OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-251-296-002

ISSUES

I. Whether Claimant established by a preponderance of the evidence that the shoulder surgery recommended by Dr. Jeffers is reasonable and necessary to treat Claimant for the effects of his work injury.

II. Whether Respondents established by a preponderance of the evidence that Claimant's temporary total disability benefits should be terminated as of October 10, 2024.

FINDINGS OF FACT

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

1. Claimant was employed by Employer as a truck driver and furniture mover.
2. On August 11, 2023, Claimant injured his right shoulder while moving a piano.[1]
3. On August 15, 2023, Claimant sought treatment for his right shoulder from Theodore Villavicencio, M.D. Claimant reported pain with shoulder movement, particularly during abduction and flexion. Dr. Villavicencio diagnosed a shoulder strain and prescribed physical therapy three times a week for two weeks, along with an arm sling. He released Claimant to modified duty and imposed work restrictions, prohibiting Claimant from driving the company vehicle or using his right upper extremity. Lastly, Dr. Villavicencio concluded that his findings were consistent with the reported history and work-related mechanism of injury.
4. On August 17, 2023, Claimant began physical therapy. He continued to undergo physical therapy regularly and received ongoing treatment from Dr. Villavicencio.
5. On August 25, 2023, Claimant returned to Dr. Villavicencio. At this appointment, Claimant continued to experience pain in his right shoulder. Examination of the rotator cuff revealed a positive painful arc, a positive Hawkins test, a positive Neer test, and a positive empty can test. Based on these findings and Claimant's ongoing pain, Dr. Villavicencio administered an injection into Claimant's shoulder and maintained the existing work restrictions, prohibiting Claimant from driving the company truck or using his right upper extremity.
6. On September 1, 2023, Claimant returned to Dr. Villavicencio. Due to Claimant's persistent symptoms, worsening range of motion, and lack of improvement with physical therapy and an injection, Dr. Villavicencio ordered an MRI.

[1] Respondents admitted liability for the injury and filed a General Admission of Liability on September 29, 2023, admitting for medical and temporary total disability benefits.

7. The MRI revealed the following: (a) no full or partial rotator cuff tears, (b) degenerative changes at the glenohumeral joint and AC joint, (c) a degenerative posterior superior to posterior inferior labral tear with developing juxta-articular and intra-labral cysts, potentially indicating an extension of a SLAP Type 8 tear from the supraglenoid tubercle, and (d) an intact biceps tendon.
8. On September 15, 2023, Dr. Villavicencio reviewed Claimant's MRI results with him. Dr. Villavicencio concluded, and informed Claimant, that the MRI revealed a large degenerative labral tear. Dr. Villavicencio concluded that the tear was likely exacerbated by Claimant's work injury, as Claimant had no prior pain or functional limitations before the incident. Based on these findings, Dr. Villavicencio referred Claimant to a surgeon for evaluation and treatment.
9. On October 19, 2023, Claimant was evaluated by Dr. Jeffers, an orthopedic surgeon, for persistent right shoulder pain following his work injury. Despite physical therapy and a corticosteroid injection, Claimant's symptoms had not improved. Claimant had ongoing pain, weakness, and limited motion. Dr. Jeffers noted that before Claimant's work injury occurred while lifting a piano, Claimant had no significant dysfunction and no history of surgery on the shoulder. He also concluded that Claimant was unable to work due to his work injury.
10. On physical examination, Dr. Jeffers found Claimant had significant tenderness over the bicipital groove, limited and painful range of motion, and weakness in external rotation. He also had a positive Jerk test, with pain elicited on Speed's and O'Brien's tests.
11. Dr. Jeffers indicated that the MRI findings showed a type II acromion with AC arthrosis, an intact rotator cuff, a posterior labral tear with paralabral cyst formation, a SLAP tear, and chondral loss at the posterior glenoid with subchondral cyst formation. He also noted that the biceps tendon was intact, with no evidence of dislocation.
12. Dr. Jeffers diagnosed Claimant with a SLAP tear and posterior labral tear. As conservative treatment had failed, he recommended an arthroscopic anterior labral repair. Claimant expressed interest in proceeding, and Dr. Jeffers planned to seek surgical approval and schedule a preoperative visit.
13. On October 23, 2023, Claimant returned to Dr. Villavicencio and said he was interested in having the surgery recommended by Dr. Jeffers. At this appointment, Dr. Villavicencio noted that Claimant was not working, since the employer was unable to accommodate his work restrictions, which were no driving of the company truck and no use of his right arm. Dr. Villavicencio also noted that Claimant did not have any further appointments with Dr. Jeffers since Claimant was waiting for the surgery to be authorized. Dr. Villavicencio followed up with Dr. Jeffers to let him know Claimant was interested in surgery and make sure he submitted the request for authorization since Dr. Jeffers' last note indicated that he would request authorization if Claimant wanted to proceed with surgery.
14. On October 24, 2023, Dr. Jeffers requested authorization to perform a posterior labral repair and a biceps tenodesis.

