OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-289-322-001

ISSUES

I. Whether Respondents were provided adequate notice of the March 11, 2025, hearing.

II. Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable injury to her right shoulder on October 26, 2024.

III. Whether Claimant established, by a preponderance of the evidence, that she is entitled to medical benefits due to her October 26, 2024, work accident.

PROCEDURAL HISTORY

This case proceeded to hearing on March 11, 2025, at 8:30 a.m. Respondents did not appear. Upon review of the record, as set forth below, the ALJ determined Respondents were provided adequate notice of the hearing and failed to appear. Accordingly, the ALJ proceeded with the hearing in their absence.

FINDINGS OF FACT

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

Notice of Injury and Notice of Hearing to Respondents

1. On October 27, 2024, shortly after midnight, Claimant reported a work injury to Employer.
2. Claimant was given various documents upon reporting her injury. One document, titled Employer's Designated Representatives, indicates that the insurer handling her Workers' Compensation claim is Zurich and that the claim will be managed by CCMSI.
3. After her alleged injury, Claimant obtained an attorney.
4. On December 10, 2024, Alycia Bird, Claims Representative from CCMSI emailed Claimant's attorney and told him that she was filing a Notice of Contest for further investigation. The email lists Ms. Bird's email address as Alycia.bird@ccmsi.com. The mailing address listed in the email for CCMSI is P.O. Box 4998, Greenwood Village, CO, 80155.
5. On December 10, 2024, a Notice of Contest (NOC) was filed by Alycia Bird and sent by mail and/or email to the Claimant, her attorney, and the Employer. The NOC identifies CCMSI as the Insurer, names Alycia Bird as the Claims Representative, and lists the mailing address as 7600 E. Orchard Rd., Suite 330 N, Greenwood Village, CO 80111. It also advised Claimant of her right to request an expedited hearing if the request was filed within 45 days of the NOC.

6. On January 23, 2025, Claimant's attorney filed an Application for Expedited Hearing (Application for Hearing) to address compensability and medical benefits. According to the certificate of service, the Application for Hearing was sent by mail and/or email to Alycia Bird at CCMSI, P.O. Box 4998, Greenwood Village, CO 80155, and Alycia.bird@ccmsi.com—the addresses provided in the December 10, 2024, email from Claims Representative Alycia Bird of CCMSI. The Application for Hearing was also mailed to the Employer, and addressed to: Horseshoe Black Hawk, 401 Main St., Black Hawk, CO 80402.

7. On January 24, 2025, the Office of Administrative Courts issued a Notice of Hearing. The Notice was emailed to Claimant's attorney and sent to the adjuster, Alycia Bird, via regular mail to CCMSI, P.O. Box 4998, Greenwood Village, CO 80155, as well as by email to Alycia.bird@ccmsi.com. Additionally, the Notice was mailed to the Employer at "Isle of Capri Black Hawk, LLC d/b/a Horseshoe Black Hawk, 401 Main St., Black Hawk, CO 80402."

8. The zip code used for the Employer's mailing address contained a clerical error and varies slightly from the zip code contained in the record. The zip code listed on the Notice of Hearing is 80402, which is the zip code used by Claimant on her Application for Hearing. The zip code on Claimant's wage records from the Employer, set forth in Claimant's Exhibit 8, is 80422 (80402 vs. 80422).

9. The Office of Administrative Courts has no record of the Notice of Hearing being returned as undeliverable from either the Employer or the adjuster at CCMSI.

10. The Notice of Hearing stated that the hearing was scheduled for March 11, 2025, at 8:30 a.m., at the Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203.

11. On March 7, 2025, Claimant's counsel filed hearing exhibits with the Office of Administrative Courts, and as represented by Claimant's counsel, with the adjuster via email. The exhibits contain a cover page that states in bold, and capitalized letters, "CLAIMANT'S EXHIBITS FOR HEARING ON MARCH 11, 2025." Again, as represented by Claimant's counsel, no one contacted Claimant's counsel to inquire or discuss the hearing set for March 11, 2025, in light of receiving Claimant's exhibits.

12. Based on the record, the ALJ finds that the Notice of Hearing was sent to the claims adjuster handling the matter via regular mail and email, using the addresses previously provided by the adjuster. The Notice of Hearing was also mailed to the Employer to an address that was reasonably likely to be received.

13. Accordingly, the ALJ finds that the Notice of Hearing was sent to an address at which it was reasonably likely to be received by the adjuster and the Respondent Employer. Therefore, the ALJ concludes that Respondents were provided adequate notice of the March 11, 2025, hearing but failed to appear.

Work Injury

14. Claimant worked as a bartender for Employer.

15. On October 26, 2024, while scooping ice from an ice machine into a large bin, Claimant felt and heard a pop in her right bicep area, followed by immediate pain. She also experienced pain in her right shoulder joint. Swelling and redness developed in the bicep area, and the bicep muscle visibly slumped downward toward her elbow.

16. The incident occurred just before midnight on October 26, 2024, and the reporting process took her into the next day on October 27, 2024.

17. Claimant initially attempted to report her injury to a manager but was unsuccessful. She subsequently reported the injury to Employer's head of security, S.M. As part of the reporting process, Claimant completed an incident report packet, including an Employee Report of Work-Related Injury form. On the form, Claimant wrote: "I was getting ice from the back and in mid-scoop I felt my bicep pop." She also noted that she had been involved in a car accident on October 22, 2024, while driving home from work, during which she sustained "whiplash and strain in her right arm."

18. The incident report packet completed by Claimant, included in Claimant's Exhibit 4, contains a "Designated Provider List for Colorado Work-Related Injuries" (DPL). *Clmnt. Ex. 4, Bates 24*. Lutheran Medical Center is listed on the DPL for after-hours care. Following completion of the reporting process, Claimant went to Lutheran Medical Center's emergency room.

19. On October 27, 2024, after being treated in the emergency room, Claimant followed up with an urgent care facility in Golden to establish care. Claimant testified that she did not recall the name of the urgent care facility but believed the word "Center" appeared in its name. Of the two Golden locations listed on the DPL, only one includes "Center" in its name—Centura Centers for Occupational Medicine (CCOM). Based on their assessment, they referred Claimant to Panorama Orthopedics.

20. On November 4, 2024, Claimant was evaluated at Panorama Orthopedics by Benjamin Kerwin Wilkerson, PA-C. Claimant told PA Wilkerson that she injured her right shoulder while scooping ice at work on October 27, 2024. It is also noted that Claimant told him that while she was involved in a motor vehicle accident approximately 6-8 weeks earlier, she was recovering well and had no specific concerns about her shoulder after the accident. Based on his assessment, PA Wilkerson ordered an MRI and advised Claimant to return for an additional assessment after the MRI had been performed.

21. On December 27, 2024, Claimant returned to Panorama Orthopedics and was again evaluated by PA Wilkerson. PA Wilkerson evaluated Claimant and reviewed her MRI. PA Wilkerson noted that the MRI showed a near complete tear of the long head of the biceps and moderate to high-grade tearing of the rotator cuff, with an estimated 75% tear in the supraspinatus. The MRI also revealed arthritis with significantly increased signal at the AC joint. PA Wilkerson explained that this pathology would not heal or regenerate without surgery. He also advised Claimant that while conservative treatment might improve her symptoms, there was a risk of further tearing, particularly given the physical demands of Claimant's job. After a discussion of treatment options—including injections, physical therapy, anti-inflammatories, and surgery—PA Wilkerson recommended surgery

as the most reliable and definitive option. Claimant agreed, and they elected to proceed with arthroscopic right shoulder rotator cuff repair, open biceps tenodesis, distal clavicle resection, subacromial decompression, and debridement. Claimant was advised of the surgical risks, and consent was obtained.

22. Claimant ultimately underwent the surgery recommended by PA Wilkerson.

23. The Claimant testified that she was in a motor vehicle accident about a month before her work injury. She also told PA Wilkerson that she was involved in a motor vehicle accident about 6-8 weeks before the November 4, 2024, appointment with him. However, she indicated on the Employee Report of Work-Related Injury form that she was involved in an automobile accident on October 22, 2024, only 4 days before her work injury. The ALJ credits Claimant's testimony and resolves this conflict in the evidence and finds that the motor vehicle accident occurred approximately one month before the work injury. This finding is based on Claimant's testimony and her statements to PA Wilkerson regarding when the automobile accident occurred which are consistent with her testimony.

24. The motor vehicle impact was to the driver's side of her vehicle. All of the driver's side airbags around the door deployed, but the steering wheel airbag did not deploy. Claimant's symptoms following the motor vehicle crash were mostly limited to disorientation, whiplash, and the triceps area of her left arm. While Claimant did have some discomfort in her right triceps area following the motor vehicle collision, Claimant credibly testified that she did not experience any symptomatology in or around her right bicep or right shoulder.

25. Claimant credibly testified that following the September 2024 motor vehicle collision she did not experience the same symptoms (pain, redness, and swelling) in her right bicep or shoulder joint area. Claimant also reported hearing and feeling a pop in her right bicep area, followed by immediate pain, as well as swelling and redness in the same area.

26. The ALJ finds that Claimant sustained a right sided bicep and shoulder injury on October 26, 2024, while scooping ice. This finding is based on Claimant's testimony, which the ALJ finds credible, and the temporal proximity between the activity and the immediate onset of symptoms.

27. The ALJ also finds that the work-related incident involving scooping ice caused the need for medical treatment, including the care provided at Lutheran Hospital, the urgent care facility in Golden, and Panorama Orthopedics as well as the surgical intervention performed there.

28. The ALJ further finds that this treatment was reasonable and necessary to cure and relieve Claimant from the effects of her work injury. This finding is supported by the logical progression of care initiated in response to Claimant's symptoms immediately following the accident and injury. Claimant first sought treatment at Lutheran Hospital because the urgent care facility was closed at the time she needed care. She subsequently followed up at urgent care and was later referred to Panorama Orthopedics for specialized evaluation and treatment by an orthopedic surgeon. The totality of the evidence supports the reasonableness and necessity of this treatment, including Claimant's testimony, the October 27, 2024, report from Dr. O'Keefe recommending orthopedic follow-up, and the medical reports from PA Wilkerson, which describe the mechanism of injury, confirm MRI

findings consistent with Claimant's symptoms, and set forth surgical recommendations directed at treating the effects of the injury.

29. The ALJ finds that the medical treatment Claimant received was provided by authorized medical providers. After reporting her injury, Claimant was given a Designated Provider List (DPL) by her Employer. Because the injury occurred after regular business hours, Claimant sought treatment at Lutheran Hospital, which was listed on the DPL for after-hours care. Following her hospital visit, Claimant obtained follow-up treatment at an urgent care facility in Golden, which was also listed on the DPL. The urgent care provider subsequently referred Claimant to Panorama Orthopedics for specialized evaluation and treatment. Based on this sequence of care and the contents of the DPL, the ALJ finds that Lutheran Hospital, the urgent care facility in Golden, and Panorama Orthopedics were authorized providers.

30. The Claimant has received medical bills for her medical care, including the emergency room bill from Lutheran Medical Center and the urgent care in Golden, Colorado.

31. Claimant paid out-of-pocket for a portion of her medical treatment.

32. Respondents received notice of Claimant's injury, and the Respondents failed to furnish reasonable and necessary medical treatment.

33. Other insurers, or Governmental program(s), paid for a portion of, or all of, Claimant's medical treatment and are entitled to reimbursement.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

Bodensleck v. ICAO, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondents were provided adequate notice of the March 11, 2025, hearing.

W.C.R.P. 24(B)(1) provides that if a party fails to appear at a hearing, the ALJ may proceed upon finding that notice of the hearing was sent to an address at which it is likely to be received by the non-appearing party or the non-appearing party's authorized representative.

The Office of Administrative Courts' Rules of Procedure and the Workers' Compensation Act are designed to ensure that all parties are afforded due process and an opportunity to be heard. These protections, however, require meaningful participation. Here, the record establishes that Respondents were provided with proper notice of the March 11, 2025, hearing. The Notice of Hearing was sent by both regular mail and email to the claims adjuster at CCMSI, using the addresses previously provided by the adjuster in the Notice of Contest and in direct email correspondence with Claimant's counsel. The Application for Hearing and Notice of Hearing were also sent by mail to the Employer using the last known business address provided in the record. Although the zip code for the Employer's address contained a slight clerical error, there is no indication that the notice was returned as undeliverable. Therefore, the ALJ finds and concludes that the notice was sent to an address at which it was reasonably likely to be received and Respondents failed to appear at the hearing.

Pursuant to W.C.R.P. 24(B)(1), the ALJ finds and concludes that Respondents were provided adequate notice of the March 11, 2025, hearing and failed to act and attend the hearing. The notice satisfied the requirements of due process under the Workers' Compensation Act and applicable rules.

Accordingly, the ALJ finds and concludes, based on a preponderance of the evidence, that Respondents were provided adequate notice of the March 11, 2025, hearing pursuant to W.C.R.P. 24(B)(1).

II. **Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable injury to her right shoulder on October 26, 2024.**

III. **Whether Claimant established, by a preponderance of the evidence, that she is entitled to medical benefits due to her October 26, 2024, work accident.**

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. 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 preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Off.,* 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 preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting 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 Ctr.,* 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 Off.,* 12 P.3d 844 (Colo. App. 2000).

Moreover, 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 Off.,* 53 P.3d 1192 (Colo. App. 2002).

In this case, the ALJ finds that Claimant sustained a right bicep and shoulder injury on October 26, 2024, while scooping ice in the course and scope of her employment as a bartender. The injury was immediately accompanied by a popping sensation, pain, swelling, and visible muscle displacement, and was promptly reported. The ALJ finds Claimant's testimony credible and further supported by contemporaneous medical records and imaging studies.

Although Claimant was involved in a motor vehicle accident before the work injury, the precise date of that accident is unclear from the record. In her incident report regarding the work injury, Claimant noted that the motor vehicle accident occurred on October 22, 2024, while driving home from work, and that she sustained "whiplash and strain in her right arm." However, the medical records and Claimant's testimony consistently indicate that the motor vehicle accident occurred approximately one month

before the work-related incident. The ALJ resolves this discrepancy by finding that the notation that the motor vehicle accident occurred on October 22, 2024, was made in error. The ALJ credits Claimant's testimony and medical documentation in concluding that the motor vehicle accident occurred in September 2024. Furthermore, no medical provider attributed Claimant's rotator cuff or biceps injury to the motor vehicle accident. This absence of medical attribution supports the conclusion that the October 26, 2024, workplace incident was the proximate cause of Claimant's injury and need for medical treatment. Moreover, even assuming the motor vehicle accident resulted in some injury to Claimant's arm or ongoing symptoms, the ALJ credits Claimant's testimony that the act of scooping ice caused her to feel and hear a distinct pop in her right bicep area, immediately followed by the onset of pain and other symptoms. Accordingly, the ALJ finds and concludes that the scooping of ice was the proximate cause of the symptoms that necessitated the need for medical treatment.

As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that her biceps and shoulder condition for which she sought medical treatment was proximately caused by the October 26, 2024, work accident. Claimant has therefore met her burden of proving a compensable injury.

In addition, the ALJ finds and concludes that the treatment Claimant received-including emergency care at Lutheran Medical Center, follow-up care at an urgent care facility in Golden, and orthopedic treatment and surgery at Panorama Orthopedics-was reasonable and necessary to treat Claimant from the effects of the work injury. The course of treatment followed a logical progression in response to persistent symptoms and was supported by diagnostic findings, including an MRI revealing significant tearing of the rotator cuff and biceps tendon. In addition, PA Wilkerson did not question the work-related cause of Claimant's condition. As a result, and based on the totality of the evidence, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the medical treatment she received at Lutheran Hospital, the urgent care in Golden, and at Panorama Orthopedics, including the surgery, was reasonable, necessary, and causally related to the October 26, 2024, compensable work injury.

Moreover, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that the medical treatment she received was from authorized providers. As found, after reporting her injury, Claimant was provided with a Designated Provider List (DPL) by her Employer. Because the injury occurred after regular business hours, Claimant sought treatment at Lutheran Hospital, which was identified on the DPL for after-hours care. She then followed up at an urgent care facility in Golden, which was also listed on the DPL. That provider subsequently referred Claimant to Panorama Orthopedics for further evaluation and treatment, which she had. Based on this sequence of care and the record, the ALJ concludes that Lutheran Hospital, the urgent care facility in Golden, and Panorama Orthopedics were authorized providers.

Lastly, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that Respondents received notice of Claimant's injury, and the Respondents failed to furnish reasonable and necessary medical treatment. As a result, the Respondents shall reimburse Claimant, or any insurer or governmental program that paid for related medical treatment, for the costs of reasonable and necessary treatment that was provided.

ORDER

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

1. Claimant sustained a compensable injury arising out of and in the course of her employment on October 26, 2024.

2. Respondents are liable for, and shall pay for, all reasonable and necessary medical treatment from authorized providers to cure and relieve Claimant from the effects of the October 26, 2024, work injury, including but not limited to:

   - The treatment Claimant received at Lutheran Medical Center right after the accident.
   - The treatment at the urgent care facility in Golden.
   - The treatment provided by Panorama Orthopedics, including the surgery performed.
   - Any out-of-pocket expenses paid by Claimant for the treatment of her work injury.
   - Reimbursement to any insurer or governmental program that paid for related medical treatment, for the costs of reasonable and necessary treatment that was provided.

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 1, 2025

/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. 4-664-891-004

ISSUES

- Did Claimant prove that her current opioid medications are reasonably needed notwithstanding a previous Order of Administrative Law Judge Cannici finding that Claimant should be weaned from opioids?

FINDINGS OF FACT

1. Claimant suffered admitted injuries August 28, 2005. She initially injured her left elbow when she tripped and fell at work. Claimant developed Complex Regional Pain Syndrome (CRPS) in her arm, which eventually spread to her legs and back.

2. Because of her severe chronic pain, Claimant was adjudicated permanently and totally disabled. Respondents filed a Final Admission of Liability admitting for PTD benefits and medical benefits after MMI. The parties later settled the indemnity portion of the claim, but left medical benefits open, subject to Respondents' right to contest the reasonable necessity of specific treatment.

3. Claimant treated with Dr. Reusswig until he passed away. She then started seeing Dr. Reusswig's partner, Dr. Patel. In 2019, Dr. Patel resigned as Claimant's ATP, and her care was transferred to Dr. Paul Leo, a pain management specialist.

4. Claimant has two implanted spinal cord stimulators (SCS) for pain relief, one in the lumbar spine to target the leg pain, and one in the cervical spine to cover her arm pain.

5. In 2020, Respondents applied for a hearing seeking "a judicial determination as to what is reasonable and necessary medical care, including Claimant's need to attend a detoxification facility," with the goal of "weaning" Claimant off opioids.

6. A hearing was held before Judge Peter J. Cannici on January 28, 2021. Because Respondents were not disputing Claimant's entitlement to medications other than opioids, Claimant had the burden of proof regarding reasonable necessity.

7. On April 5, 2021, Administrative Law Judge Cannici issued Findings of Fact, Conclusions of Law and Order (FFCLO) ordering that "Claimant shall be weaned from opioids as directed by her current ATP Dr. Leo." Respondents were also ordered to cover Ketamine infusions as reasonably necessary pain management treatment. Judge Cannici found that Ketamine would "reduce Claimant's reliance on opioid medications and thus aid in the weaning process."

8. Both parties appealed to the Industrial Claim Appeals Office (ICAO). The Panel affirmed the determination that Ketamine was reasonably needed and causally related to the work injury. However, the Panel determined the decision was internally

inconsistent and ambiguous whether "weaning" meant that opioids should be entirely eliminated or simply reduced. Consequently, the Panel set aside the portion of the FFCLO regarding "weaning" and remanded the case for additional findings and a new order.

9. On February 28, 2023, Judge Cannici issued an FFCLO on Remand finding that "Claimant requires a reduction of opioids until her use of the medication ceases. Accordingly . . . her use of opioids is only reasonable and necessary to treat her August 28, 2005 industrial injuries for a six-month weaning period." Based on these findings, Judge Cannici ordered that, "Claimant shall receive opioid medications for a six-month weaning period from the date of this order. If Claimant is not fully weaned from her opiates after six months, then Respondents are no longer financially responsible for opioid medications under the present claim."

10. Claimant appealed the February 28, 2023 FFCLO to the ICAO. The Panel held that imposing a time limit on the weaning process exceeded the scope of the remand order. The Panel further held that the six-month deadline was not supported by substantial evidence, because the issue had not been raised at hearing and no evidence was presented regarding the length of the weaning process. Based on these findings, the Panel set aside the portions of the order regarding the "six-month limitation on the weaning period." The Panel otherwise affirmed the remand order.

11. The Court of Appeals affirmed the Panel's decision on June 6, 2024. The court agreed that the six-month limitation exceeded the scope of the remand order. The court also noted,

> [T]here is a possibility that [Claimant] will not be weaned from opioid medications because although the ALJ's initial order provided that [Claimant] "shall be weaned from opioids as directed by her current ATP," her current ATP testified that he did not believe she needed to be completely weaned from opioids. But employer is not without a remedy; it may file another application for hearing . . . or request a utilization review.

12. Respondents filed the current Application for Hearing on October 21, 2024, endorsing medical benefits, issue and claim preclusion, and penalties against Claimant for failure to wean from her medications.

13. Respondents' penalty claim was denied by summary judgment on February 5, 2025. That same Order denied Claimant's motions for summary judgment on the issue of whether opioids are reasonably needed and the issue of attorney fees for endorsing unripe issues.

14. The April 5, 2021 FFCLO ordered Respondents to cover Ketamine infusions as reasonably necessary pain management treatment. That portion of the FFCLO was upheld on appeal.

15. The current evidentiary record contains Dr. Leo's medical records dating to January 25, 2022. Since that time, Dr. Leo has seen Claimant at approximately monthly intervals to monitor and adjust her medications, as necessary.

16. As of January 25, 2022, Claimant was being prescribed Nucynta ER 100 mg twice daily and oxycodone 5mg three times daily. Per Dr. Leo, that combination has a morphine milligram equivalent (MME) dose of 102.5.[1] Claimant had recently received a Ketamine infusion which helped her with her pain, and had another infusion scheduled the following day. As a result, Claimant wanted to start tapering the oxycodone. Dr. Leo reduced the oxycodone prescription to 5 mg twice daily.

17. Dr. Leo's records document that the Ketamine infusions reduce Claimant's pain for approximately three to four weeks.

18. Claimant's cervical SCS started malfunctioning in 2022, with only 6 of 16 electrodes working as of May 2022. The Boston Scientific representative adjusted the programming to try and maximize performance of the remaining leads. These adjustments were beneficial for a few months.

19. On November 25, 2022, Dr. Leo noted Claimant was doing well with her current medications and regular Ketamine infusions.

20. On January 19, 2023, Claimant told Dr. Leo she was ready to resume tapering opioids and wanted to decrease the Nucynta. Dr. Leo reduced the daily Nucynta dose by 25%. For unknown reasons, Dr. Leo neglected to update the MME level listed in Claimant's chart, even though she had reduced Nucynta by 25% and oxycodone by 33% since January 2022.

21. Claimant was forced to stop the Ketamine treatment in April 2023 because the infusion clinic abruptly closed, and it took several months to find a replacement clinic.

22. On July 25, 2023, Claimant reported the SCS was not covering her arm pain. The Boston Scientific rep interrogated the device and noted additional problems with the leads. Dr. Leo ordered x-rays to confirm whether the device was still in good position. Claimant was still looking for a new Ketamine clinic. She had purchased a TENS unit to help with the increased arm pain. Dr. Leo prescribed Lidocaine patches.

23. Further testing of the cervical SCS in October 2023 showed it was essentially nonfunctional and needed to be replaced. Dr. Leo referred Claimant to Dr. Beasley, the surgeon who had placed the cervical SCS, to consider replacement options. Claimant had found a Ketamine provider and was working to get Respondents to cover the treatment again.

24. Claimant saw Dr. Beasley in November 2023. Dr. Beasley did not think revising the SCS would be successful because he was not confident he could get the new leads and paddle into the same position.

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[1] Judge Cannici previously found that each opioid medication has a conversion to MMI, which serves as a standard to compare the equivalent strength of different medications. Judge Cannici found that Dr. Patel had wanted to get Claimant down to "MME=90," and Dr. Olsen had opined "it is generally accepted that the MME levels should be no higher than 60-90."

25. On November 28, 2023, Dr. Leo told Claimant he would try to speak with a different spine surgeon to see what they may recommend. Respondents still had not approved the resumption of Ketamine treatment.

26. At her January 24, 2024 appointment with Dr. Leo, Claimant reported she had been without Nucynta for a week because Respondents had refused authorization. As a result, her pain had flared to 8/10. Dr. Leo wrote the prescription for Nucynta again, and stated "WC stopping it is directly against the 2022 guidelines. There is no medical indication for stopping this medication as it is working as well or better for her than a full mu agonist and has a lower side effect profile with a lower chance of addiction." Dr. Leo increased the oxycodone dose "for additional pain coverage if Nucynta is rejected [again]."

27. On March 19, 2024, Dr. Leo documented that Respondents had "finally" approved Ketamine therapy, but Claimant had not been able to pursue the treatment because she had recently gotten divorced and was temporarily living with friends. She planned to restart Ketamine once her living situation stabilized.

28. Dr. Leo Lombardo performed a peer review of Claimant's opioid prescriptions in April 2024. He reviewed published literature and the Colorado MTGs regarding opioids for chronic pain. Dr. Lombardo acknowledged that opioid medications pose serious risks and must be used carefully. However, Dr. Lombardo noted that medication improved Claimant's tolerance for ambulation, activities of daily living outside the home, and a home exercise program. An opioid agreement was in place and the PDMP is checked at each visit. Therefore, he opined that the prescriptions for Nucynta and oxycodone were reasonably necessary and should be approved.

29. In September 2024, Dr. Leo noted that Claimant was living in Nederland and had no transportation to the Ketamine clinic. However, she was in the process of closing on a new home and hoped to restart Ketamine treatment soon.

30. Claimant moved to her new home in mid-October 2024. She was planning to reestablish Ketamine therapy and be evaluated for replacement of the cervical SCS. Dr. Leo documented that Claimant's arm pain had increased to 7-8/10 since the SCS stopped working. He also noted that her pain level increased when she was without the proper pain medications, and she had trouble functioning in daily life. She occasionally needed assistance from her daughter to use the restroom because of severe pain.

31. Dr. Stephen Lindenbaum issued a peer review report on November 7, 2024, regarding the Nucynta and oxycodone prescriptions. Dr. Lindenbaum noted,

> [T]his is a claimant with very severe disease. She has complex regional pain syndrome involving 3 limbs. She has both a lumbar spine stimulator and a cervical stimulator which is presently nonfunctioning because of broken leads. . . . The requested RXs are the standard of care in chronic pain patients with one long-acting opiate (Nucynta) and the other short acting opiate (Percocet) for breakthrough pain. . . . The Claimant is able to

> maintain her household independently with the use of these meds. Without them she would be bedridden. [Dr. Leo] does monthly calls and sees her every 3 months for [ ] urinalysis which has been concordant with her meds. He also does monthly PDMP checks.

Dr. Lindenbaum certified Nucynta and oxycodone as medically necessary.

32. The most recent report in evidence from Dr. Leo is from November 26, 2024. Dr. Leo opined,

> [Nucynta and oxycodone] continue to help her significantly, improving her pain from 8-9/10 to 4-5/10, allowing her to function through the day. She may have a greater need for medications because her cervical spinal cord stimulator is no longer [working] and may be revised when she has a consultation with Dr. Posely.

33. Dr. Hilary Apert performed another peer review of the Nucynta and oxycodone prescriptions in December 2024. Dr. Alpert wrote,

> [T]he claimant is stable with her current medications and her medications help her significantly, improving her pain from 8-9/10 to 4-5/10, allowing her to function throughout the day. It is further noted that the claimant's PDMP and UA were . . . consistent with prescribed medications and the 5 A's were reviewed. . . . Therefore, oxycodone . . . [and] Nucynta [are] medically necessary.

34. Dr. Nicolas Olsen has performed multiple IMEs and record reviews for Respondents since 2012. In 2020, Dr. Olsen opined that Claimant was a "poor candidate for ongoing opioid pain management," and recommended that opioids be terminated through an in-patient detoxification program. He also opined that Ketamine was not reasonably necessary.

35. On January 9, 2025, Dr. Olsen issued a report "to address whether Dr. Leo has made a reasonable attempt to completely wean [Claimant] off of her medications." Dr. Olsen noted that Nucynta and oxycodone had been reduced but the process had stalled and subsequently the medications were increased. As a result, Dr. Olsen concluded, "[w]hile it appeared she was making progress weaning medications, she eventually returned to oxycodone . . . four times a day. This was a doubling of her prior dose. Dr. Leo has not made reasonable attempts to try and wean [Claimant] off of medications as recommended by ALJ Cannici." Dr. Olsen did not comment on the fact he had increased the oxycodone prescription because Respondents denied authorization or Nucynta. Nor did he mention that Claimant's cervical SCS is no longer working.

36. Dr. Olsen maintained his belief that Claimant "should be fully weaned off her medications," and opined this can be accomplished in three to four months, after which time the medication would no longer be considered reasonable and necessary.

37. Dr. Olsen testified at hearing consistent with his report. He reiterated that Claimant should be completely weaned from opioids and that such weaning can be accomplished in four months. Specifically, Dr. Olsen stated during the first month, Claimant's Nucynta can be reduced to two times per day and the oxycodone down to three times per day. Following the second month, Claimant's Nucynta can be reduced to one time per day and her oxycodone to twice a day. On the third month, Claimant can be completely weaned off her Nucynta and the oxycodone be reduced to one time per day. Finally, during the fourth month, Claimant can be completely weaned off her narcotic medications.

38. Claimant testified that oxycodone and Nucynta help her function throughout the day. The medications decrease her pain and help her function. There have been times when Respondents did not authorize her medications timely, and she had to go without them. The result was that her pain increased, she was bedridden, and her daughter had to help her. She testified that her pain worsened after she had to stop Ketamine treatment, and when her cervical stimulator stopped working. These circumstances led to an increase in her medication use. Claimant has maintained her current medication usage since then and is hoping to have her stimulator situation addressed soon.

39. Claimant's testimony is credible.

40. The opinions of Dr. Leo, Dr. Lombardo, Dr. Lindenbaum, and Dr. Alpert regarding the reasonable necessity of Claimant's current medications are credible and persuasive.

41. Dr. Olsen's opinions that Dr. Leo has made no reasonable attempts to wean Claimant from opioids and that she should be completely weaned in four months are not persuasive. Dr. Olsen failed to account for the deterioration and eventual failure of Claimant's cervical SCS. Nor did Dr. Olsen address the prolonged disruption in the Ketamine infusion treatment. Additionally, Dr. Olsen did not consider the multiple recent peer reviews that all agreed Claimant's current opioids are reasonably needed.

42. Claimant proved that the opioid medications currently being prescribed by Dr. Leo are reasonably needed. Claimant proved the pause in the weaning process was reasonably needed and that no specific time frame for resumption or completion of weaning can be determined at this time.

43. Claimant incurred costs in connection with the prior litigation before Judge Cannici regarding opioid medications. Because Claimant ultimately prevailed on those issues, she is entitled to reimbursement of costs pursuant to § 8-42-101(5). Claimant submitted receipts of $1,101.00 for Dr. Leo's deposition and $450.50 for the deposition transcript. Respondents did not dispute these receipts or Claimant's entitlement to reimbursement of costs.

CONCLUSIONS OF LAW

A. Opioid medications

Respondents argue that "ALJ Cannici's second FFCLO mandating that Claimant be completely weaned off her opiate medications is a final order . . . and based on the doctrine of issue preclusion, the issue of whether Claimant needs to be completely weaned off opiate medications cannot be relitigated."

Issue preclusion is an equitable doctrine that bars relitigating an issue that has been finally decided by a court in a prior action. *Bebo Construction Co. v. Mattox & O'Brien*, 990 P.2d 78 (Colo. 1999). The doctrine of issue preclusion has been extended to administrative proceedings, where it "may bind parties to an administrative agency's findings of fact or conclusions of law." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). In *Sunny Acres*, the court held that issue preclusion bars relitigation of an issues if: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted was a party or in privity to a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Id*. at 47. Issue preclusion is an affirmative defense, which must be proved by a preponderance of the evidence. CRCP 8(c); *Martinez v. The Home Depot*, W.C. No. 4-490-891 (ICAO, March 18, 2004).

I agree with Respondents that the requirements for issue preclusion are satisfied with respect to Judge Cannici's findings that "Claimant requires a reduction of opioids until her use of the medications ceases," and "Claimant has established that her use of opioids is only reasonable and necessary for a [ ] weaning period." Therefore, absent reopening,[2] those findings are binding.

However, the specific parameters of the weaning process cannot be the subject of issue preclusion because the portion of the FFCLO imposing a time limit was reversed on appeal. Accordingly, there is no binding determination regarding details such as when the weaning process should start or how long it should take. Nor is there any persuasive reason why an "appropriate" weaning process must proceed in a linear fashion despite new developments occurring in the four years since the January 2021 hearing.

Ultimately, it is Claimant's burden to prove that the treatment she seeks is reasonably needed to relieve the effects of her injury and prevent deterioration of her condition, in the context of prior rulings in her case. *Grover v. Industrial Commission*, 759 P.2d 705, 712 (Colo. 1988); *Hanna v. Print Expediters*, 77 P.3d 863 (Colo. App. 2003).

As found, Claimant proved the opioid medications being prescribed by Dr. Leo are reasonably needed. The opinions of Dr. Leo, Dr. Lombardo, Dr. Lindenbaum, and Dr. Alpert regarding the reasonable necessity of Claimant's current medications are credible and persuasive. Claimant's testimony is credible. Dr. Olsen's opinion that Dr. Leo made no reasonable attempt to wean Claimant from opioids is not persuasive. Claimant started

[2] Reopening has not been endorsed and is not an issue for this hearing.

weaning from opioids in 2022 and significantly reduced her daily dosage of both Nucynta and oxycodone. But the process was interrupted by closure of the Ketamine clinic and difficulty finding a new provider. Judge Cannici had previously found that Ketamine infusions would be a critical component of the weaning process, which proved to be the case. Therefore, one would naturally expect a suspension of the weaning process when Claimant lost access to the Ketamine treatment. The difficulties related to Ketamine treatment were subsequently compounded by the deterioration and eventual failure of Claimant's cervical SCS. Neither situation was anticipated by Judge Cannici's FFCLO. The preponderance of persuasive evidence shows that a pause in Claimant's weaning process was reasonably needed and appropriate under the circumstances.

Claimant proved that no specific time frame for resumption or completion of the weaning process can be determined at this time. Dr. Olsen's opinion that Claimant should be completely weaned in four months is not persuasive because it does account for uncertainties regarding when and whether Claimant will be able to resume Ketamine treatment and have her cervical SCS replaced. The appropriate timeframe for weaning will be heavily influenced by these future developments. But because these things have not yet occurred, it would be speculative and arbitrary to impose a specific time limit at this juncture.

B. Ripeness – attorney fees

Section 8-43-211(3) provides that any party who requests a hearing on issues that are not ripe for adjudication shall be assessed the reasonable attorney fees and costs of the opposing party in preparing for the hearing.

"An issue is ripe for hearing when it is real, immediate, and fit for adjudication." *Youngs v. Industrial Claim Appeals Office*, 297 P.2d 964, 969 (Colo. App. 2012). The term "fit for adjudication" means there is no "legal impediment" to immediate adjudication of an issue. *E.g., Deane v. Regis Corporation*, W.C. No. 4-664-891-001 (ICAO, December 21, 2021). Lack of ripeness is a narrow concept, and the instances in which a court has found an issue to be unripe are quite rare. The most common scenarios in which issues were deemed unripe involved issues that were the subject of pending appeals. For example, in *BCW Enterprises, Ltd. v. Industrial Claim Appeals Office*, 964 P.2d 533 (Colo. App. 1997), the court held that a claim for penalties based on an allegedly "bad faith appeal" was not ripe while the appeal was still pending. *See also, Youngs v. Industrial Claim Appeals Office*, 297 F.3d 964 (Colo. App. 2012) (petition to reopen an order denying PTD was unripe while an appeal of the order was still pending); *Blundell v. Final Order Startek USA Inc.*, W.C. No. 4-842-550-05 (ICAO, April 9, 2015) (attorney penalized for filing an AFH to "appeal" prior orders that were not legally subject to appeal).

Claimant argues that Respondents' penalty claim is not ripe because "Respondents did not have an order ordering Claimant to wean herself off opioids and did not have a date by which such weaning was to be completed." However, Claimant's argument confuses the concept of ripeness with the merits of underlying issue or claim. An issue can be "ripe" for hearing even though it lacks merit. *E.g., Younger v. Merritt Equipment Company*, W.C. No. 4-326-355 (ICAO, December 30, 2009) ("an issue that

lacks merit does not necessarily lack ripeness. The two concepts are distinct, and a frivolous or meritless claim may nonetheless be ripe for adjudication"). Here, there was no legal impediment to bringing the claim for penalties, and the issue was therefore ripe for determination. Respondents' penalty claim was based on their interpretation of Judge Cannici's order regarding weaning from opioids. Although I ultimately did not agree with Respondents' interpretation, that does not mean the issue was not ripe. Judge Cannici's order had become final when the Application for Hearing was filed, and there was no legal impediment to raising a claim for an alleged violation of that order.

Claimant also argues that ongoing use of opioids is not ripe for adjudication without an opinion "from the treating physician, Dr. Leo, stating that Claimant's use is not reasonable or necessary." The ICAO previously rejected essentially the same argument earlier in the case. *Deane v. Regis Corporation*, W.C. No. 4-664-891-001 (ICAO, December 21, 2021) ("claimant's assertion that an ALJ is without authority to rule in regard to a medical treatment that is not proposed by an authorized treating physician is incorrect."). There is no meaningful distinction between the ripeness issue raised by Claimant regarding the opioids in this hearing and the argument rejected by the Panel's in its December 21, 2021 Order.

It is well-established that even where the respondents admit for a general award of medical benefits after MMI, they retain the right to dispute whether any specific treatment is reasonably needed or causally related to the work injury. *E.g., Grover v. Industrial Commission*, 759 P.2d 705, 712 (Colo. 1988); *Hanna v. Print Expediters*, 77 P.3d 863 (Colo. App. 2003). Claimant has cited no case law, and I am aware of none, which holds that the respondents must have an opinion from an ATP before they can dispute specific treatment. Indeed, such a requirement would essentially shift at least the burden of production to the respondents, when in fact it is the claimant's burden to prove entitlement to disputed treatment by a preponderance of the evidence.

C. Reimbursement of litigation costs

Section 8-42-101(5) provides that when any party requests a hearing on medical benefits after MMI that have been recommended by an ATP, and the contested benefit is subsequently awarded after hearing, "the court shall award the claimant all reasonable costs incurred in pursuing the medical benefit."

As found, Claimant incurred costs in connection with the prior litigation before Judge Cannici regarding opioid medications. Because Claimant ultimately prevailed on those issues, she is entitled to reimbursement of costs under § 8-42-101(5). Claimant submitted receipts of $1,101.00 for Dr. Leo's deposition and $450.50 for the deposition transcript. Respondents did not dispute these receipts or Claimant's entitlement to reimbursement of costs.

ORDER

It is therefore ordered that:

1. Insurer shall pay for Nucynta and oxycodone prescribed by Dr. Leo.

2. Claimant's claim for attorney fees against Respondents for requesting a hearing on unripe issues is denied and dismissed.

3. Insurer shall pay Claimant $1,551.50 for reimbursement of litigation costs in connection with the prior hearing before Judge Cannici.

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 27(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 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 2, 2025

DIGITAL SIGNATURE

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 5-208-155-003

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that Division Independent Medical Examination (DIME) physician Robert P. Mack, M.D. incorrectly assigned Claimant a 29% lower extremity permanent impairment rating as a result of his May 9, 2022 admitted industrial injuries.

2. Whether Respondents have proven by a preponderance of the evidence that Claimant is no longer entitled to receive medical maintenance benefits in the form of physical therapy.

FINDINGS OF FACT

1. This admitted claim involves a May 9, 2022 injury to Claimant's left knee. Claimant has worked for Employer for 30 years. On the date of injury, Claimant tripped over a cord, fell, and struck his knee on concrete. Left knee x-rays revealed a fractured patella.

2. On May 12, 2022 Claimant obtained medical treatment at Vail-Summit Orthopaedics & Neurosurgery. Max Seiter, M.D. recommended an open reduction and internal fixation (ORIF) procedure for Claimant's patella fracture. Dr. Seiter performed the left knee ORIF on the following day.

3. On May 19, 2022 Claimant began physical therapy (PT). Claimant has continued to participate in PT throughout this claim.

4. On July 20, 2022 Claimant followed up with Dr. Seiter. He recommended a second surgery. On August 26, 2022 Claimant underwent a left knee partial lateral meniscectomy, arthroscopic debridement and chondroplasty of the patella cartilage, arthroscopic lysis of adhesions, arthroscopic lateral release of the left patella, and manipulation under anesthesia.

5. On January 18, 2023 Claimant treated with Andrew Wood, M.D. at Denver Health and reported continued left knee pain and weakness. Dr. Wood injected Claimant's left knee. On April 17, 2023, Claimant returned to Dr. Wood for a repeat left knee injection.

6. On June 1, 2023 Claimant followed up with Dr. Seiter. He recommended a third left knee procedure. Dr. Seiter noted he would perform a prepatellar bursectomy and remove a small nodule of scar tissue or suture that was present in the prepatellar bursa. On August 4, 2023 Claimant underwent the proposed surgery.

7. On December 11, 2023 Claimant visited Darcy Selenka, M.D., at Denver Health. Dr. Selenka remarked that Claimant had a very poor healing patellar fracture.

Claimant noted ongoing left knee pain and symptoms, as well as functional limitations. Dr. Selenka commented that orthopedic surgery had released Claimant to activity as tolerated for the next six months. If he continued having pain and swelling, the surgeon recommended proceeding with a total knee replacement.

8. On February 2, 2024 Claimant treated at Denver Health for an injury that occurred one day earlier. Claimant slipped on ice at work and tweaked his left knee. He underwent x-rays that showed no acute fracture or dislocation. Dr. Selenka recommended Claimant elevate and apply a cold pack to his knee for 20 minutes, five times per day, and released Claimant back to work.

9. On April 2, 2024, Claimant treated at Denver Health with Spencer Tomberg, M.D. Dr. Tornberg determined Claimant had reached Maximum Medical improvement (MMI) with no permanent impairment for his left knee. He remarked that Claimant had no new limitations from "the Feb injury" and that he was clear for full duty work with no "new" restrictions.

10. On May 16, 2024 Respondents filed a Final Admission of Liability (FAL) regarding Claimant's May 9, 2022 industrial injury based on Dr. Tomberg's April 2, 2024 medical report. Respondents did not acknowledge any permanent impairment but admitted for maintenance medical treatment.

11. On May 23, 2024 Claimant objected to the FAL and requested a Division Independent Medical Examination (DIME).

12. On June 5, 2024 Claimant returned to Dr. Seiter for an examination. He injected Claimant's left knee and commented that Claimant was at MMI. Dr. Seiter recommended medical maintenance treatment in the form of PT as needed.

13. On September 27, 2024 Claimant underwent a DIME with Robert Mack, M.D. Dr. Mack agreed with Dr. Seiter that Claimant had reached MMI on June 5, 2024 and assigned a 29 percent scheduled left lower extremity impairment rating. The rating consisted of the following: (1) a five percent impairment for a lateral meniscectomy under Table 40 of the *American Medical Association Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*); (2) a 15 percent impairment for arthritis and chondromalacia under Table 40 of the *AMA Guides*; and (3) an 11 percent range of motion impairment based on flexion limited to 120 degrees. Dr. Mack also recommended maintenance treatment including a 1-year gym membership, frequent sessions with an athletic trainer, and follow ups with Dr. Seiter on an as-needed basis to include repeat injections in his left knee.

