right convexity SDH with areas that may reflect acute on chronic hemorrhage. Near the cranial vertex it measured 3.2 cm. Substantial mass-effect and right hemisphere with sulci that were effaced, right lateral ventricle was effaced, approximately 1.2 cm right greater than left midline shift (MLS). While the CT post craniotomy and evacuation of the SDH on May 26, 2020 showed smaller than on prior diagnostics, measuring 15 mm, there was increased acute hemorrhage within the collection anteriorly. The May 29, 2020 CT showed a decreased mass-effect with left MLS down to 7 mm with residual mixed density right hemispheric subdural collection measuring 1.3 cm in thickness with 7 mm subfalcine midline shift, which was an improvement from the prior day's head CT, with no new intracranial hemorrhage, cortical infarct, mass or other new or acute intracranial pathology. He was discharged with multiple recommendations for outpatient PT/OT/SLP, and medications.

39. Claimant returned to the emergency room on May 29, 2020 and was readmitted on May 30, 2020 with left arm movement suspicious for secondary focal seizure. The CT on readmission showed a recurrent SDH with new loculation of acute SD blood along the anterior and superior margins of the prior craniotomy, with a 13 mm defect. Overall, the size of the residual mixed right SDH was unchanged, measuring 14 mm. There was no change in the 9 mm MLS. They assessed that Claimant had a "recurrent subdural hematoma for which he had craniotomy 4 days ago by Dr. Rauzzino." Dr. Rauzzino was consulted, and he wanted Claimant to be admitted to the hospital. After

he reviewed the CT scan, Dr. Rauzzino would see him in the morning to decide if any other interventions were needed.

40. On June 2, 2020 Claimant was prepped for surgery as following the prior procedure he had done well but after a week, he had worsening symptoms. Diagnostics indicated that Claimant had a recurrent subdural and epidural[7] hematoma. Dr. Rauzzino proceeded with a revision right craniotomy with evacuation of epidural hematoma and recurrent subdural hematoma. The head CT postoperatively on June 3, 2020 showed a right mixed density smaller SDH with maximum thickness 0.7 cm (compared to 1.4 cm), showed less mass-effect, decreased leftward MLS, now only 0.5 cm (compared to 0.9 cm) and a decreased overall size of right posterior falx SDH with maximum thickness 0.4 cm.

41. By discharge, on June 5, 2020, Claimant was showing cognitive linguistic skills within functional limits. In the Discharge Summary Claimant had instructions to schedule a follow up with Dr. Rauzzino within one week and with Reiner Kremer, PA-C as soon as possible (within 1 week). The discharge records did no mention that Claimant had alcohol withdrawal symptoms after spending another week in the hospital. As found, this ALJ gives no credence to the argument that the Claimant was alcohol dependent or a serious alcoholic or that alcohol caused Claimant's SDH.

42. Claimant was evaluated by Derrick Winckler, PA-C from Dr. Rauzzino's office, on June 8, 2020 at Front Range Spine and Neurosurgery. PA Winckler took a history and noted that Claimant continued to have tingling in the fingertips of his left hand, but otherwise improved since the June 2, 2020 craniotomy. He had some drainage at the site of a staple. It was replaced and the drainage stopped. He was advised to return the following week for a wound check.

43. On June 11, 2020 PA Kremer of Franktown Family Medical noted Claimant's recent release from the hospital with subdural bleed that was repaired twice by Dr. Rauzzino. PA Kremer noted Claimant's use of a cane and that he was on short term disability (STD). It noted a referral to neurology for further evaluation. Claimant's physical exam was unremarkable.

44. Claimant started physical therapy with Fyzical Therapy & Balance Centers on June 16, 2020 pursuant to Dr. Rauzzino's referral. They noted complaints of balance and residual left sided strength deficits, with limited ambulation outside the home and with an assistive device. He was discharged on November 24, 2020 due to Claimant's inability to get to his appointments as he was having increased cognitive therapy visits.

45. He returned to Dr. Rauzzino's office on June 17, 2020. Claimant no longer had issues with tingling extremity sensations but continued to ambulate with a cane and continued with his seizure medications. On July 16, 2020 Claimant reported to PA Winckler that he had taken a turn for the worse with worsening headaches and problems with confusion and lethargy. PA Winkler noted that the July 2, 2020 CT scan showed no recurrent hemorrhage and only a small residual subdural hygroma.[8]

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[7] Epidural hematoma is a blood accumulation between the dura and the skull, while subdural hematoma means a bleed between the dura and brain matter.

[8] A hygroma is a collection of spinal fluid without blood.

46. Pamela Kinder, M.D., a neurologist, first saw Claimant on August 4, 2020 for evaluation and continued seizure medications management, which were increased after his June 2, 2020 admission. The headaches had abated but he continued having fatigue and increased symptoms with stress. Dr. Kinder noted that Claimant would frequently drink nightly except that since his first hospitalization, he had stopped that altogether. Neurological exam was essentially within normal limits except for gait, as Claimant had a tendency to sway to the left. Dr. Kinder noted that Claimant would not be able to drive for approximately one year, recommended a change in medication and gradual exposure to aggravating factors. On August 24, 2020 Claimant indicated to Dr. Kinder that he had almost immediate change in mood with the new medication. She diagnosed localization-related (focal) (partial) idiopathic epilepsy and epileptic syndromes with seizures of localized onset without status epilepticus and traumatic subdural hemorrhage without loss of consciousness.

47. At a follow-up on September 21, 2020 PA Stephen Ladd of Dr. Rauzzino's office, noted that Claimant was recovering fairly well still with complaints of fatigue and shakiness towards the end of the day, but improving strength. Claimant also reported that towards the end of the day he had increasing speech difficulties. PA Ladd recommended continued follow up with the neurologist for control of seizure medications and continued physical therapy. He also reviewed the last CT scan.

48. On October 29, 2020 Dr. Kathryn Polovitz, M.D. conducted an EEG with a finding of persistence of amplitude asymmetry with overlying frequencies appreciated throughout the right frontoparietal region consistent with a breath rhythm, seen in the setting of skull manipulation or underlying skull defect, as well as mild intermittent focal slowing appreciated in the right frontoparietal region suggestive of a mild focal dysfunction in the region. Claimant followed up with Dr. Kinder who noted that Claimant suffered a significant injury to his brain, his studies were still reflecting ongoing impairment at his right frontal/parietal area that could cause confusion, risk of accident and could impair his judgement.

49. The CT of the head and brain from December 31, 2020, as read by David Solsberg, M.D., showed a nearly isodense subdural fluid collection deep to the craniotomy site, that measured 4 mm. There were no mass effects or acute hemorrhage or progression of the hemorrhage since the prior study. Dr. Solsberg noted, at this time, some cerebral atrophy.[9]

50. On January 25, 2021 Claimant was readmitted to Parker Adventist after suspicion of a seizure. EEG and EKG were normal without indication of continued seizures. CT showed an acute 4 mm right frontoparietal subdural hemorrhage with no midline shift. Dr. Rauzzino, from neurosurgery, was notified, he reviewed the films then called back and stated that he felt this was likely old. However, after discussion with the patient's family and wife, they were more comfortable with Claimant staying overnight for evaluation, therefore he was admitted to the medicine service unit. He was discharged and was recommended further neurologist evaluation with Dr. Kinder as well as continued with antiseizure medications.

[9] This was the first CT report to document any atrophy of the brain.

51. Dr. Kinder reevaluated Claimant on February 1, 2021 noting he was alert but could not recall recent events, had a slightly ataxic gait and immediately lost his balance with eye closure. Dr. Kinder again explained to both Claimant and his wife the extent of the brain injury, that blood had "clotted", but remained an irritant to his brain, noting that both Claimant and his wife only now comprehended the extent of the Claimant's disability, finally realizing Claimant would not be fit to drive or work for some time. Dr. Kinder also stated that Claimant should be on long-term disability as he was not able to meet the demands of his job.

52. On February 24, 2021 Claimant followed up with PA Kremer who noted that Claimant continued to follow up with neurology and was disabled as a result of the brain hemorrhage. He was enrolled in a cognitive rehabilitation program in Parker, Colorado. He complained of left sided shoulder problems as well as right sided headaches. PA Kremer ordered a new CT to evaluate whether there were any new brain bleeds. In addition to his prior diagnosis, he was diagnosed with shoulder pain and right sided headaches. Prior exams were also similar and provided no other insightful notations other than Claimant had frequent lab workups.

53. Dr. Bruce L. Morgenstern performed a medical records review independent medical evaluation (IME) at Respondents' request on April 28, 2021. He did not examine Claimant. The records provided to Dr. Morgenstern included Dr. Rauzzino's at Front Range Spine, Franktown Family Medicine, Neurology of the Rockies, Parker Adventist and the FROI. Dr. Morgenstern specifically associated use of alcohol as a possible cause of the subdural hematoma in Claimant as alcohol consumption or abuse leads to both atrophy of the brain, which stretches the bridging cerebral vein tissue and may lead to increased risk of SDHs, and risks of falls due to intoxication. Dr. Morgenstern heavily relied on discrepancies regarding whether the work incident occurred one month or three months prior to the May 26, 2020 admission. He, erroneously, assumed that Claimant filled out the FROI instead of Employer's representative. Dr. Morgenstern stated that "[I]n summary, significant discrepancies exist both in the documented time course as well as the severity of any associated work-related injury," questioning Claimant's credibility as a historian in his final analysis and opinion.

54. Dr. Rauzzino wrote a letter dated January 31, 2022. He stated as follows:

> I treated Mr. [Claimant] directly including having performed surgery and having assessed the hematoma. I have also looked at the images at length. This was a large hematoma, mostly chronic and likely present for at least one month. It is not something that would have occurred from an injury five days earlier. The vast majority of the hematoma, or perhaps all of it, was relatable to the event that occurred one month earlier. There were chronic membranes found at the time of surgery; these membranes take time to develop over the course of weeks, not a few days. It is therefore my opinion as a level II accredited physician that the etiology of his hematoma and the need for surgery had to have been caused by an event that had occurred at least one month prior to his presentation. If he struck his head at work and if this can be documented, it would be my opinion that this was an occupational injury and not related to the minor trauma that may have occurred one week prior to his presentation.

55. Dr. Michael Rauzzino testified as an expert in neurosurgery and as a Level II accredited physician by deposition on October 17, 2022 on behalf of Claimant, as a treating provider. Dr. Rauzzino was Claimant treating neurosurgeon since his first admission in May 2020, when he treated Claimant at Parker Adventist Hospital. Dr. Rauzzino first evaluated Claimant in the emergency room at Parker Adventist, where Claimant was complaining of headaches, left sided weakness, trouble with thinking, and diagnosed Claimant with an "acute on chronic subdural hematoma." This was based on the CT study of Claimant's head. The CT showed a large fluid collection on the right side of his head compromising or compressing the right side of the brain down. Dr. Rauzzino explained that a subdural hematoma is a blood clot or an area of bleeding between the skull and the dura, and the brain. He could tell that it was acute on chronic because of the size of the hematoma. The brain would not have been able to tolerate an acute hematoma the size Claimant had, because it was several centimeters, comprised of the whole side of the brain. The radiologist measured it at 3 centimeters and noted that the brain had shifted approximately one centimeter pushing the brain to the middle. All of which lead Claimant to have neurologic deficits.

56. Dr. Rauzzino testified that Claimant's symptoms were consistent with a subdural hematoma, he recommended surgery and performed the surgery on May 26, 2020. Claimant then had recurrence of blood clotting, so Dr. Rauzzino performed a second surgery on June 2, 2020 to clean out the recurrent clot. Dr. Rauzzino noted that most (greater than 90%, nearly 100%) subdural hematomas are caused by trauma to the head. To assess the causality of the hematoma, he would normally take a history, generally traumatic, viewed the imaging, looking for color and size of the hematoma, and reviewed past records.

57. In this case, Dr. Rauzzino took a history from Claimant that he struck his head at work, which was consistent with the history Claimant provided at hearing, of an incident where he was getting up after working on the sweeper and had a solid hit on his head on a car lift bar. Dr. Rauzzino stated that this type of hit was more than sufficient to have caused the subdural hematoma, even if Claimant had been wearing a helmet. He stated of the three incidents Claimant had, the one the day before had no probability of causing the hematoma of the size Claimant had because not enough time had transpired. The one where Claimant scrapped his head on the frame of the shed, could not have caused it either, because the type of hematoma noted was older than a week prior. Dr. Rauzzino stated that "the only of those three incidents, the only one that had the potential to have caused this was the one that occurred about a month prior." He went on to state:

> Having an injury about a month prior would have been enough time for the bleeding to occur, the hematoma to expand, and the blood to have lysed. So while I try -- you know, very rare in life you can say absolutely, a hundred percent, I can actually say a hundred percent that the injury didn't occur a week prior, and it didn't occur a day prior.
>
> The analogy that I would give you is if you took an oyster and you dropped it to the ground and the pearl rolled out, we know that that pearl didn't develop just from hitting the ground, and it didn't develop a week prior. It takes time for a pearl to develop. It starts with a grain of sand, it grows, and you know, that sort of thing.

> The hematoma he had was like that. That is something that took weeks to develop, you know, to occur. So I can say with surety that of those three incidents, the one that is most plausible is -- or the only one that is plausible would be the injury he described at work.

58. Dr. Rauzzino noted that it takes time for a subdural hematoma to grow and individuals don't always present with symptoms right away because it takes time for the blood clot to form, to a point where the brain can no longer tolerate the change. At the beginning, right after the head trauma, Claimant could not have expected to have any symptoms other than the fact that he hit his head.

59. Dr. Rauzzino opined that individuals, generally, that abuse alcohol, have a tendency to fall and suffer trauma to the head, but Claimant did not provide a history of alcohol abuse to Dr. Rauzzino or any other history separate from the three instances, the shed, the boat and the work incident. Dr. Rauzzino noted that alcohol can cause the brain to shrink and atrophy but not to create a subdural hematoma. Further, in this case, Claimant's brain showed no signs of shrinkage. As found, there was no shrinkage of the brain at the time Claimant had his craniotomies in May and June 2020.

60. When performing the brain surgery to remove the clot, Dr. Rauzzino noted a chronic membrane which had encased the blood and stated that chronic membranes take several weeks to form, not just a week or days.

61. Dr. Rauzzino also noted that the color of the blood on CT showed that most of the blood was isodense, meaning that it had already broken down after clotting and showed as a gray color. He noted that there was only very little blood that showed any acute findings, as a very white color. He explained that:

> …someone with a chronic subdural hematoma, they can have bleeds into it and, you know, sometimes it happens spontaneously. That is how a subdural hematoma develops. You have a little bit of bleeding.
>
> I don't know if Dr. Morgenstern went through this. But there are veins on the surface of the brain that connect to the dura. And if you have an injury and you shear one of those veins, blood will start to ooze out. And as the blood oozes out, it presses against the brain, and since it can't push the skull out, it pushes the brain down, and as the brain gets pressed down, other veins can stretch and they can tear and they can bleed.
>
> So sometimes you can catch it right after one of the other veins has gone, started the bleed, you will see acute blood on top of the other blood, which is more chronic in nature.

62. Dr. Rauzzino stated that within a week after the head trauma, an individual could show signs of weakness, confusion. But as time passes, the symptoms become more pronounced as the subdural hematoma continues to grow over the next weeks. "People hit their head, they don't realize how hard they hit it, they shake it off, they just go about things, and they didn't realize they started a process which is going to lead, you know, to potential death, which is what happens if these things aren't treated."

63. Dr. Rauzzino testified that while the patient was suffering from symptoms of the SDH that his mind could be cloudy but once he had been treated, his mind would have cleared from the effects of the SDH and may have been able to provide a more

detailed or accurate history of the trauma. He stated that "it is hard to get an accurate history when your brain is under so much pressure."

64. Dr. Rauzzino stated that Claimant "almost died. His brain was so compressed that he was having neurologic symptoms, and to ask him to give an accurate history is difficult in that situation." Dr. Rauzzino noted that following the surgery, when Claimant was recovering, he obtained a history of the three incidents and that of the three, his opinion was that Claimant's injury at work more likely than not, caused the initial bleed, which started the hematoma and that it continued to bleed up until he was seen in the hospital emergency room. At that time, the hospital called him in as they had detected a large, acute on chronic intracranial subdural hematoma.

65. On November 7, 2022 Respondents deposed Dr. Bruce L. Morgenstern, a Board-Certified expert in neurology who conducted a record review. Dr. Morgenstern noted that most SH are caused by trauma and that it was rare for a SH to be spontaneous or not have a history of trauma. He explained as follows:

> The -- the blood forms, as we said, between the inter table of the skull below a membrane called the dura and the brain. So it basically squeezes the brain between the skull and the brain. When one leads (sic.) acutely certainly into the brain, or around the brain, blood has iron in it. And on a CAT scan, iron is white. So acute blood looks hyperdense or white.
>
> After about three days, the blood begins to deteriorate. So it goes from bright to kind of gray, which we call isodense. It's about the same color -- same shade of the brain itself. And then beginning about a week or so after that, the blood further deteriorates and becomes hypodense or dark. So we have acute blood, which is white; subacute blood, which is isodense, so sort of gray; and chronic blood, which is dark.
>
> Mr. -- on his CAT scan, Mr. [Claimant] had a combination of -- of hypodense, that is, dark blood, which was chronic, but also areas of acute blood, which were bright white. So it was interpreted as acute superimposed upon chronic.

66. Dr. Morgenstern testified that there were multiple possible causes for Claimant's SH, including excessive alcohol consumption which could have caused a fall, such as the "shed incident:" and the "boat incident" or shrinking of the brain which could have sheered the blood vessels leading to the skull. He also noted that three months as noted in the ER visit report was the outside limit for symptoms to occur from a SDH. He also criticized Claimant's change in reports from the ER visit of three months to the FROI report of approximately one month. Lastly, he noted that because Claimant was wearing a helmet, it was less likely the cause of the SDH, that "it would blunt the injury." The ALJ infers from this statement that it was also his opinion that it could occur.

67. Dr. Morgenstern questioned Claimant's credibility because of the three-month notation taken during the May 26, 2020 emergency room visit. He stated that individuals with SHs can suffer or develop cognitive difficulties as a result of the SDHs and that Claimant was reporting cognitive issues, and that he had presented to the ER with a history of headaches for the last week in the right parietal side.

68. As found, Dr. Rauzzino's opinions are more credible and persuasive than the opinions of Dr. Morgenstern. Dr. Rauzzino was the one to perform the craniotomies in this case and *found that there was no brain atrophy* present at the time of the craniotomies. He studied the CT imaging, not just the reports from the radiologists, both prior to surgery and after surgery and Dr. Rauzzino *found no shrinkage* of the brain, which was Dr. Morganster's explanation for the bleeds causing the SDH.

69. Dr. Rauzzino credibly explained that Claimant was under the influence of the SDH, that showed a midline brain shift, which caused brain damage, affecting cognitive awareness, memory, and speech. He noted specifically that the SDH could not have been caused by the boat incident because the imaging showed isodense, hypodense and hyperdense material. This combination of blood deterioration indicated to Dr. Rauzzino that the shed incident, which occurred approximately one week before the May 26, 2020 admission was not the cause of the SDH.

70. Lastly, Dr. Rauzzino credibly opined that whether the work accident was one month or three, that the CT scan indicated that it was greater than two weeks old but certainly could have been up to three months old due to the isodense blood (degradation of the blood).

71. Dr. Rauzzino's opinion persuasively established that the head trauma was probably caused by the work injury on April 30, 2020. Dr. Rauzzino's opinions are more persuasive over the contrary opinion of Dr. Morgenstern. As found, the fact that Dr. Rauzzino viewed the actual CT scans, not just the reports, as well as performed the surgeries on Claimant's brain and viewed firsthand the condition of the SDH and the surrounding brain tissue showed that it was more likely than not that the SDH was caused by an incident greater than one week before the admission, any time around three weeks to three months. Lastly, Dr. Rauzzino spoke with Claimant in person and obtained a history from Claimant after the surgeries took place, consistent with Claimant's testimony at hearing, noting that any history of present illness taken on the date of admission, would have likely not been fully reliable, not because Claimant was not credible, but because Claimant had a large SDH deforming his brain matter, which was causing brain injury, and causing both physical and cognitive deficits.

72. Further, as found, Claimant's testimony was credible and persuasive. Claimant described the incident which occurred on or about April 30, 2020, where he was getting up after working on the sweeper's chains and hitting his head on the car lift that was immediately adjacent to the sweeper and described it as a "very solid hit." The incident was so traumatic that he immediately had a headache, felt goofy, and dizzy. When he stood up, he was wobbly and could not walk in a straight line, feeling the pain. He sat there for one or two minutes. But he had a full schedule so pushed forward to get everything done. At the time he said some curse words, but no one was in the shop to hear him. While the medical records documented that Claimant "did not think anything of it," as found, Claimant did not have the experience or expertise to recognize that the significant hit to the head would or could cause trauma or injury to his blood vessels sufficient enough to cause bleeding in his brain and eventually causing the midline shifting of the brain on the right.

73. Dr. Rauzzino credibly explained that the slow bleed would have caused symptoms to be gradual. As found, Claimant's detailed description of the work incident was not casual or transient or fleeting but was very memorable, which in and of itself was very persuasive. Claimant has proven by a preponderance of the evidence that it was more likely than not that the traumatic event at work on April 30, 2020 caused the SDH and brain injury. This is in conjunction with Dr. Rauzzino's opinion that the SDH, which was isodense upon admission to the ER, was probably caused by the trauma at work which was approximately four weeks prior to admission.

74. The fact that Claimant did not specifically take notice of or write down the particular date of the injury was not unexpected, as, while he had a solid hit to his head, he was able to continue working, though with some difficulty. As stated previously in this analysis, Claimant did not have the expertise to know that there was a cerebral brain vein that was bleeding in his head. Claimant was persuasive in explaining that the accident at work would have been on or about April 30, 2020 because it was springtime and he needed to do maintenance on the sweeper in order to be able to use it to pick up all the debris on the roads from the winter road maintenance. It is less likely that the documented medical record on admission on May 26, 2020 of a work incident "three months" prior to admission was correct, as Dr. Rauzzino explained Claimant would have been cognitively impaired. Therefore, as found the date of injury is determined to be April 30, 2020.

75. As found, Respondents had notice of the work injury, as the FROI established that Claimant advised his employer of the work incident on April 30, 2020. There was no credible testimony to contradict this as Claimant suffered a SDH and could not remember what he told his Employer. Further, Claimant's wife testified that, the day Claimant was admitted to the hospital on May 26, 2020, she spoke with several people at work about Claimant's admission, including the Town Manager who is the same individual he had notified on April 30, 2020. From those conversations, Claimant's wife proceeded to subsequently report the injury on January 28, 2021. A written Workers' Compensation Claim was filed on behalf of Claimant by his counsel.

76. As found, Respondents failed to designate a medical provider in a timely manner in this matter and Claimant selected his provider, Franktown Family Medicine, and PA Kremer as his authorized treating physician. By the time a DPL was issued on February 11, 2021, Claimant had already selected his ATP and had been in treatment for many months. Further, any provider within the chain of referral were also authorized. PA Kremer referred Claimant to the neurologist, Dr. Kinder, as well as to the neurosurgeon, Dr. Rauzzino, that performed the June 2, 2020 craniotomy for follow up. PA Kremer also made referrals to multiple other providers, including physical therapy and speech therapy. As found, these providers are authorized. Further, as found Claimant was attended on both May 26, 2020 and again on May 29, 2020 in an emergency situation at Parker Adventist Hospital due to severe symptoms due to the SDHs which resulted in admissions and emergency surgeries and are found to be reasonably necessary and related to the April 30, 2020 work related injury.

77. Claimant received appropriate care in this matter. Claimant sought treatment, after the initial emergency care, with Franktown Family Medicine. They referred Claimant to multiple other providers, back to his neurosurgeon, Dr. Rauzzino, for neurologic consultation with Dr. Kinder, for physical therapy with Fyzical Therapy, and to

a speech therapist. All these are reasonably needed care to address the work-related subdural hematoma and the sequelae of the SDH, including possible seizure disorder and care. Claimant has shown that the medical treatment was authorized, reasonably necessary and related to the injury. Claimant has failed to show that a change of provider is proper in this matter as no persuasive testimony was tendered on this issue, a new physician identified or a plausible reason for requesting a change of physician.

78. Lastly, Claimant has shown by a preponderance of the evidence that he was disabled due to the work-related injury, SDH and the diagnosed seizure disorder and was unable to return to work from May 26, 2020 to the present. Claimant is entitled to temporary disability benefits. This is supported by Dr. Rauzzino, Dr. Kinder and PA Kremer's opinions as set forth above.

79. Any evidence or possible inferences contrary to the above findings, were specifically found not persuasive or not relevant.

CONCLUSIONS OF LAW

A. Generally

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See

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

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

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d 6 (Colo. App. 199f5). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." Sec. 8-41-301, C.R.S.

As found, based on the totality of the evidence, the medical records, Claimant's testimony, and the opinions of Dr. Rauzzino, Dr. Kinder, and PA Kremer are more persuasive than the contrary opinions of Dr. Morgenstern. The record shows that Claimant clearly was at work on April 30, 2020, within the course and scope of his

employment, when he hit his head on the metal bar of the car lift, which was immediately adjacent to the large industrial sweeper. As found, Claimant was not positive that the event took place on April 30, 2020, a day earlier or a day later. But the fact that Employer noted they were notified of the incident on April 30, 2020 is persuasive and the date of injury is found to be April 30, 2020.

Regardless of whether Claimant had a helmet on or not, the hit was sufficient to cause the trauma and the damage to a vein in his brain, which in turn caused a slow bleeding and the eventual severe subdural hematoma and the right midline shift of the brain, necessitating surgery. Claimant and his wife started to notice the effects and symptoms of the SDH shortly after this incident, including changes in speech, slowness of reactions or actions, memory loss and loss of function in his upper extremities. Clearly, even the Town Administrator noticed that something was not right as she was the one to send Claimant home the day he was admitted to the emergency room at Parker Adventist on May 26, 2020. It was not until a CT of his head was performed at the ER that anyone realized that Claimant had a SDH causing midline shift of the brain, which was significant and life threatening.

Dr. Rauzzino was also persuasive and credible in stating that the two incidents one week before being admitted to the ER and one day before (shed incident and boat incident respectively) were probably not the cause of the SDH. Dr. Rauzzino's testimony that because most of the blood was not bright white (hyperdense), it was actually isodense and some that was hypodense was extraordinarily persuasive. Dr. Rauzzino's opinions were credible and persuasive. Dr. Rauzzino convincingly opined that the incident at work approximately four weeks before his admission, whether he was using a helmet or not, was the probable cause of the trauma to Claimant's head and the proximate cause of the subdural hematoma and subsequent seizure disorder and this ALJ agrees.

Claimant credibly testified that he was immediately dizzy after the April 30, 2020 event and had an immediate headache. The fact that he continued working was only a sign that he had a great work ethic, as his wife testified. Claimant has shown that the proximate cause of Claimant's injuries to his head and brain was the work-related accident of April 30, 2020. Claimant's injuries arose from the accident at work in the course and scope of his employment on April 30, 2020.

C. 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).

Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). As found, the emergent treatment Claimant received on May 26, 2020 and May 29, 2020 as the immediate admissions into Parker Adventist Hospital as well as the subsequent brain surgeries performed by Dr. Rauzzino on May 26, 2020 and June 2, 2020 were "bona fide emergencies" in this case as therefore authorized pursuant to statute.

Pursuant to Section 8-43-404(5) (a) (I) (A) the employer or insurer must provide "a list of at least four physicians or four corporate medical providers …**in the first instance**, from which list an injured employee may select the physician who attends the injured employee." Section 8-43-404(5)(a)(I)(A), C.R.S. allows the employer to choose the claimant's treating physician "in the first instance." If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

Pursuant to W.C.R.P. Rule 8-2 (A) "[w]hen an employer has notice of an on-the-job injury, the employer or insurer shall provide the injured worker with a written list of designated providers from which the injured worker may select a physician or corporate medical provider." Further, pursuant to Rule 8-2(A)(1) "[a] copy of the written designated provider list must be *given to the injured* worker in a verifiable manner within seven (7) business days following the date the employer had notice of the injury." (*Emphasis added*.) Pursuant to Rule 8-2(E) "[I]f the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing." Both *Bunch v. Industrial Claim Appeals Office of State of Colorado*, 148 P.3d 381 (Colo. App. 2006) and *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984) are instructive because they deal with the issue of failure of the employer to designate a physician "in the first instance." See also *Ries v. Subway Of Cherry Creek, Inc*., W.C. 4-674-408, I.C.A.O. (August 4, 2011). These cases are instructive on the Respondents' duty to designate a medical provider when triggered by knowledge of facts that would lead a reasonably conscientious person to believe that the claimant would require medical treatment. Here, Claimant clearly required treatment beginning May 26, 2020.

An employer is deemed notified of an injury when employer has "some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." See 3 A. Larson, Workmen's Compensation Law § 78.31(a) at 15-105 (1983); *Jones v. Adolph Coors Co., supra*. Also, verbal notice to a company

superintendent has been held sufficient to inform an employer of an injury. See Frank v. Industrial Commission, 96 Colo. 364, 43 P.2d 158 (1935). As Respondents acknowledged in their FROI they were provided notice as early as April 30, 2020 and subsequently on May 26, 2020 when he was in the hospital, this triggered Respondents' duty to provide a designated provider list. As Respondents failed to do so, selection passed to Claimant and after he was released from Parker Adventist on June 5, 2020, Claimant was free to select a provider of his own choosing, which he did, in choosing Franktown Family Medicine and its referrals.

Respondents argue that they did not issue the FROI until January 28, 2021, that Claimant did not file a formal Workers' Claim for Compensation until February 4, 2021 and that Respondents had the right to designate a provider at that time. However the FROI notes that Respondents' had notice as of April 30, 2020, which this ALJ finds credible. They also noted in the subsequent FROI file by employer, on a non-Division form, that Claimant's disability began on May 26, 2020. This form lists Insurer's information and notes that Insurer received notice of the claim from Employer. All of these facts, lead this ALJ to conclude and find that Employer knew about the injury and knew when Claimant became disabled and needed medical treatment, which triggered their obligation to file a designated provider list. As found, Respondent failed to do so on May 26, 2020 or immediately subsequent to that date, or within seven business days. Respondents knew Claimant had been seen at the hospital for a serious condition and failed to send the DPL.

Claimant had follow ups with his providers immediately after he was released from the hospital on June 5, 2020 and Respondents knew or should have known he continued to have a disability and needed medical treatment as he did not return to work after having brain surgery. Further, Claimant's wife worked for Employer in the Administration office and this ALJ makes the reasonable inference that she was in communication with Employer regarding her inability to work as well as Claimant's inability to work. All of this information should have lead a reasonably conscientious person to believe that the claimant would require medical treatment. A reasonable administrator knew or should have known that Claimant required medical care and that a DPL should have been sent out or that they had an obligation to designate a medical provider willing to treat Claimant in the first instance. This did not occur until February 11, 2021, over eight months after Claimant became disabled during which time Claimant had continued care by his providers. As found, Claimant proved that it was more likely than not, by a preponderance of the evidence that the right of selection passed to Claimant.

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical care related to the injuries. As found, Respondents had notice of the accident on April 30, 2020 as established by the completed Division form, the Employer's First Report of Injury issued by Respondents. Also, the Town Administrator and Town Attorney had notice at least by May 26, 2020 when Claimant's wife contacted them to advise Claimant was he was at the hospital and would be undergoing brain surgery for the SDH. The Town Attorney actually mentioned to Claimant's wife that Claimant could file a workers' compensation claim to that effect. Further, Employer failed to designate any medical providers within a reasonable time as Claimant clearly required immediate medical care. Both Claimant and his wife credibly

testified that they had never received a designated provider list. This ALJ infers this to mean that they did not receive one until one was sent to Claimant's counsel on February 11, 2021. Lastly, the DPL that was in evidence failed to show that it was sent to Claimant within seven day following notice to Employer of the work injury or potential work injury either following the April 30, 2020 work related injury nor following the May 26, 2020 admission. Therefore, as found, Employer failed to refer Claimant to a provider in a verifiable manner in order for Claimant to choose a provider at the time he required medical care in by June 2020. The right to select a provider passed to Claimant and Claimant chose Franktown Family Medicine.

D. Change of Physician

A claimant can obtain a change of physician "upon the proper showing to the division." Section 8-43-404(5)(a)(VI)(A); *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). Section 8-43-404(5)(a)(VI)(A) does not define a "proper showing," and the ALJ has broad discretion to decide if the circumstances justify a change of physician. *Jones v. T.T.C. Illinois, Inc*., W.C. No. 4-503-150 (May 5, 2006). The ALJ should exercise this discretion with an eye toward ensuring the claimant receives reasonably necessary treatment while protecting the respondents' legitimate interest in being apprised of treatment for which they may ultimately be held liable. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Landeros v. CF & I Steel*, W.C. No. 4-395-315 (October 26, 2000). The ALJ may consider many factors including whether the claimant has received adequate treatment, whether the claimant trusts the ATP, the level of communication between the claimant and the ATP, the ATP's expertise and skill at managing a condition, and the ATP's willingness to provide additional treatment. *E.g*., *Carson v. Wal-Mart*, W.C. No. 3-964-07 (April 12, 1993); *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 1995); *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995). An ALJ need not approve a change of physician because of a claimant's personal reasons, including mere dissatisfaction with the ATP. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (November 27, 2007). On the other hand, the ALJ is not precluded from considering the claimant's subjective perception of his relationship with the physician. *Gutierrez v. Denver Public Schools*, W.C. No. 4-688-075 (December 18, 2008).

As found, Claimant failed to establish a basis for a change of physician. Franktown Family Medicine and PA Kremer were authorized treating providers when Claimant initially selected the providers and by choosing to continue to receive treatment through them. Now Claimant is requesting a change in medical provider but provided no persuasive testimony to support a change in provider nor provided an alternative medical provider. Claimant's request for a change of provider is denied.

E. Temporary Total Disability benefits

To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he

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

Claimant alleges impaired earning capacity from May 26, 2020 through the present. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive temporary disability benefits. Claimant credibly testified that he would be unable to drive to and from work or drive the equipment needed to perform his work. Further, PA Kremer and Dr. Kinder have both addressed that Claimant continues to be disable from work as he would not be capable of engaging in work activities. Dr. Kinder specifically stated that Claimant should be on long-term disability as he was not able to meet the demands of his job. Claimant was first disabled when he was admitted at Parker Adventist and was not able to return to work beginning May 27, 2020 to the present.

There is some mention in the medical records that Claimant volunteered to assist training the new head of public works for Employer and Claimant's wife also mentioned that Claimant attempted to return to work without success. Therefore, Respondents may take credit for any money paid by Employer to Claimant from May 27, 2020 to the present. Further, there is mention of short-term and long-term disability benefits. If Claimant received either type of benefit or Respondents paid for any portion of the disability benefits policies, they are entitled to an offset in the appropriate proportion.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a work-related injury to his head on April 30, 2020 in the course and scope of his employment.

2. Respondents shall pay for all authorized, reasonably necessary, and related medical benefits including but not limited to treatment at Parker Adventist, Dr. Rauzzino, Front Range Spine and Neurosurgery, Franktown Family Medicine, Fyzical Therapy & Balance Centers, Centura Health Center for Therapy Parker Adventist, Neurology of the Rockies and Dr. Kinder as well as any other provider within the chain of referral to treat the SDH and seizure disorder, and in accordance with the Colorado Medical Fee Schedule.

3. Claimant has failed to show he is entitled to a change of physician.

4. The stipulation of the parties is approved and granted. Claimant's average weekly wage is $1014.40.

5. Respondents shall pay temporary total disability benefits beginning May 27, 2020 until terminated by law. Respondents are entitled to offset any benefits paid, in accordance with the law.

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

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

DATED this 5th day of April, 2023.

Digital Signature

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant has a permanent partial disability of the whole person for his left shoulder injury.

FINDINGS OF FACT

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

1. Claimant was 57 years old at the time of the admitted work related injury of February 15, 2022. He worked as an 18 wheeler semi-truck trailer driver doing deliveries. He had been doing this type of job for approximately 16 years, but with this employer approximately 4 years. He denied any prior work injuries affecting the low back and left shoulder.

2. Claimant was seen by Anthony de Mooy, MS, BSN for an On-site First Aid Evaluation on February 15, 2022. Claimant reported that he felt pain and a pinch as a result of lifting a semi-trailer door that was sticking and hard to lift. Claimant complained of left shoulder pain and left lateral lower back pain in T-12 region. Upon exam, Mr. Mooy found pain, loss of range of motion, decreased both in the lumbar spine and the left shoulder. He recommended warm/cold packs, rest and elevation of the shoulder as well as over the counter ibuprofen.

3. On February 18, 2022 Mr. Mooy noted that Claimant was having difficulty taking off his sweatshirt and t-shirt, appearing to be unable to lift his left arm and splinting his left arm with his right hand. He observed that Claimant could not lift his left arm past 90 degrees. Mr. Mooy referred Claimant to Dr. Irish for further evaluation.