15. On November 6, 2023, Claimant was seen by Lacie Esser, PA-C, and she noted that the claim was delayed due to waiting for surgery to be authorized. At this visit, she continued Claimant's work restrictions.

16. On December 7, 2023, Claimant underwent an independent medical examination with Mark Failinger, M.D. Dr. Failinger obtained a history, performed a physical examination, and reviewed Claimant's medical records, which included the MRI report. Dr. Failinger indicated that Claimant's preexisting shoulder degeneration was present before the work incident. However, lifting the piano could have aggravated a specific portion of the shoulder, making it a compensable injury under Colorado law. But in order to render a final opinion, he wanted to review Claimant's MRI films.

17. For approximately three months after the IME with Dr. Failinger, Dr. Villavicencio's PA Esser followed up on attempting to determine whether surgery would be authorized. During this time, it was noted that Claimant was getting frustrated and that he was still unable to work. PA Esser noted that Claimant was seeking legal counsel to help him because he was "understandably quite frustrated as his shoulder remains very symptomatic, unable to work, needs to have surgery, and move on."

18. On March 18, 2024, approximately three months after the IME, Dr. Failinger reviewed Claimant's MRI films and issued an addendum outlining his opinions and conclusions: His opinions and conclusions are as follows:

> After reviewing the imaging, therefore, it is, with reasonable medical probability, that the superior labral tearing, which extends into the posterior-superior labrum, reasonably would be accelerated by, or permanently aggravated by, the piano lifting event of 08-11-2023. Therefore, under Colorado Workers' Compensation Law, treatment for the acceleration of pre-existing labral tearing would be reasonable, necessary, and related to the work incident. However, it is not with reasonable medical probability that any further acceleration of pre-existing glenohumeral arthritis, nor the AC arthritis, nor any rotator cuff tendinopathy occurred. Further surgical intervention for the rotator cuff tendinopathy is not necessary. There is little doubt that [Claimant] has multiple possible significant pain generators, including both his arthritis and his labral tearing.
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> Unfortunately, this is a most difficult case, as I noted in my Independent Medical Examination report of 12-07-2023. The patient has multiple pathologies which reasonably could be causing his pain. Although it was not accelerated, with reasonable medical probability, in the work incident of 08-11-2023, the glenohumeral arthritis is the most concerning pathology present on the MRI. That is to say, conservative measures are usually the mainstay of treatment for arthritis until, or unless, there becomes a point where the arthritis is causing such significant and recalcitrant symptoms, despite conservative treatment, that an arthroplasty surgery is necessary to be performed. In this case, treatment for the arthritis would not be reasonably related to the work incident of 08-11-2023. However,

> "fixing" or repairing the labrum in the face of arthritis does not have a medically probable chance of improving the patient's symptoms. It is more medically probable that the patient's symptoms are due to the arthritis, although his shoulder symptoms could be generated from the labrum at this point. Performing a surgery to treat the labrum, whether by performing a biceps tenodesis, or tenolysis, may or may not improve the patient's overall symptoms (the other symptoms, including the arthritis, are not reasonably work related). However, treatment of the labrum would, by the letter of the law, be compensable and related to the work incident.

