ISSUES

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

II. If Claimant established that he sustained a compensable injury, whether he also established that he is entitled to all reasonable, necessary, and related medical care for his injury.

FINDINGS OF FACT

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

1. Claimant testified that he had worked for the employer for 3 ½ years as a truck driver. He was an employee of the employer all through that time period and received W-2s during his employment. He was under the impression that Respondent carried workers' compensation insurance.

2. Claimant sustained a head injury on August 9, 2024, as he was ratcheting down a load of pipes on the bed of his truck. The load bar that he was using to lever the rachet down suddenly snapped causing Claimant to fall backwards and hit his head on the ground. As he was falling, the hard hat he was wearing was knocked off.

3. Claimant's wife testified that she noticed that Claimant had not moved from the spot where he had been loading pipes in Brighton for an extended period of time. She discerned that from a phone app[1] that permits location sharing. She attempted to contact the Claimant, but he was incoherent when she tried to contact him. At about the same time, the employees from the pipe company also noticed he had not moved in a while and called an ambulance.

4. Claimant's wife contacted the owner of the company, and expressed that the Claimant needed medical help including an ambulance to take him to the emergency room. The owner said that Claimant did not need an ambulance, and he sent his wife to pick up the Claimant. However, the ambulance arrived first and took the Claimant to Intermountain Health Platte Valley Hospital.

5. Claimant lost consciousness and is unsure as to what transpired until he woke up in the hospital. He vaguely recalls getting into the ambulance. When he regained

[1] The Claimant testified that the app is called Life360.

consciousness in the hospital, Mr. Barnes, the owner of employer was sitting in his hospital room.

6. A CT Angiogram of the head and neck was taken, and labs were also taken. Claimant was diagnosed with traumatic brain injury and concussion. He was later discharged and planned to stay with a friend in the area instead of driving to his home in Durango.

7. Following the hospitalization, Claimant was contacted by the hospital and ambulance company to obtain information for workers compensation. Although the employer said he had coverage, after several attempts to obtain the workers compensation coverage information, Claimant discovered that there was no coverage for his work injury. Claimant filed a workers claim for compensation on April 16, 2025, and it was confirmed that there was no workers compensation insurance coverage for the employer on the date of injury.

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, §§ 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).

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *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 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case there is no dispute that the Claimant was within the course and scope of employment when he suffered a traumatic brain injury and concussion. I conclude that the ambulance transport provided by Platte Valley Ambulance Service and the treatment provided by Intermountain Health Platte Valley Hospital was reasonable, necessary and related to the compensable injury.

Insurance

Employer was uninsured at the time of the injury.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that he sustained a work related injury.

2. Claimant is entitled to medical benefits incurred due to his work related injury with Platte Valley Ambulance Service, LLC and Intermountain Health Platte Valley Hospital.

3. Any issue not addressed herein is reserved for future determination.

DATED: August 6, 2025

/s/ Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 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.

Office of Administrative Courts
State of Colorado
Workers' Compensation No. WC 5-264-226-001

Issues

1. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period April 26, 2024 until terminated by statute.

2. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for her April 25, 2025 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. This claim involves an admitted January 24, 2024 injury to Claimant's right shoulder. Claimant worked as a floor tech for Employer. Her duties involved cleaning floors, maintaining bathrooms, and removing trash. Claimant worked for Employer for several years preceding January 24, 2024.

2. On January 24, 2024 Claimant was taking out the trash. When she went to pick up a trash bag with her right hand, it was much heavier than anticipated, and she jerked her right arm.

3. Claimant did not seek treatment until February 1, 2024 when Physician's Assistant Jacqueline House, evaluated her at Authorized Treating Provider (ATP) BOHC-Greeley. PA House diagnosed Claimant with a right rotator cuff strain and neck strain. She noted Claimant was unable to work from February 1, 2024 through February 5, 2024.

4. Claimant did not work from January 25, 2024 through February 19, 2024. Nevertheless, Employer continued to pay Claimant full wages.

5. On February 20, 2024 PA House examined Claimant at BOHC-Greeley. She reduced Claimant's restrictions to no use of right arm, no lifting, pushing, pulling or carrying with her left arm greater than five pounds, and no elevation of her left-hand above shoulder height. Claimant returned to modified duty work on the same date.

6. On February 22, 2024 ATP Mark Krisburg, M.D. assigned work restrictions of no use of right arm, no lifting/pushing/pulling/carrying with left arm greater than five pounds, no elevation of left-hand above shoulder height, and needs assistance with pushing carts. Employer accommodated the preceding restrictions and Claimant continued modified duty.

7. Claimant's last day physically working for Employer was March 17, 2024. On March 31, 2024 the Loveland job site closed. Claimant thus did not work, but Employer continued to pay her full wages.

8. On April 11, 2024 Dr. Krisburg determined Claimant had reached Maximum Medical Improvement (MMI). He explained that Claimant had missed multiple physical and occupational therapy appointments. Moreover, she failed to appear for a follow-up consultation with orthopedic surgeon Dr. Heaston. Dr. Krisburg remarked that "[s]he appears unmotivated to participate in getting well. Since she appears unmotivated to participate significantly in her care and to keep appointments, I feel she has reached MMI." He assigned the following permanent work restrictions: (1) no lifting, pushing, pulling or carrying greater than four pounds with the right hand; (2) no elevation of the right-hand above shoulder height; (3) no lifting, pushing, pulling or carrying greater than 15 pounds with the left hand; and (4) needs assistance pushing carts.

9. On August 21, 2024 Respondents filed a Final Admission of Liability (FAL). Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME).

10. On January 3, 2025 Claimant underwent a DIME with Matthew R. Brodie, M.D. He reviewed Claimant's medical records and conducted a physical examination. Dr. Brodie determined Claimant had not reached MMI. He explained that, based upon the available range of motion measurements, the expected increase in functional range of motion of the right shoulder had not occurred. Notably, Claimant described symptoms potentially consistent with a neuropathic, and/or vascular process, impacting the right upper extremity. Dr. Brodie continued Claimant's prescribed work restrictions.

11. On January 17, 2025 Respondents filed a General Admission of Liability (GAL). The document reopened the claim based on the determination of DIME Dr. Brodie.

12. Claimant testified at the hearing in this matter. She remarked that, after her January 24, 2024 work injury, she remained off work until February 2024, when she returned to light duty employment. She subsequently worked within her restrictions. While Claimant still had temporary work restrictions, supervisor Mike Van Houten offered her a position at the Drake facility in Fort Collins and she accepted the job. She discussed the duties with Mr. Van Houten, but there were no concrete plans and she never began working at the new location. After receiving permanent restrictions on April 11, 2024, she spoke with Human Resources Director Leticia Valdez on April 25, 2024. Ms. Valdez informed her that Employer could not accommodate her permanent work restrictions, ceased paying her, and terminated her employment. Notably, Claimant maintained that Employer never offered her work within her permanent restrictions.

13. Mr. Van Houten testified that the Loveland location where Claimant worked was closing on March 31, 2024, and he had discussed the matter with Claimant on multiple occasions. He stated that the original plan prior to her work injury was for her to continue to work as a floor tech but at Employer's Drake location. However, he explained that sometime after Claimant's work injury but before she reached MMI, he offered her a position as a general cleaner at Employer's Lincoln location because her restrictions did not fit the position of floor tech. However, Claimant refused the position because she

did not want to work with the Lincoln site supervisor. Nevertheless, Mr. Van Houten acknowledged that there was no written offer of modified duty, report regarding Claimant's refusal to work or the job site switch.

14. Ms. Valdez commented that she oversaw Claimant's Workers' Compensation claim and was aware of the Loveland job site closure. She had been in contact with Claimant since the outset of her claim, facilitated light duty based on doctor's notes, and allowed her to stay home with full wages when in pain. Ms. Valdez detailed that they discussed light duty and general cleaning tasks that would not affect Claimant's right arm. She confirmed discussions about the Drake and Lincoln job locations, and noted Employer would have accommodated temporary and permanent restrictions.

15. Ms. Valdez clarified that she was responsible for determining whether employees would be transferred or terminated when a location closed. She remarked that Claimant was offered a floor tech position at the Drake location before the Loveland closure. However, when Claimant's restrictions prevented her from taking the floor tech position, Mr. Van Houten gave the position to someone else. Nevertheless, they continued to pay Claimant's wages and planned to attempt a transfer to a general cleaner position at the Lincoln facility to accommodate her restrictions. Ms. Valdez did not have a direct conversation with Claimant about transferring but asked Mr. Van Houten to address the matter with Claimant. After the discussion, Claimant declined the transfer. Ms. Valdez then attempted to contact Claimant on numerous occasions but was unsuccessful. Employer thus decided to cease paying her and transferred the matter to the Workers' Compensation adjuster. Ms. Valdez noted that she never had a chance to offer Claimant a position after she received permanent work restrictions. She summarized that she would have offered Claimant a position within her permanent work restrictions if Claimant would have communicated. Nevertheless, Ms. Valdez acknowledged that Claimant's file lacked any documentation of job offers, modified duty offers, or permanent work at alternative job sites. She also did not have any records of Claimant's termination or refusal to work within her permanent work restrictions.

16. Claimant has demonstrated it is more probably true than not that she is entitled to TTD benefits beginning April 26, 2024. Claimant's testimony and the medical records demonstrate that she was either unable to work or under restrictions that rendered her unable to perform her job duties and impaired her earning capacity.

17. On April 11, 2024 ATP Dr. Krisburg determined Claimant had reached MMI. He assigned the following permanent work restrictions: (1) no lifting, pushing, pulling or carrying greater than four pounds with the right hand; (2) no elevation of the right-hand above shoulder height; (3) no lifting, pushing, pulling or carrying greater than 15 pounds with the left hand; and (4) needs assistance pushing carts. Claimant subsequently worked within her restrictions and earned full wages until she was terminated on April 25, 2025. On January 3, 2025 DIME Dr. Brodie determined Claimant had not reached MMI and continued Claimant's prescribed work restrictions.

18. Claimant's industrial injury caused a disability lasting more than three work shifts, she left work because of the disability, and the disability resulted in an actual wage loss. Claimant also continues to receive medical care and has not reached MMI. Accordingly, Claimant has proven that she is entitled to receive TTD benefits from April 26, 2024 until terminated by statute.

19. Respondents have failed to establish it is more probably true than not that Claimant was responsible for her April 25, 2025 termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. The record reveals that Employer terminated Claimant effective April 25, 2024. There was a significant conflict in testimony between Respondents' witnesses and Claimant. Claimant's supervisor Mr. Van Houten explained that the Loveland location where Claimant worked was closing on March 31, 2024, and he had discussed the matter with Claimant on multiple occasions. He stated that the original plan prior to her work injury was for her to continue to work as a floor tech but at Employer's Drake location. However, sometime after Claimant's work injury but before MMI, he offered her a position as a general cleaner at Employer's Lincoln location because her restrictions did not comply with the floor tech position. However, Claimant refused the position.

20. However, Respondents have failed to present any evidence regarding the preceding job offer, start date, rate of pay or job duties. They also did not present any evidence that Employer's general cleaner position was within Claimant's temporary or permanent work restrictions. Furthermore, Mr. Van Houten remarked that he last communicated with Claimant on April 2, 2024, to wish her a happy birthday, and was unaware of her permanent work restrictions. Notably, Mr. Van Houten acknowledged he did not keep any records regarding Claimant's employment, alleged offers of employment, or refusal to work. Similarly, Employer's Human Resources Director Ms. Valdez explained she never had a chance to offer Claimant a position within her permanent work restrictions because Claimant failed to communicate. However, Ms. Valdez acknowledged there was no record of a job offer to Claimant within her permanent work restrictions, and no documentation to confirm that Claimant refused an offer of employment. She also failed to maintain any records, documents, or notes regarding Claimant's separation from employment.

21. In contrast, Claimant credibly explained that after her January 24, 2024 work injury, she remained off work until February 2024, when she returned to light duty employment. She subsequently worked within her restrictions. While Claimant still had temporary work restrictions, Mr. Van Houten offered her a position at the Drake facility because the Loveland facility was closing. She accepted the job and discussed the duties with Mr. Van Houten, but no plans were finalized and she never began working at the new location. After receiving permanent restrictions on April 11, 2024, she spoke with Ms. Valdez on April 25, 2024. Ms. Valdez informed her that Employer could not accommodate her permanent work restrictions, ceased paying her, and terminated her employment. Notably, Claimant maintained that she was never offered work within her permanent work restrictions.

22. Respondents have not established that Claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. Importantly, an employee is "responsible" if she precipitated the employment termination

by a volitional act that she would reasonably expect to cause the loss of employment. Here, Claimant's termination was based on the failure to accept a position at a new job location that was within her restrictions. However, in the absence of a documented job offer and proof that the duties of the position were within her permanent work restrictions, the record reflects that Claimant did not act with deliberate intent to precipitate her termination. Moreover, Claimant's actions do not demonstrate that she exercised some control over her termination under the totality of the circumstances. The record reveals that Claimant did not precipitate her employment termination by volitional acts that she would reasonably expect to cause the loss of employment. She is thus not precluded from receiving TTD benefits after her April 25, 2024 termination from employment.