4. On the same day, February 18, 2022, Margaret Irish, DO of Injury Care Associates evaluated Claimant. Claimant reported to Dr. Irish that he felt a crack in his left shoulder when he opened the trailer door and another crack when he slid a dock plate across the floor. Claimant complained of a "pinch" feeling in his back and stated it was below the shoulder blade and into the low back. On exam, Dr. Irish noted that palpation throughout the neck and back and left shoulder/upper arm showed moderate muscle tightness in the lower left thoracic paraspinal muscles and mild tightness in the left lumbar paraspinal muscles. There was mild muscle tightness in the left upper trapezius area. Active range of motion of the left shoulder was to approximately 90 degrees abduction and forward flexion. There was a positive Neer's, Hawkins, drop arm, speeds and O'Brien's tests in the left shoulder. Dr. Irish diagnosed left shoulder rotator cuff tear and rupture, left shoulder pain, muscle and tendon strain of the muscle and tendon of back wall of thorax, and muscle, fascia and tendon strain of the lower back. Dr. Irish ordered a left shoulder MRI with arthrogram, and physical therapy. She recommended taking ibuprofen, light duty restrictions and follow up.

5. Thomas Robinson, P.T. evaluated Claimant on February 21, 2022 and Claimant was tender on palpation over the supraspinatus and infraspinatus muscles. On the pain diagram for that day, Claimant showed pain in the upper back in the trapezius areas as well as in the chest area but changed to only the trapezius, upper back area of the shoulder blade by February 23, 2022. Claimant was not working at that time. Claimant continued to have tenderness in the supraspinatus and infraspinatus muscles on multiple subsequent days as documented during treatment with Mr. Robinson.

6. By February 24, 2022 Claimant reported to Dr. Irish that the low back pain was almost completely gone, but continued to have pain of the left shoulder and left upper back/upper trapezius area. Claimant reported that physical therapy was helping, especially with range of motion and strength. On exam, Dr. Irish continued to find positive Neer's, Hawkins, drop arm, speeds and O'Brien's tests on the left. Dr. Irish noted that the objective findings were consistent with the work-related mechanism of injury. This ALJ noted that on the pain diagram for this visit, Claimant marked pain in his shoulder blade, trapezius muscle area down the scapula on the left side, proximal to the glenohumeral joint and affecting the infraspinatus, supraspinatus and subacromial muscle areas.

7. The March 1, 2022 MRI arthrogram of the left shoulder showed full-thickness tear through the anterior half of the supraspinatus tendon with medial tendon retraction estimated at 12 mm and resultant extravasation of contrast into the subacromial subdeltoid bursa, with an estimated 9mm tear and no significant muscle atrophy. Dr. Ross of Health Images read the films to show a high-grade partial-thickness tear of the subscapularis tendon with medial delamination of the posterior fibers approximately 17 mm. This resulted in medial subluxation and partial-thickness tearing of the proximal biceps tendon. There were also findings of severe osteoarthrosis of the acromioclavicular joint with minimal undersurface acromial spur formation and subchondral cystic changes along the lateral margin of the humeral head.

8. On March 2, 2022, Dr. Irish referred Claimant out for a surgical evaluation with Dr. Schnell.

9. On March 28, 2022 Claimant was evaluated by Sophie Schmitz, PA-C. Claimant reported slight improvement in the left shoulder pain but continued limited range of motion. Claimant reported he saw Dr. Schnell on March 23, 2022, discussed treatment options and findings of the MRI. Dr. Schnell recommended surgery and Claimant reported he would proceed with the recommend treatment. Ms. Schmitz proceeded to conduct the pre-op laboratory testing. On exam of the left upper extremity, Ms. Schmitz found tenderness to palpation diffusely along the posterior aspect of the left shoulder and upper trapezius region, limited range of motion of the left shoulder when compared to the right, abduction to roughly 60 degrees, limited strength against resistance of the left shoulder when compared to the right, positive Neer's, Hawkins, empty can, and teres minor/infraspinatus tests. Ms. Schmitz assessed Claimant with a QPOP test. Claimant reported, on the pain diagram, pain along the shoulder blade and trapezius as well as into the shoulder joint. On the “QuickDash” assessment, Claimant reported having moderate difficulty with social and family activities with the arm and shoulder, as well as moderate difficulty sleeping due to the pain. He also reported very limited ability to work other than daily living activities.

10. Claimant proceeded with surgical repair under Dr. Luke Schnell on April 7 2022 for a left shoulder arthroscopic supraspinatus, infraspinatus and subscapularis tendon repair, arthroscopic subacromial decompression, left shoulder open long head biceps tenodesis and extensive arthroscopic debridement.

11. On April 19, 2022 Ms. Schmitz noted that Claimant had pain of 6-8/10 located across the superior and posterior of the left shoulder. She noted tenderness along the same area, though Claimant continued to be in an immobilizer due to the surgery. Ms. Schmitz referred Claimant back to physical therapy for post op PT. The pain diagrams continued to show pain in the trapezius and scapula areas.

12. By May 5, 2022 Claimant continued to report pain in the upper back, shoulder blade area. This pattern on the pain diagrams continued throughout his treatment. Claimant reported he could not open jars, wash his back, use a knife, stated that his shoulder pain caused extreme difficulties with daily activities and socializing, and caused so much difficulty that he was having problems sleeping.

13. On May 23, 2022 Ms. Schmitz noted Claimant continued in an immobilizer arm sling, had tenderness to palpation diffusely along the posterior aspect of the left shoulder, limited range of motion of the left shoulder when compared to the right, flexion and abduction to roughly 80 degrees though she did not perform special tests of the shoulder due to Claimant being 7 weeks postop.

14. Claimant attended an appointment at Dr. Schnell's office, where PA Jane Gustafson saw Claimant on June 8, 2022 and took a history. After examination, Dr. Schell noted that there were no post-operative complications. Dr. Schnell recommended continued physical therapy, advancing to phase 2 arthroscopic rotator cuff repair protocols but below shoulder level with the left arm, discontinuing the sling and sleeping in a recliner, and reassessment in 6 weeks.

15. Claimant also followed up at Injury Care with Sophie Schmitz on June 15, 2022 and July 12, 2022. She advanced Claimant's PT regime pursuant to Dr. Schnell's instructions. This ALJ noted that on the pain diagram for this visit, Claimant marked pain in his shoulder blade, trapezius muscle area down the scapula on the left side, above the shoulder joint on the trunk and affecting the infraspinatus, supraspinatus and subacromial muscle areas. The QuickDash form noted Claimant continued to have severe difficulty sleeping due to the shoulder pain, which also interfered with opening jars, carrying bags, and engaging in activities of daily living.

16. By July 19, 2022 Dr. Schnell advanced Claimant to protocol phase 3 twice a week for six weeks, recommending no pushing, pulling, or lifting greater than 10 lbs. with the left arm until the follow up appointment.

17. Claimant followed up with PA Schmitz on August 8, 2022 who noted improvement of the left shoulder motion but still noted Claimant's slight difficulty with flexion, abduction and external rotation. Claimant still reported pain, at the time of exam, but only up to 3/10 at its worst. This ALJ noted the pain diagram for this visit, where Claimant marked pain in his shoulder blade, trapezius muscle area down the scapula on the left side.

18. Claimant's last appointment with Dr. Schell was August 26, 2022. He noted Claimant had good improvement following surgery at 4 ½ months post-operatively. He reported Claimant had returned to work, should continue with physical therapy and a home exercise program for another 3 months, as well as restrictions of pushing, pulling and lifting to 20 lbs. for another 2 weeks with the left arm, then progress to full duty, stating Claimant was at MMI and should return to consult as needed basis.

19. Dr. Richard Pompei evaluated Claimant for the first time on September 2, 2022. He noted Claimant continued to progress with treatment. Claimant was concerned with the 20 lbs. lifting restrictions because his employment required him to lift up to 90 lbs. from 6 inches to 60 inches. Dr. Pompei ordered two more weeks of physical therapy consistent with Dr. Schnell's recommendations. This ALJ noted that the pain diagram for this visit, Claimant marked pain in his shoulder blade, trapezius muscle area down the scapula on the left side, and affecting the infraspinatus, supraspinatus and subacromial muscle areas.

20. On September 16, 2022 Dr. Pompei contacted Employer to determine whether Claimant would be required to lift 90 lbs. from 6 inches to 60 and was advised this was not a requirement of the job. Claimant noted that he was approximately 90% better following the surgery and physical therapy. Dr. Pompei released Claimant to work full time on "a trial basis" and stated, if it went well, he would likely place Claimant at MMI and conduct an impairment rating due to the surgery. Claimant was advised he had a couple more sessions of physical therapy he could attend. This ALJ noted that the pain diagram Claimant had pain in his shoulder blade, trapezius muscle area down the scapula on the left side.

21. Claimant returned to physical therapy on September 21, 2022 with Robyn Ignatowski, P.T. Claimant reported he continued to see improvement with this left shoulder pain, rating it at worst 2/10 on a pain scale. Ms. Ignatowski reported Claimant had returned to work full duty with good tolerance. She documented that Claimant had progressed very well with post-op rehab to date, recommend he finish the next week's scheduled therapy visits and then be discharged. The pain diagram for this visit showed Claimant reporting pain in his shoulder blade, trapezius muscle area down the scapula on the left side.

22. On September 28, 2022 Claimant again was evaluated by Ms. Ignatowski. She documented that Claimant had continued improvement in his left shoulder and rated his pain 3/10 at its worst. She documented Claimant was complying with his independent home exercise program (IHEP) and was ready to continue independently. He demonstrate minor deficits in AROM at end ranges secondary to stiffness. Otherwise he has had excellent recovery, had demonstrated ability to lift 50 lbs. and push/pull 145 lbs. on the sled without provocation of his familiar pain. He met all established goals for therapy and was discharged. Claimant continued to note pain in his shoulder blade, trapezius muscle area down the scapula on the left side, proximal to the glenohumeral joint and affecting the infraspinatus, supraspinatus and subacromial muscle areas on the pain diagram.

23. Dr. Pompei released Claimant at MMI on September 30, 2022. Claimant reported that he was working full duty without issue, had been taking over-the-counter

medications for pain control on rare occasions, had no acute complaints and was ready for case closure. Claimant continued to note pain in his shoulder blade, trapezius muscle area down the scapula on the left side, proximal to the glenohumeral joint and affecting the infraspinatus, supraspinatus and subacromial muscle areas on the pain diagram.

24. On October 4, 2022 Dr. Pompei conducted the impairment evaluation. On that day Claimant reported to Dr. Pompei that he had been diligent with his home exercises, had been swimming, which helped, and he had returned to full duty at work. Dr. Pompei evaluated Claimant's residual impairment in accordance with the *AMA Guides to the Evaluation of Permanent Impairment,* Third Edition (*Revised*). He determined that Claimant had an 8% upper extremity impairment due to loss of range of motion of the upper extremity, which converted to a 5% whole person impairment.

25. Respondents filed a Final Admission of Liability on October 21, 2022 admitting to the 8% extremity impairment, as a scheduled impairment. The FAL noted that Claimant's average weekly wage was $2,499.42 qualifying him for the maximum temporary total disability rate of $1,158.92 based on his February 15, 2022 date of injury. Claimant was 58 years old at the time he was placed at MMI.

26. Claimant timely objected and filed an Application for Hearing on November 18, 2022 on the issue of conversion of the upper extremity impairment to a whole person impairment based on the situs of the functional impairment. Claimant specifically accepted the admission on maintenance medical benefits under *Grover*.

27. Dr. Richard J. Pompei testified by deposition dated March 9, 2023 as a Board Certified expert in occupational medicine and as a Level II accredited physician. He took over Claimant's care when he started at Injury Care Associates, becoming Claimant's authorized treating physician. He reviewed the medical records including history of a lifting mechanism of injury while performing his essential job functions injuring his left shoulder and left low back. Dr. Pompei noted that, after starting physical therapy, Claimant's low back pain resolved but he continued to have left shoulder pain. They obtained an MRI, which showed rotator cuff pathology and warranted a referral to a surgeon. He noted that Dr. Schnell performed a rotator cuff repair, specifically a left shoulder arthroscopic supraspinatus, infraspinatus and subscapularis tendon repair, subacromial decompression, left shoulder open long head biceps tenodesis and extensive debridement.

28. Dr. Pompei explained that after the surgery, Claimant had a normal course of physical therapy. He clarified that every patient is different but it was typical to run PT for approximately four to six weeks postoperatively. He noted that Claimant remained with some motion deficits once he placed Claimant at maximum medical improvement (MMI) on September 30, 2022. He performed an impairment rating examination, which showed Claimant had an 8% scheduled impairment, which converted to a 5% whole person impairment, without apportionment. He explained that each of the tendons and corresponding musculature had a role in the associated loss of function, including the supraspinatus and infraspinatus in abduction and flexion. Dr. Pompei highlighted that the muscles going from proximal to the shoulder joint (proximal and behind his shirt seam), beyond from the scapula to the subscapularis assisted in the rotation of the arm. Further, the infraspinatus and supraspinatus assisted in the raising of the arm and simply raising

of the left shoulder would involve the infraspinatus and supraspinatus as well as crossing the arm in front of the body. He noted that the infraspinatus, supraspinatus and arthroscopic subacromial decompression repairs were proximal to the glenohumeral joint.

29. Claimant had reported to his providers that he was having difficulty sleeping. Dr. Pompei testified that this is an associated symptom and common for patients with post-surgical symptoms, like Claimant, because it put pressure on the surgical site, impinging the joint and the structures of the rotator cuff muscles. Claimant was using a TENS[1] Unit with electrodes that were likely placed along the upper back of the shoulder blade. Claimant noted on September 16, 2022 that he was having severe difficulty with sleeping due to the left shoulder pain, which did not surprise Dr. Pompei. He agreed that the shoulder was the scaffold upon which the arm sits. Dr. Pompei noted that the surgical sites took place in the glenohumeral joint and superior or above to the glenohumeral joint. This ALJ infers this to mean proximal to the joint.

30. Claimant testified at hearing that he had returned to full duty work but that he avoided overhead work with the left arm. He stated that he continued to have tightness in the neck and shoulder, with pain and discomfort, despite having returned to full duty work. Claimant stated he continued to have pain and discomfort over the top of the left shoulder, along the trapezius, including tenderness in the area. He stated that he had never had problems with the left shoulder before this work related injury. While the surgery relieved a great majority of the symptoms, he continued with pain while using his left upper extremity. The pain was also along the shoulder blade and trapezius muscle. He had problems with lifting weight, lifting overhead, and anxiety, though less following surgery. He especially had problems when he slept.

31. Prior to this injury, Claimant was a stomach sleeper and he had to change his habits, but while sleeping he still may turn on to the left shoulder or onto his back and has a lighting pain sensation that will invariably wake him during the night. He testified he had problems using the left arm for many things, including driving. While the TENS Unit does help, he continued to have difficulties with moving the left shoulder, including to do exercises like pull ups. Before this accident, pull ups were a normal part of Claimant's exercise routine but Dr. Schnell advised him to not perform any repetitive overhead work with the left arm. He would place the electrodes for the TENS along the muscles on the upper back, shoulder blade and the biceps. Claimant avoids lift over his head any longer, but rather, if boxes fall off of pallets, he puts the boxes on a 10-wheeler cart so he does not have to place them back on top of the tall pallets. He had to change how he dresses and puts on a shirt and how he buttons up his shirt to avoid putting his arm straight out or overhead. Reaching out and away from his body hurts the left side of his neck.

32. Claimant has difficulty changing lanes when driving as he has difficulty looking over his left shoulder to make sure he is safe to change lanes. He has to turn his whole body in order to see properly. The pain has continued to affect him in the neck, the left shoulder, along the shoulder blade and scapular region, which is commonly called the shoulder blade.

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[1] Transcutaneous electrical nerve stimulation (TENS), which produces mild electrical current to treat ongoing pain.

33. Claimant reviewed the last pain diagrams he completed on September 6 and September 12, 2020 during his last physical therapy sessions and September 16, 2020 during his visit with Dr. Pompei. He noted that he continued to have pain up to a 3/10, depending on activity levels, and the pain was mainly located on the upper back along the shoulder blade and trapezius muscles up to the shoulder joint or glenohumeral joint. Claimant stated that he had to rely on his right upper extremity to compensate for the left shoulder injury and continued to have pain when lifting with both upper extremities. He also has had problems pushing and pulling pallets full of boxes, especially when the pallets were not properly wrapped and the boxes on the pallet shift or fall, and he has to move the heavy cases.

34. Ronald Swarsen, M.D. testified on behalf of Claimant as an expert in occupational medicine, family medicine and as a Level II accredited physician. While Dr. Swarsen did not examine Claimant, he testified regarding the structures and anatomy of the shoulder, upper extremity and arm articulation. He noted that the shoulder girdle was the scaffold upon which the arm sits and functions, specifically that the arm could not articulate without the muscles and ligaments proximal to the glenohumeral joint. Dr. Swarsen explained that Claimant had tears of the subscapularis, supraspinatus and infraspinatus muscles, which attached to the head of the humerus and were torn off. The surgery performed by Dr. Schnell included reattaching the torn ligaments. He noted that three of the four major muscles were repaired during the surgery.[2] Dr. Swarsen explained that the sack that the muscles glided upon is a cushion of fluid but because there was impingement, Dr. Schnell removed the cushion to enlarge the acromion space. Dr. Swarsen further explained the surgical procedure where the anchors were placed by drilling the bone and securing the torn tendons. There was also extensive debridement and noted that Dr. Schnell caused bleeding to occur as that was a method of irrigating the site of the surgery to promote healing.

35. Dr. Swarsen reviewed the medical records in this case and explained that three of the surgical procedures occurred proximal to the glenohumeral joint. The fourth procedure occurred partly within the joint and distal to the joint humeral head. He noted that the trapezius had three portions which start at the base of the neck on the side of the spine, traverses and attaches to the spine of the scapula and function to help stabilize the scapula and pull it upward. The mid-portion pulls the scapula into the middle of the body. Dr. Swarsen explained that Claimant continues to have an irritated trapezius and supraspinatus, which are proximal to the glenohumeral joint.

36. Dr. Swarsen reviewed Dr. Pompei's impairment rating report and agreed that Claimant has a whole person impairment rating because his continuing loss of function as well as his injury were all proximal to the glenohumeral joint, located in and around the shoulder blade and on the trunk of the body. Dr. Swarsen noted that the range of motion would not be possible without the structures of the shoulder blade and therefore all of the loss of ROM should be considered as a whole person. Dr. Swarsen explained that Claimant's symptoms involved the neck and trapezius muscles. He remarked that Claimant suffered recruitment of the muscles surrounding his left shoulder because of the pain from his work-related injury.

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[2] The fourth muscle that was not affected was the teres muscle.

37. Dr. Swarsen expounded that during the hearing Claimant would point to his neck and upper back to explain where he was continuing to have pain and discomfort, including the trapezius muscle, which was not uncommon for the kind of injury Claimant had. Claimant's loss of range of motion originated in the scapula with complex movements of the muscle tissue of the muscles attached to the trunk of the body in order to accomplish any movement of the upper extremity. In essence, the loss of function as demonstrated by Claimant continued to be in the trapezius muscle, causing the situs of functional impairment to be to the muscle tissue that is proximal to the shoulder joint.

38. As found, Claimant established that it is more probably true than not that his left upper extremity rating should be converted to a whole person impairment. As found, medical records reflect that throughout the course of Claimant's medical care, all treatment involved the shoulder and not the arm. As found, Claimant continues to experience issues with sleep and left shoulder pain that is located proximal to the glenohumeral joint and specifically over the trapezius area on the upper back. Claimant continues to modify how he performs his current job duties so that he protects his left shoulder and is overcompensating with his right upper extremity. He credibly testified that he has pain at the base of the trapezius into the scapula running along the top and at the front of his left shoulder. Claimant remarked that when he changes lanes in traffic, he needs to turn his whole body to see oncoming traffic as he has difficulty looking over his shoulder. He also now puts on shirts with his left arm first. Finally, Claimant noted that rolling onto his left shoulder interrupts his sleep.

39. Dr. Swarsen persuasively explained that Claimant suffered a functional impairment proximal to the glenohumeral joint, the scheduled rating issued by Dr. Pompei should be converted into a whole person impairment, and Claimant's symptoms involved the neck, trapezius, and rhomboid muscles, which are proximal to the glenohumeral joint. Dr. Swarsen credibly opined that most of the Claimant's surgical procedures on April 7, 2022 (three of the four procedures) occurred above the plane of the glenohumeral joint in the left shoulder. He persuasively explained that the Claimant suffered recruitment of muscles surrounding his left shoulder because of the pain from his work-related injury, and that it was common for injured workers undergoing surgery of the shoulder to suffer dysfunction and pain in the area of the trapezius muscles. He explained that the trapezius muscle is above both the glenohumeral joint and arm, on the trunk of the body. As found, Dr. Swarsen credibly and persuasively opined that the situs of Claimant's functional impairment was above the arm at the shoulder in the area of the trapezius and the Claimant's impairment should be converted to a whole person impairment.

40. Claimant's authorized treating provider's, Dr. Pompei's, credible testimony corroborated Dr. Swarsen's opinion that the majority of the surgeries occurred above the glenohumeral joint. Dr. Pompei also agreed that Claimant's left arm sustained no anatomical disruption to account for the loss of motion, but that Claimant's impairment was to the Claimant's whole person upper extremity, which was a 5 % whole person impairment in accordance with the *AMA Guides* due to diminished motion from the anatomical disruption of the tissues of the rotator cuff tendons and the attached muscles in the torso. As Dr. Swarsen remarked, Claimant suffered recruitment of the muscles surrounding his left shoulder because of the pain from his industrial injury. Dr. Swarsen also persuasively opined that it was common for injured workers undergoing surgery of

the shoulder to suffer dysfunction and pain in the area of the trapezius muscle. As found and concluded, based on the medical records, Claimant's credible testimony and the persuasive opinions of Dr. Swarsen and Dr. Pompei, Claimant suffered a functional impairment above the glenohumeral joint in his left shoulder as a result of his February 15, 2022 admitted work related injury. Accordingly, Claimant has established by a preponderance of the evidence that the 8% scheduled left upper extremity impairment rating issued by Dr. Pompei should be converted into a 5% whole person rating.

41. Testimony and evidence inconsistent with the above findings is either not relevant, 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 any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay

witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

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

B. Conversion of the impairment

If Claimant sustains an injury not found on the schedule of injuries, Sec. 8-42-107(1)(b), C.R.S. provides Claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes, the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

The "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. 4-240-315 (ICAO, June 11, 1998). If the claimant has a functional impairment to part(s) of his body other than the "arm," he has sustained a whole person impairment and must be compensated under Sec. 8-42-107(8), C.R.S. Whether a claimant has suffered the loss of an arm at the shoulder under Sec. 8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under Sec. 8-42-107(8)(c), C.R.S. is determined on a case-by-case basis. *See Delaney v. ICAO*, 30 P.3d 691 (Colo. App. 2000).

Under this test, an ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment'" and constitute a functional impairment for purposes of assigning a whole person impairment rating. *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002). Although the anatomic location of the injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled

or whole person impairment. *See, e.g., Martinez v. Albertson's LLC, supra.* ("The [claimant's] subacromial decompression was done at the acromion and the coracoacromial ligament in order to relieve the impingement, which is all related to the scapular structures above the level of the glenohumeral joint"). The mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021). However, pain affecting the trapezius, difficulty sleeping on the injured side or limitations on overhead reaching can constitute functional impairment beyond the arm at the shoulder and be appropriate for conversion to a whole person impairment. *Martinez v. Albertson's LLC*, *supra; Brown v. City of Aurora*, W.C. No. 4-452-408 (October 9, 2002); *Heredia v. Marriott*, W.C. No. 4-508-205 (September 17, 2004).

As found, Claimant met his burden of proof and established by a preponderance of the evidence he was entitled to permanent partial disability benefits based upon a whole person medical impairment rating. The medical evidence in the form of treatment records provided objective evidence that anatomical structures beyond the shoulder joint were involved. Dr. Schnell performed surgery on structures that were proximal to the glenohumeral joint and arm. Dr. Pompei's and Dr. Swarsen's opinions also supported this conclusion. In addition, Dr. Swarsen's expert testimony was persuasive on this subject, as well, that the surgery took place in anatomical areas of the body that were proximal to the shoulder joint. Dr. Swarsen was also persuasive that the majority of Claimant's impediments arise from Claimant's dysfunction caused by pain in the trapezius, and supraspinatus areas, which activate when using the upper extremity.[3] Multiple providers, including ATPs and therapists noted that Claimant had pain and tenderness in the trapezius and the pain diagrams consistently showed pain along the trapezius.

More importantly, Claimant credibly described pain and associated functional limitation in areas proximal to his arm such as the scapula and trapezius. This pain affected his ability to engage in various activities, including overhead reaching, looking over his shoulder while driving, protecting his left upper extremity while working, overcompensating with his right upper extremity, and interruption of his sleep due to pain in the left trapezius. Claimant's testimony regarding the injury to his left shoulder and its sequelae provided the factual support for this ALJ to find that Claimant has a functional impairment to parts of the body located on his truck/upper back along the trapezius muscle and support the determination that the situs of the functional impairment should entitle Claimant to a whole person rating. The ALJ also finds that Respondent presented no credible evidence to contravene the finding that structures beyond the shoulder joint were implicated. Based upon the totality of evidence presented at hearing, the ALJ determines, finds, and concludes Claimant showed he sustained a functional impairment that extends beyond the "arm at shoulder."

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[3] This ALJ declines to read the *AMA Guides* in the manner that Respondents propose (that the arm at the shoulder is equivalent to the upper extremity and therefore the structures of the shoulder girdle are part of the arm, not the trunk.) In fact, this ALJ reads the statutory provision of the "arm at the shoulder" to mean that the arm ends at the shoulder junction of the ball and socket or the glenohumeral joint.

Dr. Pompei provided an 8% scheduled rating, which converted to 5% whole person. Neither party requested a DIME, so Dr. Pompei's rating is binding under Sec. 8-42-107.2(b), C.R.S. Claimant is entitled to PPD benefits based on Dr. Pompei's 5% whole person rating. Claimant was 58 years old when he was placed at MMI on September 30, 2022. His TTD rate was $1.158.92. Therefore, 5% whole person provides PPD in the amount of $24,105.54.

ORDER

IT IS THEREFORE ORDERED:

1. Insurer shall pay Claimant PPD benefits based on Dr. Pompei's 5% whole person rating in the amount of $24,105.54.

2. Insurer may take credit for any PPD benefits previously paid to Claimant in connection with this claim.

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

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

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

DATED this 6th day of April, 2023.

Digital Signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-147-151-004

PROCEDURAL HISTORY

On July 19, 2022 Respondent filed an Application for Hearing on issues which included overcoming the DIME physician's opinions by clear and convincing evidence, causation, failure to comply with modified job offer and unauthorized medical care, as well as offsets, overpayment and credits.

Claimant filed a Response to Application for Hearing on August 18, 2022 listing the issues of medical benefits that were authorized, reasonable and necessary, temporary total and temporary partial disability benefits, and defense of the DIME physician's opinion and defense to failure to comply with modified job offer.

The parties submitted the Stipulation of Facts on March 29, 2023. The Stipulation of Facts are accepted and approved. The Stipulation of Facts are the official transcript for the November 15, 2022 hearing.

ISSUES

I. Whether Respondent proved by clear and convincing evidence that the Division of Workers' Compensation Independent Medical Examination (DIME) physician, Dr. Ranee Shenoi, was incorrect in her findings of causation, maximum medical improvement (MMI), and permanent partial impairment.

II. What were Claimant's permanent partial impairments related to the work injury, if any.

III. Whether Claimant has shown by a preponderance of the evidence that she sustained a loss of wages from March 29, 2021 through MMI.

IV. Whether Respondent has shown by a preponderance of the evidence that Claimant was responsible for her wage loss and Respondent entitled to recoup an overpayment.

FINDINGS OF FACT

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

A. Generally:

1. Claimant worked for Employer as a bus driver since approximately 2018. As part of her job, she conducted a pre-trip inspections of the bus. She had to open the hood of the bus, check oil and everything under the hood to make sure it was in working order. She had to do a break test, check windows and seats, check the First Aid kits, the tires, bolts, lights, dings or damage to the bus. The pre-trip inspection allotted time was

12 minutes but sometimes it took more time to complete it. Then she would be ready to proceed with her route. She would pick up elementary, middle school and high school children on her route. The preschoolers had paraprofessionals sometimes ride with them during the noon time. She never really had any problems with the kids, and she did not normally have do much lifting other than the heavy bus hood. The job required her to lift 50 lbs. minimum to qualify for the job. Claimant did not have any problems doing her day to day activities related to the job before her accident. She stated that she liked the summers off because it gave her time to recoup and recharge.

2. On a snowy day, on November 11, 2019, she slipped on ice when stepping up onto a curb. She had a bag in her left hand and a purse in her other hand. She slipped in a split with each leg going opposite ways. Another coworker went to grab her on her way down. She fell onto her big bag and her left leg, hitting the ground, but not all of her body fell to the ground. She did not specifically hit her head or her shoulder. One of her hands did hit the ground. She jarred her body but she did finish her bus route. She reported it to her supervisor and was seen by Dr. Matus on the date of her accident.

3. Claimant stated that she had no prior problems or injuries prior to the November 11, 2019 event. This ALJ does not find this particularly credible since Claimant injured her left lower extremity, specifically had a bone spur in her left heel in 2000, including a surgery to her left heel,[1] and had a neck whiplash injury in the 1980s, as documented in the medical records.

B. <u>Medical records</u>:

4. Claimant was evaluated by Dr. Brenden Matus at WorkWell on March 10, 2020.[2] Dr. Matus noted the patient was feeling a bit better. She had a flare with a particular stretch. Claimant had pain present in the mid-to-low back and left foot. Her pain rating was 7/10. She had "upper back neck tension and paresthesias in the right ulnar nerve distribution since her last massage." Dr. Matus stated he would monitor this problem. He further stated that if she continued to have left foot pain, he would order an MRI of the left foot and ankle as well as refer her to Dr. Myers.

5. On May 15, 2020 Claimant was evaluated by Dr. Bruce Cazden at WorkWell. He noted the mechanism of injury of November 11, 2019 when Claimant slipped on ice while stepping up on a curb with her left leg. She reported right mid to low back pain from slipping and left foot and ankle pain. He specifically noted that "[S]he has new symptoms of neck pain with numbness and tingling in both upper extremities. It does not appear that this is related to her work comp claim." He did not diagnose the neck condition as work related.

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[1] See Dr. McCranie's, Dr. Chan's and Dr. Shenoi's past medical history and surgery sections on Exhibit F, bate 031; Exh. M, bate 90, and Exh. N. bate 99.

[2] Records between November 11, 2019 and March 10, 2020, where not in evidence, only other providers' summaries of the visits, including physical therapy and massage therapy visits. This ALJ chose to rely on the descriptions from those records.

6. An MRI[3] of the cervical spine from July 14, 2020 showed degenerative disc and joint changes with mild dural sac indentation and multilevel bilateral foraminal narrowing.

7. Samuel Chan, M.D. evaluated Claimant on July 24, 2020. He took a history consistent with that described by Claimant and other providers. He specifically noted that claimant had landed on her left foot and continued to have problems with the left foot, low back, interscapular area and cervical spine. Claimant reported that her treatment plan was somewhat interrupted because of the COVID pandemic. He documented that Dr. Myers was treating her for the left foot pain and recommended she obtain HOKA shoes. He reviewed all of Dr. Matus' records. He reviewed both the x-rays of the foot and the MRI of the ankle and foot. They showed moderate anterior talofibular and mild deltoid ligament sprains as well as suspected hammertoe deformities but were otherwise normal. Dr. Chan documented that Dr. Matus continued to cite to Claimant's ongoing cervical spine complaints. On exam he noted that Claimant was tender to palpation of right greater and lesser occipital nerve insertion areas. There was also tenderness to palpation of right trapezius, levator scapulae, and splenius capitis muscles, with active trigger points noted. Tenderness to the bilateral AC joints but otherwise a normal cervical spine exam. He noted negative lumbar spine exam but tenderness to palpation of the calcaneus, sinus tarsi and downgoing toes bilaterally. He diagnosed bilateral occipital neuralgia, migraine syndrome and myalgia. He recommended trigger point injections for the occipital neuralgia, which he proceeded to perform.

8. The initial visit with Dr. Barry Ogin was on November 9, 2020 when Dr. Ogin took a fairly long history. Claimant was referred to Dr. Ogin by Dr. Matus with ongoing complaints of neck and cervicogenic headaches. He noted that Claimant had a comprehensive course of conservative care including physical therapy, massage therapy, dry needling and trigger point injections, and medications. Claimant reported that her low back pain only gave her occasional problems. He noted that Claimant's chief complaint was her neck, including aching and stiffness centrally but worse on the left hand than on the right side. She reported daily headaches and radiation into her shoulders and upper back centrally. Claimant had full shoulder range of motion without pain, scapular retraction and protraction was symmetric, she had full active range of motion of the cervical spine including with flexion, extension, right and left rotation, right and left lateral flexion. She was not reporting any numbness and tingling at that time. Dr. Ogin recommended medial branch block to the cervical spine given the MRI indications and, per the guidelines p. 28, physical examination findings consistent with facet origin pain, at least 3 months of pain, unresponsive to conservative care, including manual therapy, and has a positive psychosocial screen without aberrant concerns.

9. Dr. Ogin also documented that on December 10, 2020 she had a 100% relief following a cervical facet injection at the C2-5 bilateral MBB.

10. Dr. Ogin's report noted responses for December 18, 2020 that Claimant was three days post medial branch block (MMB) and her neck and headaches were feeling better with a good diagnostic response though the pain was gradually returning.

[3] Description taken from multiple medical records, including Dr. Ogin's March 11, 2021 report, as the original report was not in evidence.

She also complained of tingling and numbness down her left arm and into her left fourth and fifth fingers of the left hand.

11. On March 11, 2021 Dr. Ogin took a history that Claimant had increasing pain along her parascapular region, with severe pain in her right upper shoulder, down her medial arm to her hand, along the ulnar distribution. She also complained of pain in her sternum. She denied any new injuries other that the fact that she had returned to driving and had to hold out her arms to hold the steering wheel. His diagnosis and assessment was sprain of the ligaments of the cervical spine, including cervical facet joint syndrome, cervical pain, myalgia, cervical stenosis and cervical disc disorder with radiculopathy of mid-cervical region. He noted that the upper neck and headaches had responded to treatment but that, following performing an EMG which revealed a right C8-T1 radiculopathy. After a re-review of the MRI, the multi-level degenerative disc with spinal stenosis was more prevalent in the C5-C7. With that in mind, he recommended a C7-T1 epidural steroid injection.

12. On April 11, 2021, Dr. Paul Ogden responded to a request to approve a modified job offer, which included assembling and bagging hoagie sandwiches, assisting administrative personnel, and watching videos. Dr. Ogden added that "[B]ased on the restrictions of March 29, 2021 of avoiding reaching out or overhead" as well as allowing "position changes sit/stand/walk every 20-30 minutes" that Claimant was able to perform the tasks listed.

13. Respondent scheduled Claimant for an Independent Medical Evaluation (IME) with Dr. Kathy McCranie which took place on June 15, 2021. She took a history, which included the event of November 11, 2019 as well as an incident where she was cleaning out a closet and had an immediate onset of symptoms into her upper extremities and neck. She noted Claimant's recall of her medical treatment including that she did not have any benefit from the trigger point injections but had 100% immediate relief from the epidural steroid injections, though they lasted for a fairly short time before symptoms started to return. She also reviewed the medical records. Dr. McCranie opined that Claimant sustained both a lumbar strain and a strain of the foot and ankle, both of which resolved. She opined that Claimant's continuing complaints involving the cervical spine and the right greater than left upper extremity paresthesias, which were not documented until March 10, 2020, were not work related conditions. Lastly, Dr. McCranie opined that the right shoulder labral tear was not related to the November 11, 2019, injury, as an acute labral tear would cause immediate, severe pain in the shoulder and Claimant did not report shoulder pain for approximately seven months post-accident. Dr. McCranie further stated that, while the treatment for the cervical spine and shoulder were reasonably necessary, they were not causally related to the November 11, 2019 work injury.

14. Dr. McCranie stated as follows:

> [Claimant] has reached MMI for her work-related lumbar and left foot injury. She would have reached maximum medical improvement by July 6, 2020. At that time, her back symptoms had resolved and her left ankle symptoms were very minimal. Considering complete resolution of her lumbar symptomatology, normal examination of the lumbar spine, and full lumbar range of motion; there is no

> permanent impairment of the lumbar spine. Similarly in the left ankle, she has had complete resolution at this time of her left ankle pain with full range of motion. Therefore, there is no impairment of the left ankle.
>
> It is my impression that the cervical spine is not accident related, making an impairment rating non-applicable. If, however, this condition is deemed to be accident related for administrative purposes, an impairment rating was performed as it is my opinion that she is at MMI for the cervical spine regardless of causality. For degenerative changes in the cervical spine, she would receive a 6% impairment with a 4% impairment for range of motion as her sensory examination was normal. Motor examination revealed some weakness in the ulnar distribution, more likely related to findings of peripheral neuropathy. If the cervical spine is deemed to be accident related, impairment would be 10% whole person. As noted previously, it is my opinion, however, that this impairment is not accident related. Regarding the right shoulder, it is my opinion that this impairment is not accident related. She is currently involved in ongoing workup of the right shoulder and if this is deemed accident related, this is not yet at MMI. However, it is my opinion, this should be treated outside of the worker's compensation arena for the reasons outlined above.