19. The ALJ does not find Dr. Failinger's opinion persuasive due to multiple internal inconsistencies regarding the cause of Claimant's shoulder pain. Dr. Failinger attributes Claimant's symptoms primarily to glenohumeral arthritis—a non-work-related condition—but simultaneously denies that the work incident aggravated the arthritis. This is inconsistent with the fact that Claimant's pain began immediately after the work injury. Since pain is itself a symptom of injury, it follows that the condition causing the pain—whether arthritis, a labral tear, or both—must have been at least aggravated or triggered by the work incident. Yet Dr. Failinger maintains that the pain likely stems from arthritis, while also asserting that the arthritis was unaffected by the work injury. This reasoning is logically flawed. If the work incident caused the pain and arthritis is the primary source of that pain, then the work injury must have aggravated the arthritis, making treatment for it work-related.

20. In addition, while Dr. Failinger acknowledges that the work injury aggravated the superior labral tear and that treatment for the tear is related to the work incident, he expresses equivocation regarding the effectiveness of surgical intervention. Specifically, he states that surgery "may or may not improve" Claimant's symptoms. This statement reflects uncertainty rather than opposition to the procedure. As such, even Dr. Failinger's opinion lends some support to the reasonableness of proceeding with the surgical treatment recommended by Dr. Jeffers, particularly given that he concludes that the labral tear is work-related and that less invasive treatments have failed to relieve Claimant's symptoms. His equivocal stance does not rebut, but actually supports the medical necessity of the surgery in addressing symptoms reasonably attributable to the work injury.

21. On April 16, 2024, approximately 4 months after his IME with Dr. Failinger, Claimant returned to see PA Esser. At this appointment, Claimant wanted to know his options for transferring care since he was considering moving back Baton Rouge Louisiana where he has family. At this time, he had still not heard anything about the IME with Dr. Failinger and PA Esser indicated that they had not received any update either, despite reaching out to the adjuster on numerous occasions. Moreover, Claimant's restrictions remained the same – no use of his right arm.

22. On May 3, 2024, shortly after Claimant told PA Esser that he was considering moving back to Louisiana, Respondents' counsel wrote to Dr. Villavicencio and asked him to review Claimant's regular job duties as well as a modified job and determine whether Claimant could perform either of the jobs. It appears Dr. Villavicencio accidentally signed the job description and offer of employment setting forth Claimant's regular job

duties - but he did not date it - in the signature block that was made for Claimant to sign acknowledging receipt of the job description and job offer.[2] Therefore, it cannot be determined when Dr. Villavicencio approved the modified employment.

23. On May 9, 2024, Claimant was re-evaluated by Dr. Villavicencio. He reviewed Dr. Failinger's IME, which concluded that while the injury could have exacerbated a pre-existing superior labral tear, the posterior labral tear and glenohumeral arthritis were unrelated. Since the exact pain generator remained unclear, Dr. Villavicencio. decided to consult with Dr. Jeffers to review the IME, assess follow-up needs, and consider further diagnostics, such as an ultrasound-guided injection.

24. On May 21, 2024, Claimant was again seen by Dr. Villavicencio. At this appointment, Claimant advised him that he was going to move back to Louisiana on May 24, 2024, and that he wanted to resume care with an orthopedist in Louisiana. At this appointment Dr. Villavicencio decreased Claimant's work restrictions. The new restrictions permitted the Claimant to lift up to 10 pounds and use his right arm, except for overhead reaching.

25. On or about May 24, 2024, Claimant moved to Louisiana.

26. On May 28, 2024, Claimant's attorney advised Respondents that Claimant had relocated to Louisiana and provided Respondents Claimant's new address.