Conclusions of Law

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

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

5. 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 (ICAO, Sept. 27, 2001).

6. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to TTD benefits beginning April 26, 2024. Claimant's testimony and the medical records demonstrate that she was either unable to work or under restrictions that rendered her unable to perform her job duties and impaired her earning capacity.

7. As found, on April 11, 2024 ATP Dr. Krisburg determined Claimant had reached MMI. He assigned the following permanent work restrictions: (1) no lifting, pushing, pulling or carrying greater than four pounds with the right hand; (2) no elevation of the right-hand above shoulder height; (3) no lifting, pushing, pulling or carrying greater than 15 pounds with the left hand; and (4) needs assistance pushing carts. Claimant subsequently worked within her restrictions and earned full wages until she was terminated on April 25, 2025. On January 3, 2025 DIME Dr. Brodie determined Claimant had not reached MMI and continued Claimant's prescribed work restrictions.

8. As found, Claimant's industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. Claimant also continues to receive medical care and has not reached MMI. Accordingly, Claimant has proven that she is entitled to receive TTD benefits from April 26, 2024 until terminated by statute.

9. As found, Respondents have failed to establish by a preponderance of the evidence that Claimant was responsible for her April 25, 2025 termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. The record reveals that Employer terminated Claimant effective April 25, 2024. There was a significant conflict in testimony between Respondents' witnesses and Claimant. Claimant's supervisor Mr. Van Houten explained that the Loveland location where Claimant worked was closing on March 31, 2024, and he had discussed the matter with Claimant on multiple occasions. He stated that the original plan prior to her work injury was for her to continue to work as a floor tech but at Employer's Drake location. However, sometime after Claimant's work injury but before MMI, he offered her a position as a general cleaner at Employer's Lincoln location because her restrictions did not comply with the floor tech position. However, Claimant refused the position.

10. As found, however, Respondents have failed to present any evidence regarding the preceding job offer, start date, rate of pay or job duties. They also did not present any evidence that Employer's general cleaner position was within Claimant's temporary or permanent work restrictions. Furthermore, Mr. Van Houten remarked that he last communicated with Claimant on April 2, 2024, to wish her a happy birthday, and was unaware of her permanent work restrictions. Notably, Mr. Van Houten acknowledged he did not keep any records regarding Claimant's employment, alleged offers of employment, or refusal to work. Similarly, Employer's Human Resources Director Ms. Valdez explained she never had a chance to offer Claimant a position within her permanent work restrictions because Claimant failed to communicate. However, Ms. Valdez acknowledged there was no record of a job offer to Claimant within her permanent work restrictions, and no documentation to confirm that Claimant refused an offer of employment. She also failed to maintain any records, documents, or notes regarding Claimant's separation from employment.

11. As found, in contrast, Claimant credibly explained that after her January 24, 2024 work injury, she remained off work until February 2024, when she returned to

light duty employment. She subsequently worked within her restrictions. While Claimant still had temporary work restrictions, Mr. Van Houten offered her a position at the Drake facility because the Loveland facility was closing. She accepted the job and discussed the duties with Mr. Van Houten, but no plans were finalized and she never began working at the new location. After receiving permanent restrictions on April 11, 2024, she spoke with Ms. Valdez on April 25, 2024. Ms. Valdez informed her that Employer could not accommodate her permanent work restrictions, ceased paying her, and terminated her employment. Notably, Claimant maintained that she was never offered work within her permanent work restrictions.

12. As found, Respondents have not established that Claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. Importantly, an employee is "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. Here, Claimant's termination was based on the failure to accept a position at a new job location that was within her restrictions. However, in the absence of a documented job offer and proof that the duties of the position were within her permanent work restrictions, the record reflects that Claimant did not act with deliberate intent to precipitate her termination. Moreover, Claimant's actions do not demonstrate that she exercised some control over her termination under the totality of the circumstances. The record reveals that Claimant did not precipitate her employment termination by volitional acts that she would reasonably expect to cause the loss of employment. She is thus not precluded from receiving TTD benefits after her April 25, 2024 termination from employment.

ORDER

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

1. Claimant shall receive TTD benefits for the period April 26, 2024 until terminated by statute.

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: August 7, 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 Number 5-288-288-001

Issues

1. Has Claimant demonstrated, by a preponderance of the evidence, that he suffered an occupational disease arising out of and in the course and scope of his employment with Employer?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of his low back constitutes reasonable treatment necessary to cure and relieve Claimant from the effects of the occupational disease?

Findings of Fact

1. Employer operates a dairy. Claimant began working for Employer in 2016 as an equipment operator. Claimant's job duties included loading and operating a front end loader and a tractor to deliver 50 pound bags of feed and medicines to the dairy cattle. Claimant testified that he worked up to 16 hours per day, six days a week.

2. Claimant testified that the seat of the tractor was very hard and did not have hydraulic shocks. As a result, as he would drive the tractor over uneven terrain he would bounce up and down upon that hard seat. In addition, the tractor had a clutch, which Claimant operated with his left leg. Claimant testified that over time he began to experience pain in his low back. Claimant specifically testified that in mid-October 2024, he began to have pain in his back that radiated down his left leg.

3. Claimant testified that he notified his supervisor of this back and leg pain, and was instructed to "take a pill".

4. On October 28, 2024, Claimant sought treatment at Christ Clinic. The medical record lists Claimant's complaints of left lumbar and buttock pain with paresthesia in his left leg and foot. Claimant also reported he had experienced near constant pain for one month, that symptoms started suddenly, and there was no strain. The medical record also reflects

Claimant's report that he drives a tractor. Claimant was diagnosed with left L5 sciatica. It was recommended that Claimant undergo a workers' compensation evaluation.

5. On October 28, 2024, the medical director of Christ Clinic, Kate Odenwald, ACNP-BC, authored a letter that stated that Claimant "was seen in clinic tonight for subacute left lower back pain with L5 sciatica, aggravated by prolonged sitting or riding in a vehicle. It is recommended by medical providers for him to have immediate [workers' compensation] evaluation with x-rays and further assessment by an orthopedist."

6. Claimant testified that this letter was provided to Employer by Christ Clinic.

7. Thereafter, Michelle Dickinson, Owner of Employer prepared a First Report of Injury. In that document, Ms. Dickinson identified that date of injury as October 28, 2025. The cause of the injury was listed as "unknown, went to clinic stating his left lower back scatica". In that same document Ms. Dickenson indicated that she had sent Claimant's to "MBI on Topaz[1] Ave".

8. On October 29, 2024, Claimant was seen by Makenna Schmidgall, PA at Medicine for Business and Industry (MBI). Claimant's authorized treating provider (ATP) for the claim has been MBI. In the medical record of that date, Claimant's mechanism of injury is described two ways. The first was "I was driving heavy machinery and the act of sitting for too long caused pain in my back and left leg." The second description was recorded as "[w]hile working a tractor, which has a clutch, [t]wisted/pulled muscle in back". Claimant described his pain symptoms as stabbing, burning, and numbness. Claimant also reported that his symptoms started 15 days prior. PA Schmidgall listed Claimant's diagnoses as lumbar spine ligament sprain and left sided lumbago with sciatica. Claimant was prescribed medications and referred to physical therapy.

9. Thereafter, Claimant continued to treat with providers at MBI. His treatment included physical therapy, chiropractic treatment, and a home exercise program. On December 5, 2024, Claimant was seen at MBI by Amber Payne, PA-C. At that time, PT Payne opined that

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[1] The ALJ notes that medical records admitted into evidence list an address for MBI as 1608 Topaz Drive in Loveland, Colorado. During his testimony, Claimant stated that the clinic Employer sent him to was called Topaz. The ALJ infers that Claimant was referencing the MBI location on Topaz Drive.

Claimant had plateaued after 14 physical therapy visits. As a result, PA Payne recommended Claimant undergo magnetic resonance imaging (MRI) of his lumbar spine.

10. The recommended lumber spine MRI was performed on December 13, 2024. The MRI showed a left central disc extrusion at the L5-S1 level (that was impinging on the descending left S1 nerve roots); moderate central canal stenosis at the L5-S1 level; mild central canal narrowing at the L4-L5 level, with a small central disc protrusion at that level; and moderate left foraminal stenosis at the L5-S1 level.

11. Also on December 13, 2024, Claimant was seen by PA Payne. Due to the MRI findings, PA Payne referred Claimant to Dr. Alicia Feldman (also with MBI) for consultation.

12. On January 9, 2025, Claimant was seen by Dr. Feldman. At that time, Claimant reported pain in his low back that radiated into his left posterior leg and foot. Dr. Feldman recommended a transforaminal epidural steroid injection (TFESI) at the left L5-S1 level.

13. On February 13, 2025, Dr. Feldman administered the recommended TFESI.

14. On February 21, 2024, Claimant was seen by PA Payne and reported 85 percent improvement in his symptoms following the injection. Thereafter, Claimant continued to report improvement, and his medications were reduced and he returned to working full duty.

15. At the request of Respondents, on February 26, 2025, Claimant attended an independent medical examination (IME) with Dr. Scott Primack. In connection with the IME, Dr. Primack reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In the IME report, Dr. Primack opined that all of the treatment Claimant has received has been reasonable. However, Dr. Primack also opined that Claimant suffered a non-work related L5-S1 disc extrusion and compression of the S1 nerve root. Dr. Primack explained that Claimant's condition is not work related, but rather the result of an insidious onset of back symptoms. In support of these opinions, Dr. Primack noted that Claimant's back symptoms increased over a period of 12 to 14 days, with the insidious onset occurring while Claimant was operating equipment at work. Dr. Primack further opined that Claimant's sitting position on October 28, 2024 "did not intensify, aggravate, accelerate, exacerbate, or cause" the disc extrusion.

16. On April 23, 2025, Claimant was seen at MBI by Dr. Robert Dupper. On that date, Dr. Dupper placed Claimant at maximum medical improvement (MMI) with no permanent impairment.

17. Dr. Primack's hearing testimony was consistent with his IME report. Dr. Primack reiterated his opinion that Claimant suffered a spontaneous disc herniation, that is not work related. Dr. Primack testified that at the IME Claimant reported that he had experienced symptoms 13 to 15 days prior to seeking treatment at the clinic. Claimant also reported to Dr. Primack that there was no specific event that occurred, he just began to feel pain while sitting in the tractor. Claimant did not report to Dr. Primack that he had to use a clutch, or that there were issues with the seat. Dr. Primack further testified that Claimant did not suffer an occupational disease. Nor did Claimant's work activities aggravate or accelerate the disc herniation or symptoms.

18. Dr. Primack credibly testified that in order to qualify for an occupational disease diagnosis, a progressive history must be present. Dr. Primack clarified that the two weeks of reported pain leading up to Claimant's first medical evaluation is insufficient to establish an occupational disease. Dr. Primack further testified that the disc extrusion seen on imaging can be caused by either violent forces or occurs spontaneously. Dr. Primack explained that the act of driving and operating a tractor, or sitting for too long would not meet the causality requirements necessary to establish a work-related occupational disease.

19. The ALJ does not find Claimant's testimony regarding the nature and onset of his symptoms to be credible or persuasive. The ALJ credits the medical records and the opinions of Dr. Primack. The ALJ specifically credits the medical records that indicate that Claimant initially reported one month of pain, then later reported a year of pain symptoms, but also reported approximately two weeks of pain prior to seeking treatment. The ALJ is pursued by Dr. Primack's opinions that Claimant's work activities would not result in an occupational disease, nor aggravate or accelerate a pre-existing condition in Claimant's spine. Rather, Claimant suffered a spontaneous disc herniation that was not work related. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that he suffered an occupational disease arising out of and in the course and scope of his employment with Employer.

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

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to 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 work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

7. 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 preexisting condition. *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, April 10, 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. *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

8. The Colorado Workers' Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG "set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

9. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered an occupational disease arising out of and in the course and scope of his employment with Employer. As found, the medical records and the opinions of Dr. Primack are credible and persuasive.

Order

It is therefore ordered that Claimant's claim regarding an occupational disease with Employer is denied and dismissed.

Dated August 8, 2025.

Cassandra M. Sidanycz
Administrative Law Judge

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 via email to either **oac-ptr@state.co.us** or to **oac-dvr@state.co.us**. If the Petition to Review is emailed to either of the aforementioned email addresses, 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. 5-147-636-001

Issues

- Did Claimant prove that her claim remains open for medical benefits after MMI?
- Did Claimant prove that an injection performed by Dr. Kim at Kaiser on November 15, 2024, was authorized, reasonably needed, and causally related maintenance care for the admitted work injury?

Findings of Fact

1. Claimant worked for Employer as a Campus Safety Officer. She suffered an admitted injury to her left wrist on July 20, 2020, when she fell on her outstretched hand. She underwent an open reduction with internal fixation by Dr. Daniel Master on July 30, 2020. She had a second surgery on August 24, 2021, consisting of a distal ulnar osteotomy and TFCC debridement.