15. On June 21, 2021 Dr. Matus issued a report which included a description of Claimant's treatment to date. He noted his diagnosis as a work related fall injury with a strain of the low back and other muscle spasms, and strain of the muscles and tendons of the ankle and foot and the objective findings of those injuries were consistent with the history and mechanism of injury.[4] His physical exam revealed full range of motion of the cervical spine though Claimant reported tenderness on palpation of the right paraspinous muscles and trapezius muscles on the right, but no midline cervical spine tenderness. Back pain was causing minimal to some difficulty in daily life and left ankle had very minimal pain. Dr. Matus provided restrictions of limited use of the right upper extremity, avoid repetitive reaching out or overhead; limited lift, push and pull of 5 pounds maximum, and should be allowed to change positions regularly between sit/stand/walk at least every 20-30 minutes; and referred her to Dr. Primack for a final evaluation and impairment rating.[5]

16. Claimant was placed at maximum medical improvement on July 9, 2021 by Dr. Matus without restrictions or impairment. Dr. Matus agreed with the IME examiner, Dr. McCranie that the cervical spine, headaches and shoulder conditions were not work related injuries and should be treated by Claimant's PCP, if Claimant continued to have ongoing complaints regarding those problems. He did not provide a diagnosis for the neck, nor did he show in his report that he performed an impairment rating for the related low back or left lower extremity. Yet he continued to document that back pain was causing minimal to some difficulty in daily life and left ankle had very minimal pain. Dr. Matus stated "[W]e have agreed to target Maximum medical improvement status, Injury related symptoms resolved, ongoing non related symptoms." As found, Dr. Matus placed

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[4] As found, the section in Dr. Matus' June 21, 2021 and July 9, 2021 reports under "Case Summary" (Exh. H, bates 054-055; Exh. I, bate 065-066) are summaries of other providers' diagnosis, opinions and recommendations for treatment and were not necessarily adopted by Dr. Matus.

[5] The evaluation with Dr. Primack did not take place, according to the medical records and the parties statements at hearing.

Claimant at MMI as of July 9, 2021 noting that only the low back and left lower extremity injuries were related to the November 11, 2019 work injury. As further found, he did not perform an impairment rating with regard to either condition but considered them resolved.

17. On July 22, 2021 Respondent filed a Final Admission of Liability. Claimant objected and requested a Division Independent Medical Evaluation (DIME).

18. Dr. Ranee Shenoi was selected as the DIME physician. She evaluated Claimant on October 12, 2021 and issued her report on October 21, 2022. She opined that Claimant reached MMI on July 9, 2021 and had a 7% whole person impairment related to the cervical spine, including 4% for specific disorder of the spine (Table 53 IIB), a 2% for loss of range of motion, and 1% for neurologic system (loss of strength). Dr. Shenoi stated that she was asked to evaluate the cervical, thoracic and lumbar spine as well as the left foot. She stated "[A]s the DIME Examiner, I will address MMI and impairment. I will not address causation."

19. Dr. Shenoi opined that Claimant had reached MMI on July 9, 2021. She stated that the DIME application did not request she address the bilateral shoulder problems and she believed that the thoracic spine issues were coming directly from the shoulder pathology. Based on the *AMA Guides* she opined that the left foot injury provided a 1.25% impairment of the lower extremity which converted to 0% whole person impairment of the foot based on the peroneal nerve injury for altered sensation.

20. Dr. Shenoi asked Claimant what complaints were related to the work injury and she related sleep problems, pain in her right shoulder, arm, elbow and hand, including burning in the right axillary line and that her hand would get cold. She reported multiple neck complaints, going across her shoulders, which radiated into her chest and sternum as well as the right upper extremity. She reported headaches that were only intermittent. She also reported low back and left foot pain as well as ringing in her ears. As found, Dr. Shenoi only provided an impairment rating for the neck and foot, without providing a causation analysis of the body parts for which she was providing an impairment ratings. Further, she did not rate the lumbar spine or go through the process to assess the lumbar spine range of motion.

21. Dr. McCranie issued a supplemental report on November 5, 2021. Dr. McCranie specifically commented regarding the DIME physician's report. She noted that Dr. Shenoi had specifically erred by failing to perform a causation analysis. She noted as follows:

> A causation analysis is necessary in order to determine if the body part to be rated is applicable for a work-related impairment rating. By stating that she made no causation analysis, Dr. Shenoi is indicating that she is not making an opinion as to whether the rating provided is applicable to the work injury. The rating itself was otherwise technically correct. However, without any causation analysis, there is no indication that the impairment rating is applicable to the work injury of November 11, 2019. According to Desk Aid 11 impairment rating tips number 7, division independent medical examiner may declare that a condition is not work related. This may occur despite the fact the payer has accepted a body part or a diagnosis as part of the claim. In [Claimant]'s case, treatment has occurred and MMI has

been declared by an authorized provider. Considering the late onset of [Claimant]'s cervical symptoms, and a new non-accident-related event that caused the onset of these symptoms in April of 2020, it was essential that Dr. Shenoi perform a causation analysis in order to opine as to the relatedness of the cervical impairment.

C. <u>Dr. McCranie's Deposition:</u>

22. Dr. McCranie testified by deposition on June 1, 2022 as a board certified physiatrist and pain medicine specialist, with a Level II accreditation. She noted that she continued to see both private patients, including at Concentra twice a week, and patients for medicolegal evaluations with approximately 30 years of experience. Dr. McCranie indicated she was familiar with the *AMA Guides to the Evaluation of Permanent Impairment,* Third Edition (*Revised*), WCRP and the Impairment Rating Tips of the Colorado Division of Workers Compensation.[6] She specifically noted that Rule 11-3(K) required that each DIME physician make "all relevant findings regarding MMI, permanent impairment, and apportionment of impairment, unless otherwise ordered by an ALJ." Dr. McCranie stated that a causation analysis was an integral part of conducting a determination of permanent impairment. She specified that physician were required to comply with the Rules, the Division materials and Level II accreditation coursework.

23. Dr. McCranie testified that following the review of the medical records and consideration of the history provided by Claimant, March 10, 2020 was the first medically documented problem, including some tension in her neck and some right upper extremity paresthesias. The first documented pain in her cervical spine/neck was on May 15, 2020. Dr. McCranie explained that in order to link a cervical injury to the original date of injury, there needed to be a temporal relationship between the onset of symptoms and the initial accident, which was not present in this case. What was significant here is that Claimant reported to Dr. McCranie that she was cleaning out her closet in April of 2020, and she was reaching, lifting and moving some hair products, towels and sheets from her closet, and had an acute onset of neck pain and right shoulder pain at the point that brought on a lot of these symptoms, which was a more probable cause of Claimant's neck and shoulder pain.

24. Dr. McCranie specifically noted that Dr. Shenoi was aware that the medical records indicated Claimant had not reported any problems until the March 10, 2020 date when she reported tension in her upper back and neck, that Dr. Shenoi was aware of the "closet" incident, but that Claimant had stated that she had felt a pop in physical therapy as an explanation of when she started to have problems in her neck and upper back. Dr. McCranie explained that it was incorrect to simply rely on a Claimant's claim that any particular injured body part was caused by the injury but it was up to the DIME physician to make and explain the causation analysis. As a DIME physician, it is up to that physician to determine the injuries or body parts that are causally related to the work injury in question and the DIME physician cannot rely on the items check off on the Application for

[6] Division's Desk Aid No. 11, Impairment Rating Tips, Division of Workers Compensation Rules of Procedure.

a DIME. Finally, Dr. McCranie opined that Dr. Shenoi committed a clear error in addressing MMI and impairment and declining to address causation of the particular body parts, which rendered her opinions on impairment clearly incorrect under the *AMA Guides*, Third Edition, and the Division training material. Dr. McCranie stated that based on the Division's Rules of Procedures specifically dealing with DIMEs and Level II accreditation, the Division's Impairment Ratings Tips, the training for recertification, the requirement that physicians utilize the methodology in the *AMA Guides*, Third Edition, it is absolutely incumbent on a DIME physician to do a causation analysis.[7] Dr. McCranie also suggested that Dr. Shenoi relied on the fact that the ATPs had provided treatment which was paid for by Respondents. This ALJ agrees with Dr. McCranie's inference that in relying on the fact that Respondent paid for the treatment for the cervical spine that it justifies addressing impairment to that body part as related to the November 11, 2019 work injury, which is clearly incorrect.

25. Dr. McCranie cited to the Impairment Rating Tips. The Section on DIME Panel Physician Notes, under Section 7, the tips emphasize as follows:

> Declaring Condition is Not Related to Injury: Division Independent Medical Examiners may declare a condition is not work-related. This may occur despite the fact a payer has accepted a body part or diagnosis as part of the claim, treatment has occurred, and MMI has been declared by the authorized provider. If this situation arises, an impairment rating must be provided in the report or as an addendum to the DIME report. This information will often be used by the parties for further negotiations and/or settlement of the claim. However, only the work-related impairment ratings are to be recorded on the DIME Examiner's Summary Sheet.

D. Dr. McCranie's Hearing Testimony:

26. Dr. McCranie's testimony at hearing was consistent with her testimony during the deposition and her reports. She opined that, considering the degenerative disc disease in the spine as verified by the MRI report of the cervical spine and the evidence of acute injury sometime in April or May 2020, when she reported excruciating pain, the incident of the closet was the more likely cause of the neck injury. Further, Dr. McCranie did explain, that sometimes, ATPs take time to make a final causation analysis, which Dr. Matus provided in his MMI report. She opined that the fact that Claimant was sent to multiple providers, including Drs. Chan, Ogin, and Castro, for the neck injuries, was not a *de facto* determination of causation.

27. Dr. McCranie opined that Dr. Shenoi's failure to specifically address causation in her DIME report was clearly incorrect. She explained that, based upon her understanding of the Division of Worker's Compensation Rating Tips, the *AMA Guides to the Evaluation of Permanent Impairment*, Third Ed. (*Revised*), and other medical publications that the failure to perform or provide a causation analysis to support her cervical impairment rating rendered her opinion on medical impairment clearly incorrect

[7] At hearing Dr. McCranie explained that the *AMA Guides to the Evaluation of Disease and Injury Causation* explains a somewhat different and more expansive methodology of causation determinations. However, This ALJ will only rely on the law and rules applicable in this matter.

because a DIME physician must do a causation analysis for every body part that is rated and that it is insufficient and contrary to the impairment rating tips simply because the claimant had received treatment for the body part to provide a rating. Dr. McCranie also explained that the causation analysis required both an explanation of the temporal relationship of when the symptoms manifested as well as an analysis of the mechanism of injury. Dr. McCranie opined that without this analysis regarding the initial causation, the entire rating process was defective.

E. <u>Risk Manager's Testimony:</u>

28. The Risk Manager for Employer (Redacted, hereinafter JO) testified at hearing in this matter. She stated that she handled the workers' compensation claims until the excess policy carrier was activated by large expenses. As the Risk Manager she managed, monitored, reviewed, and made decisions with regard to workers' compensation claims and liability. She was generally involved from day one of a claim. She was the one that issued the First Reports of Injury (FROI) and made sure she was getting the M-164 forms to determine a worker's work status. She commented that she stayed involved in a case until the end of the claim.

29. The Risk Manager explained that Employer saw claims from the perspective of getting workers back to work, so they may authorize medical care that may not necessarily be related to the particular work accident. Employer would frequently request that providers conduct diagnostic testing early on in the case instead of delaying the process, in the hope that conservative care would work and the worker would get back to work sooner.

30. JO[Redacted] was involved in the case, however, a younger adjuster through the third party administrator, who may not have felt confident enough to question the ATP's causation analysis, was handling the day to day issues. JO[Redacted] testified she might have handled this case differently but she had a wealth of approximately 30 years' experience. It was clear that the adjuster continued to authorize care despite a lack of a good causation analysis, until she, as the Employer's Risk Manager, requested the IME with Dr. McCranie.

31. The Risk Manager was very familiar with the modified job offers made to Claimant and was involved in the process. The February 9, 2021 offer was for Claimant to perform some office work and watch safety videos (approximately 50 of them) in order to keep Claimant busy and engaged in work activities. Dr. Matus authorized this modified job offer on the same day and Employer sent the offer of modified work for Claimant to start on February 15, 2021. On March 28, 2021 Claimant advised her supervisor that she had completed the safety videos so modified duty was terminated.

32. Based on the FAL of July 22, 2021, Claimant was originally paid regular salary through December 12, 2019 (pursuant to Sec. 8-42-124, C.R.S.) at which time the Third Party Administrator paid TTD benefits beginning December 13, 2019 through January 27, 2021. Then Claimant was paid temporary partial disability (TPD) on January

28 for one day and TTD resumed as of February 1, 2021 through February 15, 2021. As of February 18, 2021[8] Claimant was paid TPD until March 28, 2021.

33. Then JO[Redacted] worked with Nutrition Services because they were frequently understaffed. At that time they were making sandwiches for the lunch truck that was provided to the children and community. They were to have Claimant sitting at a conference room table, where other workers would bring the ingredients and Claimant could make the sandwiches.

34. JO[Redacted] stated that Claimant never went back and that Dr. Matus had said that the job was within her restrictions. The Risk Manager stated that Claimant was not placed back on temporary total disability because Claimant was the one to violate the April 9, 2021 Rule 6 offer of modified employment and that the job was still available. Then school ended on May 27, 2021, and because the bus drivers were paid on a twelve month cycle despite summer time off, they restarted to pay regular wages, despite Claimant not working.

35. JO[Redacted] stated that while the pay check periods showed payment at the end of the month, the period of payment was not correct because Employer's pay period was really from the middle of the month through the middle of the following month. This ALJ infers from this testimony that, for example, the March 31, 2021 pay check actually paid from February 15 through March 14, 2021. This was confirmed by Claimant.

36. JO[Redacted] was on vacation through April 26, 2021 and prepared a letter to Dr. Matus, which was sent on May 13, 2021 with a job description of assembling and bagging hoagie sandwiches. On May 14, 2021 Dr. Matus answered stating that the prior restrictions provided by Dr. Ogden were still applicable, as long as the job did not require any work lifting greater than 10 lbs. and that Claimant be able to keep her arm close to her side. As found, this is a new restriction as of May 14, 2021.

37. Respondent argued that Employer should be entitled to a reimbursement for overpayment to Employer of the 24 hours paid to Claimant at the rate of $20.75 per hour for a total of $498.00, if Claimant was entitled to temporary disability benefits. JO[Redacted] stated that this was for the period of April 27, 2021 through April 30, 2021 paid by Employer.

38. JO[Redacted] testified that Claimant returned to work at full wages as of March 29, 2021 and temporary partial disability benefits stopped per the Final Admission of Liability (FAL) dated July 22, 2021.

39. The statement of earnings showed that in March[9] 2021 Claimant was paid $2,033.49,[10] in April 2021 she was paid $1,523.67, in May she was not paid any wages, in June she was paid $814.44 and in July she was paid $814.44 as well.

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[8] There was no explanation as to why Claimant was not paid for February 16 and 17, 2021, but it does show on the time log that she worked 6 hours a day for both days and it is to be assumed that those hours were paid by Employer.

[9] Pay periods were calculated on a monthly bases from the first to the last day of any given month and paid generally on the last day of the month.

[10] This ALJ was unable to reach the same calculation by Employer, at least with the March 31, 2021 Employee Statement of Earnings. Claimant's rate of pay was $20.75. The accrual wages showed 108

40. The hours worked print out showed Claimant working from March 29, 2021 through April 9 2021. This is consistent with what the Risk Manager testified, with the exception that it did not seem that Claimant worked her full hours all days following March 29, 2021. In fact, there were some periods that were listed as "Leave Without Pay."

F. Other Evidence:

41. On May 21, 2021 Claimant secured the signature of the supervisor approving the note stating that Claimant had showed up for work on April 26, 2021 but spoke with both the Nutrition Services Manager (supervisor) and her assistant (JC), that she was unable to make the sandwiches because of the repetitive nature of the job. The supervisor confirmed that she took down Claimant's phone number and advised Claimant to go home. The Manager further confirmed that she would call Claimant "when she found out what they should do." Claimant's testimony in this matter is found credible and supported by the supervisor's signature on the note.

42. The note further stated that Claimant worked on April 22, 2021[11] and could punch the clock at Nutrition Services but the "Oracle" system would not take her badge number. The time clock report at Exhibit Q, bate 134 seems to indicate that Claimant did, in fact, work on April 22 as it reports "5 Trans_Bus Cleaning" and provides a rate of pay. It is also clear from this print out that Claimant's work was not logged into this system after April 22, 2021. However, Claimant reported working May 24, 25, and 27, 2021 and on June 1, 2021 she received instructions from the Risk Manager to enter May 28, 2021 as work injury leave.[12] Therefore the hourly payroll print out is clearly erroneous. Also, no payroll was paid in May and the June payroll earnings statement does not include any hours worked.[13]

43. A second note dated May 24, 2021 stated that on April 23, 2021 Claimant showed up for her work shift but was in pain, feeling she needed to see her doctor, so she would not be working. The front desk receptionist agreed and noted that she would let "them" know.

44. The third note dated May 27, 2021 stated Claimant worked hours for May 24, 25, and 27, 2021. It noted Claimant was working without breaks, took May 26, 2021 off as a personal day, and on May 28, 2021, pursuant to the Assistant, JC, that she should not go into work. Claimant stated this document was signed by another supervisor (JCS-D). These dates and times were also sent to the Risk Manager, who confirmed that May 28, 2021 should be entered as work injury leave.[14]

G. Claimant's Testimony:

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hours were paid at $1,960.88. However, 108 hours multiplied by $20.75 equals $2,241.00 not $1,960.88. Even if we deduct the leave without pay of 11.50 hours from the 108 hours, that would total 96.5 hours times $20.75 for $2,002.37. There may be something this ALJ is not aware of and certainly was not clarified during JO[Redacted] testimony or Claimant's testimony.

[11] The note showed the year 2020 but given the time line of work and when work was offered, this ALJ infers that the correct year was 2021.

[12] Exh. 8.

[13] Exh. P, bates 111-112.

[14] Exh. 8.

45. Claimant testified that she continued to suffer from the effects of the injury at the time of the hearing. She stated that the treatment she received, including physical therapy, massage therapy, and the different injections helped her, but when she returned to her job of injury, she continued to have the symptoms. She also stated that treatment was delayed during some period because of the COVID pandemic and most of 2020 she was off work. Treatment was also delayed because she was struck with pneumonia and was out for multiple weeks without the ability to attend any medical appointments.

46. Claimant stated that she was initially seen at the original WorkWell for her physical therapy but because of how busy they were, she changed over to get PT at the Parker WorkWell. Claimant testified that they treated her neck symptoms in PT from the beginning as well.

47. Claimant testified that she reported the neck complaints from the beginning of her injury to her providers. As found, this was not documented in the medical records provided as evidence in the matter, though there was a dearth of records from the time period of November 11, 2019 through March 9, 2020.

48. Claimant stated that when she returned to work on January 28, 2021, she spoke with the coordinator about having problems driving the bus. She was taken back off work and WC started paying her again. Eventually she receiving the modified duty offer.

49. The offer went to Claimant on April 9, 2021 to start as of April 15, 2021. Claimant testified she started with Nutrition Services on April 22, 2021. Claimant reported that she had concerns that the work was outside her restrictions and was too repetitive. On the following day, April 23, 2021 Claimant showed up to work but left work that day to go to the doctor. On April 26, 2021 she advised her supervisor that the work was violating her restrictions. Nutrition Services did not know what to do so they sent her home. As found, Claimant is credible in this matter.

50. When she went to Nutrition Services she would have to reach for the items she needed, which was causing increased symptoms and problems for her. At one point she was delegated to just opening bags, and she had to open over two thousand baggies in one day and was in so much pain, she could not tolerate that work. She testified that she called the Risk Manager and she called Dr. Ogden without response. Claimant was frustrated by the fact that she could not clock in and out of Nutrition Services because officially, she was not one of their employees. Claimant testified that she went to WorkWell and was seen Dr. Ogden's PA on April 23, 2021.

51. She testified that she went to work on April 26, 2021. This was confirmed by signature of the supervisor. She reported that the work was outside of her restrictions. She stated that she never told the Manager or the supervisor that she could not do any of the work, only that she could not do the baggies all day, opening them. Nutrition Services did not know what to do with her. She was willing to do something other than opening the hoagies bags. Dr. Matus never took her off work completely but provided restrictions.

52. Claimant was then sent home by the Nutrition Services supervisor and was told by the supervisor that she would call Claimant when she knew something. Claimant

testified that she never received any calls after April 26, 2021 from Nutrition Services, HR or from the Risk Manager. She stated that it really was not her choice to leave. She had, at one point been making cookies from boxes of frozen ones and put them on trays to bake them, something she could do. It was really not her choice to leave but the work of opening baggies repetitively, was too much.

53. She stated that she prepared, typed and took the note dated May 21, 2023 to the Nutrition Services Manager and had her sign it to confirm the statements. Claimant did confirm she did not work in either June or July, as school was out. She did work at the end of May, 2021, after which she was again sent home. Claimant stated that she had worked some days in April and in May, 2021 but did not recall which ones exactly, other than the ones mentioned on the notes that the supervisors signed.

H. <u>Ultimate Findings:</u>

54. As found, Respondents have shown by clear and convincing evidence that Dr. Shenoi was incorrect in her final assessment of Claimant's impairment for the cervical spine being caused to the work accident. Dr. Shenoi failed to accomplish one of the integral requirement of a DIME physician in that she declined to make causation assessments in this matter. While she issued an impairment rating for the cervical spine and the left lower extremity, this does not equate to a determination of causation. A determination of causation cannot be declined or evaded. It is a requirement established by the Act, case law, the AMA Guides, the WCRP, the Level II accreditation materials as well as the Division's Impairment Rating Tips.

55. As found, the lumbar spine and left lower extremities are causally related to the November 11, 2019 work related injury.

56. As found, Claimant reached MMI with regard to the work related medical conditions on July 9, 2021, as opined by both the ATP, Dr. Matus, and Dr. Shenoi.

57. As found, the cervical spine injury was not causally related to the November 11, 2019 work injury and, despite Dr. McCranie's and Dr. Shenoi's rating of the cervical spine, no benefits are indicated in this matter.

58. However, also as found, all providers who address the condition of the left lower extremity indicated that the left lower extremity injury was causally related. This is persuasive. The ATP provided no rating nor did he take any range of motion measurements as required by the *AMA Guides to the Evaluation of Permanent Impairment*. Dr. McCranie, while she mentions that Claimant had full range of motion testing, she did not provide a worksheets upon which to rely, nor did she address the Claimant's loss of sensation. Therefore, as found, Dr. Shenoi's lower extremity impairment is found to be persuasive in this matter. Claimant is entitled to a 1.25% impairment of the lower extremity related to the peroneal nerve loss of sensation.[15]

59. As found, Claimant was under restrictions from March 29, 2021 through July 8, 2021, after which she was placed at MMI by the ATP. Claimant has shown she was

[15] As this is an ankle and foot injury, the scheduled impairment is appropriate.

entitled to temporary disability benefits from March 29, 2021 through April 9, 2021 and April 22, 2021through July 8, 2021.

60. As found, Respondents failed to show Claimant was responsible for her wage loss. Dr. Ogden's restrictions were "avoiding reaching out or overhead" as well as allowing "position changes sit/stand/walk every 20-30 minutes." Dr. Matus agreed with these restrictions and added that as long as the job did not require any work lifting greater than 10 lbs. and that Claimant should keep her arm close to her side. Dr. Matus again confirmed these restrictions on June 21, 2021 stating Claimant should "Limit use right upper extremity, avoid repetitive reaching out or overhead. Limit lift, push and pull 5 pounds max. Must be able to change positions regularly between sit/stand/walk, recommend at least every 20-30 minutes."

61. As specifically found, Claimant never received a call between April 26, 2021 through the time she returned to work in May, 2021 due to poor communication between the assigned Manager of Nutrition Services and the Risk Manager or HR. Claimant was found to be credible in this matter. As found she was provided instructions to go home and await a phone call. The Manager of Nutrition Services specifically took down Claimant's phone number down and it was reasonable to assume, if Employer wanted Claimant to return to work that the Manager of Nutrition Services or another of Employer's delegated individual would call Claimant or communicate with her in some manner. This was confirmed in the note signed by the Manager on May 21, 2021. Even the note of May 27, 2021, when Claimant was working, showed that Claimant was not provided the required breaks pursuant to Dr. Ogden's and Dr. Matus' recommendations.

62. As, found, Claimant is entitled to temporary disability from March 29, 2021 through April 14, 2021, when Claimant should have started work pursuant to the modified job offer dated April 9, 2021. This ALJ infers that Claimant did not stop working as of March 28, 2021 but April 9, 2021, as shown by the wage records, when she was working irregular hours. Claimant showed up for work on April 22, 2021 instead of April 15, 2021. Claimant is not entitled to indemnity benefits from April 15, 2021 through April 21, 2021.

63. As found, Claimant is entitled to temporary disability benefits from April 22, 2021 through July 8, 2021, after which Claimant was placed at MMI without restrictions. Claimant credibly testified that she believed the work was not within her restrictions as she was working without breaks and in a repetitive manner. On April 26, 2021 her supervisor at Nutrition Services sent Claimant home, advising Claimant that the supervisor of Nutrition Services would call her when she found out what to do. At no time was any credible evidence provided that Nutrition Services called Claimant back to report to work. Claimant returned to work on May 24, 2021, and worked the 24th, 25th and 27th, the last day the school was open. Claimant was instructed that she should not go into work on May 28, 2021 by the Nutrition Services assistant supervisor (JC). This was confirmed by another supervisor (JCS-D). He also confirmed that Claimant had no breaks, despite the restrictions imposed by Dr. Ogden for breaks every 20-30 minutes.

64. As further found, the wage records are insufficient to determine what periods were paid by employer as the wage records and time record are not clear, nor do they show which days and hours were paid by Employer. Therefore, the parties need to

exchange this information and agree on the TTD and TPD to be paid or provide it to this ALJ for further determination of the exact amounts to be paid by Respondent, if anything.

65. Testimony and evidence inconsistent with the above findings are either not credible, significantly relevant 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 any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

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

B. Overcoming the DIME Physician's determination of MMI and Impairment

Respondent argues that the DIME physician, Dr. Shenoi, was incorrect in multiple manners with regard to Claimant's MMI status and work related impairment ratings. The party challenging a DIME physician's opinions must prove that the DIME physician's determinations were incorrect by clear and convincing evidence. Section 8-42-107(8)(C), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003); *In re Claim of Lopez*, 102721 COWC, 5-118-981 (Colorado Workers' Compensation Decisions, 2021). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the determination is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002).

The DIME physician must assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. See *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 2002). Consequently, when a party challenges the DIME physician's opinion, the Colorado Court of Appeals has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning her opinions, 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*. Further, deviations from the *AMA Guides* do not mandate that the DIME physician's opinion is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to reach a particular determine is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008); *In re Claim of Pulliam*, 071221 COWC, 5-078-454-001 (Colorado Workers' Compensation Decisions, 2021). 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. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 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*.

The Act requires a DIME physician to comply with the *AMA Guides* in performing impairment rating evaluations. Sec. 8-42-101(3)(a)(I) & Sec. 8-42-101 (3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the *AMA Guides.* A determination of MMI requires the DIME physician to asses, as a matter of diagnosis, whether various components of the claimant's medical condition are casually 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). In determining whether the physician's rating is correct, the ALJ must consider whether the physician correctly applied the *AMA Guides* and other rating protocols. *Wilson v. Industrial Claim Appeals Office*, *supra*. The determination of whether the physician correctly applied the *AMA Guides* is a factual issue reserved for the ALJ. *McLane W., Inc. v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, *supra*. The question of whether the DIME physician's rating has been overcome is a question of fact for the ALJ to determine, including whether the physician correctly applied the *AMA Guides*. *Metro Moving and Storage Co. v. Gussert, supra*.

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals 11 Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Similarly, when a DIME physician's opinion is contrary to the Act, it is grounds for overcoming the DIME because the DIME report is legally incorrect. See *In re Claim of Lopez*, *supra*. Lastly, where an ALJ finds a claimant's description of her present symptoms credible, this is sufficient to overcome the DIME physician's opinion. *In re Claim of Conger*, 100521 COWC, 4-981-806-001 (Colorado Workers' Compensation Decisions, 2021).

It is clear from the evidence that Dr. Shenoi's true opinion is that, as a DIME physician, she need not address the issue of causality with regard to the different components of Claimant complaints of work related injuries. This is inconsistent with the law as established by the Act, the *AMA Guides*, the WCRP, the Division's teachings under Level II accreditation and the Impairment rating tips. Dr. McCranie is persuasive in this matter that the issue of causality is an integral part of the DIME process as well as the medical process of any physician in the workers' compensation system. She persuasively testified that a failure of a DIME physician to conduct a causation analysis before assigning an impairment rating violates the *AMA Guides* as to causation, multiple DOL rules of procedure as well as recognized standards among level II physicians for performing impairment ratings.

Dr. McCranie's opinion that Dr. Shenoi's impairment rating is "clearly incorrect" is unrebutted in the medical records or in the hearing testimony. Unlike other situations wherein a Court has to interpret multiple or even conflicting opinions from a DIME; in this case there are no such conflicting opinions with regard to causation. In fact, there are no opinions from Dr. Shenoi on causation because she failed to provide one and specifically stated she declined to do so.

Claimant argues that since Dr. Shenoi provided a diagnosis for the neck, that it is to be assumed that it was related to the November 11, 2019 incident. However, Dr. Shenoi also lists upper extremity paresthesias as well as shoulder pain and did not perform an impairment evaluation on those body parts or explain sufficiently why she did not provide ratings for the shoulder injuries. Claimant also argued that it can be assume that Dr. Shenoi adopted a causation analysis because she was aware from the medical records that Claimant had received extensive authorized medical treatment for her cervical spine under this workers compensation claim. However, as testified to by Dr. McCranie, and as set out the Division's Impairment Rating Tips, Division has made it clear to Level II physicians and DIME physicians that simply because a specific condition is identified on a DIME application and/or simply because medical treatment has been voluntarily provided for a specific body part, causation is not to be assumed.

Here, as found, Dr. Shenoi made the assumption that, since treatment was authorized for the cervical spine, that Respondent was liable and therefore rated the cervical spine. As found, Dr. Shenoi was in error. This is further supported by the fact that she discussed Claimant's shoulder issues. She stated that, since the shoulder was not checked off on the Application for a DIME, that she need not address it. This is another assumption that is incorrect. A DIME physician has an obligation to consider all body parts and make causation determinations with regard to those body parts, whether they are or not related to the injury in question, and only then can a DIME physician make determinations whether Claimant has reached MMI for those related conditions and/or if the related conditions justify an impairment rating. Dr. McCranie's testimony in this regard is credible and persuasive. Respondents have shown by clear and convincing evidence that Dr. Shenoi was clearly incorrect and have overcome the DIME physician's opinions by clear and convincing evidence.

C. Maximum Medical Improvement

Where a party has carried the initial burden of overcoming the DIME physician's opinion by clear and convincing evidence, the ALJ's determination of the correct MMI determination or rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence." *Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When the ALJ determines that the DIME has been overcome, the ALJ may independently determine the correct rating or date of MMI. *Lungu v. North Residence Inn*, WC 4-561-848 (ICAO, Mar. 19, 2004). An ALJ may thus determine whether a claimant has reached MMI and assign an impairment rating as a question of fact. *Destination Maternity and Liberty Mutual Insurance Company v. Burren*, 19SC298 (Colo. May 18,

2020); *see Niedzielski v. Target Corporation*, WC 5-036-773-001 (ICAO, Mar. 9, 2020) (when an ALJ determines that a DIME opinion has been overcome, the issue of the claimant's correct impairment rating becomes a question of fact and the ALJ may calculate the impairment based upon a preponderance of the evidence).

In this matter, Claimant's ATP, Dr. Matus, determined that Claimant was at MMI as of July 9, 2021. Claimant continued to have treatment, including therapy for the work related condition until that time. While Dr. McCranie identified an earlier date, based on her review of the medical records, this is only considered speculation as Dr. McCranie did not evaluate Claimant at that point in time. Once Dr. McCranie did evaluate Claimant and the report was provided to the ATP, the ATP had the option to make a determination of when Claimant reached MMI, and he did so by stating Claimant had reached MMI with regard to her lumbar spine and lower extremity injury on July 9, 2021. This opinion is more credible and persuasive than Dr. McCranie's speculative choice. Claimant has proven that she reached MMI as of July 9, 2021.

D. Permanent Impairment Ratings

Here, the parties must show by a preponderance of the evidence what the proper determination of impairment with regard to the work related conditions should be. But before this can be address, it is essential to have a determination of which injuries are causally related to the November 11, 2019 accident.

In this matter, it is found that the cervical spine is not a work related injury caused by the November 11, 2019 work related event. The medical records in evidence, supported the opinion of Dr. Cazden and Dr. McCranie, that Claimant did not have the cervical spine and shoulder complaints until sometime in March or April 2020, well over four months from the date of injury. While Claimant did state that the "closet" incident was not the cause of the neck and shoulder conditions, this was not persuasive. Dr. McCranie persuasively testified that it was more likely that the closet incident was the cause of those conditions and that, in order to link a cervical injury to the original date of injury, there needed to be a temporal relationship between the onset of symptoms and the initial accident, which was not present in this case. This is also true of the Claimant's continuing bilateral upper extremity symptoms. Dr. McCranie credibly opined that Claimant's continuing complaints involving the cervical spine and the right greater than left upper extremity paresthesias, which were not documented until March 10, 2020, were not work related conditions.

Lastly, Dr. McCranie credibly opined that the right shoulder labral tear was not related to the November 11, 2019, injury, as an acute labral tear would cause immediate, severe pain in the shoulder and Claimant did not report shoulder pain for approximately seven months post-accident. Dr. McCranie credibly explained that what was significant here is that Claimant reported to Dr. McCranie (and to Dr. Shenoi) that she was cleaning out her closet in April of 2020, and she was reaching, lifting and moving some hair products, towels and sheets from her closet, and had an acute onset of neck pain and right shoulder pain at that point that brought on a lot of these symptoms, which was a more probable cause of Claimant's neck and shoulder pain. Respondents have shown that it was more likely than not that the cervical spine condition and the bilateral shoulder conditions are not related to the November 11, 2019 work related accident.

It is further found that Claimant has shown that the lumbar spine and the left lower extremity conditions are related to the claim by a preponderance of the evidence. This determination is supported by the medical records of Claimant's initial treatment records that are available. None of the rating physicians have provided a lumbar spine rating in this matter. Therefore, Claimant's lumbar spine rating is 0%.

Claimant has shown that the lower extremity condition continues to have an impairment cause by loss of sensation due to damage to the peroneal nerve. Dr. Shenoi persuasively rated Claimant's lower extremity impairment at 1.25% of the lower extremity in accordance with the *AMA Guides* to the Evaluation of Permanent Impairment, Third Edition (*Revised*). This was not addressed at all by Dr. McCranie. Therefore, Dr. Shenoi's determination of permanent impairment of the lower extremity cause by the damage to the peroneal nerve is more persuasive than any contrary determination. Claimant has shown by a preponderance of the evidence that it was more likely than not she has a 1.25% lower extremity impairment rating.

E. Temporary Disability Benefits

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

As found, Claimant was under restrictions from March 29, 2021 through July 8, 2021, after which she was placed at MMI by the ATP. Here, Claimant was paid TTD through March 28, 2021. Claimant credibly testified that, when she completed watching the videos, she advised her supervisor that she had completed her assigned tasks. No further offers of employment were made by Employer between March 29, 2021 until April 9, 2021. As found, Claimant was not responsible for her wage loss. Claimant continued

to be under restrictions due to the work related injury at this time. As found, Claimant has shown by a preponderance of the evidence that she was entitled to temporary disability benefits between March 29, 2021 through April 14, 2021.[16]

On April 9, 2021 Employer sent Claimant an offer of modified duty to begin April 15, 2021. This job offer was approved on April 11, 2021 by one of Claimant's ATPs, Dr. Paul Ogden. The job was to report to Nutrition Services by April 15, 2021. Claimant failed to report until April 22, 2021. Therefore, as found, Claimant was not entitled to temporary disability benefits from April 15, 2021 through April 21, 2021.

Claimant started work on April 22, 2021. On April 23, 2021 Claimant reported to work but was in significant pain due to the repetitive nature of the tasks assigned and went to her provider. On April 26, 2021 Claimant advised her supervisor that the work was violating her restrictions due to the repetitive nature of the job. Nutrition Services did not know what to do so they sent her home. As found, Claimant was credible in this matter and, as found, she was not responsible for her wage loss. While Employer consulted with Claimant's treating provider, Dr. Matus on May 13, 2021 to determine if Claimant's job with Nutrition Services complied with Claimant's restrictions. He stated that "presuming she can keep her arm close to her side this should not preclude assembling sandwiches and placing them in bags." However, Nutrition Services nor the HR manager communicated that new restriction to Claimant nor that they would accept Claimant back to work under those terms. Claimant was credible in this regard. As found, Claimant was no responsible for her wage loss and Claimant has shown by a preponderance of the evidence that she was entitled to temporary disability benefits from April 26, 2021 through May 23, 2021 and May 28, 2021 through July 8, 2021.[17]

The exact amount of temporary disability benefits is not determined at this time as the wage records, Employer payments as well as the third party administrator's payments are incomplete. Neither can it be determined whether the temporary benefits are temporary total or temporary partial that are due and owing. Respondents shall provide Claimant an accounting of the wages paid to Claimant and the exact dates paid. Should the parties be unable to calculate the amount, the parties may provide the information within 10 days of this order and this ALJ may issue a Supplemental Order.

ORDER

IT IS THEREFORE ORDERED:

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[16] The wage records at Respondent's Exhibit Q are specifically found not to be accurate or credible, because we know that Claimant worked on May 24, 25 and 27 and these records fail to show the hours worked. This was confirmed by a supervisor at Exhibit 7 bate 45, and Exhibit 8 email from the Risk Manager.

[17] Employer argued that Employer's payment of $498.00 for wages paid from April 27, 2021 through April 30, 2021 should be credited or offset from any benefits paid. However, this is beyond this ALJ's purview and jurisdiction to address. Only benefits under the Act may be determined in this venue.

