OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-246-865-002

ISSUES

Have Respondents overcome, by clear and convincing evidence, the opinions of the Division sponsored independent medical examination (DIME) physician, regarding maximum medical improvement (MMI) and permanent impairment[1]?

FINDINGS OF FACT

1. On May 3, 2023, Claimant suffered an injury while employed with Employer.

2. On August 7, 2023, Claimant prepared a Worker's Claim for Compensation. In that document, Claimant listed her injured body parts as her right hand, wrist, and elbow. The mechanism of injury was identified as "I was a delivery driver for the company, the constant heavy lifting hurt my right hand, wrist, and elbow."

3. At the March 26, 2025 hearing, Claimant testified that she was injured on May 3, 2023 while moving a 200 pound dresser. During her testimony, Claimant asserted that in addition to suffering injuries to her right hand, wrist, and elbow, she also injured her right shoulder.

4. On February 8, 2024, Claimant attended an independent medical examination (IME) with Dr. Kathy McCranie. In connection with the IME, Dr. McCranie reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In her IME report, Dr. McCranie opined that Claimant's work related diagnoses included a right wrist strain with de Quervain's tenosynovitis and medial and lateral epicondylitis. Dr. McCranie noted that there was a discrepancy in the description of Claimant's mechanism of injury. Specifically, in the medical records, the mechanism of injury is identified as a repetitive use injury. However, Claimant reported to Dr. McCramie at the IME that she experienced a specific acute injury. Dr. McCranie further opined that Claimant's right shoulder and neck complaints are not related to the May 3, 2023 work injury.

5. Also in the IME report, Dr. McCranie determined that Claimant had reached maximum medical improvement (MMI) as of the date of the IME (February 8, 2024). In addition, Dr. McCranie assessed a permanent impairment rating of one percent for Claimant's right upper extremity. With regard to post-MMI maintenance medical treatment, Dr. McCranie recommended a trial of diclofenac gel to treat the right wrist and elbow. If the trial was successful, the Claimant could undergo use of the gel

[1] During her testimony, Claimant seemed to indicate her disagreement with the type and frequency of medical treatment recommended by Dr. Aschberger. As denial of specific medical treatment was not endorsed for the hearing, the ALJ does not address that issue in this order.

for three to six months. Dr. McCranie also recommended maintenance medical treatment of up to ten sessions (over six months) of acupuncture or trigger point dry needling.

6. On March 26, 2024, Claimant was placed at maximum medical improvement (MMI) by her authorized treating physician (ATP), Dr. Michael Shell. In the medical record of that date, Dr. Shell identified maintenance medical treatment that would include ten sessions of acupuncture or dry needling for treatment of Claimant's elbow and wrist pain. Dr. Shell did not assess permanent impairment on March 26, 2024, pending a functional capacity evaluation (FCE).

7. On May 9, 2024, Claimant attended the recommended FCE with David Wilson, OTR/L, CHT. Therapist Wilson placed Claimant in the sedentary physical demand category.

8. On May 15, 2024, Claimant returned to Dr. Shell for a permanent impairment rating. Dr. Shell assigned a permanent impairment rating of six percent (6%) for Claimant's right upper extremity. This was calculated by identifying a regional impairment of four percent (4%) for Claimant's right wrist, and regional impairment of two percent (2%) for Claimant's right elbow.

9. Relying upon Dr. Shell's May 15, 2024 report, on May 22, 2024, Respondents filed a Final Admission of Liability (FAL) admitting for an MMI date of March 26, 2024 and a permanent impairment rating of six percent (6%) for Claimant's right upper extremity.

10. Following the FAL, Claimant requested a Division sponsored independent medical examination (DIME). On November 26, 2024, Claimant was seen for the DIME by Dr. John Aschberger. In connection with the DIME, Dr. Aschberger reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his DIME report, Dr. Aschberger opined that Claimant had not yet reached MMI. In support of this opinion, Dr. Aschberger noted that Claimant has "significant restriction and dysfunction at the shoulder". Dr. Aschberger did not address in his report what medical records he relied upon. It appears that much of Dr. Aschberger's opinions are based upon his reliance on Claimant's reports to him at the DIME. In his report, Dr. Aschberger recommended further treatment that included physical therapy; shoulder injections; an extensor tendon injection at the wrist or thumb; a home exercise program; and chiropractic therapy. Although he opined that Claimant was not at MMI, Dr. Aschberger assessed permanent impairment of 11 percent (11%) for Claimant's right upper extremity. This was calculated based solely on Claimant's right shoulder. Dr. Aschberger assessed zero impairment for Claimant's right wrist and right elbow.