2. Claimant's symptoms improved after surgery but she continued to experience pain and limited motion in her left wrist, hand, and thumb. A left wrist MRI on January 11, 2022, showed a moderate TFCC tear, advanced radiocarpal joint arthritis, and a possible loose body. Dr. Masters characterized the arthritis as "post-traumatic" in nature. A left wrist injection on January 14, 2022 provided approximately 75% relief. On February 28, 2022, Dr. Masters released Claimant to follow-up "as needed," noting she might require hardware removal in the future.

3. Dr. Scott Richardson at Concentra evaluated Claimant on March 10, 2022. Even though she was still receiving benefit from the January 14 injection, she was having intermittent dorsal wrist pain and swelling, particularly with colder weather. Dr. Richardson put Claimant at MMI with a 19% upper extremity rating based on left wrist range of motion deficits. He also recommended "twenty-four months maintenance care."

4. Respondent filed a Final Admission of Liability on May 18, 2022, accepting the 19% rating. The FAL further stated, "Respondent admits to maintenance that is related, reasonable, and necessary." There was no mention of a time limit on post-MMI treatment.

5. Claimant moved to Maryland shortly after MMI. In November 2022, Respondent's adjuster, Tiara Dookie, authorized a referral for Claimant to treat with Dr. Emery Kim, an orthopedist at Kaiser.

6. Claimant received maintenance treatment from Dr. Kim, including steroid injections, braces, and OTC medications. For unknown reasons, Kaiser never sent Respondent any associated billings or medical records.

7. No medical records from Dr. Kim or any other Kaiser provider were offered at hearing.

8. Claimant submitted a reimbursement request for home physical therapy equipment on October 4, 2024, and Ms. Dookie issued a reimbursement on October 14, 2024. That same date, Claimant inquired, "Should I continue to reach out to you for approval for injections and PT items when needed?" Ms. Dookie replied that she processed the reimbursement "as a courtesy," but Respondent was not responsible for further treatment because the 24 months of maintenance referenced in Dr. Richardson's MMI report had "expired."

9. Ms. Dookie subsequently advised Claimant that "the only other option is that the Designated Medical Provider would need to make a referral for additional maintenance."

10. Claimant proved her claim remains open for a general award medical treatment after MMI that is reasonably needed and causally related to the work accident.

11. Claimant failed to prove that the November 14, 2024 injection by Dr. Kim was reasonably needed and causally related to the admitted injury.

Conclusions of Law

A. General entitlement of post-MMI medical benefits

Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the record establishes a need for future treatment, the claimant is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003).

As found, Claimant proved that her claim for medical benefits after MMI remains open, notwithstanding the 24-month limitation in Dr. Richardson's March 10, 2022 report. An award of medical benefits after MMI is typically open-ended unless a specific limitation is explicitly set forth in an uncontested FAL. *E.g., Anderson v. SOS Staffing Services*, W.C. No. 4-543-730 (ICAO, July 14, 2006); *McClure v. Wal-Mart*, W.C. No. 4-651-991 (ICAO, March 2, 2007). Here, the May 18, 2022 FAL stated, "Respondent admits to maintenance that is related, reasonable, and necessary," with no express or implied time limit. In fact, the FAL did not even reference Dr. Richardson's report which sets forth the 24-month limit. Although Respondents are entitled to request documentation regarding Claimant's current need for additional medical treatment before voluntarily providing coverage, Claimant's ability to request such benefits was not foreclosed by the arbitrary time limitation contained in Dr. Richardson's report.

B. November 14, 2024 injection

Even when the respondents admit liability for medical benefits after MMI, they retain the right to challenge the compensability or reasonable necessity of any specific treatment. *Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo. App. 2003). In such a case, the claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Statements of a party's attorney or representative are not evidence, and cannot serve as a substitute for medical records, sworn testimony, or other forms of competent evidence produced at hearing. *England v. Amerigas Propane*, W.C. No. 4-907-349-03 (ICAO, June 25, 2015).

As found, Claimant failed to prove that the November 14, 2024 injection administered by Dr. Kim was reasonably needed or causally related to the work accident. Claimant presented no medical records, billings, sworn testimony or other persuasive evidence regarding the treatment to carry her burden of proof on this issue.

Order

It is therefore ordered that:

1. Respondent shall cover medical treatment after MMI from authorized providers reasonably needed to relieve the effects of Claimant's compensable injury and

prevent deterioration of her condition, subject to Respondent's right to contest the reasonable necessity, authorization, or causation of any specific treatment.

2. Claimant's request for medical benefits related to an injection by Dr. Kim on November 15, 2024, 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: August 8, 2025

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she is permanently and totally disabled as a result of her August 21, 2023 work injury.

2. Whether Claimant proved by a preponderance of the evidence that she has a permanent, visible disfigurement arising out of her August 21, 2023 work injury.

3. Whether Claimant proved by a preponderance of the evidence that a functional capacity evaluation is reasonably necessary and related to her August 21, 2023 work injury.

FINDINGS OF FACT

1. Claimant is a twenty-six-year-old employee of Respondent-Employer with a high-school education. Claimant began working for Employer on December 16, 2021. Claimant worked as an operations associate and her duties included packing orders, "cycle counts," receiving, stocking, dispatching computer to route orders, carrying orders to the drive partner, processing inbound products with a scanner, and assigning products to shelves. On August 21, 2023, Claimant slipped in one of Employer's freezers, twisting her left foot and ankle and falling to the ground.

Prior Injury

2. Claimant had a prior work injury on December 27, 2019. Claimant slipped on ice and fell, suffering injuries to her head and right shoulder and neck. Claimant also injured her right low back, her right hip, her right knee, and her right ankle. She complained of headaches and photophobia. That injury corresponded with claim W.C. No. 5-127-383.

3. Claimant saw Dr. Annu Ramaswamy on September 17, 2020, for discharge from care for her December 27, 2019 injury. Dr. Ramaswamy noted that Claimant had a prior history of anxiety and depression, for which she saw a social worker. Claimant's anxiety and depression symptoms had worsened due to the coronavirus pandemic and she was sleeping only three to four hours a night. Dr. Ramaswamy also noted that Claimant had seen psychologist Dr. Timothy Shea and that Dr. Timothy Shea had indicated that Claimant likely had multiple non-organic factors contributing to her pain complaints and that testing revealed that she would present with pain catastrophizing along with rumination, magnification, and helplessness. Dr. Ramaswamy noted that Claimant was still experiencing panic attacks. Claimant also reported to Dr. Ramaswamy that she felt "stuck," that she would never get better, and that Claimant was hardly leaving the house. Dr. Ramaswamy noted that Claimant had assumed a "disabled role." Claimant and her mother asked Dr. Ramaswamy for a permanent handicap parking plate or placard, and Dr. Ramaswamy declined. Dr. Ramaswamy assigned a permanent impairment rating of 3% for the right knee and a 7% psychological impairment. He recommended no permanent work restrictions.

4. Claimant underwent a DIME for her December 27, 2019 injury on February 4, 2020, with Dr. David Orgel. Dr. Orgel noted that Claimant had a significant prior history of PTSD, anxiety, severe headaches, dizziness, and fainting, as well as a psychological assessment suggesting catastrophizing and somatic focus with multiple nonorganic factors. Dr. Orgel opined that "[g]iven the absence of a clear diagnosis of traumatic brain injury despite her ongoing symptoms, . . . it is more likely that her cognitive symptoms including headache, memory problems etc. related to her pre-existing psychological symptoms." Dr. Orgel assigned a 5% lower extremity impairment rating for the right lower extremity.

5. Respondents filed an Amended Final Admission of Liability (FAL) on March 16, 2021, consistent with the DIME report, thus closing the claim for Claimant's December 27, 2019 injury.

Relevant Prior Employment

6. Prior to working for Respondent-Employer, Claimant worked for OSL Phone Company from 2018 to 2019 in the position of telephone consultant and customer service associate. In that position, she would assist with ordering and purchasing cell phones, processing payments, assisting customers with cell phone needs, and resolving customer concerns.

7. Claimant also worked at Rocky Mountain Assisted Living as a "med tech caregiver" from November 2019 to 2020. Her duties included cleaning rooms, cooking, making notes in patients' records, and sterilizing equipment.

History of Present Claim

8. Claimant sought treatment at UC Health on the date of her August 21, 2023 injury. X-rays were negative and Claimant was diagnosed with an ankle sprain, prescribed a walking boot and anti-inflammatories, and referred for physical therapy.

9. Claimant eventually obtained treatment with Concentra. Claimant exhibited tenderness in her lumbar spine and was diagnosed with lumbar strain and left ankle sprain.

10. Due to ongoing pain, Claimant underwent a left foot MRI on September 22, 2023. The MRI was unremarkable, aside from some mild first and second interspace intermetatarsal bursitis.

11. Claimant was referred to podiatrist Dr. Michael Zyzda, whom she saw on November 22, 2023. Dr. Zyzda reviewed the MRI and Claimant's left ankle and

foot. He did not identify the cause of Claimant's ongoing pain. Dr. Zyzda referred Claimant to physiatry for a second opinion.

12. Claimant continued with physical therapy and eventually saw Dr. John Sacha on March 27, 2024. Dr. Sacha recommended lidocaine gel, a trial of injections, and a left distal peroneal nerve block. Claimant underwent the injections on May 17, 2024.

13. When Claimant returned to Dr. Sacha on June 12, 2024, Dr. Sacha determined Claimant had reached maximum medical improvement (MMI) with an 18% left lower extremity impairment rating based on 15% for loss of range of motion and 3% for left peroneal nerve sensory impairment, apportioning the rating to 7% based on Claimant's prior impairment rating. Dr. Sacha recommended maintenance care of a gym and pool pass for one year and he released Claimant to work full duty.

14. Claimant returned to her ATP, Dr. Kathryn Bird on July 15, 2024, and Dr. Bird felt that Claimant had reached MMI and was able to return to full duty with no restrictions.

15. Respondents filed a FAL consistent with Dr. Sacha's report on September 27, 2024. Claimant objected and requested a DIME.

16. Claimant underwent the DIME on December 4, 2024, with Dr. Brian Shea. Claimant appeared at the DIME appointment with her mother, and Claimant's mother answered most of Dr. Shea's questions to Claimant. Claimant reported that she was experiencing a lot of pain in her left foot, ankle, and leg, both hips, low back, upper back, and head on the date of the DIME. Claimant reported that she had begun to reuse her orthopedic boot over the past several months after having two left lower extremity deep vein thromboses. Claimant also reported a hematoma on the top of her head of an unknown cause. Dr. Shea examined Claimant and reviewed Claimant's prior medical history as well. He determined

that Claimant's diagnoses were those of: left ankle sprain; trans metatarsal joint sprain; and distal peroneal neuropathy. He felt that Claimant reached MMI as of July 15, 2024, with a 15% lower extremity impairment rating based on a 26% impairment for loss of range of motion and a 2% impairment of the peroneal nerve, minus the apportionment from Claimant's impairment from her prior injury.

17. Dr. Shea specifically addressed why he felt that Claimant did not warrant a low back impairment rating. He noted that Claimant's complaints at the initial emergency room visit involved the left foot and ankle without mention of the low back, that Claimant's first complaint of low back pain was not until five weeks after the injury and was reported as a ten-out-of-ten, that Claimant had a prior history of low back pain and a lumbar MRI in 2020, and that Dr. Sacha's MMI report did not document complaints of low back pain at all. Dr. Shea recommended permanent work restrictions of no work until her "over condition improves," but included a caveat that a functional capacity evaluation (FCE) would be appropriate if formal work restrictions were needed. He recommended medical maintenance care of follow-up visits with Dr. Sacha twice over the next twelve months.

18. Respondents filed a FAL on January 3, 2025, consistent with Dr. Shea's DIME report. Claimant objected and requested a hearing on permanent total disability, a disfigurement award, and medical benefits consisting of an FCE.

19. On January 14, 2025, Sarah Vestal, DNP, FNP-C, completed a Disability and Leave of Absence Medical Certification form on Claimant's behalf. NP Vestal noted that Claimant was having "continued severe migraine headaches" and a severe iron deficiency, and was therefore unable to perform her job insofar as it involved lifting and standing for long periods of time. NP Vestal recommended continuous leave from work for the next two weeks. Claimant later testified at hearing that the reasons she could not work were unrelated to the conditions identified in the leave-of-absence forms.

20. On January 26, 2025, Claimant saw Claire Hardin, NP, at HealthNow. Claimant reported concerns of a possible autoimmune disease, stating that she was having symptoms similar to those which her grandmother had as a result of the disease, including headaches, body aches, anemia, and lower leg pain. Claimant also asked to have paperwork complete for disability so that she could extend her leave from work. NP Hardin noted that Claimant was 5 feet 7.75 inches tall and weighed 425 pounds. NP Hardin opined that Claimant's current complaints were not disabilities and that she could not submit paperwork attesting that Claimant was disabled and unable to work. NP Hardin noted that, "While she may not wish to return to her job, that does not mean that she may collect a paycheck under disability." NP Hardin referred Claimant to pain management and physical therapy.