1. The Stipulation of Facts signed by the parties on March 29, 2023 are approved. The Stipulation of Facts is the official transcript of the November 15, 2022 hearing.

2. Respondent overcame Dr. Ranee Shenoi's DIME opinion by clear and convincing evidence.

3. Claimant was at MMI as of July 9, 2021.

4. Respondents shall pay permanent partial disability of 1.25% extremity impairment in accordance with Dr. Shenoi's impairment of the lower extremity for the peroneal nerve injury.

5. Respondents shall pay temporary disability benefits from March 29, 2021 through July 8, 2021.

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

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

DATED this 6th day of April, 2023.

Digital Signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-218-738-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable left knee injury in the course and scope of his employment on August 10, 2022.

IF THE CLAIM WAS DETERMINED TO BE A COMPENSABLE INJURY, THEN:

II. Whether Claimant proved by a preponderance of the evidence that the left total knee replacement recommended by authorized treating provider ("ATP") Lucas G. Schnell, D.O. is reasonable, necessary, and related to the August 10, 2022 work injury.

III. Whether Claimant established by a preponderance of the evidence an average weekly wage ("AWW") of $1,808.24 a week, based upon his 52 weeks of earnings prior to his date of injury, which wage comports to a temporary total disability ("TTD") rate of $1,205.49.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on December 2, 2022 on the issues of compensability, medical benefits that are reasonable, necessary and related to the injury, causation of the injury, average weekly wage, and entitlement to TTD benefits. At hearing, Claimant withdrew the issue of TTD benefits.

On December 30, 2022, Respondent filed a Response to Claimant's December 2, 2022 Application for Hearing citing issues of relatedness, pre-existing condition, reasonable and necessary medical benefits, and average weekly wage.

Claimant testified on his own behalf in this matter.

At the commencement of the hearing, Claimant offered to stipulate that Claimant's average weekly wage ("AWW") was $1,808.24, based upon 52 weeks of earnings prior to his date of injury. Respondent conceded that Claimant's average weekly wage was $1,808.24 in Employer's position statement. The stipulation of the parties is approved and incorporated in this order.

FINDINGS OF FACT

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

1. Claimant was a 55-year-old corrections security officer who has worked for Employer for 25 years. On August 10, 2022, Claimant was serving the position of a night

shift supervisor at one of Employer's youth services center. The center is for "at risk" youths and he and a staff of 10 performed nightly rounds and responded to any situations that arose, which included handling physical management and would respond to medical situations.

2. Claimant had a prior history of left knee injuries. On April 20, 2007[1], Dr. Mark Failinger examined Claimant and noted a tear of the cartilage or meniscus of the knee, negative Lachman's, some joint line pain and minimal effusion with good motion. He noted that the cortisone injection had "helped tremendously" and he was very happy with the results. Dr. Failinger noted that "[U]nfortunately he knows he has significant arthritis and unfortunately there is not "any cure" for that, but we are trying to manage to progress him, doing as many things as possible without making his symptoms worse." At that time, Dr. Failinger recommended conservative care but not an unloader brace.

3. On August 10, 2022, prior to Claimant's work related aggravation, he attended an appointment with his primary care provider at Kaiser, Tracy Frombach, D.O. for issues regarding his left knee. At that evaluation, it was Dr. Frombach's assessment that Claimant had "osteoarthritis of the left knee … left knee instability," and Dr. Frombach stated:

> We did discuss operative and non operative (sic.) options of knee arthritis. The patient does not want to consider knee replacement surgery at this time he wants to consider repeat steroid injection to see how well this does
> Unloader brace was also offered to the patient due to his instability. He wants to avoid bracing at this [2]

4. On exam, Dr. Frombach noted some left knee tenderness palpation over the lateral joint line but not the medial joint line, range of motion from 0° to approximately 130 without any pain, varus stress with LCL[3] mild laxity, valgus negative, and a negative McMurray. Dr. Frombach ordered x-rays, which showed no acute osseous abnormality but the prior left ACL repair changes were seen with severe lateral compartment osteoarthritis and a moderate suprapatellar joint effusion and noted prepatellar soft tissue swelling. Dr. Frombach performed a steroid injection and ordered physical therapy.

5. Following the visit with Dr. Frombach, Claimant reported to work for the evening shift of August 10, 2022. Claimant was involved in physical management training with other employees and was injured during one of the training exercises. He was involved with inserting himself between two other employees to show a technique when avoiding stepping on them, he twisted his left knee and it immediately gave out, causing swelling and severe pain.

6. Claimant testified that while his knee was somewhat sore while going up steps before, now it dislocates going up and down steps and he has to use a knee brace every day. Further his pain is only tolerable with medications. This has also caused

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[1] The April 20, 2007 visit with Dr. Failinger was for a date of injury of September 21, 2003.

[2] There are two versions of this note. The first stated "patient does want want (sic.) to consider knee replacement" and the other stated "patient does not want to consider knee replacement." This ALJ made the logical determination and inference that the provider realized the grammatical error and corrected his record.

[3] LCL is assumed to be lateral collateral ligament.

further mental health issues and is currently taking medication for that as well due to the pain and adjustment disorder.

7. On August 12, 2022, Claimant presented at the Employer's designated medical provider "Injury Care Associates of Thornton" where he was evaluated by James Fox, M.D., an authorized treating physician (ATP) who took a Report of Injury as setting forth:

> Patient is employed as a corrections officer and was injured on 8/10/22 during a training exercise inadvertently stepped in between 2 participants and twisted his left knee. Of note, pt has a history of ACL reconstruction in 1989. He denies any significant knee problems in the past 20 years but states that he had arthroscopic evaluation of his knee twice in the "2000s". Patient is still having quite a bit of pain in his knee which is increased with weightbearing, twisting and pivoting.

8. It was ATP Fox's opinion at that first visit that Claimant's injury was "consistent with history and/or work-related mechanism of injury," and he did not assign any restrictions. Dr. Fox ordered an MRI of the left knee and requested Claimant follow up after the diagnostic evaluation.

9. Claimant credibly testified that he requested no restrictions following his August 10, 2022 medical appointment because his Employer would accommodate any temporary limitations Claimant had due to his workplace injury. Claimant stated he was able to do most of his activities, with the exception of the training and responding to emergencies as he could not handle the stairs.

10. The MRI performed on August 15, 2022 at Health Images Diamond Hill and read by Steven Ross, M.D. showed a previous ACL reconstruction with evidence of re-tear of the intra-articular portion of the graft, previous partial meniscectomy and/or complex tears of both the medial and lateral menisci, moderate to severe tricompartment osteoarthrosis and chondromalacia, postsurgical changes of the patellar tendon, and knee joint effusion.

11. Also on August 15, 2022 Employer completed an Employer's First Report of Injury (FROI) noting that on August 10, 2022 Claimant sustained an injury to his left knee during PSI training close to midnight. His left knee swelled up throughout the shift and caused stiffness and was reported to his supervisor later in the shift the following morning.

12. On August 18, 2022, Claimant again reported to Injury Care Associates of Thornton, where ATP Fox was replaced by ATP Richard J. Pompei, D.O. It was Dr. Pompei's assessment at the second visit that:

> 54-year-old male with history of left ACL reconstruction with acute on chronic left knee pain occurring after a work-related incident. Discussed MRI results with the patient today. Results listed below. Suspect these are chronic and degenerative in nature. However plan to refer to orthopedic surgery for further MRI review and further causation analysis.
> * * *
> **Causality Statement WORK RELATED**: Based on the clinical exam findings and information provided to me by the patient, the incident is likely related to

> the occupational events, if the history provided to me is accurate. This incident is likely work-related.

13. Claimant filled out a pain diagram at the August 18, 2022 visit indicating that the pain in his left knee was an 8 out of 10 and that he was "most of the time" concerned that his "knee might suddenly give way or let [him] down." He also reported that most nights he had difficulty with his knee.

14. On August 24, 2022, Claimant presented at the offices of Front Range Orthopedics & Spine where he was evaluated by referral from ATP Fox by Lucas Schnell, D.O. who made an assessment in current plan as follows:

> This is a 54-year-old male who sustained an acute injury to his left knee at work on 8/10/2022. He works as a corrections officer and was doing skills exercise when he got his left foot caught and had a pivoting injury. He has had sharp pain globally in the knee ever since.
>
> * * *
>
> I discussed with the patient that unfortunately he had a pre-existing condition of a complete ACL rupture as well as arthritis. With multidirectional meniscus tears I feel that there is some chronicity to these tears as well. I cannot delineate whether there was exacerbation or progression of tears with his work-related injury however. It is reasonable to correlate an exacerbation of his pre-existing conditions with the work injury that he describes. At this time I do not think he would be a good candidate for an additional arthroscopic procedure due to his history and the amount of arthrosis of his knee.

15. On September 2, 2022 Claimant returned to ATP Pompei, who noted the following:

> Patient states he saw Dr. Schnell on 8/24/2020 [sic 8/24/2022] where he received a corticosteroid injection in his left knee. . . . He notes they were considering possibly doing a knee arthroscopy, and the subject of knee replacement was brought up, ... He states he is having trouble with stairs, getting up from a seated position.

16. At the September 2, 2022 medical appointment with ATP Pompei, Claimant was still concerned that his knee might suddenly give way, and the pain diagram documented that he was having "trouble with stairs, getting up from a seated position, popping and dislocating." He was managing his pain with Mobic with some benefit and requested pain medication refills. On exam, Dr. Pompei noted joint effusion, difficulty with range of motion in terms of flexion and extension of his knee, as well as tenderness to palpation along the medial and lateral joint lines. He had a positive McMurray's, an equivocal Lachman's, varus and valgus stress testing with significant crepitation of the knee, a positive patellar grind and an antalgic gait.

17. Claimant reported working full duty. He complained of moderate to severe pain. He had difficulties with his activities of daily living, including bathing, getting into a vehicle, doing household chores, problems standing or getting up because of his knee. He noted he would have extreme difficulty getting up if he were to kneel down. He was limping most of the time, having the knee give way all of the time, and trouble sleeping because of the knee.

18. Claimant was seen by Dr. Schnell on September 30, 2022 who noted that the steroid injection only provided two days of relief. He was still attending physical therapy and had both pain and apprehension of his left knee. Claimant reported that his knee was actually subluxing when he pivoted, squatted, twisted or rolled over in bed. Dr. Schnell noted that Claimant had:

> …failed conservative management. He has a pre-existing condition of arthritis and likely a chronic ACL rupture. I cannot delineate the acuity of his meniscus tears. He is not a candidate for arthroscopic intervention due to severe arthrosis. A knee replacement would address all of the issues in his knee at this point. He is (sic.) likely exacerbated pre-existing condition and potentially made the problem worse with his work-related injury regarding his meniscus tears. We reviewed the recovery time and expectations with a knee replacement. He would like to proceed with this.

19. On September 30, 2022, Claimant followed up with ATP Pompei, who noted that:

> Patient rates his pain is 7 out of 10 today. He states he has seen Dr. Schnell on 9/21/2022 and 9/30/2022 … He notes Dr. Schnell is recommending total knee arthroplasty of his left knee because at this point the patient is increasingly functionally limited with pain and apprehension with subluxation of his knee.

Dr. Pompei assessed that Claimant had a sprain of unspecified site of the left knee and noted:

> Also I agree that he has exacerbated his pre-existing condition and made the problem worse at his work-related injury given the fact that his pain has significantly increased along with now subluxation of his knee following his work-related injury without much improvement in physical therapy. I agree that the next definitive step is left total knee arthroplasty with Dr. Schnell (sic.) patient is to follow-up with our clinic letting us know the date of surgery so we can appropriately adjust his M1 64 (sic.) and follow-ups accordingly.

Claimant reported similar symptoms on the Oxford Knee Assessment, including difficulties with giveaway of the left knee most of the time. Dr. Pompei recommended Claimant ice the knee as needed and follow up with Dr. Schnell for the surgery.

20. On October 3, 2022, ATP Schnell put in a "Surgery Authorization Request" for Claimant to undergo a "left total knee arthroplasty" (TKA).

21. On October 13, 2022, Respondent timely denied ATP Schnell's request for surgery, indicating "compensability had not been established."

22. When Claimant's surgery was denied he obtained his records from Kaiser and noted that the report issued by Tracy Frombach, D.O. on August 10, 2022 prior to his injury that evening was in error. Claimant testified he reached out to Kaiser, who issued a corrected medical record for the August 10, 2022 visit which set forth that Claimant did **"**not want to consider knee replacement surgery" at that time but wished to consider repeat steroid injection to see how well he did.

23. On October 14, 2022, Claimant returned to ATP Pompei, who noted:

> Patient's pain is an 8 out of 10 today. He continues with sensations of instability, popping, clicking, locking. … He continues with physical therapy at Injury Care Associates. He notes that he received a call from his insurance company and stating that the surgery was denied, however he is going to get records from his previous work-related surgery from Concentra to be reviewed.

Dr. Pompei agreed with Dr. Schnell that Claimant was not a candidate for an arthroscopic intervention due to the severe arthrosis. He further emphasized as follows:

> Also agree that he exacerbated his pre-existing condition and made the problem worse at his work-related injury given the fact that his pain has significantly increased along with now subluxation of his knee following his work-related injury without much improvement in physical therapy. I agree that the next definitive step is left total knee arthroplasty with Dr. Schnell.

24. Claimant's pain diagrams following his injury consistently indicated that he was concerned most of the time or all of the time that his knee might give out.

25. On October 21, 2022 Respondent filed a Notice of Contest stating that it was for further investigation of prior medical records.

26. Claimant credibly testified that prior to his injury he did not have clicking, popping, or locking in his knee. Claimant testified that he had some instability, but that his knee was not dislocating as it was following his injury, nor was he having any significant pain prior to the injury. Following his August 10, 2022 accident the pain was constant, and he was having problems negotiating the stairs or even getting out of a seated position, especially when he would twist and pivot.

27. On November 1, 2022, Claimant presented again to ATP Pompei who noted that Claimant's pain continued to be a 7 out of 10, he felt unsafe at work at this point as he could not mitigate any circumstances that would need de-escalation with the knee the way it was. He continues to have knee stability issues and felt there was a safety issue as he could not intervene in any situations that might need de-escalating without significant risks of harm to himself. Dr. Pompei continued to state that Claimant had an exacerbation of his pre-existing condition and the August 10, 2022 accident made the problems worse.

28. On November 29, 2022, Claimant presented to ATP Pompei, who provided Claimant with a "hinged knee brace to aid instability while he is at work in case he has to restrain someone." On exam, Dr. Pompei noted that claimant had progressed from having a small effusion up to a moderate effusion, a positive Lachman, positive AP drawer, valgus and varus stress with significant crepitation on exam, positive pivot shift, positive for subluxation, positive McMurray's and difficulty squatting due to sensation of instability. At that visit it was ATP Pompei's opinion that Claimant needed to have his knee aspirated due to increased effusion. His Oxford Knee Assessment and pain diagram remained consistent with prior reports.

29. All of Claimant's pain diagrams since his date of injury reflected that Claimant's pain complaints were in the range of 7 to 8 out of 10.

30. Claimant credibly testified that his pain levels in his knees have remained at an increased level since the date of injury and not returned to baseline.

31. On January 10, 2023, Claimant continued his treatment with ATP Pompei, who noted that Claimant's reported pain complaint continued to be about 7 out of 10**.** Claimant was getting good effect with his visits with Dr. Reilly and he felt the Prozac was helping. Claimant reported that his knee had been "dislocating more often" despite being in physical therapy and trying to strengthen the muscles around his knee is much as possible. On exam, Dr. Pompei found only minimal effusion but Claimant continued with a positive Lachman, positive AP drawer, positive valgus and varus stress with significant crepitus on examination, positive pivot shift, positive subluxation, which was more prolonged than previous, positive McMurray's and difficulty with squatting due to sensation of instability.

32. Claimant testified at the time of his injury he was not receiving mental healthcare, but as a result of the anxiety and problems sleeping from his knee pain, he was referred by ATP Pompei to Kevin Reilly, PSY, and had been prescribed Prozac, which was helping Claimant with his mental health condition related to his workplace injury.

33. Claimant underwent an independent medical evaluation with Dr. Failinger on January 13, 2023. Dr. Failinger took a history that Claimant was doing relatively well prior to the August 10, 2022 incident when he was participating in a Physical Management Training session. He stated he was performing a V-Man maneuver, and he was getting down to place his knees between another coworker's leg to perform the maneuver, but his left shoe got caught on the pants leg of the person he was working with. He believed he was falling as he was trying to step between the other coworker's legs. In an attempt to not step on her, he stepped "over her," and his weight shifted to his left knee. He noticed sharp pain in the left knee. He stated the knee hurt right away, and he had increasing pain in his knee. He reported the incident to his supervisor.

34. Claimant provided Dr. Failinger with a history of prior injuries to his left knee while in high school, for which he underwent surgery, while in the military, for which he also underwent surgery, for a work-related injury to the left knee, which required two surgeries before he was placed at maximum medical improvement with a 20% lower extremity impairment rating. Claimant told Dr. Failinger that his knee was never great after the 2003 work related injury and that after injections and other surgeries, he was told he would likely develop degenerative joint disease. Claimant reported that prior to the injury on August 10, 2022, he would have flare-ups that would settle down after occasional cortisone injections. Claimant reported to Dr. Failinger that he had popping and noises by the knee, and had difficulty going up stairs now. He stated that the knee dislocated now, which was not something that happened to him before the incident of August 10, 2022.

35. Dr. Failinger diagnosed Claimant with a left knee sprain. Dr. Failinger opined that Claimant had a flare-up of his pre-existing arthritis on August 10, 2022, not a new injury. Dr. Failinger explained that it was not medically probable that Claimant sustained any significant appreciable acceleration or permanent aggravation of his pre-existing medial and lateral meniscus tears, both of which appeared to have undergone prior surgeries and both of which had significant degeneration prior to August 10, 2022. Dr. Failinger went on to explain that of greatest importance is the MRI scan which noted severe osteoarthritis that was tricompartmental. Dr. Failinger opined that the MRI findings

were pre-existing and not due to or accelerated by anything that occurred on August 10, 2022. However, Dr. Failinger admitted that "[N]o imaging is provided" for his review, so he did not review the actual imaging, just the report.

36. Claimant's primary complaint to Dr. Failinger was about instability and the frequent dislocation of their knee. Dr. Failinger opined that the instability could not have been worsened by the mechanism of injury described by Claimant. Dr. Failinger explained that once the anterior cruciate ligament was gone, and Claimant's had been for many months to years prior to August 10, 2022, one cannot make the instability worse unless other ligaments were torn and Claimant did not sustain any ligamentous injury on August 10, 2022.

37. Mark Failinger, M.D., opined that the surgery recommended by Dr. Schnell was necessary, but that it was not causally related to the work injury, giving the opinion that:

> It appears, with high medical probability, that his next step in treatment to avoid his instability and his pain would be to undergo a total knee replacement, as an arthroscopy and ACL reconstruction would only make him worse, as Dr. Schnell appropriately counseled the patient. However, the need for a total knee replacement would not be reasonably performed to treat any pathology created in the work incident of 08-10-2022. Rather, a knee replacement is necessary to treat pathology and symptoms due to the pre-existing arthritis.

38. On January 24, 2023, Claimant returned to ATP Pompei, who noted Claimant had had his independent medical exam performed and was awaiting the results. He stated his hearing was scheduled for March, he had been working full duty and continued to utilize his hinged knee brace for stability. On exam, Dr. Pompei again found Claimant was wearing the hinged brace, which he removed for the exam, and noted continued positive pivot shift and positive Lachman's. He found that the knee did sublux again on exam and noted a slight antalgic gait.

39. On February 7, 2023, Claimant returned to ATP Pompei, who noted Claimant had the **"**sensation of increasing instability and more frequent subluxations." Claimant had been diligent with physical therapy and home exercises and had been wearing the brace full-time as opposed to just wearing it at work and that he continued on modified duty.

40. Claimant stated that he had never used a brace until ATP Pompei prescribed the knee brace, and Claimant agreed to use it because his knee condition was substantially and permanently aggravated by the injury on August 10, 2022. Claimant focused on the clicking, popping, and locking that was not present prior to his injury of August 10, 2022, and the fact that no doctor prior to Dr. Schnell had requested a knee replacement.

41. Claimant stated that the problems with the clicking, popping and subluxations or dislocations had not happened prior to the incident on August 10, 2022. He also explained that he now had difficulty going down the stairs, which he did not have prior to the work injury. Going up and down the stairs was an important part of his job in order to respond to emergencies that happened at the youth center. While he stated that the pain is somewhat controlled with medications, it has not returned to baseline since

the work incident, neither has the anxiety and mental health issues. He continues to take medications for both. Prior to this, he did not have any restrictions and was able to perform the full duties of his job. Further, prior to the work injury he was able to work out and keep fit. He has not been able to reengage in the same kind of physical fitness program as prior to his injury.

42. Claimant stated that the findings of his ATPs, specifically Dr. Pompei's opinion on at least two occasions, that "he exacerbated his pre-existing condition and made the problems worse at work" support his claim that the injury which occurred on August 10, 2022 was a substantial and permanent aggravation.

43. As found, Claimant is found to be credible and his testimony reliable.

44. As found, Dr. Failinger's opinions have been considered, to the extent they focus on pathology, not symptoms, and the request for surgery is based upon Claimant's current symptoms, which include dislocating or subluxation of the left knee, popping and clicking, all of which were not present prior to the August 10, 2022 work injury.

45. As found, Dr. Pompei's and Dr. Schnell's opinions are more credible and persuasive than the contrary opinion of Dr. Failinger. As found, Claimant's testimony is in direct contradiction to Dr. Failinger's findings in that the pain diagrams reflect higher pain than prior to injury, reflect the knee giving out, which it was not doing prior to August 10, 2022, including the clicking, locking and popping.

46. As found, Dr. Failinger's opinion that Claimant "sustained a knee strain at most," is not found as credible as the opinion of Dr. Pompei, Claimant's ATP, who found Claimant had sustained an aggravation of the preexisting underlying degenerative condition, and by inference Dr. Schnell, who has put in an authorization request for the left total knee arthroplasty.

47. As found, Claimant continues to work for Employer who has modified his position so that he is not placed in a position that will further injure the left knee.

48. As found, the parties' stipulation of AWW of $1,808.24 is approved and incorporated into this order.

49. Testimony and evidence inconsistent with the above findings is found to not be relevant, 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 any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

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

B. 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); *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 benefits are sought by a preponderance of the evidence. *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 preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

A pre-existing condition does not preclude a claim for compensation and an injury is compensable if an 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). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms after an incident at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc.*, W.C. No. 4-989-682-01 (August 17, 2016). Compensable medical treatment includes evaluations or diagnostic evaluations.

Causation may be established entirely through circumstantial evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Medical evidence is neither required nor determinative of causation. A claimant's testimony, if credited, may alone constitute substantial evidence to support the ALJ's determination concerning the cause of the claimant's condition. *See Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986) (claimant's testimony was substantial evidence that his employment caused his heart attack); *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); see also *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997) (lay testimony sufficient to establish disability).

As found, Claimant has shown by a preponderance of the evidence that it is more likely than not that he suffered an injury arising out of and in the course of employment while demonstrating a training movement at work and stepped over a coworker, trying to

avoid stepping on her, and he injured his left knee, including causing severe pain and knee dislocation. As found, Claimant's accident directly and proximately caused the injury to his left knee which included substantial and findings of the permanent aggravation of his preexisting condition, the ongoing knee dislocations or subluxation as opined by Dr. Pompei, all conditions for which benefits are sought. Dr. Pompei's and Dr. Schnell's opinions are persuasive and support the claim that it is more likely than not that Claimant had an aggravation of the underlying degenerative condition.

As found, on August 10, 2022 Dr. Frombach noted some left knee tenderness to palpation over the lateral joint line but not the medial joint line, range of motion from 0° to approximately 130 without any pain, varus stress with LCL[4] mild laxity, valgus negative, and a negative McMurray. Dr. Frombach performed a steroid injection as part of Claimant's maintenance program prior to the injury. However, as further found, following the incident and accident of August 10, 2022, Dr. Pompei noted on September 2, 2022 that Claimant had joint effusion, difficulty with range of motion in terms of flexion and extension of his knee, as well as tenderness to palpation along the medial and lateral joint lines. He found that Claimant had a positive McMurray's, an equivocal Lachman's, varus and valgus stress testing with significant crepitation of the knee, a positive patellar grind and an antalgic gait. As found, Dr. Pompei credibly and persuasively documented Claimant's increase in physical findings and Claimant credibly and persuasively testified to this increasing symptom of pain, instability, clicking and popping of his left knee, were triggered by the August 10, 2022 accident and consequently triggered the Claimant's need for medical treatment. As found, Claimant's need for treatment and disability (as Claimant has had to modify his job duties) were the proximate result of the August 10, 2022 work related injury and not just the natural consequence of the pre-existing condition. As concluded, had the injury not occurred Claimant would have likely continued to require injections when he had flare-ups and but for the accident of August 10, 2022, Claimant may have continue to maintain his symptoms under control without requiring further care. As further concluded, but for the accident of August 10, 2022 Claimant would not have required the treatment currently being recommended. As found and concluded, Claimant has shown by a preponderance of the evidence that that it is more likely than not that he suffered a compensable permanent aggravation of his preexisting condition when he was involved in the training exercise while in the course and scope of his employment on August 10, 2022 which caused a need for medical care and disability.

C. 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*

[4] LCL is assumed to be lateral collateral ligament.

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).

Respondents argued that all the way back in 2007 Dr. Failinger advised Claimant that he would eventually need the left knee replacement, and that despite the accident of August 10, 2022, as supported by Dr. Failinger opinion, that the time was now, not because of any aggravation but because it was inevitable due to the arthritic and degenerative process cause by the prior injuries. This ALJ disagrees. An arthritic knee alone does not cause the need for the left knee replacement. The exponential increase in symptoms is what caused the need for the surgery. And this is well supported by Claimant's testimony that while he had some pain and discomfort prior to the August 10, 2022 accident, those symptoms were controlled by exercise, maintaining himself in shape, the occasional steroid injections that really helped his symptom control and some medications. As found, following the work injury of August 10, 2022 the symptoms were not just occasional pain and discomfort, they were the frequent subluxation of the knee, the clicking and popping of the knee, the swelling of the knee, the positive findings on exam as established by Dr. Pompei and noted above. All these new symptoms and serious instability are the cause for the need for the total knee arthroplasty (TKA) recommended by Dr. Schnell. All of these new symptoms were proximally cause and aggravation of the underlying preexisting condition, which are found to be caused by the compensable work related injury of August 10, 2022. Even Dr. Failinger stated that the TKA was reasonably necessary at this point in time. As found, Claimant has shown by a preponderance of the evidence that it was more likely than not that the TKA is reasonably needed and related to the August 10, 2022 work related injury.

D. Average Weekly wage

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid &*

Waldron v. Vigil, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

Here, the parties agreed that Claimant's average weekly wage was appropriately $1,808.24 and the stipulation of the parties was approved in this order.

ORDER

IT IS THEREFORE ORDERED:

1. The Claimant proved by a preponderance of the evidence that he suffered an aggravation of his underlying degenerative condition of his left knee on August 10, 2022 within the course and scope of his employment.

2. Respondents shall pay for reasonably necessary and related medical care cause by the August 10, 2022 aggravation, including the total knee arthroplasty recommended by Dr. Schnell.

3. The stipulation of the parties is approved and ordered. Claimant's average weekly wage is $1,808.24 and the temporary total disability rate is $1,205.49.

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

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

DATED this 10th day of April, 2023.

Digital Signature

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the closed claim of March 11, 2019 should be reopened due to a worsening of condition.

II. If the claim is reopened, then whether Claimant has proven by a preponderance of the evidence he is entitled to further medical care to cure and relieve him of the effects of the admitted work injury, including surgery recommended by the authorized treating physician (ATP), John D. Papilion, M.D.

FINDINGS OF FACT

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

1. Claimant was a right handed, 82 years old at the time of the hearing in this matter. Claimant originally injured his right shoulder on March 11, 2019 while working for Employer as a shuttle driver. This was an admitted claim.

2. Claimant would pick up customers and their luggage at Employer's place of business and drop them off at the airport and vice versa. He would pick up customer's luggage and place the luggage on the rack, which had three levels. He would also assist customers with their luggage and place the luggage in customers' car trunks. Claimant worked for Employer for nine years without problems before his March 11, 2019 work injury.

3. On June 20, 2019 Claimant was initially evaluated by Dr. John Papilion with regard to his March 11, 2019 work injury. Dr. Papilion took a history that Claimant was carrying out his duties as a shuttle driver and was swinging a heavy 20 to 25-pound bag up overhead, felt a pop in his right shoulder and had immediate pain and drop arm. Since then, he had significant difficulty with raising his right arm, lifting away from his body and overhead. He had a history of rotator cuff repair in 1987. On exam he noted a markedly positive drop arm test with weakness in the supraspinatus and infraspinatus, a positive lag test, positive belly press test and positive impingement sign. Following review of the diagnostic testing, he assessed Claimant had a massive acute on chronic rotator cuff tear of the right shoulder and medial dislocation of the biceps tendon. He noted that the rotator cuff was irreparable and recommended proceeding with a total reverse shoulder arthroplasty.

4. Claimant last worked for Employer of injury in January 2020. Claimant testified he was laid off and did not seek further employment until two years later.

5. The surgery did not take place until February 5, 2020 and it is not clear from the evidence what was the cause of the significant delay. Dr. Papilion proceeded with the reverse total right shoulder arthroplasty, which included a Tornier size 29 mm glenoid

plate with a 39 mm glenosphere, a size 8 press-fit Aequalis Flex stem with a high-offset reverse tray and a +6 mm polyethylene humeral cup. Dr. Papilion also performed an in-situ biceps tenodesis.

6. By March 19, 2020, Dr. Papilion noted that Claimant was doing exceedingly well with minimal to no complaints of pain. He was very pleased with Claimant's progress. By April 30, 2020 Dr. Papilion continued to be effusive over Claimant's progress, recommended work hardening and released Claimant to work as a commercial driver with lifting limited to 10 lbs. away from the body or overhead.

7. On August 5, 2020 Dr. John Sacha performed an impairment rating noting that Claimant merited only an impairment for loss of range of motion of the right shoulder of 9% upper extremity impairment, which converted to a 5% whole person impairment. He recommended that Claimant be placed at maximum medical improvement (MMI), with light duty as recommended by Dr. Papilion and be allowed maintenance medical care.

8. Claimant saw Dr. Papilion on February 11, 2021 for a routine follow-up. Overall, he was doing very well. He had a functional capacity evaluation 6 months previously and fell into the medium work category. He had not yet returned to work as he had not been called back by Employer. His biggest complaint was weakness in external rotation. He was having little to no complaints of pain and good strength in the deltoid with a negative drop-arm test. Dr. Papilion stated that Claimant was doing well overall and placed him at MMI at that time with permanent restrictions of 40 lbs. lifting and push/pull up to 100 lbs. He recommended maintenance visits.

9. Claimant was placed at MMI on February 18, 2021 by Dr. Amanda Cava of Concentra with the same restrictions imposed by Dr. Papilion, with the exception that she added no overhead reaching. Claimant felt good at the time. While he was able to use his right arm, he could not do so fully. He stated he did not have the same strength, range of motion and felt weaker than prior to his work injury.

10. Claimant recalled he had a functional capacity evaluation performed. His permanent restrictions were lifting 40 lbs., no overhead lifting and pushing/pulling up to 100 lbs. Claimant credibly stated that he never violated those restrictions.

11. Respondents filed a Final Admission of Liability on April 19, 2021 and the claim was closed, except that medical benefits remained open for maintenance care.

12. On February 10, 2022 Claimant returned to Dr. Papilion for a follow-up maintenance visit, two years post reverse shoulder arthropathy for his massive irreparable rotator cuff arthropathy. On exam, Dr. Papilion noted that Claimant's wound was well healed, he could actively flex and abduct to about 120 degrees, with external rotation of 60, internal rotation of 60, good strength and manual testing in the deltoid with a negative drop-arm test. Dr. Papillion documented finding some calcification in the lateral deltoid adjacent to the acromion. At the time Dr. Papilion stated that Claimant remained at MMI. He had not regained any motion and had some limited function. He had few complaints of pain. He stated that he did review Dr. Sasha's impairment rating and it was apparent that Dr. Sasha did not take into consideration additional impairment for Claimant's total shoulder arthroplasty. Under the Table 19, he should have been awarded

an additional 30% impairment of the upper extremity which should have been combined to his loss of motion.

13. Claimant stated he returned to consult with Dr. John Papilion in February 2022 for a routine visit only, at which time he was doing fine. He stated he had no pain in the right shoulder, despite the limited strength and range of motion. He stated that his shoulder was functioning well enough for what he would do on a daily basis.

14. Claimant returned to work for another employer as an auto parts delivery driver (hub driver) in February 2022 to work part time, starting with two days a week. He was working one and one half days a week after August 2022. He serviced two stores, one in Sterling and the other in Fort Morgan. He would regularly do two round trips per day. He would push a cart, loaded with parts, from the dock to his van and load the parts, which were generally small, like windshield wipers, spark plugs, short exhaust pipes, fuel pumps, nuts and bolts. During his tenure with this employer he had only taken large engine blocks only twice. These were loaded onto the van for him with a forklift and taken off with a forklift. He did not touch them. In fact, Claimant credibly testified that he did not touch anything that was heavy or exceeding his restrictions. Claimant continued to work for this subsequent employer part time.

15. The first week of August, he was at his part time job. He went to get his cart that had been loaded with items for delivery. He started pushing it out to his van. He stated that the cart was no more than 20 lbs. and the items on it weighed no more than 10 to 15 lbs. total. The cart had a handle which he used to push the cart. When the cart went over the sill of the doorway, the cart was jarred, jogging the packages and one of the packages started to fall off to the right of the cart no more than two feet away from Claimant. The package was approximately two inches by eight inches and approximately twelve inches long, and was approximately on the cart at shoulder height on top of other packages. Claimant went to reached out, but as he was extending his right hand, he felt a sliding sensation in his right shoulder, like it was going to dislocate, so he stopped the movement immediately. He never made contact with the box that fell to the ground. Claimant had never felt that sensation before. He continued with his duties and felt fine for the remainder of the day. By this time Claimant had been working for this employer for approximately six months without problems.

16. A couple of weeks after the first incident, he was again at work, and after he had loaded his van, he went to close the sliding door of the van, when again, felt the sliding sensation, as if his shoulder was going to dislocate. He pulled back, tightened his shoulder and the joint seemed to slide back into place. Claimant was outside of the van on the passenger side, when he attempted to slide the door closed with his right upper extremity. He had not more problems with finishing his work but he was careful with his right arm.

17. Approximately one week later, the third incident happened the last Saturday in August[1], when he was lying on his couch. He went to cross his arms and his arm slipped off his chest and fell to the floor. He experienced an extremely painful sensation where his shoulder popped out. Claimant looked down and noticed that his shoulder had

[1] This ALJ infers that this was on August 27, 2022.

just popped out, and there was a big bulge. He fought the pain to get his shoulder to go back into place by pulling back with the muscles of his shoulder until it popped back into place. Claimant determined he should schedule an appointment with Dr. Papillion. He was able to secure an appointment for September 15, 2022.

18. Approximately the following Monday, which would have been September 12, 2022, when he was working, Claimant was turning the wheel of his van to make a right-hand turn and as he turned the wheel, his shoulder went out again. It was very painful and was very difficult to push and pull his shoulder joint (ball) back into the socket. This subluxation was the most painful of the incidents.

19. Claimant stated that he did not file a claim against the current employer because the incidents above were just normal everyday movements and not injuries in and of themselves. He felt that there was something wrong with the shoulder replacement and that was part of his March 11, 2019 claim. He explained that because the arm socket just fell away from the ball when he made certain movements he felt that there was something wrong with the shoulder replacement. Claimant has changed the way he uses his right arm after the fourth episode and now he uses his left arm when he must reach for anything.

20. On September 15, 2022 Claimant was evaluated by Dr. Papilion. Claimant reported that he was trying to catch a small box and reached forward and felt as though his shoulder came out of place. He was able to self-reduce.[2] This occurred about 6 weeks prior to his follow up with Dr. Papilion. He had a total of 4 similar episodes. These were quite painful for him. There was little activity, just reaching forward. He had to compress the shoulder and was able to reduce it and then symptoms resolved. On exam, Dr. Papilion noted some muscular atrophy and deformity about the shoulder as expected. He could flex and abduct to about 150 degrees, external rotate of 80, internal rotate of 70. There was good strength to manual testing of the deltoid and negative drop-arm test. He did have a positive apprehension test and Dr. Papilion was able to manually sublux the right shoulder anteriorly. Dr. Papilion recommended proceeding with a revision arthroplasty with poly[3] exchange but did not believe there was need to change any of the other components. He provided Claimant with work restriction of 5-pound lift and no overhead lifting. Dr. Papilion sent the request for authorization of the revision surgery on September 29, 2022 to Respondents.

21. On November 8, 2022 Dr. Papilion stated that it remained his opinion that the additional revision surgery was related to the original March 11, 2019 work related injury and not to any minor incidents where Claimant was simply reaching forward.

22. Respondents had Claimant evaluated by Dr. William Ciccone for an independent medical examination on December 21, 2022. Dr. Ciccone took a history as follows:

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[2] Both Dr. Papilion and Dr. Ciccone noted that the use of the words “self-reduced” was a medical term that means to put the socket of the humerus bone up onto the metal ball, and was a term likely interpreted and used by the physician, not claimant.