11. Following her review of additional medical records, (including Dr. Aschberger's DIME report), on January 3, 2025, Dr. McCranie authored a second report. In this supplemental report, Dr. McCranie reiterated her opinion that Claimant was at MMI for the May 3, 2023 work injury. It is Dr. McCranie's opinion that Dr.

Aschberger erred in his opinion that Claimant is not at MMI. Dr. McCranie specifically noted that Dr. Aschberger did not provide a causation analysis in his report. Nor did Dr. Aschberger indicate which medical records he reviewed. Dr. McCranie further noted that the first mention of right shoulder symptoms appears in an August 24, 2023 medical record when Claimant was at occupational therapy. As noted by Dr. McCranie, this was more than three months after the work injury. Dr. McCranie explained that there was no acute or repetitive mechanism of injury that would cause Claimant to experience right shoulder pain more than three months after her injury. Dr. McCranie also noted that Dr. Aschberger did not mention shoulder impingement or other shoulder pathology in his examination of Claimant. In spite of this, Dr. Aschberger listed a diagnosis of right shoulder pain with positive impingement. In her January 3, 2025 report, Dr. McCranie explained that Dr. Aschberger's finding of "impingement is inconsistent with physical examination."

12. On March 4, 2025, Claimant was seen by Dr. M. Susan Zickefoose. In the medical record of that date Dr. Zickefoose referenced Dr. Aschberger's DIME report and related recommendations. Dr. Zickefoose specifically noted that the DIME report indicated that Claimant received only "limited treatment" for her shoulder complaints and no home exercise program had been provided. Dr. Zickefoose noted that Claimant began physical therapy for her right shoulder on October 17, 2023 and was instructed on a home exercise program. Dr. Zickefoose specifically noted that it was unclear from the DIME report which of Claimant's shoulders was to undergo the injections recommended by Dr. Aschberger.

13. The ALJ does not find Claimant's testimony to be credible or persuasive. Specifically, the ALJ does not credit Claimant's testimony regarding the nature and onset of her right shoulder symptoms. The ALJ credits the medical records and finds that Claimant's right shoulder symptoms did not begin until more than three months after the admitted work injury. The ALJ further credits the medical records and the opinions of Drs. Shell and McCranie over the contrary opinions of Dr. Aschberger. The ALJ specifically credits Dr. McCranie's opinions that Dr. Aschberger erred in failing to perform a causation analysis, identify the medical records he relied upon in reaching his opinions, and determining that Claimant was not at MMI. The ALJ further finds that Dr. Aschberger's report is further erroneous due to his diagnosis of impingement without making noting any such findings on examination. The ALJ specifically finds that Claimant reached MMI as of March 26, 2024, as determined by her ATP, Dr. Shell. Therefore, The ALJ finds that Respondents have successfully overcome the opinions of the DIME physician.

14. As the opinions of the DIME physician have been overcome, the ALJ now turns to the factual determination of Claimant's permanent impairment rating. Notwithstanding his opinion that Claimant was not at MMI, Dr. Aschberger assessed a provisional permanent impairment rating. The ALJ finds that Dr. Aschberger further erred in assessing permanent impairment solely for Claimant's right shoulder, with no impairment for Claimant's right wrist and right elbow. The ALJ finds that the best assessment of Claimant's permanent impairment was done by Dr. Shell on May 15,

2024 (following an FCE). Therefore, the ALJ finds that Claimant's permanent impairment of her right upper extremity is six percent (6%) as determined by Dr. Shell.

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. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

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

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in their opinions including whether the DIME physician appropriately utilized the Colorado Medical Treatment Guidelines (MTG) and the AMA Guides in their opinions.

5. Once an ALJ determines an employee has reached MMI, the employee's permanent impairment rating becomes a question of fact that the ALJ can resolve after considering any conflicting medical evidence regarding impairment. *Destination Maternity v. Burren*, 463 P.3d 266, 277 (Colo. 2020).

6. As found, Respondents have successfully overcome the opinions of the DIME physician, Dr. Aschberger, by clear and convincing evidence. The opinions that have been overcome relate to MMI and permanent impairment. As found, Dr. Aschberger erred in failing to perform a causation analysis, identify the medical records he relied upon in reaching his opinions, and determining that Claimant was not at MMI. As found, Claimant has reached MMI as of March 26, 2024. As found, Claimant's permanent impairment rating for her right upper extremity is six percent (6%) (as determined by Dr. Shell). As found, the medical records and the opinions of Drs. Shell and McCranie are credible and persuasive.

ORDER

It is therefore ordered:

1. Respondents have overcome, by clear and convincing evidence, the opinions of DIME physician on MMI and permanent impairment.

2. Claimant reached maximum medical improvement (MMI) on March 26, 2024.

3. Claimant has permanent impairment to her right upper extremity of six percent (6%); (as determined by Dr. Shell).

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

Dated April 16, 2025.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

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