21. Claimant returned to NP Hardin at HealthNow on March 6, 2025. Claimant reported that she had gone to urgent care two days earlier due to a worsening of her left knee joint pain. Claimant denied any back pain. NP Hardin reviewed the X-ray results of Claimant's left knee from two days earlier and noted mild joint effusion. NP Hardin opined that Claimant's obesity was the most likely cause of Claimant's joint effusion. She referred Claimant for physical therapy and prescribed Claimant lidocaine patches and anti-inflammatory medications.

22. Again, Claimant returned to HealthNow on April 3, 2025, reporting that she had left knee pain and swelling for over a month. Claimant denied any direct trauma or injury to her left knee, but she noted that she had a work-related injury to her left foot and ankle several months prior to the onset of left knee symptoms. Claimant also reported that she had no notable improvement over the past several weeks, despite undergoing physical therapy, and that she was unable to bear weight on the left knee and required use of a knee brace and crutches for stability. Claimant reported pain of eight to ten out of ten.

23. Claimant had an MRI performed of her left knee on April 29, 2025, which showed a degenerated ACL with some possible age-indeterminate high-grade and

possibly full-thickness tear, a medial meniscus tear, moderate left knee effusion, and possible lateral patellar subluxation and patellar chondromalacia.

24. Claimant obtained a vocational evaluation with Dan Best on April 13, 2025, in preparation for hearing. Claimant reported to Mr. Best that she was still experiencing pain and limitations in her left lower extremity when she was returned to work at full duty by Drs. Sacha and Bird. Claimant's employer had nevertheless provided her with one to two shifts per week, four to five hours each, and Claimant continued with periodic, limited, part-time work activities with Employer for approximately fifteen months from December 2023 through the beginning of March 2025.

25. Claimant reported to Mr. Best that since March 2025, she had even more significant functional limitations and an ongoing need for crutches to assist with ambulation.

26. Mr. Best opined that Claimant would be expected to have full capabilities in terms of returning to past work activities when just considering the opinions of Dr. Sacha and Dr. Bird. However, given Dr. Shea's opinion that Claimant may need additional work restrictions, and given Claimant's self-reported limitations, Mr. Best opined that Claimant may need additional evaluation of her functional capacity as well as formal vocational rehabilitation to make her more competitive in the labor market.

27. Respondents obtained a vocational evaluation with Donna Ferris on May 21, 2025, in preparation for hearing. Upon review of Claimant's employment history and medical treatment history, including Claimant's permanent work restrictions, Ms. Ferris opined that Claimant was capable of earning wages in areas she has prior training and experience or in areas where no such experience is required. Ms. Ferris did not provide any further analysis.

28. Claimant testified at hearing on her own behalf. She testified that she was unmarried and living in Englewood with her mother and her four-year-old son. Claimant testified that she had some college education and had held jobs since she was in high school, including phone sales jobs, Rocky Mountain Assisted Living, and Walgreens.

29. Claimant testified that her injury occurred in August 2023 while she was working as a senior operations associate with Respondent-Employer. Claimant testified that she slipped and fell in the freezer at work due to condensation and a big crack in the floor. Claimant testified that she injured her left foot, left ankle, and left toes.

30. Claimant testified that her job as a senior operations associate included packing groceries for customers, unloading pallets and carts, stocking, inventory, training employees, opening and closing the store, and assisting the drivers. Claimant testified that the job was very physically demanding and involved lifting, carrying, and pulling all day every day, totaling forty hours per week.

31. Claimant testified that prior to her injury, she had no physical limitations. She acknowledged that she had a prior workers' compensation injury, but she had been released to full duty and was able to return to full-time work with no lingering pain or limitations.

32. Claimant testified that her left foot condition from the August 2023 injury did not improve over time and that she continued to experience pain and numbness. Claimant testified that half the time she cannot get out of bed, and, when she can, she has to sit right back down. She testified that she could not care for her child or help her family most of the time, that she was unable to walk long distances, would avoid stairs, and that she could not do much cleaning or laundry due to excruciating pain. Claimant testified that she could not lift or play with her son.

33. Claimant testified that the typical day involved her getting out of bed, getting assistance from her mother, and standing for no more than ten to fifteen minutes. Claimant testified that she was unable to walk long distances and that she would use crutches and an ankle and knee brace, sometimes using her mom's cane. Claimant testified that she would avoid stairs.

34. Claimant testified that after she was placed at MMI and released to full duty, she tried to return to work for Respondent-Employer and she worked Mondays through Wednesdays from 10:00 A.M. to 2:00 P.M., then down to one day a week. Claimant testified that her duties were different and that she was unable to perform the job as before. She testified that she could not do any tasks for a long time as those tasks would involve walking. Claimant testified that she stopped going to work in March 2025 due to the pain and due to doctors' advice and that she has not returned to work anywhere else as she did not feel physically capable of doing full-time work. Claimant testified that her symptoms had worsened since quitting her job.

35. In support of her claim for disfigurement, Claimant testified that her knee braces and crutches were visible in public and that she had an altered gait. Claimant testified that DIME Dr. Shea was the one who recommended that she wear a brace.

36. Claimant also expressed that she wished to undergo an FCE as recommended by DIME Dr. Shea.

37. When asked about her prior conditions, Claimant denied that she ever had panic attacks, despite Dr. Ramaswamy's note to the contrary in his September 17, 2020 report.

38. The Court finds the claimant's testimony unreliable and gives it minimal weight. Her account contradicts previous medical records, which document a history of

panic attacks and state that her January 14, 2025, request for a disability determination was for severe migraine headaches and iron deficiency.

39. Additionally, other factors diminish the claimant's credibility: her pain complaints are disproportionate to the objective findings, she has a documented history of catastrophizing and assuming a disabled role, and Nurse Practitioner Hardin determined that her autoimmune symptoms were not disabling and that her true motivation was to collect a paycheck under disability.

40. Dr. Sacha testified at hearing as well. Dr. Sacha testified that he reviewed all of Claimant's medical records including those from the most recent injury in March 2025.

41. Dr. Sacha testified that when he first evaluated Claimant in March 2024, Claimant reported pain over the front of her ankle and top of her foot and numbness and tingling over the dorsum of the foot. Dr. Sacha testified that Claimant did not mention to him her prior 2019 injury.

42. Dr. Sacha testified that Claimant's low back complaints and left knee complaints were unrelated. Rather, Dr. Sacha testified that Claimant's current symptoms and disability are from her March 2025 full-thickness massive ACL tear and patellar dislocation, as noted in the April 29, 2025 MRI. Dr. Sacha testified that Claimant's knee was not in that condition when he examined her. Dr. Sacha felt that no permanent work restrictions would be required for her August 2023 injury. To the contrary, Dr. Sacha testified, Claimant should be active but for her new March 2025 injury.

43. The Court finds Dr. Sacha's testimony credible.

44. Andrew Kuzma also testified at hearing. Mr. Kuzma testified that he was Claimant's supervisor since March 2024. He testified that Claimant worked just as

any other associate but underperformed in terms of how much she could pack in units-per-hour. Mr. Kuzma testified that Claimant never reported pain to him when she was working and that he never observed Claimant having difficulty walking, except when Claimant would wear a boot to work.

45. The Court finds Mr. Kuzma's testimony credible.

46. Donna Ferris also testified at hearing regarding her vocational evaluation. Ms. Ferris testified that she had met with Claimant as part of her vocational evaluation and that she listened to the other testimony presented at hearing, which did not change her opinion. She felt that Claimant was capable of earning wages.

47. The Court finds Ms. Ferris's testimony credible.

Ultimate Findings

48. Claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled. Claimant has not proved that she is unable to earn wages in the same or other employment due in part to her work injury. Both Dr. Bird and Dr. Sacha felt that Claimant was able to work full duty without any permanent work restrictions. Although DIME Dr. Shea opined that permanent work restrictions of no-work would be appropriate pending an FCE, the Court finds no persuasive reason to credit Dr. Shea's opinion on permanent work restrictions over those of Claimant's treating physicians, Dr. Bird and Dr. Sacha, who have examined Claimant multiple times and would be expected to be more familiar with Claimant's level of function. Furthermore, Claimant has not proved that her work injury is a significant, causative factor in her current disability. Claimant's current disability more likely arises from a new March 2025 injury involving significant damage to her ACL. The evidence suggests that Claimant's current significant limitations, such as needing crutches and being unable to bear weight, are a direct result of her recent left knee injury. Additionally, Dr. Sacha credibly testified that

Claimant's new knee injury, with its massive ACL tear and patellar dislocation, is the primary cause of her current symptoms, not the work-related foot and ankle sprain.

49. Claimant has failed to prove by a preponderance of the evidence that she has sustained a serious, permanent disfigurement to areas of the body normally exposed to public view, entitling her to additional compensation. While Claimant was initially prescribed a boot at her initial emergency room visit, she eventually stopped wearing the boot. She began to wear the boot again only in the fall of 2024 after having two left lower extremity deep vein thromboses, as she reported to DIME Dr. Shea. While Claimant testified that Dr. Shea recommended Claimant wear a knee brace, Dr. Shea's DIME report does not document any such recommendation, and the Court finds the absence of any documentation of such a recommendation to be more credible than Claimant's testimony to the contrary. Last, regarding Claimant's altered gait and use of crutches, the Court finds that Claimant's recent March 2025 injury is the more likely cause of Claimant's current disability and need for crutches, as Mr. Kuzma credibly testified that Claimant appeared to have no apparent difficulty walking at work except when wearing her boot, which the Court infers to mean that Claimant was not using crutches during her employment with Respondent-Employer up until her new injury in March 2025. Therefore, the Court finds that there is no residual disfigurement from Claimant's August 2023 injury.

50. Last, Claimant has failed to prove by a preponderance of the evidence that an FCE is reasonably necessary medical treatment. While DIME Dr. Shea recommended an FCE for further evaluation of Claimant's permanent work restrictions, no treating physician has recommended an FCE. Without such a recommendation, this Court does not have authority to order such a test.

CONCLUSIONS OF LAW

Generally

1. 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.

2. 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).

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

Permanent Total Disability

4. A claimant is entitled to PTD benefits only if he or she can demonstrate that they are unable to earn any wages in the same or other employment. Section 8-40-201(16.5)(a), C.R.S. Case law maintains that "employment" means competitive and continued employment, not precluding a claimant from earning temporary wages for certain periods of time. *New Jersey Zinc Co. v. Industrial Commission*, 440 P. 2d 284 (Colo. 1968); *Hobbs v. Indus. Claim Appeals Off.*, 804 P.2d 210 (Colo.App.1990); *Gruntmeier v. Tempel & Esgar Inc.*, 730 P.2d 893 (Colo.App.1986). Courts also analyze a claimant's eligibility to receive PTD benefits by using a non-exclusive list of certain "human factors" to account for those intangible and qualitative elements of employability. *Weld Cnty. School Dist. RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). These factors include but are not limited to Claimant's age, access to a commutable labor market, skills, education, physical and mental ability, and work history. *Id.* at 558.

5. As found, Claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled. Claimant has not proved that she is unable to earn wages in the same or other employment due in part to her work injury. Both Dr. Bird and Dr. Sacha felt that Claimant was able to work full duty without any permanent work restrictions. Although DIME Dr. Shea opined that permanent work restrictions of no-work would be appropriate pending an FCE, the Court finds no persuasive reason to credit Dr. Shea's opinion on permanent work

restrictions over those of Claimant's treating physicians, Dr. Bird and Dr. Sacha, who have examined Claimant multiple times and would be expected to be more familiar with Claimant's level of function.

6. Moreover, "[i]n order to establish that the industrial injury was a significant causative factor, a claimant is required to prove that there was a direct causal relationship between the industrial injury and the [permanent total disability]." *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.*, 21 P.3d 866, 869 (Colo.App.2001); *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo.App.1986).

7. The Court concludes, as found, that Claimant has not proved that her work injury is a significant, causative factor in her current disability. Claimant's current disability more likely arises from a new March 2025 injury involving significant damage to her ACL. The evidence suggests that Claimant's current significant limitations, such as needing crutches and being unable to bear weight, are a direct result of her recent left knee injury. Additionally, Dr. Sacha credibly testified that Claimant's new knee injury, with its massive ACL tear and patellar dislocation, is the primary cause of her current symptoms, not the work-related foot and ankle sprain.

Disfigurement

8. Section 8-42-108(1), C.R.S. permits an ALJ to award disfigurement benefits up to a maximum of $4,000 if the claimant is "seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view. . . ." The ALJ may award up to $8,000 for "extensive body scars" and other conditions expressly provided for in § 8-42-108(2), C.R.S. These awards are subject to annual adjustment by the Director of the Division of Workers' Compensation pursuant to §8-42-108(3), C.R.S.