27. On June 18, 2024, and instead of making Claimant an offer of modified employment, Respondents filed a Petition to Modify, Terminate, or Suspend Compensation claiming the following:

> Claimant was released to return to work, modified duty, by his authorized treating physician on May 20, 2024. The Employer was in a position to make the modified offer approved by the ATP; however, the Claimant voluntarily terminated his employment with the Employer by moving to Port Allen, Louisiana, precluding the Employer from making a Rule 6, W.C.R.P., offer of modified employment within the physician-imposed restrictions.

28. On July 16, 2024, and in response to Claimant's objection to the Petition, Respondents filed an Application for an Expedited Hearing to resolve the TTD issue raised in their Petition - that Claimant was no longer entitled to TTD.

29. On July 22, 2024, Claimant was evaluated at Prime Occupational Medicine in Louisiana. Based on Claimant's ongoing shoulder symptoms, he was referred to an orthopedic surgeon. At this appointment, his work restrictions were increased to no use of his right arm.

30. On September 10, 2024, Claimant's attorney and Respondents' attorney entered into a Stipulation. They agreed that they received a medical report from Prime Occupational Medicine dated July 22, 2024, which increased Claimant's restrictions to prohibit use of his right arm. Based on their stipulation below, it appears the parties

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[2] The job description signature block, which Dr. Villavicencio singed, indicates that Claimant has read and understands the requirements of the job "should [he] be employed by TWO MEN AND A TRUCK." Plus, the job description is not dated.

agreed this represented a worsening of Claimant's condition as July 22, 2024, and entitled Claimant to TTD as of July 22, 2024. Therefore, after the change in Claimant's restrictions, the parties agreed and stipulated that:

- Claimant was responsible for the termination of his employment with [Employer] as of May 28, 2024. At that time, his work was restricted to no lifting in excess of ten pounds and no driving of company truck.
- Claimant was assigned work restrictions of no use of his right arm by authorized treating provider, Prime Occupational Medicine, on July 22, 2024.
- The disputed period of the Claimant's receipt of TTD benefits is June 18, 2024, through July 22, 2024, during which TTD benefits of $2,640.15 were paid to Claimant.
- In full and final resolution of the termination for cause and TTD issues endorsed on Respondents' July 16, 2024, Expedited Application for Hearing, Claimant agrees to stipulate to a TTD overpayment of $1,320.07 to be applied to his future receipt of permanent partial disability (PPD) benefits.
- ***The parties further stipulate and agree that Claimant is entitled to TTD from July 22, 2024, until terminable by law*** (emphasis added).

31. As set forth above, pursuant to the September 10, 2024 stipulation, the parties agreed that Claimant was responsible for the termination of his employment as of May 28, 2024. Notwithstanding Claimant's responsibility for the termination, the stipulation further provides that he is entitled to TTD benefits as of July 22, 2024, when his work restrictions were increased, and that such benefits shall continue until terminable by law. Accordingly, the stipulation resolves the consequences of Claimant's termination in accordance with its terms, namely, that Respondents are entitled to take one-half of the amount in dispute as an overpayment or credit against Claimant's future permanent partial disability PPD benefits, and that Claimant's entitlement to TTD continues from July 22, 2024, forward, until it can be terminated under the Act.

32. By October 10, 2024, Claimant had moved back to Colorado, and was evaluated by Physician Assistant Christopher Monteith, who had never previously evaluated Claimant. Although Claimant's condition appeared to remain unchanged, PA Monteith modified Claimant's work restrictions. Rather than prohibiting all use of the right arm, he allowed Claimant to use it and lift up to 10 pounds, with the exception of overhead activities. These are the same type of restrictions Respondents relied upon in Respondents' attempt to make a modified job offer to Claimant in May 2024.