[3] This ALJ infers that poly is the polyethylene humeral cup, which was part of the prosthesis of the shoulder replacement.

> In September 2022 he was loading a van and as a box fell off of a cart. He reached out quickly to grab the box and felt a shift in his shoulder. There was no pop, or clunk and had very minimal pain at the time. Approximately one week later, this occurred again when he was reaching back for the van door and felt it slip.
>
> A more recent event was while lying down his arm fell off the couch into extension and had a significant dislocation and clunked when putting it back into joint. Overall, this has happened four times. Since that time, he has been restricting use of the arm, restricting any abduction or external rotation due to feelings of instability. He started at Concentra and eventually saw orthopedics again to discuss possible surgery to stabilize the shoulder. He reapplied to have his case reopened.

23. Dr. Ciccone performed a record review going back to 2014 summarizing only key complaints. Multiple records were incorrect. For example, he stated that Dr. Papilion documented an episode in March 2022. In fact, Dr. Papilion stated that the reaching for the box incident was only six weeks prior to his evaluation on September 15, 2022.

24. Dr. Ciccone opined that revision shoulder surgery was needed to stabilize Claimant's shoulder replacement. He disagreed that the March 11, 2019 work injury should be reopened because he felt that the incident of reaching for a falling box at work was the cause of the current instability and that Claimant needed to open another workers' compensation claim with the current employer as the surgery was reasonably necessary and related to the new incident at work.

25. At the time of the hearing Claimant stated that he avoided using his right arm because when he tried, if felt like it would slip out. Claimant would like to proceed with the surgery proposed by Dr. Papilion because he has no confidence in being able to use the right arm without it subluxing or dislocating, which is generally very painful.

26. Dr. William Ciccone testified by deposition on March 22, 2023 as an expert orthopedic surgeon and noted that he was Level II accredited. He had conducted an independent medical evaluation on December 21, 2022. He reviewed the medical records, examined Claimant, and provided his opinion. Dr. Ciccone noted that the incidents at work and the incident at home where Claimant reported subluxation of his shoulder, are all consistent and could explain the subsequent positive apprehension tests. He further stated as follows:

> A … His instability events began specifically after the event at work for [current employer] in September of 2022. And after that, it became much more persistent and restrictive.
>
> So from a causal analysis, you would relate the second injury to the instability, not the first injury.
>
> Q And the second injury being --
>
> A The one at [current employer].
>
> Q Okay. And then the third incident with the van, was that a subsequent injury event as well?
>
> A Yeah, I think these are all subsequent events with shoulder instability. Once that creates itself, you have multiple subluxation events. It can happen from any type

of activity. It may not -- it could be individual injuries but it's because of the initial event.

27. Dr. Ciccone explained that the initial inciting event is the one where Claimant reached out to catch the box while at work. Dr. Ciccone opined that the objective medical evidence did not support that Claimant's shoulder condition worsened as a natural progression of the original 2019 work related injury. He went on to state that three things could cause instability. The first being wearing out the plastic, an infection or having a subsequent injury. Dr. Ciccone opined that it was too early to have wear and concluded that the instability was caused by a subsequent event. However, when questioned, it is clear that Dr. Ciccone did not fully enquire about how the incidents happened. He was unaware that Claimant had not fully extended his arm or that he did not catch the falling box. He confirmed a quoted statement from his report that Claimant had reached back for the van door and felt the shoulder joint slip. But Claimant did not "reach back" for the van door. When asked about how painful the third subluxation was, he stated "I don't have it there. I - I - I don't - I don't think he mentioned whether it was painful or not. At least I don't have it in my note."

28. Dr. Ciccone opined that the revision arthroplasty was reasonably needed to repair the instability of Claimant's shoulder. He further stated that he believe the activity of reaching out probably loosened some scar tissue and some other constraints that can happen from surgery that now makes the shoulder unstable. Lastly, he stated that "My *assumption is that he had an event when he caught a box* and he dislocated his shoulder. That is the primary event" (*emphasis added*). When asked whether there was evidence that the replacement failed, Dr. Ciccone stated "So I would say that instability is a failed replacement."

29. John D. Papilion, M.D. testified at hearing and was accepted as an expert in medicine generally and as an orthopedic surgeon specializing in shoulder surgeries as well as a Level II accredited physician accredited by the Division of Workers' Compensation. Dr. Papilion explained reverse arthroplasty surgery of the shoulder as a shoulder replacement where the ball and socket are reversed, which caused the deltoid muscle to be the major muscle to articulate the arm, substituting for the rotator cuff, when it was so damaged that it could not be repaired. So the metal ball was fixed to the socket and the plastic cup was fixed to the upper end of the humerus. Dr. Papilion explained that like most patients, Claimant was able to get improved motion, strength and function following the surgery but never back to normal, and was unable to return to his regular job with Employer lifting heavy bags.

30. Dr. Papilion confirmed that he had seen Claimant in February 2022 for a routine maintenance visit only, which had been set up when Claimant was placed at MMI. Dr. Papilion noted that on exam at the September 15, 2022 visit, Claimant provided the history of what was happening with his shoulder. Dr. Papilion noted atrophy and wasting of the musculature surrounding the shoulder, which was expected since the rotator cuff tendons and muscles were no longer attached to the bone and there was nothing stimulating them to keep them toned or functioning. It also showed a different appearance because the socket was where the ball was and vice versa. He credibly testified that the atrophy was expected because "everybody that has a reverse shoulder replacement has

atrophy around the – the musculature in the shoulder girdle…" Dr. Papilion explained a reverse total shoulder arthroplasty as follows:

> This is a salvage procedure that we do in patients that have massive irreparable rotator cuff tears, rotator cuffs that we cannot repair. So this procedure is basically a shoulder replacement. It's an open surgery where we dislocate the shoulder, take the ball off, and replace the ball and socket with metal and plastic. And we reverse those, meaning that we put a ball where the socket was and a stem down the inside of the bone that has a socket attached inside the humerus that has a plastic socket. And it's a bit technical, but it basically changes the biomechanics of the shoulder and it pushes – it pushes the center of rotation that way and that way, and it puts the deltoid muscle under tension, and that's what the patient uses to raise their arm up.

31. Dr. Papilion noted that patients do not get back full motion or strength with the procedure. Following taking a history and examining Claimant, Dr. Papilion opined that Claimant's claim needed to be reopened for purposes of proceeding with a revision arthroplasty surgery.

32. Dr. Papilion opined that Claimant did not have an injury that aggravated his shoulder condition, only that it was a progressive condition, expected with total reverse arthroplasty patients. Claimant only had incidents caused by the natural progression of the expected consequence following a total reverse shoulder arthroplasty. Dr. Papillion opined that simply reaching for the box did not damage the components he wants to replace or that Claimant did not tear anything in his shoulder at that time. Dr. Papilion stated:

> my feeling that either - either his capsule had stretched out or he tore - tore his subscapularis, which is one of the restraining muscles that were reattached, but it wasn't -- it wasn't an injury that caused his shoulder to -- to dislocate.
>
> …
>
> I don't think that with the history that he was giving to me that he had an injury. He had an incident where the shoulder just happened to come out of place just merely reaching forward, which I don't think was a traumatic episode, and I don't think it was enough to tear anything.
>
> So my - that's - that's the big reason why I think this is related to his reverse shoulder arthroplasty. Sometimes we just get unstable. Sometimes the capsule can stretch out or the muscles are not strong enough. That would give this shoulder its stability, is the muscle that -- the deltoid muscle pulling on the humerus bone into that -- into that ball, and if you don't have that muscle tone, then the shoulder can become unstable.

18. Dr. Papilion further stated that he did not think that simply reaching out did any damage to the components that he replaced. He opined that the capsule had just stretched out, which gave him the initial subluxation, which in turn put tension on the capsule and that with each subluxations there was more laxity. He stated that:

> I just think that his shoulder is unstable, and when I examined him, I could sublux it. I could push it out of place.

> So the typical treatment for that is to - unfortunately, you have to go back in and open the shoulder up, and you pop out the little plastic cup that we put on the humerus bone, and it comes in all different thicknesses, and I would..
>
> Would involve opening up the shoulder, taking that little plastic liner out and putting a thicker one in that's either 3 or 6 millimeters thicker, and then I also would probably - his cuff that he has now is not terribly constrained, and I would put another constrained cup that has deeper - a deeper dish in it to - to restore that stability to the shoulder.
>
> And I -- and every shoulder dislocation I've seen after a reverse replacement, that subscapularis tendon is - the one in the front of the shoulder is usually torn off when the shoulder dislocates.
>
> So we would either try to reattach that or if not, then just - just deal with it. But those are the actions that I would do to restore the stability intraoperatively.

33. As found, Claimant was credible in his testimony. Claimant clearly explained that he was not doing anything out of the ordinary or outside his restrictions either at work or at home when his shoulder slipped out of place. The movements were not quick, fast and were ordinary activities he performed every day. Claimant credibly explained that he believed that something went wrong with his shoulder replacement when it slipped out and that he had done nothing that would be the responsibility of his current employer. He expressed his belief that it was all part of the original claim and injury of March 11, 2019.

34. As found, Dr. Papilion's explanation of the progression of the cup or capsule stretching out and the muscles not being strong enough to keep the cup on the metal ball was credible and persuasive. He further credibly explained that stretched cup and the lack of muscle tone of the shoulder joint caused it to become unstable and caused the subluxations or dislocations.

35. As found, it is more probable than not that the condition of the artificial joint was no longer stable and supported by the atrophying muscles and caused the subluxations and instability. As found, Claimant's condition has changed significantly because the instability of the joint changed how Claimant carries out activities of daily living and work, where he has to continuously protect the right upper extremity from movement.

36. Dr. Papilion's opinions are more persuasive that Dr. Ciccone's opinions. Especially since Dr. Ciccone failed to get a complete history and correct mechanism of actions that Claimant described above. Dr. Ciccone noted that Claimant had made a "quick" motion to catch the box that was falling. When, in fact, Claimant was merely beginning to reach out when he felt his shoulder slip and stopped the motion immediately. He did not reach out to catch the falling box. In fact, the box fell to the ground. Dr. Ciccone noted that Claimant was "reaching back for the van door and felt it slip," when, in fact, Claimant was outside of the van on the passenger side, sliding the door closed. He made mistakes such as not noting the time line, first stating these incidents occurred in March and then in September. As found, Dr. Ciccone did not have all the correct facts to make a credible causation analysis.

37. Furthermore, Dr. Ciccone noted that one of the possibilities was that the instrumentation of the joint replacement had failed or stretched. He recognized that movement could probably loosen some scar tissue and some other constraints that can happen from surgery that could make the shoulder unstable.

38. Claimant has proven by a preponderance by a preponderance of the evidence that he has had a change in condition that is proximally related to the original surgery and joint replacement due to the March 11, 2019 work related injury. Claimant has proven that it is more likely than not that the instability of his shoulder and need for further surgical repair is sufficient to establish the need to reopen the March 11, 2019 claim. As found, Claimant's credible testimony regarding the "incidents" cited above were merely functions of inconsequential movements that did not amount to injuries or aggravations or intervening events, movements well within his restrictions and activities he performed daily without consequence.

39. As found, Both Dr. Papilion and Dr. Ciccone did agree that the revision surgery was reasonably necessary. Dr. Papilion was more credible than the contrary opinions of Dr. Ciccone with regard to the proposed surgical revision of the total reverse shoulder arthroplasty being related to conditions proximately caused by the original work injury.

40. As also found, Claimant's March 11, 2019 industrial injury left Claimant's body in a weakened condition that played a causative role in producing additional disability or the need for additional medical treatment. As a result, Claimant's disability and need for medical treatment represent compensable consequences of the industrial injury. As a result, the ALJ finds and concludes that Claimant has establish by a preponderance of the evidence that his condition proximately caused by the March 11, 2019, industrial accident has worsened since being placed at MMI and that his claim should be reopened.

41. Thus, the ALJ further finds and concludes that Claimant has established by a preponderance of the evidence that the need for medical treatment is causally related to his March 11, 2019, work injury. Claimant has proven by a preponderance of the evidence that the revision surgery is reasonably necessary and related to the March 11, 2019 work injury.

42. 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 any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

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

B. Petition to Reopen for Further Medical Benefits

The issue of medical benefits is integrally intertwined with the issue of the petition to reopen the claim. A Claimant cannot reopen a claim without claimant a specific benefits

such as temporary disability or medical benefits that are reasonably needed and related to the claim in question. Therefore, both issues will be addressed at the same time.

Section 8-43-303(1), C.R.S. provides that a Worker's Compensation award may be reopened based on a change in condition. When a claim is closed, the claimant is precluded from receiving further benefits unless there is an order reopening the claim on the grounds of error, mistake or change of condition. *See Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), (a claim may be reopened for further medical treatment when the claimant experiences an "unexpected and unforeseeable" change in condition); *Brown and Root, Inc. v. Indus. Claim Appeals Off.*, 833 P.2d 780 (Colo. App. 1991).

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); *Brickell v. Business Machines, Inc.*, 817 P.2d 536 (Colo. App. 1990); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988). There is no basis to reopen a claim if the reopening does not lead to the award of additional benefits. *Richards v. ICAO*, *supra.*

In seeking to reopen a claim, Claimant shoulders the burden of proving his condition 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); *Cordova v. Industrial Claim Appeals Office, supra*; *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986); *El Paso County Department of Social Services v. Donn*, 865 P.2d 887, (Colo. App. 1983); *Barker v. Poudre School Dist.,* W.C. No. 4-750-735 (ICAO, Mar. 7, 2012). In order to prove that an industrial injury was the proximate cause of the need for medical treatment, an injured worker must prove a causal nexus between the need for treatment and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998).

Respondents are liable to provide medical treatment that is reasonably necessary to cure or relieve the employee from the effects of the injury or prevent further deterioration of the claimant's condition. Sec. 8-42-101, C.R.S.; *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609, 611 (Colo.App.1995). 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. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The mere occurrence of a compensable injury does not require an ALJ to find that the need for subsequent medical treatment was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those, which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); Sec. 8-41-301(1)(c), C.R.S. (2022).

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., supra*; *Jarosinski v. Indus. Claim Appeals Off.,* 62 P.3d 1082, 1084 (Colo. App. 2002); *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). A change in condition pertains to changes that occur after a claim is closed (after a Claimant was determined

to be at maximum medical improvement). *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006); *El Paso County Department of Social Services v. Donn*, *supra*. The pertinent and necessary inquiry in this case is whether Claimant has suffered any deterioration in his work related condition that justifies additional benefits. *Cordova v. Indus. Claim Appeals Office, supra*.

The question of whether Claimant has proven a change in condition of the original compensable injury or a change in physical or mental condition which can be causally connected to the original compensable injury is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, *supra*; *City of Durango v. Dunagan, 939 P.2d 496 (Colo. App. 1997); Faulkner v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

The reopening authority is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ. *Renz v. Larimer County Sch. Dist. Poudre R-1,* 924 P.2d 1177 (Colo.App.1996). See *Berg v. Ind. Claim Appeals Off. of Colorado*, *supra*. The ALJ is vested with authority to address whether a claimant met their burden of proof under a preponderance of the evidence standard. See *Renz. V. Larimer County Sch. Dst. Poudre R-1, supra*. Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball, supra*; *Jarosinski v. Industrial Claim Appeals Office, supra*; *City of Durango v. Dunagan*, *supra*. However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). If a new intervening cause results in the need for care then reopening is improper. See *Owens v. ICAO*, *supra*. "If the worsening is the result of an intervening cause, including an intervening industrial injury, the worsened condition is not a compensable consequence of the original industrial injury, but a new injury." *Edwards v. Wal-Mart Stores, Inc.*, W.C. No. 4-478-405 (ICAO, December 13, 2002). The question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.*

An ALJ must determine, based on the totality of the circumstances if the causal link is present. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). In this case, both surgeons, Dr. Papilion and Dr. Ciccone, have agreed that the revision of the reverse total shoulder surgery is reasonable and necessary and this ALJ agrees. The only issue is whether the worsening of Claimant's condition was related to the March 11, 2019 work injury.

As found, this ALJ credits the opinions of Dr. Papilion, the original surgeon that performed the total reverse right shoulder arthroscopy, to reach the conclusion that Claimant's need for revision surgery was, more likely than not, probably caused by the

natural stretching or deterioration of the plastic cup portion of the prosthesis which was implanted as a consequence of the March 11, 2019 work related injury. Dr. Papilion's opinions are more credible and persuasive that the contrary opinions of Dr. Ciccone, who based his causation analysis on faulty assumptions.

Moreover, this ALJ is not even remotely persuaded that the described "incidents" while Claimant was carrying out employment related duties aggravated, accelerated or combined with this pre-existing condition to give rise to an intervening event. These incidents were, in fact, non-events, as Claimant was simply moving his body in a manner that was natural and not outside his restrictions. Claimant's disability and need for treatment, rather, were caused by the instability of the shoulder replacement and the atrophied muscles caused by the original shoulder replacement. In February 2022, before Claimant began his current position, Dr. Papilion documented finding some calcification in the lateral deltoid adjacent to the acromion. As found, this likely started the deteriorating process.

As Dr. Papilion noted in his September 15, 2022 report, Claimant provided the history of what was happening with his shoulder. Dr. Papilion noted atrophy and wasting of the musculature surrounding the shoulder, which was expected since the rotator cuff tendons and muscles were no longer attached to the bone and there was nothing stimulating them to keep them toned or functioning. The atrophy of the muscles combined with either the calcification or loosening scar tissue is what caused the instability as the muscle were having a difficult time holding the stretched out polyethylene humeral cup onto the metal ball implanted during the reverse arthroplasty. Dr. Papilion persuasively and convincingly opined that an incident where the shoulder just happened to come out of place just merely reaching forward, was not a traumatic episode, and was not enough to tear anything. The persuasive evidence presented supports a conclusion that Claimant's need for treatment, including surgery is more probable than not related to the natural deterioration of the prosthesis and scar tissue that simply released causing the subluxations or dislocations, which in turn caused the instability of the right shoulder. From the totality of the evidence, Claimant's need for the surgery was proximately caused by the progression of atrophy of Claimant's muscles caused by the joint replacement. Further, the joint replacement was proximately caused by the March 11, 2019 work injury. Therefore, the need for the revision surgery flows naturally and proximately from the March 11, 2019 work injury.

Based upon the totality of the evidence presented, Respondent 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. (2022); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Respondents are liable for the revision surgery proposed by Dr. Papilion as well as any medical care or rehabilitation associated with that surgery.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has shown by a preponderance of the evidence that he had a worsening of condition to justify a reopening of the March 11, 2019 claim.

2. Respondents shall pay for the revision surgery under Dr. Papilion and for any associated medical care related that surgery.

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**. 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 28th day of April, 2023.

Digital Signature

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he her average weekly wage ("AWW") should be increased above what was admitted to in the general admission of liability ("GAL")?

- Whether Claimant is entitled to additional temporary disability benefits, including temporary partial disability benefits, based on the increased **AWW?**

- The parties stipulated prior to the hearing that if Claimant was to be found to have earned less than her AWW for any given period of time in which she was on restrictions after her injury, Claimant's loss of earning was attributable to the effects of the work injury.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on September 6, 2021 while working for Employer. Claimant testified she went to pick up a bag of dog food that weighed forty-seven (47) pounds and injured her lower back. Claimant had begun working for Employer on June 2021. Claimant testified she was initially earning $12.75 per hour. Claimant testified at hearing that prior to her work injury she had received a raise to $14 per hour. Claimant testified she worked overtime prior to her date of injury.

2. Claimant testified she received two raises after her injury, one to earning over $15 per hour, and a second raise that increased her hourly rate to over $16 per hour. According to the wage records entered into evidence, Claimant received a raise from $12.75 per hour to $14 per hour on August 8, 2020. According to the wage records entered into evidence, Claimant received a raise from $14 per hour to $15.81 per hour on or about February 20, 2022. According to the wage records, Claimant received a second raise up to $16.48 per hour on or about May 1, 2022.

3. In addition to Claimant's job with Employer, Claimant had another job with working information technology ("IT") for a law firm owned by her family. Claimant testified she began working for her family's law firm while she was teenager. Claimant testified she earns $500 twice per month plus bonuses.

4. Claimant testified she stopped working for Employer on May 28, 2022. Claimant testified that after her injury she was not able to maintain a full time schedule. Claimant testified she was not paid temporary disability benefits from her Employer.

5. Claimant testified she has not missed time from work with her concurrent Employer working IT since her injury.

6. Respondents filed a general admission of liability ("GAL") admitting for an AWW of $453.46. The GAL admitted for TTD benefits beginning May 28, 2022 at a TTD rate of $302.31. According to the GAL, the AWW was calculated based on Claimant's earnings from June 14, 2021 through September 4, 2021.

7. Claimant argues at hearing that the ALJ should consider post injury raises in calculating Claimant's AWW. The ALJ is not persuaded. The ALJ notes that while Claimant received post-injury raises, those raises were provided to Claimant over five months after the injury. Under these circumstances, the ALJ does not believe that using Claimant's post-injury earnings is the appropriate method for calculating Claimant's AWW.

8. Respondents argue that it is improper to use Claimant's earnings from her concurrent employment with the law firm due to the fact that Claimant has not missed time from her concurrent employment. Respondents argue that this may become relevant to readdress if Claimant is provided a permanent impairment rating in the future, but should not be included in the AWW calculation at the present time.

9. The ALJ is not persuaded. Claimant should not have to seek a new hearing in the future to increase her AWW once she is provided a permanent impairment rating. Claimant's AWW is to be calculated based on her earnings at the time of her injury, which includes her concurrent employment. There is no requirement that Claimant miss time from her concurrent employment or receive a permanent impairment rating to have her earnings from her concurrent be included in calculating her AWW.

10. While Claimant's temporary disability benefits will not include her concurrent employment, it does not negate the fact that Claimant's AWW is intended to include earnings from any concurrent employment Claimant had at the time of the injury.

11. According to the wage records, Claimant worked 29.22 hours her first week of employment (June 14 through June 19, 2021), but worked 42.58 hours the next week. The ALJ notes that there were only two weeks prior to Claimant's injury in which she worked less than $30 hours for employer, the first week of employment and the week of August 1, 2021 through August 7, 2021 when Claimant took leave without pay. The ALJ has determined that these two weeks should not be included in calculating Claimant's AWW as she was voluntarily off of work for a period of time during one week and the first week of Claimant's employment may not have included all days within the pay period. In the remaining ten (10) weeks of employment, Claimant averaged 34.583 hours of work per week, not including overtime. Claimant also worked 2.58 hours of overtime that was paid at a rate of time and a half during the week of June 20 through June 26, 2021.

12. Based on Claimant earning $14 per hour at the time of the injury, the ALJ determines Claimant's AWW should be based off of her hourly rate at the time of the injury. The ALJ further notes that Claimant received two $75 vaccination stipends

during her employment with Employer prior to her injury. The ALJ finds that the vaccination stipends should likewise be used in calculating Claimant's AWW.

13. Using Claimant's hourly rate of $14 per hour and considering Claimant's average hours per week, plus the 2.58 hours of overtime, the ALJ determines Claimant's AWW from her work with Employer to be $504.58 (345.83 hours worked x $14 = $4,841.62 + $54.18 (2.48 x $14 x 1.5) = $4,895.80 + $150.00 ($75 x 2 vaccination stipends)= $5,045.80 divided by 10 weeks= $504.58).

14. Claimant's AWW should also include her earnings from her concurrent employment, even Claimant did not miss time from work with her concurrent employment. Claimant testified that she was paid $1000 per month ($500 twice per month) for her concurrent employment. This equates to an increase in the AWW of $230.77 ($12,000 divided by 52= $230.77).

15. Therefore Claimant's AWW for this injury is determined to be $735.85.

16. Claimant's temporary partial disability ("TPD") benefits for the period of September 7, 2021 through May 27, 2021 are based only off of Claimant's AWW related to her employment with Employer as Claimant was not losing wages from her concurrent employment. For purposes of TPD benefits, Respondents shall pay Claimant TPD benefits for each week she did not earn $504.58 for the period of September 7, 2021 through May 27, 2022 pursuant to W.C.R.P. 5-6(E).

17. For purposes of temporary partial disability ("TPD") benefits after May 28, 2022, Respondents shall pay Claimant TPD benefits at a TPD rate of $338.39 ($504.58 x 2/3 = $338.39) based on Claimant's earnings of $504.58 with Employer beginning May 28, 2022 and continuing until terminated by law or statute.

18. The ALJ notes that the GAL admitted for TTD benefits effective May 28, 2022, however these would technically be TPD benefits as Claimant continued to maintain her concurrent employment without any wage loss.

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 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).

2. 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., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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). 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).

4. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995).

5. As found, claimant's AWW for her September 6, 2021 injury is properly calculated at $735.85.

6. Based on the stipulation of the parties, Respondents are liable for TPD benefits for each week Claimant was not earning her AWW as calculated by her earnings with Employer to be $504.58 while employed with Employer up through May 27, 2022 after which time, Claimant is entitled to TPD benefits at a rate of $338.39.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant weekly TPD benefits based on Claimant's earnings of $504.58 for the period of September 7, 2021 through May 27, 2022.

2. Respondents shall pay Claimant TPD benefits at a rate of $338.39 for the period of May 28, 2022 until terminated by law of statute.

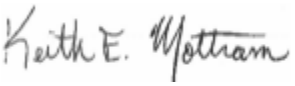
3. Claimant's AWW for her September 6, 2021 injury is $735.85.

4. All matters not determined 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. 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. In **addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: April 27, 2023



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 5-124-689-006

ISSUES

- Did Respondent prove Claimant received an overpayment of $2,563.19?
- If the ALJ finds Claimant received an overpayment, the amount or rate of repayment.

FINDINGS OF FACT

1. Claimant works for employer as a Correctional Officer.

2. Claimant suffered an admitted injury to her left side, including her left knee and left breast when she fell at work during drill instruction exercises. The date of injury was October 8, 2010.

3. Following a Division Sponsored IME with Dr. Larson, the Claimant was placed at MMI. However, the Claimant successfully challenged that determination at hearing and the MMI determination was set aside by Order of ALJ Lamphere, dated February 2, 2021.

4. The Claimant underwent further treatment after that Order and again was placed at MMI on November 12, 2021.

5. Respondent filed a Final Admission (FAL)) on December 8, 2021. (Respondent's Exhibit B). In that Final Admission, the Respondent asserted an overpayment of $2,563.19. Claimant objected to the FAL and requested a hearing. Claimant's Application for Hearing dated January 4, 2022 did not endorse overpayment. Although not an exhibit, Respondent states in its proposed order that it filed a Response to the Application for hearing listing the overpayment asserted under the FAL. No hearing was held on this Application for Hearing.

6. Respondent filed an application for hearing dated December 21, 2022 alleging overpayment. (Claimant Exhibit 4). Claimant filed a Response to the Application dated December 28, 2022. (Claimant Exhibit 5).

7. [Redacted, hereinafter SW] is a claim adjuster at [Redacted, hereinafter CV]. She testified that CV[Redacted] is the Employer's third-party administrator. She handled the Claimant's workers' compensation claim at CV[Redacted] and oversaw the indemnity payments to the Claimant. She was familiar with the payment logs in Exhibit E of Respondent's Exhibits. The logs included payments that were made by CV[Redacted], as well as payments made by the prior third-party administrator. She was familiar with the payments made after MMI. She testified that the overpayment was due to temporary disability benefits paid after MMI. The indemnity payment log submitted into evidence shows two TTD checks issued on November 18, 2021 and November 25, 2021, each in

the amount of $1,329.06. The first check includes the day before MMI. After subtracting that day of TTD, the overpayment for TTD paid after MMI is the amount claimed by Respondent.

8. Respondent's Exhibit D shows wage records from checks issued beginning on February 28, 2022 through January 31, 2023. These records establish a pay raise that occurred in January 2022, associated with a promotion. They also establish various incentive pay and a bonus paid at various times in 2022.

9. Claimant testified that she exhausted her paid time off, sick pay, comp time and vacation time for time she spent away from work for medical treatment and was never reimbursed for those hours. However, Claimant did not provide any credible specific evidence concerning these hours and the ALJ is left to speculate as to the specifics of these allegations and whether this information would have any effect on the specific overpayment asserted in this hearing. In any event the issue of unpaid temporary disability benefits was not endorsed as an issue for hearing in Claimant's Response to Application for Hearing and is not an issue before the ALJ in this hearing. The only issue listed by Claimant in her Response was "Overpayment". (Claimant's Exhibit 5). As such, the ALJ cannot consider any alleged unpaid temporary disability benefits as a reduction to the overpayment asserted.

10. With respect to funds available to satisfy the overpayment, Claimant was asked questions concerning accounts shared between Claimant and her Spouse. Claimant maintains a separate banking account for her income, separate and apart from her husbands' banking account. Respondent provided no evidence that Claimant's husband's income is relevant to the repayment issue.

CONCLUSIONS OF LAW

A. Respondent's Assertion that Claimant is bound by the existence and amount of Overpayment

Respondent asserts that because Claimant did not endorse any challenge to the overpayment in her January 4, 2022 Application for hearing that she is bound by the existence and amount of overpayment as set forth in the FAL. This argument is without merit. Respondent provides no legal authority for this argument. The issue of overpayment continues to be the burden of proof of the Respondent to be established at a hearing. The notation regarding "overpayment" in the FAL simply provides notice to the claimant that an overpayment is asserted. See, *Peoples v. Industrial Claim Appeals Office*, 457 P.3d 143 (Colo. App. 2019). The notice of overpayment does not relieve the Respondent establishing the amount of overpayment at an evidentiary hearing.

B. Overpayment

Section 8-40-201(15.5) defines an overpayment as:

> [M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results

> in duplicate benefits because of offsets that reduce disability or death benefits payable . . . . For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits . . . .[1]

The statute creates three categories of overpayments. The first category is for overpayments created when a claimant receives money "that exceeds the amount that should have been paid. . ." Only the first category of overpayment is involved in this case.

Respondent has the burden to prove Claimant received an overpayment. *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002).

The Claimant was paid TTD after the date of MMI of November 12, 2022 and that constitutes an overpayment which the Respondent is entitled to recover.

C. Repayment

C.R.S. §8-43-207(1)(q) provides that an ALJ is empowered to order a repayment of overpayment in connection with a hearing. After consideration of the evidence, including the receipt of a raise in pay, a bonus and incentive pay, the ALJ concludes that a reasonable amount for repayment of the overpayment is $200 per month until the overpayment is repaid.

[1] This statute was amended in HB 21-1207, effective on January 1, 2022. The Industrial Claims Appeals office recently decided that the definition of overpayment does not apply to injuries that occurred prior to this effective date. *Barnes v. City and County of Denver*, WC 5-063-493. (ICAO March 27, 2023).

ORDER

It is therefore ordered that:

1. Respondent's claim for an overpayment of $2,563.19 is granted.

2. Claimant shall repay Respondent the TTD overpayment of $2,563.19 at the rate of $200 per month until the overpayment is repaid.

3. Any issue not addressed herein are reserved for future determination.

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

DATED: April 13, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-153-633-004

ISSUES

- Did Claimant prove that Claimant is subject to a penalty pursuant to C.R.S. §8-43-304 for violation of the Order of Judge Lamphere dated April 13, 2022.

- Claimant's request for attorney fees for Respondent's alleged pursuit of an unripe issue.

PROCEDURAL HISTORY

A hearing was previously held in this claim on March 10, 2022 before ALJ Lamphere in which the parties stipulated Claimant was overpaid benefits in the amount of $4,458.99. In his April 13, 2022 order, ALJ Lamphere ordered Claimant to repay the overpayment in monthly payments of $300 starting the first of the month after the order became final. (Respondent's Exhibit A). Claimant timely appealed ALJ Lamphere's order to the Industrial Claim Appeals Office ("ICAO'). The ICAO decision issued on August 15, 2022 affirmed ALJ Lamphere's order. (Respondent's Exhibit B). Claimant did not appeal the ICAO decision, thus, ALJ Lamphere's order became final 22 days after the ICAO decision, or on September 6, 2022.

Claimant subsequently filed another Application for Hearing in this claim with issues of reopening and medical benefits. The Claimant did not identify Judge Lamphere's order for repayment as an issue on this Application for hearing. This case was consolidated with the claim for compensability in W.C. 5-202-731.The hearing on that Application was held before ALJ Perales on September 29, 2022. ALJ Perales' order denying and dismissing Claimant's petition to reopen was issued on November 18, 2022. That order also denied and dismissed the claim for compensability in WC 5-202.731. That Order was affirmed by the Industrial Claim Appeals Office on April 4, 2023. Claimant is currently appealing that order to the Colorado Court of Appeals.

STIPULATED FACTS

The parties have stipulated that Claimant has not made any payments in any amount towards the $4,458.99 overpayment.[1]

FINDINGS OF FACT

1. Claimant worked for Employer as a correctional officer. Claimant sustained an admitted injury on October 23, 2020 to his right shoulder. The claim was previously closed by Final Admission. (Respondent's Exhibit A, p.3).

2. Claimant applied for a hearing to reopen this claim and the reopening was denied by order of Judge Lamphere dated April 13, 2022. That order also ordered repayment of the stipulated overpayment of $4,458.99 at the rate of $300 per month payable at the first of the month. That Order became final on September 6, 2022 when all appeals were exhausted.

3. Claimant also filed another application for hearing on this claim on the issues of petition to reopen and medical benefits. The hearing was consolidated with W.C. 5-202-731 on the primary issue of compensability. The hearing on that application was held before ALJ Perales on September 29, 2022. ALJ Perales denied and dismissed the Claimant's petition to reopen and claimed medical benefits in an order issued on November 18, 2022. The order also denied compensability in the consolidated case. As noted in footnote 1, Claimant has stated that he has filed an appeal of this order to the Colorado Court of Appeals and the Order is not final.

4. Claimant testified that the last day he worked was April 7, 2022 when he was restricted from work when he claims to have sustained a new injury to his right arm.[2]

5. Claimant testified that he is has been receiving disability benefits from [Redacted, hereinafter UM] since the Lamphere Order was issued. On December 24, 2022, Claimant received $15,107.14 in disability benefits from UM[Redacted] followed by $9,377.85 on January 25, 2023. (Respondent's Exhibit E, pp. 34 – 35). Additionally, Claimant testified that he continues to receive monthly long-term benefit checks from UM[Redacted] in the amount of $3,124.95). Claimant receives no other income.

CONCLUSIONS OF LAW

A. Stay of Proceedings

[1] Claimant provided this stipulation during the telephone testimony of [Redacted, hereinafter TC] and TC's[Redacted] testimony is therefore not included in the Findings of Fact since it was unnecessary to the disposition of the matter.

[2] This claimed injury is the subject matter of WC 5-202-731 where compensability was denied as part of the order issued by Judge Perales on November 18, 2022.

Claimant argues that the issue of penalties should be stayed pending a final order of Judge Perales' Order dated November 18, 2022. Claimant's argument ignores the fundamental fact that the Order of Judge Lamphere is the Order that imposes the obligation to repay the overpayment of $4,458.99 at the rate of $300 is a final order and is not subject to any further appeal. Moreover, the amount of the overpayment was stipulated by the parties and that is not subject to dispute. The current order on appeal by Judge Perales does not affect the Claimant's obligations owed on the Lamphere order to repay the overpayment, irrespective of the outcome to the Perales order on appeal. Claimant argues that if the Perales order is reversed or set-aside then potentially no overpayment would exist. This argument ignores the current legal obligation to repay the overpayment as ordered under a final order. It also relies on speculation as to what may happen in future court proceedings that may or may not eliminate the overpayment. Such speculation does not provide a basis for a stay of this proceeding. As such, the request for stay of this hearing on penalties, for violation of the Lamphere order is denied. Claimant has provided no legal authority in support of his request for stay and the Judge in this case is unable to find any legal authority that applies to this specific situation in an administrative proceeding that would require that a stay of this proceeding be imposed.

B. Ripeness and Attorney Fees

Claimant contends that the penalty claim, which is the subject matter of this hearing, is not ripe for consideration because of an ongoing appeal of a prior order in this claim. C.R.S. §8-43-211(3) provides that an attorney who requests a hearing or files a notice to set a hearing on an issue not ripe for adjudication may be assessed reasonable attorney fees for the expenses of the opposite party. An issue is ripe when it is real, immediate and fit for adjudication. *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App 2006). The term "fit for adjudication" refers to a disputed issue for which there is no legal impediment to immediate adjudication. Under that doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which never occur. Olivas-Soto v. ICAO, supra. (Citations omitted). *See also McMeekin v. Memorial Gardens*, W.C. 4-384-910 (ICAO 9/30/2014). There is nothing speculative or contingent with respect to the determination of penalties for violation of Judge Lamphere's order. The Order contains a stipulation of the amount of overpayment. It contains the rate of repayment and it is final. The status of the appeal of a subsequent order of Judge Perales on the issues of reopening of this claim and compensability of a consolidated claim does not affect whether there has been a violation of the order issued by Judge Lamphere. As such, the issue of penalties is ripe.[3]

C. Penalty

Section 8-43-304(1) provides that an employee who "fails, neglects, or refuses to obey any lawful order made by the director or panel. . . shall be punished by a fine of not more than one thousand dollars per day for each such offense. . ." Further, C.R.S. §8-43-

[3] Even if that were not the case, attorneys fees and costs may not be awarded absent a request by the requesting party to have the unripe issue stricken by a prehearing administrative law judge. C.R.S. §8-43-211(3). Claimant did not present evidence of compliance with this statutory requirement.

305 provides that 'Every day during which any . . employee . . . fails to comply with any lawful order of an administrative law judge . . . shall constitute a separate and distinct violation thereof."