14. On December 17, 2024 Claimant underwent an Independent Medical Examination (IME) with John Burris, M.D. Dr. Burris assigned Claimant a 10% left lower extremity impairment rating. He initially explained that Dr. Mack's 29% rating should have been calculated as 28% based on the combined values chart. Moreover, Table 40 #5 of the *AMA Guides* allows for arthritis with a maximum lower extremity value of 0-20% for

the entire knee. However, Claimant's work-related injury was confined to the patellofemoral compartment or 1/3 of the knee joint. Dr. Burris explained that the maximum #5 work-related rating is 1/3 of 20% or 7%, and not the 15% assigned by Dr. Mack. Furthermore, even if Claimant's meniscal tear was work-related, Dr. Seiter's operative note described the tear as involving only 5% of the meniscus. However, Table 40 #2 allows 0-10% impairment for one meniscus. For a 5% involvement of the meniscus, the maximum value would thus be 5%x10% or 0.5%, and not the 5% assigned by Dr. Mack. Finally, Dr. Mack's range of motion measurements were inconsistent with Dr. Seiter's. Dr. Burris agreed that Claimant had reached MMI on June 5, 2024, but noted that no maintenance care was warranted.

15. Claimant testified at hearing that prior to this work injury, he had no left knee problems. He was able to engage in his physically demanding job of coaching skiing. Claimant still works as a ski instructor and coach but can no longer demonstrate drills like he did prior to his injury. Moreover, Claimant can no longer engage in hobbies including cycling, skiing, and surfing.

16. Claimant also addressed his February 2024 intervening incident. He stated that he only visited the clinic once for that event so he could get cleared to work. When he was placed at MMI by Dr. Tomberg on April 2, 2024, Claimant believed he had reached MMI for the minor February injury. Claimant remarked that since he has been placed at MMI, he has undergone physical therapy approximately every other week, as well as several cortisone injections.

17. At hearing, Dr. Burris testified consistently with his report. He explained that the knee is commonly divided into the following three compartments: (1) the patellofemoral compartment; (2) the medial compartment; and (3) the lateral compartment. Dr. Burris remarked that Claimant's patellofemoral compartment was the only compartment within Claimant's knee that should have been rated. Although Claimant underwent surgery that addressed synovitis in other compartments of the knee, the synovitis was not arthritis but swelling inside the joint capsule. Based on the single compartment, Claimant should have received a 7% permanent impairment rating. In conjunction with a 3% rating for range of motion deficits, Dr. Burris reiterated that Claimant should be awarded a 10% lower extremity permanent impairment rating. Dr. Burris remarked that Dr. Mack arbitrarily assigned an excessive 15% lower extremity rating under Table 40.

18. Second, Dr. Burris believed the 5% rating assigned by Dr. Mack for the partial meniscectomy was erroneous because it was not clear there was any causal relationship between the meniscus tear and Claimant's work-related event. Moreover, even if the meniscus tear was work related, it involved only five percent of the meniscus.

19. Third, Dr. Burris commented that Dr. Mack erred in assigning an 11% range of motion impairment. Dr. Mack failed to normalize the range of motion testing in conjunction with Claimant's unaffected knee. He also did not account for the discrepancy in Claimant's range of motion as compared to the testing documented in the medical

records. Notably, the *AMA Guides* specify that the impairment rating physician should try to reconcile a discrepancy from the medical records.

20. Respondents have failed to demonstrate it is more probably true than not that Dr. Mack incorrectly assigned Claimant a 29% lower extremity permanent impairment rating as a result of his May 9, 2022 admitted industrial injuries. Initially, because Claimant received a scheduled impairment rating for his left knee injuries, Dr. Mack's DIME opinion is not entitled to presumptive weight. Claimant has undergone extensive conservative treatment as well as three surgeries because of his left patellar fracture. Dr. Mack agreed with Dr. Seiter that Claimant had reached MMI on June 5, 2024 and assigned a 29 percent scheduled left lower extremity impairment rating. The rating consisted of the following: (1) a five percent impairment for a lateral meniscectomy under Table 40 of the *AMA Guides*; (2) a 15 percent impairment for arthritis and chondromalacia under Table 40 of the *AMA Guides*; and (3) an 11 percent range of motion impairment. Regarding maintenance treatment, Dr. Mack recommended a 1-year gym membership, frequent sessions with an athletic trainer, and follow ups with Dr. Seiter on an as-needed basis to include repeat injections in his left knee.

21. In contrast, Dr. Burris explained that Claimant's patellofemoral compartment was the only one of three compartments within Claimant's left knee that should have been rated. Although Claimant underwent surgery that addressed synovitis in other compartments of the knee, the synovitis was not arthritis and was swelling inside the joint capsule. Based on the single compartment, Claimant should have received a 7% permanent impairment rating. In contrast, Dr. Mack's 15% Table 40 rating was excessive. Second, Dr. Burris explained that the 5% rating for the partial meniscectomy assigned by Dr. Mack was erroneous because the meniscus tear was not work-related. Furthermore, even if the meniscus tear was work related, it involved only five percent of the structure. Finally, Dr. Burris commented that Dr. Mack erred in assigning an 11% range of motion impairment. Accordingly, based on the 7% rating for surgery on a single knee compartment, in conjunction with a 3% rating for range of motion deficits, Dr. Burris reasoned that Claimant should receive a 10% lower extremity permanent impairment rating.

22. Despite Dr. Burris' opinion, Respondents have failed to demonstrate by a preponderance of the evidence that Dr. Mack incorrectly assigned Claimant a 29% lower extremity permanent impairment rating. Nevertheless, Dr. Burris correctly explained that Dr. Mack's 29% rating should have been calculated as 28% based on the combined values chart. Aside from the minor clerical calculation error, Dr. Mack's opinion was within his discretion pursuant to the *AMA Guides* and the Division of Workers Compensation Impairment Rating Tips. Importantly, because Dr. Seiter performed a meniscus repair Dr. Mack was permitted to assign an impairment rating for the procedure. Importantly, because Table 40 #2 allows 0-10% impairment for a meniscus, the 5% rating Dr. Mack assigned was within his discretion. Furthermore, Table 40 #5 of the *AMA Guides* allows for arthritis with a maximum lower extremity value of 0-20% for the entire knee. Dr. Mack exercised his discretion in assigning a 15% rating for Claimant's arthritis and

chondromalacia. Finally, Dr. Mack awarded an 11 percent range of motion impairment based on flexion limited to 120 degrees.

23. Although Dr. Burris was critical of Dr. Mack's impairment rating, his comments are insufficient to overcome Dr. Mack's impairment rating by a preponderance of the evidence. Based on the anatomical structures involved with the injuries sustained, coupled with the extent of objective pathology, it more probable than not that Claimant would have ongoing subjective complaints as described at hearing. Based on Claimant's extensive treatment and functional limitations, Dr. Mack properly determined he suffered a 28% whole person permanent impairment as a result of his May 9, 2022 admitted industrial injuries.

24. Respondents have failed to prove it is more probably true than not that Claimant is no longer entitled to receive medical maintenance benefits in the form of PT. Respondents filed a FAL acknowledging medical maintenance treatment. In their October 21, 2024 Application for Hearing, Respondents endorsed maintenance medical care as an issue for hearing. Although endorsed, Respondents did not raise the issue at hearing, but asserted in their Position Statement that they are only challenging continued PT. Because Respondents filed a FAL acknowledging medical maintenance benefits and now seek to terminate PT, it is their burden to prove Claimant is no longer entitled to receive the treatment.

25. The record reveals Respondents have continued to provide Claimant with medical maintenance benefits. Claimant's treating providers, as well as DIME Dr. Mack, have all recommended continued maintenance treatment. Notably, on June 5, 2024 Dr. Seiter recommended PT as needed. DIME Dr. Mack did not specifically mention PT, but recommended a 1-year gym membership, frequent sessions with an athletic trainer, and follow ups with Dr. Seiter on an as-needed basis to include repeat injections in his left knee. Moreover, even Dr. Burris stated that injections have been helpful for Claimant to maintain function and delay his need for a total knee replacement. A one-year gym membership was also a "good idea." Although Dr. Burris noted it would be appropriate to transition from formal PT to a home exercise program, his comments are insufficient to terminate Claimant's continued treatment. The bulk of the evidence thus reflects that Claimant is entitled to receive continued medical maintenance care including PT. Accordingly, Respondents have failed to present substantial evidence to support a determination that future medical treatment in the form of continued PT is no longer reasonable or necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

Overcoming the DIME on Lower Extremity Impairment

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Indus. Claim Appeals Off.,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Indus. Claim Appeals Off.,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Off.,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S. *See Yeutter v. Indus. Claim Appeals Off.*, 487 P.3d 1007, 1012 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v.*

Indus. Claim Appeals Off., 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on causation is also entitled to presumptive weight. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

7. However, the increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The heightened burden of proof does not apply to the whether the claimant proved functional impairment beyond the schedule. *Parra v. Spectrum Retirement Communities, LLC*, WC 5-052-120-005 (ICAO, May 6, 2021). It is only after the ALJ determines the claimant sustained whole person impairment that the DIME physician's impairment rating becomes entitled to presumptive effect under § 8-42-107(8)(c), C.R.S. *Id.*; *see Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998) (noting that DIME provisions do not apply to the rating of scheduled injuries).

8. The *AMA Guides* provide the rating physician with discretion when determining the extent of an injured worker's permanent medical impairment rating. The phrase "based on" in the revised third edition of the *AMA Guides* reflects that they are the starting point, not the exclusive source, for impairment rating methodology. The preceding wording allows doctors some leeway and discretion in determining a patient's final impairment rating. *Fisher v. Indus. Claim Appeals Off.*, 484 P.3d 816, 819 (Colo. App. 2021).

9. As found, Respondents have failed to demonstrate by a preponderance of the evidence that Dr. Mack incorrectly assigned Claimant a 29% lower extremity permanent impairment rating as a result of his May 9, 2022 admitted industrial injuries. Initially, because Claimant received a scheduled impairment rating for his left knee injuries, Dr. Mack's DIME opinion is not entitled to presumptive weight. Claimant has undergone extensive conservative treatment as well as three surgeries because of his left patellar fracture. Dr. Mack agreed with Dr. Seiter that Claimant had reached MMI on June 5, 2024 and assigned a 29 percent scheduled left lower extremity impairment rating. The rating consisted of the following: (1) a five percent impairment for a lateral meniscectomy under Table 40 of the *AMA Guides*; (2) a 15 percent impairment for arthritis and chondromalacia under Table 40 of the *AMA Guides*; and (3) an 11 percent range of motion impairment. Regarding maintenance treatment, Dr. Mack recommended a 1-year gym membership, frequent sessions with an athletic trainer, and follow ups with Dr. Seiter on an as-needed basis to include repeat injections in his left knee.

10. As found, in contrast, Dr. Burris explained that Claimant's patellofemoral compartment was the only one of three compartments within Claimant's left knee that should have been rated. Although Claimant underwent surgery that addressed synovitis

in other compartments of the knee, the synovitis was not arthritis and was swelling inside the joint capsule. Based on the single compartment, Claimant should have received a 7% permanent impairment rating. In contrast, Dr. Mack's 15% Table 40 rating was excessive. Second, Dr. Burris explained that the 5% rating for the partial meniscectomy assigned by Dr. Mack was erroneous because the meniscus tear was not work-related. Furthermore, even if the meniscus tear was work related, it involved only five percent of the structure. Finally, Dr. Burris commented that Dr. Mack erred in assigning an 11% range of motion impairment. Accordingly, based on the 7% rating for surgery on a single knee compartment, in conjunction with a 3% rating for range of motion deficits, Dr. Burris reasoned that Claimant should receive a 10% lower extremity permanent impairment rating.

11. As found, despite Dr. Burris' opinion, Respondents have failed to demonstrate by a preponderance of the evidence that Dr. Mack incorrectly assigned Claimant a 29% lower extremity permanent impairment rating. Nevertheless, Dr. Burris correctly explained that Dr. Mack's 29% rating should have been calculated as 28% based on the combined values chart. Aside from the minor clerical calculation error, Dr. Mack's opinion was within his discretion pursuant to the *AMA Guides* and the Division of Workers Compensation Impairment Rating Tips. Importantly, because Dr. Seiter performed a meniscus repair Dr. Mack was permitted to assign an impairment rating for the procedure. Importantly, because Table 40 #2 allows 0-10% impairment for a meniscus, the 5% rating Dr. Mack assigned was within his discretion. Furthermore, Table 40 #5 of the *AMA Guides* allows for arthritis with a maximum lower extremity value of 0-20% for the entire knee. Dr. Mack exercised his discretion in assigning a 15% rating for Claimant's arthritis and chondromalacia. Finally, Dr. Mack awarded an 11 percent range of motion impairment based on flexion limited to 120 degrees.

12. As found, although Dr. Burris was critical of Dr. Mack's impairment rating, his comments are insufficient to overcome Dr. Mack's impairment rating by a preponderance of the evidence. Based on the anatomical structures involved with the injuries sustained, coupled with the extent of objective pathology, it more probable than not that Claimant would have ongoing subjective complaints as described at hearing. Based on Claimant's extensive treatment and functional limitations, Dr. Mack properly determined he suffered a 28% whole person permanent impairment as a result of his May 9, 2022 admitted industrial injuries.

Medical Maintenance Benefits

13. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest liability for a particular benefit, the claimant must prove

that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013); *see* §8-43-201(1), C.R.S. (stating 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."

14. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant is no longer entitled to receive medical maintenance benefits in the form of PT. Respondents filed a FAL acknowledging medical maintenance treatment. In their October 21, 2024 Application for Hearing, Respondents endorsed maintenance medical care as an issue for hearing. Although endorsed, Respondents did not raise the issue at hearing, but asserted in their Position Statement that they are only challenging continued PT. Because Respondents filed a FAL acknowledging medical maintenance benefits and now seek to terminate PT, it is their burden to prove Claimant is no longer entitled to receive the treatment.

15. As found, the record reveals Respondents have continued to provide Claimant with medical maintenance benefits. Claimant's treating providers, as well as DIME Dr. Mack, have all recommended continued maintenance treatment. Notably, on June 5, 2024 Dr. Seiter recommended PT as needed. DIME Dr. Mack did not specifically mention PT, but recommended a 1-year gym membership, frequent sessions with an athletic trainer, and follow ups with Dr. Seiter on an as-needed basis to include repeat injections in his left knee. Moreover, even Dr. Burris stated that injections have been helpful for Claimant to maintain function and delay his need for a total knee replacement. A one-year gym membership was also a "good idea." Although Dr. Burris noted it would be appropriate to transition from formal PT to a home exercise program, his comments are insufficient to terminate Claimant's continued treatment. The bulk of the evidence thus reflects that Claimant is entitled to receive continued medical maintenance care including PT. Accordingly, Respondents have failed to present substantial evidence to support a determination that future medical treatment in the form of continued PT is no longer reasonable or necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of his condition.

ORDER

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

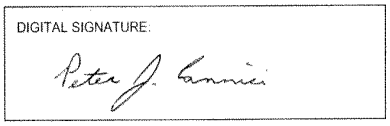
1. Claimant suffered a 28% left lower extremity impairment rating because of his May 9, 2022 admitted industrial injuries.

2. Claimant shall continue to receive medical maintenance benefits, including PT, as recommended by his treating physicians and DIME physician Dr. Mack.

3. Any issues not resolved in this Order are reserved for future determination.

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

DATED: April 2, 2025.



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

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

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.
>
> 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

[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

[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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-273-457-001

ISSUE

Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his October 1, 2024 termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving Temporary Total Disability (TTD) benefits.

FINDINGS OF FACT

1. On May 20, 2024 Claimant sustained an admitted industrial injury to his right lower extremity. He was struck by a pipe being moved by a forklift operator.

2. Claimant visited UCHealth Greeley Hospital-Emergency Care for treatment with Darren Erick Trembly, M.D. Dr. Trembley's impression after ordering x-rays was an avulsion fracture of the anterior tibial plateau. Claimant's right knee was placed in a knee immobilizer pending an orthopedic appointment and additional imaging studies.

3. On May 23, 2024 Claimant visited Physician's Assistant Jaqueline House and Mark Krisburg, M.D. at Banner Occupational Health Clinic – Greeley. Diagnoses included a fracture of the upper right tibia, superficial head injury, left shoulder pain, and left knee pain. Referral to an orthopedic specialist and CT scan were ordered. Claimant was restricted from working.

4. On June 5, 2024 Respondents filed a General Admission of Liability (GAL). They acknowledged medical benefits and Temporary Total Disability (TTD) benefits for open periods.

5. Claimant testified that on August 9, 2024 he received a telephone call from Sedgwick claim representative Maria Abrahim-Petrone. She advised Claimant that he was expected to return to work for eight hours each day.

6. Following his release to light duty, Claimant returned to work on August 13, 2024. Claimant initially returned to work for eight hours per day.

7. On August 15, 2024 Claimant returned to PA-C House and Dr. Krisburg. He received modified work restrictions. Claimant was not to drive for work, seated office work only, and ambulation for personal reasons only and with crutches. He was limited to 2 hours of work per day.

8. Respondents filed a second GAL on August 23, 2024. They acknowledged Temporary Partial Disability (TPD) benefits after Claimant's return to work pursuant to

the work restrictions assigned on August 15, 2024.

9. On September 26, 2024 Claimant returned to PA-C House. She released him to work eight hours per day. PA-C House modified Claimant's work restrictions to include driving his personal vehicle short distances, seated work only, ambulating for personal reasons with crutches or cane, and elevating his right foot above the hip for 10-15 minutes every two hours.

10. Claimant testified that he returned to work full time on September 30, 2024 for his first day with the recently modified restrictions. He commented that it very difficult to accommodate his restrictions in the area where he was seated. It was especially difficult to elevate his foot above his hip. Claimant remarked that when he started feeling pain, he went home to ice his leg.

11. Employer's Executive Assistant for Human Resources and Payroll Whitney Hale testified at hearing. Ms. Hale confirmed that she had direct supervisory duties over Claimant following his release to modified duty.

12. Ms. Hale explained that Employer provided various accommodations to allow Claimant to stretch his leg. She remarked that Employer offered Claimant an additional chair to put his leg up or flipped over a bench so he could elevate his leg. Moreover, in the front entry way, there were cushioned chairs where he could take a rest break during his time in the office. Ms. Hale confirmed that Claimant was allowed to leave for 15 minutes at a time without clocking out. However, she had communicated to Claimant that if he had to leave for over one hour, he was expected to clock out. In contrast, Claimant maintained he did not know he was supposed to clock out if he had to leave work for several hours, despite his acknowledgement that he had to clock out for any medical appointments during work hours.

13. On October 1, 2024 Ms. Hale and partial company owner Amy Janssen had a text message conversation about Claimant clocking in and leaving while on the clock. Ms. Hale detailed that she and Ms. Janssen closely monitored Claimant's hours while he was working modified duty. She commented that, once she noticed that Claimant was absent for long periods of time when he was supposed to be at the office, they reviewed video camera footage and the times when Claimant left.

14. Ms. Hale explained that on September 30, 2024 Claimant clocked in to work at 9:06 a.m. and clocked out at 3:41 p.m. However, when Claimant quickly left out the back door early in the day, Ms. Hale waited to see whether he simply left to rest in his car or stretch his leg. When he failed to return for a couple of hours, they checked the cameras. After reviewing the video, Employer adjusted Claimant's card to reflect the time he was in the office at his desk. The adjusted time reflected Claimant was only at work from 9:06 am to 9:07 am and 1:52 pm to 3:31 pm.

15. On the following day, or October 1, 2024, Claimant clocked in at 8:38 am and clocked out at 2:00 pm. However, as Claimant's adjusted timecard reveals, he was

only in the office from 8:38 am until 9:52 am and returned from 11:25 am until 2:00 pm. Ms. Hale noted that Employer was only paying Claimant for his time at work, not for the time that he went home to stretch.

16. On October 1, 2024 Employer terminated Claimant for time clock fraud. The termination document specifies that Claimant had clocked in and left the building for multiple hours on different days. Ms. Hale explained that Employer had previously terminated employees for time clock fraud, and in fact turned off mobile clock-ins to eliminate the issue of not properly clocking in and out.

17. Claimant maintained that another partial owner of Employer advised him that it was in the best interests of the company to remain clocked in even if he was not working. Claimant acknowledged that he was not at the office during the hours reflected in his timecards for September 30, 2024 and October 1, 2024, but maintained he was unaware that he had to clock out if he left for two hours at a time.

18. Respondents have established it is more probably true than not that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on May 20, 2024 Claimant sustained an admitted industrial injury to his right lower extremity while working for Employer. Following his release to light duty, Claimant returned to work on August 13, 2024. Claimant initially returned to work for eight hours per day, but because he was unable to tolerate the pain and discomfort, the restrictions were reduced to two hours each day. Employer accommodated Claimant's restrictions including allowing him to leave for short periods of time to stretch his leg.

19. On September 26, 2024 Claimant returned to PA-C House and she released him to work eight hours per day. She modified Claimant's work restrictions to include driving his personal vehicle short distances, seated work only, ambulating for personal reasons with crutches or cane, and elevating his right foot above the hip for 10-15 minutes every two hours. Claimant testified that he returned to work full time on September 30, 2024 for his first day with the recently modified restrictions. He commented that it was very difficult to accommodate his restrictions in the area where he was seated. It was especially difficult to elevate his foot above his hip. Claimant remarked that when he started feeling pain, he went home to ice his leg.

20. While Claimant alleges that he left work due to his disability, the first day when he was supposed to work for eight hours he stayed at work for only one minute before leaving. Claimant did not let his supervisor know, or clock out, but left out the back door and did not return for several hours. Notably, on September 30, 2024 Claimant clocked in to work at 9:06 a.m. and clocked out at 3:41 p.m. However, after reviewing video, Employer adjusted Claimant's card to reflect the time he was in the office at his desk. The adjusted time reflected Claimant was only at work from 9:06 am to 9:07 am and 1:52 pm to 3:31 pm. On the following day, Claimant again left after being at work for less than an hour and a half. He failed to inform anyone or clock out. Importantly,

Claimant clocked in at 8:38 am and clocked out at 2:00 pm. However, as Claimant's adjusted timecard reveals, he was only in the office from 8:38 am until 9:52 am and returned from 11:25 am until 2:00 pm.

21. Claimant maintained that another partial owner of Employer advised him that it was in the company's best interests to remain clocked in even if he was not working. He acknowledged that he was not at the office during the hours reflected in his timecards for September 30, 2024 and October 1, 2024, but explained he was unaware that he had to clock out if he left for two hours at a time. Despite Claimant's explanation that he was not aware of the requirement to clock out, his testimony is not credible. Claimant knew he had to be off the clock to attend medical appointments, and he communicated with his Employer prior to leaving for appointments when he would be absent for several hours. Moreover, Ms. Hale credibly explained that Claimant's job duties and attendance requirements had been communicated to him.

22. On September 26, 2024 Claimant's treating physician released him to work eight hours per day. Claimant failed to apprise his supervisors of his inability to tolerate an eight-hour shift and unilaterally decided to leave work without clocking out. Furthermore, Claimant's Employer complied with his work restrictions and provided various accommodations, including allowing him to leave for short periods of time to stretch his leg. Ms. Hale noted that, prior to September 30, 2024, Employer was working with Claimant to allow him to maintain his employment by accommodating his restrictions and the need to do what was necessary for him to tolerate his symptoms while at work. Notably, Claimant admitted that he was able to tolerate a three-hour work shift for over one month prior to September 30, 2024. Claimant's termination was not predicated on the worsening of his work-related condition, but on timecard fraud. Claimant's failure to properly clock out was a violation of company policy that could lead to termination. Ms. Hale remarked that other employees had previously been terminated for similar misconduct. Claimant's actions in failing to adhere to Employer's attendance and time recording policies demonstrate that he exercised some control over his October 1, 2024 termination under the totality of the circumstances. Claimant precipitated his employment termination by volitional acts that he would reasonably expect to cause the loss of employment. Accordingly, Claimant was responsible for his termination from employment and is precluded from receiving TTD benefits after October 1, 2024.

CONCLUSIONS OF LAW

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

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Off.*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that a claimant was responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

5. As found, Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on May 20, 2024 Claimant sustained an admitted industrial injury to his right lower extremity while working for Employer. Following his release to light duty, Claimant returned to work on August 13, 2024. Claimant initially returned to work for eight hours per day, but because he was unable to tolerate the pain and discomfort, the restrictions were reduced to two hours each day. Employer accommodated Claimant's restrictions including allowing him to leave for short periods of time to stretch his leg.

6. As found, on September 26, 2024 Claimant returned to PA-C House and she released him to work eight hours per day. She modified Claimant's work restrictions

to include driving his personal vehicle short distances, seated work only, ambulating for personal reasons with crutches or cane, and elevating his right foot above the hip for 10-15 minutes every two hours. Claimant testified that he returned to work full time on September 30, 2024 for his first day with the recently modified restrictions. He commented that it was very difficult to accommodate his restrictions in the area where he was seated. It was especially difficult to elevate his foot above his hip. Claimant remarked that when he started feeling pain, he went home to ice his leg.

7. As found, while Claimant alleges that he left work due to his disability, the first day when he was supposed to work for eight hours he stayed at work for only one minute before leaving. Claimant did not let his supervisor know, or clock out, but left out the back door and did not return for several hours. Notably, on September 30, 2024 Claimant clocked in to work at 9:06 a.m. and clocked out at 3:41 p.m. However, after reviewing video, Employer adjusted Claimant's card to reflect the time he was in the office at his desk. The adjusted time reflected Claimant was only at work from 9:06 am to 9:07 am and 1:52 pm to 3:31 pm. On the following day, Claimant again left after being at work for less than an hour and a half. He failed to inform anyone or clock out. Importantly, Claimant clocked in at 8:38 am and clocked out at 2:00 pm. However, as Claimant's adjusted timecard reveals, he was only in the office from 8:38 am until 9:52 am and returned from 11:25 am until 2:00 pm.

8. As found, Claimant maintained that another partial owner of Employer advised him that it was in the company's best interests to remain clocked in even if he was not working. He acknowledged that he was not at the office during the hours reflected in his timecards for September 30, 2024 and October 1, 2024, but explained he was unaware that he had to clock out if he left for two hours at a time. Despite Claimant's explanation that he was not aware of the requirement to clock out, his testimony is not credible. Claimant knew he had to be off the clock to attend medical appointments, and he communicated with his Employer prior to leaving for appointments when he would be absent for several hours. Moreover, Ms. Hale credibly explained that Claimant's job duties and attendance requirements had been communicated to him.

9. As found, on September 26, 2024 Claimant's treating physician released him to work eight hours per day. Claimant failed to apprise his supervisors of his inability to tolerate an eight-hour shift and unilaterally decided to leave work without clocking out. Furthermore, Claimant's Employer complied with his work restrictions and provided various accommodations, including allowing him to leave for short periods of time to stretch his leg. Ms. Hale noted that, prior to September 30, 2024, Employer was working with Claimant to allow him to maintain his employment by accommodating his restrictions and the need to do what was necessary for him to tolerate his symptoms while at work. Notably, Claimant admitted that he was able to tolerate a three-hour work shift for over one month prior to September 30, 2024. Claimant's termination was not predicated on the worsening of his work-related condition, but on timecard fraud. Claimant's failure to properly clock out was a violation of company policy that could lead to termination. Ms. Hale remarked that other employees had previously been terminated for similar misconduct. Claimant's actions in failing to adhere to Employer's attendance and time

recording policies demonstrate that he exercised some control over his October 1, 2024 termination under the totality of the circumstances. Claimant precipitated his employment termination by volitional acts that he would reasonably expect to cause the loss of employment. Accordingly, Claimant was responsible for his termination from employment and is precluded from receiving TTD benefits after October 1, 2024.

ORDER

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

1. Claimant was responsible for his termination from employment and is precluded from receiving TTD benefits after October 1, 2024.

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

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

DATED: April 4, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-263-244-001

ISSUES

I. Whether the Administrative Law Judge has jurisdiction to determine the validity of the Final Admission of Liability and whether the claim is closed

II. Whether the Rule 6 "Demand" letters generally referencing "Telecare Anywhere" as an authorized treating physician were proper.

III. Whether Claimant's claim is closed due to Claimant's failure to object to the April 1, 2024, and/or May 3, 2024, Final Admission of Liability within 30 days, and apply for a hearing on any disputed issues that are ripe for adjudication.

PROCEDURAL MATTERS – NOTICE TO CLAIMANT

This matter was initially set for hearing on November 14, 2024, before Administrative Law Judge Kara R. Cayce. Claimant did not appear. Judge Cayce found that the Notice of Hearing had been mailed to Claimant's last known address of 12160 East Center Drive, Aurora, CO 80012 and concluded that the notice was likely received.

Following Claimant's nonappearance, Judge Cayce issued an Order to Show Cause directing Claimant to explain his failure to appear. The Order required that: (1) Claimant submit, within 30 days of the date of the Order, a written showing of good cause for his failure to appear on November 14, 2024; (2) if good cause were established within that time, the ALJ would issue an order to that effect and schedule a de novo hearing; and (3) if no good cause were shown, the ALJ would issue an order to that effect and reset the hearing within 30 days for presentation of Respondents' evidence. Claimant did not respond to the Order to Show Cause.

The hearing was set for February 19, 2025; however, that hearing was continued, pursuant to an order, because of a family emergency involving Respondents' counsel.

On February 19, 2025, Respondents rescheduled the hearing for March 11, 2025, and issued a Hearing Confirmation, which was mailed to Claimant at 12160 East Center Drive, Aurora, CO 80012. The confirmation stated that the hearing would be held on March 11, 2025, in Denver at 1:30 p.m. That same day, the Office of Administrative Courts (OAC) issued a Notice of Hearing (NOH) confirming the March 11, 2025, hearing at 1:30 p.m., to be held at the OAC, 1525 Sherman Street, 4th Floor, Denver, CO 80203. The NOH was also mailed to Claimant at his last known address.[1] The NOH was not returned to the OAC as undeliverable.

[1] The address used to provide Claimant notice of the proceedings is the same address used by the Division of Workers' Compensation on their April 4, 2024, letter to the adjuster regarding the filing of the April 1, 2024, Final Admission of Liability.

Claimant did not appear for the March 11, 2025, hearing. Based on the record, the undersigned concluded that proper notice of the March 11, 2025, hearing was provided by mailing the NOH to an address at which Claimant was likely to receive it. Accordingly, the hearing proceeded in Claimant's absence.

FINDINGS OF FACT

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

1. This matter involves an admitted claim with a date of injury of January 22, 2024.
2. On February 6, 2024, Claimant failed to attend a scheduled medical appointment.
3. On February 12, 2024, the insurer issued a certified letter to Claimant rescheduling the missed appointment for February 15, 2024. The letter warned expressly that failure to attend the rescheduled appointment would result in suspension of temporary disability benefits pursuant to § 8-42-105(c), C.R.S.
4. Claimant did not attend the rescheduled medical appointment on February 15, 2024.
5. On February 20, 2024, the medical provider confirmed in writing that Claimant had not attended the February 15 appointment and rescheduled the appointment for February 27, 2024.
6. On February 21, 2024, the insurer issued another certified letter to Claimant advising that the appointment had been rescheduled for February 27, 2024, and again warning that failure to attend would result in suspension of temporary disability benefits.
7. Claimant failed to attend the medical appointment on February 27, 2024.
8. On February 28, 2024, the insurer issued a 30-day letter to Claimant advising that he had not attended his rescheduled medical appointments and instructing him to schedule a follow-up appointment. The letter stated: "PLEASE BE ADVISED THAT FAILURE TO RESPOND TO THIS LETTER WITHIN THIRTY (30) DAYS WILL RESULT IN A FINAL ADMISSION OF LIABILITY BEING FILED WITH THE DIVISION OF WORKERS' COMPENSATION." The letter also requested that Claimant indicate whether he was seeking additional medical treatment or believed he had recovered and was not claiming permanent impairment.
9. Respondents' counsel represented at hearing that Claimant did not respond to the 30-day letter.
10. On April 1, 2024, the insurer filed a Final Admission of Liability (FAL), reflecting that Claimant's temporary disability benefits had been suspended as of February 27, 2024.
11. On April 4, 2024, the Division of Workers' Compensation issued a letter to the adjuster indicating that the April 1, 2024, FAL was deficient. The Division indicated that a response was required within 15 days. They also indicated that if the requested documentation could not be provided, temporary benefits were to continue. Lastly, the Division also requested that the adjuster submit either correspondence stating its position or an amended admission with a new certification of mailing within 15 days of receipt of the letter.

12. On May 3, 2024, the insurer filed a revised FAL.

13. According to representations made by Respondents' counsel, Claimant did not file a timely objection to either the April 1 or May 3 FAL, nor file an Application for Hearing on any disputed and ripe issues as required by § 8-43-203(2)(b)(II), C.R.S.

14. Respondents' counsel also indicated that he was not sure whether the Division had issued a subsequent letter asserting that the May 3, 2024, FAL was deficient.

15. A certified copy of the Division file was not submitted into the record.

CONCLUSIONS OF LAW

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

Pursuant to § 8-43-201, C.R.S., administrative law judges have original jurisdiction to hear and decide all matters arising under Articles 40 to 47 of Title 8 of the Colorado Revised Statutes. This jurisdiction is limited to the adjudication of actual disputes between parties. As held by *Franklin v. Colorado Springs Sch. District 11*, W.C. No. 4-436-174, 2007 (July 25, 2007), this statutory language does not authorize administrative law judges to issue advisory opinions in the absence of a present controversy.

Here, Claimant is not currently seeking any workers' compensation benefits. Claimant has not filed an Application for Hearing, nor has he asserted entitlement to any temporary disability, permanent impairment, or medical benefits. Likewise, Respondents are not presently asserting any defenses to a claim for benefits. Respondents maintain that the claim is closed pursuant to the FAL filed on April 1, 2024, or May 3, 2024, but no Application or formal objection challenging the FALs is pending before this court.

In *Franklin*, the Panel emphasized that administrative tribunals may not issue rulings contingent upon the occurrence of hypothetical or future events, nor may they resolve questions in the abstract simply to clarify the parties' legal positions. The current posture of this case presents no justiciable issue. Rather, the inquiry about the "validity" or "technical sufficiency" of the FALs has been raised absent any request by Claimant for benefits or any legal disagreement as to entitlement to additional benefits. As such, there is no controversy to resolve under § 8-43-201, C.R.S., and ruling on the validity of the FALs and whether the case is closed under these circumstances would amount to an impermissible advisory opinion.

Accordingly, the undersigned concludes that jurisdiction is lacking to issue a decision on the sufficiency or effect of either FAL in the absence of an actual dispute between the parties.

ORDER

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

1. The request for a determination regarding the sufficiency or validity of either Final Admission of Liability and whether the case is closed is hereby dismissed for lack of jurisdiction.

2. This dismissal is without prejudice to either party's right to raise a justiciable dispute in the future.

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 7, 2025

/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 4-998-272-001

ISSUE

Did Claimant prove by a preponderance of the evidence that the platelet rich plasma injection given to Claimant on October 11, 2024, was reasonable, necessary and related to his work injury of March 7, 2015?

FINDINGS OF FACT

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

1) On March 7, 2015, Claimant was working as a police officer when he sustained an admitted work injury to his right shoulder as a result of pulling on a door while attempting to extricate a woman from a vehicle.

2) Claimant initially presented to Dr. Miguel Castrejon on March 16, 2015 with complaints of intermittent dull pain located at the anterior shoulder and shoulder blade as well as pain to the right anterolateral right elbow. Physical examination revealed tenderness in the right proximal biceps, anterior capsule, and right trapezius. Dr. Castrejon diagnosed right biceps tendon strain and recommended physical therapy ("P.T.") No work restrictions were given at this visit. (Claimant's Submissions – Bates # 000064)

3) Claimant attended P.T. through April 18, 2015, after which he presented to Dr. Castrejon for a follow up evaluation on May 5, 2015. According to Dr. Castrejon's note of May 5, Claimant failed to improve with PT and at times was worse. On that date, Claimant was reporting pain over the anterior shoulder and elbow that worsens with elevation or forced grasping activities. Dr. Castrejon prescribed Voltaren gel and recommended an MRI for Claimant's shoulder and elbow. (Claimant's Submissions - Bates # 000066)

4) An MRI was done on May 7, 2015, and the radiologist's impressions were as follows:

    a. Inferior labral tear at the 6 o'clock position with associated with a [sic] paralabral cyst measuring 0.8 x 0.5 in maximum dimension. Mild degenerative changes of the remainder of the labrum without other evidence of tear.
    b. Mild osteoarthrosis of the glenohumeral joint.

c. Mild degenerative changes of the acromioclavicular joint.
d. Mild tendinosis of the supraspinatus, infraspinatus and intra-articular portion of the long biceps tendon.
e. Mild subacromial/subdeltoid bursitis.
f. The remainder of the exam is unremarkable.

(Claimant's Submissions – Bates #000105-000106)

5) Claimant was seen by Dr. Castrejon on May 13, 2015, and June 8, 2015 with the same complaints. On June 8, 2015, Claimant was referred to Dr. David Weinstein for a surgical consultation. (Claimant's Submissions – Bates # 000105 – 000106)

6) Claimant presented to Dr. Weinstein on June 19, 2015 with ongoing complaints of pain in the anterior and anterolateral aspect of the shoulder as well as pain in the area of his biceps and forearm. Claimant was also having difficulty reaching overhead, gripping and doing any repetitive activity. According to this note, Claimant sustained an injury to his right shoulder attempting to open a door at the scene of a motor vehicle accident. In doing so, Claimant put "significant force across his elbow and shoulder." Upon physical examination, it was noted that there was tenderness over the distal biceps, the brachioradialis, posterior interosseous nerve, and mild weakness with supination and elbow flexion. Dr. Weinstein's impressions were rotator cuff tendinitis, right anterior-inferior labral tear, and right elbow biceps/ brachioradialis tendinitis with a potential posterior interosseous nerve inflammation. In an attempt to avoid surgery, Dr. Weinstein administered a cortisone injection into the posterior subacromial space. (Claimant's Submissions – Bates # 000110 – 000112)

7) Claimant returned to Dr. Weinstein on July 27, 2015, with the same symptoms as in the initial visit. According to this note, the cortisone injection provided minimal improvement. Physical examination of the right shoulder showed tenderness over the subacromial space with a positive impingement sign and pain over the anterior glenohumeral joint line. Weakness with rotator cuff testing was also noted. (Claimant's Submissions – Bates # 000113-000114)

8) On October 29, 2015, Dr. Weinstein performed surgery consisting of a right arthroscopic subacromial decompression, a right arthroscopic extensive glenohumeral debridement of grade 4 chondral- lesion of the glenoid, and right arthroscopic anterior/ inferior capsular shift with labral repair. (Claimant's Submissions – Bates # 000115-000116)

9) Post surgery, Claimant engaged in a course of P.T. and acupuncture. Dr. Castrejon put Claimant on light duty while recovering. (Claimant's Submissions – Bates # 000074-000078)

10) Claimant was re-evaluated by Dr. Weinstein on February 17, 2016. On this date, it was noted that Claimant was making steady progress but was still having mild tightness behind his back. Dr. Weinstein released Claimant from his care with

directions to return if needed. (Claimant's Submissions – Bates # 000117-000118)

11) In a letter to Dr. Castrejon dated June 4, 2016, Dr. Abercrombie wrote that Claimant was having minimal discomfort but was having tightness with reaching behind his back and weakness when reaching out in front of him. (Claimant's Submissions – Bates # 000042)

12) Claimant was placed at MMI by Dr. Castrejon on August 2, 2016 with a 6% scheduled impairment. Dr. Castrejon returned Claimant to full duty work and recommended maintenance medical care to include six visits of chiropractic care and a steroid injection. Based on Dr. Castrejon's report, Respondent filed a Final Admission of Liability, wherein it admitted to the 6% scheduled impairment and maintenance medical care. (Respondent's Submissions – Bates # 009-012)

13) On February 24, 2020, Claimant was seen by Paula Hornberger, PA-C at the City Clinic for a right shoulder injury sustained while arresting a drunk female. The history revealed that on January 30, 2020, Claimant was assisting a female who collapsed, causing a pulling sensation leading to right shoulder pain that radiates into the neck. Ms. Hornberger noted that Claimant's prior injury from 2015 was stable prior to this recent injury. Ms. Hornberger diagnosed a right shoulder strain and recommended P.T. and ibuprofen. Ms. Hornberger opined Claimant was not at MMI due to his acute symptoms. (Respondent's Submissions – Bates # 442)

14) An MRI done on March 3, 2020, revealed the following:

    a. Mild supraspinatus and subscapularis tendinopathy with strain with a tear.
    b. Mild to moderate acromioclavicular arthropathy.
    c. Hold labral degeneration with a tear. Mild to moderate glenohumeral arthropathy, chondral thinning and fibrillation identified, cystic changes and osteophyte formation identified.
    d. Small right glenohumeral join effusion with synovitis and debris loose bodies present within the subscapular recess.