33. On October 23, 2024, Claimant was re-evaluated by Dr. Jeffers. He indicated that despite previous recommendations for a biceps tenodesis and labral debridement, the proposed surgery may have been denied. At the appointment, Claimant continued to experience significant pain and dysfunction, rendering him unable to work. Dr. Jeffers also noted that a recent outside surgical consultation confirmed the necessity of the recommended surgery. On examination, Claimant still demonstrated tenderness over the bicipital groove, limited and painful range of motion, and weakness with resisted

external rotation, belly press, and Jobe's empty can test. He also exhibited a positive Jerk test, with pain elicited on Speed's and O'Brien's tests. Dr. Jeffers again stated that the MRI showed a Type I acromion with AC arthrosis, an intact rotator cuff, and complete tearing of the posterior superior to posterior inferior labrum with an associated paralabral cyst. Additionally, there was Grade 3 chondral loss at the posterior glenoid with subchondral cyst formation and the biceps tendon appeared intact but was consistent with a SLAP tear. Lastly, he recommended surgery and indicated that he would try to get the surgery authorized again.

34. On October 24, 2024, Clamant was evaluated by PA Esser. At this appointment, she continued Claimant's work restrictions that allowed limited use of his right arm. These restrictions were signed off by Dr. Villavicencio.

35. After Claimant's restrictions were decreased, and Claimant was allowed to use his right arm on a limited basis - which were the same restrictions Claimant had when Respondents attempted to offer Claimant modified employment the first time- Respondents did not attempt to make Claimant another offer of modified employment.

36. On October 30, 2024, Respondents filed another Petition to terminate Claimant's TTD. Respondents contended that they should be able to terminate Claimant's benefits because:

> Claimant was released to return to work, modified duty, by his authorized treating physician on October 10, 2024. Attached are a September 10, 2024, Signed Stipulation and September 11, 2024, Order ratifying that Stipulation. In the Factual Stipulation, Claimant stated that he was responsible for the termination of his employment. At the time of his self-termination, he was cleared to return to work with the same restrictions that are now in place. Please see the Signed Factual Stipulation, Order Ratifying that Stipulation, and medical records from Concentra documenting Claimant's work restrictions. But for the Claimant's responsibility for termination, the Employer could have, and would have, accommodated the restrictions imposed by the ATP on October 10, 2024.

37. Neil Santos, Controller for Respondent Employer, testified at the hearing. Mr. Santos testified that in his role as Controller, he helps create modified job offers for individuals who have been injured at work. According to Mr. Santos, who the ALJ finds credible, the Employer was capable of accommodating Claimant's new work restrictions and could have offered Claimant modified employment consistent with those restrictions following his return to Colorado if they chose to do so. Nevertheless, the Employer made no effort to do so. As Mr. Santos testified:

> [W]e don't go hunt people down to give them jobs. We have people that apply to us, and then we interview and then we give them jobs. But we wouldn't go track down someone randomly and ask them if they want to come work for us.

38. This testimony reflects that, despite having the ability to offer modified work, the Employer chose not to extend an offer of modified employment to Claimant.

39. At the time the petition was filed to terminate Claimant's temporary total disability benefits, none of the statutory requirements to terminate TTD had been met. Claimant had not reached MMI, had not returned to regular or modified employment, had not been released to full duty, and had not been provided an offer of modified employment and failed to accept the offer of modified employment.

40. At some point after Dr. Failinger's IME, and subsequent addendum, Dr. Jeffers was asked several questions about the Claimant's work injury, including its extent as it related to various conditions observed on the MRI, the proposed surgery, and how the scope of the procedure might depend on his findings once he begins operating on the shoulder joint.

41. Dr. Jeffers, in an undated report, gave a very detailed answer. He set forth in detail the work related and non-work-related conditions involving Claimant's shoulder. Then he went on to describe in detail the decision making process he will implement to determine the repairs that are necessary to treat Claimant's work injury.

42. Dr. Jeffers confirmed Claimant has a superior labral anterior to posterior (SLAP) tear, a posterior labral tear, and chondromalacia of the right glenohumeral joint. Regarding the cause of Claimant's conditions, Dr. Jeffers agrees with Dr. Failinger that the chondromalacia is pre-existing but asserts that the SLAP tear and posterior labral tear were caused or significantly aggravated by the piano-lifting incident. He emphasized that the mechanism of injury aligns with the development of these tears.