9. As found above, the Court concludes that Claimant has failed to prove by a preponderance of the evidence that she has sustained a serious, permanent disfigurement to areas of the body normally exposed to public view, entitling her to

additional compensation. While Claimant was initially prescribed a boot at her initial emergency room visit, she eventually stopped wearing the boot. She began to wear the boot again only in the fall of 2024 after having two left lower extremity deep vein thromboses, as she reported to DIME Dr. Shea. While Claimant testified that Dr. Shea recommended Claimant wear a knee brace, Dr. Shea's DIME report does not document any such recommendation, and the Court finds the absence of any documentation of such a recommendation to be more credible than Claimant's testimony to the contrary. Last, regarding Claimant's altered gait and use of crutches, the Court finds that Claimant's recent March 2025 injury is the more likely cause of Claimant's current disability and need for crutches, as Mr. Kuzma credibly testified that Claimant appeared to have no apparent difficulty walking at work except when wearing her boot, which the Court infers to mean that Claimant was not using crutches during her employment with Respondent-Employer up until her new injury in March 2025. Therefore, the Court finds and concludes that there is no residual disfigurement from Claimant's August 2023 injury.

Functional Capacity Evaluation

1. 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.

2. However, an ALJ may not order an authorized treating physician to provide a particular form of treatment that has been prescribed only by a physician unauthorized to treat. For example, in *Torres v. City and County of Denver*, W.C. No. 4-917-329-03 (May 15, 2018), an ICAO panel set aside an ALJ's order in which the ALJ ordered the respondents liable for a discectomy and fusion surgery recommended solely by a DIME physician. The panel reasoned that the ALJ did not have authority to order such treatment in the absence of a recommendation by a treating physician. *See also Potter v. Grounds Service Co. Inc.*, W.C. No. 4-935-

523-04 (Aug. 15, 2018)(ALJ lacked authority to order neurological consult recommended by DIME but not by any authorized physician).

3. As found, the Court concludes that Claimant has failed to prove by a preponderance of the evidence that an FCE is reasonably necessary medical treatment. While DIME Dr. Shea recommended an FCE for further evaluation of Claimant's permanent work restrictions, no treating physician has recommended an FCE. Without such a recommendation, this Court does not have jurisdiction to order such a test.

4. Although essential tests recommended by the DIME physician for completion of the permanent impairment rating may be ordered by an ALJ, even in the absence of a recommendation by an authorized treating physician, Rule 11-4(D), WCRP, Dr. Shea recommended the FCE for purposes of determining Claimant's permanent work restrictions. Therefore, an FCE would not constitute an essential test for purposes of the DIME, and the Court concludes that this ALJ does not have authority to order an FCE absent a recommendation from a treating physician. *See Potter*.

ORDER

It is therefore ordered that:

1. Claimant has not proved by a preponderance of the evidence that she is permanently and totally disabled as a result of her August 21, 2023 work injury.
2. Claimant has not proved by a preponderance of the evidence that she has a serious permanent disfigurement resulting from her August 21, 2023 work injury.
3. Claimant has not proved by a preponderance of the evidence that a functional capacity evaluation is reasonably necessary and related to her August 21, 2023 work injury.
4. All matters not determined herein are reserved for future determination.

DATED: August 8, 2025.

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

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.

Office of Administrative Courts

State of Colorado

Workers' Compensation No. WC 5-106-551-006

Issues

The following issues were raised for consideration at hearing:

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to reopen his claim based upon an alleged worsening of condition.

II. Whether Claimant established, by a preponderance of the evidence, that he is entitled to additional medical treatment in the form of a right arthroscopic subacromial decompression with rotator cuff debridement surgery as recommended by Dr. David Weinstein. The questions answered in this regard are:

- Whether the proposed surgery should be considered maintenance in nature and whether Dr. Weinstein is an authorized provider.

Findings of Fact

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

1. Claimant injured his right shoulder while working as an assistant manager at Wendy's of Colorado Springs on January 12, 2019. According to the medical documentation, Claimant was helping stock 30-pound boxes on some freezer shelves when he developed pain in his right shoulder. (CHE C-3; RHE 4, p. 15). Because he thought it was a simple sprain that would heal on its own, Claimant waited a few weeks to be seen by a physician. *Id*.

2. Claimant was seen initially by Dr. Jessica Fisher at UC Health Circle Square worker's compensation clinic on February 13, 2019. (CHE C-3; RHE 4, p. 14). Claimant's care would ultimately be transferred to Dr. Cynthia Schafer, M.D. at the UC Health Occupational Medicine Clinic located on Garden of the Gods. (CHE C-3; RHE 4, p. 14).

3. Prior to the transfer of care to Dr. Schafer, Dr. Fisher referred Claimant to physical therapy. She also ordered an MRI of the right shoulder. Claimant underwent magnetic resonance imaging (MRI) of the right shoulder on March 15, 2019. The MRI demonstrated a "full-thickness partial width supraspinatus tear measuring 1.2 x 1.6 cm

and a low-grade partial width tear involving the infraspinatus." (CHE C-3; RHE 4, p. 16). Because he had an abnormal MRI and remained symptomatic, Claimant was referred to Dr. James Duffy for an orthopedic evaluation. Id.

4. Claimant was evaluated by Dr. Duffy on April 2, 2019. (CHE C-3; RHE 4, p. 16). Dr. Duffy recommended rotator cuff surgery. Id. Nonetheless, Dr. Fisher transferred Claimant's Care to Dr. Nicholas Kurz on May 1, 2019. (RHE 5, p. 30). Dr. Duffy's request for authorization to proceed with right rotator cuff surgery was denied and he was placed at maximum medical improvement (MMI) by Dr. Kurz without restriction. Id. at 31. Claimant requested a Division Independent Medical Examination and the same was performed by Dr. Miguel Castrejon, M.D. on September 23, 2019. (RHE 5). While the DIME opinions of Dr. Castrejon were pending, Claimant underwent a right sided arthroscopic rotator cuff repair, with subacromial decompression and biceps tenodesis with Dr. James Duffy on June 4, 2019.[8] Id.

5. Claimant experienced persistent pain and demonstrated "significantly" decreased post-surgical range of motion during a reevaluation appointment with Dr. Duffy on August 8, 2020. (CHE C-3; RHE 4, p. 16). Consequently, Dr. Duffy ordered a repeat MRI, which revealed the failure of one of the surgical anchors placed during Claimant's June 4, 2019, surgery. Claimant was determined not to be at MMI by Dr. Castrejon following his September 23, 2029, DIME and Claimant returned to treatment with Drs. Schafer and Duffy.

6. Dr. Duffy returned Claimant to the operating room on September 24, 2020, where he removed the displaced suture anchor and repaired the resulting defect. (CHE C-3; RHE 4, p. 16).

7. Claimant undertook a prolonged course of care following his September 24, 2020, surgery to include extensive physical therapy. Unfortunately, Claimant continued to experience pain, swelling and severely limited post-operative range of motion. Adhesive capsulitis was suspected prompting Dr. Duffy to administer both a steroid and inter-articular Toradol injection. (RHE 4, p. 16).

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[8] Surgery to repair Claimant's rotator cuff had been scheduled for March 26, 2019, but was canceled due to the Covid 19 pandemic. (CHE C-3; RHE 4, p. 16).

8. Claimant continued to struggle with range of motion loss. By October 1, 2021, Claimant demonstrated 100 degrees of active right shoulder abduction, 160 degrees of passive right shoulder flexion and 150 degrees of passive right shoulder abduction. (CHE C-3; RHE 4, p. 16). Dr. Duffy did not believe that a third surgery was warranted and suggested that Claimant seek a second surgical opinion. Id.

9. Claimant requested a second opinion from Dr. Adam Seidl, who had surgically repaired his left rotator cuff in 2016. (CHE C-3: RHE 4, p. 16). Claimant underwent a second orthopedic opinion with Dr. Seidl on October 26, 2021. (RHE 10, p. 88). At this encounter, Dr. Seidl noted that Claimant injured his shoulder "issues" had "progressively" worsened over thew past three years. Id. Claimant demonstrated 90 degrees of active right should flexion and abduction and a positive Hawkins sign on examination. Id. at 92. Dr. Seidl felt that Claimant's physical examination findings were consistent with adhesive capsulitis. Id. He opined that the best course of treatment would be to first try an intra-articular ultrasound guided injection directed to the shoulder and that if this did not prove long term pain relief, then a third orthoscopic procedure with capsular release and manipulation under anesthesia. (MUA). Id.

10. Dr. Seidl administered an ultrasound guided steroid injection to the right shoulder on November 2, 2021. (RHE 10, p. 94).

11. Claimant returned to Dr. Seidl's attention on December 7, 2021. (RHE 10, p. 96). As part of this follow-up appointment, Dr. Seidl noted, "We treated him with injection and exercises, he has failed to respond to get fully better."[9] Id. Accordingly, Dr. Seidl recommended arthroscopic debridement and manipulation under anesthesia. Id.

12. Respondents obtained a WCRP, Rule 16 Independent Medical Examination (IME) with Dr. William Ciccone on January 19, 2022. (RHE 7). Following his examination and records review, Dr. Ciccone agreed that the surgery proposed by Dr. Seidl was reasonable, necessary and causally related to Claimant's admitted industrial injury. Id. at 65.

13. Dr. Seidl took Claimant to the operating room on April 28, 2022, where he

[9] Per the January 19, 2022, IME report of Dr. William Ciccone, Claimant only experienced "three days of some relief" from the injection.

performed a third orthoscopic surgery. During this procedure, Dr. Seidl found "extensive adhesions as well as a partial retear of the rotator cuff which he repaired with bio inductive implant." (CHE C-3; RHE 4, p. 16). Dr. Ciccone opined that these first three surgeries to the right shoulder were reasonable and necessary. (Depo.Tr. Dr. Ciccone, 8:24-25 and 9:1).

14. Following additional post-surgical physical therapy, Claimant returned to Dr. Schafer on December 29, 2022. (CHE C-3; RHE 4). During this follow-up appointment, Dr. Schafer placed Claimant at MMI and assigned 9% scheduled upper extremity impairment for range of motion loss at the level of the glenohumeral joint. Id. Claimant was discharged from care and advised to continue his established range of motion and strengthening home exercise program as maintenance care. Id. Dr. Ciccone opined that this was a reasonable maintenance care plan for Claimant. (Depo.Tr. Dr. Ciccone, 10:1-5). Claimant testified that Dr. Schafer did not refer Claimant to Dr. Weinstein or to Peak Vista Community Health Center.

15. On February 22, 2023, Claimant was evaluated by his primary care provider (PCP), Physician Assistant (PA) Brett Whetstine, at Peak Vista Community Health Centers. (CHE E-5: RHE 12, p. 120). Claimant complained of constant and worsening neck and right shoulder pain. Id. For the right shoulder, PA Whetstine referred Claimant for an MRI scan and back to orthopedics. Id. For the cervical stenosis and lumbar degenerative disc disease, Claimant was referred for an MRI of the cervical spine and to pain management. Id. at 121.

16. Claimant underwent an MRI of the right shoulder on March 18, 2023. (RHE 9, p. 84). The MRI showed no complication of the surgical bed sites. Id. at 85. There was supraspinatus tendinosis and postsurgical change with partial thickness subarticular tears of the supraspinatus tendon but no defined full-thickness retracted tears. Id. There was subscapularis and infraspinatus tendinosis without defined tears. Id. The MRI showed degenerative changes in the acromioclavicular joint with mild subacromial/subdeltoid bursitis, peritendinous inflammation of the rotator cuff and degenerative change in the posterior humeral head and greater tuberosity. Id. There was mild glenohumeral joint effusion and thickening of the inferior glenohumeral ligament. Id.

17. Claimant underwent the follow-up DIME with Dr. Castrejon on March 28,

2023. (CHE D-4; RHE 6). During this examination, Claimant reported that following his release from Dr. Schafer, he sought treatment from his primary care physician. (CHE D-4; RHE 6, p. 39). Claimant advised Dr. Castrejon that he had been referred for a repeat right shoulder MRI and Dr. Castrejon noted that the results of the MRI were provided to him. Id. Claimant also testified that he provided Dr. Castrejon with the updated MRI report. Dr. Castrejon reviewed the updated MRI scan and noted that the scan confirmed the presence of impingement syndrome, which was consistent with Claimant's clinical examination. (CHE D-4; RHE 6, p. 46). Dr. Castrejon then noted that the MRI and the clinical findings did not "support the presence of adhesive capsulitis" and that it was "medically probable that the presence of impingement is limiting active and passive shoulder motion." Id. Claimant advised Dr. Castrejon that he would be returning to his primary care physician for treatment options. Id. at 39.

18. Dr. Castrejon opined that Claimant was adequately placed at MMI by Dr. Schafer on December 29, 2022. (CHE D-4; RHE 6, p. 47). Dr. Ciccone agreed with Dr. Castrejon's opinion of MMI. (Depo.Tr. Dr. Ciccone 11:10-13). Regarding Claimant's persistent impingement, Dr. Castrejon recommended continued conservative treatment, although he could not "discount the possibility for additional surgery." Id. at 48. He noted that Claimant would require "orthopedic follow-up to more definitively establish a treatment plan" and that such follow-up should include a return to Dr. Seidl for treatment that would be "intended to maintain MMI." Id.