The assessment of penalties is governed by an objective standard of negligence and involves a two-step analysis. First, the ALJ must determine whether the employee violated the Act, a rule, or an order. Second, the ALJ must determine whether the violation was objectively reasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

There is no question that the Claimant in this case violated the final order of Judge Lamphere ordering repayment of the overpayment. The order is very clear that the overpayment amount was stipulated to by the parties and the rate of repayment was not appealed or otherwise disputed. Claimant also stipulated in this hearing that he has made no payments pursuant to Judge Lamphere's Order. Further, Claimant did not make any argument that the order was not final. As to reasonableness, the argument provided by Claimant is that this proceeding should be stayed pending appeal of a subsequent order that denied reopening of this case based on worsening of condition. In his position statement, the Claimant argues that he is unable to pay and the money since he has been on short term and long-term disability and that money is not considered income. However, Claimant provided no testimony of his inability to pay the overpayment at hearing. I am therefore left with argument without persuasive supporting testimony or other evidence on Claimant's alleged inability to repay the overpayment. The only testimony Claimant provided as to this allegation was his inclusion of testimony that the disability payments received from UM[Redacted] were used to pay his bills from the previous months. No further testimony or evidence was offered as to why he could not repay the overpayment based on his financial circumstances. I conclude that based on the preponderance of the evidence that the violation of Judge Lamphere's order based on this argument is not objectively reasonable. Claimant has been in violation of the April of the final order of Judge Lamphere for 187 days from October 1, 2022, the first full month following the date the Lamphere order became final, until the date of this hearing.

As to the amount of penalties, in order to assess an appropriate penalty, this ALJ is mindful of the analysis in Associated Business Products v. Industrial Claim Appeals Office, 126 P.3d 323 (Colo. App. 2005) which includes as factors the reprehensibility or culpability of the party, the relationship between the penalty and the harm to the victim caused by the other party's actions and the sanctions imposed in other cases for comparable misconduct. I conclude that based on the evidence, Claimant is culpable for payment of the undisputed overpayment and failed to provide any persuasive evidence as to why he failed to pay the required amounts. As to other comparable penalties, I have considered the facts and holding in the case of Lange v. Kern, W.C. 4-907-620-002 (ICAO January 18, 2019) that imposed penalties of $2 per day for failing repay an overpayment pursuant to an order. After consideration of that case as well as the facts in this case, and considering the amount of the overpayment in dispute as well as the Claimant's financial situation, based on the evidence presented at the hearing, the ALJ determines that the

appropriate penalty for violation of Judge Lamphere's order is $5 per day. The ALJ has considered the holding in Colorado Department of Labor v. Dami Hospitality, L.L.C. 442 P.3d 94 (Colo. 2019) regarding gross disproportionality. Based on the disability payments received from UM[Redacted], the amount of penalty imposed is not excessive and serves the purpose of compliance with a valid order without unduly burdening the Claimant's financial situation. Even though the harm to the Respondent in this case may be considered minimal, the Claimant's failure to comply with a lawful order is serious and must result in a meaningful consequence so that Claimant understands that he may not ignore a valid order.

ORDER

It is therefore ordered that:

1. Claimant's request for a stay of this proceeding to determine the issue of penalties is denied.

2. Respondent's request for imposition of penalties against the Claimant is granted. Claimant shall pay penalties of $935.00. The amount apportioned to Respondent shall be 25% of the penalty and the remaining 75% is apportioned to the Colorado uninsured employer fund as set forth in C.R.S. §8-43-304(1).

3. Claimant's request for attorney fees is denied and dismissed.

4. Any issue not resolved by this order is 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: April 27, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-208-340-002

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on March 12, 2022 he suffered an injury arising out of and in the course and scope of his employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment he has received for his right hip is reasonable and necessary medical treatment to cure and relieve the effects of the March 12, 2022 injury.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment he has received for his right knee is reasonable and necessary medical treatment to cure and relieve the effects of the March 12, 2022 injury.

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

5. If the claim is found compensable, whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant shall be assessed a late reporting penalty pursuant to Section 8-43-102(1)(a), C.R.S.

FINDINGS OF FACT

1. The employer operates a construction equipment rental business. In addition to renting large construction equipment, the employer also rents, sells, and repairs small equipment such as lawn mowers and chainsaws. [Redacted, hereinafter JS] and his spouse, [Redacted, hereinafter MC], own and operate the business.
2. In November 2021, the claimant was hired to work for the employer as a driver and small engine mechanic. The claimant's driver job duties included pickup and delivery of rented equipment at customer locations.

3. On Saturday, March 12, 2022, the claimant was tasked with delivering a bobcat/skid steer with a snow bucket attachment from the employer's location in Glenwood Springs, Colorado to a customer in Snowmass, Colorado. The claimant was accompanied by another employee, the owners' 16 year old son, WS[1]. The piece of equipment was delivered to the requested location in Snowmass without incident. The

[1] The ALJ identifies WS by initials only because WS was a minor on March 12, 2022, and remained a

minor on the date of the hearing.

claimant and WS were then tasked with picking up the equipment later the same day. When the claimant and WS arrived at the designated pick up time, they learned that the equipment was essentially buried in snow. The claimant and WS assisted the customer with shoveling snow to remove the equipment.

4. JS[Redacted] was aware of all of the above details related to the equipment delivery and pick up.

5. The claimant provided detailed testimony regarding the loading of the March 12, 2022 equipment upon pick up. The claimant testified that as he began to drive the bobcat onto the trailer, the trailer became unhitched from the ball of the trailer hitch. The claimant further testified that this resulted in the trailer going up into the air creating a space between the trailer and the truck. The claimant testified that WS ran in between the raised trailer and the truck. The claimant testified that he was concerned that if he continued forward with the bobcat onto the trailer, or reversed off of the trailer, this would cause the trailer to crash toward the ground, injuring WS. The claimant testified that he opted to leap from the bobcat to tell WS why it was unsafe to stand in that location. The claimant further testified that while in the act of jumping up and out of the bobcat, his right foot became caught in the "foot pocket". The claimant testified that he immediately felt pain in his right hip.

6. JS[Redacted] was not informed of these details described in paragraph 5 above regarding the Snowmass equipment on March 12, 2022.

7. Subsequently, the trailer was secured and the bobcat loaded. The claimant and WS traveled back to Glenwood Springs from Snowmass. The claimant drove on the return trip.

8. The claimant testified that while driving back to Glenwood Springs, he began to experience pain in his right knee. The claimant believes that while exiting the bobcat he may have struck his knee on the snow bucket.

9. Thereafter, the claimant returned the bobcat to the employer's location and then drove WS to his home. The claimant did not communicate with JS[Redacted] or MC[Redacted] upon arrival at their home.

10. The following day, Sunday, March 13, 2022, the claimant was not scheduled to work. The claimant testified that on that date he had pain in his right hip with pain and swelling in his right knee.

11. The claimant reported to work as scheduled on Monday, March 14, 2022. Upon his arrival the claimant and JS[Redacted] interacted. The claimant reported that the delivery and pick up in Snowmass went well. The claimant did not provide any information regarding the unhitched trailer and related incident. JS[Redacted] did notice that the claimant appeared "stiff' in his movements and he inquired about it. The claimant responded that he tweaked his knee in the snow. The claimant did not indicate that the "tweak" occurred as a work related incident. The claimant did not make any

statements regarding his right hip. JS[Redacted] asked if the claimant needed to see a doctor for his knee and the claimant declined.

12. MC[Redacted] testified via deposition. MC[Redacted] provided testimony regarding the employer's process for handling employee injuries. MC[Redacted] testified that if an employee is injured that they would be expected to report that injury to either JS[Redacted] or MC[Redacted]. Once that reporting occurred steps would be taken to obtain medical treatment and file a claim. that it is the employer's

13. The claimant did not provide the employer with a verbal or written statement regarding the unhitched trailer and "near miss" incident involving WS. The only information relayed to the employer was that he tweaked his knee in the snow.

14. MC[Redacted] first became aware of the claimant's right knee issues on April 29, 2022. MC[Redacted] testified regarding a conversation she had with the claimant on that date regarding JS[Redacted] own medical treatment. During that conversation, the claimant stated that he receives medical treatment at Steadman clinic. The claimant also stated to MC[Redacted] that he might have to seek treatment for his right knee because he had slipped on the snow in March. The claimant did not indicate to MC[Redacted] that his slip on ice occurred at work. The claimant did not indicate that he wanted to pursue a workers' compensation claim during the April 29, 2022 conversation.

15. On May 23, 2022, the claimant was seen by his primary care physician (PCP) Dr. Kelli Konst-Skwiot with Grand River Clinic Rifle. The purpose of that appointment was a normally scheduled follow-up regarding the claimant's pain medications. The claimant has taken pain medications for many years to treat chronic lumbar back pain. The claimant began seeing Dr. Konst-Skwiot on January 14, 2020.

16. Dr. Konst-Skwiot's January 4, 2020 medical record refers to the claimant's use of Vicodin for approximately 10 years. The claimant reported to Dr. Konst-Skwiot that he had used Vicodin since undergoing surgery and injections years prior. Medical records entered into evidence demonstrate that the claimant had extensive low back treatment with Steadman Clinic beginning in 2013. Since beginning treatment with Dr. Konst-Skwiot in 2020, the claimant has regularly occurring follow-up appointments to discuss his pain medications.

17. The claimant testified that on March 12, 2022 he was using Vicodin, as was his practice. The claimant also testified that as of the day of hearing he continues to use Vicodin on a daily basis.

18. While at such a follow-up appointment with Dr. Konst-Skwiot on May 23, 2022, the claimant described any incident that occurred in March involving his right knee. Dr. Konst-Skwiot noted "He states he was getting out of bobcat and there are pockets for his feet. His leg got caught in bucket and it was really sore[.] It happened in [M]arch and it is still painful[.] He said it happened at work. He has not yet started a

case through his job." At the May 23, 2022 appointment with Dr. Konst-Skwiot, the claimant did not report injuring any other body part.

19. During the May 23, 2022 appointment, Dr. Konst-Skwiot provided the claimant with forms for pursuing a workers' compensation claim. The claimant understood that he was to provide these documents to the employer.

20. On May 23, 2022, the claimant presented MC[Redacted] with the paperwork provided to him by Dr. Konst-Skwiot. At that time, the claimant informed MC[Redacted] that he wished to pursue a workers' compensation claim related to his right knee and an incident that occurred on March 12, 2022. MC[Redacted] testified that she did not immediately initiate a claim because she understood that any injury was to be reported within four days.

21. After communications with the insurer, on June 13, 2022, MC[Redacted] prepared a First Report on Injury or Illness regarding a March 12, 2022 incident. The body part identified in that report is the claimant's right knee. The report also states that the claimant "tweaked knee on snow" while "loading a machine on trailer". MC[Redacted] testified that the information provided in that First Report was directly from the claimant. The claimant did not provide any additional information regarding the mechanism of his injury to MC[Redacted]. The claimant did not report injury to any other body.

22. On that same date, MC[Redacted] provided the claimant with a list of designated medical providers. The claimant selected Glenwood Medical Associates (GMA).

23. The claimant was seen at GMA on June 15, 2022 by Dr. Emily Zerba. At that time, the claimant reported right hip pain, right knee pain, and left foot pain. With regard to the March 12, 2022 mechanism of injury Dr. Zerba recorded:

> He was loading jumped out of skid-[steer] to help a co[-]worker and when he landed his right foot was at an angle (no pain in the knee) but then started to have right hip pain. The right hip pain started when he tried to pull his leg out. Pain on the anterior portion of the hip. . . Later that day he started to have right knee pain on the inside (medial aspect).

24. In the June 15, 2022 medical record, Dr. Zerba ordered magnetic resonance imaging (MRI) of the claimant's right hip and right knee. The purpose of the MRIs was to ascertain if the claimant had suffered a labral tear in his right hip and/or a meniscus tear in his right knee. The claimant denied prior right hip and right knee injuries. Dr. Zerba opined that the claimant's right hip and right knee condition were work related. She assessed work conditions that included a 15 pound lifting restriction, and no crawling, kneeling, squatting, or climbing.

25. On June 15, 2022, the claimant provided MC[Redacted] with the work restrictions assigned by Dr. Zerba. Due to the claimant's work restrictions the employer was unable to provide the claimant with continuing work. June 17, 2022 was the claimant's last day working for the employer.

26. JS[Redacted] testified that between March 12, 2022 and June 15, 2022, the claimant continued to perform all of his normal jobs duties without issue. The claimant did not communicate to JS[Redacted] that he could not perform his job duties because of an injury.

27. MC[Redacted] also testified that the claimant continued to work "full pace" until he was seen by Dr. Zerba on June 15, 2022.

28. On June 23, 2022, the claimant underwent MRIs of both his right hip and right knee. Dr. Elizabeth Kulwiec authored reports for both of the June 23, 2022 MRIs.

29. With regard to the right hip MRI, Dr. Kulwiec noted, *inter alia,* that cam-type morphology of the right hip with extensive degenerative changes and tears of the anterosuperior and posterosuperior labrum; mild osteoarthritis of the hip with grade 3 chondromalacia of the superior joint; a small joint effusion; mild bilateral greater trochanteric bursitis; and lumbar degenerative disc disease.

30. For the claimant's right knee, Dr. Kulwiec noted that, *inter alia,* a tear of the body and posterior horn of the medial meniscus; quadriceps enthesopathy; grade 2 chondromalacia of the patella and medial femoral condyle; strain or tendinosis of the semimembranosus tendon; a small joint effusion; and mildly thickened medial patellar plica.

31. On July 2, 2022, the respondents filed a Notice of Contest regarding the March 12, 2022 incident. The document indicates the respondents contested the claimant's claim pending a doctor's report.

32. On July 13, 2022, the claimant returned to Dr. Zerba to discuss the MRI results. Dr. Zerba noted that the right knee MRI showed a posterior horn meniscus tear and the right hip MRI showed a cam deformity with an anterior posterior labral tear. Dr. Zerba referred the claimant for an orthopedic consultation and increased the claimant's lifting restriction to 30 pounds.

33. On July 19, 2022, physician advisor Dr. Albert Hattem issued a report in which he opined that the claimant did not suffer an injury on March 12, 2022. In support of this opinion, Dr. Hattem noted that the claimant did not seek treatment related to the March 12, 2022 event until he was seen by Dr. Zerba on June 15, 2022. Dr. Hattem also noted that if the claimant had experienced a significant injury to his right hip and/or right knee "one would have expected him to seek treatment for these injuries at that time or within weeks of the injury, not more than three months later." Finally, Dr. Hattem opined

that a medial meniscus tear and a labral tear are both "likely age-related degenerative findings and not due to an acute injury."

34. On August 17, 2022, the claimant returned to Dr. Zerba and reported that his claim was denied and he had not seen an orthopedic specialist.

35. At the request of the respondents, on October 25, 2022, the claimant attended an independent medical examination (IME) with Dr. Robert Messenbaugh. In connection with the IME, Dr. Messenbaugh reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. At the IME, the claimant described a mechanism of injury virtually identical to the one he described in his testimony regarding the bobcat and WS. The claimant denied prior treatment and injuries to his right hip and right knee. The claimant disclosed to Dr. Messenbaugh that he has consistently taken Vicodin since undergoing a lumbar spine fusion. On examination, Dr. Messenbaugh noted a "slight catch" within the right hip. On examination of the claimant's right knee, Dr. Messenbauth noted full extension and full flexion of his right knee.

36. During his review of the claimant's medical records, Dr. Messenbaugh noted that on August 2, 2017, the claimant underwent a right hip MRI. In his IME report, Dr. Messenbaugh noted that the 2017 MRI shows severe and advanced pathology involving his right hip with labral tearing and degeneration, chondral damage, and evidence of impingement.

37. The August 2, 2017 MRI report was admitted into evidence at hearing. That report was issued by Dr. Charles Ho. In this report, Dr. Ho found, *inter alia,* a partial detachment of the articular margin of anterior to lateral labrum, with severe central labral degeneration and swelling hypertrophy; chondral degeneration thinning grade 2 to 3 along the peripheral anterior lateral aspect of the acetabulum; mild greater trochanteric bursitis, scarring, and edema.

38. In the October 25, 2022 IME report, Dr. Messenbaugh opined that the claimant did not suffer injuries to his right knee or his right hip on March 12, 2022. Dr. Messenbaugh noted that it was improbable that the right meniscus tear was caused by the events of March 12, 2022. Dr. Messenbaugh explained that a contusion to the knee would not result in a meniscus tear. With regard to the claimant's right hip, Dr. Messenbaugh noted that the pathology in the claimant's right hip was present "well before" March 12, 2022.

39. After reviewing additional medical records, on December 6, 2022, Dr. Messenbaugh issued an addendum to his IME report. In that addendum, Dr. Messenbaugh noted his review of records from Steadman clinic from February 18, 2011 through November 16, 2017. Dr. Messenenbaun noted that on August 2, 2017, Dr. Thos Evans performed a right hip intraarticular steroid injection. In that same August 2, 2017 medical record Dr. Evans noted that if the injection did not provide the claimant with relief, a referral to Dr. Philippon for right hip arthroscopy would be appropriate. In the IME addendum, Dr. Messenbaugh opined that the claimant had "quite severe and

symptomatic right hip pathology years prior to any event on March 12, 2022." Dr. Messenbaugh noted that his opinions expressed in his October 25, 2022 IME report were unchanged. Dr. Messenbaugh's testimony was consistent with his written reports.

40. At the request of the claimant, Dr. Kulwiec compared the 2017 and 2022 right hip MRIs. On February 16, 2023, Dr. Kulwiec issued an addendum to her June 23, 2022 report. In that addendum, Dr. Kulwiec noted that this comparison showed that the mild asphericity of the femoral head was unchanged; that abnormal signal and blunting of the glenoid labrum was similar on both exams; a small joint effusion was unchanged; and the signal in the quadratus femoris muscle remained normal.

41. The ALJ finds the claimant's testimony about the event involving the trailer coming unhitched and his dramatic exit from the bobcat to be neither credible nor persuasive. At no time did the claimant report the emergent nature of this incident to the employer. The ALJ finds that the claimant simply stated that he tweaked his knee on the snow.

42. The ALJ credits the testimony of JS[Redacted] and MC[Redacted] regarding the sequence of events in this case. The ALJ credits the medical records, particularly the comparisons of the two hip MRIs that demonstrate no change to the claimant's right hip. In addition, the ALJ credits the opinions of Drs. Hattem and Messenbaugh over the contrary opinions of Dr. Zerba. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that on March 12, 2022 he suffered an injury arising out of and in the course and scope of his employment with the employer. The ALJ further finds that the claimant has failed to demonstrate that it is more likely than not that the events of March 12, 2022 aggravated or accelerated any preexisting condition in his right hip and/or right knee to necessitate medical treatment.

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 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). The ALJ's factual findings concern only evidence that is dispositive of the issues involved.

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

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on March 12, 2022, he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the events of March 12, 2022, accelerated or aggravated any preexisting condition to necessitate medical treatment. As found, the medical records, the testimony of [Redacted JS] and MC[Redacted], and the opinions of Drs. Hattem and Messenbaugh are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim related to a March 12, 2022 date of injury is denied and dismissed. All remaining endorsed issues are denied and dismissed as moot.

Dated April 10, 2023.

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

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

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-188-968-002

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the cervical disk arthroplasty at the C5-C6 level, as recommended by Dr. Alex Sielatycki, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted May 21, 2021 work injury.

FINDINGS OF FACT

1. The claimant works for the employer as a welder/mechanic. On May 21, 2021, the claimant suffered a work injury when he stood up and stuck his head on scaffolding. The claimant testified that initially he felt a "crunching sound" in his neck and felt dazed. Over the next several days the claimant experienced increasing pain in his neck. In addition, the claimant had radiating pain into his right shoulder and right arm.

2. On May 24, 2021, the claimant was seen by Dr. Matthew Grzegozewski regarding the May 21, 2021 injury. At that time, x-rays showed no evidence of fracture or subluxation. Dr. Grzegozewski diagnosed a cervical strain and administered a trigger point injection.

3. On May 24, 2021, Dr. Grzegozewski ordered work restrictions of no lifting, pushing, or pulling over 20 pounds. Over time the claimant's symptoms improved and his work restrictions were gradually increased to 40, 50, 60 pounds lifting and push/pull up to 100 pounds.

4. On July 12, 2021, the claimant underwent magnetic resonance imaging (MRI) of the cervical spine. The MRI was deemed to be a "negative study". The radiologist noted normal alignment and marrow signal, well-maintained disc height, and no bulge or herniation.

5. In the weeks and months following the injury the claimant underwent conservative care that included physical therapy, occupational therapy, massage therapy, chiropractic care, and pain medications. The claimant testified that these various treatment modalities provided temporary relief of his symptoms. No treatment has provided long term relief.

6. As part of this conservative medical treatment, the claimant underwent osteopathic manipulative therapy (OMT). On November 17, 2021, the claimant was seen by Dr. Aaron Stewart. At that time, the claimant reported right sided neck pain down into the upper thoracic area. Dr. Stewart administered OMT and recorded that the claimant tolerated the procedure well.

7. On November 19, 2021, the claimant communicated with [Redacted, hereinafter KF], Nurse Case Manager. In that discussion, the claimant reported to KF[Redacted] that he did experience some symptom relief from the recent OMT session. The claimant specifically reported that the burning radiating pain was better after OMT.

8. The claimant testified that in the days after the November 17, 2021 OMT treatment he started to experience left sided symptoms. The claimant described this as a deep sensation on the left side of his neck. The claimant further testified that he had not previously experienced left sided symptoms.

9. On Sunday, November 21, 2021, the claimant experienced an extreme flare up of symptoms while hanging a door at home. At the time of this incident, the claimant's work restrictions included lifting up to 60 pounds, and push/pull up to 100 pounds. The claimant testified that he was attempting to adjust a bifold door when he felt a pop in his neck followed by excruciating pain in his neck. In addition, the claimant experienced numbness down his left arm, followed by a burning sensation from his left shoulder into his left wrist. The claimant's pain was so severe that he was transported to Memorial Regional Emergency Services.

10. On November 21 2021, the claimant was seen at Memorial Regional Emergency Services by Dr. Tinh Huyn. Dr. Huyn recorded that the claimant was experiencing "sudden worsening neck pain while working on a cabinet with arms over head prior to arrival." The claimant reported to Dr. Huyn that he had pain radiating down his left arm. The claimant also described the May 21, 2021 work incident to emergency department staff. The claimant was given Gabapentin and placed in a soft neck collar, which provided some relief of his symptoms. Dr. Huyn reviewed the June 24, 2021 MRI and determined that the claimant did not need further imaging.

11. On November 22, 2021, the claimant spoke with KF[Redacted] and stated that "he is slightly better than last night. The OMT seemed to help last week, but the pain has now gone to his left side which is new. Yesterday was the worst pain he has had. He had a pop last night and he had numbness to his left arm and fingers. His arm was weak for a while."

12. On November 22, 2021, the claimant returned to Dr. Stewart. The medical record of that date states that the claimant's "pain had improved following an OMT treatment last week." The claimant also described the November 21, 2021 incident at home and treatment in the emergency department. The claimant testified that Dr. Stewart did not administer OMT on November 22, 2021, because of the claimant's report of the November 21, 2021 incident and onset of symptoms. Dr. Stewart ordered a cervical spine MRI.

13. The claimant testified that the new left sided symptoms lasted a few days. Then one night while wearing the neck brace provided by the emergency department, he felt a pop in his neck, and his symptoms returned to the right side. It is the claimant's belief that the left sided symptoms were caused by the November 17, 2021 OMT.

14. On November 24, 2021, the claimant underwent a repeat MRI of the cervical spine. That MRI showed a congenitally small canal at the C3 to CG levels and a disc bulge at the C5-C6 level.

15. On December 1, 2021, the respondent filed a General Admission of Liability regarding the claimant's May 21, 2021 work injury.

16. Following the November 24, 2021 MRI, the claimant was referred for a surgical consultation. On December 20, 2021, the claimant was seen by Dr. Michael Rauzzino. Dr. Rauzzino documented that the claimant was experiencing neck pain, bilateral shoulder pain, and right arm weakness. Dr. Rauzzino noted that an initial MRI showed degenerative findings. Dr. Rauzzino noted that the claimant had "an abrupt episode of worsening of symptoms when he felt a pop on the left side of his neck when his symptoms switched from the right side to the left." Dr. Rauzzino noted that a repeat MRI showed findings similar to the prior MRI, with a small concentric disc bulge at the C5-C6 level. Dr. Rauzzino opined that this disc bulge was not the cause of the claimant's pain symptoms. Dr. Rauzzino recommended continuing physical therapy and consideration of injections.

17. Thereafter, the claimant consulted with Dr. Eric Harris. The claimant was first seen by Dr. Harris on January 11, 2022. In the medical record of that date, Dr. Harris noted the claimant's May 2021 incident at work. Dr. Harris recorded that the claimant had "several repeat aggravations of his symptoms, one in early November of last year that caused him to have some symptoms on the left. He then went for an MRI, which was reportedly negative. He then started having symptoms on the right, which is where he is hurting now." Dr. Harris noted that the claimant had "an unusual constellation of symptoms that have been kind of moving around". Dr. Harris recommended continuing physical therapy, use of a Medrol Dosepak, and referred the claimant to Dr. Trevin Thurman for injections.

18. On January 20, 2022, the claimant was seen by Dr. Thurman. At that time, the claimant reported an onset of symptoms in May, with a worsenting in November. The claimant also reported pain radiating down his right arm and into his hand. Dr. Thurman reviewed the claimant's cervical spine MRI and diagnosed a right C6 radiculopathy and C5-C6 disc herniation Dr. Thurman recommended a right C6-C7 interlaminar epidural steroid injection (ESI). The claimant underwent the recommended ESI on February 4, 2022. In a report dated March 16, 2022, Dr. Thurman noted that the February injection did not provide the claimant with relief. Dr. Thurman recommended the claimant undergo a transforaminal epidural steroid injection (TFESI).

19. On March 17, 2022, Dr. Long Vu administered right C4-C5 and C5-C6 TFESIs.

20. On April 5, 2022, the claimant was seen by Dr. Scott Primack. In the medical record of that date, the claimant reported that the March 17, 2022 TFESIs provided him with pain relief for 16 days. Dr. Primack recommended that the claimant undergo facet joint injections at the C4-C5 and C5-C6 levels.

21. On May 4, 2022, Dr. Thurman administered bilateral C4-C5 and C5-C6 intraarticular facet joint injections. On May 23, 2023, the claimant returned to Dr. Thurman and reported he had 80 percent relief of his neck pain symptoms, but no improvement of the radiating right arm pain. The claimant also reported that he had started to experience left sided neck pain that radiated into his left arm. At that time, Dr. Thurman referred the claimant back to Dr. Harris.

22. On May 24, 2022, the claimant was seen by Dr. Harris and reported radiating pain into both arms. At that time, Dr. Harris recommended a repeat MRI of the claimant's cervical spine.

23. On June 22, 2022, the MRI showed a disc bulge at the C5-C6 level that was asymmetric to the right with annular tear demonstrates mild to moderate spinal canal narrowing and contacts the ventral right cord and mild left neural foraminal narrowing secondary to uncovertebral disease.

24. On June 23, 2023, Dr. Thurman performed electromyography (EMG) testing. In his EMG report, Dr. Thurman noted mild to moderate bilateral subacute C6 cervical radiculopathy; and mild to moderate left and mild right median neuropathy (consistent with carpal tunnel syndrome).

25. On June 24, 2022, the claimant returned to Dr. Harris. At that time, Dr. Harris noted the EMG findings and recommended that the claimant undergo surgical intervention. Specifically, Dr. Harris recommended either a C5-C6 cervical disc arthroplasty or, in the alternative, a C5-C6 anterior cervical discectomy and fusion (ACDF).

26. On August 3, 2022, the claimant returned to Dr. Rauzzino. At that time, Dr. Rauzzino agreed that surgery was warranted. However, he opined that an ACDF at the C5-C6 level would better address the claimant's symptoms. Dr. Rauzzino noted that the claimant had more than a year of symptoms without significant relief from conservative treatment. Dr. Rauzzino also identified an abnormal MRI**,** and EMG results that suggested C6 nerve root irritation. Dr. Rauzzino further opined that the claimant's need for the surgery was ..occupationally related."

27. On August 19, 2022, the claimant attended an independent medical examination (IME) with Dr. B. Andrew Castro. In connection with the IME, Dr. Castro obtained a history from the claimant, performed a physical examination, and reviewed the claimant's medical records. In his August 21, 2022 IME report, Dr. Castro opined that surgery is not indicated to treat the claimant's symptoms. In support of this opinion, Dr. Castro noted that the claimant is neurologically intact with mild findings on MRI. Dr. Castro also noted that the claimant does not have clear symptoms of cervical

radiculopathy. Dr. Castro noted that the claimant's symptoms are "somewhat vague". It is also Dr. Castro's opinion that the onset of new symptoms in November 2021 is unrelated to the claimant's May 21, 2021 work injury. Dr. Castro recommended that the claimant undergo a functional capacity evaluation.

28. The IME recording and related transcript were entered into evidence. During the IME, the claimant told Dr. Castro that a few days after a "DO worked on [the claimant]" in November, he began to have left sided symptoms. The claimant then described the November 21, 2021 incident at home.

29. On October 24, 2022, the claimant was seen by surgeon Dr. Alex Sielatycki for "a third opinion". Dr. Sielatycki diagnosed a disc herniation at the C5-C6 level, which was causing radiculopathy. Dr. Sielatycki recommended the claimant undergo a cervical disc arthroplasty, rather than a fusion. As to the issue of causation, Dr. Sielatycki opined:

> it is highly likely that the injury in question did cause these symptoms and the disk herniation. The MRI has the appearance of a more acute soft disk herniation. The patient denies any significant previous cervical spine pain. The onset of symptoms correlates with the injury as described. I therefore do believe that the injury in May of 2021 is causally related to his disk herniation in the neck and is related to the need for ongoing treatment.

30. Dr. Castro's testimony by deposition was consistent with this written report. Dr. Castro reiterated his opinion that the recommended surgery is not indicated to treat the claimant's condition. Dr. Castro also testified that he does not see a causal connection between the claimant's May 2021 work injury and the fusion surgery recommended by Dr. Harris. Dr. Castro testified that the claimant's symptoms are "all over the place" as far as moving between right sided and left sided. He also noted that even the claimant's neck symptoms are intermittent. Dr. Castro also reiterated that the MRI findings are mild and noted that the claimant is neurologically intact on examination.

31. The claimant testified that his current symptoms include a burning sensation into his right and left shoulders, with pain that begins on the right side of his neck and radiates down into his right shoulder blade. He also experiences pain in his right forearm. The claimant further testified that since November 21, 2021 he has not returned to work for the employer. In addition, he is no longer able to engage in other activities such as hunting and fishing.

32. The ALJ does not find the claimant's testimony regarding the onset of his new left sided symptoms to be credible or persuasive. The ALJ finds that the claimant began to experience those new left sided symptoms only after he attempted to hang a closet door at his home on November 21, 2022. The ALJ is not persuaded that the OMT administered by Dr. Stewart led to the onset of those symptoms. The ALJ credits the medical records and the opinions of Dr. Castro over the contrary opinions of Drs. Harris,

Rauzzino, and Sielatycki. Although Drs. Harris, Rauzzino, and Sielatycki each make some reference to an increase of the claimant's symptoms in November 2021, the ALJ is not persuaded that they were made aware of the incident at the claimant's home on November 21, 2021. The ALJ finds that only Dr. Rauzzino had a clear understanding of the claimant's full medical history, including details surrounding the November 21, 2021 incident. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the recommended cervical spine surgery is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the May 21, 2021 work injury.

CONCLUSIONS OF LAW

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

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

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

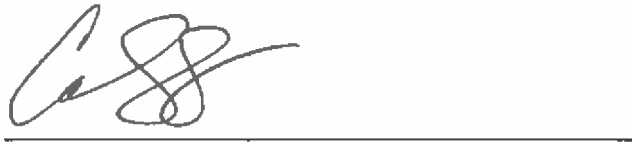
4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate that the cervical disk arthroplasty at the C5-C6 level, as recommended by Dr. Alex Sielatycki, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted May 21, 2021 work injury. As found, the medical records and the opinions of Dr. Castro are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for a cervical spine surgery, as recommended by Dr. Alex Sielatycki, is denied and dismissed.

Dated April 20, 2023.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 5. 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; otheiwise, the ALJ's order will be final. Section 8-43-301(2), C.R.5. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-197-156-002

PROCEDURAL MATTERS

1. On November 30, 2022, the respondents filed an Application for Hearing (AFH) endorsing the issue of withdrawing the March 4, 2022 General Admission of Liability (GAL) on the basis of improvidence.

2. The claimant is self-represented in this matter.

3. The respondents mailed a copy of the AFH to the claimant at the address of [Redacted, hereinafter HA]. This is the address that the DOWC has on file for the claimant. The DOWC has no email listed for the claimant.

4. On December 14, 2022, the respondents filed a hearing confirmation with the Office of Administrative Courts (OAC) for a hearing on March 16, 2023 at 1:00 p.m. The hearing confirmation was emailed to the claimant at two email addresses: [Redacted, hereinafter ESS] and [Redacted, hereinafter JG]

5. However, in the certificate of mailing on the hearing confirmation, the claimant's email address was identified as ESS[Redacted] This email contains a typographical error in the spelling of the claimant's first name ([Redacted, hereinafter JEY] vs. [Redacted, hereinafter JFY]).

6. On December 19, 2022, the OAC issued a hearing notice for the March 16, 2023 hearing. The email used for the claimant was the one containing the typographical error [Redacted, hereinafter OY]).

7. On March 9, 2023, the OAC sent a Google Meet invitation to the parties to attend the March 16, 2023 hearing via that platform. The email used for the claimant for that invitation was his correct email address of JEY[Redacted].

8. On March 16, 2023, the respondents appeared ready to proceed to hearing. The claimant failed to appear and did not contact the court indicating that he would be late or otherwise request to be excused from the hearing.

9. At the March 16, 2023 hearing, the ALJ considered Rule 23 OACRP which applies to a non-appearing party. The ALJ determined that although the hearing confirmation was sent to the email address containing a typographical error, the hearing confirmation and the Google Meet invitation were both emailed to the correct email address. Therefore, the ALJ determined that the claimant was provided some notice of the March 16, 2023 hearing.

10. The ALJ entered the respondents' exhibits into evidence and heard the respondents' legal position regarding the request to withdraw the GAL.

11. Given the unusual circumstances surrounding the notifications provided to the claimant of the hearing, the ALJ elected to issue an Order to Show Cause related to the claimant's failure to appear.

12. Therefore, on March 20, 2023, the ALJ issued an Order to Show Cause that held issuance of Findings of Fact, Conclusions of Law, and Order (FFCLO) pending the claimant providing good cause, in writing, for his failure to appear at the March 16, 2023 hearing. The claimant was given until April 20, 2023 to provide such information to the ALJ.

13. That show cause order also stated that if no good cause was shown, the ALJ would close the evidence in this matter and issue FFCLO pursuant to Section 8-43-215 C.R.S.

14. No written statement was received from the claimant regarding his failure to appear on March 16, 2023. Therefore, the ALJ now issues FFCLO on the endorsed issue.

ISSUES

Whether the respondents have demonstrated, by a preponderance of the evidence, that the March 4, 2022 GAL should be withdrawn as improvident, and a new GAL filed for medical benefits only.

FINDINGS OF FACT

1. On January 25, 2022, the claimant suffered a work related injury to his low back.

2. Following the injury, the claimant sought treatment in the emergency department (ER) at Fort Defiance Indian Hospital on January 25, 2022. At that time, the claimant was seen by Karissa Nemeti, RN and Matthew Plumb, PA-C. The medical record of that date indicates that the claimant was injured while climbing down a ladder and twisted.

3. PA Plumb assessed a muscle strain and took the claimant off of work for five days.

4. On February 8, 2022, the claimant returned to the ED and was seen by Kendra Wilson, FNP. At the claimant's request, Nurse Wilson determined that the claimant could return to work without restrictions.

5. On March 4, 2022, the insurer filed a General Admission of Liability reflecting payments for temporary total disability (TTD) benefits for the period of January 29, 2022 through February 7, 2022.

6. The respondents' now request to withdraw the March 4, 2022 GAL, as the dates of TTD are based upon work restrictions assigned by a physician's assistant (PA) and lifted by a nurse practitioner (FNP).

7. If the request is granted, and the GAL withdrawn, the respondents intend to file a new GAL reflecting admission for medical benefits only.

8. Absent any persuasive evidence to the contrary, the ALJ finds that the respondents request to withdraw the March 4, 2022 GAL is appropriate. The ALJ finds that the respondents have demonstrated that it is more likely than not that the March 4, 2022 GAL was filed improvidently.

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.$. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.$. 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. When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. Section 8-43-201(1), C.R.S.; see also *Salisbury v. Prowers County School District,* W.C. No. 4-702-144 (ICAO, June 5, 2012); *Barker v. Poudre School District,* W.C. No.

4-750-735 (ICAO, July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to Section 8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital,* W.C. No. 4-754-838-01 (ICAO, Oct. 1, 2013).

5. As found, the respondents have demonstrated, by a preponderance of the evidence, that the March 4, 2022 GAL should be withdrawn as improvident, and a new GAL filed for medical benefits only.

ORDER

It is therefore ordered:

1. The General Admission of Liability (GAL) filed on March 4, 2022 is hereby withdrawn.

2. Within ten (10) days of this order, the respondents shall file a General Admission of Liability admitting for medical benefits only.

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

Dated April 21, 2023.