    (Claimant Submission's – Bates # 000107)

15) Claimant received chiropractic care from Dr. Abercrombie from June 30, 2020 through July 24, 2020 for a right-sided cervicothoracic strain, right shoulder strain, and cervical/upper thoracic facet and costovertebral joint dysfunction. According to the July 24, 2020 note, Claimant was doing much better and was released from care. Claimant was advised to continue with the same stretches as before. (Claimant's Submissions – Bates # 000044-000049)

16) Claimant sustained another work injury to his right shoulder on May 2, 2021, while trying to lift a tactical shield. (Respondent's Submissions – Bates # 330)

17) Claimant had MRI done on May 14, 2021 which revealed progressive mild glenohumeral joint osteoarthritis with glenohumeral join effusion, synovitis with intraarticular bodies and rotator cuff tendinitis without evidence of tears. (Claimant's Submissions – Bates # 000108)

18) On May 20, 2021, Claimant was evaluated by Ms. Hornberger with ongoing right shoulder pain, which was surrounding his right scapula and radiated along his lateral right upper arm. Upon physical examination, Ms. Hornberger found full range of motion of the right shoulder, elbow, and wrist, right trapezial tenderness anteriorly and posteriorly along the soft tissue. Miss Hornberger's assessment was right shoulder strain, exacerbation of underlying degenerative arthritis and right thoracic strain. Ms. Hornberger recommended P.T., prescribed medication, and referred Claimant to Dr. Weinstein. (Claimant's Submissions – Bates # 000330)

19) On May 26, 2021, Claimant returned to Dr. Weinstein's office where he was seen by Shannon Constantinides, FNP-C. At this visit, Claimant was noted to be experiencing diffuse pain over the posterior aspect of the subacromial area as well as myofascial pain in the trapezius, scapula rotators, and axilla. There was also a sensation of muscle pulling and burning across the strap muscles. The pain worsened with activities requiring lifting, reaching, and overhead movement. X-rays were taken which showed, in part, a moderate amount of inferior glenohumeral joint space narrowing with osteophyte formation seen at the inferior humeral head/ surgical neck, consistent with moderate degenerative joint disease. Ms. Constantinides' assessment was acute right shoulder pain, right shoulder rotator cuff tendinitis, primary localized osteoarthritis of the right shoulder (exacerbated), and myofascial pain syndrome. Ms. Constantinides administered a cortisone injection into the glenohumeral joint and advised Claimant if there is no improvement, consideration should be given to additional cortisone injections, PRP injections, arthroscopy with glenohumeral debridement/subacromial decompression, or shoulder arthroplasty. (Claimant's Submissions – Bates # 000119-000122)

20) In a follow-up visit with Dr. Weinstein on July 7, 2021, it was noted that Claimant was doing better with conservative care, although he was still experiencing mild weakness with overhead activity in the anterior and anterolateral aspect of his shoulder. Dr. Weinstein recommended additional P.T. and to continue anti-inflammatory medication as needed. (Claimant's Submissions -Bates # 000123-000124)

21) Claimant underwent chiropractic care and massage therapy from August 10 through September 7, 2021, along with two P.T. sessions from August 23, 2021 through September 20, 2021. (Claimant's Submissions – Bates # 000022)

22) On September 28, 2021, Claimant was placed at MMI by Dr. Nicholas Kurz for the 2021 injury with no impairment or need for additional care. (Claimant's Submissions – Bates #000296)

23) Claimant presented to Ms. Hornberger on August 4, 2022, with right shoulder, neck, and upper/mid back pain following extensive training at the C.S.P.D. weapons range the day prior. Physical examination was abnormal with right upper-mid thoracic paraspinal tenderness and right trapezial tenderness with trigger points. There was also tenderness of the right anterior shoulder over the long and short head of the biceps proximally. Ms. Hornberger's diagnoses were right shoulder strain and right cervicothoracic strain. Ms. Hornberger prescribed chiropractic care, massage, over-the-counter medication and referred Claimant to Dr. Weinstein for evaluation and consideration of an injection as "this has helped in the past." (Claimant's Submissions – Bates # 000298-000299)

24) On September 19, 2022, Claimant was seen by Dr. Weinstein with mild to moderate ache deep within the anterior and posterior aspect of the shoulder radiated down his mid-humorous, which increased with shoulder level and overhead activity. He was also having difficulty moving his arm away from his body and was having pain in the posterior aspect of his shoulder. Claimant told Dr. Weinstein his symptoms are similar to what he had experienced over the last year, although to a higher level. Physical examination revealed mild tenderness over the scapular rotators, particularly in the inferior scapula as well as moderate tenderness over the anterior and posterior joint. There was also mild tenderness over the bicipital groove and subacromial space. X-rays of the shoulder were essentially unchanged from those taken on May 26, 2021. Dr. Weinstein's impressions were right rotator cuff tendonitis, right aggravation of glenohumeral arthritis, and right upper extremity myofascial inflammation. Dr. Weinstein recommended a glenohumeral cortisone injection with P.T. and chiropractic care. (Claimant's Submissions – Bates # 000126-000128)

25) Notes from Ms. Hornberger and Dr. Thomas Centi dated August 18, 2022, and September 6, 2022 respectively reflect that Claimant was doing better. Dr. Centi's September 6, 2022 note indicated under "PMH" that Claimant had right shoulder surgery in 2015, and had good immediate recovery but has had persistent intermittent pain since. (Claimant's Submissions – Bates #000303-000307)

26) On September 22, 2022, Claimant had a right shoulder glenohumeral cortisone injection. (Claimant's Submissions – Bates # 000303-000307)

27) On November 15, 2022, Claimant was placed at MMI by Dr. Thomas Centi for the August 3, 2022 work injury with no impairment or need for maintenance care. Dr. Centi's note of this date reflects Claimant was doing better but was still having some shoulder discomfort. This note reiterates that Claimant has had persistent intermittent pain since his 2015 shoulder surgery. (Claimant's Submissions – Bates # 000314-000315)

28) Claimant returned to Ms. Hornberger on July 12, 2023 with increased right shoulder pain which has persisted since March/ April. Ms. Hornberger referred Claimant to P.T. and Dr. Weinstein for an injection. In the WC164 form signed by Ms. Hornberger, she checks that Claimant needs maintenance care to include injections as it relates to his 2015 shoulder surgery. (Claimant's Submissions – Bates # 000319-000320, and 000322)

29) On July 17, 2023, Claimant presented to Mr. Raulie for consideration of a repeat injection. According to this note, Claimant's last cortisone injection lasted a reasonable amount of time, but Claimant was wondering about PRP injections. X-rays taken at that visit showed moderate to advanced narrowing in the right glenohumeral joint with inferior osteophyte formation of the surgical neck. There were hypertrophic changes of the AC joint consistent with arthrosis noted. Mr. Raulie's impressions were chronic right shoulder pain, aggravation of moderate to advanced glenohumeral degenerative joint disease, right rotator cuff tendonitis, and right upper extremity myofascial pain. At this visit, various treatment options were discussed to include continued observation, P.T., home exercises, cortisone injections, PRP injections, and surgery. (Claimant's Submissions – Bates # 000132-000135)

30) On September 22, 2023, Claimant underwent a PRP injection. Claimant was reevaluated by Mr. Raulie on November 13, 2023. At that time, Claimant's shoulder was improving and was doing much better. It was noted that Claimant was able to perform more activities without discomfort and was sleeping better due to a decrease in pain. (Claimant's Submissions – Bates # 000137-000140)

31) Claimant saw Ms. Hornberger on November 15, 2023, at which time he was released from care with instructions to follow up with Dr. Weinstein for injections and P.T. as needed. (Claimant's Submissions – Bates # 000373-000375)

32) Claimant had 13 P.T. sessions from January 3, 2024 through March 25, 2024. A review of these notes reflect that Claimant reported stiffness, pain, and difficulty with using his right upper extremity over the past 8 years. (Claimant's Submissions – Bates # 000377-000401)

33) On October 11, 2024, Claimant returned to Mr. Raulie for a repeat PRP injection to his right shoulder. According to Mr. Raulie's note, Claimant had great relief from his previous PRP injection. (Claimant's Submissions – Bates # 000141-000142)

34) At Respondent's request, Claimant had an evaluation with John Burris, MD, on August 13, 2024. As part of his evaluation, Dr. Burris reviewed medical records dating back to 2013. Based upon his examination of Claimant and review of the medical records, Dr. Burris opined that Claimant is not a candidate for PRP injections pursuant to the MTGs. Dr. Burris further opined that any treatment to

Claimant's right shoulder is not related to the 2015 work injury. (Respondent's Submissions – Tab D)

35) In support of his opinion that the PRP injections are not supported by the MTGs, Dr. Burris relied upon Rule 17, Exhibit 4, which states that PRP injections are not generally recommended but may be considered in unusual circumstances when the following three criteria are met:

    a. There is tendon damage;
    b. There has been no response to appropriate conservative measures; and
    c. The next level of guideline-consistent therapy would involve an invasive procedure with risk of significant complication.

    Dr. Burris went on to state the MRI does not show tendon damage and Claimant is working full duty without restrictions therefore the requirements are not met. (Respondent's Submissions – Bates # 029-030)

36) In support of his opinion that Claimant's present right shoulder condition is not related to the 2015 work injury, Dr. Burris wrote that Claimant had glenohumeral joint arthritis dating back to the MRI of May 7, 2015 and it is therefore a pre-existing condition unrelated to his workers compensation claim. Furthermore, repeat diagnostic imaging reveals the natural progression of this arthritis. Regarding Claimant's workers compensation claims since reaching MMI for the 2015 work injury, Dr. Burris wrote that they involved relatively "minor mechanisms of injury" with no acute abnormalities. (Respondent's Exhibits – Bates # 029)

37) A review of the medical records prior to March 5, 2015, reveals a paucity of complaints related to Claimant's right shoulder, except for two of Dr. Abercrombie's notes. The October 29, 2011 note reflects that Claimant was experiencing an ache in the upper back and mid back region with a knot under the right shoulder blade. The March 3, 2015 note indicates Claimant had a concern of new right shoulder and arm symptoms after doing push-ups. However, Dr. Abercrombie's note does not reflect any treatment directed toward the upper arm or rotator cuff. Rather, Dr. Abercrombie's treatment was directed toward the upper torso/ thoracic spine and the lower torso/ lumbar spine. (Claimant's Submissions – Bates # 000001 and 000007)

38) Dr. Weinstein testified as an expert in orthopedic surgery. He also testified that he is Level II accredited by the Division of Workers' Compensation. Dr. Weinstein testified that Claimant's ongoing right shoulder problems are related to the March 7, 2015 work injury for which surgery was performed. Dr. Weinstein explained that, based on his review of the medical records, Claimant did not have any significant problems with his right shoulder prior to the March 5, 2015, work injury. Then he has a grade 4 chondral lesion which Dr. Weinstein characterized as a small area of isolated arthritis, due to a labral tear which occurred as a result of the March 5, 2015 work injury. As a result, Claimant's glenohumeral arthritis

became symptomatic and progressive as his shoulder is no longer able to adequately compensate. (Depo. Tr. P. 14, l. 1 – P. 15, l. 3; P. 16, ll. 5-8; P. 37, l. 21- P.38, l. 19)

39) Dr. Weinstein was aware of Claimant's visit to Dr. Abercrombie on March 3, 2015. However, Dr. Weinstein testified that doing push-ups would likely not tear the labrum but would more likely cause issues with the musculature of the neck. Regarding Claimant's right shoulder injuries subsequent to the 2015 work injury, Dr. Weinstein testified they were essentially aggravations of the underlying arthritis dating back to the original injury. For this opinion, Dr. Weinstein relied upon his review of the medical records and examinations of Claimant for the subsequent injuries which, he testified, don't show any acute damage to Claimant's tendon or labrum. According to Dr. Weinstein, the forces involved in the subsequent injuries did not involve forces great enough to cause severe damage to the shoulder, but enough to aggravate the underlying arthritis related to the 2015 work injury. (Depo. Tr. P. 49, ll. 4-17; P. 62, l. 4 – P. 64, l. 21)

40) Dr. Weinstein further testified that the PRP injection of October 24, 2024 was reasonable and necessary as it relates to Claimant's 2015 right shoulder injury. In support of his opinion, Dr. Weinstein pointed to Claimant's subsidence of shoulder symptoms after each PRP injection. Dr. Weinstein testified that there is literature that shows PRP injections reduce inflammation in arthritis with little to no side effects unlike cortisone injections, which can cause further cartilage degeneration. In addition, Dr. Weinstein also testified that PRP injections help with tendonitis. According to Dr. Weinstein, Claimant meets the MTG Guidelines for PRP injections in that he has inflammation of the rotator cuff along with degenerative arthritis. In addition, if the injections lose their effectiveness, the next treatment modality would be invasive with significant risk of complications. In addition, Dr. Weinstein said that while Claimant has returned to full duty work, he has not returned to full function. (Depo. Tr. P. 29, ll. 2-24; P. 30, ll. 19-25; P. 43, l. 19- P. 44, l. 9; P. 47, ll. 4-17; P.66, ll. 4-7; P.67, ll. 4-8)

41) Dr. Burris testified as an expert in occupational medicine. Dr. Burris reiterated his opinion that Claimant does not meet the criteria for PRP injections as set forth in the MTGs. Dr. Burris explained that Rule 17, Exhibit 4, p.33 of the MTGs sets forth the criteria for whether or not a PRP injection is reasonable and necessary. Dr. Burris said it is borderline as to whether or not Claimant meets the first criteria of having tendon damage that while Claimant has some swelling and inflammation he did not have severe tearing. Dr. Burris went on to say Claimant has not had 6 weeks of conservative care before the October 2024 PRP injection. Finally, Dr. Burris testified that there is no documentation of significant functional benefit, as he has been working full duty since 2016. (Hearing Tr. P. 62, l.3-P.64-l.13)

42) Concerning Claimant's ongoing shoulder issues, Dr. Burris testified that Claimant has glenohumeral joint arthritis prior to his March 7, 2015, injury and that when

he was placed at MMI he returned to his baseline and the need for a PRP injection would be the result of a natural progression of the arthritis. Dr. Burris testified that his opinion concerning etiology remained the same even when factoring in the various injuries Claimant sustained subsequent to the March 7, 2015 injury. (Hrg. Tr. P.56,l.20-P.59,l.15)

43) On cross-examination, Dr. Burris agreed it is very common for glenohumeral arthritis to be asymptomatic. Furthermore, Dr. Burris agreed that trauma to the shoulder joint can cause asymptomatic arthritis to become symptomatic. Dr. Burris conceded that the MTGs are flexible in that the treating physician can deviate from them in individual cases. Dr. Burris further conceded that the MTGs are for pre-MMI care and are not intended to limit post-MMI care. (Hrg. Tr. P. 70, l. 17 – P. 71, l. 8; P. 798, l. 8 – P.81, l. 20; P.86,l.23-P.87-l.2)

44) Claimant testified to his March 7, 2015 work injury and to the subsequent work injuries to his right shoulder. According to Claimant, he had no problems with his right shoulder prior to the March 7, 2015 work injury other than pain which emanated from his cervical spine and down his right shoulder. Claimant further testified consistent with the medical records that insofar as the injuries to his right shoulder subsequent to the March 5, 2015 work injury are concerned, that he was provided limited care, never given work restrictions, and was always placed back at MMI with no impairment or recommendations for maintenance care. Claimant also testified that after being placed at MMI on August 2, 2016, he continued to have problems with his right shoulder to include pain, tightness, and muscle spasms for which he performed self-directed care such as working out, stretching, and using a compression vest. (Hrg Tr. P.11,ll.5-16;P.16,l.13-P.24,l.12;P.30,l.2-P.32-l.12)

45) Claimant testified that while steroid injections to his right shoulder provided some symptomatic relief, it was short-lived. However, Claimant went on to testify, consistent with his medical records, that the PRP injections provided significant relief such that his sleep was better, and he was able to perform his everyday activities with less pain. (Hrg. Tr. P. 25, l. 17- P.27, l. 12; P. 28, l. 24 – P. 29, l. 14)

46) The opinions of Dr. Weinstein are more persuasive than Dr. Burris' opinions to the contrary.

47) Claimant's testimony is credible and persuasive.

48) Claimant has proved by a preponderance of the evidence that the PRP injection of October 11, 2024 was reasonably necessary to relieve the effects of his March 5, 2015 injury and to prevent deterioration of his condition.

CONCLUSIONS OF LAW

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

General Legal Principles

A. The purpose of the Workers' Compensation Act of Colorado (Act), § 8- 40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S*. The Claimant shoulders the burden of proving by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43- 301(1), C.R.S.; Faulker 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).* 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. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. 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 all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission, 441 P.2d 21 (Colo. 1968); see also, Dow Chemical Co. v. Industrial Claim Appeals Office, 843 P.2d 122 (Colo. App. 1992)* (ALJ may credit one medical opinion to the exclusion of a contrary opinion). As found in this case, the medical opinions of Dr. Weinstein regarding the cause of Claimant's symptoms and the need for PRP injections are credible and more persuasive than those to the contrary.

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

arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *5 P.3d 385 (Colo. App. 2000).*

CLAIMANT'S ENTITLEMENT TO MEDICAL BENEFITS

D. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, *759 P.2d 705 (Colo. 1988); Sims v. Industrial Claim Appeals Office, 797 P.2d 777 (Colo. App. 1990)*. However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, *210 P.2d 448 (Colo. 1949); Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c)*, C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, *942 P.2d 1337 (Colo. App. 1997*). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally therefrom. *Standard Metals Corp. v. Ball*, *supra*. Contending that Claimant's current symptoms and need for PRP injections represent the natural progression of a preexisting, non-industrial condition that would have become symptomatic, whether Claimant worked for Employer or not, Respondents urge the ALJ to conclude that the recommended PRP injections are unrelated to March 5, 2015 work injury. The ALJ is not persuaded.

E. It is well settled that a pre-existing condition "does not disqualify a claimant from receiving worker's compensation benefits." *Duncan v. Indus. Claims Appeals Office*, *107 P.3d 999, 1001 (Colo. App. 2004).* To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or the need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, *805 P.2d 1167, 1169 (Colo. App. 1990).* Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, *633 P.2d 502 (Colo. App. 1981).* Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying preexisting condition. *See Merriman v. Industrial Commission*, *120 Colo. 400, 210 P.2d 488 (1940).*

F. In this case, the persuasive evidence demonstrates that prior to March 5, 2015, Claimant had minimal, if any, issues with his right shoulder. Subsequent to the March 5, 2015, work injury, Claimant underwent surgery with Dr. Weinstein and was ultimately placed at MMI on August 2, 2016 with a 6% scheduled impairment and a recommendation for maintenance care. It is recognized that Claimant had three work injuries to his right shoulder subsequent to the August 2, 2016, MMI date. However, the medical record evidence reflects that for each injury Claimant had a relatively short course of care and was placed at MMI with no impairment and no recommendation for

maintenance care. The subsequent injuries were essentially temporary aggravations of the underlying residuals from the 2015 work injury. Both Dr. Weinstein and Dr. Burris agree that Claimant has arthritis in his glenohumeral joint which is progressive. However, Dr. Weinstein opined that Claimant's ongoing shoulder problems relate back to the March 7, 2015 work injury based on the fact that Claimant's right shoulder was essentially asymptomatic prior to said date. According to Dr. Weinstein, Claimant's right shoulder became symptomatic as a result of the 2015 work injury and continues to this day. It is recognized that Dr. Burris believes Claimant's present shoulder issues are due to his ongoing glenohumeral arthritis, which predated the March 7, 2015 work injury. However, the medical record evidence does not reflect Claimant was having prior right shoulder issues which required ongoing treatment. As found, the evidence presented persuades the ALJ that Claimant's March 7, 2015, injury to his right shoulder was sufficient to aggravate his pre-existing arthritis giving rise to his ongoing glenohumeral joint symptoms. The ALJ finds no persuasive evidence to establish that Claimant's pre-existing arthritis was symptomatic or disabling prior to March 5, 2015. It is concluded that Claimant has proven by a preponderance of the evidence that the etiology of Claimant's ongoing right shoulder symptoms is the March 5, 2015 work injury.

G. A Claimant may receive maintenance medical benefits if it is proven that medical treatment will be necessary to relieve the Claimant from the effects of the injury or to prevent deterioration of the Claimant's condition. *Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988)*; See *Hanna v. Print Expeditors, Inc., 77 P.3d 863 (Colo. App. 2003)*; *Stolluneyer v. Industrial Claim Appeals Office, 916 P.2d 609 (Colo. App. 1995).* It is well settled that it is appropriate for an ALJ to consider the MTGs in deciding whether a certain medical treatment is reasonable and necessary for the Claimant's condition, and that the ALJ's consideration of the MTGs may be denoted from where there is evidence justifying the deviations. Rule 17-4 (A), *Logiudice v. Siemen's Westinghouse, W.C. No. 4-665-873 (January 25, 2011);* See *Hieb v. Devereux, W.C. No. 4-626-898 (March 15, 2017).* Additionally, § 8-43-201(3), C.R.S. states an ALJ is "not required" to use the MTG's as the sole basis for a determination that a medical treatment is reasonable and necessary. Furthermore, Rule 17, Exhibit 4, section 2.1 states that the recommendations in the MTGs are for pre-MMI care and are not intended to limit post-MMI treatment.

H. In the case at hand, there is a discrepancy between the opinions of Dr. Weinstein and Dr. Burris concerning whether Claimant meets the criteria for PRP injections for his shoulder symptoms. Dr. Weinstein testified that the PRP injections are for both Claimant's tendonitis as well as his glenohumeral joint arthritis. Claimant has received conservative care and performed home therapy to assist in keeping his symptoms at a baseline level since being placed at MMI by Dr. Castrejon in 2016. Furthermore, Claimant credibly testified that the PRP injections increase his function in that he is better able to perform his activities of daily living and is able to sleep better. Even if Claimant does not meet the criteria set forth in the MTGs, Dr. Weinstein testified that the PRP injections increase Claimant's function. As found, Dr. Weinstein's opinions are more credible and persuasive than those of Dr. Burris. Considering the totality of the evidence, it is concluded that Claimant has proven by a preponderance of the evidence that the PRP injections are reasonable and necessary to cure and relieve Claimant from

the effects of the March 7, 2015 industrial injury as well as maintain his functional status.

ORDER

It is therefore ordered that:

1) Respondent shall pay for Claimant's PRP injection of October 11, 2024.

2) All matters not determined herein, and not closed by operation of law, are reserved for future determination.

Dated this 8th day of April, 2025.

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

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 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. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable occupational pulmonary disease arising out of and in the course of his employment with Respondent-Employer.

2. Whether Claimant has proved by a preponderance of the evidence that medical care was reasonably necessary to cure and relieve him of the effects of his occupational disease.

3. The amount of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant was employed with Respondent-Employer as the director of product development. Claimant alleges an occupational disease of his respiratory system arising from exposure to volatile organic compounds in the workplace.

2. Respondent-Employer is a technology licensing company that develops hardware and formulations for various manufacturers of vaporized marijuana products.

3. Claimant's job included creating formulations of oil which consisted of multiple volatile organic compounds, including terpenes, being added together on a small scale to eventually be sold to a manufacturer who would mass produce the product. The formulation process would involve using a pipette to transfer the terpenes into hot oil, blending the hot oil using a homogenizer to create aerosolization and labelling it. After the formulation process, Claimant would distribute small batch product samples to testers, including Claimant and other employees of Respondent-Employer, and conduct a survey for feedback on different aspects of product use. Testers like Claimant would inhale the formulation in the cartridge. From 2018 to 2022, Claimant conducted these tests and tracked results.

4. When Claimant was seventeen years old, he was diagnosed with bronchitis and treated for six months, during which time he kept an inhaler at his doctors' recommendation. Later, when Claimant was in college from 2011 to 2015, he developed respiratory distress for unknown reasons. His providers again gave him an inhaler and he was released from care six months later.

5. Around March 2020, Claimant reported to Respondent-Employer that he had contracted COVID-19. Claimant requested he be able to work from home, which Respondent-Employer allowed.

6. On December 22, 2020, Claimant underwent a CT scan of his chest which showed an inflammatory infiltrate suggesting infection or aspiration in the left lower lobe along with mild diffuse esophageal distention.

7. In March of 2021, Claimant sought treatment for dysthymia, mental fogginess, and diarrhea, at the National Jewish.

8. In April 2021, Claimant saw gastroenterologist Dr. Miranda Ku. Dr. Ku opined that Claimant's respiratory issues were related to his stomach, including recurrent aspiration and vocal cord dysfunction, both of which can be the result of GERD.

9. In July 2021, Claimant was diagnosed with the delta variant of COVID-19. Claimant had pneumonia-type symptoms, shortness of breath, and difficulty breathing. Claimant was treated by Dr. Howard Saft at National Jewish Health but was not hospitalized. By the start of 2022, Dr. Saft released Claimant from treatment, and Claimant no longer needed medications or inhalers.

10. On February 18, 2022, Claimant underwent a methacholine challenge test provided by Dr. Pacheco. Claimant's results of the methacholine challenge testing did not meet the threshold for asthma. Claimant also had a laryngoscopy on February 18, 2022, performed by Dr. Michael Mohning after his methacholine challenge test. The laryngoscopy showed cobblestoning in Claimant's posterior pharynx.

11. From February 2022 through December of 2023, Claimant saw Dr. Saft for fatigue, dyspnea, viral syndrome, rash, skin sores, cognitive and physical fatigue, decreased appetite, abdominal complaints, and heartburns with muscle aches.

12. At some point in early 2023, Claimant began conducting his product testing at home. At that point, Claimant was handling the cartridge formulation steps; preparation of samples; creation of CBD oils; terpene bottling and testing.

13. However, in April 2023, Claimant stopped participating in the testing altogether due to experiencing throat irritation and coughing from consuming the product. Claimant continued to work with the product from his home office, including creation of the formulas, filling the pods, and distributing the samples, and he kept his laboratory equipment next to his work desk, resulting in continued exposure to the vapors.

14. Claimant sought treatment with Dr. Saft at National Jewish on January 9, 2024. Claimant reported to Dr. Saft that his chest symptoms and tightness had been worse when he would go to work and that he would feel better when at home.

Claimant denied experiencing heartburn. Claimant explained that he would work regularly with terpenes. Claimant also disclosed to Dr. Saft that he would smoke marijuana for his sciatica and that he no longer exercised due to his recent symptoms. Dr. Saft noted that Claimant had worsening dyspnea with left mid-chest discomfort and mildly decreased pulmonary function on testing as well as some mild wheezing. An X-ray of Claimant's chest was clear. Dr. Saft expressed concern about occupational exposures being a contributing factor. He recommended Claimant continue with Pulmicort and Spiriva, albuterol as needed, a Medrol Dosepak trial, and a spirometry. Dr. Saft referred Claimant to occupational medicine for further evaluation.

15. On January 17, 2024, Claimant returned to National Jewish where he was attended by Dr. Karin Pacheco for further evaluation regarding the workplace exposure for Claimant's pulmonary condition. Claimant reported that his symptoms had begun approximately two years earlier with the onset of shortness of breath and a raspy cough and that the symptoms had worsened in November and December 2023 with a change in his cough to one characterized as dry, short, and sharp. Claimant told Dr. Pacheco that when he returned to the workplace in January 2024, he noted the onset of a profound cough triggered by workplace fumes, and that despite removing the chemicals from Claimant's home office Claimant's cough had not improved much. Dr. Pacheco reviewed Claimant's occupational and medical history. Dr. Pacheco noted that on physical examination, Claimant had diffuse expiratory wheezes throughout his chest consistent with active asthma. While Claimant reported avoiding use of his albuterol inhaler due to it triggering palpitations and worsening his postural orthostatic tachycardia syndrome (POTS), so Dr. Pacheco recommended switching to Xopenex. Additionally, although Claimant denied developing any rashes when his skin was exposed to the compounds during his work, Dr. Pacheco suspected that Claimant may have developed sensitization and asthma to the compounds or an allergy to marijuana itself. Dr. Pacheco recommended a methacholine challenge with laryngoscopy and for Claimant to start peak flow monitoring twice daily.

16. On January 26, 2024, Dr. Saft wrote a letter stating Claimant was "undergoing testing to determine the cause of his medical condition," and recommended that Claimant refrain from working with chemicals involved in his position with Employer "as they may be a contributing factor."

17. On or about March 12, 2024, Claimant saw Dr. Saft again after developing symptoms of a runny nose, cough, fevers, chills, and shortness of breath. Claimant reported taking multiple COVID tests, all of which were negative. Dr. Saft's physical exam noted his lungs were clear and no wheezing. Dr. Saft noted, "Overall, he was improving with his symptoms, but then developed a rhinorrhea, cough, dyspnea." The record did not document any heartburn. Dr. Saft instructed Claimant to discontinue all use of marijuana products, and he recommended

conducting an allergy test for the chemicals Claimant was exposed to in the workplace.

18. On April 24, 2024, Claimant underwent another methacholine challenge test at National Jewish, which showed "Positive airways hyperresponsiveness to methacholine with a PD-20 FEV1 at 70.15 mcg." That same date, Claimant underwent another laryngoscopy, which showed moderate erythema and moderate edema.

19. Claimant returned to Dr. Pacheco on May 7, 2024. She reviewed Claimant's results from the two methacholine challenges and noted that the 2022 results were "borderline positive" and that the recent repeat test on April 24, 2024, was "clearly positive" for asthma. Claimant reported to Dr. Pacheco that he has had to decrease his use of marijuana due to near constant nausea and loss of appetite, which Dr. Pacheco noted to be suggestive of "cannabis hyperemesis syndrome." Claimant also reported experiencing rashes on both of his forearms that had since resolved. Dr. Pacheco noted this to be consistent with possible contact dermatitis. Claimant denied experiencing heartburn. Dr. Pacheco assessed Claimant with asthma and hyperemesis syndrome and recommended Claimant undergo allergy testing for the workplace chemicals, discontinue use of marijuana, and continue with Pulmicort.

20. On June 5, 2024, Claimant again saw Dr. Pacheco. Dr. Pacheco reviewed the testing from Claimant's patch testing which showed positive reactions to fragrances and preservatives. Dr. Pacheco felt that because the reactions were immediate, they were likely neurally mediated. Claimant also reported that his nausea had resolved, though as a result of lorazepam prescribed by his psychiatrist and not as a result of his temporarily discontinuing marijuana use. Claimant reported heartburn as well, clarifying that he would experience mild acid reflux to spicy foods and would avoid such foods. Dr. Pacheco provided Claimant with temporary work restrictions of returning to work without exposure to terpenes and flavorings. Claimant was to continue using a peak flow meter daily. She also recommended speech pathology for control of irritable larynx syndrome.

21. When Claimant returned to Dr. Pacheco six weeks later on July 17, 2024, Dr. Pacheco reviewed Claimant's peak flow data. Claimant reported that he had completely stopped smoking marijuana and now only consumed edibles. He also reported that he had tried to return to the office with his restrictions, but that he had been sent home pending a full duty release. He reported that he was still able to do some work, including coordination, response to e-mails, market research, and cannabis moving, and that he continued to receive his regular salary. Regarding Claimant's pulmonary function testing, Dr. Pacheco noted that Claimant's results were not substantially different from those obtained on January 17. Dr. Pacheco recommended Claimant switch from Pulmicort to Advair, conduct prick skin testing for regional aeroallergens, enroll in pulmonary rehabilitation, and continue to monitor peak flow rates at home.

22. On September 10, 2024, Claimant underwent an IME with Dr. John Hughes arranged by his attorney. Dr. Hughes reviewed Claimant's medical records with National Jewish, took Claimant's subjective history, and examined Claimant. Dr. Hughes opined that Claimant presented with "a rather straightforward history of occupational asthma" and relied on Dr. Pacheco's medical evaluation and assessment that asthma in Claimant's case "has been substantially aggravated by his occupational exposure to terpenes and flavorings." He ultimately concluded that Claimant sustained occupational asthma as a result of his exposure to terpenes and flavorings at work. He further opined that the medical evaluations and treatment appear to have been reasonable, necessary, and related to Claimant's occupational asthma.

23. Respondents, in turn, obtained an IME with Dr. Jeffrey Schwartz. Dr. Schwartz reviewed Claimant's medical and occupational history as provided by Claimant and as documented in Claimant's medical records. Dr. Schwartz also performed a spirometry test on Claimant which showed significant variability of his peak expiratory flow. Ultimately, Dr. Schwartz concluded that Claimant did not have asthma of any etiology. He reasoned that the methacholine challenge test from February 2022 showed normal bronchial hyperresponsiveness, which, he explained, would make a diagnosis of asthma "exceedingly unlikely" given that airway hyperresponsiveness is a pathophysiologic hallmark of asthma. Although Claimant had a positive methacholine challenge test in April 2024, Dr. Schwartz felt that it was a non-specific result likely attributable to a concurrent viral illness, GERD, or chronic sinusitis rather than asthma. Even if Claimant had asthma, Dr. Schwartz noted that the medical literature linking terpene exposure to asthma was non-existent, and that there was insufficient testing to determine whether Claimant had a terpene-specific allergy. Regarding Claimant's pulmonary symptoms, Dr. Schwartz felt that they were more likely the result of other conditions, including Claimant's GERD with likely laryngopharyngeal reflux and recurrent aspiration, Claimant's chronic sinusitis with polyposis, possible vocal cord dysfunction, and likely a psychogenic component as evidenced by the inconsistent spirometry effort.

24. On September 18, 2024, Claimant returned to National Jewish where he was attended by Jordan Leigh Bull, PA-C. Claimant reported that he continued to work for Respondent-Employer performing desk work. However, Claimant reported that he recently had to transport product while covering for a coworker, resulting in sinus inflammation and burning that persisted for a week. Claimant explained that he had been in the warehouse for only two minutes while picking up the product, that he spent less than an hour with transporting the product, and that this was even with the product being individually packaged and placed in a larger container for transportation.

25. At hearing, Claimant and Licethy Jubrey credibly testified consistently with the above.

26. Dr. Schwartz testified at hearing as an expert in internal medicine and pulmonology. He testified that Claimant suffered from GERD as evidenced by an esophagram and CT scans showing esophageal dilation. He explained that GERD can occur without the typical symptoms of heartburn or regurgitation, a condition sometimes referred to as "silent GERD." In his opinion, GERD was a more likely cause of Claimant's respiratory complaints and throat irritation than asthma, particularly given the laryngoscopy findings of throat inflammation and cobblestoning, which he attributed to post-nasal drainage and chronic sinusitis rather than chemical exposure or asthma.

27. Regarding the methacholine challenge test results, Dr. Schwartz testified that the 2021 test was definitively negative, which in his view ruled out asthma under accepted medical standards. While the 2024 test yielded a positive result, Dr. Schwartz dismissed its diagnostic value due to Claimant's then-recent viral respiratory infection. He testified that such infections can temporarily induce airway hyperresponsiveness, leading to false positives on methacholine testing.

28. Dr. Schwartz also testified that he found the spirometry test results to be unreliable. He noted significant variability in Claimant's expiratory efforts, which he interpreted as inconsistent with good-faith performance. Because of this variability, he concluded that the results could not be used to support an impairment rating or to diagnose asthma. He further suggested that the inconsistency could indicate malingering.

29. In his testimony, Dr. Schwartz noted that terpenes have not been shown to cause asthma and that Claimant experienced similar symptoms in response to a wide range of everyday irritants, including mouthwash, rubbing alcohol, and garlic. This, he opined, reflected a generalized sensitivity rather than an occupationally-induced condition. He also raised the possibility of cannabis hyperemesis syndrome based on Claimant's ongoing marijuana use and associated gastrointestinal complaints. In his view, continued cannabis use, despite medical advice to cease, undermined any claim that the workplace exposures were the primary cause of Claimant's condition.

30. The Court finds Dr. Schwartz's testimony credible but does not find his opinions regarding the cause of Claimant's asthma symptoms to be persuasive.

31. The Court finds instead that Claimant has proved by a preponderance of the evidence that he sustained a compensable aggravation of his pre-existing asthma as a result of his prolonged and repeated exposure to terpenes or other volatile organic compounds in the workplace.

32. Claimant's job responsibilities involved regular and prolonged exposure to volatile organic compounds, including terpenes and other flavoring agents, during the formulation and testing of vaporized cannabis products. Claimant's symptoms of cough, dyspnea, and chest tightness began and progressively worsened during

the period of occupational exposure, and the symptoms were worse when Claimant was newly exposed to the chemicals again. For example, Claimant reported to Dr. Pacheco on January 17, 2024, that when he returned to the workplace in January, he experienced a profound cough triggered by workplace fumes. While he reported that symptoms persisted after removing chemicals from his home, the acute worsening upon re-exposure at the office supports a cause-and-effect relationship. Claimant also reported that on September 18, 2024, when transporting product, he experienced a flare-up in his symptoms just from being in proximity to the product. Although Dr. Schwartz raises well-reasoned doubts as to the cause of Claimant's symptoms and offers GERD as a plausible alternate explanation, the Court finds the temporal correlation between Claimant's exposure and symptom onset to be such that it is more likely than not that Claimant's workplace chemical exposure aggravated Claimant's pre-existing asthma, necessitating medical treatment.

33. Therefore, the Court finds that Claimant has proved that Claimant's worsened pulmonary condition resulted directly from the conditions under which his work was performed for Respondent-Employer, and which followed as a natural incident of the work and as a result of the exposure occasioned by the nature of his employment, and which is fairly traced to Claimant's work as a proximate cause and which did not come from a hazard to which the worker would have been generally exposed outside of the employment.

34. The Court further finds that Claimant has proved by a preponderance of the evidence that his treatment at National Jewish Health from January 9, 2024, and thereafter, as summarized above, was reasonably necessary to cure and relieve Claimant of the effects of his occupational disease.

35. Claimant earned $125,499.97 in wages during the fifty-two weeks leading up to his date of injury. Therefore, his average weekly wage is $2,413.46.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability – Occupational Disease

An injury must “arise out of and occur in the course of” employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. Section 8-41-301, C.R.S.; *see also*, *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). An injury “arises out of” the employment when it is sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the service provided to the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury is said to have arisen in the course of employment if the injury occurred while the employee was acting within the time, place, and circumstances of the employment. *Id*. For an injury to arise out of employment, the claimant must show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991).

Here, Claimant’s injury is best characterized as an occupational disease. An occupational disease, as opposed to an industrial injury, arises not from an accident, but from a prolonged exposure occasioned by the nature of the employment. *Colo. Mental Health Inst. v. Austill*, 940 P.2d 1125 (Colo.App.1997). Section 8-40-201(14), C.R.S., defines “occupational disease” as: “A disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed

as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been generally exposed outside of the employment."

As found, Claimant's job responsibilities involved regular and prolonged exposure to volatile organic compounds, including terpenes and other flavoring agents, during the formulation and testing of vaporized cannabis products. Claimant's symptoms of cough, dyspnea, and chest tightness began and progressively worsened during the period of occupational exposure, and the symptoms were worse when Claimant was newly exposed to the chemicals again, and the temporal correlation between Claimant's exposure and symptom onset is such that it is more likely than not that Claimant's workplace chemical exposure aggravated Claimant's pre-existing asthma, necessitating medical treatment.

The Court concludes, as found, that Claimant has proved by a preponderance of the evidence that he sustained a compensable aggravation of his pre-existing asthma as a result of his prolonged and repeated exposure to terpenes or other volatile organic compounds in the workplace.

Medical Benefits

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

As found, the Court concludes that Claimant has proved by a preponderance of the evidence that the medical treatment Claimant received at National Jewish Health from January 9, 2024, and thereafter, as summarized above, was reasonably necessary to cure and relieve Claimant of the effects of his occupational disease.

AWW

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM*, 867 P.2d 77, 82 (Colo. App. 1993). In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury. *See* § 8-42-102(2), C.R.S. (2021).

Where the prescribed methods will not result in a fair calculation of a claimant's AWW in the particular circumstances, section C.R.S. § 8-42-102(3) grants an ALJ discretion to determine AWW "in such other manner and by such other method as will, in the opinion of the director *based upon the facts presented*, fairly determine such employee's average weekly wage." Section 8-42-102(3), C.R.S. (emphasis added).

As found, Claimant earned $125,499.97 in wages during the fifty-two weeks leading up to his date of injury. Therefore, the Court concludes that Claimant's average weekly wage is $2,413.46.

ORDER

It is therefore ordered that:

1. Claimant has proved by a preponderance of the evidence that he sustained a compensable occupational disease arising out of and in the course of his employment with Respondent-Employer.

2. Claimant has proved that the medical treatment he received at National Jewish Health on January 9, 2024, and thereafter, was reasonably necessary to cure and relieve him of the effects of his occupational disease.

3. Claimant's average weekly wage is $2,413.46.

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 9, 2025.

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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that the left total knee arthroplasty (TKA), as recommended by Dr. Jeffrey Arthur, is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted July 30, 2022 work injury?

FINDINGS OF FACT

1. On July 30, 2022, Claimant suffered an injury to her right knee while working for Employer. Respondents have admitted liability for the July 30, 2022 work injury.

2. Claimant's authorized treating physician (ATP) for this claim is Dr. David Reinhard. Claimant has received various treatment modalities for her right knee during this claim. This has included imaging, injections, and surgery.

3. Claimant first underwent surgery to her right knee on May 15, 2023. That surgery was performed by Dr. Mark Fitzgerald. Specifically, Dr. Fitzgerald performed a right knee partial medial meniscectomy, partial lateral meniscectomy, and patellofemoral and lateral chondroplasty.

4. Following that surgery, Claimant had physical therapy, and initially was doing well. However, her right knee symptoms returned and she was seen by Dr. Jeffrey Arthrur for consultation.

5. On January 25, 2024, Dr. Arthur recommended right total knee arthroplasty[1] (TKA). That surgery was performed by Dr. Arthur on May 31, 2024.

6. On August 27, 2024, Respondents filed a General Admission of Liability (GAL).

7. On October 10, 2024, Claimant was seen by Dr. Arthur for a post-surgical follow up. At that time, Claimant reported an increase in pain in her **left** knee. Dr. Arthur ordered left knee x-rays. In comparing those x-rays to x-rays taken in January 2024, Dr. Arthur noted that Claimant had a significant increase in arthritic changes in the left knee. Specifically, Dr. Arthur noted that there was a significant increase in osteophyte formation in the patellofemoral joint, and joint space narrowing. With regard to causation, Dr. Arthur wrote "it can be difficult to decipher what caused what or when things have occurred. But [I] agree with the overall thinking that some of the time it took to get the knee arthritis for the right side she was favoring that side which then exacerbated some of her issues on the left side." At that time, Dr. Arthur recommended a left total knee replacement.

[1] Replacement.

8. On October 10, 2024, Dr. Arthur requested authorization for a left total knee arthroplasty (TKA).

9. On October 16, 2024, Claimant was seen by Dr. Reinhard. In the medical record of that date, Dr. Reinhard noted that Claimant was experiencing left knee pain. Dr. Reinhard also noted that Dr. Arthur had recommended a left knee replacement. Dr. Reinhard noted that Claimant initially had right knee symptoms, but her left knee began "hurting due to overuse". Dr. Reinhard specifically opined that Claimant's "left knee pain is likely due to overuse of the left lower extremity since her 07/30/22 right knee injury."

10. On January 28, 2025, Claimant attended an independent medical examination (IME) with Dr. Qing-Min Chen. In connection with the IME, Dr. Chen reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. Chen noted that the left knee MRI shows moderate to severe osteoarthritic changes in all three compartments of Claimant's left knee. Dr. Chen opined that Claimant's left knee symptoms and any need for medical treatment are not related to the July 30, 2022 work injury. In support of this opinion, Dr. Chen noted that the Colorado Medical Treatment Guidelines (MTG) do not recognize compensation as a mechanism of injury. Dr. Chen also noted that Claimant is "morbidly obese" with a body mass index (BMI) of 40.3. Dr. Chen further noted that the osteoarthritis in Claimant's left knee is a progressive disorder that will get worse over time. With regard to the recommended left knee replacement, Dr. Chen opined that Claimant's need for surgery is "due to idiopathic and non-work-related reasons".

11. Dr. Chen's testimony was consistent with his IME report. Dr. Chen reiterated his opinion that Claimant's left knee condition is not related to the July 30, 2022 work injury. Dr. Chen further testified that compensating for one leg does not cause an aggravation in the other leg. Dr. Chen testified that Claimant's age and weight are risk factors and more likely the causes of the progression of the arthritis in Claimant's left knee. Dr. Chen testified that although Claimant needs a left total knee replacement, Claimant's need for that surgery is not related to the July 30, 2022 work injury.

12. Claimant testified that prior to her July 30, 2022 work injury she had no symptoms in either of her knees. Claimant further testified that she noticed an increase in left knee pain when she moved from using a walker to using a cane. Her left knee symptoms continued to worsen when she stopped using a cane and bore all her weight on her left leg to compensate for her injured right knee. At the time of the hearing, Claimant stated that she continues to have pain and swelling in her left knee. Claimant testified that she wishes to pursue the left knee replacement to improve her pain and function.

13. The ALJ credits the medical records and the opinions of Drs. Arthur and Reinhard. The ALJ also credits Claimant's testimony regarding the nature and onset of her left knee symptoms. The ALJ specifically credits Dr. Arthur's opinion that during the period of time that Claimant was favoring her right knee her left knee condition was exacerbated. The ALJ recognizes Dr. Chen's testimony that an injured limb does not lead to injury of the contralateral limb. However, the ALJ finds that as a result of Claimant's right knee injury and related surgeries and ongoing rehabilitation, Claimant began to have

symptoms in her left knee that required medical treatment. The ALJ finds that the pre-existing arthritic condition present in Claimant's left knee was aggravated and accelerated by her compensation for injury right knee. This aggravation caused the asymptomatic arthritis in Claimant's left knee to become symptomatic, thus necessitating medical treatment.

14. Based upon the foregoing, the ALJ finds that Claimant has successfully demonstrated that it is more likely than not that her left knee complaints are causally related to the July 30, 2022 right knee injury. In addition, the ALJ finds that Claimant has successfully demonstrated that it is more likely than not that the recommended left total knee arthroplasty is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the 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.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates, accelerates or

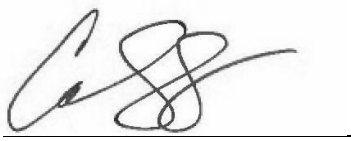
combines with a preexisting disease or infirmity to produce disability or need for treatment." *H & H Warehouse v. Vicory, supra.*

5. As found, Claimant has demonstrated, by a preponderance of the evidence, that the recommended left TKA is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted July 30, 2022 work injury. As found, the medical records, the opinions of Drs. Arthur and Reinhard, and Claimant's testimony are credible and persuasive on this issue.