19. On April 5, 2023, Claimant followed up with PA Whetstine for his right shoulder and neck pain. (CHE E-5; RHE 12, p. 126). Claimant was referred to pain management and physical therapy for his cervical spine. Id.; RHE 12, at 126-127. Regarding the condition of his right shoulder, PA Whetstine referred Claimant to Dr. David Weinstein. (RHE 12, p. 130).

20. Claimant returned to Dr. Seidl on June 1, 2023. (RHE 10, p. 104). Claimant reported that he continued to struggle since his last surgery and had not made much progress. Id. Dr. Seidl noted that Claimant had active forward elevation to about 100º and passively external rotation was 140º, and 30º internal rotation. Id. Dr. Seidl noted that he did a side-by-side comparison of the most recent MRI with Claimant's prior imaging concluding that the rotator cuff looked thicker than pre-surgery and indicated that the bio-

inductive implant stimulated some healing. Id. Overall, Dr. Seidl felt that the new MRI looked slightly better than the prior MRI scan. Id. Dr. Seidl opined that there was not a great solution for Claimant's continued pain, but he did not recommend any further surgical intervention. Id. Dr. Seidl advised Claimant that he could follow-up in the future at any point. Id. Claimant testified that Dr. Seidl did not refer him to Dr. Weinstein.

21. Claimant was evaluated PA Raulie at Orthopedic Centers of Colorado on June 21, 2023. (RHE 11, p. 106). Claimant testified that he did not provide any of his medical records from his workers' compensation injury to the providers at Orthopedic Centers of Colorado. Claimant advised PA Raulie that his right shoulder had been bothering him for four years. Id. Claimant reported that he went to see his doctor for a yearly physical in February 2023 and he was referred to orthopedics because he might be a candidate for shoulder replacement. Id. PA Raulie noted that the right shoulder had only a mild amount of atrophy and no evidence of scapular winging. Id. at 108. Range of motion on the right shoulder was forward elevation actively to approximately 120º and passively to 170º and external rotation to 50 degrees. Id. Impingement sign and Hawkin's Test were positive. Id. PA Raulie recommended aspiration to assess for infection. Id. at 110.

22. On August 23, 2023, Claimant followed up with PA Raulie. (CHE F-6; RHE 11, p. 111). Claimant reported that he had the same discomfort in his right shoulder. Id. PA Raulie noted that physical therapy was advised but Claimant did not believe it would be of much help. Id. Instead, Claimant asked when he would get his shoulder replaced. Id. PA Raulie discussed consideration of a cortisone injection, but Claimant indicated that he had not fared well with that in the past. Id. at 113. PA Raulie opined that there was no indication for shoulder replacement based on imaging, examination, and history. Id. PA Raulie recommended arthroscopic subacromial decompression, rotator cuff debridement versus repair, capsular release with lysis of adhesions with manipulation and anesthesia. Id.

23. Claimant was evaluated by Dr. Weinstein at Orthopedic Centers of Colorado on September 13, 2023. (CHE F-6; RHE 11, p. 115). Claimant reported that he had had persistent pain since his last surgery. Id. Claimant's range of motion was noted to be 120º of elevation and 40º of external rotation. (RHE 11, p. 116). Dr. Weinstein

recommended arthroscopic subacromial decompression with rotator cuff debridement versus repair, capsule release or lysis of adhesions. Id. at 117. Dr. Weinstein noted that this would not alleviate Claimant's myofascial pain directly. Id.

24. Claimant followed up with Dr. Schafer on September 18, 2023. (CHE C-3). Claimant hoped that Dr. Schafer would agree with his primary care physician and refer Claimant back to Dr. Weinstein's office for repeat surgery through workers' compensation because of his poor outcome. Id. Dr. Schafer noted that she did not have time to review the records during the office visit, but she did perform an "extensive and detailed record review on 10/1/2023." Id. Dr. Schafer stated, "this case has been placed at MMI with permanent restrictions", noting further, "If [Claimant] wishes to proceed with additional surgery for the shoulder, he needs to work through the DIME process again with his attorney." Id. Based upon the content of Dr. Schafer's September 18, 2023, report, the ALJ is not convinced that she recommended additional right shoulder surgery or that she referred Claimant to Dr. Weinstein for the same.

25. Respondents filed a Final Admission of Liability (FAL) on January 10, 2024, admitting to maintenance care after MMI. (RHE 1, p. 3).

26. Claimant underwent a second IME with Dr. Ciccone, at Respondents' request, on May 2, 2024. (RHE 8, p. 68). Claimant reported that he continued to have stiffness in his shoulder and pain with reaching and lifting. Id. at 69. Dr. Ciccone measured Claimant's range of motion and noted 110º forward flexion, 90º abduction, 45º external rotation, 60º internal rotation, 40º adduction, and 50º extension. Id. Dr. Ciccone opined that Claimant's range of motion was a bit better during his examination than it was on the date of MMI with Dr. Schafer. (Depo.Tr. Dr. Ciccone 9:20-25). Dr. Ciccone noted that Claimant had positive impingement signs and pain at the acromioclavicular joint and pain with lift-off testing. (RHE 8, p. 69).

27. Dr. Ciccone opined that Claimant would not benefit from a fourth surgery. (RHE 8, p. 81). He noted that the procedure recommended by Dr. Weinstein, i.e. decompression with capsular release and revision rotator cuff repair was the same procedure performed in May of 2022 and that Claimant did not respond well to the procedure and did not make much progress. Id; Depo.Tr. Dr. Ciccone 7:1-14. Dr. Ciccone opined that there was no reason to believe that Claimant would respond any differently

to the same procedure. Id. Dr. Ciccone explained that with Claimant's medical history he was more inclined to shoulder stiffness following surgery and repeating the same surgeries was not reasonable. (Depo.Tr. Dr. Ciccone 12:4-13).

28. Dr. Ciccone testified by deposition on April 17, 2025. He was qualified as a Level II accredited expert in orthopedic surgery. (Depo.Tr. Dr. Ciccone 5:22-25 and 6:1-10). Dr. Ciccone testified that when he evaluated Claimant in May of 2024, Claimant did not report that his right shoulder condition was worsening. Instead, Claimant simply complained of persistent pain in his right shoulder. Id. at 8:7-11. According to Dr. Ciccone, Claimant did not require maintenance care. Id. at 11:17-19. He explained that Claimant underwent a few years of physical therapy and should be able to transition to a good home-exercise program with stretching. Id. at 11:17-22. Moreover, Dr. Ciccone opined that Claimant did not require any follow-up care with Dr. Seidl. Id. at 21:8-14.

29. Dr. Ciccone opined that Claimant performed better during his examination in May of 2024 than was documented by Dr. Schafer on December 29, 2022. (Depo.Tr. Dr. Ciccone 13:16-21). Further, Dr. Ciccone opined that his examination of Claimant in May of 2024 was about the same as Dr. Castrejon's examination on March 28, 2023. Id. at 13:22-25 and 14:1. Dr. Ciccone concluded that Claimant remained at MMI for his right shoulder. Id. at 14:2-4.

30. Dr. Castrejon prepared a supplemental Division IME report on May 23, 2025. As noted, this report was admitted into evidence as part of a June 20, 2025, prehearing/status conference. The report is marked (by the ALJ) as Claimant's Hearing Exhibit J. In his May 23, 2025, report, Dr. Castrejon noted that he received "a cover letter, dated April 11, 2025, authored by Mr. Castrejon." Dr. Castrejon noted that in the letter, Claimant indicated that his condition had worsened, and he described ongoing pain, limited shoulder function, and sleep disruption. Dr. Castrejon reviewed the medical file provided to him by Claimant. He noted that Claimant's multitude of risk factors predispose him to a poor outcome. Dr. Castrejon opined that Claimant was not a candidate for shoulder replacement surgery. Dr. Castrejon continued to opine that "further surgery is not in the applicant's best interest." Additionally, Dr. Castrejon opined that there was no substantial information that would propose that Claimant was no longer at MMI.

Conclusions of Law

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

Generally

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

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. 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*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Claimant's Request to Reopen His Claim Based on a Change Condition

D. Pursuant to § 8-43-303 (1) C.R.S., a claim may be reopened based on a

change of condition which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo. App. 1993). Pursuant to § 8-43-303(1), C.R.S., a "change of condition" refers to a "change in the condition of the original compensable injury or a change in Claimant's physical or mental condition which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). Reopening may be appropriate where the degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000); *Brickell v. Business Machines, Inc.*, 817 P.2d 536 (Colo. App. 1990) (reopening is appropriate if additional benefits are warranted). In this case, Claimant seeks additional medical benefits based upon the surgical recommendation of Dr. Weinstein. Accordingly, if supported by the evidence, additional medical benefits may be warranted. Thus, reopening may be appropriate if the claim is closed as to medical benefits.

E. Here, the evidence presented persuades the ALJ that the claim never closed for medical benefits by virtue of Respondents' January 10, 2024, FAL admitting to maintenance care after MMI. Thus, the need to "reopen" it to obtain additional medical treatment is contrary to the procedural posture of the claim and unnecessary. Indeed, ALJ Perales concluded as much in an Order regarding Claimant's motion to reopen medical maintenance benefits dated April 10, 2025. Here, the ALJ finds the questions presented concerning Claimant's entitlement to medical benefits are whether, based on Claimant's assertions of worsening symptoms, he is at MMI and if not, whether he is entitled to additional reasonable, necessary and related medical treatment at the hands of Dr. Weinstein to cure and relieve him from the effects of his industrial injury or if Claimant is at MMI, whether he is entitled to maintenance treatment in the form of a right shoulder surgery recommended by Dr. Weinstein. Because the ALJ concludes that Dr. Weinstein is not authorized to treat Claimant, this order does not address whether the surgery recommended by Dr. Weinstein is reasonable, necessary or related to Claimant's January 12, 2019, industrial injury.

The Question of MMI and Whether the Recommended Shoulder Surgery Constitutes Maintenance Medical Care

F. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, 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).

G. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. 2013. In this case, the evidence presented persuades the ALJ that Claimant's remains at MMI. Indeed, Claimant's condition has not fundamentally changed since he reached MMI on December 29, 2022. Claimant alleged that he was having worsening neck and shoulder pain when he was evaluated by his PCP on February 22, 2023, and he was referred for an MRI scan. Claimant testified that he was referred to pain management because of his worsening pain; however, the medical records show that Claimant was referred to pain management for his neck and low back which are not causally related to the January 12, 2019, work injury.

H. Despite reporting worsening to his PCP and getting an updated MRI scan, which Claimant presented to Dr. Castrejon during his DIME on March 28, 2023, Dr. Castrejon agreed that Claimant was properly placed at MMI. Dr. Castrejon was aware that Claimant was seeking additional treatment through his PCP and even reviewed the updated MRI report at the Division IME appointment. If Dr. Castrejon felt that Claimant's condition had worsened, he would not have maintained MMI. Claimant did not challenge Dr. Castrejon's MMI determination.

I. Dr. Ciccone testified that his examination of Claimant on May 2, 2024, was about the same as Dr. Castrejon's Division IME. Based upon the totality of the evidence presented, the ALJ finds, Dr. Ciccone opinion that Claimant remains at MMI credible and persuasive. Moreover, Dr. Seidl opined that the MRI scan from March 18, 2023, looked better than the prior MRI when compared side-by-side. Dr. Seidl did not have any additional treatment to offer Claimant and did not recommend any follow-up treatment in June 2023. Dr. Schafer noted that she performed an extensive review of records on October 1, 2023, but continued to note that Claimant was at MMI with permanent restrictions. She did not provide any additional treatment recommendations and advised Claimant to go through the Division IME if he wanted additional surgery. Finally, Dr. Castrejon reviewed additional documents provided by Claimant and opined on May 23, 2025, Claimant remains at MMI. Having concluded that Claimant remains at MMI, the ALJ addresses the question of whether the proposed right shoulder surgery should be considered maintenance care.

J. In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter a "general" order for maintenance treatment similar to that described in *Grover*. Even with a general award of maintenance medical benefits, respondents retain the right to dispute whether the need for medical treatment was caused by the compensable injury and/or whether it was reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity). The question of whether the claimant met the burden of proof to establish an entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003).

K. In *Hayward v. Unisys Corp.,* W.C. No. 4-230-686 (July 2, 2002), *aff'd,* Colo. App. No. 02CA1446 (Jan. 9, 2003) (NSOP), the Court noted that "surgery is not, as a matter of law, 'curative' treatment." Thus, surgery can be awarded as maintenance care. While surgical intervention can be ordered as maintenance treatment,[10] the evidence presented in the instant case persuades the ALJ that the surgery recommended by Dr. Weinstein is designed to "cure" Claimant's persistent impingement by debriding the rotator cuff or repairing recurrent tearing rather than simply performing surgery to relieve Claimant's pain or preventing deterioration of his condition. Accordingly, the ALJ is not convinced that the surgery recommended by Dr. Weinstein should be considered maintenance treatment.