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

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

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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.$. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-141-216-004

ISSUES

- Did Claimant prove a bilateral SI joint fusion surgery performed by Dr. Christian Balcescu on November 3, 2022 was reasonably needed and causally related to her admitted work injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a Produce Supervisor. Her regular duties included stocking fruits and vegetables. The job was physically demanding and required her to frequently lift and carry up to 50 pounds.

2. Claimant suffered admitted injuries to her low back and left shoulder[1] on June 12, 2020 while breaking down pallets of lettuce. She lowered a heavy box of produce from her head to her left shoulder and felt a painful "pop" in her low back and severe pain radiating down her legs.

3. Claimant's claim has been complicated by a lengthy pre-injury history of low back problems, beginning with a lumbar fusion in 1994. She recovered well from the fusion, but the record reflects several subsequent episodes of low back symptoms, typically as a result of triggering incidents. The most recent episodes before the work accident were in 2015 and 2016.

4. Claimant was evaluated by PA-C Scott Morey on January 13, 2015 for low back pain. She had fallen in late 2014, and her back and right leg had been bothering her since that time. She described numbness in the right buttock, anterior lateral thigh, and anterior shin on the right, occasionally down to the foot. Examination showed significant tenderness over the right-side paraspinals and the right SI joint. The left SI joint was nontender, as were the bilateral sciatic notches. Sensation was decreased in the right leg but normal in the left. Mr. Morey reviewed a recent MRI which he described as "rather benign" with no stenosis, disc desiccation, or herniations. Mr. Morey assessed "low back pain associated with her fall." He thought the right leg numbness could be from "a contused nerve." He ordered an EMG but did not anticipate Claimant would need surgery. The record contains no subsequent records from Mr. Morey.

5. Claimant started PT on March 4, 2016 for "LBP and neck pain which began about a year ago when she fell on ice but became worse on 2/8/16." Claimant testified

[1] Claimant's left shoulder injury was the subject of a prior hearing before ALJ Lamphere on June 29, 2021. Judge Lamphere ordered Respondents to cover a left shoulder surgery recommended by Dr. James Duffey. The shoulder surgery was eventually performed on December 9, 2021. The left shoulder is not involved in the present litigation, and will only be noted in passing for historical purposes or if otherwise necessary to understand Claimant's medical status as relates to her lumbar spine and/or SI joint conditions.

her back and neck had flared from moving to Colorado in a U-Haul vehicle. She told the therapist her legs occasionally gave out. She was using a TENS unit but taking no pain medication. The therapist instructed Claimant to perform aquatic exercises pending an MRI and orthopedic evaluation.

6. A lumbar MRI was performed on March 8, 2016. It showed post-surgical changes at L4-S1, and mild multi-level DDD and facet arthropathy.

7. Claimant saw PA-C Phillip Falender on March 9, 2016. Her primary complaints appeared related to her neck and associated upper extremity symptoms, but she also reported pain in her low back, right buttock, and right leg. Mr. Falender indicated she had "very mild stenosis" in her lumbar spine per the MRI. He ordered PT and referred Claimant to Dr. Mark Meyer to consider injections.

8. Claimant was evaluated by Dr. Julia Brinley on April 26, 2016 for severe neck and low back symptoms. She described shooting pain down her legs into her feet. Dr. Brinley noted there was nothing on the recent MRI to explain her symptoms. Physical examination showed multiple bilateral tender points on the arms, legs, and back. Dr. Brinley opined, "given her multiple tender points and imaging that is unrevealing of cause she could potentially have fibromyalgia." Dr. Brinley ordered electrodiagnostic testing.

9. Dr. Gregory Ales performed a lower extremity EMG on June 6, 2016. The results were normal except for reduced amplitude of the right peroneal motor nerve. Dr. Ales suspected the finding was related to prior nerve root compression, although it could possibly reflect an L5 radiculopathy. There was no evidence of compressive neuropathy, or acute or chronic radiculopathy in any other nerves or muscles studied.

10. Claimant had a lumbar injection in June 2016 that helped her leg symptoms.

11. On June 27, 2016, Dr. Brinley opined Claimant "has a component of fibromyalgia in addition to her long-standing arthritis."

12. The final pre-injury record regarding Claimant's low back is dated November 16, 2016 from Dr. Brinley. The lower extremity numbness had improved and she was only having "mild" leg pain. Dr. Brinley recommended continued weight loss and PT.

13. Before the work injury, Claimant participated in numerous activities without difficulty, including horseback riding, four-wheeling, camping, hiking, skiing, shoveling snow, dancing, and walking her dog. Additionally, she performed her physically demanding job with no limitations or restrictions. Claimant's testimony is supported by the lack of treatment records from November 2016 until the work accident in June 2020.

14. After the June 12, 2020 industrial accident, Employer referred Claimant to UCHealth for authorized treatment. She saw PA-C Jayme Eatough at the initial appointment. Claimant reported severe pain in her back, hips, legs, and left shoulder. Ms. Eatough commented the physical examination was "hard today due to pain." She was "very tender" to palpation over the thoracic and lumbar spines, and the paraspinal muscles on both sides. Her gait was stiff and slow and it was painful to move and change

positions. Straight leg raise testing was negative. Lumbar x-rays showed moderate disc space narrowing from L3-S1, but no fracture or other obvious bony abnormality. Thoracic x-rays showed diffuse degenerative changes. Claimant was given a nonspecific diagnosis of "back pain." Ms. Eatough prescribed muscle relaxers and took Claimant off work.

15. Claimant saw Dr. Emily Burns on June 17, 2020. She reported ongoing mid- and low back pain, radiating pain in both legs, and numbness in the right thigh, down to the foot. Physical examination showed significant diffuse tenderness to palpation along the lumbar spine the bilateral paraspinal muscles. Dr. Burns noted "not much" SI joint or sciatic notch tenderness to palpation.[2] Sensation was decreased to light touch in both feet, the lateral lower legs, and right anterior thigh. Her gait was "very antalgic." Dr. Burns ordered "stat" thoracic and lumbar MRIs to rule out cauda equina syndrome or an acute thoracic fracture. Claimant's medications were refilled and she was continued off work.

16. The MRIs were completed later that evening. The thoracic MRI showed a left-sided disc protrusion at T9-10 with potential compression of the left T10 nerve root, but no other significant abnormality. The lumbar MRI showed a posterior disc protrusion and mild facet arthropathy at L2-3, and a pre-existing fusion from L3-S1, with no residual or recurrent stenosis.[3]

17. Claimant returned to Dr. Burns on June 19, 2020. She continued to report low back pain and right thigh numbness. Physical examination showed diffuse tenderness throughout the lumbar spine and tenderness over the right SI joint. Dr. Burns reviewed the MRI reports and noted the left T10 nerve root impingement could be related to her thoracic symptoms, although it did not exactly correspond to her symptoms, which were worse on the right. Dr. Burns saw nothing acute or emergent on the lumbar MRI to account for Claimant's low back and leg symptoms. She recommended conservative treatment and referred Claimant to Dr. Brian Polvi, a chiropractor. Claimant was released to resume "very limited duty," with minimal lifting and frequent postural changes.

18. Claimant had her initial evaluation with Dr. Polvi on June 30, 2020. She reported ongoing severe pain in her back, buttocks, and legs, including periodic "lightning bolts down both legs." Claimant was in moderate to severe distress because of pain with difficulty ambulating and changing positions. Dr. Polvi documented a very thorough physical examination of Claimant's thoracic and lumbar areas. Dr. Polvi noted muscle spasm and trigger points on palpation throughout the bilateral paralumbar and gluteal musculature, with associated moderate to severe local pain. He also found moderate to severe local pain over the bilateral SI joint sulci. Kemp's maneuver produced increased diffuse thoracic, lumbar, SI joint, and gluteal region symptomatology. Hibb's maneuver was remarkable for moderate to severe piriformis muscle spasm bilaterally with increased lower extremity referred symptomatology. Yeoman's maneuver produced increased bilateral SI joint pain. Dr. Polvi administered treatment to the lumbar, sacral, and gluteal regions, and bilateral piriformis musculature. He advised Claimant he may perform

[2] The ALJ interprets this as reflecting some SI joint pain, but significantly less than the low back pain.

[3] Claimant had a prior low back injury that resulted in an L5-S1 lumbar fusion, with subsequent extension of the fusion to L3, and subsequent removal of the fusion hardware.

manipulative procedures to the bilateral SI joints at future visits depending on her tolerance.

19. Claimant completed 12 sessions with Dr. Polvi over approximately 8 weeks. Dr. Polvi consistently documented complaints of pain in the low back, buttocks, sacrum, and pelvis. He also repeatedly observed tenderness and muscle spasm in the low back and pelvic areas. He directed manual therapies, exercises, and dry needling to the low back, buttocks, pelvis, hips, and piriformis muscles.

20. Dr. Burns' records document improvement with chiropractic treatment in July and August 2020. In contrast to her earlier records and Dr. Polvi's records, Dr. Burns noted "no SI joint or sciatic notch tenderness to palpation" on several occasions.

21. On August 18, 2020, Claimant told PA-C Peter Carroll in Dr. Burns' office she had improved "a lot" with Dr. Polvi's treatment. She had lifted 50 pounds without difficulty or pain during a recent therapy session, and wanted to go back to work. She was released with medium level work with no lifting over 50 pounds.

22. Claimant followed up with Dr. Burns on August 24 and said she was doing "very well with almost no low back pain." She also denied leg symptoms. Employer had "not accepted" the previous restrictions, so Dr. Burns released Claimant to full duty.

23. On September 16, 2020, Dr. Burns noted Claimant was "doing OK" but having some low back pain at work with reaching down or turning to the side. She asked about spinal injections to help improve her function. Dr. Burns referred Claimant to Dr. Kenneth Finn, a physiatrist.

24. Claimant saw Dr. Finn on October 8, 2020. She described low back pain radiating to the hip, buttock, and right leg, with numbness and tingling in what sounded to Dr. Finn like an L3 distribution. Examination of the low back showed muscle spasm and tenderness. Dr. Finn appreciated no SI join tenderness. Lower extremity sensation was decreased in an L3 distribution. Dr. Finn recommended an intralaminar ESI at L2-3.

25. The ESI was performed on November 3, 2020.

26. Claimant followed up with Dr. Finn on November 17, 2020. The ESI had significantly decreased her pain for three days and then abruptly returned, which Dr. Finn considered a positive diagnostic response. Dr. Finn noted she was still having predominantly L3 and some L2 symptoms and recommended a transforaminal ESI "for a more targeted approach."

27. On December 9, 2020, Dr. Burns documented Claimant was doing worse and "in a lot of pain, especially her right leg." She appeared "very uncomfortable . . . Even with just sitting on the table." Dr. Burns thought Claimant's symptoms sounded consistent with L4-5 compression or irritation, although the MRI had not showed an issue at that level. She referred Claimant back to Dr. Polvi for additional chiropractic treatment.

28. The transforaminal ESI was performed on December 16, 2020. Claimant's pain initially flared for few days, then improved slightly for a few days, and then "came back really strong." At a follow-up appointment with Dr. Finn on January 5, 2021, Claimant still had intense, burning pain in her thighs and numbness into her feet. Her pain was worsening, and she was interested in "a more aggressive next step." Dr. Finn opined additional injections were not warranted because they did not provide appreciable therapeutic benefit, and referred Claimant to Dr. Hammers for a neurosurgical evaluation.

29. Claimant saw Dr. Burns on January 6 and reported burning pain in both thighs wrapping around into her groin area and radiating down the right leg to the foot. Dr. Burns opined, "it is very clear we need to put her back on some restrictions which she has been hesitant to in the past but agrees to today."

30. Respondents denied the referral to Dr. Hammers and set up an IME with Dr. Wallace Larson.

31. Claimant saw Dr. Larson on February 21, 2021. She described ongoing and worsening back pain, and pain and numbness in her legs and feet. On examination, Claimant was tender to palpation throughout her thoracic and lumbar spine areas, buttock, hips, and sacrum. Dr. Larson saw no objective evidence of any acute pathology on the imaging studies and dismissed Claimant's physical exam findings as "nonphysiologic." He opined there was no indication for shoulder or spinal surgery. Dr. Larson opined Claimant had returned to her "baseline" and required no further treatment related to the June 2020 work injury.

32. Dr. Burns reviewed Dr. Larson's IME report on March 16, 2021. She disagreed that Claimant's then-current condition was consistent with her pre-injury "baseline." Dr. Burns noted Claimant had recovered well from her 1994 lumbar surgery and was having no significant back or leg symptoms or limitations immediately before the June 2020 work accident. Dr. Burns reiterated her agreement with Dr. Finn's referral for a surgical evaluation. She also ordered a lower extremity EMG.

33. Dr. Finn performed electrodiagnostic testing on April 13, 2021. There was evidence of a chronic L5 radicular process but nothing acute.

34. On June 29, 2021, Claimant attended a hearing before Administrative Law Judge Lamphere regarding the surgical evaluation with Dr. Hammers and a left shoulder surgery recommended by Dr. Duffey.

35. On August 10, 2021, Dr. Burns discussed with Claimant the possibility that the prolonged delay in completing the neurosurgery evaluation could have a long-term negative effect on her condition. Claimant asked if she could move forward in the meantime under her health insurance, but Dr. Burns did not know if that was an option for a work-related condition during an active claim. She advised Claimant to discuss the issue with her attorney.

36. On September 22, 2021, Judge Lamphere ordered Respondents to cover the shoulder surgery, and the lumbar surgical evaluation with Dr. Hammers.

37. An updated lumbar MRI was performed on August 11, 2021. It was unchanged compared to the June 17, 2020 MRI.

38. Dr. Hammers evaluated Claimant on October 25, 2021. He saw no neurological compression or other surgical lesion on the MRIs to account for Claimant's symptoms or examination findings. Therefore, Dr. Hammers did not recommend surgery.

39. On November 9, 2021, Dr. Burns referred Claimant back to Dr. Finn to consider SI joint injections.

40. Dr. Finn reevaluated Claimant on November 29, 2021. The physical examination showed midline and paravertebral tenderness of the lumbar spine, bilateral SI joint tenderness, and a positive Patrick's maneuver. Dr. Finn diagnosed sacroiliitis and recommended bilateral SI joint injections.

41. The SI injections were performed on December 29, 2021.

42. Claimant moved to Sheridan, Wyoming approximately 10 days after the SI joint injections. Her care was transferred to Sheridan Orthopedic Associates.

43. Claimant was evaluated by Dr. Cristian Balcescu, a spine surgeon at Sheridan Orthopedic Associates, on March 8, 2022. Claimant was "currently still quite painful," and described low back pain with radiation down the buttocks and hips into both legs and feet. Confusingly, the physical examination documented in Dr. Balcescu's report was entirely normal. Dr. Balcescu provided a preliminary "working diagnosis" of lumbar radiculopathy, but wanted to obtain Claimant's records before making his final diagnosis or treatment recommendations.

44. Dr. Balcescu reevaluated Claimant on March 25, 2022. He had reviewed voluminous records in the interim and was better prepared to understand the details of Claimant's situation. Dr. Balcescu agreed with Dr. Hammers that spinal surgery was not indicated based on the imaging studies. However, he noted Claimant has received some benefit from the bilateral SI joint injections in December 2021. Claimant said her pain increased shortly after the injections but she started getting relief approximately 3 days later. Dr. Balcescu would not consider that timeline to be a positive diagnostic response. But when pressed for specifics, Claimant could not categorically state she had no temporary relief immediately after the injection for the duration of the anesthetic. Given Claimant's uncertainty about the post-injection response, and the arguably therapeutic benefit she received after several days, Dr. Balcescu recommended repeating the injections.

45. Repeat bilateral SI joint injections were performed on April 11, 2022 by Dr. Shaun Gonda. The injections were performed under CT guidance to ensure proper placement.

46. Claimant returned to Dr. Balcescu on May 17, 2022. She described a positive diagnostic response to the injections, with an immediate reduction of her pain from 8-9/10 to 0/10. Approximately 4 hours later (when the anesthetic wore off), her pain

returned to 6/10. Dr. Balcescu performed a physical exam and found significant clinical signs of SI joint dysfunction, including bilateral tenderness to palpation over the sacral sulcus, positive thigh thrust test, positive FABER (*i.e*., Patrick's test), and positive Gaenslen's maneuver. Dr. Balcescu diagnosed bilateral SI joint arthropathy based on her reported symptoms, exam findings, and positive diagnostic response to the SI joint injections. Given her failure to respond to conservative measures, Dr. Balcescu recommended bilateral SI join fusions. Claimant wanted to pursue surgery but was unsure whether Respondents would cover it.

47. Respondents denied the surgical preauthorization request pending and IME with Dr. Anant Kumar.

48. Claimant saw Dr. Kumar on July 19, 2022. Examination of Claimant's low back showed tenderness to palpation and reduced range of motion. He also noted several positive Waddell signs. In contrast to Dr. Finn and Dr. Balcescu, Dr. Kumar stated all SI joint tests were negative on his exam. Dr. Kumar also noted Claimant had no immediate pain relief from the SI joint injections performed by Dr. Finn in December 2021, which "obviously proves the SI joint is not a pain generator." Dr. Kumar opined there were no clinical, radiological, or objective indications for an SI joint fusion.

49. Claimant followed up with Dr. Balcescu on October 5, 2022. SI joint testing was again positive bilaterally. Dr. Balcescu reiterated his recommendation for bilateral SI joint fusions. Claimant wanted to proceed with surgery despite the denial of preauthorization because she was debilitated by ongoing severe symptoms.

50. Dr. Balcescu performed a bilateral SI joint fusion on November 3, 2022.

51. Claimant had a post-op appointment with Dr. Balcescu's PA-C on November 23, 2022. Claimant reported she was "doing very well" since the surgery. Her pain level had dropped to 1-2/10 and she was taking no pain medication, not even Tylenol. She was no longer having the "zingers" down her legs, and had only occasionally a "little bit" of residual numbness in two toes on the right foot.

52. At hearing, Claimant testified the surgery was tremendously helpful and, "I'm back to living again." Consistent with the post-op report, she testified her lower extremity numbness has improved and she no longer has "lightning bolts" going down her legs. Her pain levels decreased to 2-3/10 and she had stopped taking pain medication. Claimant is very satisfied with the surgery and would do it again "in a heartbeat."

53. Dr. Balcescu testified he initially provided a provisional diagnosis of lumbar radiculopathy because Claimant's pain appeared to be in an L5 distribution. The symptoms she described can also be consistent with SI joint dysfunction, but the more common source would be the lumbar spine. He had the opportunity to review her medical records before he next saw Claimant on March 25, 2022, and the information in her records pointed away from the lumbar spine as the source of her problems. The imaging studies showed the previous fusion had healed well, and there was no significant stenosis or nerve compression. The most "striking" thing Dr. Balcescu noticed in the prior records

was that Claimant's best therapeutic response occurred after she received bilateral SI joint injections in December 2021. She then had a strongly positive diagnostic response to the repeat injection, coupled with clinical examination findings confirming the diagnosis of bilateral SI joint dysfunction. Dr. Balcescu opined the SI joint problems and the resulting surgery are causally related to the June 2020 work accident. He saw nothing in the medical records to contradict Claimant's report that she was doing well with no significant symptoms of functional limitation immediately before the work accident.

54. Dr. Kumar testified any pathology related to Claimant's SI joints is unrelated to the June 2020 work accident. He pointed out the first diagnosis of SI joint dysfunction was provided by Dr. Finn in November 2021, 18 months after the work accident, and opined it is improbable that an injury to Claimant's SI joints would have gone undiagnosed by multiple providers for so long. He did not mention the multiple positive SI joint exam findings documented at Dr. Polvi's June 30, 2020 evaluation. Dr. Kumar questioned the validity of Dr. Balcescu's exam findings and testified that his own exam at the IME showed no evidence of SI joint pathology. He opined it is not medically probable Claimant's complaints of low back pain, hip pain, and bilateral leg pain and numbness were caused by an injury to the SI joints. Instead, Dr. Kumar opined Claimant's reported symptoms are "nonphysiological," and therefore unlikely to respond to any treatment, including surgery. Dr. Kumar disputed Claimant's report of significant improvement after the SI joint surgery, opining such a "miraculous" recovery "doesn't make any sense."

55. Dr. Balcescu's opinions and conclusions are credible and more persuasive than the contrary opinions offered by Dr. Kumar and Dr. Larson.

56. Claimant's testimony is credible and persuasive regarding her preinjury functional abilities and her response to the November 3, 2022 SI joint fusion surgery.

57. Claimant proved the bilateral SI joint fusion surgery performed by Dr. Balcescu on November 3, 2022 was reasonably needed and causally related to the admitted June 12, 2020 work injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

As found, Claimant proved the bilateral SI joint fusion surgery performed by Dr. Balcescu on November 3, 2022 was reasonably needed and causally related to the admitted June 12, 2020 work injury. Dr. Balcescu credibly explained that his diagnosis of bilateral SI joint arthropathy is consistent with Claimant's reported symptoms and supported by objective evidence including exam findings and Claimant's response to SI joint injections. To be sure, it is unusual that no one specifically diagnosed SI joint dysfunction until November 2021. But clinical signs implicating the SI joints as a pain generator have been present since the beginning. Dr. Burns noted SI joint tenderness within a week after the accident. And Dr. Polvi's detailed examination on June 30, 2020 provides persuasive evidence of SI joint involvement. Given the close connection between the SI joints and the spine, the considerable overlap between symptoms referable to these body parts, and Claimant's prior lumbar fusion, it is perhaps understandable that the SI joints were initially given short shrift. As Dr. Balcescu explained, the lumbar spine was the more likely source of Claimant's symptoms, so it made sense to focus there first. The ALJ also notes it took 10 months to complete the neurosurgical evaluation with Dr. Hammers, but once Dr. Hammers ruled out a surgical issue in the lumbar spine, Dr. Burns quickly referred Claimant to Dr. Finn for possible SI joint injections. Eventually, with a fresh perspective and the benefit of a longitudinal picture of Claimant's treatment, Dr. Balcescu uncovered the true source of Claimant's ongoing symptoms. And his insights were ultimately validated by the immediate and substantial benefit Claimant received from the SI joint surgery.

Claimant had episodes in 2015 and 2016 with low back and right leg symptoms similar to those documented after the 2020 work accident. But the prior episodes were relatively transient and did not require long-term treatment. Claimant received good relief from an injection in June 2016, and there is no persuasive evidence she sought specific treatment for low back or radicular symptoms between November 2016 and the June 12, 2020 work accident. More important, Claimant performed a physically demanding job during that time with no restriction or limitations related to low back or leg symptoms. The persuasive evidence shows the June 12, 2020 accident either caused new SI joint pathology, aggravated an underlying, pre-existing SI joint condition, or some combination thereof. The net result was a substantial change in Claimant's pre-injury status that is directly traceable to the work accident. The preponderance of persuasive evidence establishes that the June 12, 2020 accident was the proximate cause of Claimant's SI joint dysfunction and need for treatment, including surgery. The good surgical outcome confirms the surgery was reasonably needed.

ORDER

It is therefore ordered that:

1. Insurer shall cover the bilateral SI joint fusion surgery performed by Dr. Cristian Balcescu on November 3, 2022.

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

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

DATED: April 4, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-146-499-002

ISSUES

- Did Respondents prove all issues in this claim were closed by a Final Admission of Liability (FAL) filed on August 9, 2022?
- Did Claimant prove one or more issues in his claim should be reopened based on a change of condition?
- If the claim is reopened, did Claimant prove additional medical treatment is reasonably needed and causally related to his admitted injury?
- Did Claimant prove entitlement temporary disability benefits before December 25, 2021 greater than the benefits admitted in the August 9, 2022 FAL?
- Did Claimant prove entitlement to reinstatement of TTD on or after December 25, 2021?
- Did Respondents prove additional TTD is barred because Claimant was responsible for termination of employment?
- Average weekly wage.
- PPD.
- Disfigurement.

FINDINGS OF FACT

1. Claimant suffered an admitted injury on August 12, 2020 while working as a mover. Claimant was moving heavy boxes when he felt a pulling and tearing sensation in his right groin area. Approximately one week later, he coughed and felt a sharp pain in the right groin and noticed a bulge. The bulge became progressively larger and more painful, so Employer referred Claimant to Concentra. He was diagnosed with a right inguinal hernia and referred to Dr. McCann, a surgeon.

2. Dr. McCann performed a right inguinal hernia repair with mesh on September 2, 2020.

3. Claimant was put at MMI on October 5, 2020 by Dr. Daniel Peterson at Concentra. Claimant was still having pain in the right groin, but felt ready to return to work.

4. Shortly after being placed at MMI, Claimant noticed a painful bulge in his left groin. An ultrasound confirmed a left inguinal hernia. Claimant also reported ongoing pain in the right inguinal area radiating down his right thigh, and pain in the right testicle.

5. The claim was reopened, and Claimant underwent a left inguinal hernial repair by Dr. McCann on December 16, 2020.

6. The left hernia repair was successful, but Claimant continued to complain of pain in the right groin and right testicle. A repeat ultrasound of the scrotum and right inguinal area on January 29, 2021 showed no abnormalities to explain the ongoing symptoms.

7. Claimant saw Dr. Peterson on February 24, 2021 and reported no improvement in the right groin and testicular pain. Dr. Peterson thought the symptoms might be related to ilioinguinal neuropathy and recommended Claimant follow up with Dr. McCann.

8. Claimant returned to Dr. Peterson on March 24, 2021. He had seen Dr. McCann, who did not think Claimant had any inguinal nerve issues. Dr. McCann saw no surgical issue and recommended pain management.

9. Claimant saw Dr. Mark Meyer on May 13, 2021, who recommended an ilioinguinal nerve block.

10. On June 16, 2021, Claimant told Dr. Peterson he was very frustrated by his ongoing severe symptoms. He was receiving Oxycodone from the VA for an unrelated back condition, but the medication was not helping his groin symptoms. Claimant was not working and said he had "too much pride for light duty." Claimant wanted to proceed with the injection recommended by Dr. Meyer.

11. Claimant returned to Dr. Peterson on July 26, 2021. He had undergone the nerve block, which only provided relief for approximately two days.

12. Claimant had two additional nerve blocks, without benefit. Based on Claimant's lack of response to injections, Dr. Meyer opined he was not a candidate for radiofrequency neurotomy.

13. Claimant's last appointment with Dr. Peterson was October 13, 2021. Claimant's pain was unchanged since the prior visit. Dr. Peterson found no evidence of recurrent inguinal hernias. Claimant missed a follow up appointment on November 12, 2021, and was later discharged from Dr. Peterson's care.

14. Dr. Lawrence Lesnak began treating Claimant as the new ATP on January 10, 2022. Claimant had no relief from the injections and said Dr. Meyer advised he was not a candidate for a radiofrequency ablation procedure. Dr. Lesnak agreed that an ablation was not indicated given Claimant's lack of response to the injections. On examination, Dr. Lesnak found no clinical evidence of recurrent hernia or any other objective findings to explain Claimant's symptoms. Nevertheless, Dr. Lesnak ordered an ultrasound of the right groin to look for a possible occult recurrent right inguinal hernia. Dr. Lesnak offered Claimant a tramadol prescription for his pain. However, Claimant stated, "I've tried tramadol in the past, and if this is all you're gonna give me, I don't want anything at all." Therefore, Dr. Lesnak wrote no prescriptions.

15. Claimant had the right groin ultrasound on January 27, 2022. It showed no evidence of a recurrent right inguinal hernia.

16. Claimant followed up with Dr. Lesnak on February 7, 2022. He continued to complain of constant moderate-to-severe right testicular pain, as well as right-sided low back, buttock, and medial thigh pain. His testicular pain was severely aggravated with walking, squatting, or lifting. Any direct pressure on his right testicle or scrotum significantly increased his pain. Claimant gave Dr. Lesnak a 2-½ page handwritten narrative describing his constant pain and associated functional limitations. Physical examination showed no evidence of any inguinal abnormalities. Testicular examination produced pain, but no appreciable abnormality. Dr. Lesnak told Claimant he could not identify any specific pain generator based on examination, post-surgical diagnostic imaging, or the diagnostic nerve injections. Dr. Lesnak recommended no additional testing or specific treatment and put Claimant at MMI. Dr. Lesnak opined Claimant did not quality for a rating because he had no palpable hernia-related defects and no clinical evidence to support a diagnosis of right ilioinguinal neuritis. He released Claimant from care.

17. Dr. Martin Kalevik performed a Division IME on June 28, 2022. Claimant described ongoing severe right groin and testicular pain, as he had previously reported to Dr. Lesnak. Claimant said the pain prevented him from lifting any appreciable weight and limited his ability to sit for prolonged periods. Claimant was using a cane because the groin pain made it difficult to walk. Dr. Kalevik observed a slight alteration of gait, favoring the right leg. Claimant was upset about the continued right groin and testicular pain, and felt the doctors had "brushed him off" without providing adequate treatment. Dr. Kalevik's examination showed no evidence of a recurrent hernia. He agreed with Dr. Meyer and Dr. Lesnak that additional nerve blocks were not warranted because of Claimant's previous lack of response. He also agreed Claimant was at MMI as of February 7, 2022. Dr. Kalevik assigned a zero percent rating because there was no palpable hernia defect on the right or left side, and "pain in and of itself is not ratable." He concluded the source of Claimant's pain is "unclear" and no specific pathology had been identified by multiple examinations or diagnostic testing. However, Dr. Kalevik thought it was reasonable to obtain an MRI of the right groin or pelvis within the next 90 days to look for a recurrent hernia, "meshoma," or malfunctioning of the mesh. If the MRI showed an abnormality associated with the injury and hernia repair, re-evaluation by a surgeon would be warranted. Otherwise, Claimant would remain at MMI.

18. Respondents filed a Final Admission of Liability (FAL) on August 9, 2022 based on Dr. Kalevik's DIME report. The FAL admitted for various periods of temporary disability benefits, statutory interest, an overpayment, and $20,561.97 in medical benefits. The FAL specifically denied medical benefits after MMI, and denied that Claimant suffered any permanent impairment. The section addressing disfigurement was left unchecked, and the accompanying space to state the amount of any disfigurement benefit was left blank. The FAL contains no language to the effect that all benefits not specifically admitted are denied.

19. Claimant filed an Objection to Final Admission of Liability on August 24, 2022. He then filed a Notice and Proposal and Application for a Division IME form on August 29, 2022.

20. Claimant exchanged emails with Respondents' counsel on September 13, 2022 and was advised that the claim was closed because he had not requested a hearing within 30 days of the FAL. Claimant contacted the Division and was told by an unidentified person that his claim was not closed. The Division representative mailed Claimant a blank Application for Hearing form.

21. Claimant completed the Application for Hearing and mailed it on September 22, 2022, which was 44 days after the FAL.

22. All issues endorsed on Claimant's Application for Hearing (except for reopening), were ripe for adjudication when the FAL was filed.

23. Respondents proved the claim is closed as to all issues specifically admitted or denied in the August 9, 2022 FAL. Claimant conceded he received the FAL, and there is no persuasive evidence it was technically defective in any way. Although Claimant timely filed the Objection to Final Admission of Liability form, he did not file an Application for Hearing within 30 days of the FAL. Claimant had already undergone a DIME and was not entitled to a second DIME. As a result, the August 29, 2022 Notice and Proposal was insufficient to perfect an objection to the FAL.

24. Respondents failed to prove the FAL closed the issue of disfigurement. The FAL neither admitted nor denied disfigurement benefits.

25. Claimant has surgical scarring in his groin area because of the work injury. At hearing, the ALJ advised Claimant of the so-called "bathing suit rule" for determining if a disfigurement is "normally exposed to public view." Claimant agreed the scarring is not visible when wearing a bathing suit. However, Claimant demonstrated a slight alteration of gait favoring his right side. Claimant also routinely uses a cane to assist with ambulation when he is out of the house in public. Claimant credibly testified the alteration of his gait and need for a cane are related to his ongoing right groin and testicular pain since the work injury. Claimant has sustained serious permanent disfigurement to areas of the body normally exposed to public view. The ALJ finds that Claimant shall be awarded $1,800 for disfigurement.

26. Claimant failed to prove a change of condition to justify reopening any portion of his claim. He has complained of right groin and testicle pain and associated functional limitations to multiple providers, since before he was put at MMI. At hearing, Claimant admitted his current condition is the same as when he was put at MMI in 2022. There is no objective evidence of worsening, nor any other persuasive basis to conclude that Claimant's condition is appreciably different than it was when he was put at MMI.

CONCLUSIONS OF LAW

A. Issue closure

Respondents argue that Claimant's claim was closed by the August 9, 2022 FAL, and the ALJ has no jurisdiction to award any additional benefits unless the claim is reopened. Closure of issues by an FAL is an affirmative defense that the respondents must prove by a preponderance of the evidence. *Yim v. Avalanche Industries*, W.C. Nos. 4-506-753; 4-059-342 (December 5, 2005).

An FAL provides the primary mechanism for the respondents to initiate administrative closure of a claim. Once an FAL is filed, the claimant must take certain actions within thirty days or "the case will be automatically closed as to issues admitted in the final admission." Section 8-43-203(2)(b)(II)(A). Objecting to an FAL is a multi-part process. Here, Claimant completed the first step in the process by filing the Objection to Final Admission of Liability form on August 24. However, simply filing the Objection form is not enough. A claimant must also request a DIME pursuant to § 8-42-107.2 or request a hearing on ripe and disputed issues. *Id*.

The available options (either requesting a DIME or requesting a hearing) may be limited depending on what has previously transpired in the claim. Section 8-43-203(2)(b)(II)(A) provides that a claimant may only request a DIME "if [a DIME] has not already been conducted." In this case, Claimant had already undergone a DIME with Dr. Kalevik, so his only option was to request a hearing on ripe and disputed issues, within 30 days of the FAL. *Caylor v. State of Colorado*, W.C. No. 4-880-213-03 (May 13, 2015).

An issue is "ripe" if it is "real, immediate, and fit for adjudication." *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006). An issue is "fit for adjudication" if there is no legal impediment to its immediate adjudication. *E.g., McMeekin v. Memorial Gardens*, W.C. No. 4-387-910 (September 30, 2014).

Claimant's September 22, 2022 Application for Hearing was untimely because it was mailed more than 30 days after the FAL. [1] The FAL explicitly addressed medical benefits, AWW, temporary disability, permanent impairment, and medical benefits after MMI. Those issues were "ripe for adjudication" when the FAL was filed and were closed by the failure to timely request a hearing. No further temporary disability, PPD, or medical benefits can be awarded absent a reopening. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005).

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[1] Claimant's Application for Hearing was not actually received by the OAC until October 13, 2022, because it was inadvertently mailed to the OAC's prior address at 1259 Lake Plaza Drive based on outdated information provided to Claimant by the Division. But even if we accept September 22, 2022 as the date of filing under the doctrines of "unique circumstances" or "substantial compliance," the Application was still 14 days late. *E.g., Converse v. Zinke*, 635 P.2d 882 (Colo. 1981); *Kratzer v. Iliff Care Center*, W.C. No. 4-280-513 (August 22, 2001).

B. Disfigurement

Although Respondents proved that most of the issues endorsed on Claimant's Application are closed, they failed to prove the issue of disfigurement is closed.

As an initial matter, it is important to bear in mind that FALs do not necessarily close a "claim." Rather, an FAL closes "issues" in a claim. *See* § 8-43-203(b)(II)(A) ("the case will be automatically closed *as to the issues admitted* in the final admission") (emphasis added). While the net effect may be to close the entire claim depending on the specific issues addressed in the FAL, such an outcome is not invariably the case.

Because the legal effect of an FAL is directed to "issues" and not "claims," an uncontested FAL may result in some issues being closed while others remain open. For instance, in *Dalco Industries v. Garcia*, 867 P.2d 156 (Colo. App. 1993) the respondents filed a FAL that addressed temporary and permanent partial disability benefits but did not address penalties. The court held that "§ 8-43-203(2) provides for continuing jurisdiction over *any issue not specially addressed* in a non-contested final admission of liability. The [ ] final admission of liability was limited to an admission for temporary and permanent partial disability benefits. Therefore, the issue of penalties was not 'automatically closed' and the ALJ retained jurisdiction to decide this issue." *Id.* at 158 (emphasis added).

The Court of Appeals refined this rule in *Dyrkopp v. Industrial Claim Appeals Office*, 30 P.3d 821 (Colo. App. 2001). In *Dyrkopp*, the FAL had admitted for various benefits, including PPD. The FAL also contained a statement that "All benefits or penalties not admitted below are hereby specifically denied." The court held,

> [T]he language "as to the issues admitted" in § 8-43-203(2)(b)(II) does not mean only those "issues" on which an employer agrees to pay benefits. Rather, . . . the phrase must be interpreted as referring to issues on which the employer *affirmatively takes a position*, either by agreeing to pay benefits or by denying liability to pay benefits. *Id*. at 822. (Emphasis added).

Even though the FAL in *Dyrkopp* contained no checkmark or other notation in the section related to PTD benefits, the court pointed to the explicit denial of "all benefits not admitted" as encompassing the issue of PTD. Therefore, the court held the issue of PTD was closed.

The ICAO has repeatedly relied on statements in FALs to the effect that "benefits not specifically admitted are denied" as sufficient to close issues that were not otherwise explicitly addressed on the FAL. *E.g., Campello v. Progressive Insurance Company*, W.C. No 4-205-461 (January 27, 2003); *Tygrett v. Denver Water*, W.C. No. 4-979-139-002 (March 15, 2021); *Villegas v. Denver Water*, W.C. No. 4-889-298-002 (February 5, 2021).