ORDER

It is therefore ordered that Respondents shall pay for the recommended left total knee arthroplasty (TKA), pursuant to the Colorado Medical Fee Schedule.

Dated April 10, 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.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-281-625-001

ISSUE

Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his October 1, 2024 termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving Temporary Total Disability (TTD) benefits.

FINDINGS OF FACT

1. Claimant worked as a general manager for Employer. His duties involved managing a car wash facility. On June 29, 2024 Claimant suffered an admitted industrial injury to his left shoulder.

2. Claimant continued working modified duty following his work injury. Respondents acknowledged Temporary Partial Disability (TPD) benefits from June 30, 2024 and continuing.

3. Operations Manager Tony Salazar testified at the hearing in this matter. He explained that he had approximately 2.5 years of experience with Employer and directly oversaw Claimant's performance. Mr. Salazar noted he supervised Claimant daily. The record reveals that on October 1, 2024 Claimant was terminated from employment.

4. Mr. Salazar explained that Claimant was terminated for violation of company policy, numerous instances of tardiness, low performance, and insubordination. He commented that employees have previously been written up and terminated for being late. Although Claimant's separation form did not have the boxes checked related to the reasons for his termination, Mr. Salazar explained there had been a technical issue, and noted the form in Claimant's Human Resources (HR) folder was completed with all boxes checked.

5. Mr. Salazar testified that employees received training on Employer policies and guidelines. Although Claimant did not obtain a written copy of Employer's Handbook, the materials were reviewed during new hire orientation. Moreover, the Handbook is also available for employees to access anytime on Employer's website.

6. The record is replete with documentation of Claimant's infractions. Mr. Salazar explained that Claimant was late for his 6:30 a.m. shift six times between September 3-17, 2024. He confirmed Claimant's tardiness after reviewing CCTV footage showing his late arrival to work. The tardiness was unacceptable for a general manager of one of Employer's facilities. Mr. Salazar also noted that, regardless of whether the facility opened on time, Claimant was repeatedly late for his shift.

7. Mr. Salazar commented that during Claimant's employment he was made aware of various performance deficiencies including poor site presentation. Notably, the facility was in disarray and equipment was not clean. Generally, there was a poor customer experience despite several audits and coaching.

8. Mr. Salazar also explained that Claimant reached out to him regarding employee Mike Ariano, who Claimant oversaw at Employer's car wash. In a September 20, 2024 e-mail to HR employee Audrey Scanga, Mr. Salazar documented that Mr. Ariano had not arrived for his work shift by 7:00 am because he had overslept. Claimant had sought to terminate Mr. Ariano for job abandonment if he did not show up or call by 1:00 pm. However, Mr. Salazar explained that one no call no show was an insufficient basis for termination, and Claimant could not fire Mr. Ariano. Claimant responded negatively to the instruction and stated he was going to force Mr. Ariano to quit. Moreover, Mr. Salazar noted that Claimant had recently openly expressed that he did not care about his job or performance. Claimant did not timely submit the car wash belt inspection and received a 0 on his report card as a result.

9. In the September 20, 2024 e-mail to Ms. Scanga, Mr. Salazar also explained that Claimant had been deflecting his shortcomings and failures onto a supervisor named Ernesto. Mr. Salazar reminded Claimant several times that he was the general manager and "should not be pawning everything off on his employees." Notably, on September 18, 2024 Claimant received a "secret shop with a score of 75%." Claimant forwarded the result to Mr. Salazar blaming Ernesto for the shortcomings. Mr. Salazar then sent Claimant an informative email with coaching and training on how to handle the situation. He explained that the preceding responses from Claimant demonstrated a complete disregard for his position. Claimant simply did not care about timely submissions or following company policies and guidelines.

10. In a September 26, 2024 e-mail to Claimant, Mr. Salazar addressed Claimant's insubordination. He remarked that Employer has specific pre-approved vendors used for ordering specific products. However, Claimant insisted on using an unapproved vendor for a product. When Mr. Salazar attempted to direct Claimant to use the vendor approved for the order, Claimant responded that he would simply find a different way to obtain reimbursement. Mr. Salazar noted this was not an acceptable practice, and failure to follow the direction would be considered insubordination. Ms. Scanga also sent Claimant an e-mail explaining the importance of following established ordering processes. She noted it was essential to adhere to Employer guidelines to ensure consistency and efficiency across all car wash locations. Although she appreciated Claimant's initiative, she directed him not to make independent purchases.

11. Mr. Salazar summarized that the cause for Claimant's termination was tardiness on six occasions. There were other factors considered in Claimant's termination including inappropriate comments to other employees, several instances of subordination and poor customer service.

12. Shawn Liberge testified at the hearing in his capacity as Employer's director of operations. He had indirect supervisory duties over Claimant because he oversaw the operations team including Claimant's direct supervisor Mr. Salazar. Mr. Liberge commented that there were multiple concerns with Claimant's job performance during his employment. All of the concerns were related to Claimant's conduct. Mr. Liberge stated he personally visited the location where Claimant was a general manager. After speaking with Claimant and attempting to coach and redirect him, he did not leave with a feeling that any of the performance issues would be addressed.

13. On September 26, 2024 Mr. Salazar sent an e-mail to Mr. Liberge and Ms. Scanga explaining that he was "[g]etting very frustrated with [Claimant] and the blatant disrespect despite over a dozen conversations with him. I feel as if I'm stuck with him due to the workers comp claim and can't hold him accountable." Ms. Scanga responded that just because Claimant was on Workers' Compensation did not mean he was able to break policies. She also reiterated that Claimant was required to order products that other Employer locations were using. She noted "[I]f he wants to be insubordinate about it after that, I would write him up." Mr. Liberge echoed [s]tick to your guns, he needs to order what is standard across all locations as directed."

14. Claimant testified at hearing that Employer never told him that arriving late for work was a concern. He noted the store was open every day on time. Claimant also explained that he never received an Employee Handbook. Employer also did not explain why he was terminated. Furthermore, Mr. Liberge visited Claimant's car wash in person only once while he worked for Employer.

15. Claimant remarked that he received 25 hours of paid time off (PTO) from Employer after termination. However, he had not earned or accrued 25 hours of PTO by October 1, 2024. Claimant also noted he began working for a different employer on October 21, 2024.

16. Respondents have established it is more probably true than not that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on June 29, 2024 Claimant sustained an admitted industrial injury to his left shoulder while working for Employer. Claimant subsequently worked modified duty and Employer accommodated his work restrictions. Claimant's medical restrictions or physical condition did not contribute to his October 1, 2024 termination. Rather, the evidence reveals that Claimant was terminated based his conduct and numerous policy violations.

17. Mr. Salazar detailed that Claimant was terminated for violation of company policy, numerous instances of tardiness, low performance, and insubordination. The record is replete with documentation of Claimant's infractions. Mr. Salazar credibly explained that Claimant was late for his 6:30 a.m. shift six times between September 3-17, 2024. He confirmed Claimant's tardiness after reviewing CCTV footage showing his late arrival to work. The tardiness was unacceptable for a general manager of one of Employer's facilities.

18. Mr. Salazar commented that during Claimant's employment he was made aware of various performance deficiencies including poor site presentation. Notably, the facility was in disarray and equipment was not clean. Claimant also engaged in insubordination by failing to comply with Employer's policies and guidelines regarding ordering supplies. Ms. Scanga emphasized the importance of following established ordering processes. She noted it was essential to adhere to the guidelines to ensure consistency and efficiency across all of Employer's car wash locations. Claimant also threatened to force another employee to quit and exhibited an overall lack of care about his job. Mr. Salazar summarized that the cause for Claimant's termination was tardiness on six occasions. Other factors included inappropriate comments to other employees, several instances of subordination and poor customer service.

19. Mr. Liberge also credibly commented that there were multiple concerns with Claimant's job performance during his employment. All of the concerns were related to Claimant's conduct. Mr. Liberge stated he personally visited the location where Claimant was a general manager. After speaking with Claimant and attempting to coach and redirect him, he did not leave with a feeling that any of the performance issues would be addressed. Claimant's performance was unsatisfactory, and he failed to use opportunities for improvement or follow directions from his supervisors.

20. In contrast, Claimant testified that Employer never told him that arriving late for work was a concern. He noted the store was open every day on time. Claimant explained that he never received an Employee Handbook. Employer also did not apprise him of the reasons for his termination. However, Claimant's testimony that he was unaware that he could be terminated for his conduct is simply not credible. Mr. Salazar remarked that employees received training on Employer policies and guidelines. Although Claimant did not obtain a written copy of Employer's Handbook, the materials were reviewed during new hire orientation. Moreover, the Handbook was available for employees to access anytime on Employer's website.

21. Claimant's termination was not predicated on his work-related injuries, but on his violation of Employers' policies, lateness to work on numerous occasions during a short period of time, poor performance and insubordination. Claimant's actions in failing to adhere to Employer's attendance policies and deficiencies in job performance demonstrate that he exercised some control over his October 1, 2024 termination under the totality of the circumstances. Claimant precipitated his employment termination by volitional acts that he would reasonably expect to cause the loss of employment. Accordingly, Claimant was responsible for his termination from employment and is precluded from receiving TTD benefits after October 1, 2024.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1),

C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Off.*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that a claimant was responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

5. As found, Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on June 29, 2024 Claimant sustained an admitted industrial injury to his left shoulder while working for Employer. Claimant subsequently worked modified duty and Employer accommodated his work restrictions. Claimant's medical restrictions or physical

condition did not contribute to his October 1, 2024 termination. Rather, the evidence reveals that Claimant was terminated based his conduct and numerous policy violations.

6. As found, Mr. Salazar detailed that Claimant was terminated for violation of company policy, numerous instances of tardiness, low performance, and insubordination. The record is replete with documentation of Claimant's infractions. Mr. Salazar credibly explained that Claimant was late for his 6:30 a.m. shift six times between September 3-17, 2024. He confirmed Claimant's tardiness after reviewing CCTV footage showing his late arrival to work. The tardiness was unacceptable for a general manager of one of Employer's facilities.

7. As found, Mr. Salazar commented that during Claimant's employment he was made aware of various performance deficiencies including poor site presentation. Notably, the facility was in disarray and equipment was not clean. Claimant also engaged in insubordination by failing to comply with Employer's policies and guidelines regarding ordering supplies. Ms. Scanga emphasized the importance of following established ordering processes. She noted it was essential to adhere to the guidelines to ensure consistency and efficiency across all of Employer's car wash locations. Claimant also threatened to force another employee to quit and exhibited an overall lack of care about his job. Mr. Salazar summarized that the cause for Claimant's termination was tardiness on six occasions. Other factors included inappropriate comments to other employees, several instances of subordination and poor customer service.

8. As found, Mr. Liberge also credibly commented that there were multiple concerns with Claimant's job performance during his employment. All of the concerns were related to Claimant's conduct. Mr. Liberge stated he personally visited the location where Claimant was a general manager. After speaking with Claimant and attempting to coach and redirect him, he did not leave with a feeling that any of the performance issues would be addressed. Claimant's performance was unsatisfactory, and he failed to use opportunities for improvement or follow directions from his supervisors.

9. As found, in contrast, Claimant testified that Employer never told him that arriving late for work was a concern. He noted the store was open every day on time. Claimant explained that he never received an Employee Handbook. Employer also did not apprise him of the reasons for his termination. However, Claimant's testimony that he was unaware that he could be terminated for his conduct is simply not credible. Mr. Salazar remarked that employees received training on Employer policies and guidelines. Although Claimant did not obtain a written copy of Employer's Handbook, the materials were reviewed during new hire orientation. Moreover, the Handbook was available for employees to access anytime on Employer's website.

10. As found, Claimant's termination was not predicated on his work-related injuries, but on his violation of Employers' policies, lateness to work on numerous occasions during a short period of time, poor performance and insubordination. Claimant's actions in failing to adhere to Employer's attendance policies and deficiencies in job performance demonstrate that he exercised some control over his October 1, 2024

termination under the totality of the circumstances. Claimant precipitated his employment termination by volitional acts that he would reasonably expect to cause the loss of employment. Accordingly, Claimant was responsible for his termination from employment and is precluded from receiving TTD benefits after October 1, 2024.

ORDER

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

1. Claimant was responsible for his termination from employment and is precluded from receiving TTD benefits after October 1, 2024.

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

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

DATED: April 10, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-276-942-001

ISSUES

- Did Claimant prove she suffered a compensable injury to her left shoulder on September 28, 2022?

- If the claim is compensable, did Claimant prove entitlement to medical benefits, including a March 4, 2024, appointment at Concentra?

- The parties agreed to reserve the issues of AWW and temporary disability benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a delivery driver, delivering frozen foods and meals to residential customers. She typically worked 8- to 12-hour shifts, five days per week. The job required lifting up to 50 pounds on a regular basis.

2. On September 28, 2022, Claimant was retrieving items from a shelving unit in her vehicle, when a tray holding containers of ice cream became unbalanced and fell. She caught the tray at approximately waist level. When she did so, Claimant felt a sharp, stabbing pain in her left shoulder.

3. Claimant took a break for approximately 30 minutes to allow the pain to subside. The initial "severe" pain improved to a "mild" level, and she resumed working. Claimant testified that she limited the use of her left arm during the remainder of her shift. But she did not leave early or lose any wages.

4. Claimant called her supervisor immediately after the accident and was instructed to call Insurer's "1-800 number" to report the injury. Claimant's supervisor advised it was "up to her" if she wanted to see a doctor. Claimant called the 1-800 number and completed an accident report. She declined an offer of medical treatment because "I figured I would just tough it out."

5. Thereafter, Claimant worked her regular job and sought no treatment for the left shoulder for more than a year. Claimant testified she occasionally had difficulty handling food items because of the shoulder pain and skipped delivery of certain items because they were too heavy. However, there is no persuasive evidence she missed any time or lost any wages because of her left shoulder.

6. Employer had financial difficulties in 2023 and eventually closed the branch where Claimant worked around November 2023. Employer ceased operations shortly thereafter.

7. Claimant saw her private physicians several times between August 2023 and December 2023 for unrelated conditions, with no mention of any left shoulder issues. This includes a November 20, 2023 appointment with Dr. Ashima Singh, at which Claimant provided a relatively comprehensive history outlining chronic neck and back pain and other general health issues. Claimant reported "distress" about losing her job but said nothing about any left shoulder injury or symptoms.

8. On December 4, 2023, Claimant told her PCP that her longstanding anxiety had worsened when she lost her job with Employer. She again did not mention any left shoulder issues.

9. The first medical report referencing Claimant's left shoulder is a December 21, 2023 note from Dr. Singh. Claimant's primary concern at that appointment was a recent visit to the ER for severe neck pain and headaches. However, she also reported that "a year and a half ago she injured her left shoulder at work. She has been having difficulty raising her arm. . . . She did not pursue further treatment because she wanted to keep working." Examination of the left shoulder showed weakness in abduction and adduction. Empty can test and Hawkins test were positive. Dr. Singh suspected a rotator cuff tear but made no treatment recommendation because Claimant wanted wait until she could determine if her workers' compensation claim was "still valid."

10. Claimant contacted Respondents and asked to see a doctor for her shoulder. Claimant was referred to Concentra, where she saw Dr. Tanya Hrabal on March 4, 2024. Claimant reported that she injured her left shoulder in September 2022 while pulling a tray of ice cream from her vehicle. She stated, "she will go a long time without pain and then do something to aggravate it and it will hurt again." Claimant said she could not raise her arm above shoulder level and that reaching to the side was painful. Dr. Hrabal concluded that Claimant did not suffer a work injury. She put Claimant at MMI and released her with no impairment and no restrictions.

11. At hearing, Claimant agreed her shoulder symptoms were intermittent rather than continual but disputed the characterization that she went "a long time" without symptoms. She testified that the symptom-free intervals typically lasted 2-4 weeks.

12. Claimant went to the St. Mary Corwin Hospital Emergency Department on March 22, 2024, for evaluation of left shoulder pain. Claimant complained of "intermittent" left shoulder pain for one and a half years since an incident at work. Claimant stated, "she dealt with the pain and never got evaluated." X-rays showed mild arthritic changes but no acute pathology. Claimant was prescribed lidocaine patches and Voltaren gel, and referred to an orthopedic surgeon "per her request."

13. Dr. Mark Failinger performed an IME for Respondents on January 18, 2025. Claimant told Dr. Failinger she was offered medical treatment when she reported the injury but had declined. She said her shoulder pain subsequently waxed and waned over the next two years and she "learned to live with" it. Claimant told Dr. Failinger she had an MRI of the left shoulder in June 2024, and was told it showed a partial rotator cuff tear. Claimant saw an orthopedic surgeon, Dr. Craig Fossee in September 2024, who performed two cortisone injections and referred Claimant to therapy. [1]

14. Dr. Failinger opined that the mechanism described by Claimant could reasonably cause a "mild strain" but would not normally be expected to cause any long-term or permanent structural injury to the rotator cuff, labrum, or biceps tendon. Such strains typically heal in six to eight weeks. Dr. Failinger considered it important that Claimant sought no treatment for 18 months after the incident, and did not report shoulder issues to providers she saw for other conditions during that interval, despite working a "relatively physical job" that required reaching and lifting in overhead positions and carrying food items. Therefore, Dr. Failinger concluded that any strain had resolved long before the first report of shoulder symptoms in March 2024.

15. Dr. Failinger reiterated and expanded on his opinions in his deposition testimony. Dr. Failinger opined that Claimant's description of waxing and waning symptoms in the 18 months after the incident is consistent with degeneration changes and arthritis, rather than an acute injury. Dr. Failinger testified that, in his experience, partial rotator cuff tears are typically degenerative in nature. Dr. Failinger concluded that Claimant's recurring shoulder symptoms were, with very high medical probability, due to ongoing osteoarthritis and degenerative rotator cuff pathology, rather than any permanent pathology caused by the alleged work accident in September 2022.

16. Dr. Failinger's opinions are credible and persuasive.

17. Claimant testified that even though she reported the accident to Employer, she did not pursue treatment because she was worried about losing her job. Claimant testified there were instances where her supervisor had been upset with other employees who had called off from work. However, Claimant conceded that Employer had covered a previous claim involving her right shoulder.

18. Claimant failed to prove she suffered a compensable injury to her left shoulder on September 28, 2022. Although Claimant may have suffered a minor strain, she sought no treatment and continued working her regular job until November 2023, when her position was eliminated for economic reasons. Dr. Failinger is persuasive that the symptoms Claimant reported when she finally sought treatment for the shoulder were unrelated to the incident in September 2022. Because the accident did not proximately cause disability or a need for medical treatment, it did not give rise to a compensable "injury."

[1] Neither the MRI report nor Dr. Fossee's records were offered at hearing.

CONCLUSIONS OF LAW

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

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 and caused symptoms does not 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).

As found, Claimant failed to prove she suffered a compensable injury on September 28, 2022. Although Claimant may have suffered minor soft tissue strain, she received no treatment for it. Nor is there persuasive evidence that the incident proximately caused disability or a wage loss. Claimant's allegation of significant ongoing symptoms and limitations is undermined by her failure to mention any shoulder problems at multiple medical appointments before December 2023—nearly 18 months after the accident. Dr. Failinger is persuasive that any minor strain had resolved well before then. The shoulder symptoms Claimant reported in December 2023 and thereafter probably reflect the natural progression of a degenerative process, without contribution from the incident at work.

Because the September 28, 2022 incidenet did not proximately cause a disability or need for medical treatment, there was no compensable "injury."

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 27(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 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 11, 2025

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

1. Whether Respondents' failure to fully comply with the requirements of Rule 16-7-2, WCRP, shall be deemed authorization of the disputed bilateral hip replacement surgery.

FINDINGS OF FACT

1. On May 10, 2023, Claimant's authorized treating physician, Dr. White, submitted a request for prior authorization for bilateral hip replacement surgery. Respondents received the request on May 11, 2023.

2. On May 18, 2023, Respondents sent a response to Dr. White advising that the request for prior authorization was denied pending an independent medical examination scheduled with Dr. Timothy O'Brien, which had been scheduled to take place on July 13, 2023, sixty-three days from the date of the request for prior authorization. There had been no order extending the time limit for the IME beyond sixty days.

3. Dr. O'Brien issued a report on July 31, 2023, and concluded that the hip replacement surgery was related. However, in that report, he did not address whether the surgery requested by Dr. White was reasonable and necessary.

4. Dr. O'Brien did not send a copy of his July 31, 2023, report to all parties concurrently. Instead, he sent it only to Respondents' counsel on August 4, 2023. By the time Dr. O'Brien provided his report to Respondents, twenty-two days had already passed from the date the IME was performed. Dr. O'Brien did not serve his July 31, 2023 report to all parties within twenty days of the July 13, 2023 exam as required by Rule 16-7-2(E)(2), WCRP (2023).

5. Respondents' counsel exchanged Dr. O'Brien's report with Claimant's counsel on August 8, 2023.

CONCLUSIONS OF LAW

Generally

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

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

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

"Deemed Authorization"

Claimant argues that the prior authorization for her bilateral hip replacement surgery should be deemed automatically authorized pursuant to Rule 16-7-2(E) because Respondents failed to fully comply with all required timing provisions, including scheduling and report deadlines for the IME. She contends that compliance with only the initial scheduling and notification step is insufficient, as the rule mandates full and timely

compliance with all subparts, including an IME within sixty days, and a timely and simultaneous exchange of the IME report.

Respondents in turn argue that because they scheduled an IME and notified Dr. White of the IME within ten days of the request for prior authorization, there exists an exception to the "deemed authorization" provision contained in Rule 16-7-2(E).

Rule 16-7-2, WCRP (2023), as it was in effect at the time of the request for prior authorization, read in relevant part:

> *. . . (B) The payer shall have 10 days from the date of the appeal to issue a final decision and provide documentation of that decision to the provider and parties.*
>
> *. . .*
>
> *(E) Failure of the payer to timely comply in full with all Prior Authorization requirements outlined in this rule shall be deemed authorization for payment of the requested treatment unless the payer has scheduled an [IME] and notified the requesting provider of the IME within the time prescribed for responding.*
>
> *1. The IME must occur within 30 days, or upon first available appointment, of the Prior Authorization request, not to exceed 60 days absent an order extending the deadline.*
> *2. The IME physician must serve all parties concurrently with the report within 20 days of the IME.*
> *3. The payer shall respond to the Prior Authorization request within 10 days of the receipt of the IME report.*
> *4. If the injured worker does not attend or reschedules the IME, the payer may deny the Prior Authorization request pending completion of the IME.*
> *5. The IME shall comply with Rule 8 as applicable.*

In other words, Rule 16-7-2 plainly established that failure to comply in full with all prior authorization requirements is not deemed authorization if the respondents otherwise schedule an IME and notify the requesting physician of the IME within ten days of his request for prior authorization. Therefore, so long as respondents schedule an IME and notify the requesting physician within ten days of the request, failure to comply in full with all prior authorization requirements is not "deemed authorization." Indeed, such a reading is consistent with the purpose of Rule 16, as it affords the provider adequate notice that payment is not guaranteed. *See Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (2007)("The purpose of Rule 16 is to offer protection to an authorized treating physician from providing treatment that the insurer later challenges as non-compensable.")

Here, Respondents scheduled an IME with Dr. O'Brien and provided Dr. White notice of the IME within ten days of the request for prior authorization. Therefore, Respondents' failure to obtain the IME within sixty days or to timely exchange the IME

report, while perhaps a valid basis for monetary penalties, is not "deemed authorization" pursuant to Rule 16-7-2.

The Court therefore concludes that Dr. White's request for prior authorization is not deemed authorized by virtue of Respondents' failure to fully comply with Rule 16-7-2.

ORDER

It is therefore ordered that:

1. Dr. White's request for prior authorization is not deemed authorized by virtue of Respondents' failure to fully comply with Rule 16-7-2.

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 11, 2025.

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

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 for three to

[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.

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:

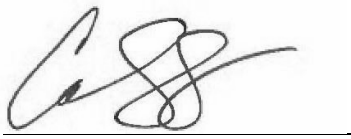
1. Respondents have overcome, by clear and convincing evidence, the opinions of DIME physician on MMI and permanent impairment.

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.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-279-677-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable left upper extremity injuries during the course and scope of his employment on March 25, 2024.

2. Whether Claimant has proven by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his March 25, 2024 industrial injuries.

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits.

5. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits.

6. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his June 5, 2024 termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a Lead Carpenter. On March 25, 2024 Claimant ran out of materials he needed to complete a project. He thus drove to Home Depot to obtain supplies.

2. After Claimant completed his shopping, he exited the Home Depot pushing a flat-bed cart through the parking lot. However a pickup truck struck Claimant and the flat-bed cart. The impact knocked Claimant back about 5 or 6 feet and he fell to the ground.

3. Claimant testified that, when he was struck by the truck, he flung his left arm behind him to brace his fall. He remarked that he impacted the ground with his left wrist while his left arm was extended. The force of the impact extended up through his left shoulder.

4. EMT personnel arrived at the scene and transported Claimant to Good Samaritan Emergency Department. The EMT reports reflect that Claimant noted

symptoms to his right hip, right back and right wrist. Claimant did not report any injuries to his left upper extremity.

5. A physical examination and diagnostic imaging at the Emergency Department revealed normal findings with no acute injuries. Claimant was then discharged to home care.

6. Claimant explained that, over the course of several days after the accident, he began experiencing significant symptoms and functional deficits in his left arm, wrist and shoulder.

7. Claimant commented that his supervisor Mr. Brock had contacted him and asked if he could return to work. Claimant responded that he was unable to lift his saw, but Mr. Brock noted he could provide Claimant with an assistant to help perform his job duties as a carpenter. Claimant remarked that Ronald Martinez was assigned to assist him with various job tasks including lifting heavy items.

8. Employer's Office Manager Cheryl Swihart confirmed that, after taking one day off on Sunday, March 25, 2024 following the Home Depot incident, Claimant returned to full duty work on Monday, March 26, 2024. He worked regular shifts and hours until his termination on June 5, 2024. Claimant had no ongoing symptoms and did not request additional medical care. There was also no indication that Claimant was suffering from left shoulder, left elbow, or left upper extremity symptoms. Claimant did not lose any wages between the date of injury and his date of termination, other than the day following the accident. He did not miss three regular work shifts.

9. Employer's Project Manager Eric Didlott testified at the hearing. He worked with Claimant following the March 25, 2024 work accident. Mr. Didlott did not observe any ongoing complaints, symptoms or limitations in Claimant's left shoulder, left elbow, or left upper extremity.

10. Employer's Project Manager Zachary Brock also testified at the hearing. He explained that Claimant did not report any symptoms after the Home Depot accident. Mr. Brock commented that he never provided Claimant with a helper to complete his job duties. However, he recognized that he occasionally had an employee work with Claimant for purposes of training, Nevertheless, it would not have made sense to assign Claimant to jobs where he needed assistance because Claimant was Employer's most expensive employee,

11. On June 5, 2024 Claimant was terminated based on two specific incidents. On June 4, 2024 Mr. Brock was present when Claimant came into the office and confronted owner Omar Ashour about tires on his work vehicle. He noted that Claimant had become upset and argumentative, accusing Mr. Ashour of not taking care of his truck. The incident occurred in front of other coworkers and subcontractors. On June 5, 2024 Mr. Brock received a call from a client who reported feeling unsafe in her own home due to Claimant's aggressive conduct regarding a microwave installation. She was not

comfortable and told Claimant to leave. Mr. Brock noted the two preceding scenarios were sufficient grounds for termination. Ms. Swihart also commented that Claimant would have understood the reasons for his termination. She noted that the Employee Handbook included sections outlining work ethic and etiquette. Specifically, the Handbook at Respondents' Exhibit J, page 11, provides that employees must maintain a certain level of courtesy and professionalism at all times, including interactions with customers and colleagues. A failure to abide by these directives could result in termination.

12. The record reflects that Claimant suffered from a pre-existing left upper extremity condition. Medical records dated February 16, 2024 from Lone Tree Family Practice, or about five weeks before the Home Depot incident, reveal that Claimant's chief complaints were elbow pain, bilateral shoulder pain and finger pain. The condition had been occurring periodically for years but was now unrelenting. Claimant also had burning down his left arm for one week prior to his visit. Claimant underwent a left shoulder x-ray and was referred for physical therapy for range of motion limitations in the left shoulder.

13. The medical records also reveal that Claimant did not seek any additional medical care for his March 25, 2024 work injury until June 11, 2024 or almost six weeks after the accident and six days after his termination. On June 11, 2024 Claimant visited his Primary Care Physician (PCP) at Lone Tree Family Practice. He reported that he was experiencing pain and limited range of motion in his left shoulder. Claimant underwent a left shoulder MRI to assess his condition.

14. On June 20, 2024 Claimant visited Peak Orthopedics/Advent Health Orthopedics for an examination. He was evaluated by Physician Assistant Kristen Bradley. Claimant reported that his left shoulder pain began five months earlier without specific injury or trauma. However, PA-C Bradley noted "within the last six weeks he had been hit by a car in a parking lot on an outstretched left arm with worsening symptoms since then." Claimant mentioned he had undergone multiple forms of conservative management including rest, ice and heat, anti-inflammatory medication, activity modification and physical therapy without improvement. PA-C Bradley noted the MRI revealed "high-grade bursal sided near full thickness tear supraspinatus infraspinatus tendinosis subscapularis tendinosis with low-grade partial tear long head of biceps tendinosis with medial subluxation tearing superior and inferior aspects of labrum with adjacent paralabral cyst. AC joint DJD." She remarked that the MRI correlated with Claimant's symptoms and recommended surgery in the form of arthroscopic rotator cuff repair, subacromial decompression, distal clavicle excision, and biceps tendonesis.

15. On June 28, 2024 Claimant underwent left shoulder surgery with Mark Fitzgerald, M.D. Following the successful left upper extremity surgery, Dr. Fitzgerald recommended a course of physical therapy with Select Physical Therapy. However, Claimant was unable to complete physical therapy because Respondents denied the claim.

16. On July 22, 2024 Claimant filed his claim for compensation. The filing occurred almost one month after his left shoulder surgery and about six weeks after his termination. On August 15, 2024 the matter was placed on a Notice of Contest for initial investigation and review of medical records.

17. Based on Claimant's left elbow symptoms, Dr. Fitzgerald referred Claimant to specialist In Sok Yi, M.D. who worked in Dr. Fitzgerald's office. On November 18, 2024 Claimant began obtaining treatment with Dr. Sok Yi at Advent Health Medical Group, Orthopedics & Spine at Inverness (a name change from Peak Orthopedics). Claimant reported numbness and tingling in his left ring and small finger as well as pain in his left elbow that started a few weeks after his work accident. Claimant underwent an elbow joint injection and was directed to proceed with an MRI. Because Claimant was also developing cubital tunnel syndrome, Dr. Sok Yi recommended EMG testing.

18. Claimant completed the recommended imaging of his left elbow. Based on the results, Dr. Sok Yi diagnosed Claimant with a tendon tear in his left elbow and recommended surgery following an unsuccessful course of steroid injections. Dr. Sok Yi has specifically requested authorization for a left cubital tunnel release, a left elbow arthroscopy with joint debridement, and debridement of the lateral epicondylitis. Respondents denied the surgical request.

19. Claimant testified at the hearing. He explained that, following the March 25, 2024 work accident, he took one day off from work and returned to full duty on the following day. Claimant commented that Employer provided him with helper Ronald Martinez because he could not carry his saw due to his ongoing symptoms. Claimant ultimately underwent left shoulder surgery and left elbow surgery that provided some relief.

20. Regarding his June 5, 2024 termination, Claimant acknowledged he was informed that the action involved a disagreement with a customer. He was aware that the owner of a home where he was working, had gotten upset with him after he had told her to just let him finish his job. Claimant denied being angry with her or arguing. He also acknowledged that one day earlier, on June 4, 2024, he had a disagreement with Employer's owner Mr. Ashour. Claimant explained he was getting flat tires on his work truck and attempting to obtain new tires. He had anticipated receiving new tires from Employer but found that Employer had merely placed temporary patches. The tires remained bald. Claimant thus confronted Mr. Ashour in the office while in the presence of other employees and subcontractors. He confirmed that he was aware his actions could warrant termination and told his wife that he might be fired.

21. On October 24, 2024 Claimant underwent an Independent Medical Examination (IME) with Qing-Min Chen, M.D. He reviewed Claimant's medical records and conducted a physical examination. Dr. Chen noted that Claimant's mechanism of injury involved pushing a flat-bed cart while exiting a Home Depot. A pickup truck struck Claimant's flat-bed cart and knocked him back five to six feet. Claimant caught himself on the pavement with his outstretched left arm. At the emergency room Claimant noted

severe right lateral hip pain where he was struck by the cart, Imaging did not reveal any fractures and Claimant was discharged home. Dr. Chen diagnosed Claimant with a left shoulder high-grade, bursal-sided supraspinatus tendon tear, left shoulder impingement syndrome with rotator cuff tendinosis, and left shoulder degenerative biceps tendinosis with medial subluxation. All of the conditions were pre-existing and not related to the Home Depot incident.

22. Based on the history provided, Dr. Chen did not believe Claimant suffered a traumatic rotator cuff tear or aggravation on March 25, 2024. He explained that traumatic rotator cuff tears are very painful and symptomatic. An individual would not ignore the symptoms for about three months. Based on Claimant's delay in treatment from March until June, Dr. Chen determined his left shoulder symptoms constituted "a natural progression of his underlying disease process more so than anything that is related to his occupation." Moreover, a medical record from June 25, 2024 revealed that Claimant began having left shoulder pain without any specific injury or trauma about five months earlier. Dr. Chen remarked that the symptoms were consistent with both impingement syndrome and a likely bursal-sided tear. He explained that, as the shoulder continues to impinge on itself over time, the acromion will start cutting in on the bursal side of the rotator cuff. Based on Claimant's chronology of symptoms, he suffered from a pre-existing left shoulder condition unrelated to the Home Depot accident.

23. In reviewing additional medical records on February 25, 2025, Dr. Chen addressed Claimant's left elbow symptoms. He remarked that Claimant did not report his left elbow condition until approximately August 2024 or about five months after the Home Depot incident. Dr. Chen explained that there was no evidence of a tendon tear pulling itself off a bone, or other indication of a traumatic injury. There was also no evidence of an aggravation of Claimant's pre-existing left elbow osteoarthritis. Dr. Chen summarized that cubital and carpal tunnel syndrome are idiopathic conditions that do not occur from traumatic injuries. The March 25, 2024 accident at Home Depot did not cause or change Claimant's cubital and carpal tunnel syndrome. Claimant's need for elbow surgery or cubital and carpal tunnel releases is thus not causally related to his work accident.

24. On March 14, 2025 the parties conducted the post-hearing evidentiary deposition of Dr. Chen. He maintained that Claimant's left upper extremity symptoms were not causally related to the March 25, 2024 Home Depot accident. Moreover, the incident did not aggravate Claimant's pre-existing left upper extremity conditions. Dr. Chen detailed that Claimant had subjective complaints of left shoulder and elbow pain prior to the accident. Even a couple of weeks prior to the event Claimant described the same constellation of symptoms. Importantly, on March 25, 2024 Claimant fell on his right-hand side and right arm and did not report left upper extremity symptoms on the date of the incident. After considering MRIs of the left shoulder and elbow, Dr. Chen determined there was no evidence of left upper extremity trauma from the March 25, 2024 accident. He also reiterated that Claimant suffered from left upper extremity degenerative, idiopathic, or overuse conditions.

25. Claimant has failed to establish it is more probably true than not that he suffered compensable left upper extremity injuries during the course and scope of his employment on March 25, 2024. Initially, Claimant testified that, when he was struck by the truck on March 25, 2024, he flung his left arm behind him to brace his fall. He remarked that he impacted the ground with his left wrist while his left arm was extended. The force of the impact extended up through his left shoulder. However, EMT reports reflect that Claimant only noted symptoms to his right hip, right back and right wrist. Claimant did not report any injuries to his left shoulder, left elbow or left upper extremity. A physical examination and diagnostic imaging in the emergency room revealed normal findings. Claimant was then discharged to home care. Claimant now contends that he suffered left upper extremity injuries to his shoulder and elbow that required surgical treatment. Because the bulk of the evidence, credible testimony and persuasive medical opinions reflect that Claimant did not suffer any left upper extremity injuries or an aggravation of his condition on March 25, 2024, his claim fails.

26. The record reveals that Claimant has a history of pre-existing left upper extremity symptoms. Medical records dated February 16, 2024 from Lone Tree Family Practice, or about five weeks before the Home Depot incident, reveal that Claimant's chief complaints were elbow pain, bilateral shoulder pain and finger pain. The condition had been occurring periodically for years but had now become unrelenting. Claimant received treatment for his condition including x-rays and other related care. Moreover, on June 20, 2024 Claimant visited Peak Orthopedics/Advent Health Orthopedics and reported that his left shoulder pain began five months earlier without specific injury or trauma. The record thus demonstrates that Claimant had been experiencing left upper extremity symptoms prior to the March 25, 2024 Home Depot incident that were similar to those described days after the event.

27. Claimant also did not report any left-sided injuries on March 25, 2024. All representations to the EMTs and medical providers limited his symptoms to his right hip and possibly right hand. Claimant confirmed that he did not have symptoms to the left side of his body or his extremities until days after the incident. The medical records also reveal that Claimant did not seek any additional medical care for his March 25, 2024 work injury until June 11, 2024 or almost six weeks after the accident and six days after his termination. On June 11, 2024 Claimant visited his PCP and reported that he was experiencing pain and limited range of motion in his left shoulder. It is unlikely that Claimant would have suffered a significant traumatic rotator cuff tear or elbow hyperextension and delay seeking treatment from March until June. Moreover, Claimant did not report his left elbow symptoms until approximately August 2024 or about five months after the Home Depot incident. When Claimant disclosed his symptoms to Dr. Sok Yi he did not relate them to any trauma from March 25, 2024.

28. Employer witnesses credibly testified that Claimant did not report any ongoing symptoms, limitations, or otherwise request additional medical care after March 25, 2024. Claimant did not demonstrate any evidence of left-sided limitations or injuries after returning to full duty work. Moreover, Mr. Brock credibly commented that he never

provided Claimant with a helper to complete his job duties. Although Claimant acknowledged that he only took one day off after the Home Depot accident and then returned to full duty work, he remarked that Employer provided him with a helper to complete his tasks because of ongoing symptoms. However, Claimant's testimony is simply not credible because the record reveals he did not mention any continuing symptoms to Employer. Furthermore, Mr. Brock recognized that he occasionally had an employee work with Claimant for purposes of training, but it did not make sense to assign Claimant to jobs where he needed assistance because he was Employer's most expensive employee,

29. The persuasive expert medical opinion of Dr. Chen also reflects that Claimant did not likely injure his left upper extremity, including his shoulder and elbow, on March 25, 2024. Dr. Chen maintained that Claimant's left upper extremity symptoms were not causally related to the March 25, 2024 Home Depot accident. Based on the history from March 25, 2024, Dr. Chen did not believe Claimant suffered a traumatic rotator cuff tear or aggravation. He explained that traumatic rotator cuff tears are very painful and symptomatic. An individual would not ignore the symptoms for about three months. Based on Claimant's delay in treatment from March until June, Dr. Chen determined his left shoulder symptoms constituted "a natural progression of his underlying disease process more so than anything that is related to his occupation." Moreover, a medical record from June 25, 2024 revealed that Claimant began having left shoulder pain without any specific injury or trauma about five months earlier. Similarly, Dr. Chen addressed Claimant's left elbow and reasoned that cubital and carpal tunnel syndrome are idiopathic conditions that do not occur from traumatic events. The March 25, 2024 accident at Home Depot did not cause or alter Claimant's cubital and carpal tunnel syndrome. Claimant's need for elbow surgery or cubital and carpal tunnel releases is thus not causally related to his work accident. Dr. Chen summarized that the Home Depot accident did not aggravate Claimant's left upper extremity degenerative or idiopathic pre-existing conditions.

30. Although Claimant contended that he injured his left upper extremity when he was struck by a truck in a Home Depot parking lot on March 25, 2024, the bulk of the evidence does not support his contention. He has failed to demonstrate it is more probably true than not that the Home Depot accident proximately caused his left upper extremity conditions. The record also reveals that the accident did not aggravate, accelerate, or combine with Claimant's pre-existing conditions to produce a need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo.

306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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

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

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

7. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered compensable left upper extremity injuries during the course and scope of his employment on March 25, 2024. Initially, Claimant testified that, when he was struck by the truck on March 25, 2024, he flung his left arm behind him to brace his fall. He remarked that he impacted the ground with his left wrist while his left arm was extended. The force of the impact extended up through his left shoulder. However, EMT reports reflect that Claimant only noted symptoms to his right hip, right back and right wrist. Claimant did not report any injuries to his left shoulder, left elbow or left upper extremity. A physical examination and diagnostic imaging in the emergency room revealed normal findings. Claimant was then discharged to home care. Claimant now contends that he suffered left upper extremity injuries to his shoulder and elbow that required surgical treatment. Because the bulk of the evidence, credible testimony and persuasive medical opinions reflect that Claimant did not suffer any left upper extremity injuries or an aggravation of his condition on March 25, 2024, his claim fails.

8. As found, the record reveals that Claimant has a history of pre-existing left upper extremity symptoms. Medical records dated February 16, 2024 from Lone Tree Family Practice, or about five weeks before the Home Depot incident, reveal that Claimant's chief complaints were elbow pain, bilateral shoulder pain and finger pain. The condition had been occurring periodically for years but had now become unrelenting. Claimant received treatment for his condition including x-rays and other related care. Moreover, on June 20, 2024 Claimant visited Peak Orthopedics/Advent Health Orthopedics and reported that his left shoulder pain began five months earlier without specific injury or trauma. The record thus demonstrates that Claimant had been experiencing left upper extremity symptoms prior to the March 25, 2024 Home Depot incident that were similar to those described days after the event.

9. As found, Claimant also did not report any left-sided injuries on March 25, 2024. All representations to the EMTs and medical providers limited his symptoms to his right hip and possibly right hand. Claimant confirmed that he did not have symptoms to the left side of his body or his extremities until days after the incident. The medical records also reveal that Claimant did not seek any additional medical care for his March 25, 2024 work injury until June 11, 2024 or almost six weeks after the accident and six days after his termination. On June 11, 2024 Claimant visited his PCP and reported that he was experiencing pain and limited range of motion in his left shoulder. It is unlikely that Claimant would have suffered a significant traumatic rotator cuff tear or elbow hyperextension and delay seeking treatment from March until June. Moreover, Claimant did not report his left elbow symptoms until approximately August 2024 or about five months after the Home Depot incident. When Claimant disclosed his symptoms to Dr. Sok Yi he did not relate them to any trauma from March 25, 2024.