43. Dr. Jeffers then set forth his surgical plan, which includes: i) a diagnostic arthroscopy to evaluate the labral tear and chondromalacia, ii) a biceps tenodesis to address the SLAP tear by detaching the long head of the biceps from the superior labrum, and iii) a possible labral repair or debridement depending on the severity of the cartilage damage.

44. As to the reasonableness of the treatment, Dr. Jeffers partially agrees with Dr. Failinger's assessment that the chondromalacia is unrelated to the injury. However, he disagrees with the assertion that repairing the labrum in the presence of arthritis would be ineffective. He persuasively argues that the MRI may overestimate cartilage damage and that a focal repair could still improve symptoms. Moreover, Dr. Jeffers indicates that the tenodesis surgery is expected to alleviate Claimant's pain by addressing the SLAP tear and reducing biceps-related tension on the superior labrum. He believes that this should improve strength and function.

45. Dr. Jeffers' response is found to be highly persuasive for the following reasons. First, Dr. Jeffers logically connects the piano-lifting incident to the labral tears based on Claimant's symptoms. Second, he notes how the biceps tendon procedure will reduce tension on the superior labrum. Third, he has a practical surgical plan in that he proposes a flexible surgical approach that adapts to the actual findings during the arthroscopy. This demonstrates an understanding of the injury and a cautious and evidence-based treatment strategy. Fourth, Dr. Jeffers candidly agrees with aspects of Dr. Failinger's findings regarding the degenerative changes but provides a well-supported counterpoint about the labral tear's origin. Fifth, he considered the functional impact the injury has had on Claimant. He highlights Claimant's persistent pain and functional limitations despite conservative treatments, making a compelling case for surgery as a necessary next step.

46. In the end, the ALJ finds that Dr. Jeffers' response is highly persuasive in supporting his surgical recommendation to treat Claimant from the effects of his work injury because it aligns the mechanism of injury, diagnoses, clinical symptoms, and imaging findings in a coherent narrative that supports work-related causation and justifies the proposed surgery.

47. Respondents contend that based on the MRI findings, which indicate Claimant does not suffer from bicipital tendonitis, a subluxing biceps tendon, or a biceps pulley disorder, the tenodesis surgery recommended by Dr. Jeffers is not supported by the Colorado Medical Treatment Guidelines (MTGs).[3] It appears Respondents are correct. While Claimant's MRI confirms a SLAP-type labral tear, the MTGs do not support biceps tenodesis as a standard treatment for labral tears in the absence of bicipital tendonitis, subluxing biceps tendon, or a biceps pulley disorder. As such, when evaluated strictly under the MTGs, the biceps tenodesis is not listed as a reasonable procedure to treat Claimant's labral tear.

48. However, the MTGs also recognize that "treatments or indications for treatments not addressed by the MTGs require prior authorization for a case-by-case assessment of appropriateness." (Section 1.c, Page 6). The MTGs do not specifically address performing a biceps tenodesis to treat a SLAP lesion without a coexisting biceps tendon abnormality. Thus, a case-by-case assessment is appropriate.

49. In assessing the matter, the information provided by Dr. Jeffers is very helpful. The surgical rationale provided by Dr. Jeffers is both patient-specific and persuasive. Dr. Jeffers has independently reviewed the Claimant's history, imaging, and physical exam findings, all of which demonstrate ongoing pain and dysfunction despite conservative care, including physical therapy and corticosteroid injections. In his clinical judgment, Claimant has a SLAP labral tear with persistent posterior labral pathology that correlates with Claimant's symptoms, functional limitations, and physical exam (positive O'Brien's, Speed's, and Jerk tests; bicipital groove tenderness; limited painful motion). Dr. Jeffers notes Claimant's symptoms are "refractory" and that he remains "unable to work due to shoulder pain."

50. Based on the totality of the evidence, the ALJ does not find the MTGs to be persuasive under the facts and circumstances of this case as to whether the surgery recommended by Dr. Jeffers is reasonable and necessary.

51. Given the Claimant's labral tear and ongoing symptoms and disability, Dr. Jeffers recommended a surgical plan consisting of posterior labral debridement and biceps tenodesis to relieve pressure on the labrum-which is torn-with the goal of restoring function and allowing Claimant to return to work.