In Claimant's case, the section of the August 9, 2022 FAL relating to disfigurement was left blank, and the FAL contained no categorical denial of all benefits not specifically admitted. Because the FAL failed to "affirmatively" take a position with respect to disfigurement, the issue is not closed.

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." Disfigurement compensation is appropriate "if the scars would be apparent in swimming attire." *Twilight Jones Lounge v. Showers*, 732 P.2d 1230 (Colo. App. 1986). When made aware of the applicable legal standard, Claimant agreed the scarring in his groin area is not visible to the public and therefore ineligible for a disfigurement award.

A claimant's use of a cane or other assistive device can be a disfigurement if causally related to a work injury. *E.g., Felix v. The Griffith Center, Inc*., W.C. No. 3-972-633 (January 12, 1998); *Irvin v. Medical Center of Aurora*, W.C. No. 4-320-720 (January 6, 2006). As found, Claimant proved his altered gait and regular use of a cane are causally related to the work accident. The ALJ concludes Claimant should be awarded $1,800 for disfigurement.

C. Reopening

Section 8-43-303 authorizes an ALJ to reopen any award based on a change in condition. A "change in condition" refers either to a change in the condition of the original compensable injury, or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). If a claimant's condition has changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from a separate cause. *Goble v. Sam's Wholesale Club*, W.C. No. 4-297-675 (May 3, 2001). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. When a claimant seeks reopening based on a change of condition after MMI, a prior DIME determination is entitled to no special weight. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The claimant must prove a basis to reopen by a preponderance of the evidence. Section 8-43-304(4). A claimant is not required to present expert medical testimony or opinions to establish a change of condition, but can rely on any form of competent and persuasive evidence, including lay testimony. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

As found, Claimant failed to prove a change of condition to justify reopening any portion of his clam. The ALJ does not doubt that Claimant continues to suffer severe groin and testicular pain, and he is understandably searching for a solution to those issues. But the symptoms and associated functional limitations have been present since before Claimant was put at MMI. Claimant conceded his current condition is the same as when he was put at MMI in 2022. There is no objective evidence of any worsening, nor any other persuasive basis to conclude that Claimant's condition is appreciably different than it was when he was put at MMI.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant $1,800 for disfigurement.

2. Claimant's claims for additional temporary disability benefits, additional medical benefits, PPD benefits, and medical benefits after MMI are denied and dismissed.

3. Claimant's request to reopen closed issues in his claim is denied and dismissed.

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

DATED: April 7, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-116-023-001

ISSUES

- Did Claimant prove he is entitled to PPD benefits based on a 10% whole person impairment?

FINDINGS OF FACT

1. Claimant suffered an admitted work-related injury on April 4, 2019 when a heavy security door slammed shut on his right elbow.

2. Claimant was initially seen at Concentra on April 4, 2019. X-rays showed no fracture, and he was diagnosed with a right elbow contusion. He participated in therapy for several months, without substantial benefit. He continued to report elbow pain with pain, numbness, and tingling into his right hand.

3. Claimant testified he started having neck pain approximately two months after the accident. He likened the pain to a "kink" in the neck with sharp pain when moving his head too quickly. Claimant testified he received incidental treatment to the neck during therapy for the right elbow. However, the therapy records from June and July 2019 primarily focus on the right arm, with no persuasive indication of any significant neck or right shoulder issues.

4. Dr. John Sacha performed electrodiagnostic testing in September 2019 that showed right ulnar neuropathy and carpal tunnel syndrome.

5. Claimant was referred to Dr. Craig Davis, a surgeon. Initially Dr. Davis recommended conservative care. However, because of Claimant's persistent symptoms, Dr. Davis eventually recommended surgery.

6. Dr. Davis performed a right elbow ulnar nerve decompression, right carpal tunnel release, and right olecranon bursectomy on December 11, 2019.

7. Claimant resumed therapy after surgery. Therapy records through July 8, 2020 contain no persuasive evidence of any neck or shoulder symptoms.

8. At a July 9, 2020 PT session, Claimant complained of severe left shoulder pain from sleeping on the shoulder. There was no mention of any right shoulder symptoms. On August 18, 2020, the therapist also documented "pt reports neck pain on contralateral side of injury," *i.e.*, the left side of the neck. There were no examination findings or other persuasive clinical evidence of any associated functional impairment related to the neck or shoulder. The reference to contralateral neck pain was repeated in the PT records for approximately three weeks. On September 9, 2020, the therapist documented "pt reports he no longer has neck pain on contralateral side." This comment was repeated in subsequent PT records through October 13, 2020.

9. Claimant completed multiple pain diagrams during his treatment at Concentra. At least four pain diagrams are in the record, none of which indicate any complaints beyond the right arm.

10. Claimant saw multiple treating providers during his course of treatment without reported shoulder or neck symptoms. There are no documented complaints beyond the right elbow during visits with Dr. Sacha in 2019. Dr. Davis documented no complaints beyond the right elbow during multiple appointments from May 14, 2019 through August 5, 2020. There were no complaints beyond the right elbow during at least 13 Concentra appointments from January 2020 through January 2021.

11. Claimant completed a Functional Capacity Evaluation (FCE) on January 20, 2021, which showed he could work at the medium physical demand level. Claimant reported right elbow and arm pain that limited heavy lifting and gripping. He described popping and shooting pain in the right elbow, forearm, and wrist. He also reported numbness and tingling in the right forearm and hand. There was no mention of significant right shoulder or neck symptoms.

12. Claimant was put at MMI by Dr. Thomas Corson at Concentra on January 25, 2021. Dr. Corson documented continued right elbow problems, but nothing related to the shoulder or neck.

13. Dr. Sander Orent performed a DIME on July 16, 2021. Claimant reported "ongoing and persistent pain in the elbow with locking and tingling in the fingers." Dr. Orent determined Claimant was not at MMI. He recommended an MRI, repeat electrodiagnostic testing, and a consultation with Dr. Davis "to see what can be done about the locking elbow and the persistent neuropathic symptoms in the hand." Dr. Orent's documented significant exam findings were confined to the right elbow and arm. However, in the section of the report addressing a provisional rating, Dr. Orent stated, "there are symptoms here that include discomfort around the shoulder blade and neck, especially when he wakes up from sleep. I do not think these areas are rated but they do suggest the possibility of whole person conversion." Dr. Orent described no functional impairment associated with the neck and shoulder blade symptoms.

14. Respondent accepted the DIME and authorized additional evaluations and treatment.

15. Claimant followed up with Dr. Davis on December 7, 2021. He reported "clicking and popping [in the elbow] and has low-grade pain, but he is doing all of his normal activities." Dr. Davis noted the popping and clicking seemed to be coming from inside the joint, and hypothesized Claimant may have synovitis or a small loose body. Dr. Davis ordered an MRI of the right elbow. He offered Claimant an injection, but Claimant declined because a previous injection had not helped. There is no mention of any shoulder or neck issues.

16. Claimant returned to Dr. Davis on March 9, 2022 to review the MRI. Dr. Davis commented that the MRI was "basically normal." Dr. Davis saw no surgical lesion and opined Claimant was at MMI.

17. Dr. Kawasaki performed electrodiagnostic testing on May 12, 2022. It showed residual sensory and motor nerve slowing across the elbow, but no slowing at the wrist. Claimant told Dr. Kawaski "he would like to have his case closed as he does not wish to pursue the cleanup surgery with no guarantees." Dr. Kawasaki put Claimant at MMI with a 13% right upper extremity rating for range of motion deficits and residual neurological impairment. Dr. Kawasaki's report contains no reference to shoulder or neck issues.

18. Claimant underwent a follow-up DIME with Dr. John Hughes on August 30, 2022. Dr. Hughes noted that Claimant's pain diagram showed right elbow and ulnar forearm symptoms as well as symptoms in the right wrist and hand. Examination of Claimant's neck showed full range of motion, except lateral flexion was reduced to approximately 30 degrees, with positive right-side facet loading. Dr. Hughes agreed Claimant was at maximum medical improvement as of May 19, 2022. He assigned a 5% upper extremity rating for right wrist range of motion, an 8% upper extremity rating for loss of range of motion in the right elbow, and a 3% upper extremity impairment rating for injury to the right ulnar nerve. Dr. Hughes' final combined rating was 16% upper extremity, which converts to 10% whole person. He gave no indication the incidental cervical spine findings were related to the work injury or warranted conversion to whole person.

19. In his deposition, Dr. Orent confirmed he had not seen or evaluated Claimant since July 2021, and had reviewed no additional records after the original DIME. Dr. Orent explained ulnar nerve injuries typically cause numbness and pain radiating distally from the elbow toward the ends of the hands, and weakness. Dr. Orent did not know what was causing the discomfort around Claimant's shoulder blade and neck noted in the DIME report, but thought it was probably referred pain from the elbow. He described no functional impairment associated with the neck and shoulder symptoms. Dr. Orent agreed with the rating methodology used by Dr. Hughes.

20. At hearing, Claimant described ongoing popping in his elbow that shoots pain down into his hand, fingers, and wrist, and up to his shoulder and neck. Claimant described "stiffness" in his neck and shoulder but testified "it doesn't hamper my range of motion." Claimant described no significant functional impairment associated with the episodes of shoulder and neck pain.

21. Claimant failed to prove his injury caused functional impairment beyond the right arm.

CONCLUSIONS OF LAW

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the

industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. E*.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). However, the mere presence of pain in a part of the body not listed on the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

As found, Claimant failed to prove his injury caused functional impairment beyond the right arm. While Claimant may experience transient neck and right shoulder pain, those symptoms do not give rise to any functional impairment affecting parts of his body not listed on the schedule. Consequently, there is no basis to "convert" the admitted right 16% upper extremity scheduled rating to a whole person rating for purposes of calculating the PPD award.

ORDER

It is therefore ordered that:

1. Claimant's request for additional PPD benefits based on a whole person rating 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: April 13, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-201-987-001

ISSUES

- Did Claimant prove a left total knee arthroplasty (TKA) recommended by Dr. Robert Fitzgibbons is reasonably needed and proximately caused by his January 6, 2022 admitted work injury?

FINDINGS OF FACT

1. Claimant has worked for Employer as a security guard since 2004. In January 2022, he was stationed at the [Redacted, hereinafter FX] Mead freight facility. He typically patrolled the lot and parking areas three times during an 8-hour shift, which required walking up to 1.5 miles per patrol.

2. Claimant suffered admitted injuries on January 6, 2022 when he slipped on ice and fell. He twisted his left knee and fell on his left side. Claimant felt immediate severe pain in his left knee.

3. Employer referred Claimant to Concentra for authorized treatment. He saw Dr. Lori Long-Miller at the initial appointment on January 10, 2022. Claimant explained he slipped on ice, twisted his left knee, and fell on his left side. His knee felt unstable, and he was having difficulty ambulating. On inspection, Dr. Long-Miller observed swelling but no ecchymosis or effusion. The knee was tender to palpation over the MCL and the medial tibial plateau. Dr. Long-Miller noted crepitus and limited range of motion. Claimant was diagnosed with a knee "strain" and a suspected MCL injury.[1]

4. A left knee MRI was completed on January 11, 2022. It showed tearing and degeneration of the medial meniscus, "bone on bone cartilage loss" in the medial compartment, mild cartilage loss in the patellofemoral and lateral compartments, and partial tearing and degeneration of a prior ACL graft.

5. Claimant had two prior surgeries on his left knee that set the stage for his current situation. He had a left knee meniscal repair in 1997, and an ACL reconstruction in 2008. Claimant credibly testified he recovered well after the surgeries and returned to normal activities. Claimant's testimony is corroborated by the lack of medical records documenting any evaluations or treatment of the left knee until at least 2020.

6. Claimant injured his neck and back in a motor vehicle accident (MVA) in February 2020. Contemporaneous medical records make no mention of any injury to the left knee. Claimant participated in PT for several months after the accident. On April 13, 2020, the therapist noted Claimant was having some left knee pain with walking and

[1] Claimant also injured his left shoulder and back in the accident. Those conditions are not involved in the present litigation and will only be referenced if necessary to understand Claimant's status as relates to his left knee injury.

squatting during PT. On April 17, 2020, the therapist stated she discontinued squatting activities during therapy because they were causing knee pain. On August 17, 2020, Claimant reported his left knee was bothering him and he was using a knee brace "at times doing work at home due to feeling like his knee 'shifts.'"

7. Claimant discussed the left knee symptoms with his PCP, Aaron Schumacher, NP, on August 19, 2020. Claimant stated his knee pain had gotten worse since April 2020, and requested a referral to PT. Provocative knee tests were negative, except a positive posterior drawer sign. Mr. Schumacher diagnosed "probable arthritis" and recommended Claimant take ibuprofen, use a compression sleeve with activity, and ice his knee after "vigorous exercise."

8. Claimant discontinued PT on August 24, 2020, and there are no additional records specifically referencing left knee symptoms until after the January 6, 2022 work accident.

9. Claimant followed up with Dr. Long-Miller on January 13, 2022 to review the MRI. Dr. Long Miller noted "lots of degenerative changes, partial tear ACL graft and medial meniscus and bone on bone medial knee." She referred Claimant to PT and recommended an orthopedic evaluation.

10. Claimant saw Dr. Robert Fitzgibbons, an orthopedic surgeon, on January 17, 2022. Claimant described persistent pain since the work accident. He told Dr. Fitzgibbons about the 2008 ACL reconstruction and stated "his left knee was doing fairly well" before the January 6 accident. Considering the MRI findings, Dr. Fitzgibbons did not think an arthroscopy would be helpful. He recommended PT and possible injections if Claimant's symptoms did not improve.

11. On February 24, 2022, Dr. Long-Miller documented that Claimant's knee was "improved but not resolved." The examination showed continued tenderness to palpation, crepitus, and limited range of motion. Dr. Long-Miller advised Claimant a knee replacement "will not be done by work comp."

12. Claimant followed up with Dr. Fitzgibbons on March 8, 2022, primarily in relation to his left shoulder. Claimant stated his knee was "doing well," but also reported ongoing knee pain and instability, aggravated by prolonged standing and walking. Dr. Fitzgibbons recommended surgery for the shoulder.

13. On March 14, 2022, Dr. Long-Miller documented there was "no change" in Claimant's left knee since the previous visit.

14. Claimant started seeing Keith Meier, NP, at Concentra on April 5, 2022. Examination of the left knee showed tenderness over the medial joint line and limited flexion with pain. Meniscal tests were positive. Mr. Meier advised that Dr. Fitzgibbons would decide whether a knee replacement was warranted and would need to submit the request for authorization. Regarding causation, Mr. Meier opined, "Patient has work[ed] his current job for 19 years without issue. Current work injury exacerbated the left knee issue and should be considered work related."

15. On April 25, 2022, Dr. Fitzgibbons noted, "[Claimant's] left knee is still symptomatic and bothersome. Physical therapy helped initially but now he is left with pain and instability of his left knee. The patient is adamant that his left knee was doing well until [h]is work related injury." Dr. Fitzgibbons stated, "will get Workmen's Comp. approval for a left total knee arthroplasty and removal of hardware."

16. Dr. William Ciccone performed a records review for Respondents on June 14, 2022. He opined Claimant suffered a minor sprain/strain at work on January 6, 2022. He noted Claimant was predisposed to develop arthritis in the knee because of the previous ACL reconstruction. Dr. Ciccone opined all pathology shown on the January 11, 2022 MRI was pre-existing and unrelated to the work accident. He said degenerative meniscal tears are common in knees with advanced arthritis, and unrelated to trauma. Given the significant pre-existing degenerative changes, Dr. Ciccone would expect Claimant's symptoms to wax and wane for no specific reason. He concluded the minor sprain/strain did not cause, aggravate, or accelerate the advanced degenerative changes in Claimant's knee.

17. Respondents formally denied the TKA based on Dr. Ciccone's report.

18. Mr. Meier addressed the denial in his June 22, 2022 report. Mr. Meier opined, "I do not agree that the left knee injury is not work related. The patient has worked for this company for 19 years without issue. He has a documented work-related injury . . . Under Colorado guidelines an exacerbation of a preexisting condition is work related."

19. On July 20, 2022, Claimant told Mr. Meier, "I was squatting 175 pounds before this injury. Now I can't do any squatting. I want to get back to where I was."

20. Claimant started seeing Dr. Eric Vanzura at Concentra on August 19, 2022. Dr. Vanzura "entirely" disagreed with Dr. Ciccone's causation opinions, because Claimant was "fully functional" before the work accident despite the preexisting degenerative changes.

21. Dr. Vanzura reiterated his support for the TKA on August 19, 2022. He noted, "prior to the injury [Claimant] was walking and functioning normally despite degenerative changes [and] prior repair of ACL . . . which worked great. Was fully functional with squats and throwing hay bales prior to work related injury. MRI shows degenerative changes in addition to new injuries from work slip/fall." Dr. Vanzura added, "I insist that this patient's new knee instability is due to his slip and fall onto left leg with twisting knee injury. He does have pre-existing degenerative changes but was fully functioning and has entirely new problems after his work-related injury. WC definitely should cover at least the majority of cost for a total knee replacement." Dr. Vanzura referred Claimant to Dr. Lucas Schnell, a knee specialist, for a second opinion.

22. Dr. Schnell evaluated Claimant on September 12, 2022. Dr. Schnell agreed a TKA was appropriate. Regarding causation, Dr. Schnell opined Claimant's pre-existing arthritis "was exacerbated by his fall at work."

23. Dr. Ciccone performed an in-person IME on December 21, 2022. Claimant told Dr. Ciccone he had recovered from the ACL reconstruction with no significant ongoing issues. Claimant had completed a six-mile hike just a few weeks before the work accident. He also lifted weights at least twice per week and performed "full exercises with no pain." Since the accident, Claimant had given up numerous activities, such as weightlifting, running, hunting, landscaping, and home repairs. He was having difficulty with routine household activities such as mowing the lawn, taking out the garbage, vacuuming, and washing dishes. Dr. Ciccone saw no reason to change the opinions expressed in his previous report. He reiterated that the "minor" knee strain at work did not cause, aggravate, or accelerate the pathology seen on the MRI. Dr. Ciccone noted 2020 records showing intermittent knee pain, which he believed was consistent with the expected course of progressive osteoarthritis. He also pointed to post-injury records showing fluctuating pain levels. Dr. Ciccone concluded that the proposed TKA is related to the natural progression of Claimant's underlying, pre-existing condition, not the work injury.

24. Dr. Ciccone testified in deposition consistent with his report. Dr. Ciccone testified the improvement in the Claimant's knee pain in the weeks after the accident was consistent with a resolving left knee strain. He would expect a traumatic aggravation of pre-existing arthritis to produce persistent pain in the knee. Once the pain starts resolving, or goes back to intermittent, he considers the pre-existing condition to be at baseline. Dr. Ciccone downplayed the substantial change in Claimant's functional abilities before and after the work accident. Dr. Ciccone conceded a physical examination in August 2020 showed no evidence of a symptomatic meniscus tear or compromised ACL. He also agreed no pre-injury medical records documented sufficient clinical findings to suggest Claimant was a candidate for a TKA.

25. Dr. Sharma performed an IME for Claimant on January 17, 2023. Dr. Sharma opined Claimant suffered an "exacerbation, aggravation, acceleration and actually a worsening of his underlying arthritis as a result of this work injury."

26. In addition to his pre-injury work activities, Claimant regularly engaged in strenuous exercise, including heavy squats, leg extensions, rowing, and running. He also did "a lot" of work around his home, including heavy landscaping. Claimant's testimony regarding his pre-injury condition and activities is credible and persuasive.

27. The causation opinions of Dr. Vanzura, Dr. Schell, Mr. Meier, Dr. Fitzgibbons, and Dr. Sharma are credible and more persuasive than the contrary opinions offered by Dr. Ciccone and Dr. Long-Miller.

28. Claimant proved the January 6, 2022 work accident aggravated, accelerated, or combined with his pre-existing condition and proximately caused the need for a left TKA.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

As found, Claimant proved the January 6, 2022 work accident aggravated, accelerated, or combined with his pre-existing condition and proximately caused the need for a left TKA. The causation opinions of Dr. Vanzura, Dr. Schell, Mr. Meier, Dr. Fitzgibbons, and Dr. Sharma are credible and more persuasive than contrary opinions in the record. Even though Claimant's left knee was severely arthritic and "bone on bone" the day before the work accident, he was able to work and engage in a wide range of avocational activities such as weightlifting, hiking, running, and landscaping, without limitation or difficulty. Dr. Ciccone's opinion that Claimant returned to "baseline" shortly after the accident is not persuasive. Claimant's preinjury baseline was a minimally symptomatic knee that caused no significant limitations on his ability to work or participate in a variety of physically demanding activities including weightlifting and hiking. Although the documented severity of Claimant's symptoms has fluctuated since the accident, he has continued to experience knee pain, and more importantly, substantially reduced function. The preponderance of persuasive evidence shows the work accident aggravated and accelerated the need for a TKA.

ORDER

It is therefore ordered that:

1. Insurer shall cover the left total knee arthroplasty recommended by Dr. Robert Fitzgibbons.

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

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

to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 21, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-221-765-001

ISSUES

- Did Claimant prove he suffered a compensable injury to his left shoulder on September 15, 2022 "arising out of" his employment?

- If the claim is compensable, the parties stipulated to an average weekly wage (AWW) of $1,273.15. The parties also stipulated that Respondent shall cover an evaluation with Dr. David Weinstein.

STIPULATED FACTS

1. Claimant injured his left arm on September 15, 2022 swatting at a fly that had been bothering him for a while. Claimant swatted at the fly as hard as he could with his left arm, causing immediate pain.

2. Claimant had no prior left shoulder problems.

FINDINGS OF FACT

1. Claimant works for Employer as a Correctional Officer. He injured his left shoulder on September 15, 2022 when he swatted forcefully at a fly while working at a desk. Claimant felt a painful, tearing sensation in the lateral left shoulder and numbness down his left arm into the left ring and middle fingers.

2. Claimant selected Concentra from Employer's list of designated providers. At the initial appointment, Claimant was diagnosed with a left shoulder strain and referred for an MRI and PT.

3. A left shoulder MRI was completed on October 28, 2022. It showed a joint effusion, mild arthritis, supraspinatus tendinitis, and mild AC joint impingement. No rotator cuff or labral tears were identified.

4. A steroid injection on November 3, 2022 provided some relief. Because of persist symptoms, Claimant was referred to Dr. David Weinstein for an orthopedic evaluation.

5. Claimant proved the left shoulder injury arose out of and occurred within the course of his employment.

CONCLUSIONS OF LAW

To establish a compensable claim, a claimant must prove they suffered an injury while "performing service arising out of and in the course of his employment." Section 8-41-301(1)(b). The terms "arising out of" and "in the course of" are not synonymous. The

"course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). There is no presumption that an injury occurring at work during work hours necessarily arises out of employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). The claimant must prove a causal nexus between the injury and their employment by a preponderance of the evidence. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

Respondent does not dispute the "course of employment" element, and this case turns on whether Claimant's injury "arose out of" his employment.

As found, Claimant proved his injury arose out of his employment. Several interrelated concepts support this conclusion. First, a claimant need not actually be performing work duties at the time of the injury, nor must the injurious activity be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996). "Many job functions involve discretionary or optional activities on the part of the employee, devoid of any duty component and unrelated to any specific benefit to the employer, but nonetheless are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment." *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). In this case, the fly had been "bothering" Claimant for "a while," and the ALJ infers it was interfering with his ability to focus on work tasks. As a result, swatting at the fly was intended to remove a distraction and facilitate accurate and timely completion of his work.

Second, Claimant's citation to the "personal comfort" doctrine is persuasive. Under the personal comfort doctrine, a wide variety of activities have all been held to be incidental to employment, such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water, and keeping warm. *E.g., In re Question Submitted by United Stated Court of Appeals for Tenth Circuit*, 759 P.2d 17 (Colo. 1988); *Eslinger v. Kit Carson County Memorial Hospital*, W.C. No. 4-638-306 (January 10, 2006) (warming up car and brushing off snow in parking lot at end of shift); *Geist v. Liberty Mutual Group*, W.C. No. 4-839-225 (October 11, 2011) (employee pushed back in chair to stand and go to the restroom); *Lehr v. Town of Wiggins*, W.C. No. 4-488-778 (February 14, 2002) (employee tried to throw an empty soda bottle into the trash but missed, bent over to pick up the bottle and injured his low back). The rule is based on the premise that actions taken to satisfy the employee's personal comfort are indirectly conducive to the employer's business. *Ocean Accident & Guarantee Corp. v. Pallero*, 180 P. 95 (Colo. 1919). Although personal comfort cases most commonly involve basic bodily functions (*i.e.*, eating, drinking, and toileting), the doctrine has been extended to activities which are not biological necessities, like smoking cigarettes. *E.g., Even v. The Mining Exchange*, W.C. No. 4-892-465 (April 29, 2013) (employee slipped on stairs while returning from a smoke break). Logically, the doctrine should also extend to an attempt

to remove disruptive stimuli, such as closing an office door to mitigate noise or, as here, swatting at a bothersome insect.

Third, the act of swatting at the fly was insufficiently "substantial" to constitute a personal deviation from Claimant's work. An employee who is otherwise engaged in work activity can momentarily step outside the scope of employment by engaging in a purely personal deviation. In such cases, the question is "whether the claimant's conduct constituted such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006). The deviation must be "substantial" to remove the claimant from the course and scope of employment. *Kelly v. Industrial Claim Appeals Office*, 214 P.3d 516 (Colo. App. 2009). Here, Claimant was performing work activity immediate before swatting the fly, and presumably intended to return to working immediately afterward. Although the duration of a putative personal deviation is not dispositive, it is a legitimate factor to consider when evaluating whether the deviation was substantial. More importantly, even though Claimant undoubtedly hoped to obtain a personal benefit of removing an annoyance, he was also attempting to facilitate his ability to concentrate on work tasks. This combination of personal and work-related motivations is inconsistent with a finding of a "purely personal" deviation.

Finally, a finding of compensability is consistent with the "but for" test for injuries arising from "neutral risks" set forth in *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). *City of Brighton* recognized three categories of employment risks causing injury to employees: (1) employment risks; (2) personal risks; and (3) neutral risks, which are neither employment related nor personal. An irritating insect is not an inherently employment-related risk, like a gas explosion or malfunctioning piece of machinery. Nor is it an entirely personal risk, such as an epileptic seizure or an assault in retaliation for an adulterous affair. It is more akin to neutral risks such as stray bullets, car thieves, and lightning strikes. Under *City of Brighton,* an injury caused by a neutral risk arises out of employment "if it would not have occurred but for the fact that the conditions and obligations of the employment placed [the] claimant in the position where he or she was injured." *Id*. at 504-05. In this case, Claimant's injury would not have occurred "but for" the fact that his employment placed him in the position to be bothered by the fly.

ORDER

It is therefore ordered that:

1. Claimant's claim for an injury to his left arm and shoulder on September 15, 2022 is compensable.

2. Claimant's average weekly wage is $1,273.15.

3. Respondent shall cover an evaluation with Dr. David Weinstein.

4. 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: April 25, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-210-496-002

ISSUES

- Did Claimant prove he suffered a compensable injury to his right shoulder on March 10, 2022 arising out of and in the course of his employment?

- Did Claimant prove Respondent is liable for an evaluation by Dr. Timothy Sandell on December 1, 2022?

- Did Respondent prove Claimant's indemnity benefits should be reduced 50% for willful violation of a safety rule?[1]

FINDINGS OF FACT

1. Claimant works for Employer as a Head Clerk. In March 2022, his regular shift was from 2:30 PM to 11:00 PM.

2. Claimant injured his right shoulder at work on March 10, 2022. He was at the registers and observed two youths he believed were shoplifting beer. Claimant left his position near the registers and walked "at a quick pace" toward the front door, with the intent to "engage" the youths before they exited the store. Upon reaching the door, Claimant's hamstring "blew," and he fell on his outstretched right arm. He suffered a severe rotator cuff tear.

3. Shoplifting is a significant problem at many of Employer's stores, including the store where Claimant worked. Employer has promulgated written rules entitled "STORE PERSONNEL SHOPLIFTING DETERRENCE POLICY." The document states, "Improperly handling a suspected shoplifting situation puts the safety of Associates, Customers and the suspected shoplifter at risk. . . . Customer Service / Customer Delight is the best method to deter shoplifting, and it is the only deterrence method you may use." (Emphasis in original). The Policy explicitly instructs employees "Do not pursue, follow, or chase a shoplifter inside the store or outside the store exit."

4. Despite these admonitions, Employer does not expect its employees to remain entirely passive in the face of shoplifting. Under the section captioned "WHAT YOU SHOULD ALWAYS DO," the Policy states, "Engaging with a suspected shoplifter while they are in the store may prevent the theft. In most cases, excellent Customer Service / Customer Delight at the door can deter a push-out or walk-out. Always engage with Customer Service / Customer Delight first."

[1] No indemnity benefits were requested at the March 7, 2023 hearing because Claimant withdrew the endorsed issues of TTD and TPD. Nevertheless, the parties agreed Respondent's safety rule defense was ripe for determination and elected to try the issue.

5. Claimant interpreted Employer's policy of "engagement" to mean he should "try to talk to" or "have a conversation with" suspected shoplifters to deter theft. There is no persuasive evidence Claimant received training or instruction about "engagement" that differs from his understanding.

6. Claimant's medical records contain notations that he was "running after" and "chasing" the youths when the injury occurred. Claimant credibly disputed the characterization that he was chasing or running after the youths; he was walking toward the door at "a quick pace" because he "was trying to get to the door before they did." The medical providers probably incorrectly paraphrased Claimant's statements.

7. Claimant did not immediately ask Employer to provide medical treatment because, "I didn't think it was going to be a serious thing." He went to his PCP and was sent to physical therapy. Claimant participated in PT for eight weeks, without significant improvement.

8. An MRI of the right shoulder was done on May 17, 2022. It showed supraspinatus, infraspinatus, and subscapularis tendon tears, a torn biceps tendon, and a greater tuberosity osteochondral injury related to the acute rotator cuff tears.

9. After learning the extent of his injury, Claimant initiated a workers' compensation claim with Employer. [Redacted, hereinafter JM], the District Asset Protection Manager, interviewed Claimant about the incident in May 2022. During the interview, Claimant initially stated that he was "hurrying after" the shoplifters, but on further questioning, he clarified he was "not chasing" them.

10. Employer's Shoplifting Deterrence Policy states that "associates who violate this policy will be subject to disciplinary action up to and including termination." Employer has previously disciplined other employees for violating the policy.

11. Claimant was not disciplined for the March 10, 2022 incident. When asked at hearing whether JM[Redacted] believed Claimant's description of the incident constituted a violation of Employer's policy, she replied, "possibly."

12. Employer referred Claimant to Concentra. He was diagnosed a rotator cuff tear and referred to Dr. Michael Simpson for a surgical evaluation.

13. Dr. Simpson evaluated Claimant on July 19, 2022, and opined Claimant "undoubtedly" required surgery. Dr. Simpson submitted a preauthorization request for an arthroscopic subacromial decompression, rotator cuff repair, biceps tenodesis, and possible in-space balloon acromioplasty if the supraspinatus turns out to be "non-reconstructable."

14. Respondent filed a Notice of Contest on July 19, 2022 denying the claim as "not work-related." Respondent also denied the surgery preauthorization request.

15. Dr. Allison Fall performed an IME for Respondent on November 10, 2022. Dr. Fall agreed the surgery requested by Dr. Simpson is reasonably necessary and causally related to March 10, 2022 work accident.

16. Claimant saw Dr. Timothy Sandell, a physiatrist, on December 1, 2022. Dr. Sandell reviewed Dr. Simpson's report and agreed Claimant remained a surgical candidate. However, he referred Claimant to a different surgeon, Dr. Ross Schumer.

17. Dr. Sandell stated Claimant was "referred to my office to assume care moving forward," but his records do not identify the referral source.

18. No medical record or other document in evidence shows a referral to Dr. Sandell by any authorized provider. No testimony was presented on this issue, and the parties did not stipulate that Dr. Sandell is authorized.

19. Claimant's testimony regarding the accident, his understanding of Employer's shoplifting policies, and the motivation for his actions is credible.

20. Claimant proved his injury arose out of his employment and he remained within the sphere of employment when the injury occurred.

21. Respondent failed to prove Claimant willfully violated a safety rule.

22. Claimant failed to prove Dr. Sandell is an authorized provider.

CONCLUSIONS OF LAW

A. Compensability

To establish a compensable claim, a claimant must prove they suffered an injury while "performing service arising out of and in the course of his employment." Section 8-41-301(1)(b). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). There is no presumption that an injury occurring at work during work hours necessarily arises out of employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). The claimant must prove a causal nexus between the injury and their employment by a preponderance of the evidence. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

Ordinarily, it would seem rather obvious that injuries suffered by a grocery store manager while attempting to speak with a shoplifter arose out of and occurred within the course of the employment. But Respondent argues Claimant violated specific directives relating to shoplifters and was therefore acting outside the "sphere of his employment" when the injury occurred.

If an employer issues a directive that limits the "sphere" of a claimant's employment, any injury sustained while violating such directive is not compensable. *E.g., Bill Lawley Ford v. Miller,* 672 P.2d 1031 (Colo. App. 1983). To remove conduct from the sphere of employment, the directive must be clear, specific, and evidence an intent to cause a cessation of employment. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). Relevant factors in the analysis include the employer's reason for imposing the directive, the circumstances under which it was given, when it was given, what the employer intended to prohibit, and how the claimant interpreted the order. *Nielsen v. PXC Denver, LLC*, W.C. No. 4-241-772 (March 5, 1996).

As found, Claimant proved he remained within the "sphere of his employment" at the time of his injury. Employer's Policy regarding shoplifters does not evidence a clear intent to cause a cessation of employment. The directives are intended to regulate Claimant's conduct while performing his job instead of limiting the scope of his employment. Contrary to the situation in *Bill Lawley Ford, supra,* Employer's Policy does not instruct employees to do nothing in response to shoplifting. Rather, Employer requires employees to take some action and attempts to limit "how" they do it. In other words, the Policy "regulate[s] the employee's conduct while he is engaged in such employment," as opposed to defining the sphere of the employment itself. *Ramsdell v. Horn, supra*, at 152. Claimant was attempting in good faith to comply with the instruction to "engage" the shoplifters before they left the store. Therefore, the injury arose out of and occurred within the course of his employment.

B. Safety rule penalty

Section 8-42-112(1)(b) provides that indemnity benefits shall be reduced 50% where the injury results from the claimant's "willful" failure to obey any reasonable rule adopted by the employer for the safety of the employee. The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondents to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968); *see also Sayers v. American Janitorial Service, Inc*., 162 Colo. 292, 425 P.2d 693 (Colo. 1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to the employer). Willfulness may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra; Industrial Commission v. Golden Cycle Corp*., 246 P.2d 902 (Colo. 1952). Violation of a safety rule is not willful if the employee had a "plausible purpose to explain his violation of a rule." *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1995). Generally, violating a rule to facilitate accomplishment of a job-related task is not willful. However, violation of a rule simply to make the job easier or quicker is not considered a "plausible purpose." *Grose v. Riviera Electric*, W.C. No. 40418-465 (August 25, 2000). A safety rule penalty is an affirmative defense, and it is the respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995).

As found, Respondent failed to prove Claimant willfully violated a safety rule. Claimant performed no action prohibited by the Shoplifting Deterrence Policy. He was not pursuing or chasing the shoplifters but rather was attempting to engage with them at the front door. Claimant's testimony regarding his understanding of the Policy and his motivation for moving quickly to meet the shoplifters at the door is credible.

Employer's Policy requires relatively nuanced distinctions if an employee suspects or knows a customer is stealing merchandise. On the one hand, the employee must not "pursue, follow, or chase a suspected shoplifter." But they are encouraged—and arguably required—to "engage" with shoplifters "while they are in the store" or "at the door," which is precisely what Claimant believed he was doing when the injury occurred. Claimant understood "engagement" to mean conversing with the shoplifter or asking if they required assistance. There is no persuasive evidence Claimant was trained in methods of engagement that differ from his understanding. The absence of any detailed description of the ways to "engage" shoplifters creates a zone of discretion for the employee to decide how best to handle any given situation. The lack of clarity is confirmed by JM's[Redacted] admission that the circumstances described at hearing were only a "possible" violation of Employer's rules. And the fact that Claimant was not disciplined in connection with the incident suggests even Employer was not convinced Claimant violated a rule.

Even if Claimant were deemed to have violated a safety rule based on his position relative to the shoplifters, the violation was not "willful." Instead, Claimant had a "plausible purpose" to engage the shoplifters before they left the store.

C. Dr. Sandell's December 1, 2022 bill

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Besides 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). The respondents are only liable for treatment rendered by authorized treating providers. Absent an emergency, the ALJ cannot award medical treatment recommended or provided by unauthorized providers, even if the treatment was otherwise reasonably needed or causally related. *E.g., Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (May 15, 2018); *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (May 4, 1995).

Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

As found, Claimant failed to prove Dr. Sandell is an authorized provider. There is no persuasive evidence that Concentra or Dr. Simpson referred Claimant to Dr. Sandell. Dr. Sandell stated Claimant was "referred to my office to assume care," but did not identify the referral source. There is no medical record or other document in evidence reflecting a referral to Dr. Sandell by an authorized provider. No testimony was presented on this issue, and the parties did not stipulate that Dr. Sandell is authorized.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right shoulder injury is compensable.

2. Respondent shall cover medical treatment from authorized providers reasonably needed to cure and relive the effects of Claimant's compensable injury.

3. Claimant's request for payment of Dr. Sandell's December 1, 2022 bill is denied and dismissed.

4. Respondent's request for a 50% reduction of indemnity benefits for a safety rule violation 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: April 28, 2023

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