10. As found, Employer witnesses credibly testified that Claimant did not report any ongoing symptoms, limitations, or otherwise request additional medical care after March 25, 2024. Claimant did not demonstrate any evidence of left-sided limitations or injuries after returning to full duty work. Moreover, Mr. Brock credibly commented that he never provided Claimant with a helper to complete his job duties. Although Claimant acknowledged that he only took one day off after the Home Depot accident and then

returned to full duty work, he remarked that Employer provided him with a helper to complete his tasks because of ongoing symptoms. However, Claimant's testimony is simply not credible because the record reveals he did not mention any continuing symptoms to Employer. Furthermore, Mr. Brock recognized that he occasionally had an employee work with Claimant for purposes of training, but it did not make sense to assign Claimant to jobs where he needed assistance because he was Employer's most expensive employee,

11. As found, the persuasive expert medical opinion of Dr. Chen also reflects that Claimant did not likely injure his left upper extremity, including his shoulder and elbow, on March 25, 2024. Dr. Chen maintained that Claimant's left upper extremity symptoms were not causally related to the March 25, 2024 Home Depot accident. Based on the history from March 25, 2024, Dr. Chen did not believe Claimant suffered a traumatic rotator cuff tear or aggravation. He explained that traumatic rotator cuff tears are very painful and symptomatic. An individual would not ignore the symptoms for about three months. Based on Claimant's delay in treatment from March until June, Dr. Chen determined his left shoulder symptoms constituted "a natural progression of his underlying disease process more so than anything that is related to his occupation." Moreover, a medical record from June 25, 2024 revealed that Claimant began having left shoulder pain without any specific injury or trauma about five months earlier. Similarly, Dr. Chen addressed Claimant's left elbow and reasoned that cubital and carpal tunnel syndrome are idiopathic conditions that do not occur from traumatic events. The March 25, 2024 accident at Home Depot did not cause or alter Claimant's cubital and carpal tunnel syndrome. Claimant's need for elbow surgery or cubital and carpal tunnel releases is thus not causally related to his work accident. Dr. Chen summarized that the Home Depot accident did not aggravate Claimant's left upper extremity degenerative or idiopathic pre-existing conditions.

12. As found, although Claimant contended that he injured his left upper extremity when he was struck by a truck in a Home Depot parking lot on March 25, 2024, the bulk of the evidence does not support his contention. He has failed to demonstrate by a preponderance of the evidence that the Home Depot accident proximately caused his left upper extremity conditions. The record also reveals that the accident did not aggravate, accelerate, or combine with Claimant's pre-existing conditions to produce a need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

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

DATED: April 18, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-260-718-002

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that Insurer failed to timely deny the requested treatment pursuant to WCRP Rule 16-7.[1]

2. If Insurer failed to timely deny the requested treatment, whether Claimant must prove by a preponderance of the evidence that the bilateral transforaminal epidural steroid injections at L3-L4 recommended by Dr. Tam Nguyen are reasonable, necessary, and casually related to Claimant's December 4, 2023 work injury.

FINDINGS OF FACT

1. Claimant is a 63-year-old male employed as a material handler with Employer. Claimant suffered an admitted work injury on December 4, 2023. Ex. C.

2. On December 15, 2023, Claimant underwent a lumbar posterolateral fusion at L4-L5 and L5-S1 with Daniel Robert Possley, D.O. at Platte Valley Hospital. Ex. J.

3. Between December 2023 and August 2024, Claimant participated in physical therapy for his lower back, Ex. O, and he attended follow-up appointments for his lumbar posterolateral fusion with Lee Michael Fonseca, N.P., at Plate Valley Clinic – Spine, Ex. L.

4. On July 6, 2024, Nurse Fonseca recommended Claimant undergo bilateral transforaminal epidural steroid injections (TFESI) at L3-L4 based on Claimant "having some right leg weakness [at] the L4 dermatome distribution of the leg." Ex. L p. 147-48; *see* Ex. K p. 110.

5. Claimant was referred to Premier Spine & Pain Institute for the bilateral TFESI at L3-L4.

6. On August 23, 2024, Shandria Fontaine from Premier Spine & Pain Institute sent a fax to Insurer requesting prior authorization for the bilateral TFESI at L3-L4. Ex. N. Tam Nguyen, M.D., is the requesting provider. *Id.*

7. Claimant was scheduled to undergo the bilateral TFESI at L3-L4 on September 3, 2024. Ex. N.

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[1] The ALJ refers to the Workers' Compensation Rules of Procedure in effect on August 23, 2024, the date the prior authorization request at issue was submitted to Insurer. The regulations in effect at that time can be found at https://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=11530&fileName=7%20CCR%201101-3%20Rules%201-17 (last visited April 18, 2025).

8. Shaina Carter, a Senior Claims Representative with Insurer, testified at hearing. Ms. Carter credibly testified that she received the prior authorization request on August 23, 2024. *See* Ex. N p. 167.

9. Ms. Carter credibly testified that once she received the prior authorization request, she saved the request to Insurer's claim file and informed "central UR," Insurer's utilization review team, of the request.

10. Frank D. Polanco, M.D., completed a physician review of the prior authorization request for Insurer. Ex. M. Dr. Polanco recommended denying the requested bilateral TFESI at L3-L4. *Id.*

11. Dr. Polanco's recommendation is dated August 30, 2024. Ms. Carter credibly testified that she did not receive the recommendation until the early afternoon of September 3, 2024.

12. Ten days from August 23, 2024 was September 2, 2024. September 2, 2024 was the Labor Day holiday.

13. Ms. Carter credibly testified that on September 3, 2024, once she received Dr. Polanco's recommendation, she called and spoke to Ms. Fontaine at Premier Spine & Pain Institute to tell her that Insurer was denying the requested TFESI.

14. Mike Koons, Medical Operations Central Utilization Review Manager for Insurer, also testified at hearing.

15. On September 3, 2024, at 3:15 p.m., Mr. Koons sent Ms. Fontaine an email stating "[a]ttached is the denial and reviewer's opinion that Shaina mentioned would be coming." Ex. N p. 168. Attached to that email is a letter dated September 4, 2024 denying the requested TFESI. Ex. N p. 171.

16. Ms. Carter credibly testified that when correspondence is placed into Insurer's system, it is available for review online at that time but that hard copies are mailed to the parties the following day. For that reason, the letter attached to Mr. Koons email is dated September 4, 2024 despite being created on September 3, 2024.

17. Insurer did not email Claimant, Claimant's counsel, or Employer on September 3, 2024 to inform them of the denial. Ms. Carter credibly testified that the letter denying the prior authorization request was mailed by Insurer to Claimant, Claimant's counsel, and Employer on September 4, 2024.

18. Claimant did not undergo the bilateral TFESI at L3-L4 on September 3, 2024. Claimant credibly testified at hearing that he did not attend his appointment on September 3, 2024 because a nurse at Premier Spine & Pain Institute informed his wife that Insurer had denied the procedure.

19. Dr. Polanco testified at hearing and was admitted as an expert in occupational medicine and pain management. Dr. Polanco testified that:

a. The requested bilateral TFESI at L3-L4 did not meet the Medical Treatment Guidelines criteria in WCRP Rule 17 Exhibit 1. Particularly, the medical records he reviewed did not establish that Claimant was experiencing severe radicular pain, had positive straight leg raise tests, or had imaging reflecting nerve impingement. *See* Rule 17 Exhibit 1 Section 8 Recommendation 87.

b. Because Claimant's injury had occurred in December 2023, by August 2024 Claimant was no longer in the acute or subacute phase of his injury, which is the time in which TFESI are most effective. In his professional opinion, the risks of undergoing bilateral TFESI at this stage of Claimant's injury outweighs any potential benefit Claimant may receive.

20. The ALJ found Dr. Polanco's testimony generally unpersuasive. On cross-examination, Dr. Polanco conceded his review of Claimant's medical records did not include any records between January 6, 2024 and June 27, 2024. *See* Ex. M. Therefore, Dr. Polanco was missing approximately five of the eight months of post-injury records for Claimant when he came to the opinion that the requested bilateral TFESI was not reasonable or necessary. Dr. Polanco also admitted on cross-examination that he did not rely on his opinion that Claimant was beyond the acute and subacute phase of his injury when recommending denial and that he only reached that opinion upon re-reviewing his report for hearing.

21. Having reviewed the medical records, the ALJ gives greater weight to the recommendations of Claimant's treating providers (that the bilateral TFESI at L3-L4 is reasonable and necessary to treat the effects of Claimant's industrial injury) than Dr. Polanco's opinion to the contrary.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado, section 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. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 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, 318 (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 the weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals Off.*, 43 P.3d 637, 641 (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*. 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. *Bodensieck v. Indus. Claim Appeals Off.*, 183 P.3d 684, 687 (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 Off.*, 55 P.3d 186, 191 (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*, 165 Colo. 504, 506 (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, 389 (Colo. App. 2000).

Timeliness of Denial of Prior Authorization

This proceeding raises the questions of whether Insurer timely denied the prior authorization request for the bilateral TFESI at L3-L4 and, if not, what effect does the untimely denial have? For the reasons discussed below, the ALJ concludes that Insurer failed to comply in full with Rule 16-7 and, therefore, Insurer authorized the requested treatment. As a result, Claimant may undergo the bilateral TFESI at L3-L4 and Insurer must pay for that treatment. Because of the untimely denial, and under the circumstances of this claim, the ALJ concludes Claimant does not have to establish that the requested bilateral TFESI at L3-L4 is causally related, reasonable, and necessary to cure and relieve the effects of his industrial injury because the treatment has been deemed authorized.

Rule 16 contains utilization standards "to assure the quick and efficient delivery of medical benefits at a reasonable cost." Rule 16-1. Rule 16-7 addresses the prior authorization process by which a provider can request authorization to guarantee payment for treatment requested and approved. *See* Rule 16-2(R) (defining prior authorization as "a guarantee of payment for treatment requested in accordance" with Rule 16).

Rule 16-7 sets out the requirements of the prior authorization process for both requesting providers and payers. There is no contention in this proceeding that the prior authorization request submitted by Dr. Nguyen was incomplete, *see* Rule 16-7(C), or was for a treatment for which a prior authorization is not to be requested, *see* Rule 16-7(A).

Under Rule 16-7(B) when a prior authorization request is received "the payer *shall respond* to all Prior Authorization requests *in writing within 10 days* from receipt of a completed request as defined per this Rule." (emphasis added).

> If the payer is denying a request for medical reasons, the payer *shall*, *within 10 days of receipt of the complete request*: Furnish the requesting [authorized treating provider (ATP)] *and the parties* with a *written denial* that sets forth an explanation of the specific medical reasons for the denial, including the name and professional credentials of the provider performing the medical review and a copy of the reviewer's opinion; the specific citation from the MTGs, when applicable; and identification of the information deemed most likely to influence a reconsideration of the denial, when applicable.

Rule 16-7-1(B)(2)(b) (emphasis added). "Failure of the payer to timely comply *in full* with all Prior Authorization requirements outlined in this rule *shall be deemed authorization* for payment of the requested treatment unless the payer has scheduled an independent medical examination (IME) and notified the requesting provider of the IME within the time prescribed for responding." Rule 16-7-2(E) (emphasis added).

Here, the credible evidence establishes the following timeline of events:

- A complete prior authorization request was received by Insurer on August 23, 2024.

- Ten days from August 23, 2024 was September 2, 2024. Because September 2, 2024 was the Labor Day holiday, Insurer had to respond in writing to "the requesting ATP and the parties", Rule 16-7-1(B)(2)(b), by September 3, 2024. *See* Rule 1-2(B) (computation of time).

- On September 3, 2024, Insurer provided Premier Spine & Pain Institute, the requesting ATP, with a written denial of the prior authorization request.

- On September 4, 2024, Insurer provided the parties – Claimant, Claimant's attorney, and Employer – with written denial of the prior authorization request.

Respondents acknowledge that Claimant, Claimant's attorney, and Employer were not provided written denial of the prior authorization request by September 3, 2024. However, Respondents contend that when Insurer sent Ms. Fontaine at Premier Spine & Pain Institute a written denial of the prior authorization request, they substantially complied with Rule 16-7-1(B)(2)(b). *See EZ Bldg. Components Mfg., LLC v. Indus. Claim Appeals Off.*, 74 P.3d 516 (Colo. App. 2003); *Koontz v. Bowser Boutique, Inc.*, W.C. No. 4-359-795 (ICAO, Jan. 13, 2012). Further, because Claimant was informed by Premier Spine & Pain Institute that Insurer had denied the request, Respondents argue that Claimant had actual knowledge of the denial on September 3, 2024.

The ALJ finds no support for Respondents' "substantial compliance" argument in Rule 16-7. Rather, the plain language of Rule 16-7-2(E) requires the payer "comply in full" and, if it fails to do so, the treatment requested "shall be deemed authorized for

payment." *See Gomez v. JP Trucking, Inc.*, 2022 CO 21, ¶ 27 ("[A]s with a statute, if the language of a regulation is unambiguous, we enforce it as written, giving the words and phrases their common and ordinary meaning."). Here, Rule 16-7-1(B)(2)(b) required Insurer to provide *written* notice to the provider *and the parties* by September 3, 2024. Because that did not happen, Insurer did not "comply in full" with the rule and, by operation of Rule 16-7-2(E), the treatment has been deemed authorized.

The ALJ further concludes that the result of the treatment being "deemed authorized" by failure to timely deny is that Claimant does not have to establish at hearing that the treatment is casually related, reasonable, and necessary. Any other interpretation of Rule 16-7-2(E) would render the timeliness requirements of Rule 16-7 meaningless since any payer could ignore the time requirements of the rule and then challenge the treatment on the grounds it is not casually related, reasonable, and/or necessary, resulting in the rule's "deemed authorized" consequence for failure to timely deny having no effect.

Respondents' cite *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (ICAO, May 10, 2007) for the proposition that the ALJ retains jurisdiction to determine whether the requested treatment is reasonable and necessary even when Rule 16 is violated. In *Bekkouche*, the claimant was attending ongoing chiropractic treatments. An application for hearing was filed endorsing the issue of medical benefits to determine the compensability of those treatments. On appeal to the Panel, the claimant argued that because the respondents had not timely denied prior authorization under Rule 16, the respondents were precluded from seeking an adjudication of their liability for those medical benefits from an ALJ. The Panel disagreed with the claimant and concluded that "respondents' default under Rule 16 only required them to provide the ongoing chiropractic care until the matter was resolved by an administrative law judge following a hearing." According to the Panel, "we decline to read Rule 16 to require the defaulting insurer to pay for ongoing treatment indefinitely, with no recourse to the adjudicative procedures."

But in this matter, the prior authorization request is for a single treatment which the Insurer has not paid for. Interpreting Rule 16-7 to allow Respondents' to challenge that treatment here would mean that Insurer's failure to comply in full with the rule had no legal effect despite the rule's clear directive that failure to comply results in a treatment being "deemed authorized." The ALJ considered the possibility that when a payer fails to comply with Rule 16-7, the legal effect should be that the burden shifts from the claimant to prove the treatment is causally related, reasonable, and necessary to the respondents to prove that the authorization was error, but there is simply no authority supporting that type of burden-shifting at this time. Rather, the ALJ is compelled to conclude that when Insurer failed to comply in full with Rule 16-7, it authorized the bilateral TFESI at L3-L4 and Claimant is entitled to undergo that treatment knowing Insurer will pay for it.

ORDER

It is therefore ordered that:

1. Insurer failed to comply in full with Rule 16-7-1(B)(2)(b) when denying Claimant's prior authorization request for bilateral TFESI at L3-L4. Therefore, by operation of Rule 16-7-2(E), Insurer authorized the treatment and must pay for that treatment. As Insurer has authorized payment for the requested treatment, Claimant need not prove by a preponderance of the evidence that the requested bilateral TFESI at L3-L4 is casually related, reasonable, and necessary to relieve the effects of his industrial injury.

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

SIGNED: April 18, 2025.

Robin E. Hoogerhyde
Administrative Law Judge

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 O.A.C.R.P. Rule 27. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury to his neck on August 5, 2024, arising out of and in the course of his employment with Respondent-Employer.

2. Whether Claimant proved by a preponderance of the evidence that his treatment at Midtown Occupational Health Services on August 14, 2024, was reasonably necessary to cure and relieve him of the effects of his August 5, 2024 injury.

FINDINGS OF FACT

1. Claimant is a forklift driver and bricklayer's assistant for Respondent-Employer who alleges a neck injury while physically assisting a coworker with an unstable stack of bricks. Claimant alleges that on August 5, 2024, while working on scaffolding near the end of his shift, Claimant identified an unstable stack of bricks, at which point he braced the bricks with his body while he and a coworker unstacked and restacked the bricks for better stability. Claimant alleged that he developed pain which gradually worsened while carpooling home with coworkers. Claimant reported the injury to his supervisor the next morning.

2. On August 14, 2024, Claimant obtained treatment at Midtown Occupational Health Services where he was attended by Ashley Cary, NP-BC. Claimant reported through an interpreter that "he was attempting to lift and pull towards himself 100 [bricks], which weigh[ed] 400 pounds. He reports the [left side of] his body was well-positioned on the ground but the right side was somewhat unsteady. Patient reports as a result he developed immediate right-sided neck pain." Claimant was referred for and began undergoing massage therapy.

3. Claimant had a follow-up appointment on August 21, 2024, with Dr. Lori Rossi at Midtown, again with the assistance of an interpreter. Dr. Rossi noted that Claimant had been tasked on the date of injury with performing duties such as lifting twenty-pound buckets and climbing ladders as well as lifting two hundred fifty pounds of bricks and that Claimant experienced a significant increase in pain at the end of the day. The Court finds that this is in reference to worsening symptoms Claimant had experienced since returning to work after the injury, as Dr. Rossi later noted that Claimant reported increasing issues with return to work following the injury.

4. Over the next several weeks, Claimant underwent massage therapy, physical therapy, and chiropractic care.

5. Claimant underwent a cervical spine MRI on September 3, 2024, which showed significant multilevel degenerative changes and spondylosis through the cervical spine.

6. On October 2, 2024, Respondents obtained a physician-advisor independent medical record review by Dr. Albert Hattem. Based on the review of the medical records, Dr. Hattem understood the mechanism of injury to be that Claimant attempted to lift and pull toward himself one hundred bricks, weighing a total of four hundred pounds, thus developing immediate right-sided neck pain. Dr. Hattem reviewed Claimant's medical records and ultimately concluded that it was not likely that Claimant's cervical spine complaints were work-related. He reasoned that the August 21, 2024 report with Dr. Rossi documented that Claimant reported neck pain beginning at the end of the workday after lifting twenty-pound buckets and climbing ladders. Dr. Hattem noted that the AMA Guides to the Evaluation of Disease and Injury Causation, Second Edition advised that there was insufficient evidence for heavy physical work as a risk factor for neck pain. Dr. Hattem also reasoned that Claimant's work was not of a repetitive or precision-type involving prolonged neck flexion, a type of work for which there has been some evidence that it is a risk factor as noted by the Medical Treatment Guidelines, Rule 17, Exhibit 8. Dr. Hattem felt that there was "no documentation whatsoever" that Claimant sustained a cervical spine injury at work, noting that he was not involved in a motor vehicle accident, did not suffer a whiplash event, and did not suffer any type of head injury. He also felt that the September 3, 2024 MRI showed only preexisting and age-related degeneration.

7. On October 28, 2024, Claimant obtained his own independent medical examination (IME) with Dr. Sander Orent with the assistance of an interpreter. The mechanism of injury, as Dr. Orent understood it, was that Claimant saw an unstable cube of bricks on the scaffolding and that Claimant lifted and pulled the 280-pound cube of bricks back onto the scaffolding. Claimant reported to Dr. Orent that this occurred approximately one half hour prior to the end of the shift. Claimant told Dr. Orent that he had a three-way call with a nurse who told him to stay home, take ibuprofen, and ice his neck for four or five days. Claimant reported that the only treatment that had been helpful thus far had been massage. Dr. Hattem noted that Claimant had undergone a left shoulder rotator cuff repair fourteen years earlier. On physical examination, Dr. Hattem noted that Claimant's cervical range of motion was markedly restricted and that Claimant exhibited cervical spine tenderness about the paraspinal musculatures. Claimant had a negative Spurling's maneuver. Dr. Orent reviewed the medical history and ultimately disagreed with Dr. Hattem's analysis. He felt that Claimant sustained a substantial strain to his neck that aggravated preexisting underlying arthritic problems which had been previously asymptomatic. Dr. Orent felt that Claimant was entirely

sincere, that there were no confounders or pain behaviors, and that Claimant provided maximum effort in his ranges of motion.

8. On November 1, 2024, Michelle K. Hart, FNP, responded to an inquiry from Respondent-Employer regarding Claimant's temporary work restrictions. NP Hart responded that Claimant was unable to lift more than fifteen pounds due to significant multilevel degenerative disc disease and spondylosis throughout the cervical spine.

9. Dr. Lawrence Lesnak performed an IME of Claimant on November 13, 2024, with the assistance of an interpreter. As part of that IME, Dr. Lesnak conducted a computerized outcome assessment to determine the presence of any potential psychosocial factors that may be influencing his symptoms, recovery, or perceived level of function. The psychosocial-evaluation portion of the assessment was assessed using the Distress Risk and Assessment Method (DRAM) evaluation, and Claimant's results placed him in the "normal" category for psychosocial functioning. The portion concerning self-reported functional assessment showed that Claimant scored "60/102 on the Activities of Daily Living index, a 65/100 on the Work/Leisure index, a 20/100 on the Anxiety/Depression index, and a 10/100 on the Social Interest index." Based on the totality of the testing, Dr. Lesnak concluded that "may be some mild to moderate psychosocial factors that could be influencing the patient's symptoms." Dr. Lesnak conclusion appears to be based on Claimant exhibiting mild-to-moderate level of somatic pain complaints, which he noted "may suggest some degree of symptom somatic disorder/somatoform disorder." However, Dr. Lesnak did not specifically address the significance of the self-reported functional assessment results.

10. Dr. Lesnak took Claimant's subjective history of the mechanism of injury. Claimant's description was substantially the same as that which he provided to Dr. Orent, including that the injury occurred near the end of Claimant's work shift. Claimant described his current symptoms as involving constant mild right lateral neck pains, sharper when rotating the neck to the right. Claimant also complained of right arm weakness and frequent right middle, ring, and little finger numbness diffusely. Claimant denied mid-back or left upper extremity symptoms. Claimant also denied any history of neck or right upper extremity symptoms prior to the injury.

11. On physical examination, Claimant exhibited limited cervical extension and limited right cervical side bending. Cervical root tension maneuvers on the right produced some right lateral neck pain, but the pain was not reported as radiating to his right suprascapular region or right upper extremity. Claimant also exhibited tenderness to palpation in the right distal lateral neck. However, Dr. Lesnak noted that no distinct trigger points or muscle spasms were identified. Dr. Lesnak also noted that Claimant exhibited no specific pain behaviors or nonphysiologic findings during examination.

12. Dr. Lesnak concluded that Claimant may have sustained a mild soft tissue strain or sprain to the right cervical paraspinal musculature based on Claimant's reported history of lifting and sliding a stack of bricks at work on August 5, 2024. He noted that this diagnosis was made in the absence of clinical or imaging evidence of acute cervical spine injury, radiculopathy, or other neurological or joint pathology, as imaging revealed only multilevel degenerative disc disease and spondylosis unrelated to trauma. Dr. Lesnak felt that Claimant's mild-to-moderate somatic pain complaints were possibly indicative of a somatoform disorder and found no medical evidence supporting the need for extensive treatment or permanent work restrictions. However, he recommended a limited physiatry consultation to explore acupuncture or trigger point therapy, stating that maximum medical improvement might be achieved within a month. Dr. Lesnak hedged that if the coworker's account that Claimant did not perform the physical task described is accurate, then the reported symptoms would be unrelated to occupational activities, negating the need for any further care or work-related causation.

13. Claimant testified that, on the date of injury, he was working on a jobsite in Colorado Springs for Respondent-Employer as a bricklayers' assistant. Claimant had been working for Respondent-Employer for about two and a half years.

14. His job duties included helping the bricklayers, including having the material ready, ensuring that the project would proceed, keeping the workspace clean, and maintaining safety.

15. Just prior to the injury, everything had been going normally. When the workers were almost finished with their shift, the supervisor asked that they work an extra hour of overtime. Claimant testified that his shift normally ended at 3:30 P.M.

16. Claimant testified that his injury occurred when he was helping a coworker, [redacted] with a bundle of bricks that was at risk of toppling from the scaffolding and falling on coworker [redacted] Claimant testified that he used his hands, knees, and feet to prop the stack of bricks up. Claimant testified that he and [redacted] worked together to reduce the hazard by [redacted] tossing Claimant bricks while Claimant would restack the bricks in a new stack. Claimant testified that he lifted and pulled. He experienced a jerking pain, but it was not an intense pain in the moment. Claimant continued to work until finishing his shift around 4:00 P.M.

17. Claimant testified that his pain began to worsen while he was carpooling home with [redacted] and [redacted] in [redacted] pickup truck. Claimant began feeling the neck pain increase, and his coworkers provided him with ibuprofen.

18. Claimant testified that he did not report his injury at the end of the shift because the foreman was no longer on the jobsite. It was not until the next morning that he notified his employer when he contacted [redacted] by telephone. Claimant testified that David Padilla then asked him to talk with Eduardo Rivas about his

reported injury. Claimant testified that when he spoke with Mr. Rivas around 7:20 A.M., Mr. Rivas advised him to rest at home and remain calm and that Mr. Rivas did not direct him to a doctor.

19. Claimant testified that the pain gradually worsened over the next several days. Claimant testified that around August 13, 2024, Mr. Rivas gave him the "green light" to go to the clinic for treatment, and Claimant sought treatment on August 14.

20. In his testimony, Claimant denied any prior neck problems or right shoulder problems, though he acknowledged that he had previously had a torn tendon in his left shoulder and corresponding surgeries. However, Claimant testified, those problems resolved and never resulted in neck pain, and that he was able to perform his work just normally prior to his date of injury with no restrictions.

21. Dr. Orent testified at hearing as well as an expert in occupational and environmental medicine and internal medicine. Dr. Orent testified largely consistently with his IME report. He added that the degenerative conditions identified on the MRI can occur asymptomatically and can be caused to flare up as a result of trauma. Regarding Claimant's delayed onset of pain, Dr. Orent explained that it is due to the delay inherent in inflammation as well as the pain-masking characteristic of adrenaline. Regarding Dr. Hattem's interpretation of the August 21 Dr. Rossi report, Dr. Orent opined that Dr. Hattem had misinterpreted Dr. Rossi's description of the mechanism of injury. Last, Dr. Orent clarified that he did not find any indication during the IME of an exaggeration of symptoms.

22. Dr. Lesnak also testified at hearing as an expert in physical medicine and rehabilitation. Dr. Lesnak testified that he listened again to the IME audio and that Claimant's description of the injury was that he put his hands in the holes of the pallet to help lift the bricks, that it occurred near the end of the shift, and that it was just one instance that Claimant described. Dr. Lesnak further added that Claimant's symptoms were not consistent with a specific diagnosis, that the physical examination was "fairly benign," and that the mechanism described by Claimant's coworker, [redacted] would not cause a cervical spine injury. Dr. Lesnak testified that he himself had worked as a bricklayer prior to medical school and that such work, in the absence of any pushing or pulling, would not be a cause of a work injury. However, he acknowledged that the mechanism—if it had occurred as Claimant described—could cause a mild neck strain.

23. At hearing, Claimant's coworker [redacted] testified as well. [redacted] testified that, at the time of Claimant's alleged injury, Claimant was holding the bricks back so they would not fall. He testified that Claimant did not apply force on the bricks to move the bricks. [redacted] also did not recall tossing bricks to Claimant, though he acknowledged that tossing bricks is a technique sometimes used. He testified that each brick weighed about five pounds. [redacted] testified

that his shift ended at 3:30 P.M. that day and that he did not recall working past that time.

24. Respondents called Eduardo Rivas to testify at hearing as well. Mr. Rivas testified that he was the safety manager for Respondent-Employer and had been working for Respondent-Employer for six years, though he had been doing that type of work for the past nineteen or twenty years.

25. Mr. Rivas testified that employees were not working overtime on the date of injury, and that there are specific rules for working overtime.

26. Mr. Rivas testified that he learned of Claimant's injury only after hearing about it from Claimant's supervisor, though he acknowledged that an injury could be reported to one's supervisor. Mr. Rivas testified that Claimant told him he was alone at the time of the injury, and Mr. Rivas denied telling Claimant to rest at home.

27. The Court finds the testimony of Claimant more credible than those of Mr. Rivas and [redacted] The events on Claimant's date of injury and shortly thereafter would have been of substantial significance to Claimant, as they marked the onset of a physical injury that resulted in pain, medical treatment, and ultimately, temporary disability. Given the personal impact of the incident, Claimant is more likely to have accurately remembered the details of those events. In contrast, for Mr. Rivas and [redacted] the events would not likely hold comparable significance, making it less likely that their recollections would be as detailed or reliable. Moreover, Claimant's account has remained substantially consistent across multiple settings, including medical histories and sworn testimony, further reinforcing its credibility.

28. To the extent that Claimant's account of the work injury varied somewhat among the several records and testimony, the Court finds the accounts substantially similar and the differences to be inconsequential. Minor discrepancies in Claimant's descriptions of the mechanism of injury—such as the exact weight or number of bricks involved—are immaterial and do not undermine the overall consistency of his account. The essential elements of the injury, including the timing, the physical exertion involved in stabilizing and repositioning bricks, and the subsequent onset of pain, remained consistent throughout his reports to medical providers and during testimony. These minor variations are reasonably attributed to differences in interpretation by medical providers, language translation issues, or the natural imprecision of recollection rather than any intent to mislead.

29. The Court also finds Dr. Orent's and Dr. Lesnak's testimonies credible insofar as both agree that Claimant sustained or may have sustained a work-injury to his neck if Claimant's account of events is to be credited, which this Court does. The opinions of Drs. Orent and Lesnak both support the occurrence of at least a mild

soft-tissue injury causally related to the work incident. Dr. Orent attributed the onset of symptoms to a strain that aggravated preexisting, asymptomatic degenerative conditions, while Dr. Lesnak concluded that Claimant may have sustained a mild strain or sprain to the right cervical musculature. Both experts identified objective findings consistent with Claimant's reported symptoms and neither identified non-physiological findings nor pain behaviors.

30. While Dr. Orent and Dr. Lesnak disagree regarding the extent of the injury, the Court finds that Claimant's injury was sufficient that it necessitated medical treatment that included, at the very least, the August 14, 2024 visit at Midtown.

31. The Court finds that Claimant sustained a compensable neck injury on August 5, 2024, arising out of and in the course of his employment with Respondent-Employer.

32. The Court finds that the August 14, 2024 treatment at Midtown was reasonably necessary to cure and relieve Claimant of the effects of his August 5, 2024 neck injury.

CONCLUSIONS OF LAW

Generally

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

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

Industrial Claim Appeals Office, 55 P.3d 186 (Colo.App.2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo.App.2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

The existence of a preexisting condition will not prevent an injury from "arising out of" the employment. *Peter Kiewit Sons' Co. v. Indus. Comm'n of Colo.*, 124 Colo. 217, 220, 236 P.2d 296, 298 (1951); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990). Generally, an injury will be found compensable if the employment aggravated, activated, caused, or accelerated a medical disability or need for medical treatment. *Id*.

An incident which merely elicits pain symptoms caused by a preexisting condition does not compel a finding that the claimant sustained a compensable aggravation. *F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Barba v. RE 1J School District*, W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company*, W.C. No. 3-850-024 (December 14, 1989). Rather, a claimant must establish to a reasonable degree of probability that the need for additional medical treatment is proximately caused by the aggravation and is not simply a direct and natural consequence of the preexisting condition. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo.1949); *Rockwell Intl. v. Turnbull*, 802 P.2d 1182 (Colo.App.1990).

The Court concludes that Claimant has proved by a preponderance of the evidence that, as found, Claimant sustained a compensable injury to his neck arising out of and in the course of his employment with Respondent-Employer on August 5, 2024, and that the injury caused a temporary disability and a need for medical treatment.

Medical Benefits

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

The parties stipulated at hearing that the reasonableness and necessity of the August 14, 2024 visit at Midtown would be at issue. The Court concludes that, as found, Claimant's injury was sufficient that it necessitated medical treatment that included, at the very least, Claimant's initial visit at Midtown.

ORDER

It is therefore ordered that:

1. Claimant has proved by a preponderance of the evidence that he sustained a compensable neck injury on August 5, 2024, arising out of and in the course of his employment with Respondent-Employer.

2. Claimant has proved by a preponderance of the evidence that the treatment he received on August 14, 2024, at Midtown was reasonably necessary to cure and relieve him of the effects of his August 5, 2024 neck injury.

3. All issues 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 21, 2025.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-250-904-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable occupational disease arising out of the course of her employment with Employer.

2. Whether Claimant established by a preponderance of the evidence entitlement to reasonable and necessary medical benefits.

3. Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability (TTD) benefits.

STIPULATIONS

1. If Claimant's claim is compensable, Claimant's authorized treating physician ("ATP") is Barry Nelson, D.O., at Concentra.

2. If Claimant's claim is compensable, Claimant's average weekly wage is $1,998.98.

FINDINGS OF FACT

1. Claimant began working for Employer in 2006 and became a full-time delivery driver in 2011. In her role as a delivery driver, Claimant's job duties required her to drive a van and deliver packages to various residences and businesses. Claimant primarily worked as a "swing driver," meaning she had no set delivery route, but worked various routes for other drivers when necessary.

2. Claimant normally worked four 10 to 10 ½-hour days per week, driving industrial and residential routes, which required her to make between 150 and 300 stops per day and to deliver between 200 and 400 packages per day. The packages Claimant delivered varied from envelopes to larger packages weighing up to fifty pounds. For irregular-sized and heavy packages, Claimant used a wheeled dolly to deliver packages, but otherwise she carried packages for deliveries. Generally, industrial routes had fewer stops and heavier packages than residential routes. Claimant estimated that approximately 25% of the routes she drove were industrial routes. Claimant's work required significant walking, squatting, and lifting. For each delivery, Claimant was required to enter and exit the delivery van (ascending and descending three steps), walk to the delivery point, and return to the van. Claimant testified that, based on the Fitbit she wore, she walked eight to ten miles per day performing her job duties, and climbed approximately ten flights of stairs per day. Claimant's testimony regarding her job duties was credible and corroborated by other witnesses.

3. Claimant has a history of knee issues, including a left meniscectomy in 2015, a right knee sprain in 2021, and a January 11, 2023 workers' compensation injury in which she sustained sprains of both knees and a left knee meniscal tear.

4. For the January 2023 injuries, Claimant received treatment through ATP Barry Nelson, D.O., at Concentra. As part of that treatment, on March 2, 2023, Claimant had a left knee MRI which showed significant tricompartmental degenerative arthritis in her left knee, meniscal degeneration, and osteonecrosis in the femoral condyle. (Ex. L).

5. Dr. Nelson referred Claimant to orthopedist John Papillion, M.D., for evaluation of her knees. On May 11, 2023, Dr. Papillion performed a viscosupplementation injection in Claimant's left knee and later noted it provided excellent relief. On June 8, 2023, he indicated that Claimant was at MMI for her January 2023 injuries, and noted that Claimant would seek additional care through her private health insurance. He further indicated that Claimant may be a candidate for knee arthroplasty. (Ex. L).

6. On June 12, 2023, Dr. Nelson placed Claimant at MMI for the January 2023 injuries with no permanent impairment. Although he noted that Claimant would be unable to return to her regular work duties because her knees would not tolerate "jumping in and out of a…delivery vehicle multiple times per day," he released Claimant to work without restrictions and indicated she had returned to her "baseline." (Ex. L).

7. On June 15, 2023, Respondents filed a Final Admission of Liability consistent with Dr. Nelson's findings, admitting for medical care and previously paid TTD benefits from January 12, 2023 through June 11, 2023. No evidence was admitted indicating Claimant challenged the FAL. (*See* Ex. T).

8. Outside the workers' compensation system, Claimant also saw Jordan Feierman, D.O., at Orthopedics Centers of Colorado for her knee condition beginning June 6, 2023. Dr. Feierman obtained x-rays of Claimant's knees which showed severe medial compartment arthritis and patellofemoral arthritis. He also recommended viscosupplementation injections for her knees. On June 27, 2023, Dr. Feierman performed a viscosupplementation injection in her right knee, and noted Claimant would return for a second injection in two weeks. (Ex. O).

9. Although Dr. Nelson released Claimant to work on June 12, 2023, Claimant did not return to work for Employer until July 5, 2023. On that date, Claimant was joined on her route by supervisor Casey Behrendt consistent with Employer's return-to-work procedures. Mr. Behrendt testified that Claimant was able to safely perform her job duties, but that she moved slowly and reported that her knees were hurting. Claimant worked on July 6, 2023. She testified that while running her routes on that day, she experienced significant pain in her knees, and that she struggled to complete her deliveries due to knee pain. Claimant testified that, on July 7, 2023, she reported to her manager, Mario Botello, that her knees were painful, and was instructed to go home. Claimant testified that she told Mr. Botello she was going to try to have her knees replaced under short-term disability, and that she did not report an occupational injury at that time. Claimant has not returned to work for Employer since July 7, 2023.

10. On July 10, 2023, Claimant returned to Dr. Feierman reporting that the initial injection did not provide significant relief and that her knee pain was worse. Dr. Feierman documented that Claimant declined the second injection, but also documented that the second injection was performed on July 10, 2023. Claimant testified that she did not receive the injection. Dr. Feierman noted that Claimant would like to proceed with an evaluation for bilateral total knee arthroplasties, and referred her to Jared Michalson, M.D., for further evaluation. (Ex. O).

11. Also, on July 10, 2023, Claimant submitted to Employer a short-term disability claim form, in which it is indicated that Claimant had bilateral knee arthritis, and would have an evaluation with an orthopedic surgeon for knee replacements. In the section of the form apparently completed by Dr. Feierman, he indicated that Claimant's condition was not due to her employment. (Ex. S).

12. Claimant saw Dr. Michalson on July 14, 2023, reporting a multiple history of knee pain, left greater than right anteromedial and anterolateral knee pain limiting her ability to walk. Claimant indicated that her knee pain was exacerbated by her job, and that the pain was severe, occurring daily, and becoming constant. Dr. Michalson noted that Claimant had gained weight over the previous months, and her then-current body weight was 280 pounds[1] and also noted that Claimant smoked one pack of cigarettes per day. On examination, Dr. Michalson found mild swelling in both knees, and tenderness in the joint line. X-rays showed significant joint space loss, osteophyte formation, and sclerosis consistent with significant osteoarthritis. After consulting with Claimant and considering her prior treatment, Dr. Michalson recommended left total knee arthroplasty, which was scheduled for August 14, 2023. (Ex. O).

13. On August 1, 2023, Claimant was seen at New West Physicians for a pre-surgical evaluation. (Ex. Q). Claimant testified that the surgery was not performed due to insurance approval issues through Medicaid.

14. On September 20, 2023, Claimant filed a Workers' Claim for Compensation, for arthritis in both knees, and a date of injury of July 7, 2023. (Ex. A). On September 27, 2023, Employer filed a First Report of injury, indicating Claimant informed Employer of her alleged injury on September 26, 2023. (Ex. B).

15. On October 11, 2023, Claimant's counsel contacted Respondents' counsel indicating that Respondents had not authorized medical care for Claimant, and that Claimant would seek treatment outside of the workers' compensation system and outside the chain of referrals if treatment were not authorized. (Ex. 7).

16. On October 11, 2023, Respondents filed a Notice of Contest, indicating a need for further investigation. (Ex. C).

17. Thereafter, Claimant sought treatment through Kaiser Permanente for her knees. Claimant testified that she received Medicaid in fall 2023, and that Kaiser was the

[1] In 2021, Claimant's physicians documented her bodyweight as 265 pounds. (Ex. L). In March 2023, Dr. Nelson documented Claimant's bodyweight as 250 pounds. (Ex. L).

Medicaid provider. Claimant initially saw Brittney Justice, D.O, on November 14, 2023, reporting bilateral knee arthritis. Claimant also indicated that she already had an appointment with orthopedics at Kaiser to establish care for her knees.

18. On December 1, 2023, Claimant saw Avani Javer, M.D., at the Kaiser Orthopedics clinic. X-rays showed severe degenerative changes in the bilateral knees. Dr. Javer diagnosed Claimant with severe bilateral knee osteoarthritis, and referred her for a bilateral knee ablation. He noted that Claimant was not a surgical candidate due to her weight[2] (BMI in excess of 40) and being a smoker. (Ex. P). No additional records of treatment or evaluation of Claimant's knee issues at Kaiser were offered or admitted into evidence.

19. On December 13, 2023, Claimant was seen at Kaiser for a primary care visit at which multiple medical issues were addressed, including bilateral knee arthritis. Claimant was prescribed Meloxicam for knee pain and inflammation. (Ex. P).

20. The remainder of the documented treatment Claimant received between November 13, 2023 and June 3, 2023 at Kaiser was for mental health issues, and other general health issues, including hypertension, mild persistent asthma, depression, weight issues, diabetes, knee arthritis and other issues. On November 14, 2023, Claimant reported that she had been diagnosed with depressive disorder 26 years earlier, and that she was then experiencing more symptoms related to the loss of her job, her workers' compensation claim, losing housing, and a family illness. Claimant reported she had been on Prozac for more than twenty years. (Claimant's medical records demonstrate that Prozac was an active prescription through at least October 2022). Although Claimant at least partially attributed her increased depression symptoms to her worker's compensation claim, none of Claimant's health care providers offered a credible opinion indicating that Claimant's symptoms or need for mental health treatment was causally-related to her employment or her knee arthritis. (Ex. P).

21. On May 29, 2024, Claimant saw orthopedic surgeon Mark Failinger, M.D., for a Claimant-requested IME. Dr. Failinger was admitted as an expert in orthopedic surgery. Dr. Failinger opined that Claimant's job employment activities, including years of walking, climbing stairs, loading and unloading vehicles to deliver packages, combined with her pre-existing conditions, including degenerative knee conditions, knee surgery, and obesity, caused a more rapid acceleration of her arthritis, leading to the need for knee replacement surgery. Dr. Failinger testified that the load of Claimant's work activity, combined with her weight dramatically increased the force on her knees, and that those conditions, combined with her pre-existing arthritis resulted in the arthritic condition of her knees. Dr. Failinger further testified that the force of walking and using stairs increases the stress on the knee by a factor of three to five. In reaching his opinion, Dr. Failinger relied, in part, on relevant portions of the AMA Guides, noting that the Colorado Medical Treatment Guidelines for repetitive use do not address the lower extremities. Dr. Failinger also cited medical literature supporting the conclusion that workers whose jobs require

[2] Although Dr. Javer did not record Claimant's weight, on November 14, 2023 Claimant weighed 295 pounds. (Ex. P).

kneeling, squatting, lifting, and climbing stairs can develop or aggravate knee osteoarthritis. Dr. Failinger's opinion that Claimant's work activities since 2006, including walking, climbing stairs, and carrying packages, contributed to the development and acceleration of osteoarthritis in her knees is credible and persuasive.

22. Claimant's Exhibit 5 is a letter authored by Amanda Blackmon, LPCC. In that letter, Ms. Blackmon indicated that Claimant was her client, and that Claimant meets the diagnostic criteria for depression. She noted Claimant has attended sessions since September 10, 2024 and that she would continue to do so through 2025. (Ex. 5). No other records from Ms. Blackmon were offered or admitted into evidence, and no credible evidence was admitted demonstrating that the nature of the services Ms. Blackmon provided to Claimant, or that such services are causally-related to her employment or her knee issues.

23. On December 11, 2024, Dr. Javer authored a letter indicating that Claimant was unable to perform her work duties, including climbing in a truck, ascending stairs, squatting or lifting more than two pounds due to the need to have bilateral knee replacement. (Ex. 6). No credible evidence was admitted indicating that Dr. Javer had seen or evaluated Claimant since his initial visit on December 1, 2023, or that he had altered his opinion from December 2023 that Claimant was not a surgical candidate due to her weight and smoking.

24. On January 9, 2025, Claimant saw Qing-Min Chen, M.D., for a Respondent-requested independent medical examination. Dr. Chen testified in a post-hearing deposition and was admitted as an expert in orthopedic surgery. Dr. Chen opined that Claimant's knee condition, and arthritis is idiopathic in nature and unrelated to her employment. He indicated that a total knee replacement is reasonable and necessary, but unrelated to her injury. He opined that the primary factors causing or accelerating Claimant's knee arthritis are her weight and being an active smoker.