52. Based on the totality of the evidence, including the persuasive opinions of Dr. Jeffers, Claimant's testimony, and the underlying medical record, the ALJ finds that the surgical

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[3] In their proposed order, Respondents cite the most recent Medical Treatment Guidelines (MTGs), Rule 17, Exhibit 4, which became effective on January 1, 2025. Although it is debatable whether the new Guidelines are applicable—given that they took effect after the Claimant's date of injury, after the recommended surgery, and after the relevant medical opinions were rendered—the ALJ will nevertheless consider Respondents' argument based on the new MTGs.

recommendations made by Dr. Jeffers are reasonable and necessary to treat Claimant's work-related injury.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

Respondents are liable for medical treatment that is 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).

Moreover, 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.

Dr. Jeffers diagnosed Claimant with a SLAP tear and a posterior labral tear, conditions that he credibly opined were caused or significantly aggravated by Claimant's work injury. He further explained that these injuries were consistent with the mechanism of the piano-lifting incident. Dr. Jeffers' surgical plan-consisting of a diagnostic arthroscopy, possible labral repair or debridement, and a biceps tenodesis-was supported by both imaging findings and clinical symptoms, including bicipital groove tenderness, positive Jerk, Speed's, and O'Brien's tests, and ongoing functional limitations. Moreover, the surgery has a reasonable expectation of decreasing Claimant's pain and improving his functioning.

Although the MTGs do not explicitly authorize biceps tenodesis absent specific biceps pathology, the guidelines permit case-by-case review for procedures not expressly addressed. Dr. Jeffers persuasively justified the surgery based on Claimant's continued pain, failed conservative treatment, and clinical presentation. He also explained that the tenodesis was intended to relieve superior labral tension, thereby reducing pain and improving function.

Dr. Jeffers' opinion is further strengthened by his reasoned disagreement with Dr. Failinger, who despite conceding that the labral tear was compensable offered contradictory reasoning about the source of Claimant's pain and failed to reconcile the temporal link between Claimant's symptoms and the work injury. In contrast, Dr. Jeffers provided a consistent and medically sound rationale that accounted for both imaging and clinical findings. The ALJ finds his analysis more persuasive and better aligned with the objective evidence and overall clinical picture when compared with Dr. Failinger's opinions.

Based on the totality of the evidence, including the persuasive and well-supported opinions of Dr. Jeffers, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Jeffers is reasonable and necessary to treat Claimant's work-related right shoulder injury. Accordingly, Respondents are liable for the cost of the proposed procedure.

II. Whether Respondents established, by a preponderance of the evidence, that Claimant's temporary total disability benefits should be terminated as of October 10, 2024.

Once temporary total disability (TTD) benefits have been reinstated after it has been determined that a Claimant is at fault for the termination of his employment, either as a result of a post-termination worsening of the Claimant's condition or pursuant to a stipulation between the parties to reinstate TTD after the termination, those benefits may only be terminated if one of the statutory conditions set forth in § 8-42-105(3), C.R.S., is met. *See Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004) (holding that the statutory bar to TTD based on a for-cause termination does not apply where a subsequent worsening causes the wage loss); *Smith v. Wal-Mart*, W.C. No. 4-751-887 (ICAO May 19, 2009) (holding that a return to pre-worsening restrictions does not reestablish the earlier disqualifying wage loss); *Stokes v. Nordstrom*, W.C. No. 4-782-170 (ICAO July 23, 2010) (affirming that voluntarily reinstated TTD after a post-termination worsening cannot later be terminated based on the claimant's prior responsibility for the separation). These cases collectively state that once TTD has been reinstated under such circumstances, the Employer may not rely on the prior employment termination, nor on the fact that the Claimant has returned to his pre-worsening restrictions as an independent ground for terminating TTD benefits. Instead, termination is proper only upon the first occurrence of one of the events enumerated in § 8-42-105(3): (a) the Claimant reaches maximum medical improvement (MMI); (b) the Claimant returns to regular or modified employment; (c) the treating physician provides a written release to return to regular work; or (d) the treating physician provides a written release to return to modified work, such employment is offered in writing, and the Claimant fails to begin such employment.