Dr. Weinstein's Status as an Authorized Treating Provider

L. Even if Claimant had established that the surgery recommended by Dr. Weinstein was maintenance in nature, the evidence presented persuades the ALJ that Dr. Weinstein is not an authorized provider in this case. Authorization to provide medical treatment refers to a provider's legal authority to deliver medical care to the injured worker with the expectation that the provider will be compensated by the insurer for such treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an already authorized provider refers the claimant in the normal progression of treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997).

M. Under § 8-43-404(5) (a) (I) (A), C.R.S., the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition(s). The rationale for this principle is that the respondents may ultimately be

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[10] See *Shipman v. Larry's Transmission Center,* W.C. No. 4-721-918 (August 25, 2008)(surgery to correct a leg-length discrepancy approved as post-MMI treatment); *Hayward v. Unisys Corp.,* W.C. No. 4-230-686 (July 2, 2002), *affd, Hayward v. Industrial Claim Appeals Office,* (Colo. App. No. 02CA1446, January 9, 2003) (knee surgery may be curative or may be a form of Grover-style maintenance treatment designed to alleviate deterioration of the claimant's condition); *Jacobson v. American Industrial Service/Steiner Corp., V/.C.* No. 4-487-349 (April 24, 2007); *Cervantes* v. *Academy School District #* 20 W. C. No. 4-604-873 (May 23, 2005).

liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Section 8-43-404(7)(a), C.R.S. provides that "an employer or insurer shall not be liable for treatment provided pursuant to article 41 of Title 12, C.R.S. unless such treatment has been prescribed by an authorized treating physician." If the claimant obtains unauthorized care, the respondents are not required to pay for it. *In Re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO, June 18, 2010); see *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999); *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973). In this case, Claimant admitted that he sought treatment on his own with his PCP and was subsequently referred to Dr. Weinstein directly by PA Whetstine. Based upon the evidence presented, Dr. Weinstein is the only physician recommending a fourth surgery in this case. Moreover, the record is devoid of any persuasive evidence establishing that Dr. Weinstein requested pre-authorization from Respondent-Employer or Insurer to proceed with a fourth surgery directed to the right shoulder, which the ALJ finds supports an inference that Claimant had elected to proceed with care outside of the Workers' Compensation system. Indeed, Claimant agreed that Dr. Schafer and Dr. Seidl were his ATPs. He also admitted that neither Dr. Schafer nor Dr. Seidl referred him to Dr. Weinstein. Claimant's testimony in this regard is consistent with the balance of the record evidence submitted for review. Indeed, careful review of the available record fails to establish a referral to Dr. Weinstein from any of Claimant's authorized physicians under his workers' compensation claim. Because Respondents properly designated Dr. Schafer and Dr. Seidl and because the evidence presented fails to establish that neither Dr. Schafer nor Dr. Seidl referred Claimant Dr. Weinstein, the ALJ concludes that Dr. Weinstein is not authorized to treat Claimant for the effects of his January 12, 2019, work injury. Consequently, the treatment recommended by Dr. Weinstein is unauthorized. As such, Respondents are not obliged to pay for the costs associated with this care, including the surgery recommended by Dr. Weinstein. *Yeck v. Industrial Claim Appeals Office, supra.*

Order

It is therefore ordered that:

1. As Dr. Weinstein and the Orthopedic Centers of Colorado are not authorized providers in this case, Claimant's request for additional medical benefits, i.e. a fourth surgery directed to the right shoulder must be denied and dismissed.

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

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

DATED: August 11, 2025

/s/ Richard M. Lamphere

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

Office of Administrative Courts

State of Colorado

Workers' Compensation No. WC 5-161-783-004

Issues

1. Whether Respondents established by clear and convincing evidence that the Division Independent Medical Examiner (DIME) erred with respect to her determination that Claimant has not reached maximum medical improvement (MMI).
2. Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability benefits from August 11, 2021 until terminated pursuant to statute.

Stipulations

1. The parties stipulated that Claimant's average weekly wage (AWW) at the time of Injury was $883.10.

Findings of Fact

1. Claimant is a 54-year-old Mandarin speaking woman who worked as a deli clerk at Employer's grocery store for approximately nine years. Claimant alleges that on January 24, 2021, a swinging door struck the right side of her head causing a significant injury. Since January 24, 2021, Claimant has reported ongoing symptoms for more than four years, including impaired use of her right arm and leg, coordination problems, dizziness, headaches, and cognition, vision, and memory issues.

Claimant's Relevant Pre-Incident Medical History

2. Claimant was diagnosed with breast cancer in December 2016, and underwent chemotherapy for that condition concluding in April 2017. (Ex. P). She later had a lumpectomy, in June 2017, and received radiation therapy from August 2017 through September 2017. (Ex. P). Over the course of her cancer treatment and follow-up with Rocky Mountain Cancer Center (RMCC), Claimant experienced multiple side effects of her treatment and condition, including body and joint aches, fatigue, nausea. Claimant's mental status and cognitive function were routinely evaluated, and no cognitive deficits were noted, although she was noted to have depression and anxiety on multiple

occasions. (Ex. P). In addition, Claimant experienced symptoms which pre-dated and/or persisted after the conclusion of her cancer treatment, including headaches, and neurologic symptoms in her hands and feet.

3. Claimant had a history of chronic headaches pre-dating her cancer treatment, but also began experiencing left occipital headaches, and neck pain after beginning chemotherapy warranting a cervical MRI in February 2017. (Ex. P, p. 889, 907, 909; Ex. N). The MRI reportedly showed multilevel degenerative changes, mild canal stenosis, and slight flattening of the ventral aspect of the spinal cord at C4-5. (Ex. P, p. 879). In March 2017, Claimant reported persistent numbness in her feet, and was diagnosed with peripheral neuropathy. (Ex. P, p. 884). Throughout her cancer treatment, Claimant's neurological examinations were grossly normal, with a normal gait. (Ex. P).

4. In September 2017, Claimant reported experiencing numbness in her finger tips in the mornings, beginning three weeks earlier, but no numbness in her palms or feet. (Ex. P. p. 824). On October 6, 2017, Claimant underwent an EEG study to evaluate for "possible seizure activity." The record noted that Claimant may have had a seizure four years earlier, and a second one later, with episodes of confusion. The EEG study was within normal limits. (Ex. I).

5. In November and December 2017, Claimant reported experiencing chronic, episodic headaches, for which she was followed by a neurologist.[1] (Ex. P, p. 812, 819). Subsequent records indicate Claimant saw a neurologist – Dr. Oh – for Botox injections for headaches, and was prescribed various medications, including amitriptyline and gabapentin. (Ex. P).

6. In July 2018, Claimant underwent a brain MRI for increased headaches. The MRI showed no acute intracranial process, or evidence of metastatic disease.[2] (Ex. N).

7. At an August 6, 2018 visit with RMCC, Anne Maihot, PA, noted that the July 2018 MRI was ordered due to worsening headaches with dizziness, and was negative. (Ex. P, p. 755).

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[1] No neurological records from this time period were offered or admitted into evidence.

[2] The MRI also showed hyperintensities in the periventricular and subcortical areas, consistent with a chronic condition. This finding was also shown on Claimant's later MRIs and is not relevant to the issues in this case.

8. Over the following months, Claimant began reporting additional issues, including worsening memory issues with “no clear source” in December 2018; (Ex. P., p. 739); worsening dizziness when not sleeping well in March 2019 (Ex. P., p. 734); new dizziness symptoms in July 2019 (Ex. P., p. 722); and peripheral neuropathy with significant joint and muscle pain (Ex. P., p. 686).

9. On November 5, 2019, Claimant was seen at an emergency room for confusion, and underwent a head CT to evaluate for “generalized weakness,” which was interpreted as showing no acute intracranial abnormality. (Ex. N; Ex. P. p. 681).

10. In December 2019, Claimant reported experiencing transient paresthesias and numbness in her hands and upper arms that had become more noticeable four months earlier. The treating provider, John Novak, PA indicated it was unclear if the symptoms were related to one of her prescribed medications – Arimidex. (Ex. P. p. 680).

11. In January 2020, at an oncology rehabilitation appointment, Claimant reported increasing numbness and tingling in her upper extremities, left greater than right, and left shoulder pain with activities, and indicated Claimant was stopping Arimidex. (Ex. J). Over the following two months, Claimant underwent rehabilitation for these symptoms. At her final documented visit on March 13, 2020, Claimant reported that her right upper extremity felt numb, and that her left upper extremity felt better. (Ex. J).

12. By April 27, 2020, Claimant reported to RMCC that her numbness and paresthesias in her extremities had improved. She also reported occasional bilateral lower extremity pain and weakness, which was chronic. (Ex. P, p., 670). In June 2020, Claimant reported to RMCC that she was experiencing cramping and stiffness in her bilateral hands, worse in the morning, and worsening chronic headaches, neck, and shoulder pain. (Ex. P, 662-63).

13. In July 2020, Claimant was seen at the Medical Center of Aurora emergency department and underwent a brain MRI for worsening headaches. The admission record indicates a diagnosis of major depressive disorder, single episode. (Ex. W). The MRI showed the same abnormalities of the cerebral white matter seen on earlier MRIs, which the radiologist indicated “may represent chronic changes, demyelinating disease, prior trauma or infection, or migraine phenomenon.

14. On May 12, 2020, Claimant saw Kindra Galloway, M.D., at Cornerstone Family Practice, reporting new right-hand pain and swelling starting 3 months earlier, which Claimant associated with one of her medications – Letrozole. She noted that Dr. Oh had previously prescribed amitriptyline and performed Botox injections for migraines, but that Claimant was discharged from his practice ten months earlier for missed appointments. (Ex. BB). Later in May 2020, Claimant saw Brandon Hoy, D.O., at Cornerstone, reporting right upper extremity paresthesias over the previous two to three years, and right shoulder pain with radiation down her arms. Dr. Hoy recommended using a right wrist splint for possible carpal tunnel syndrome. (Ex. AA).

15. At an October 12, 2020 RMCC visit, Claimant reported cramping and stiffness in both hands, and right sided headaches and jaw pain. She denied any issue with vision, balance, or cognition, and was noted to have a normal gait (Ex. P, p. 656).

16. Claimant's last documented medical visit before January 24, 2021 was a visit at Cornerstone Family Practice with Catherine O'Leary, M.D., for issues related to hair-loss. At this visit, Claimant's gait was documented as normal. (Ex. X, p. 1098).

January 24, 2021 Workplace Incident

17. The incident underlying Claimant's claim was captured on video without audio. (Ex. Y and Z). At 6:41 a.m., on January 24, 2021, Claimant was walking at a normal pace from the Employer's storage area toward a set of swinging doors leading to the public area of the store. The door does not appear to be heavy, and is made of thin, lightweight material, as commonly seen in grocery stores. As she pushed the right-side door open a few inches, a person on the other side was pushing a cart parallel to the door. The door moved a few inches into either the person or the cart and moved back to a neutral position, not passing the threshold in Claimant's direction. The person pushing the cart continued on a path away from the door. As the door moved back, it appeared to contact the bill of Claimant's baseball cap or the front portion of her head on the right side. (Ex. Z). The Claimant's head did not move backward, and her baseball cap remained in place. Following the contact, Claimant moved backward approximately six feet to her left and stumbled into a stack of cardboard boxes. Claimant's movement appeared disproportionate to the force with which the door contacted her. (Ex. Y).

18. Within ten seconds of the door making contact two employees approached Claimant. Claimant sat on the ground near the pile of cardboard boxes for about two minutes, intermittently interacting with others. Within three minutes of the incident Claimant limped across the room with the assistance of a co-worker and sat on a bench or box. She remained seated for several minutes periodically talking with co-workers. Approximately eleven minutes after the incident, a co-worker brought her a bag of ice, which Claimant held to her head without assistance. Around thirteen minutes after the incident, Claimant laid down on the box or bench after another co-worker brought a cushion for her head. At no point during the video does Claimant appear unconscious or unresponsive. (Ex. Y).

19. Emergency medical personnel arrived approximately 45 minutes after the incident. (Ex. Y; Ex. Q). Co-workers reported to EMS personnel that they interacted with Claimant immediately after the incident, and that she was awake, alert, and oriented -- consistent with the video evidence. Claimant told EMS personnel she "might have passed out for a brief moment," and reported right-sided head and facial pain, along with mild dizziness. EMS noted that Claimant communicated in broken English, had no visible signs of head or facial trauma, no bruising, swelling or lacerations, equal and reactive pupils, and no apparent neurological deficits. EMS noted Claimant appeared to be experiencing severe anxiety and some head pain. During transport Claimant's arms were shaking, which she attributed to fear. Upon arrival at Littleton Adventist Hospital Emergency Department, Claimant was transferred from the EMS stretcher to a bed under her own power. (Ex. Q).