25. Dr. Chen testified that the knees are "very sensitive to weight" and that a person's body weight is one of the strongest risk factors for acceleration and development of osteoarthritis. Dr. Chen concluded that Claimant's weight and smoking, rather than her employment activities were the cause of her knee arthritis. He testified that a person's weight acts as a "force multiplier," such that, when walking one pound of weight imparts five pounds of force on the knee and fifteen pounds going up and down stairs. Thus, he opined that Claimant's weight results in increased pressure and force on her knees when she walks or climbs stairs causing and accelerating arthritis in her knee. However, he also opined that prolonged walking, climbing hills and using stairs does not cause or accelerate osteoarthritis, and was actually beneficial to the knees. Dr. Chen failed to reconcile this inherent contradiction in his opinion regarding the impact of walking and stair-climbing on knee arthritis. Dr. Chen's opinion that Claimant's development and aggravation of osteoarthritis is unrelated to her work activities is neither credible nor persuasive.

26. Mr. Behrent testified that he did not learn that Claimant alleged that she had sustained an occupational injury to her knees until a few months after he worked with her

on July 5, 2023. He testified that after receiving notice that Claimant was asserting a workers' compensation claim for her knees, he prepared a written statement addressing his interaction with Claimant. The statement Mr. Behrent authored was dated September 27, 2023. (Ex. I).

27. Mr. Botello testified that on July 7, 2023, Claimant reported that her knees were hurting and that she could not perform her job duties as a result. He indicated that he had a discussion with his division manager about Claimant's condition, and was instructed to send Claimant home to avoid her getting hurt on the job. Mr. Botello indicated that Claimant did not report to work on July 8, 2023, and that he became aware that Claimant was alleging a workers' compensation injury later when he received an email asking him to complete a statement. Mr. Botello authored a written statement on September 27, 2023. (Ex. I).

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove her injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Marjorie Jorgensen v. Air Serve Corporation,* W.C. No. 4-894-311-03, (ICAO, Apr. 9, 2014).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by

> the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, W.C. No. 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified, or aggravated the disease for which compensation is sought. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner, supra*. In this regard, the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO Aug. 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Claimant has established by a preponderance of the evidence that she sustained a compensable occupational disease arising out of the course of her employment with Employer. As found, Dr. Failinger's opinion that Claimant's job activities caused or accelerated the arthritic condition in her knees is credible and persuasive. His opinion is consistent with Dr. Chen's opinion that walking and using stairs results in increased force applied to a person's knees, and can result in the development and acceleration of arthritis. Claimant's job required her to walk more than eight miles per day, climb in and out of a delivery van 150 to 300 times per day, and climb stairs throughout the day, four to five days per week for more that eleven years. These movements are a particular risk of Claimant's employment. That is, they are more prevalent in Claimant's work activities than the normal activities Claimant in which would engage absent her employment. Claimant's medical records demonstrate that since at least 2021, her body weight has fluctuated between 250 and 290 pounds. Thus, per Dr. Chen, with each step she takes, between 1250 and 1450 pounds of force is applied to each knee, and between 3,750 and 4,350 pounds when using stairs. The accumulation of these pressures over a period of years more likely than not caused or contributed to Claimant's bilateral knee osteoarthritis. The ALJ concludes that Claimant's osteoarthritis is a direct result of the

conditions of her employment and, is a natural result of the work exposure. Consequently, Claimant's bilateral knee osteoarthritis is compensable.

General Medical Benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). 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). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has established a compensable occupational disease to her knees, Claimant has established by a preponderance of the evidence that she is entitled to a general award of medical benefits for reasonable and necessary care related to her occupational disease.

Other Medical Benefits

Claimant requests that the ALJ order Respondents to pay for her medical care from various providers including Orthopedic Centers of Colorado (OCC), New West Physicians, Kaiser Permanente, and Ms. Blackmon. Additionally, Claimant requests authorization of bilateral knee replacements, and "weight loss support treatment."

Reimbursement of Medical Treatment

With respect to treatment previously received at OCC, New West, Kaiser, and with Ms. Blackmon, Claimant asserts that Respondents are responsible for reimbursement of Claimant's medical expenses under § 8-42-101(6), C.R.S., which provides:

> (a) If an employer receives notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided. ...
>
> (b) If a claimant has paid for medical treatment that is admitted or found to be compensable and that costs more than the amount specified in the workers' compensation fee schedule, the employer or, if insured, the employer's insurance carrier shall reimburse the claimant for the full amount paid....

Claimant has established that some, but not all, of Claimant's incurred medical expenses are compensable under 8-42-101(6), C.R.S.

Notice of Injury

The first factor to determine compensability of medical treatment under 8-42-101(6), is whether Respondents failed to furnish medical care after receiving notice of injury. An employer is deemed notified of an injury when it has "some knowledge of the 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." *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

Claimant provided Respondents with notice of an injury on September 20, 2023, when she filed her Workers' Claim for Compensation. (Ex. A). The record contains no credible evidence that Claimant notified Respondents that she attributed her condition to her employment, such that Respondents would reasonably determine that it involved a workers' compensation claim. Although Claimant informed Employer that she was experiencing knee pain on July 7, 2023, no credible evidence was admitted demonstrating that Claimant reported that she attributed her condition to her employment on that date. The evidence demonstrates that rather than report a workers' compensation injury, Claimant sought short-term disability benefits on July 10, 2023. (Ex. S). In doing so, Claimant did not attribute her condition to her employment, but completed a form . specifically indicating that her knee osteoarthritis was not work related. No other evidence was admitted indicating that Claimant otherwise informed Respondents of a potential claim until September 20, 2023. At that point, Employer knew or reasonably should have known that Claimant's condition was alleged to be work-related, and the obligation to provide medical care began. Thus, the ALJ concludes that Respondents were provided with notice of Claimant's injury on September 20, 2023. The record also demonstrates that Respondents did not provide Claimant with medical care, or a list of designated providers as required by § 8-43-404(5)(a)(I)(A), C.R.S, after receiving notice of Claimant's injury/occupational disease.

Accordingly, Respondents are responsible for the reasonable and necessary medical care Claimant required to cure or relieve the effects of her occupational disease after September 20, 2023. The ALJ addresses the care Claimant received from specific providers separately below.

Orthopedic Centers of Colorado (OCC)

Claimant has failed to establish that Respondents are liable for treatment Claimant received at OCC. The evidence demonstrates that Claimant began treatment with Dr. Feierman at OCC on June 6, 2023, and outside the workers' compensation system. Dr. Feierman referred Claimant to Dr. Michalson (also at OCC), and Claimant saw him on June 27, 2023 and July 14, 2023. No credible evidence was admitted demonstrating that Dr. Feierman, Dr. Michalson or other providers at OCC were authorized treating providers or were within the chain of referrals from an ATP. Moreover, the treatment Claimant received from these providers occurred before she notified Respondents of her condition on September 20, 2023. Because the all of the treatment Claimant at OCC was before

Respondents received notice of injury, Respondents are not responsible for reimbursement of such care under § 8-42-101 (6)(a), C.R.S.

New West Physicians

Claimant has failed to establish that Respondents are liable for treatment received at New West Physicians. Claimant's only treatment at New West was a pre-surgical evaluation on August 1, 2023. Because the treatment was before Claimant provided Respondents notice of her condition, Respondents are not responsible for reimbursement of such care under § 8-42-101 (6)(a), C.R.S.

Kaiser Permanente

Claimant sought treatment at Kaiser Permanente beginning on November 13, 2023, after providing notice of injury to Respondents. The treatment Claimant received at Kaiser was for multiple medical issues, including hypertension, mild persistent asthma, depression, weight issues, diabetes, knee arthritis and other issues. Claimant offered no credible evidence demonstrating how her hypertension, asthma, weight issues, diabetes, and other general health issues were causally related to her knee condition. Claimant has a long history of depression and attributed her depression to multiple issues including not-working, selling her house, family illness, her knee condition, and other issues. However, neither Claimant's treating providers nor Dr. Failinger offered an opinion demonstrating that such treatment was reasonable, necessary or causally-related to her knee condition.

The ALJ finds that Claimant's treatment with Dr. Javer, and her Kaiser primary care visit on December 13, 2023, at which she was prescribed medication for her knee condition were reasonable, necessary, and related to her occupational disease, and are compensable. With the exception of treatment for her knees, Claimant has failed to establish that treatment for other issues, including depression, weight issues, diabetes, asthma, hypertension, and other general health issues are reasonable, necessary, and related to her occupational disease.

Amanda Blackmon, LPCC

With respect to Claimant's treatment with Ms. Blackmon, the only evidence in the record regarding Ms. Blackmon's treatment is a December 11, 2024 letter in which she indicated that Claimant met the criteria for a depression diagnosis, and that Claimant had attended sessions with Ms. Blackmon. No credible evidence was admitted explaining the treatment Ms. Blackmon provided, whether the treatment was reasonable and necessary, or whether it is causally-related to Claimant's work injury. Because Claimant has failed to establish that her treatment with Ms. Blackmon is causally-related to her employment or occupational disease, her request to require Respondents to reimburse Claimant for treatment with Ms. Blackmon is denied.

AUTHORIZATION OF SPECIFIC MEDICAL TREATMENT

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).

Bilateral Knee Replacement

In July 2023, Dr. Michalson recommended that Claimant undergo a left total knee arthroplasty. At that point in time, Claimant had not filed a claim for workers' compensation benefits or notified Employer of an occupational disease claim, and the request for surgery was denied by Claimant's non-workers' compensation insurer. No evidence was admitted indicating that Dr. Michalson was an authorized treating provider or that the request for authorization was submitted to Respondents. Dr. Laver at Kaiser noted the potential for knee replacement surgery, but opined that Claimant was not a candidate for surgery due to her weight and smoking. The record contains no evidence of a current recommendation for bilateral knee replacement surgery by an authorized provider. Because no authorized treating provider has recommended Claimant undergo knee replacement, the ALJ is without jurisdiction to authorize such treatment. *Potter v. Ground Services Co.*, W.C. No. 4-935-523-04 (ICAO Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAO May 4, 1995). Claimant's request for authorization of bilateral knee replacement is denied without prejudice due to lack of jurisdiction.

"Weight Loss Support Treatment"

Claimant has failed to establish that such "weight loss support treatment," has been recommended. Although Dr. Javer indicated that Claimant was not a surgical candidate due to her weight, no credible evidence was admitted indicating that "weight loss support treatment," has been recommended or that Claimant requires any formal treatment of that nature. Because no credible evidence was admitted demonstrating that an ATP has recommended weight loss support treatment, the ALJ is without jurisdiction to authorize such treatment. *Potter, supra; Torres, supra*. Claimant's request to require Respondents to pay for "weight loss support treatment" is denied without prejudice due to lack of jurisdiction.

Temporary Total 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* § 8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). The Act 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 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 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.

Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits. The ALJ finds credible Claimant's testimony that she is unable to perform the duties of her job as a delivery driver due to her work-related knee condition. Moreover, Claimant's testimony is consistent with Dr. Nelson's opinion prior to Claimant's return to work that she would not be able to perform the duties of a delivery driver due to her knee condition. As such, Claimant is entitled to temporary total disability benefits from the date her occupational disease prevented her from performing her duties. No credible evidence was admitted demonstrating that the criteria for termination of TTD under § 8-42-105 (3), C.R.S., have occurred. Claimant is therefore entitled to TTD benefits from July 8, 2023 until terminated pursuant to the Act.

ORDER

It is therefore ordered that:

1. Claimant sustained compensable occupational disease to her bilateral knees on or about July 8, 2023.

2. Respondents shall pay for authorized, reasonable, and necessary medical treatment to cure or relieve the effects of Claimant's industrial injury.

3. Respondents shall reimburse Claimant for treatment at Kaiser Permanente with Dr. Javer on December 1, 2023, and the December 13, 2023 visit to primary care.

4. Claimant's request that Respondents reimburse Claimant for other treatment at Kaiser Permanente, Orthopedic Centers of Colorado, New West Physicians and Amanda Blackmon, LPCC is denied.

5. Claimant's request for authorization of bilateral knee replacements, and "weight loss support treatment" is denied without prejudice due to lack of jurisdiction.

6. Claimant is entitled to temporary total disability benefits from July 7, 2023 until terminated pursuant to the Act.

7. Claimant's authorized treating physician is Barry Nelson, D.O., at Concentra.

8. Claimant's average weekly wage is $1,998.98.

9. 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 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 21, 2025

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

Office of Administrative Courts

State of Colorado

Workers' Compensation No. WC 5-285-638-001

ISSUES

I. Did Claimant prove by a preponderance of the evidence that he sustained compensable injuries within the course of his employment with Respondent-Employer?

II. Whether the care received by claimant from Alliance Health Partners and Easy Orthopedics was reasonable, necessary and related to the compensable injury?

III. Who is the Authorized Treating Physician?

FINDINGS OF FACT

Based on the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant has been employed by Employer for approximately 1 year and 3 months. Claimant is a systems administrator whose duties include maintaining confidentiality, integrity, and availability of the systems within the corporation.

2. On September 11, 2024, at approximately 1:00 P.M., Claimant took his regular 10-minute break and headed to the parking lot to get in his car to go to the convenience store to get a snack and some water.

3. Claimant's office is at 360 Wooten Rd. in Colorado Springs, Colorado. The building nearest to claimants' office is a similar style office building located at 320 Wooten Rd. the parking lot where claimant was instructed to park is a shared parking lot that employees and patrons of the two-office buildings park. When the Claimant first started working for the employer, he was shown a little printout map that showed the areas where the people with the employer park.

4. As Claimant was driving his vehicle through the parking lot heading for the exit to Wooten Rd. he was backed into by a Lexus Sedan. Claimant was struck on the passenger side of his vehicle. When the Lexus collided with claimant's vehicle, Claimant testified that body rocked back and forth, and he hit his head on the support bar of his soft top convertible. Immediately thereafter Claimant heard a ringing in his ears along with pain in his left shoulder from

where it hit the door of the car. In addition, claimant had pain in his back, knee, and hip.

5. The photographs submitted of Claimant's Mazda convertible depict damage to the side of the Claimant's vehicle. The passenger side door was dented in from the middle of the door all the way to the rear quarter panel.

6. Claimant was seen by Cody Hoover, RN at Complete Care for care on September 12, 2024, Claimant had complaints about the head, neck, right hip, left leg, and rated his pain a 6/10 on a scare of 1 to 10. Mr. Hoover found a Sprain of ligament in the cervical spine, unspecified sprain of the right hip and strain of muscle, fascia and tendon at neck level. The record states that the Claimant's vehicle was hit by a truck instead of a Lexis. It also states the truck was going approximately 30 – 45 mph. This information is obviously incorrect and puts into question the diagnoses and extent of any injuries.

7. On October 1, 2024, Claimant saw James Thatcher, D.C. Presumably Claimant was referred to Dr. Thatcher by his attorneys, Heuser and Heuser since they are listed as his insurance company. Dr. Thatcher took a history that Claimant was leaving a parking lot and was backed into by a Lexus sedan. The patient struck his right knee on the dashboard of the vehicle and his left shoulder on the door of the vehicle. Claimants' chief complaints were of head pain, neck pain and back pain. After examination Dr. James Thatcher's diagnoses in part was Cervical disc disorder with radiculopathy, mid-cervical region sprain of hip, Knee sprain/strain. Dr. Thatcher provided Chiropractic care and Claimant was referred to Dr. Daniel Paull for evaluation of his shoulder and knee.

8. Claimant presented to Dr. Daniel Paull for evaluation October 7, 2024. On assessment Dr. Paull found Claimant had left shoulder impingement, left subscapular bursitis, and a likely a right knee MCL sprain. Dr. Paull administered corticosteroid injections to the claimants left subacromial, and claimants left subscapular bursa.

9. On October 21, 2024, Claimant returned to Dr. Thatcher after the injections. Dr. Thatcher's note reflects that over the last 3 weeks, the patient has had stiffness at the cervical spine and an increase in his upper back tightness. In addition, Claimant has had a gradual decrease in his headache pain and felt improvement in his left shoulder pain after an injection administered by Dr. Paull on October 7, 2024.

10. Claimant continued to treat with Dr. Thatcher from October 23, 2024, to December 10, 2024. Dr. Thatcher notes over that period reflect that Claimant cervical and upper thoracic symptomology decreased overall in terms of frequency and intensity. In addition, Claimant's headaches have largely resolved,

and his left shoulder pain had decreased.

11. Claimant returned to Dr. Paull on December 17th reevaluation. Dr. Paull found that Claimant was doing well with regards to his left shoulder and right knee with minimal pain in those areas. Dr. Paull recommended that Claimant continue physical therapy and follow up with him on an as needed basis. Claimant was also presented to Dr. Thatcher on that day and reported improved range of motion in the upper cervical spine.

12. Claimant was seen by Dr. Thatcher on December 23, and December the 30, 2024, Claimant stated he was no longer having any headaches since his last visit and felt that he was showing improvement in the cervicothoracic and limbo pelvic regions, he believed that Physical therapy was helping his right hip right knee and shoulder pain as well. Dr. Thatcher's initial diagnosis remained largely unchanged from the first visit by Claimant.

13. Claimant was evaluated by Dr. Allison Fall at Respondents' request on January 31, 2025. Dr. Fall reviewed all the medical records and completed a physical examination of Claimant on that day. In her report, she opined that Claimant had a left shoulder contusion, right knee contusion, and diffuse myofascial pain with temporary aggravation of anxiety. According to her report the mechanism of injury was a parking lot motor vehicle collision. Dr. Fall noted that Claimant had been receiving conservative care since the accident and has made gradual improvement overtime. Dr. Fall recommended a follow-up with an occupational medicine provider and additional physical therapy prior to MMI. A follow up with Dr. Paull would also be appropriate prior to MMI.

14. Dr. Paull testified as an expert in Orthopedic surgery on February 6, 2024. Dr. Paull testified on accordance with his records that Claimant had sustained injury to his left right knee. It is his perspective is that cars are very heavy objects and even moving at slow speeds impart a tremendous amount of force, more than enough to injure somebody depending on the position they are in. Dr. Paul further testified that in analyzing a patient he relies on pain levels before and after the event, as well as prior history to provide the care he believes his patient needs.

15. Dr. Paull testified that he primarily treats patients that were injured in automobile accidents. When asked if these injuries are the type of injuries typically result from an automobile accident, Dr. Paul testified:

a. "left shoulder injuries are super common. Left shoulder impingement, your neck and back issues are very common. Same thing with the subscapular bursitis when the shoulder blade gets jammed up."

b. "It's often missed but common source of pain generator. People complain of mid-back pain when its actually coming from the shoulder blade."

c. “Same thing with the knee. If the knee – if there is any sort of twisting motion, if the knee impacts anything, you can get all kinds of contusions, or depending on the position the knee was in, you can get an MCL sprain or meniscus injury or that sort of thing. So, there was no injuries that I saw that were surprising.”

16. Dr. Fall testified by deposition on February 25, 2025, as an expert in physical medicine. Dr. Fall testified that according to her report on the day she saw claimant reviewed the medical record and examined Claimant and she found left shoulder contusion, right knee contusion, diffusion myofascial and temporary aggravation of anxiety. Dr. Fall also testified that on the day of the examination she found those injuries to result from the auto accident. (Depo. Of Allison Fall P. 31 Line 19 through P.32 Line 3)

17. During the deposition Dr. Fall changed her opinion and testified that Claimant did not sustain an injury. She further testified that there is no objective evidence that claimant required physical therapy, or massage therapy because of the auto accident on September 11, 2024. The reason for her change in opinion was based on her review of the photos of the damage to the Claimant’s vehicles in the accident.

18. Dr. Fall testified that there are three points to her mechanism of injury analysis 1. Whether is biologically possible, 2. Is there a temporal relationship between, 3. There is no other cause determined. Dr. Fall testified that the Claimant did not sustain any injuries as the result of the automobile collision.

19. Lisa Muehler testified that Lockheed Martin does not own the parking lot, nor are they responsible for the care and maintenance of the parking lot where the accident took place. Lockheed Martin also does not own the building that they operate out of. However, she further testified that all Lockheed Martin employees do park there.

20. Claimant has proven by preponderance of the evidence he was within the course and scope of his employment when he was involved in the automobile collision in the parking lot outside his office.

21. However, Claimant has failed to sustain his burden of proof that he sustained any injuries as the result of the automobile collision.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), *Sections 8-40-101, C.R.S. 2007, et seq.,* is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In general, the Claimant 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 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 the Respondents. *Section 8-43-201, C.R.S.*

B. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office, 84 P.3d 1023 (Colo. 2004).* This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office, 43, P.3d 637 (Colo. App. 2001).* Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder shoulder 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 P3d 684 (Colo. App. 2008); Kroupa v. Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002).*

Compensability

D. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office, 321 P. 3d 548 (Colo. App. 2001),* aff'd *Harman-Bergstedt, Inc. v. Loofbourrow, 320 P.3d 327 (Colo. 214); Section 8-45-301(1)(b), C.R.S.*

E. The phrases “arising out of” and “in the course of” are not synonymous and a Claimant must meet both requirements for the injury to be compensable. *Younger v. City and County of Denver, 810 P.2d 647, 649 (Colo. 1991); In re Question Submitted by U.S. Court of Appeals, 759 P.2d 1720 (Colo. 1988).* The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando, 811 P2d 379, 381 (Colo. 1991).* An injury occurs in the course of employment when it takes place within the time and place limits of the employment relationship and during and activity connected with the employee’s job-related functions. *In Re Question submitted by U.S. Court of Appeals, supra; Deterk v. Times Publishing Co., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).*

F. Generally, an injury sustained while traveling to or from work is not considered to have occurred within the scope of employment. *Varsity Contractors v. Baca 709 P.2d 55 (Colo. App. 1985); Berry’s Coffee Shop, Inc. v. Palomba, 161 Colo. 369, 423 P.2d 2 (1967).* However, there is an exception when “special circumstances” create a causal relationship between the employment and the travel beyond the sole fact of the employee’s arrival at work. *Madden v. Mountain West Fabricators, 977 P.24 861,863 (Colo. 1992); Staff Administrators, Inc. v. Reynolds, 977 P.2d 866 (Colo. 1999).*

G. In *Madden v. Mountain West Fabricators, Inc.,* supra. The Supreme Court set forth four categories of evidence that may establish a travel injury to be an exception to the coming and going exclusion:

1.) Whether the travel occurred during working hours,

2.) Whether the travel occurred on or off the employer’s premises,

3.) Whether the travel was contemplated by the employment contract.

4.) Whether the obligations or conditions of the employment created a “zone of special danger” out of which the injury arose.

H. Injuries sustained in parking lots which are provided by the employer for the benefit of employees arise out of the employment because they are a normal incident to the employment relationship. *Seltzer v. Foley's Department Store*, W. C. No. 4-432-260 (September 21, 2000). In the Matter of the Claim of Elaine Wilson, Claimant's parking lot injury was compensable even though it occurred while claimant was off the clock, and at a place where the risk was shared by the general public. *In the Matter of the Claim of Elaine Wilson, Claimant*, No. W.C. No. 4-937-322-01, (Colo. Ind. Cl. App. Off. Mar. 16, 2015).

The claimant must also satisfy the “arising out of” requirement for compensability. The “arising out of” element is narrower than the “course” element and requires the claimant to prove that the injury had 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.” *See Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968) In order to satisfy the arising out of requirement, it is not necessary that the claimant actually be engaged in performing job duties at the time of the injury. *In the Matter of the Claim of Elaine Wilson, Claimant*, No. W.C. No. 4-937-322-01, (Colo. Ind. Cl. App. Off. Mar. 16, 2015)

As in *Wilson*, Claimant was in a parking lot that shared by more than just employees. Claimant was parked where all other Lockheed Martin employees park. Claimant was parked where he was directed to park on his first day of work. Additionally, Claimant was on the clock.

Therefore, based on the totality of the evidence the ALJ concludes that Claimant has proven by a preponderance of the evidence he sustained an injury that was within the course and scope of his employment.

Alternatively, since the Claimant was on a paid 10-minute break to obtain a snack and a bottle of water from a nearby convenience store, the injury sustained during that break can be and is considered to be within the course and scope of employment. *Roach v. Industrial Commission of the State of Colorado*, 792 P.2d 991 (Colo. App. 1986).

Medical Benefits

Compensable injuries involve an “injury” which requires medical treatment or causes disability. H & H Warehouse v. Vicory, 805 P.2d 1167 (Colo. App. 1990). Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. Eller v. Industrial Claim Appeals Office, 224 P.3d 397 (Colo. App. 2009).

It is concluded as a matter of law Claimant failed to meet his burden of proof. It is concluded as a matter of law the incident in question did not cause a compensable injury.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; Faulkner v. Indus. Claim Appeals Office, 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a

particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. Kroupa v. Industrial Claim Appeals Office, supra; Wal-Mart Stores, Inc. v. Industrial Claims Office, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. HLJ Management Group, Inc. v. Kim, 804 P.2d 250 (Colo. App. 1990).

It is concluded as a matter of law Claimant failed to meet his burden of proof and establish the healthcare he sought/obtained after the incident was reasonably needed to cure and relieve the effects from and related to the incident.

Contrary to Claimant's assertion that he sustained injuries as the result of the automobile collision, Dr. Fall, after review of the photographs of the vehicles involved, testified that the Claimant sustained no injuries from the collision. This testimony from Dr. Fall is credible and persuasive. It is concluded that since Claimant sustained no injuries, Respondents are not liable for any medical treatment after the incident on September 12, 2024.

ORDER

It is therefore ordered that:

1.) The September 11, 2024 incident was within the course and scope of employment.

2.) Respondents are not liable the medical expenses rendered by Cory Hoover at Complete Care, Dr. James Thatcher at Alliance Health Partners, and Dr. Daniel Paull at Easy Orthopedics since the treatment rendered was not necessary and did not result from the incident on September 11, 2024

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

Dated this 22nd day of April, 2025.

Michael A. Perales

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

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 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. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury on April 7, 2022, arising out of and in the course of his employment with Respondent-Employer.

2. Whether Claimant has proved by a preponderance of the evidence that there exists fraud, overpayment, error, mistake, or a change of condition such that there exists cause for reopening his claim pursuant to § 8-43-303, C.R.S.

FINDINGS OF FACT

1. Claimant alleges that he sustained burn injuries while working for Respondent-Employer on April 7, 2022, as a dishwasher. Specifically, Claimant alleges that he attempted to pick up a pot of hot chicken broth that had only one handle and the hot chicken broth spilled over his knee and ankle causing burns.

2. Respondents filed a Notice of Contest (NOC) on September 23, 2022, denying the claim for further investigation. A copy was mailed to Claimant's home address.

3. Claimant obtained legal counsel. However, that counsel moved to withdraw from the case on February 3, 2023. The Division of Workers' Compensation granted the motion on February 17, 2023.

4. At some point in time, roughly in May 2023, Respondents filed a motion with the Division to close the claim for failure to prosecute. On June 2, 2023, the Director issued an Order to Show Cause, ordering that Claimant's failure to respond to the Order within thirty days would result in the claim being automatically closed. The Order was sent to Claimant's home address.

5. There is no evidence in the record that Claimant ever responded to the June 2, 2023 Order. The Court finds that the claim was automatically closed effective July 3, 2023.

6. At hearing, Claimant testified that on the date of injury he was working a twelve-hour shift as a dishwasher. He testified that he was wearing pants, shoes, and socks at the time of the injury, and that after spilling the chicken broth on his leg, he continued to work for only a few more days before he was no longer able to. At the time of the injury, Claimant had concurrent employment with Amici's Pizza. Claimant acknowledged that he later sustained a separate injury with another employer, Firstwatch.

7. Claimant also confirmed in his testimony that his address was that which was documented on the certificates of mailing of the NOC and the Director's June 2, 2023 Show Cause Order.

8. The Court finds Claimant's testimony credible.

9. The claims adjuster, Ronda Hackett, also testified at hearing. She testified that she was assigned to this matter on December 20, 2024. However, she reviewed the file and the log notes and found that no mail that Respondent-Insurer ever sent to Claimant's home address was ever returned as undeliverable. She also testified that she had spoken with Claimant approximately ten times over the phone and that Claimant had never provided her with any medical records documenting him being taken off work.

10. The Court finds Ms. Hackett's testimony credible.

11. The Court finds that there does not exist cause to reopen the claim on the bases of fraud, overpayment, error, nor mistake. Furthermore, the Court does not find any credible evidence that Claimant's alleged work injury has worsened so as to cause a change in the degree of Claimant's permanent disability or his need for medical or temporary disability benefits since the time the claim was closed. Therefore, the Court also does not find cause to reopen the matter on the basis of a change in condition.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Reopening

Once a claim is closed, it may be reopened only on grounds of fraud, overpayment, error, mistake, or change in condition. Section 8-43-303, C.R.S. (2024). The reopening authority granted to ALJs by § 8-43-303 "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." *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186, 189 (Colo.App.2002).

A "change in condition" refers to a "change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Cordova v. Industrial Claims Comm'n*, 55 P.3d 186, 189 (Colo. 2002); *In re Caraveo*, W.C. No. 4-358-465 (October 25, 2006). Reopening is appropriate when the claimant's degree of permanent disability has changed since MMI or where the claimant is entitled to additional medical or temporary disability benefits that are causally connected to the compensable injury. *See Duarte v. Glen Ayr Health Center*, W.C. No. 4-521-453 (June 8, 2007).

As found, this matter closed effective July 3, 2023, as a result of the Director's June 2, 2023 Order. At the time, the compensability of Claimant's claim was at issue.

Claimant has not put forth any cogent or persuasive argument that there exists a factual basis warranting reopening of his claim under § 8-43-303. Indeed, as found, the Court does not find cause to reopen the claim on the bases of fraud, overpayment, error, mistake, or change of condition. The Court finds no credible evidence that Claimant's alleged work injury has worsened so as to cause a change in the degree of Claimant's permanent disability or his need for medical or temporary disability benefits since the time the claim was closed.

Therefore, the Court finds that Claimant has not proved by a preponderance of the evidence that there exists cause for reopening his claim under § 8-43-303, C.R.S.

Compensability

As Respondents filed a NOC in this matter, and the matter remains closed, the Court does not address compensability.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove by a preponderance of the evidence that there exists cause for reopening his claim.

2. All issues 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 22, 2025.

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury on June 13, 2024, during the course and scope of his employment with Employer.

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

3. Whether Claimant is entitled to select his authorized treating physician.

4. Claimant's Average Weekly Wage.

FINDINGS OF FACT

1. Claimant was hired by Employer in May, 2023, to fulfill orders for restaurants. He was paid in checks in the amount of $1,360.00 bi-weekly. The checks provided by employer entered into evidence total $32,640 over a period of 52 and 2/7 weeks. The Claimant's average weekly wage is $624.26.

2. Amardeep Dham testified that Respondent-Employer did not have workers' compensation insurance at the time of the injury because the insurance broker used by Respondent-Employer did not offer the business workers' compensation insurance or inform the business that it needed workers' compensation insurance.

3. On June 13, 2024, while working for Employer, Claimant injured his back when he lifted a heavy bag of flour. As he lifted the bag of flour, he felt a crack in his back and lost feeling to his leg. He fell to the ground. Claimant reported the injury that same day. Employer advised him to take Tylenol for his pain. However, Claimant's pain continued to increase, and he called a family member to pick him up and take him to a hospital.

4. Claimant was taken to the Denver Health Urgent Care Center. He was evaluated by Kendall Mulvaney, P.A., for complaints of low back pain and numbness/weakness in his bilateral lower extremities. He was diagnosed with severe low back pain. He was transferred to the emergency room for further pain management and advanced imaging including MRI to evaluate source of severe symptoms. (Claimant's Exhibit 3, pages 110 to 115).

5. Claimant was transferred to the Emergency Department where an MRI of the lumbar spine was completed. The lumbar MRI showed mild multilevel spondylosis with posterior disc bulges at L4-5 and L5-S1 and associated annular fissure at L5-S1, mild effacement of the left subarticular zones at L4-5, and mild bilateral foraminal narrowing at L5-S1. He was referred to Neurosurgery. (Claimant's Exhibit 3, pages 32 to 35).

6. Claimant was evaluated by Andrea Coder, P.A., at the Neurosurgery Department of Denver Health. Claimant was diagnosed with acute low back pain and L4-5 herniated disc with lumbar radiculopathy. He was prescribed Medrol and Flexeril, physical therapy, and was advised to follow up in 4 - 6 weeks. He was discharged that same day. (Claimant's Exhibit 3, page 54).

7. Claimant returned to work on June 17, 2024, but was informed by Employer he was not employed anymore.

8. Claimant has received physical therapy treatment at the Denver Health Outpatient Rehabilitation Services for his lower back pain and bilateral lower extremity pain. (Claimant's Exhibit 3, pages 138 to 149).

9. Claimant was never provided a list of designated providers by Respondent.

10. Claimant continues to experience lower back pain, as well as left lower extremity pain and numbness. Claimant returned to work cleaning at a court. However, he has difficulty performing his job duties.

11. The testimony of Claimant is credible.

CONCLUSIONS OF LAW

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 seek 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.

Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41 301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

Claimant has proven that it was more likely than not he was injured in the course and scope of his employment with Employer on June 13, 2024, when he injured his low back while lifting a bag of flour. Claimant's claim is determined to be compensable.

Medical benefits

Employer is 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). A claimant must establish the causal connection between the compensable event and the need for medical care 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).

Authorization refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005).

Claimant has shown he is entitled to medical benefits that are reasonably necessary and related to Claimant's low back injury on June 13, 2024. Claimant's injuries were treated by the various providers at Denver Health. Claimant had a lumbar MRI which showed mild multilevel spondylosis with posterior disc bulges at L4-5 and L5-S1 and associated annular fissure at L5-S1, mild effacement of the left subarticular zones at L4-5, and mild bilateral foraminal narrowing at L5-S1. Claimant received physical therapy and had follow up appointments with the outpatient clinic. Claimant has proven by a preponderance of the evidence that Claimant's medical care through Denver Health was authorized, reasonably necessary and causally related to the June 13, 2024, incident. However, Respondent is not liable for medical treatment unrelated to the low back injury.

Authorized Treating Physician

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

In this case, the employer did not provide the claimant with a list, at any time, of at least four providers from which the claimant could choose to treat for his work injury. Claimant received emergency treatment at the Denver Health Hospital. He has also received medical treatment at the outpatient clinic. As a result, the claimant has established by a preponderance of the evidence that he may select a physician to treat him from the effects of his work injury.

ORDER

Based upon the preceding findings of fact and conclusions of law, the following order is entered:

1. Claimant has established by a preponderance of the evidence that he suffered a compensable injury on June 13, 2024, during the course and scope of his employment with Employer.

2. Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary, and causally related medical benefits for his June 13, 2024, injury.

3. Claimant has established by the preponderance of the evidence he is entitled to select a physician to treat his work-related injuries.

4. Claimant's Average Weekly Wage is $624.26.

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

DATED: April 23, 2025.

Michael A. Perales
Michael Perales
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80202

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-259-225-001

PROCEDURAL MATTER

At the outset of the hearing, Claimant advised the Court that the issues surrounding his entitlement to medical benefits and a change of provider had been resolved. Consequently, he withdrew his request for determination of these issues.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits from May 20, 2024, and ongoing.

II. If Claimant failed to establish that he is entitled to TTD as of May 20, 2024, whether he established, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning January 28, 2025, and ongoing.

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

IV. Whether Claimant established that Respondents are subject to penalties for its failure to file an Admission of Liability pursuant to W.C.R.P. Rule 5-5 (C) following the termination of Claimant's TTD on February 24, 2024.

V. A determination of Claimant's proper average weekly wage (AWW).

FINDINGS OF FACT

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

1. On November 13, 2023, Claimant was mopping a floor when he slipped and fell over a metal stool landing on the left side of his chest wall. He had persistent and worsening pain in the area, so he presented to Concentra Medical Centers (hereinafter "Concentra") later that same day. (RHE E). While at Concentra, Claimant was evaluated by Physician Assistant (PA) Mendy Peterson, who ordered chest x-rays. *Id*. at 21. X-rays revealed fractures of the left 8th, 9th and 10th ribs as well as a possible pulmonary contusion. (RHE F). Accordingly, Claimant was advised to proceed to the Emergency Room.

2. Claimant presented to the emergency room (ER) at Grandview Hospital where CT imaging revealed displaced fractures of the 8th, 9th, and 10th ribs, a questionable fracture of the sternum, and a small basilar pneumothorax and pulmonary contusion. (RHE H, p.41). Transfer to Memorial Hospital was recommended. *Id.*

3. Claimant was transported by ambulance to Memorial Central Hospital. (RHE G). Upon arrival, Claimant complained of difficulty breathing. (RHE H, p. 51). Claimant's diagnostic imagining was reviewed by Dr. Michelle Buehner from the Trauma & Acute Care Surgery (TACS) Team. *Id.* at 52. After review of Claimant's CT scan, Dr. Buehner opined that Claimant had multiple displaced rib fractures that appeared to have penetrated his lung. *Id.*

4. Claimant was admitted to the hospital, a chest tube was inserted, and he underwent rib plating performed by Dr. Nathan Schmoekel on November 14, 2023. (RHE H, pp. 67-68). Claimant was discharged from the hospital to recuperate from home on November 19, 2023. He then presented to Peak Vista Community Health Center (hereinafter "Peak Vista") on November 30, 2023.[1] (RHE I, pp. 122-126).

5. During the November 30, 2023, appointment, Dr. Paul Cump made small adjustments to Claimant's medication regimen and counseled him on appropriate activity levels as he recovered from his injuries. (RHE I, p. 122, 125).

6. Respondents filed a General Admission of Liability (GAL), which is undated but based upon the evidence was probably filed on or about December 23, 2023. The GAL admitted liability for medical and TTD benefits at a rate of $351.59, based upon an average weekly wage of $527.36, commencing November 14, 2023, and continuing. (CHE 1, p. 2).

7. Claimant returned to Peak Vista for follow-up care on December 28, 2023, January 30, 2024, and February 20, 2024. (RHE I, pp. 127-137). Claimant testified that Employer asked him to return to work in February 2024, so he went to Peak Vista on February 20, 2024, to obtain a release to return to work. As part of this February 20th appointment, Dr. Cump drafted correspondence advising Employer that Claimant was able to return to work on February 26, 2024, with the following work restrictions, "no climbing and no lifting over 30 pounds." (RHE I, p. 137).

8. Claimant returned to work with the aforementioned restrictions, albeit earning full wages on or about February 26, 2024. (RHE L). Per Dr. Cump's stated work

[1] Claimant had established a treatment relationship with the providers at Peak Vista dating back to January 9, 2019. (See RHE I, p. 110).

restrictions, the ALJ finds that Claimant was to be working modified duty. Regardless, Claimant testified that Employer was not honoring his work limitations. Thus, Claimant testified that he was performing his duties like he had prior to his injury. Claimant added that when he returned to work, his TTD checks were stopped. According to Claimant, he has not received any TTD checks since February 24, 2024.

9. Claimant testified that he did not receive an admission of liability after his TTD benefits were stopped. As presented, the evidence persuades the ALJ that Claimant's TTD benefits were terminated after his February 24, 2024, check and that a GAL reflecting the termination of his disability benefits was not filed until March 3, 2025. (See RHE B). In fact, Respondents concede that a GAL reflecting the termination of TTD benefits following Claimant's return to work was mistakenly not filed until March 3, 2025.

10. Claimant returned to Peak Vista on May 8, 2024, where he was once again evaluated by Dr. Cump. (RHE I, pp. 138-142). After evaluating Claimant, Dr. Cump drafted a work status note indicating that Claimant was released to return to work in a medium duty capacity, meaning that Claimant could lift a maximum of 50 pounds and frequently lift/carry items weighing up to 25 pounds. *Id*. at 142. Dr. Cump also made the following comment regarding management of Claimant's November 13, 2023, injury: "This injury should be handed (*sic*) by a Work Comp doctor as that is the LAW! Please advise me when [Claimant] is under the care of a Work Comp physician." *Id.* (emphasis in original).

11. Regarding the purpose of the May 8, 2024, appointment, Claimant testified that his foreman, John Ortega had requested that he go to his provider to see if he could obtain a release to return to full duty work. Based upon the evidence presented, the ALJ infers that for Claimant to continue working and be of service to Employer, they needed him to be able to perform a more exhaustive list of his duties, including those that exceeded the 30-pound lifting restriction imposed by Dr. Cump on February 20, 2024. As presented, the evidence persuades the ALJ that contrary to Claimant's assertions Employer was probably following Claimant's restrictions but was finding it difficult to justify his continued employment given the nature of his position. Thus, Mr. Ortega probably asked Claimant to obtain a full duty work release.

12. According to Claimant, he was willing to go to his doctor to try to obtain a full duty release as he wanted to continue working. As evidence of this, Claimant sent the following email message to his employer on April 27, 2024:

> Hello this is only to let you know that I can get the document from the doctor that allows me to go back to work. The only thing I want is to

> [continue] working for the company. I am a good person, hardworking and honest. Please give me another chance [as] this is the only thing I want. I am not going to create problems [for] your company like liability issues. I am not that kind of person and thank you.

(CHE 6). After sending the above referenced email message to his employer, Claimant returned to Dr. Cump on May 8, 2024, where he asked to be released from care. According to Claimant, Dr. Cump refused to provide him with a full duty release. Instead, Dr. Cump updated Claimant's work restrictions allowing for medium duty capacity work to include a maximum lifting capacity of 50 pounds and a frequent lift/carrying limit of up to 25 pounds. (RHE I, p. 142).

13. Claimant testified that after he saw Dr. Cump, he took the work status paperwork to his employer that same day. He added that after sharing the note with Employer he was scheduled to be seen at Concentra the next day, i.e. May 9, 2024. Claimant testified that after eating lunch in his truck, he proceeded to the shop to clock into work for the afternoon. On his way to the shop, Claimant ran into Employer's General Manager, Benjamin James. Claimant testified that he asked Mr. James for permission to miss work to attend the scheduled appointment at Concentra and that Mr. James granted his request.

14. After speaking with Mr. James, Claimant went to the shop to inform Mr. Ortega about the approved time off to attend the upcoming Concentra appointment. Claimant testified that after telling Mr. Ortega about needing time off to attend the Concentra appointment, Mr. Ortega immediately began to verbally berate him. According to Claimant, Mr. Ortega then abruptly terminated his employment. Claimant testified that after this verbal exchange, he proceeded to the office to discuss his termination, but nobody there would talk to him about it. Claimant then collected his tools and turned in his radio and keys before leaving Employer's premises. Claimant never returned to work for Employer after May 8, 2024.

15. Mr. James contacted Claimant via text message the next day to inform him that he had not been terminated and that he should report for work. Claimant admitted that after receipt of this original message he received subsequent messages advising him that he still had a job and to return to work. Claimant testified that he was still under restrictions at the time and that Employer never offered him a job in writing that would accommodate his restrictions. Claimant did not report for work on May 21, 2024, nor did he report on May 22nd or May 23rd. Accordingly, his employment was terminated for

"voluntary job abandonment" on May 23, 2024, after this three day no call, no show period. (RHE N, p. 232).

16. Mr. James testified as Employer's General Manager. He testified that there was a verbal dispute between Claimant and Mr. Ortega prompting Claimant to turn in his keys and leave Employer's premises. He understood that Mr. Ortega, whom he referred to as the Maintenance Supervisor, did not fire the Claimant but had instead sent him home for the day. He added that Mr. Ortega did not have the authority to terminate Claimant and that the Human Resources (HR) team must review and guide all termination decisions.