In this case, Claimant was initially restricted from using his right arm entirely. Over time, those restrictions improved, and Claimant was permitted limited use of his right arm. Respondents intended to offer modified employment consistent with those updated restrictions, but Claimant relocated to Louisiana on or about May 28, 2024, before any offer could be extended. No written offer of modified employment was ever made. On June 18, 2024, Respondents filed a petition to terminate TTD benefits, asserting that Claimant's voluntary relocation constituted the cause of his wage loss.

Subsequently, Claimant's restrictions changed again on July 22, 2024, and he was once again restricted from using his right arm. The parties entered into a stipulation, apparently grounded in *Anderson*, recognizing that TTD may be reinstated following a worsening of condition, even if the initial wage loss was attributable to Claimant. The parties agreed that the disputed period of TTD was from June 18 through July 22, 2024 - with July 22nd being the date Claimant's restrictions changed and he could no longer use his right arm. The amount at issue for the closed period of disputed TTD was $2,640.15. The stipulation provided that Respondents would receive one-half of the disputed amount-$1,320.07-as a credit and overpayment against future permanent partial disability benefits, due to Claimant being responsible for the termination of his employment. The stipulation further provided that Claimant's TTD would be reinstated effective July 22, 2024, "until terminable by law." Thus, the consequences of Claimant being responsible for the termination of his employment were resolved.

On October 10, 2024, Claimant's restrictions returned to the limited-use level they had been at just prior to his relocation, allowing limited use of his right arm. Moreover, Claimant had returned to Colorado. Respondents then filed a second petition to terminate TTD benefits, arguing that they would have accommodated Claimant's restrictions but for his earlier resignation from employment. However, testimony presented at hearing established that although Respondents may have had the capacity to offer modified employment, they chose not to make such an offer once the updated restrictions to pre-worsening levels were issued.

As set forth by *Stokes*, once TTD is reinstated, either voluntarily or pursuant to a stipulation, following a termination from employment, the Employer may not later terminate those benefits based on the Claimant's prior responsibility for the separation. Moreover, as set forth by *Smith*, a return to pre-worsening restrictions does not reestablish the earlier disqualifying wage loss. The Employer must instead demonstrate the occurrence of one of the enumerated statutory conditions in § 8-42-105(3). The record here contains no evidence of a written release to regular employment, no return to regular or modified employment, and no written offer of modified employment that Claimant refused to start following the October 10, 2024, change in Claimant's restrictions.

Respondents' reliance on *Gilmore v. ICAO*, 187 P.3d 1129 (Colo. App. 2008), is unavailing. Unlike the present matter, *Gilmore* did not involve a post-termination worsening of condition followed by voluntary reinstatement of TTD. The court there found that the wage loss was attributable solely to the for-cause termination, and the Claimant remained physically capable of working. Here Claimant's condition worsened after his employment ended, resulting in reinstated TTD on both medical and legal grounds. *Gilmore* itself reaffirms the holding in *Anderson* that a worsening of condition after a for-cause termination supports continued TTD benefits, notwithstanding the earlier fault.

As a result, Claimant remains entitled to temporary total disability benefits. Respondents have not demonstrated that any of the statutory bases for termination under § 8-42-105(3), C.R.S., have occurred. Moreover, consistent with *Stokes* and *Smith*, TTD benefits reinstated following a post-termination worsening, or by stipulation after such worsening, cannot later be terminated based on Claimant's prior responsibility for his employment termination or return to pre-termination restrictions. Accordingly, Respondents have failed to establish, by a preponderance of the evidence, a lawful basis to terminate TTD benefits as of October 10, 2024.

ORDER

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

1. Respondents shall pay for the surgery recommended by Dr. Jeffers.
2. Respondents' request to terminate TTD is denied and dismissed.
3. 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, 2025

/s/ Glen Goldman

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