17. Mr. James testified that he sent a text message to Claimant after learning that he had turned in his keys and left the premises the day before. According to Mr. James, he advised Claimant that he was not fired, and he needed to come back to work. In his text messages, Mr. James reiterated to Claimant that his job was secure, and he had merely been sent home for the day after arguing with Mr. Ortega. Mr. James testified that he reached out to Claimant at least three or four times on separate days to let him know his job was open and to return to work. Mr. James testified that in response to his text messages, Claimant adamantly expressed that Mr. Ortega had fired him. Because Claimant was not retuning to work as requested, Mr. James reached out to HR to see what to do about the situation. According to Mr. James, Claimant's employment was terminated for job abandonment three days after he was given a deadline to report and failed to do so.

18. Employer has a written attendance policy requiring all employees to report promptly for their designated work shifts. (RHE M). The attendance policy specifically addresses unexcused absences from work. *Id*. at 227. The attendance policy provides: "Excessive tardiness or unexcused absenteeism will not be tolerated. Failure to follow the proper call-in procedures or poor attendance will result in disciplinary action, up to and including termination of employment. *Absence from work for three consecutive days without notifying the employee's supervisor will be considered job abandonment and a voluntary resignation"*. *Id*. (emphasis added).

19. Claimant's employment was terminated on May 23, 2024, by Thomas Gwynne, Employer's Regional Vice President, in accordance with Employer's attendance policy. (RHE N, p. 232). The termination letter was sent to Claimant via email and mailed to his physical address. *Id*. Claimant confirmed both addresses where the letter was sent during his testimony. Based upon the evidence presented, the ALJ finds Claimant's assertion that he did not receive the termination letter unconvincing. Because Claimant never returned to work following the incident with Mr. Ortega, he was paid for his

accumulated, but unused leave time and 19.40 hours of work that predated his May 23, 2024, termination. (RHE N). Claimant was paid on May 31, 2024. (RHE L, pp. 218-219).

20. Claimant was evaluated by Dr. John Raschbacher on November 19, 2024. Dr. Raschbacher is not an authorized treating physician. Rather, he performed an independent medical evaluation (IME) of Claimant at Respondents' request. As part of his IME, Dr. Raschbacher opined that Claimant had reached maximum medical improvement (MMI) by May 8, 2024. (RHE J, p. 158). He opined further that it was not necessary to restrict Claimant's physical activity, noting instead that Claimant "should be at regular work status." *Id*. at 159.

21. The parties reached an agreement to resolve the dispute regarding selection of the authorized provider to attend to Claimant's November 13, 2023, injuries. In furtherance of that agreement, Claimant was evaluated by Dr. Miguel Castrejon on January 28, 2025. (RHE K). After completing a records review and a physical examination, Dr. Castrejon noted that Claimant had not "returned to work since he was fired on 5/8/24". (CHE 5, p. 128). Dr. Castrejon opined that Claimant was able to "[r]eturn to temporary light duty." Dr. Castrejon assigned work restrictions including sit, stand and walk as "tolerated", no lifting over 15 pounds, no overhead work and no repetitive bending/stooping. While Dr. Castrejon's report contains information regarding identity of Employer and the insurance carrier, no persuasive evidence was presented to establish that the report outlining Claimant's work restrictions was presented to Employer.

22. During cross-examination, Mr. James addressed the question of whether a job was extended to Claimant in writing, at any time, after he was sent home on May 8, 2024. In response, Mr. James testified that he personally sent a text message to Claimant indicating that the job Claimant was working was open, that he had not been terminated and that he needed to return to work. Mr. James added that Employer would accommodate Claimant's work restrictions as they had when he returned to work initially on February 26, 2024. Mr. James testified that Employer's assumption at the time the messages to come back to work were sent to Claimant was that he would return to the same modified job he was performing prior to the May 8, 2024, altercation with Mr. Ortega. Regardless, Mr. James conceded that he was unaware of any modified job approved by a physician being sent to Claimant after he was sent home on or about May 8, 2024.

23. Claimant concedes that the wage records submitted by Respondents at Exhibit L are a more accurate reflection of his earnings and average weekly wage than the records he submitted at CHE 7. Review of the records contained at Exhibit L reflect payment for regular and overtime wages on a reoccurring basis for 26 weeks (May 13, 2023 – November 10, 2023) prior to the date of Injury as follows:

05/13/23	05/26/23	$1,215.20
05/27/23	06/09/23	$1,288.80
06/10/23	06/23/23	$1,294.40
06/24/23	07/07/23	$1,290.40
07/08/23	07/21/23	$1,309.60
07/22/23	08/04/23	$1,932.80
08/05/23	08/18/23	$2,477.60
08/19/23	09/01/23	$1,476.80
09/02/23	09/15/23	$1,285.60
09/16/23	09/29/23	$1,294.40
09/30/23	10/13/23	$1,287.20
10/14/23	10/27/23	$1,333.23
10/28/23	11/10/23	$1,362.08

(RHE L, pp. 191-204). In addition to the above referenced pay periods, the wage records admitted into evidence reflect a $1,000.00 bonus check, which the ALJ did not consider when calculating Claimant's average weekly wage. (See RHE L, p. 202). Although the wage records admitted into evidence reflect Claimant's earnings over a period greater than six months, the ALJ finds that the above 26-week period best reflects the Claimant's average earnings. The total earned during this period equals $18,848.11, which results in an average weekly wage of $724.93. ($18,848.11 ÷ 26 weeks = $724.93/week).

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), §§ 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. C.R.S. § 8-40-102. Generally, the claimant in a workers' compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-42-101. 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 properly true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a workers' compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A workers' compensation case is decided on the merits. §8-43-201, C.R.S.

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

Claimant's Entitlement to Temporary Disability Benefits and his May 23, 2024, Termination

C. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss to be entitled to TTD benefits. C.R.S. § 8-42-103(1)(a); *Liberty Heights at Northgate v. Industrial Claim Appeals Office*, 30 P. 3d 872 (Colo. App. 2001).

D. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). The impairment of the 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/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in C.R.S. § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claims Appeals Office, supra*.

E. In this case, the evidence presented supports a conclusion that Claimant's November 13, 2023, industrial injury caused a disability lasting more than three work shifts and that this disability caused an actual wage loss as demonstrated by Claimant's complete inability to resume his prior employment between November 14, 2023, and February 26, 2024. Indeed, Respondents admitted liability for TTD benefits as of November 14, 2023, and continued to pay those benefits through February 24, 2024.

(CHE 1, p. 2; RHE B, p. 7). Thereafter, the evidence supports a conclusion that Claimant returned to modified duty work, at full wages, on or about February 26, 2024. (RHE L). Therefore, Respondent's terminated Claimant's TTD benefits.[2]

F. Claimant now contends that he is entitled to collect TTD benefits beginning May 20, 2024, and continuing because his wage loss on and after this date is causally related to his November 13, 2023, injury. The ALJ is not persuaded. In this case, the persuasive evidence demonstrates that while Claimant was temporarily disabled as of May 20, 2024[3], Employer had been accommodating the work restrictions imposed on him by Dr. Cump following Claimant's February 20, 2024, appointment. Moreover, the ALJ is convinced that Claimant worked modified duty, at full duty pay, under these restrictions from February 26, 2024, to May 8, 2024, when he engaged Mr. Ortega in what the ALJ concludes was probably an emotionally charged verbal argument. Based upon the evidence presented, the ALJ is not convinced that Claimant's modified employment was terminated by Mr. Ortega on May 8, 2024. Rather, the ALJ credits the testimony of Mr. James to find and conclude that Claimant was probably sent home for the day on May 8, 2024, for quarreling with his foreman. Moreover, the ALJ is convinced that Mr. James, as Employer's General Manager, informed Claimant, on multiple occasions after the May 8th altercation, that he had not been terminated and to return to work. As presented, the evidence supports a conclusion that Mr. James' messages were either ignored or outright challenged by Claimant who stubbornly refused to return to work on the erroneous belief that he had been terminated. Only after refusing to return to work and the passage of a three day no-call, no-show period, was Claimant's employment terminated, which resulted in further wage loss. Thus, while Claimant was temporarily disabled and he suffered a wage loss after May 8, 2024, Respondents argue that the request for TTD should be denied on the grounds that he is responsible for that wage loss.

G. Sections 8-42-105(4), C.R.S., and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." *See William Holsonback v. Brand Scaffold Builders*, W.C. No. 4-724-509 (June 12, 2008). Because the injury in this case occurred after July 1, 1999, the aforementioned statutory provisions, collectively referred to as the "termination statutes", apply to Respondents' assertion that Claimant is responsible for his wage loss. Under the termination statutes, a claimant who is responsible for the

[2] An analysis regarding the asserted penalties for failing to timely file an Amended General Admission of Liability reflecting the termination of Claimant's TTD benefits is set out below.

[3] As evidenced by restriction of bodily function following Claimant's February 20 and May 8, 2024, medical appointments with Dr. Cump at which he assigned physical restrictions limiting the scope of Claimant's work.

termination of modified or regular employment is not entitled to temporary disability benefits absent a worsening of condition, which reestablishes the causal connection between the injury and the wage loss. See *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004); see also *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Grisbaum v. Industrial Claim Appeals Office*, 109 P.3d 1054 (Colo. App. 2005). Simply put, a claimant who is responsible for his/her wage loses the right to temporary disability benefits following the termination date. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo. App. 1994).

H. Since the termination statutes provide a defense to an otherwise valid claim for temporary disability benefits, Respondents shoulder the burden of proving, by a preponderance of the evidence, that Claimant was responsible for his termination and subsequent wage loss. *Colorado Compensation Insurance Authority v. Industrial Claims Appeals Office,* 20 P.3d 1209 (Colo. App. 2000). The dispositive question in these cases is whether the employee performed a volitional act or otherwise exercised a degree of control over the circumstances resulting in his/her discharge. See generally, *Keil v. Industrial Claim Appeals Office*, 847 P.2d 235 (Colo. App. 1993). Respondents do not have to prove that the claimant knew or should have known that his/her conduct would result in termination. *Gonzales v. Industrial Commission*, 740 P.2d. 999 (Colo. 1987). Rather, it is only necessary for Respondents to establish that the claimant is “responsible” for his/her termination and subsequent wage loss through a volitional act or the exercise of some control over the circumstances surrounding the termination.

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

414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). In this case, the ALJ is convinced that Claimant committed a number of volitional acts and exercised a degree of control over the circumstances leading to his termination. Indeed, the evidence supports a conclusion that Claimant either deliberately ignored multiple messages from Mr. James, whom he knew to be Employer's General Manager, to return to work or utterly refused to report for work despite knowing that he had not been fired by Mr. Ortega. As presented, the evidence supports a conclusion that Claimant's conscious decision not to return to work ultimately lead to his termination for violating Employer's attendance policy after he was a no-call, no-show for three consecutive workdays, i.e. on May 21st, 22nd, and 23rd.

J. Claimant's volitional refusal to follow Employer's reasonable requests and established attendance policies exhibits a significant degree of contempt for Mr. James and Employer. Based upon the evidence presented, it is not surprising that his employment was terminated. Indeed, the ALJ concludes that any employee acting in a similar fashion as Claimant would reasonably expect such behavior to result in the loss of employment. Accordingly, the ALJ is convinced that Claimant is responsible for the termination of his employment. Pursuant to C.R.S. § 8-42-103 (1) (g), § 8-42-105 (4) (a), and § 8-42-105(4) (a), any wage loss beginning May 8, 2024, and extending through January 28, 2025, is not attributable to Claimant's November 13, 2023, work-related injury but rather the termination of his employment. Accordingly, Claimant's request for TTD benefits for the period extending from May 20, 2024, to January 28, 2025 is denied and dismissed. Alternatively, Claimant asserts entitlement to TTD beginning January 28, 2025, and ongoing, presumably on the basis that he experienced a worsening of condition based on the restrictions assigned by Dr. Castrejon. As presented, the evidence fails to convince the ALJ that Claimant has proven that his condition has worsened. More importantly, the ALJ credits the testimony of Mr. James to find and conclude that had Claimant been interested in returning to work and had Dr. Castrejon's restrictions been presented to Employer, those restrictions, more probably than not, would have been accommodated and Claimant would have been returned to modified duty. Thus, Claimant's request for TTD benefits commencing January 28, 2025, and ongoing is denied and dismissed.

Claimant's Entitlement to Penalties for Failure to File an Amended General Admission of Liability Following Claimant's Return to Work on February 26, 2024

K. Section 8-43-304(1), of the Act identifies four categories of conduct and authorizes the imposition of penalties when an employer or insurer: (1) Violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or Panel. *Pena v. Industrial*

Claim Appeals Office, 117 P.3d 84 (Colo. App. 2005). The imposition of penalties under §8-43-304(1) requires a two-step analysis. First, the ALJ must determine whether the complained of conduct constitutes a violation of the Act, a rule or an order. If the ALJ finds a violation, the ALJ must secondly determine whether the action or inaction resulting in the violation were objectively unreasonable or beyond the control of the insurer. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003). Examples include sudden illness of the responsible individual, power outages, faulty information, insufficient notice, unsound official advice, or horrific weather conditions, among others. *Madera v. Zak Dirt, Inc.*, WC 5-085-650-003 (ICAO, June 7, 2021). The reasonableness of Insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that Insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

L. Division of Workers' Compensation Rules of Procedure, Rule 5-5 (C) provides: "Upon termination or reduction in the amount of compensation, a new admission shall be filed with supporting documentation on or prior to the next scheduled date of payment regardless of the reason for the termination or reduction". In this case, the last disability benefit was paid through February 24, 2024, and the next disability benefit would have been due on March 10, 2024. As presented, the evidence supports a conclusion that Insurer did not file an amended GAL, reflecting the termination of Claimant's TTD, until March 3, 2025. Indeed, Counsel for Respondents admitted that the GAL required by Rule 5-5 (C) was not filed timely. Accordingly, the ALJ concludes that there has been a violation of a procedural rule in this case. Nonetheless, Respondents argue that no penalty should be imposed because the violation was technical in nature and Claimant suffered no harm because he had returned to work at full wages.

M. The imposition of penalties under § 8-43-304(1) is mandatory if there has been a violation of the Act, a rule or an order and the violation was not reasonable under an objective standard. See, C.R.S. § 8-43-304(1). An ALJ errs as a matter of law in refusing to impose a penalty when these elements have been proven. *Varga v. A1 Sewer Master Mountain Water,* W.C. No. 4-508-548 (ICAO July 1, 2004); *Castro v. FBG Service Corporation*, W.C No. 4-739-748 (ICAO Dec. 31, 2008). *See also, Armbruster v. Rocky Mountain Cardiology,* W.C. No. 4-447-502 (ICAO Feb. 24, 2003). *aff'd by Rocky Mountain Cardiology v. ICAO,* 94 P.3d 1182 (Colo. App. 2004). In this case, Insurer offered no defense to the asserted violation of the rule other than to claim that the violation was inadvertent, and that Claimant was not harmed by Insurer's failure to file the required admission. It is well settled that an adjuster's "mistaken beliefs" and poor claims handling procedures are not predicated on a rational argument based on law or fact, and thus have

been determined to be objectively unreasonable. *Diversified Veterans Corporate Center v. Hewuse,* 942 P.2d 1312, 1314 (Colo. App. 1997). In concluding that Insurers conduct in failing to file the necessary admission was objectively unreasonable in this case, the ALJ finds the case of *Arnhold v. UPS,* W.C. No. 4-979-20802 (ICAO Feb. 24, 2017) instructive. In *Arnhold*, respondents were ordered to pay back-due TTD within fifteen days of the order. The adjuster testified she miscalculated the due date mandated by order. The ALJ concluded this was a "human error," was not unreasonable, and declined to award penalties. The ICAO reversed. In reversing, the Panel noted, "Respondents cannot be both negligent in miscalculating the date the TTD payment was due and also be deemed reasonable in doing so." *Arnhold* *4. Also in *Kerr v. Costco,* W.C. No. 5-076-601 (ICAO June 2, 2021), respondents were required by WCRP 5-6(c) to timely issue permanent partial disability (PPD) benefits. The ALJ found respondents violated the rule but declined to issue penalties. In refusing to assess penalties, the ALJ found that respondents forgot to update claimant's address, "inadvertently" mailed the check to a wrong address, and this "clerical error" was not unreasonable. Again, ICAO reversed noting that late payment of PPD due to a 'clerical error' and 'inadvertence' does not denote the conduct of a reasonable employer or insurer. Thus, the Panel remanded the case to the ALJ for assessment of penalties. Here, inadvertently failing to file the required admission for months after it was due constitutes negligent and unreasonable conduct on the part of insurer whether or not Claimant was harmed. Accordingly, penalties must be assessed.

N. The purpose of penalties is to address and dissuade similar ongoing conduct. However, the ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* WC 4-619-954 (ICAO, May 5, 2006). Any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Indus. Claim Appeals Off.*, 126 P.3d 323 (Colo. App. 2005); *Espinoza v. Baker Concrete Construction*, WC 5-066-313 (ICAO, Jan. 31, 2020); *Colorado Dep't of Labor & Employment v. Dami Hosp., LLC*, 442 P.3d 94 (Colo. 2019) (hereinafter *Dami Hospitality*). When determining the penalty, the ALJ may consider factors including the "degree of reprehensibility or culpability of the party and the relationship between the penalty and the harm to the victim caused by the other party's actions. *Associated Business Products*, 126 P.3d at 324. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc*., WC 4-981-806 (ICAO, July 1, 2019). In this case, the evidence presented supports a conclusion that the delay in filing an amended admission of liability following Claimant's return to work probably resulted from isolated, albeit negligent and unreasonable adjusting practices. While Claimant had returned to work earning full wages and was subsequently responsible for the termination of his employment, Respondents failed to file the required admission for 358 days (March

10, 2024 - March 3, 2025) after it was due. Thus, while the harm to the Claimant in this case may be considered minimal, it is noted that failure to comply with the procedural rules adopted by the Division of Workers' Compensation for 358 days is serious and must result in a meaningful consequence so that Insurer understands that they may not ignore their claims adjusting responsibilities. Based on the evidence presented, the ALJ determines that the appropriate penalty for the above referenced violation is $10/per day for each day of the Respondents failure to file an admission of liability after terminating benefits commencing March 10, 2024, and continuing until March 3, 2025, when the required admission was filed. In imposing this penalty, the ALJ has considered the holding in *Dami Hospitality* regarding gross disproportionality. The amount of the penalty imposed is not excessive and serves the purpose of gaining Respondents' compliance with the procedural rules adopted by the Division of Workers' Compensation without unduly creating a financial hardship for Insurer. Simply put, the fine is proportional to the offending conduct and appropriate under the circumstances presented.

Claimant Average Weekly Wage

O. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).* Sections 8-42-102(3) and (5)(b), C.R.S. give the ALJ discretion to calculate an AWW that will fairly reflect a claimant's wage loss and diminished earning capacity. As found, the best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity is based on the earnings from May 13, 2023, through November 10, 2023. The total earned during this period equals $18,848.11, which results in an average weekly wage of $724.93. ($18,848.11 ÷ 26 weeks = $724.93/week). The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his November 13, 2023, work related injury.

ORDER

It is therefore ordered that:

1. Respondents have proven by a preponderance of the evidence that Claimant is responsible for the termination of his employment after May 8, 2024. Accordingly, his claim for TTD benefits between May 20, 2024, and January 28, 2025, is denied and dismissed.

2. Claimant failed to establish his entitlement to TTD benefits commencing January 28, 2025, and ongoing. Thus, this claim for benefits is denied and dismissed.

3. Claimant's request for imposition of penalties against Insurer is granted. Insurer shall pay penalties of $3,580.00. The amount apportioned to Claimant shall be 50% of the penalty and the remaining 50% is apportioned to the Colorado uninsured employer fund as set forth in C.R.S. § 8-43-304(1).

4. Claimant's average weekly wage is $724.93.

5. Any issue not resolved by this order is reserved for future determination.

DATED: April 25, 2025

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-217-644-001 and 5-265-312-001

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer?

- If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits for the period of February 2, 2024 and continuing?

- If Claimant has proven he sustained a compensable injury, whether Respondents have proven by a preponderance of the evidence that Claimant committed a volitional act that led to his termination of employer?

FINDINGS OF FACT

1. Claimant was employed with Employer in the housekeeping department beginning in December 2021. Claimant sustained a compensable injury to his ankle while employed with Employer on July 25, 2022. Respondents filed a General Admission of Liability ("GAL") for that injury on October 3, 2022 admitting for medical benefits and temporary partial disability benefits.

2. Claimant testified that after the July 25, 2022 injury, he returned to work for Employer and on January 28, 2024 he was working in the laundry section for Employer taking wet laundry out of the washing machine when he heard something in his neck and back and felt pain. Claimant testified he reported the injury to a supervisor on the date the injury occurred and was provided with lighter work the rest of the day. Claimant testified he reported the incident to another Supervisor, America, two days later.

3. Claimant testified he sought medical treatment from the same clinic that provided him with treatment for the 2022 ankle injury, but the clinic denied the service. Claimant testified he then went to Vail Occupational Health for treatment and was see two times, but then was denied further treatment.

4. Andres Vega testified on behalf of Employer. Ms. Vega testified that Claimant had been off of work due to his neck injury from the bus accident and returned to work for Employer on January 27, 2024. Ms. Vega testified Claimant worked on January 27 and January 28, but was then off of work on January 29 and January 30. Ms. Vega testified that Claimant worked on January 31 and may have worked on February 9. Ms. Vega testified that Claimant worked for 3.79 hours on February 13, 2024.

5. Ms. Vega testified Claimant showed up on February 8, 2024 and reported he had physical discomfort in his hands and fingers along with pain in his neck. Ms. Vega testified she told Claimant he should file a claim and offered to help Claimant complete the form, but Claimant denied the offer of help. An Employer's First Report of Injury was filed on February 12, 2024 by Employer.

6. Respondents presented the testimony of Azucena Corral, the Director of Housekeeping for Employer. Ms. Corral testified she was Claimant's supervisor in January 2024. Ms. Corral testified Claimant did not report an injury to her on January 28, 2024. Ms. Corral testified that when Claimant worked on February 13, 2024 he left early and mentioned something about his arms feeling weak.

7. Claimant has a history of prior injuries to his neck including a prior cervical fusion and an incident on December 24, 2029 when he was struck by a bus. As a result of this incident, Claimant underwent a cervical spine computed tomography ("CT") scan on January 10, 2020 that showed anterolisthesis at the C3-C4 and the C4-C5 levels, partial fusion across C5-C6 level with hardware. The CT scan further showed bilateral facet arthropathy at the C2-3 level, mild right and moderate left foraminal stenosis at the C3-4 level, mild spinal canal stenosis due to a disc bulge at the C4-5 level, mild left foraminal stenosis due to facet arthropathy at the C5-6 level, mild canal stenosis due to posterior disc osteophyte complex at the C6-7 level and mild bilateral forminal stenosis at the C7-T1 level.

8. Claimant underwent a magnetic resonance image ("MRI") of the right shoulder on July 16, 2020 that showed a complete full thickness tear of the distal supraspinatus tendon insertion with retraction of the torn fibers, full-thickness disruption of the proximal long head biceps with retraction of the torn fibers, subluxation of the humeral head and labral tearing and fraying. Claimant eventually underwent right shoulder surgery to repair the rotator cuff on March 8, 2021.

9. Claimant continued to experience pain in his shoulder and underwent a repeat MRI on October 7, 2022 that showed a full thickness tear of the supraspinatus tendon with a majority of the tendon retracted. It was opined at this time that Claimant's shoulder surgery had failed and a revision surgery was recommended. Claimant eventually underwent the repeat shoulder surgery on October 18, 2022 under the auspices of Dr. Black.

10. Claimant additionally was complaining of pain into his left hand during this time and underwent a cervical MRI on October 14, 2022. The MRI showed sever left foraminal narrowing secondary to uncovertebral spurring, facet arthropathy ad disc height loss at the C3-4 level, disc height loss and desiccation at the C4-5 level with severe right and mild left foraminal narrowing, disc osteophyte complex indents on the anterior cord margin with mild central stenosis at the C5-6 level, and disc height loss with dorsal disc osteophyte complex at the C6-7 level.

11. Claimant was examined by Dr. York with Panorama Summit Orthopedics on December 9, 2022. Dr. York noted Claimant reported paresthesia and dysesthesias in his bilateral hands and noted Claimant reported feeling clumsy and dropping things. Dr. York performed a C3-4 posterior cervical fusion with C3 laminectomy on February 16, 2023.

12. Claimant was examined by Dr. Black for his right shoulder on October 25, 2023. Claimant reported he was doing well with no pain but noted he did have some pain that radiates from his neck that he described as electrical in nature. Dr. Black noted that Claimant was doing very well 12 months out from a complex revision rotator cuff repair and indicated that the residual pain and symptoms were more related to Claimant's cervical spine, than his shoulder.

13. On November 10, 2023, Claimant reported to physicians' assistant ("PA") Emily Mitchell that he had numbness in both of his arms, but the numbness had continued to improve over time. Claimant reported he still had right trapezius and shoulder pain but that he continued to improve with physical therapy.

14. With regard to the present claim, Claimant sought treatment at Mountain Family Medical Centers on February 8, 2024 and reported he was moving 160 pounds of wet laundry when he experienced pain and numbness in his right hand and last three fingers. Claimant was scheduled to see his orthopedic physician on February 9.

15. Claimant was examined by Dr. York on February 9, 2024. Dr. York noted that Claimant was back to work full duty, but had increased pain into his arms and hands last week after pulling wet towels out of the dryer. Dr. York recommended Claimant get an updated MRI and CT scan of the cervical spine.

16. Claimant was examined by PA Philbus at Colorado Mountain Medical on February 16, 2024. The records from this exam indicate that Claimant reported he was pushing a cart of laundry when his neck pain was exacerbated.

17. Claimant was examined by PA Geller at Vail Health on March 28, 2024. Claimant had previously been evaluated by Vail Health for his August 2022 injury and PA Geller reported Claimant's symptoms developed in February 2024 while pushing a cart. PA Geller noted that Claimant was a poor historian and confused about his symptoms, their onset, and care he has received. Claimant reported on this visit that his injury occurred on January 28, 2024, but PA Geller noted that the date of injury on the WC164 form lists the date of injury as 2/1.

18. Claimant underwent a repeat MRI scan on April 10, 2024. The MRI scan showed a moderate disc bulge at the C3-4 level with facet arthrosis resulting in severe bilateral foraminal stenosis. A moderate disc bulge was also noted at the C4-5 level with facet arthrosis and severe bilateral foraminal and moderate central canal stenosis. Anterior fusion hardware was noted at the C5-6 level. A mild disc bulge was noted at the C6-7 level with moderate facet arthrosis resulting in severe right and moderate left

foraminal and moderate central canal stenosis. A moderate sized disc bulge was also noted at the C7-T1 level with bilateral facet arthrosis resulting in severe right and moderate left foraminal stenosis.

19. Claimant underwent another MRI of his cervical spine on May 12, 0224. This MRI showed multilevel, multifactorial degenerative changes of the cervical spine including mild bilateral facet arthropathy, with mild bilateral neuroforaminal stenosis at the C2-3 level, posterior disc osteophyte complex with uncovertebral hypertrophy and moderate bilateral facet arthropathy at the C3-4 level, posterior disc osteophyte complex with uncovertebral hypertrophy and moderate facet arthropathy at the C4-5 level, posterior disc osteophyte complex with uncovertebral hypertrophy and mild bilateral facet arthropathy at the C6-7 level and posterior disc osteophyte complex with bilateral uncovertebral hypertrophy and moderate bilateral face arthropathy at the C7-T1 level.

20. Claimant returned to Dr. Barnett with Panorama Summit Orthopedics on July 22, 2024. Dr. Barnett noted Claimant's prior fusion surgeries and his onset of symptoms after working in the laundry room at a hotel. Dr. Barnett diagnosed Claimant with cervical spondylosis without myelopathy, cervical myofascial pain syndrome and cervical degenerative disc disease. Dr. Barnett recommended Claimant cervical medial branch blocks starting at the C4-5 level.

21. Claimant returned to Dr. Barnett on August 12, 2024. Dr. Barret reviewed the April 10, 2024 cervical MRI and based on Claimant's complaints of radicular arm pain and findings of myelopathy, referred Claimant to a surgical spine physician.

22. The ALJ credits the medical records entered into evidence and finds that Claimant has failed to establish that he sustained an injury arising out of and in the course and scope of his employment on January 28, 2024. The ALJ notes that the accident histories in the medical records are not consistent and conflict with Claimant's testimony at hearing. The ALJ has thoroughly reviewed the medical records and treatment and is unable to ascertain any acute injury that could be related to an incident of January 28, 2024. Therefore, the ALJ finds that Claimant has failed to establish that there was a new injury on January 28, 2024.

23. Insofar as Claimant argues that the medical treatment is related to the July 25, 2022 injury, the ALJ is likewise not persuaded. The evidence fails to establish that Claimant's cervical condition and treatment after January 28, 2024 could be tied to Claimant's July 25, 2022 admitted injury.

24. Based on the finding of compensability, the ALJ does not need to make additional findings on the remaining issues.

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. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 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, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer. As found, the accident histories provided by Claimant to his medical providers as indicated in the medical records are inconsistent with Claimant's testimony at hearing.

6. Based on the determination that Claimant has failed to establish a compensable injury arising out of and in the course and scope of his employment, his claim for benefits is dismissed.

7. With regard to the July 25, 2022 injury for which Respondents have admitted compensability, the ALJ finds that the medical treatment to Claimant's neck incurred after January 28, 2024 is not related to the July 24, 2022 workers' compensation injury.

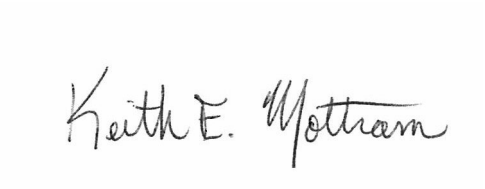
ORDER

It is therefore ordered that:

1. Claimant's claim for benefits for an injury of January 28, 2024 is denied and dismissed.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. 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 29, 2025



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

I. Did Claimant prove by a preponderance of the evidence that the spinal cord stimulator trial is reasonable and necessary?

II. Whether the referral from Dr. Malinky to a surgeon is reasonable and necessary?

FINDINGS OF FACT

Based on the evidence received at hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained an admitted injury to his low back on January 6, 2014 while transferring a patient from a wheel chair to an x-ray table. The patient was heavy, and she grabbed Claimant and pulled him over her wheelchair.

2. Claimant had a L5-S1 laminectomy, microdiscectomy, and decompression performed by Dr. Castro on December 12, 2019.

3. Claimant was placed at MMI on July 30, 2020, by Dr.Centi. He was referred to Dr. Malinky for maintenance care.

4. Dr. Caufield performed a DIME on January 12, 2021, and determined that the Claimant was not at MMI.

5. After receiving additional injections (ESI) and rhizotomies (RFA), Claimant was again placed at MMI on August 4, 2021.

6. Due to gastrointestinal issues, Claimant refrains from taking medications and therefore has to utilize epidural steroid injections.

7. Dr. Malinky has recommended a referral to a surgeon, Dr. Lundgren, to determine if the Claimant is a candidate for additional surgery. Dr. Malinky also recommended a spinal cord stimulator trial to determine if he is a candidate for a spinal cord stimulator (SCS).

8. Claimant wants the SCS trial because the relief he is getting from ESIs and RFAs is diminished. In a questionnaire submitted to Dr. Primack for his second IME on August 28, 2024, Claimant indicated that he was seeing him for “Re-evaluation for my lower back pain. Injections have failed to a point. Wanting re-evaluation for possible second opinion. He also indicated that his pain levels ranged from 3 to 8 on a scale of 1 to 10.

9. Dr. Primack has mistakenly opined that the Claimant is doing better in the interval from 2022 to 2024, which is contrary to the Claimant's testimony and the information supplied to Dr. Primack in the second questionnaire.

CONCLUSIONS OF LAW

Generally

A. 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. The 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).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of 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'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 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).

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

Medical Benefits

D. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability 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*, *supra*.

E. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, the Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). I conclude that the recommendation for a SCS trial by Dr. Malinky and referral to Dr. Lundgren are reasonable, necessary and related to Claimant's work injury.

ORDER

Based on the forgoing findings of fact, it is ORDERED:

1. Claimant's request for referral to Dr. Lundgren for a surgical evaluation is granted.

2. Claimant's request for a Spinal Cord Simulator trial is granted.

3. Any issue not resolved herein is reserved for future determination.

Dated April 29, 2025

Michael A. Perales
Administrative Law Judge

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 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. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Respondents have established by clear and convincing evidence that the date of maximum medical improvement MMI, assigned by the Division Independent Medical Examination (DIME) physician is incorrect.

2. Whether Respondents have established by clear and convincing evidence that the permanent impairment rating assigned by the DIME physician is incorrect.

FINDINGS OF FACT

Pre-July 11, 2023 Medical Treatment

1. Claimant has a history of multiple motor vehicle accidents in 2012, 2017 and 2019. No records of treatment related to the 2012 or 2017 accidents were admitted into evidence. The 2019 accident resulted in injuries to her back and neck, for which she received treatment. Claimant characterized her 2019 treatment as "minor," and indicated it did not affect her activities of daily living. Claimant apparently referred herself to physical therapy at Spine & Sport Physical Therapy on October 9, 2019, for her lower back, neck, and headaches. At physical therapy, Claimant reported intermittent neck and low back pain for the previous six months, and that the pain had improved significantly since her physician prescribed meloxicam (Mobic)[1]. Claimant reported that her neck pain was constant, and resulted in an inability to move her neck. She was noted to have limited range of motion of her upper lumbar and mid cervical region, with trigger points in the paraspinals and trapezius. (Ex. J). Records from two treatment dates were admitted into evidence. Claimant was recommended to undergo physical therapy two times per week for eight weeks, although no further records of treatment related to the 2019 accident were admitted into evidence. (Ex. J).

2. On December 27, 2021, Claimant saw Gregory Holman, N.P., at CHPG Meridian Neighborhood Health Center for back pain, reporting that it began on December 25, 2021. X-rays showed mild left convex scoliosis at L2, and multilevel disc degeneration and facet degenerative joint disease at L3-4 and L4-5. Mr. Holman diagnosed Claimant with acute low back pain without sciatica, and degenerative disc disease. He prescribed Claimant Robaxin and Flexeril (muscle relaxants), and noted that Claimant would continue to take Mobic, from which the ALJ infers that Claimant had an active prescription for Mobic at the time of the December 2021 injury. (Ex. 14).

3. Claimant returned to Mr. Holman on October 10, 2022, for multiple issues, including chronic low back pain. He noted that Claimant was taking Flexeril and

[1] No records from Claimant's prescribing physician were offered or admitted into evidence.

Meloxicam on a daily basis and refilled both medications. Claimant was also noted to be taking Ambien for insomnia. (Ex. 14).

July 11, 2023 Auto Accident and Associated Treatment

4. On July 11, 2023, Claimant was involved in a side-impact auto accident at approximately 10:40 a.m., in Aurora, Colorado. (Ex. 26). Respondents admitted the accident arose out of the course of Claimant's employment with Employer. (Ex. 4).

5. At the scene of the accident, Claimant was recommended to go to the emergency room, but declined to do so. Instead, she sought treatment at Concentra where she saw David Hnida, D.O., at approximately 1:30 p.m., on July 11, 2023. Claimant reported her vehicle's airbag did not deploy in the accident and that she struck her head. Claimant reported headaches, neck discomfort, left knee pain, lower back pain, fatigue, slight nausea, and general body pain. Although Claimant reported striking her head, she did not believe she experienced a loss of consciousness, and she had no signs of head trauma on examination. Dr. Hnida diagnosed Claimant with headache, neck pain, knee pain, and back pain. He documented that Claimant requested imaging of her head, neck, low back, hips and knees, and placed an "Emergency Medicine Referral." (Ex. F).

6. Claimant then went to the Sky Ridge Medical Center Urgent Care Center where she underwent a head CT scan and cervical spine imaging, neither of which showed acute injuries. At Sky Ridge, Claimant reported that her vehicle's airbag did deploy in the collision, and that she was experiencing right-sided neck and left-sided lumbar pain. She reported no loss of consciousness and denied significant headaches. On physical examination, Claimant's head was noted to be atraumatic. She was diagnosed with cervical and lumbar strains, and discharged. (Ex. E).

7. Claimant returned to Concentra on July 12, 2023, and saw Michael Pete, P.A. Mr. Pete noted that Claimant had the cervical/head CT and that an MRI was recommended but she was unable to get it due to availability. Claimant reported being most concerned with her left lower back, and that she was sore in her neck and upper back, and continued headaches. Mr. Pete referred Claimant for physical therapy. (Ex. F).

8. The lumbar MRI, performed on July 13, 2023, was compared to a May 20, 2019 lumbar MRI, and showed some worsening of some pre-existing conditions, including interval changes, such as new right central disc protrusion at L5-S1, worsening canal stenosis at L3-4 and L4-5, and mild L2-3 canal stenosis. (Ex. 18). The May 20, 2019 MRI report was not included in the hearing record.

9. Claimant attended two physical therapy visits at Concentra PT on July 13 and 14, 2023.[2] At the July 13, 2023 physical therapy visit, Claimant reported left-sided lower back pain into the glute region, and that her head and neck were "good." The following day,

[2] Exhibits 16 & K include a Concentra physical therapy note from July 17, 2023 from someone other than Claimant.

Claimant reported right-sided lower back pain, and that her neck was “doing very well.” (Ex. K). Claimant did not return to Concentra physical therapy after July 14, 2023.

10. On July 14, 2023, Claimant returned to Dr. Hnida. On examination, Dr. Hnida noted tenderness in the right lateral shoulder, left knee, cervical spine, and lumbosacral spine, and documented that her head was atraumatic. Dr. Hnida indicated Claimant was “transferring care out of the work comp system,” and see her primary care provider at Concentra, noting that Claimant had an appointment “Wednesday.” He opined that Claimant had reached her “functional goal” and released her to work without restrictions, and placed her at MMI effective July 14, 2023. Dr. Hnida’s assessment at discharge was neck strain, low back strain, knee pain and headache. (Ex. F). No credible evidence was admitted explaining whether Dr. Hnida placed Claimant at MMI because Claimant decided to transfer her care to her Concentra, or whether Claimant elected to transfer her care because Dr. Hnida placed her at MMI.

11. On July 19, 2023, Claimant saw Gregory Holman, NP at CHPG Meridian Neighborhood Health Center, outside the workers’ compensation system. Claimant reported she “was already having back pain” that was made worse by the motor vehicle accident. Claimant’s physical examination was normal, with the only reported symptom being back pain. Mr. Holman noted that Claimant was “negative for headaches.” He prescribed Flexeril and referred Claimant for an orthopedic evaluation. (Ex. C).

12. Between July 21, 2023 and September 26, 2023, Claimant attended 16 physical therapy visits at CACC for evaluation and treatment of her left hip and left leg, on referral from Mr. Holman. At the initial visit, Claimant completed a patient intake form, and did not indicate headaches were one of her chief complaints. Similarly, Claimant did not report experiencing, and was not treated for headaches at these visits. (Ex. 16).

13. On July 30, 2023, Claimant saw Raewin Shell, D.O., at On Point Urgent Care. Claimant reported feeling dizziness, lightheadedness, ringing in her ears, and sensitivity to both noise and light starting. Claimant told Dr. Shell she was in a T-bone accident on July 11, 2023 “at rapid speed” and that her car airbags deployed. She also reported that she had “severe low back pain which occasionally shoots down her left leg and leg gives way.” Claimant indicated she had “not mentioned her concussion” to her doctor. Dr. Shell’s examination was normal with the exception of reported tenderness in the paraspinal muscles. Dr. Shell diagnosed Claimant with post-concussion syndrome and recommended concussion therapy. (Ex. 15).

14. On August 1, 2023, Claimant saw Euna Kim, NP at an urgent care clinic in California, after flying to for a business trip. Claimant reported an onset of headaches with nausea, light and sound sensitivity starting the day before, and that she was advised by her primary care provider to go to urgent care to obtain Fiorcet (a migraine medication). Ms. Kim’s examination was unremarkable, and Claimant was discharged after a Ketorolac injection. (Ex. H).

15. On August 3, 2023, Claimant returned to Mr. Holman, reporting that she was having severe headaches that “turned into migraines.” Claimant also reported for the first time experiencing anxiety. (Ex. C).

16. Claimant then began attending physical therapy at Spine & Sport Physical Therapy on August 4, 2023, and ultimately attended 38 visits between August 4, 2023 and November 13, 2023. From August through September 2023, Claimant attended physical therapy at both Spine & Sport and CACC. Treatment at Spine & Sport was for post-concussion issues. Claimant reported to Spine & Sport that she began to experience a drastic increase in her symptoms when she flew on an airplane for work the week of August 4, 2023. (Ex. 13).

17. On August 10, 2023, Claimant saw Kaitlyn Angeletti, PA-C at Centura Orthopedics on referral from Mr. Holman. Claimant reported a 4 to 5-year history of left low back pain radiating into her left buttocks, posterolateral thigh, and posterolateral lower leg with an exacerbation about a month ago. On examination, Claimant had an equivocal straight leg test on the left, and subjective reports of back and neck pain. Ms. Angeletti recommended continued physical therapy, and a transforaminal epidural steroid injection (TESI). She noted that Claimant may ultimately require a decompression and fusion surgery, but recommended continued non-operative treatment.

18. Claimant returned to Mr. Holman on September 11, 2023, reporting blurred vision, vertigo, lightheadedness, and multiple resulting falls. Claimant also reported extreme anxiety due to post-concussion syndrome, and requested medication for anxiety. (Ex. 14).

19. On September 25, 2023, Claimant returned to Mr. Holman reporting daily migraine headaches, and lower back pain. He ordered a brain MRI, which showed no acute intracranial abnormality. (Ex. 14).

20. Claimant's last documented treatment was a physical therapy visit at Spine & Sport on November 13, 2023. (Ex. 13).

21. On December 1, 2023, Claimant saw Barry Ogin, M.D., for a Respondent-requested independent medical examination (IME). Dr. Ogin indicated that Claimant's clinical presentation was consistent with cervical and lumbar strain injuries, resulting in aggravation of pre-existing conditions. He noted that there was no evidence of any significant new disc pathology or radicular complaints. At the IME, Claimant reported that she had received an epidural steroid injection in October 2023, and that her back pain had resolved. Claimant did report intermittent leg symptoms but was unable identify the dermatomal distribution, and Dr. Ogin's neurologic examination was normal. He opined that to the extent Claimant had radicular complaints, they were due to her preexisting spinal stenosis and not the result of her work-related auto accident.

22. Dr. Ogin further opined that there was no indication that Claimant had suffered a traumatic brain injury (TBI). He noted that Claimant's contemporaneous medical records did not document any signs of a head injury, and she did not develop significant headaches, vision problems, balance issues, or other signs of a concussion until more than two weeks after the accident. Instead, he indicated that it would be extremely unlikely for concussion-like symptoms to present suddenly more than two weeks after the accident when there was no specific head trauma, or concerns regarding a traumatic brain injury. He further noted that Claimant's progressive worsening of concussion-like symptoms after the accident was not the typical course for concussion symptoms. He therefore

opined that Claimant's reported concussion symptoms could not be attributed to a traumatic brain injury. (Ex. A).

23. On January 1, 2024, Respondents filed a Final Admission of Liability, admitting Claimant reached MMI on July 14, 2023, without permanent impairment. (Ex. 4).

24. On February 5, 2024, Claimant objected to the FAL, and requested a DIME examination. (Ex. 5 & 6).

25. On May 30, 2024, Claimant saw Caroline Gellrick, M.D., for a DIME examination. The parties conducted Dr. Gellrick's deposition on February 25, 2025, and the transcript was submitted in lieu of live testimony. Claimant reported to Dr. Gellrick that the airbags in her vehicle did not deploy and that she struck her head on the steering wheel. In conjunction with the IME, Claimant presented Dr. Gellrick with a list of physicians whom she had seen, and apparently whose treatment Claimant attributed to her work-injury, including neurologists and neurosurgeons. However, Claimant provided no records from these providers, and no records of their treatment or assessment were offered or admitted into evidence. Dr. Gellrick testified that Claimant's neurological records would be "very important," in her assessment.

26. Dr. Gellrick's examination of Claimant was fairly benign. Claimant reported no neck pain or decreased cervical range of motion, no headaches, and no other symptoms consistent with a TBI (*i.e.*, no dizziness, vision issues, or balance issues). Claimant reported taking Tylenol for headaches 2-3 times per week, and that she had no more migraines. Dr. Gellrick noted tenderness in the lower back radiating from L5 to the sacroiliac area, but negative provocative tests. Claimant was noted to be extremely flexible in the lumbar spine, with the exception of lateral side bending on the left which produced pain down the left leg. Claimant reported fearing a loss of balance when walking in her neighborhood. Dr. Gellrick found no evidence of ongoing TBI issues, and no evidence of current cervical spine issues. She noted that the cause of Claimant's previously reported TBI symptoms was unclear and that her symptoms did not manifest until more than two weeks after the auto accident, and became progressively worse. She indicated that TBI symptoms typically progressively improve over time, unlike Claimant's symptoms which reportedly worsened over time.

27. Based on her review of records and examination, Dr. Gellrick placed Claimant at MMI effective December 1, 2023. She attributed five diagnoses to Claimant's auto accident: aggravation of pre-existing lower back pain; cervical strain; cephalgia (*i.e.*, headaches); reactive adjustment disorder; and post-concussive syndrome. Of these, she assigned impairment ratings for her lower back and cephalgia. Specifically, she assigned Claimant a 7% rating for her lumbar spine, and a 5% rating for headaches, which combine for a 12% whole person impairment. She found no other ratable conditions.

28. Dr. Gellrick's lumbar spine rating was based on her opinion that the July 11, 2023 auto accident aggravated Claimant's pre-existing back issues. She noted that there were no previous range of motion measurements to compare and assigned an impairment rating based on the range of motion measurements obtained at the DIME examination. She indicated that although Claimant was able to touch her toes on examination, range

of motion measurements of lumbar flexion demonstrated a deficit. Dr. Gellrick's rationale for assigning a lumbar impairment rating was credible.

29. Dr. Gellrick based Claimant's headache rating on the AMA Guides' section for Episodic Neurological Disorder, which provides for a 5 to 15% rating for disorders resulting in "slight interference with daily living." (AMA Guides, p. 109). Dr. Gellrick cited the Division's Desk Aid #11, as the basis for this rating. Paragraph 10 of the Desk Aid provides that "Headaches that qualify for a separate work-related impairment rating should be rated using the Episodic Neurological Disorders section in Table 1 – Section B (Chapter 4, p. 109)." And she noted in testimony that she elected not to provide Claimant with an impairment for TBI. However, the DIME report indicates "TBI region impairment would be consideration of cephalgia, still occurring on medication of Gabapentin." The report offers no cogent explanation for this statement.

30. Dr. Gellrick offered a confusing and seemingly inconsistent explanation for causation, indicating that Claimant's headaches could be caused either by a cervical strain or a TBI (*i.e.*, either a direct blow to the head or a contrecoup injury resulting from violent shaking of the head). However, Dr. Gellrick found no evidence of ongoing TBI or cervical spine issues, and offered no credible explanation for attributing her headaches to these apparently resolved injuries. She also testified that there was no difference in the diagnoses of TBI, post-concussion syndrome, and cephalgia, and that the condition from which the headaches derived (*i.e.*, cervical strain or a TBI) did not change anything with respect to causation.

31. Dr. Gellrick testified that she believed Claimant's cephalgia was the result of the July 11, 2023 accident because she became symptomatic within two weeks of the accident, and was initially documented to have soreness on the right side of her neck, which could be causing headaches. Later, she testified that she believed Claimant's headaches were the result of her head striking the steering wheel. When addressing the fact that Claimant's head was atraumatic after the accident and there was no evidence of an acute injury on imaging studies, Dr. Gellrick opined that Claimant could have sustained a contrecoup lesion as a result of violent shaking of the head during the collision, and opinion not expressed in her report.

32. Dr. Gellrick testified that she assigned Claimant a 5% rating for headaches under the AMA Guides' Episodic Neurological Disorders table, because Claimant "didn't focus on her headaches. And her current ADL's and what she was doing, didn't seem that the headaches were impacting her life." The only aspect of Claimant's life Dr. Gellrick identified as potentially being impacted was Claimant's reported fear of walking in her neighborhood alone. However, Dr. Gellrick admitted she did not know the cause of Claimant reported fear, and her report indicates it was related to reported balance issues. She offered no credible explanation for attributing Claimant's issues with walking alone to headaches.

33. Dr. Ogin testified at hearing that he believed Dr. Gellrick had erred in assigning Claimant impairment ratings for her lumbar spine and for headaches. With respect to the lumbar spine, Dr. Ogin indicated that he believed Dr. Gellrick erred in assigning an impairment rating because Claimant had recovered from any lower back injury and her

range of motion was unaffected. He further testified, credibly, that he could not rationalize Dr. Gellrick's statement that Claimant had no ongoing TBI issues, but also had headaches caused by a TBI. He noted that Claimant's headache symptoms were initially minor, until July 30, 2023, after which she began reporting progressively worse and varied symptoms. He testified that Claimant's ongoing headache symptoms cannot be attributed to her motor vehicle accident because there is no defined cause of the condition, and that the symptoms did not begin until weeks after the accident.

34. Claimant testified at hearing that she was "knocked out" as a result of the collision and that she continues to have headaches for which she takes multiple medications. She indicated that she continues to experience back pain going down her left leg into her toes. Claimant's testimony that she was "knocked out" in the collision is inconsistent with her reports to medical providers. The medical records also demonstrate that Claimant reported to some providers that the airbags in her vehicle were deployed and reported to others that they did not.

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming DIME on MMI and Impairment

The Act defines MMI as "a 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." § 8-40-201(11.5), C.R.S. Where disputes exist on whether a Claimant has reached MMI, the ALJ must resolve that issue.

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician's opinions concerning MMI and whole person impairment carry presumptive weight and may be overcome by clear and convincing evidence. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME's MMI determination and/or whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's MMI determination or impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO Nov. 17, 2000). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Indus.,* WC 4-712-812 (ICAO Nov. 21, 2008); *Licata v. Wholly Cannoli Café*, W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Indus. Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Serv.,* W.C. No. 4-941-721-03 (ICAO Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.*, W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); *compare In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an

assessment of data collected during a clinical evaluation, and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Indus. Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

MMI

Respondents have failed to establish that the DIME physician erred in assigning Claimant an MMI date of December 1, 2023. Dr. Gellrick testified that she assigned the date of MMI based on her examination of Claimant and review of records, which included Dr. Ogin's report. Although Dr. Ogin's report indicated Claimant had reached MMI, he did not assign a specific date in the report. Notwithstanding, Dr. Ogin testified at hearing that he did not disagree with the date assigned by Dr. Gellrick. The rationale for Dr. Hnida's assigned MMI date of July 14, 2023 is unclear from the medical record. The record contains no credible evidence demonstrating that Dr. Gellrick's assigned MMI date is highly probably incorrect.

Impairment Rating

Lumbar Spine

Respondents have failed to establish by clear and convincing evidence that Dr. Gellrick erred in assigning Claimant an impairment rating for her lumbar spine. Dr. Gellrick assigned Claimant an impairment rating for her lower back based on an aggravation of a pre-existing condition. Dr. Ogin's opinion that Claimant has recovered amounts to a mere difference of opinion and does not rise to the level of clear and convincing evidence that Dr. Gellrick's impairment rating is incorrect.

Headaches

Respondents have established by clear and convincing evidence that Dr. Gellrick's assignment of an impairment rating for cephalgia is incorrect. Dr. Gellrick assigned Claimant an impairment rating for cephalgia under the Episodic Neurological Disorder impairment table in the AMA Guides, which allows an impairment rating for "slight" interference with daily living. The Desk Aid provides that Table 1 is to be used for "headaches that qualify for a separate work-related impairment." To qualify for an impairment rating, there must be a specific diagnosis and objective pathology. See Desk Aid #11, General Principles, ¶ 1, and § 8-42-107 (8)(c), C.R.S.. Moreover, to qualify for an impairment rating, the condition for which the rating is assigned must be causally-related to a work injury.

Dr. Gellrick's rationale for assigning a headache impairment rating was unpersuasive. She offered no credible explanation for determining that Claimant's cephalgia was caused by either a cervical strain or TBI, when Claimant had no ongoing issues associated with either of these conditions at the DIME, beyond speculation that Claimant struck her head on the steering wheel. She therefore assigned a separate rating for "cephalgia" based on the Claimant's report that she was experiencing headaches and a conclusion that Claimant struck her head on the steering wheel (*i.e*., a TBI).

Although Claimant initially reported to Dr. Hnida that she struck her head in the auto accident, there is no credible evidence in the record demonstrating that this occurred. The only evidence that Claimant struck her head during the collision was her own report. None of the providers who examined her noted any trauma to Claimant's head following the collision, and all imaging studies were negative. Moreover, no physician diagnosed Claimant with a concussion until July 30, 2023, when Dr. Shell, whom Claimant saw once, diagnosed a concussion apparently based solely on Claimant's report that she sustained a concussion. Dr. Gellrick offered no credible medical rationale for determining that Claimant's headaches, which did not begin to significantly manifest until 19 days after her work injury were causally-related to her motor vehicle accident. The ALJ finds credible Dr. Ogin's opinion that Claimant's cephalgia is unrelated to her accident.

Even if Claimant's cephalgia is causally-related to her work injury, no credible evidence exists indicating that she meets the criteria for an impairment rating under the AMA Guides for "slight interference with daily living." In her testimony, Dr. Gellrick indicated that Claimant's headaches were not impacting her life. The only potential impact was Claimant's reported fear of walking alone, which Dr. Gellrick indicated that she did not know the cause. In short, Dr. Gellrick offered no rational basis for attributing Claimant's purported difficulties with activities of daily living to her headaches. As a result, the assignment of an impairment rating for headaches was incorrect.

Considering the delayed emergence of headaches, the lack of a coherent explanation for ongoing cephalgia, and the lack of credible evidence indicating headaches have impacted Claimant's daily living, the ALJ concludes that it is highly likely that Dr. Gellrick erred in assigning Claimant an impairment rating for cephalgia.

Determination of Claimant's Impairment Rating

Once an ALJ finds that the DIME physician's rating has been overcome, the claimant's correct medical impairment rating becomes a question of fact for the ALJ to determine based on a preponderance of the evidence. *Garlets v. Memorial Hosp.*, W.C. No. 4-336-566 (ICAO Sep. 5, 2001). Once the DIME is overcome, the DIME's opinion regarding impairment is not given any special weight, and the ALJ is free to consider other medical evidence of the claimant's permanent impairment. *Id.*; *Mosely v. Indus. Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003). "The only limitation is that the ALJ's finding must be supported by the record and consistent with the AMA Guides and other rating protocols." *Serena v. Pueblo Belmont OP Co. LLC*, W.C. No. 4-922-344-01 (ICAO Dec. 1, 2015).

Claimant reached MMI on December 1, 2023, consistent with Dr. Gellrick's opinion. The ALJ finds credible Dr. Gellrick's lumbar spine impairment rating of 7%. No credible evidence was admitted demonstrating that Dr. Gellrick erred in assigning this rating, and no credible evidence was admitted demonstrating a different, more appropriate impairment rating. With respect to cephalgia, the ALJ finds that there is insufficient evidence to attribute Claimant's cephalgia to her July 11, 2023 work injury, and thus, no impairment rating is appropriate for that condition. Claimant is entitled to a 7% lumbar spine impairment.

ORDER

It is therefore ordered that:

1. Respondent has established by clear and convincing that the DIME physician erred in assigning Claimant an impairment rating for cephalgia.

2. Respondents failed to establish by clear and convincing evidence that the MMI date assigned by the DIME physician was incorrect.

3. Claimant reached MMI on December 1, 2023.

4. Claimant is entitled to receive permanent partial disability benefits based on a 7% impairment rating for the lumbar spine.

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 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 29, 2025

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 NOS. 5-264-330-001

ISSUE

- Whether claimant's claim is barred by the Statute of Limitations

FINDINGS OF FACT

1. Claimant was employed with Alps insurance beginning in June of 2021. Claimant worked remotely from her home in Colorado. Claimant received a promotion with the Employer, which was also a remote position

2. Claimant chose to travel to the Employer's home office and attend training. Clamant arrived in Missoula on the evening of Sunday, October 17, 2021, and returned to Colorado on the afternoon of Wednesday, October 20, 2021.

3. At the Employer's office in Montana, Claimant worked with Heather Kellum, who was a client processing specialist, and Liesel Brink, who was a manager and payroll coordinator. The employer witnesses testified that upon claimant's arrival at the office, on Monday, October 18, 2021, they both observed claimant to exhibit symptoms of sniffling with a runny nose. The two women observed the existence of these symptoms throughout claimant's training. When asked about these symptoms by both women, claimant advised both that she was just suffering from allergies, and had left her medication at home.

4. Liesel Brink testified that she was approached by a co-worker, who was worried about claimant coming to the office with these symptoms, especially since claimant's visit was during the COVID pandemic. As such, Ms. Brink approached the claimant during her brief two and one-half day visit to inquire as to whether claimant was ill. Claimant advised Ms. Brink that she was suffering from allergies and left her allergy medicine at home. Claimant testified that she did not recall these conversations with Ms. Kellum or Ms. Brink.

5. Ms. Kellum testified that she worked in closely with claimant during her training visit as she was the one whose primary responsibility it was to train claimant. During there time together, Ms. Kellum testified that claimant also advised her that she felt extremely fatigued, and Ms. Kellum observed claimant having a difficult time going up and down stairs. Claimant advised Ms. Kellum that she suffered from an autoimmune disorder which caused achy joints.

6. Clamant further testified that on October 19 & 20th, she was hurting, she had a headache and didn't feel good.

7. Both Ms. Kellum and Ms. Brink testified that during claimant's visit, she had confided in them that she was upset as one of her sons had tested positive for

COVID and she believed that he contracted the disease from one of the teachers at his school.

8. When Claimant was asked at hearing as to whether she told the two women about one of her son's testing positive before the trip, claimant responded, "not that I can recall". On rebuttal, Claimant denied that either of her boys had tested positive for COVID before she left for her trip to Montana.

9. Liesel Brink drove clamant to the airport on Wednesday, October 20, 2021. Ms. Brink continued to notice that claimant appeared ill; and in fact, claimant admitted that when she arrived at the airport in Missoula, she texted her husband at 1:38 p.m. the following: "I AM HURTING AND FEELING SO BAD AND EVERYTHING MY NOSE IS RUNNING SUPER BAD, THROAT IS SORE AND I AM SNEEZING SO BAD".

10. At the end of October, 2021, claimant was hospitalized, and for a period placed on a ventilator. Claimant was released from the hospital in December, 2021.

11. During Claimant's hospitalization, Claimant's husband maintained contact with Employer as the Employer was concerned for the claimant's well-being. Claimant admitted that at no time during her hospitalization did she or her husband advise Employer that she believed she had contracted COVID at work. Claimant also admitted that at no time after her release from the hospital, or during the time that she returned to work in February or March 2022, up until the time she left the company on August, 2022, did she advise anyone at Employer that she suspected she contracted COVID while working at Employer. Claimant secured subsequent employment with Verizon within a couple of days of leaving the Employer. Claimant was laid off from Verizon in July, 2023.

12. Claimant testified that after being laid off from Verizon in July 2023, she applied for Unemployment. In connection with her Application, she had an phone interview with one of the unemployment representatives. Initially, she testified that this interview took place in July or August 2023, but later testified that it may have taken place later than that, due to the back log for unemployment. Clamant testified that it was after speaking to this representative that she learned she may have a claim for the contraction of COVID against Alps. Claimant testified that during this conversation the unemployment officer conducting the phone interview indicated: "Honey, if you got sick… they had made me aware that there was laws that should have been protecting me when I fell ill with COVID but it was out of her hands but that I needed to talk to an lawyer." At no time after this meeting did claimant contact Employer to advise that she suspected her prior COVID diagnosis was caused by her employment, nor did she ask Employer to file a claim. Rather, claimant waited until February 4, 2024 to file a Workers' Claim for Compensation. When asked by her attorney why she did not file a claim in

the fall of 2023, Claimant responded, “Because I was not aware of the COVID laws protecting me as an employee.”

13. Consistent with this testimony, Ms. Brink confirmed that Employer did not receive any notice from claimant that she was alleging that her diagnosis of COVID back in October 2021, was in any way linked to her employment. Ms. Brink did not receive notice of this allegation until the insurance company notified her after Clamant filed her Workers’ Claim for Compensation.

14. Clamant filed her Workers’ Claim for Compensation on February, 8, 2024. (Resp. Ex. A). Respondents filed a Notice of Contest on February 29, 2024 (Resp. Ex. B).

CONCLUSIONS OF LAW

GENERALLY

A. 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. The 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).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of 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'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 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).

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

STATUTE OF LIMITATIONS

D. Sec. 8-43-103 (2), C.R.S. provides:

(2) The director and administrative law judges employed by the office of administrative courts shall have jurisdiction at all times to hear and determine and make findings and awards on all cases of injury for which compensation or benefits are provided by articles 40 to 47 of this title. Except in cases of disability or death resulting from exposure to radioactive materials, substances, or machines or to fissionable materials, or any type of malignancy caused thereby, or from poisoning by uranium or its compounds, or from asbestosis, silicosis, and anthracosis, the right to compensation and benefits provided by said articles **shall be barred unless, within two years after the injury** or after death resulting therefrom, a notice claiming compensation is filed with the division. **This limitation shall not apply** to any claimant to whom compensation has been paid or if it is established to the satisfaction of the **director within three years after the injury or death that a reasonable excuse exists for the failure** to file such notice claiming compensation and if the employer's rights have not been prejudiced thereby**,** and the furnishing of medical, surgical, or hospital treatment by the employer shall not be considered payment of compensation or benefits within the meaning of this section;… but, in all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as required by the provisions of said articles, this statute of limitations shall not begin to run against the claim of the injured employee or said employee's dependents in the event of death until the required report has been filed with the division. (*emphasis added).*

Claimant is alleging a date of last exposure to an alleged occupation disease in the form of COVID, of October 20, 2021. There is no dispute that pursuant to the statute a Workers' Claim for Compensation was due to be filed by October 20, 2023. Because the claim was not filed with the Division of Worker's Compensation within two years, claimant has failed to meet the two year filing deadline for the statute of limitations and the claim is time barred. *Clubb v. RE Monks*, W.C. 4-952-696 (ICAO March 31, 2015).

First, claimant alleges that she had a "reasonable excuse" for the untimely fling of her Workers' Claim for Compensation. In a workers' compensation claim, the statute begins to run when a claimant, as a reasonable person, "should recognize the nature, seriousness, and probable compensability of the injury. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).

Claimant testified that she was hospitalized for COVID from late October until December 2021. Claimant and her Employer testified that either claimant or her husband were in contact with the Employer to advise as to the status of claimant's recovery. It is undisputed that, at no time during any of these discussions, or at any time during the period that claimant returned to work for the employer, which occurred in February 2022, did claimant advise her Employer that she believed she had contracted COVID from visiting her employer in October 2021.

Arguably, a "reasonable person" who believes she contracted COVID at work, should had made a reasonable effort to identify and rule out potential sources for the contraction of their disease, shortly after the contraction of same. In this effort to analyze the source of her exposure, a reasonable person would have suspected that since she was immunocompromised and unvaccinated, that perhaps she contracted COVID on the trip to or during her visit to Montana for business training. At the very least, a reasonable person would have discussed this possibility with their Employer at some time after they returned to work at the Employer. Claimant has provided no reasonable explanation for her failure to suspect that she contracted COVID during her visit to her employer in October 2021. Not having the necessary evidence to prove a compensable claim is not the same as not knowing the probable compensable nature of claim. Claimant clearly was aware of the facts necessary to suspect and at least allege the probable compensable nature of the claim, shortly after her contraction of COVID.

Claimant testified that she did not realize that she could file a claim until after she met with an unidentified unemployment worker in either July or August 2023. Claimant claims that it was only until after speaking with the alleged worker that she learned of her right to file a claim. Claimant testified that this meeting took place shortly after she was laid off from her subsequent employer, Verizon, which conversation occurred on or about July or August 2023. Claimant testified that during this conversation she was advised to consult an attorney. At no time after this meeting did the Claimant contact Employer to advise that she suspected her prior COVID diagnosis was caused by her employment, nor did she ask Employer to file a claim.

Not all reasons for the late filing of a claim are sufficient to sustain the claimant's burden of proof. *Industrial Commission v. Canfield,* 172 Colo. 18, 469 P.2d 737 (1970). A "reasonable excuse" is one which is "legally justifiable." *Armour & Co. v. Industrial Commission,* 149 Colo. 251, 368 P.2d 798 (Colo. 1962). Here, the Claimant has provided no reasonable explanation as to why she waited until February 4, 2024, to file a Workers' Claim for Compensation.

Whether or not a claimant has shown a reasonable excuse for the late filing of a claim is a discretionary decision for the administrative law judge. Reasonable excuses have been found in cases where employers have knowingly and willfully misled claimants about the compensability of injuries and where attorneys have incorrectly advised claimants. The key to the question to be asked is the reasonableness of the claimant's actions. Here, the claimants' actions were simply not reasonable.

E. Tolling of the Statute of Limitations

Claimant has asserted that the statute of limitations is somehow tolled by inaction on the part of Respondents.

Per 8-43-301 (2), C.R.S, the statute of limitations does not begin to run if the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division" as required by the Workers' Compensation Act. *City of Englewood v. Industrial Claim Appeals Office*, 954 P.2d 640 (Colo. App. 1998). An employer has notice of an occupational disease or lost-time injury when it obtains some knowledge of facts connecting the claimant's injury or condition with employment and indicating to a reasonably conscientious manager that the case may involve a potential claim for benefits. *See Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984). The determination of whether circumstances trigger the running of the statute of limitations is generally one of fact for the ALJ. *Mendoza v. Sanders Construction, Inc.,* W.C. Nos. 4-655-387; 4-749-187 (May 27, 2009); *Saxton v. King Soopers, Inc.,* W.C. No. 4-200-777 (March 11, 1997).

Claimant has not pointed to any evidence in the record to support her contention that the Employer had notice of a work-related injury/disease. In fact, Claimant admitted that she never advised her Employer that she suspected that her contraction of COVID was caused by exposure at work. Further, there is no evidence that Employer received any such notice until after Claimant filed her Workers' Claim on February 4, 2024. This is three and one-half (3.5) years after claimant's alleged exposure. Therefore, the record is devoid of any evidence to support Claimant's allegation that Respondents did not timely admit or report this underlying claim; and as such, any argument forwarded for the tolling of the statute of limitations must fail. Neither the law nor the facts of this claim triggered any duty on the part of Employer to file any notice with the Division, since they had no knowledge of its alleged link to claimant's employment. On the contrary, Respondents were entitled to the benefit of the presumption that the Claimant's contraction of COVID was in fact unrelated to her work in October 2021, especially since the employer was in contact with the claimant's husband after she contracted COVID. Claimant has presented no evidence that respondents were aware of anything other than the fact that claimant was hospitalized with COVID in the fall of 2021. As such Respondents could not have known of a potential claim for claimant's contraction of COVID at her work prior to her filing her claim and Respondents had no duty to file any report of incident until after such notification, which they timely did after the Notice from the Claimant. Thus, the statute of limitations is not tolled by any failure to act on the part of respondents. Claimants have a duty to properly report the claims to respondents as well as a duty to timely file their claim with the Division of Workers Compensation. *Pierce-Kouyate, v. Wilson's Of Colorado Ltd,* W.C. 4-717-784 (November 21, 2007). (Statute of limitations not tolled where respondents had no notice of either lost time or permanent impairment)

F. Statute not tolled by the decision of Life Care Centers of America v. ICAO, 553 P.3d 905 (Colo. App. 2024. (Hereinafter referred to as the *Gaines* decision).

Contrary to claimant's argument, the *Gaines* decision did not decide if a COVID claim could be filed in Colorado. Rather, as noted in the first paragraph of the decision, *Gaines at 905*, the Court stated, "We conclude that under the circumstances in of this case, COVID met the statutory definition of an Occupational Disease set forth in §8-40-201 (14), C.R.S. 2023."

In *Gaines,* the Court of Appeals affirmed the ALJ's finding of compensability. The Court did not rule that claimant was legally prohibited from filing a claim for COVID until after this decision had been issued. Rather, as evidenced by the facts of *Gaines,* claimant filed a Workers' claim for Compensation alleging exposure to an occupational disease in the nature of COVID on June 2, 2020. Further, *Gaines* proceeded to hearing before an ALJ on January 17, 2023; thus, disproving this claimant's allegation that she was legally barred from filing a claim for COVID until after this decision was issued.

In *Gaines,* the Court of Appeals further discussed claimant's additional policy argument that the Panel's order violated the underlying policies associated with and giving rise to the requirements set forth for occupational disease. The Court noted that although the argument had not been preserved on appeal, that if was preserved for appeal, the petitioner's argument is unpersuasive, because the Act expressly allows coverage for diseases or infections, such as COVID-19, so long certain requirements are met.

The very case cited by claimant as support for her argument that there was somehow a legal impediment to her filing her Workers' Claim for Compensation within the two (2) year statute of limitations, actually, supports the converse conclusion, i.e. that claimant was free to file a claim alleging COVID exposure as an occupational disease before the issuance of this decision.

In further support of this conclusion, many claims were filed and hearings held on admitted and denied COVID claims during the time period wherein claimant had a duty to file her Workers' Claim for Compensation. See *Gibbs v. Madison Creek Partners, LLC*., W.C. No: 5-201-483 (July 18, 2023); Michael *Schledwitz v. Larimer County*, W.C. No. 5-162-929 (September 21, 2022), and *Nichols v. ICAO,* W.C. No.: 5-228-939 (April 4, 2024). This is not to mention the many cases litigated at the OAC and not appealed, as well as the many claims settled, as verified by the fact that the Director of the Division of Workers' Compensation published statistics as to the number of COVID claims filed, which was published on a regular basis after the outbreak. As such claimant's argument that the *Gaines* decision somehow tolled the statute of limitations must fail.

ORDER

It is therefore ordered that:

1. Claimant's claim is barred by the application of the Statute of Limitations, as set forth in Sec. 8-43-103(2), C.R.S. and the claim is hereby 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 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 30, 2025

Michael A. Perales

Michael Perales
Administrative Law Judge
Office of Administrative Courts
1515 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-277-475-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable injury at work on July 3, 2024.

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical benefits reasonably necessary to cure and relieve him of the effects of his July 3, 2024 injury.

FINDINGS OF FACT

1. Claimant is 20 years old. Claimant works for Employer's Stormwater Department as a Utility Water Worker. As a Utility Water Worker, Claimant's job duties include general maintenance, trimming trees, driving small and heavy equipment, shoveling snow, and inspecting grates and manhole covers.

2. Claimant testified at hearing. The ALJ found Claimant's demeanor to be open and honest and credits his testimony in full.

3. On July 3, 2024, Claimant started working at 7:00 a.m. He was assigned to a three-man crew conducting manhole inspections, which requires removing, inspecting, and cleaning the manhole and its cover. From approximately 7:30 a.m. to 2:30 p.m., Claimant worked outside on streets where the manholes were located.

4. Manhole inspections include removing the manhole covers which weigh up-to 100 pounds. On July 3, 2024, Claimant and his crew removed and inspected 50 manhole covers and it was 97 degrees out.

5. Luke Stolpmann drove the truck used by the crew to do manhole inspections. During the day Claimant was feeling extremely hot with the weather, was "super sweaty"/drenched in sweat, and felt light-headed. Employer had previously sent out an email that it was "hitting record highs" that week in the United States. Claimant had his own water bottle with him and there was an additional jug of water in the back of the truck. When he felt thirsty, Claimant would drink from the water bottle as advised by Employer.

6. Shortly before 3:00 p.m., Claimant rode as a passenger back to Employer's facility. The plan was to put away the equipment the crew used and complete their paperwork. After the truck pulled into the facility, Claimant stepped down from the truck steps, felt very light-headed, loss consciousness, and fell to the ground and hit the back of his head on concrete.

7. No one directly observed Claimant losing consciousness and striking his head on concrete.

8. Mr. Stolpmann helped Claimant get up after he regained consciousness, and they went inside to their supervisor's office. One of Claimant's supervisors got ice for Claimant's head while another supervisor grabbed paper towels to stop the head wound from bleeding.

9. Christian Lerch, the emergency manager for Aurora Water, called an ambulance which took Claimant to AdventHealth Parker Hospital. Ex. A p. 4.

10. At AdventHealth Parker Hospital, Claimant saw Keith Benson, P.A. Claimant told P.A. Benson he had "been outside all day, had a syncopal episode when he stood up falling backwards striking his head, has pain in his neck, posterior scalp." Ex. 5 p. 16.

11. Upon arriving at the emergency room, Claimant was observed to have a "3-centimeter laceration to the occiput scalp" and minimal tenderness along his cervical spine. Ex. 5 p. 21. Claimant received 4 staples for the head laceration and electrolyte and fluid repletion through an IV. Ex. 5.

12. Claimant underwent a CT of his head, a CT of his cervical spine, and an EKG. The EKG showed "atrial fibrillation versus multiple ectopic beats" and Claimant was found to be "clinically dehydrated." Ex. 5 p. 21-22. Claimant's dehydration normalized with electrolyte and fluid repletion. *Id.* The CT scan of head showed no acute intracranial findings and no underlying fracture. *Id.* at p. 24. Similarly, the CT of cervical spine showed no acute findings. *Id.* at p. 26.

13. P.A. Benson diagnosed Claimant's syncopal episode as "unspecified" and did not reach a conclusion as to why Claimant loss consciousness. Ex. 5 p. 22. Claimant's differential diagnoses included "cardiogenic syncope, dehydration, electrolyte abnormality, intracranial hemorrhage, skull fracture, cervical spine fracture, [and] cardiac arrhythmia." *Id.*

14. Luke Stolpmann testified at hearing. Mr. Stolpmann confirmed that it was extremely hot on the day in question and that he was part of the three-man team inspecting manhole covers with Claimant. Mr. Stolpmann testified that the team spent about half the day inside their work truck and half the day outside in the heat. The job lifting the manhole cover at each location was distributed evenly between himself, Claimant, and the third team member.

15. Around 2:30 p.m. Mr. Stolpmann drove the work truck back to Employer's facility and he went inside the facility to complete paperwork. Having realized he forgot the paperwork, Mr. Stolpmann walked back towards the truck at which time he saw Claimant unconscious on the ground ten to twelve feet in front of the front grill of the truck. After Claimant regained consciousness, he helped Claimant up and brought him into the facility where a supervisor called an ambulance.

16. The ALJ finds Mr. Stolpmann's testimony generally credible. However, to the extent Mr. Stolpmann's testimony conflicts with testimony given by Claimant, the ALJ credits Claimant's testimony as more credible.

17. After the incident, Claimant took four days off of work. Employer gave Claimant "compensation time" for two of the days and Claimant had to use paid time off for the other two days.

18. Lane Swink, Claimant's supervisor at the time of the injury, emailed Claimant after his injury with a list of authorized treating physicians. *See* Ex. A (ATP form electronically signed by Claimant August 12, 2024). Mr. Swink testified at hearing that he left early on July 3, 2024, and, therefore, he did not see Claimant after he was injured on July 3.

19. On July 8, 2024, Claimant was seen at Colorado Occupational Medical Partners by Tom Chau, P.A. Ex. 6. At that visit Claimant reported "continued visual disturbances, dizziness, nausea and headaches." *Id.* at p. 126. Claimant's staples were removed, and he was referred to a concussion clinic for further evaluation of post-concussive syndrome and to cardiology "due to abnormal EKG findings from the Emergency Room." *Id.* at p. 127-128. "Due to ongoing dizziness, vision changes and headaches, it was recommended that Claimant remains off work." *Id.* at p. 128.

20. P.A. Chau noted "[a]t this time, it is difficult for me to determine with any degree of medical probability or certainty that this is a work-related injury or exposure. Causality, therefore, is pending further evaluation." Ex. 6 p. 127.

21. Claimant was previously seen by Colorado Occupational Medical Partners in July 2023 for a separate work-related head injury. Ex. B p. 17. On July 18, 2023, Claimant was struck in the back of the head by a heavy metal ramp dropped by a coworker. *Id.* Claimant lost consciousness and was transported by ambulance to Anschutz Medical Campus Emergency Department (Children's Hospital) where he received treatment. *Id.*

22. On July 9, 2024, Claimant went to Anschutz Medical Campus Emergency Department (Children's Hospital) and was seen by Julia Brant, M.D. Ex. 7. Claimant was seen for "evaluation of headache, nausea after recent syncopal episode of head strike." *Id.* at p. 139. Claimant complained of a worsening headache, nausea, and blurry vision. *Id.* at p. 140. Claimant reported his headache pain as "10/10" despite taking ibuprofen and Tylenol. *Id.*

23. At Children's Hospital Claimant received an IV cocktail for his headache, nausea, and dizziness and he underwent a repeat EKG. Ex. 7 p. 143. Claimant's EKG was normal. Claimant underwent an EKG, which was normal. *Id.*

24. Dr. Brant diagnosed Claimant with "concussion, head injury, vasovagal syncope." Ex. 7 p. 139. Claimant's differential diagnoses included "arrhythmia, skull fracture, intracranial injury, electrolyte abnormality." *Id.* Dr. Brant noted there was "[n]o clear etiology of the syncope." *Id.* at p. 140. It was recommended that Claimant follow up with cardiology to determine if his syncopal episode was vasovagal or cardiac. *Id.* at p. 147.

25. Claimant credibly testified that he went to Children's Hospital on July 9, 2024, because the day before he spoke to Russell Hendrix, a claims adjuster for Employer, and during that call Mr. Hendrix told him that if he had any severe symptoms it was okay to follow up with an emergency department. When he felt sick on July 9, Claimant went to Children's Hospital specifically because he had previously been treated there and he was comfortable with the hospital. *See* Ex. F (Claimant's medical records for Children's Hospital). While he was at Children's Hospital, Mr. Hendrix called Claimant to inform him that Employer was denying his workers' compensation claim.

26. Russell Hendrix, a now-retired claims adjuster for Employer, testified that he spoke with Claimant on either July 8 or July 9, 2024, before he electronically submitted the Employer's First Report of Injury. Mr. Hendrix testified that when discussing the claim with Claimant, Claimant told him that when he got to the facility on the afternoon of July 3, 2024, he got out of the truck and "walked outside to either take or make a phone call," and that he passed out and hit his head on the concrete. Mr. Hendrix could not recall if he told Claimant it was okay to go to the emergency room if he felt worse, but as a general practice he would tell an employee that it is okay to go to the emergency room if they do not feel well.

27. Based on Claimant's reported pain, his continued concussive symptoms, and his history of head trauma, the ALJ finds Claimant's visit to Children's Hospital was an emergency.

28. Respondent introduced Claimant's medical records from Children's Hospital from July 24, 2020 to July 9, 2024. Ex. F. Claimant's records indicate that:

a. On December 11, 2019, he had a concussion without loss of consciousness, *id.* at p. 56, and in July 2020, he experienced dizziness "primarily with changes in position" and "had one episode of fainting but reports it was almost a year ago and could not recall the circumstances." *Id.* at p. 61.

b. In June 2022, Claimant reported dizziness that "does not occur with vigorous physical activity which is somewhat reassuring against cardiac etiology. Neurological etiology unlikely in the absence of symptoms such as headache, loss of consciousness or seizure-like activity. Able to play soccer and basketball without symptoms. Most noticeable with heavy weight lifting. May be vasovagal response." *Id.* at p. 55.

c. In July 2023, Claimant was struck in the head at work and loss consciousness. *Id.* at p. 52. Claimant was seen for post-concussion syndrome and his symptoms included migraines, foggy vision, difficulty focusing, slower reflexes, dizziness when standing up or going down stairs, nausea, vomiting, and fatigue. *Id.*; *Id.* at p. 48-49.

29. Claimant also has been diagnosed with "mild intermittent asthma without complication." Ex. F p. 38. On cross-examination, Claimant attributed his episodes of dizziness to his asthma.

30. Respondent filed its Employer's First Report of Injury on July 9, 2024. Ex. A p. 2; Ex. B. p. 9. On July 11, 2024, Respondent filed a Notice of Contest and indicated that the injury/illness was not work-related. Ex. C.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 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, 318 (1979). The facts in a workers' compensation case must be interpreted neutrally and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing the weight, credibility, and sufficiency of evidence in workers' compensation proceedings is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals Off*., 43 P.3d 637, 641 (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.* 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. *Bodensieck v. Indus. Claim Appeals Off.*, 183 P.3d 684, 687 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385, 389 (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.; 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, 574 (Colo. App. 1998).

Claimant proved by a preponderance of the evidence that he sustained a compensable work injury on July 3, 2024. First, a preponderance of the evidence supports a conclusion that Claimant's injury occurred "in the course of" his employment because his injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. After a day of lifting heavy manhole covers in 90-degree heat, Claimant stepped out of a work truck at Employer's facility and lost consciousness, striking his head on concrete. Respondent suggests that perhaps Claimant was on his way to make a personal phone call when he passed out, and, therefore, was engaging in an activity that was not connected to his work-related functions. But there is no credible direct evidence and little circumstantial evidence to support that suggestion. Instead, the weight of the evidence supports the finding that Claimant was at work during working hours and had just stepped out of a work truck in order to complete paperwork detailing the work done that day when he passed out and struck his head.

Second, Claimant has established it is more probable than not that his injury arose out of his employment. Claimant's assigned task that day was to go outside and inspect manhole covers in severe heat conditions. Claimant completed that task and upon returning to Employer's facility he passed out and struck his head. When Claimant was evaluated at AdventHealth Parker Hospital, he was found to be clinically dehydrated. The weather, the heavy manual labor Claimant was performing, and Claimant's extreme sweating (along with a later finding of clinical dehydration) more likely than not caused Claimant to lose consciousness, strike his head, and need medical treatment. The ALJ is mindful of the logical fallacy of mistaking temporal proximity for a causal relationship. *See Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020); *Shaffstall v. Champion Technologies*, W.C. No. 4-820-016 (ICAO, Mar. 2, 2011) (discussing *Scully v. Hooters of Colo.*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008)). But in this case, the ALJ finds and concludes that the temporal proximity of Claimant's loss of consciousness after spending the day lifting heavy manhole covers in high heat with excessive sweating and later confirmation that he was clinically dehydrated establishes by a preponderance that Claimant's injury arose out of his employment.

In their position statements both parties discuss whether a special hazard of employment contributed to Claimant's injury. *See, e.g.*, *Austin v. Walmart*, W.C. No. 5-191-762 (ICAO, Feb. 22, 2024) ("The rationale for the special hazard rule is that unless a special hazard of employment increases the risk or extent of injury, than an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to 'arise out of' the employment."); *Raley v. Atlas Cold Logistics*, W.C. No. 4-841-323 (ICAO, Nov. 15, 2012) (discussing the special hazard rule). However, the ALJ is unconvinced that Claimant's injury was precipitated by a pre-existing nonindustrial condition. Respondent focuses on Claimant's reported history of dizziness in an attempt to establish a history of syncopal episodes but simply put, being dizzy is not the same as fainting. Claimant's medical history supports a single "episode of near fainting," Ex. F p. 61, sometime prior to July 2020, which does not compel a conclusion that Claimant suffers

from a pre-existing nonindustrial condition such that Claimant needs to establish a special hazard of employment in order to establish a compensable injury. As the ALJ has determined there is no pre-existing nonindustrial condition precipitating Claimant's injury, the special hazard doctrine does not apply.

Based on the totality of the evidence, Claimant proved it is more likely than not he suffered a compensable work injury on July 3, 2024 arising out of and in the course of his employment, resulting in disability and the need for medical treatment.

Medical Treatment

Respondents are liable for medical treatment that is causally related, reasonable, and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. "The employer has the right, in the first instance, to designate the authorized treating physician." *Williams v. Team Panels Int'l, Inc.*, W.C. No. 4-452-283 (ICAO, June 13, 2001) (citing § 8-43-404(5)(a), C.R.S.). "If the claimant obtains unauthorized care, the employer and insurer are not liable to pay for it." *Id.* (citing *Yeck v. Indus. Claim Appeals Off.*, 996 P.2d 228 (Colo. App. 1999)).

> Colorado recognizes an "emergency" exception to the ordinary rules governing authorization. Thus, in an "emergency situation," an employee need not give notice to the employer nor await the employer's choice of a physician before seeking medical treatment. However, when the emergency has ended, the claimant must notify the employer of the need for continuing medical services so that the employer may exercise its right of selection.

Id. (citing *Sims v. Indus. Claim Appeals Off.*, 797 P.2d 777 (Colo. App. 1990)).

"There is no precise legal test for determining the existence of a medical emergency. Rather, the question of whether a bona fide emergency exists is one of fact and is dependent on the circumstances of the particular case." *Delfosse v. Home Servs. Heroes Inc.*, W.C. No. 5-075-625-001 (ICAO, Apr. 26, 2021). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Hobirk v. Colo. Springs School District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

Respondent concedes that if the ALJ determines, as she has, that Claimant's injury is compensable, then Claimant's medical treatment at AdventHealth Parker Hospital and Colorado Occupational Medical Partners is covered pursuant to section 8-43-404, C.R.S. and *Sims*. However, Respondent contends that Claimant's visit to Children's Hospital emergency room on July 9, 2024 was unauthorized and not an emergency and, therefore, it should not be liable for the medical expense incurred from that visit.

On July 8, 2024, Claimant was seen by P.A. Chan who recommended Claimant remain off work "[d]ue to ongoing dizziness, vision changes and headaches." Claimant was referred to a concussion clinic to address his post-concussion symptoms. Just one day later, Claimant was experiencing "10/10" headache pain with continued nausea and dizziness. And Claimant had previously suffered a head trauma with loss of consciousness and post-concussive symptoms requiring care. Under these circumstances, the ALJ concludes that Claimant has established by a preponderance that he was experiencing an "emergency" such that he was entitled to seek immediate medical care rather than contact Colorado Occupational Medical Partners for emergent care.

Further, Claimant credibly testified that when he spoke to Employer's claims adjuster Mr. Hendrix, he was told that if he was experiencing severe symptoms that he should go to an emergency room. From this conversation, Claimant was under the impression that he could select what emergency room to visit if he was experiencing severe symptoms. Additionally, Claimant was previously taken by ambulance to Children's Hospital emergency department when he suffered his July 18, 2023 work-related head injury and loss of consciousness. Lastly, when he experienced "10/10" pain with nausea and dizziness, Claimant went to the hospital he was most familiar with.

Claimant's July 9, 2024 emergency room visit was reasonable, necessary, and causally related to his July 3, 2024 injury. Claimant sought treatment for headache, nausea, and blurry vision that was directly related to his head trauma from striking the concrete on July 3, 2024. Indeed, Claimant reported to P.A. Chan just the previous day that he was still experiencing headaches, nausea, and dizziness.

For the foregoing reasons, the ALJ finds and concludes that Respondent is liable for Claimant's July 9, 2024 emergency room visit to Children's Hospital, as well as his visit to AdventHealth Parker Hospital and Colorado Occupational Medical Partners.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable industrial injury on July 3, 2024 arising out of and in the course and scope of his employment with Employer.

2. Respondent shall pay for Claimant's reasonable and necessary medical treatment causally related to the July 3, 2024 injury, including the cost of Claimant's July 9, 2024 emergency room visit to Children's Hospital.

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

SIGNED: April 30, 2025.

Robin E. Hoogerhyde
Administrative Law Judge

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 OACRP Rule 27. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.