Littleton Adventist Hospital

20. Claimant arrived at the Littleton Adventist ER at 7:58 a.m., on January 24, 2021. Her Glasgow coma score[3] was normal at 15/15, and an initial neurological assessment showed her to be alert and oriented, but complaining of headaches, forgetfulness, and tingling in her fingers and toes bilaterally. On admission, Claimant was noted to be five feet three inches tall and weighed 116 pounds. CT scans of her face and head and a brain MRI showed no acute findings. A head CT performed at 9:09 p.m. on January 24,

[3] The Glasgow Coma Score is a scale of 3 to 15, and used to evaluate a person's level of consciousness after a brain injury, with a score of 15 being normal. (Hrg. Tr. p. 130, l. 6-16).

2021 was interpreted as showing “questionable mild soft tissue swelling in the left frontotemporal scalp,” although none of the providers who physically examined Claimant noted evidence of swelling or head trauma. (Ex. F, p. 368).

21. Attending physician William Boroughf, D.O. examined Claimant at 9:37 a.m., on January 24, 2021, and summarized his findings as: “Questionable LOC, no abnormal neuro exam, no persistent nausea or vomiting, and patient is able to recall all events, therefore low concern for significant concussion.” He diagnosed Claimant with a “contusion of face” and recommended discharge to home for symptomatic care. (Ex. 5).

22. An hour later, a nurse reported that Claimant was reporting dizziness and unsteadiness with ambulation, leading to trauma consult. After approximately four hours of observation, Claimant was admitted and remained at Littleton Adventist until January 29, 2021. During her stay, she was noted to have memory problems, such as being unable to remember the current year, day of the week, or month. (Ex. 5).

23. During an inpatient physical therapy visit on January 27, 2021, Claimant was noted to be unable to lift her feet from the floor while walking, and was assessed as being ataxic. The same day, Kathryn Calderwood, PA examined Claimant and noted it was unclear why Claimant was unsteady and had new onset ataxia with an otherwise normal neurological exam. The record also indicates that this was inconsistent with Claimant’s injury, and a neurological consult with Daniel Koontz, M.D. was requested. (Ex. 5).

24. Dr. Koontz examined Claimant on January 27 & 28, 2021. Claimant reported that she briefly lost consciousness after the door had sent her “flying backwards into boxes,” and that another employee was trying to help her “as she woke up.” Dr. Koontz found functional signs, give-way weakness bilaterally in both upper and lower extremities, bilateral Hoover’s[4] signs, and indicated Claimant was “not at all ataxic.” He diagnosed Claimant with a concussion with loss of consciousness of less than 30 minutes, and indicated that if Claimant’s head and neck imaging was negative, her prognosis was “quite good” (Ex. 5).

[4] A Hoover’s sign is positive when weakness of hip extension returns to normal strength with contralateral hip flexion against resistance, and indicates a patient is more functional than they represent. (Ex. V; Gellrick Dep., p. 62)

25. During a January 28, 2021 speech therapy visit at Littleton Adventist, Claimant reported she was found approximately one hour after being hit by the door. (Ex. 4).

26. After Claimant's reported symptoms did not improve, she was deemed unsafe for discharge, and transferred to an inpatient rehabilitation facility – Encompass Rehabilitation. (Ex. 5).

Encompass Rehabilitation

27. Claimant was admitted to Encompass on January 29, 2021, and remained there until February 11, 2021. During the admission, Brendan Polun, D.O. examined Claimant, who reported a loss of consciousness and waking up when co-workers found her. Dr. Polun noted questionable lower extremity weakness, functional signs including ratcheting break away weakness, with appropriate tone, positive bilateral Hoover's signs, no clonus, no focal deficits, symmetric reflexes, and no ataxia. (Ex. D).

28. During her admission at Encompass, Claimant had reported difficulties with walking, sitting, standing, memory, cognition, dizziness, and headaches. However, multiple providers noted inconsistencies in Claimant's presentation. For example, Claimant reported decreased sensation in her left leg on one day and in her right the next; exhibited bilateral foot drop at times but not at others; was unable to use her right arm on testing but then was observed to use the arm to push out of her chair; inconsistently reported being able to sit or stand on her own; would not attempt active movements despite adequate strength in physical therapy; and ratcheting weakness. Although Claimant was on a "low stimulation" protocol due to reported photophobia, dizziness, headaches, and sound sensitivity, Claimant was observed to be sitting in her bed playing on her phone. (Ex. D).

29. At discharge, Dr. Polun noted no barriers to discharging Claimant to her home, indicating she would continue to recover over the following weeks and a full recovery was expected. He also further indicated that Claimant should return to work in one to two weeks. Claimant was found to be independent in eating, dressing, toileting, and bathing, and required assistance with other functions such as walking standing, and toilet transfers. Claimant's discharge diagnosis was mild traumatic brain injury (TBI) and post-concussive syndrome, and she was discharged with a walker. (Ex. D).

Events after Discharge from Encompass Rehabilitation

30. On February 12, 2021, the day after her discharge from Encompass, Claimant saw Jessica Leitl, M.D., at Care Now Urgent Care. Claimant reported that she was struck in the right temporal region, resulting in a 30-minute loss of consciousness, and presented using a walker. She reported persistent daily headaches, dizziness, photophobia, and right leg weakness, coordination and mobility deficits, impaired concentration, strength deficits, and visual perception deficits. Claimant also reported right shoulder pain and weakness, and posterior elbow pain, leading Dr. Leitl to order x-rays of her shoulder and arm (which were negative). Based on her examination and Claimant's reports, Dr. Leitl diagnosed Claimant with a concussion with loss of consciousness, and muscular strains of the right arm and shoulder and recommended a neurological consultation and physical therapy for Claimant's shoulder. (Ex. B).

31. After discharge from Encompass, Claimant received in-home speech, occupational, and physical therapy through Denver Physical Therapy At Home from February 25, 2021 through May 13, 2021. During this time, Claimant had thirty-one physical therapy visits, nineteen occupational therapy visits, and three speech therapy visits. Claimant's physical therapy and occupational therapy notes document mild improvement in her symptoms. (Ex. 29).

32. On February 22, 2021, Claimant saw PA Novak, PA, at RMCC and reported that when she was struck by the door at work, she lost consciousness for approximately one hour. Mr. Novak observed that Claimant exhibited a clear neurologic deficit which was new since her last visit, and was complaining of right lower extremity weakness, numbness, foot drop, photophobia, dizziness, and that she was unable to lift her right arm past 90 degrees due to shoulder pain. (Ex. P).

33. On February 23, 2021 and February 24, 2021, Respondents conducted video surveillance of Claimant. The surveillance video shows Claimant descending stairs with assistance of others, and using a walker. Several times Claimant is shown using her right arm and hand in a manner that appears inconsistent with her reports of being unable to use her right hand and arm, including grasping something out of her pocket with her right hand, and using her right hand and arm to ascend a flight of stairs. (Ex. 33).

34. On February 24, 2021, Claimant saw David Frank, M.D., at Care Now. Dr. Frank became Claimant's authorized treating physician. Claimant reported being "blind-sided by a pallet jack that came through a swinging door," sustained a loss of consciousness and "regained consciousness in hospital." He ordered a neuropsychological evaluation with the comment: "LOC for a reported 1 hour. Please test brain function. Are current [symptoms] consistent with trauma and concussion[?] If not from what? [Symptoms] are inconsistent on my exam." Dr. Frank also recommended a neurological evaluation with the comment: "LOC for a reported 1 hour. Please evaluate. Significant deficits both mentally and physically on exam that do not appear consistent." (Ex. B).

35. On March 3, 2021, Claimant saw Kevin Reilly, Psy.D., for a neuropsychological assessment on referral from Dr. Frank, using a Mandarin interpreter. During the examination, Dr. Reilly noted that Claimant was unable to remember her birth date, and indicated she did not remember many of the details of her injury. He opined that Claimant demonstrated non-credible inconsistencies in presentation and reporting her injury history. Dr. Reilly stated that the results of his evaluation were inconsistent with a post-concussion syndrome or TBI, and that her clinical presentation was "strongly indicative of exaggerated symptoms (even if this were a severe traumatic brain injury-which it is not)." He further opined that there was a "strong functional overlay to the patient's clinical presentation," and that psychiatric conditions such as conversion disorder or malingering disorder need to be considered. He noted that Claimant was tearful when asked about her marriage and divorce, and opined that it indicated potential secondary gain factors in that her ex-husband must be involved in caring for her. He concluded that Claimant's clinical presentation was inconsistent with a TBI and that he was unable to support continuing therapies for "brain injury rehabilitation." (Ex. O).

36. Also on March 3, 2021, Claimant saw neurologist Marc Wasserman, M.D. Claimant reported that she had no memory of the January 24, 2021 incident, and reported being unconscious for 45 minutes. Claimant also reported steadily worsening symptoms since the incident, and experiencing severe headaches, light sensitivity, neck and back pain, weakness in her arms and legs, concentration issues, and impaired short-term memory.

On examination, Claimant's neck range of motion was limited, she had give-way[5] weakness throughout, variable weakness in both legs (noting that she dragged her left leg behind her when she walked, but was able to support herself with her right leg). He noted further inconsistencies in finger to nose testing, and pronator drift. He indicated that Claimant reported being unable to move her right hand to perform finger taps, but moved her hand earlier in the examination. He opined that Claimant's examination showed "severe functional overlay, but there could also be some genuine injury and post-concussive symptoms overlying her presentation, particularly as post-concussive symptoms can take a few months to resolve." He recommended a repeat brain MRI, and a spinal MRI due to her reported weakness; EMG/NCV testing of the arms and legs, and a neuropsychological evaluation. (Ex. R). The brain MRI, performed on March 22, 2021 showed no acute injury. Similarly, cervical, thoracic, and lumbar MRIs performed on March 22, 2021 were also negative. (Ex. 4). The EMG/NCV study performed on March 29, 2021 was normal. (Ex. N & R). With respect to the EMG/NCV study, Dr. Wasserman noted that Claimant's effort was "suboptimal but no acute spontaneous activity to suggest muscle damage is present." (Ex. R).

37. On March 11, 2021, Claimant saw Catherine O'Leary, M.D., at Cornerstone Family Practice. Dr. O'Leary noted that Claimant reported a loss of consciousness of less than 30 minutes after being hit by a cart going through double door and falling into some boxes hitting her head. Claimant reported experiencing lightheadedness, photophobia, nausea, fatigue, confusion, ataxia, worsened right arm and leg weakness, and headaches. Claimant was using a rolling walker for ambulation. Dr. O'Leary noted that Claimant had a history of right upper extremity weakness in the past, for which she saw a neurologist (Dr. Oh), but her current complaints were worse than before. She diagnosed Claimant with post-concussion syndrome. (Ex. X).

38. On March 22, 2021, Claimant returned to Dr. Frank. On physical examination, he noted that Claimant's gait was abnormal and "very non physiologic." He indicated that Claimant "Falls back or to the side a lot but always lands in a chair or catches herself. Falls heavy when she lands in chair." He diagnosed Claimant with concussion with loss

[5] Give-way weakness is a non-physiologic sign that occurs when testing strength and resistance collapses. (Hrg. Tr., p. 143-144; 172)

of consciousness, muscle strain at shoulder and right arm, low back pain, paresthesia of skin, and muscle weakness, but noted that Claimant's exam "continues to be inconsistent and non-diagnostic." (Ex. B).

39. On April 6, 2021 , Claimant saw neurologist Lynn Parry, M.D., for an independent medical examination (IME) at the request of her attorney. Dr. Parry indicated that Claimant was struck forcibly in the head by a swinging door when a "person pushing a large pallet was rushing, did not stop to ascertain whether someone was on the other side of the door," and that Claimant had an "observed loss of consciousness for approximately 30 minutes." Based on her examination, record review and information provided by Claimant, Dr. Parry opined that Claimant had sustained a moderate TBI. This diagnosis was based primarily on the Claimant's reports of confusion, disorientation, and decreased recall lasting more than 24 hours. She further diagnosed Claimant with post-concussive migraine, post-traumatic vestibulopathy/central vertigo, right centrally mediated hemisensory deficit with cortical sensory abnormalities, apraxia, mild dystonia, and post-concussive encephalopathy. (Ex. 8).

40. Dr. Parry was critical of and disagreed with Dr. Reilly's assessment that Claimant likely had secondary gain issues, and opined that Claimant's previous chemotherapy "may have significant effect on brain structures which are not apparent on radiologic studies," noting that this "is a relatively new field but must be considered in terms of relative risks at the time of sustaining her head injury." She recommended vestibular therapy, and aggressive treatment for post-concussive migraine headaches to decrease photophobia and phonophobia. In her report, Dr. Parry did not address any of the concerns regarding functional overlay or inconsistencies documented by Dr. Wasserman, Dr. Frank, or other providers. (Ex. 8).

41. On April 14, 2021, Dr. Frank reviewed Dr. Parry's report and 45 minutes of surveillance video of the January 24, 2021 incident. Dr. Frank described the incident as follows: "It appears she walked into a swinging door that was obstructed by a person walking on the outside of the door. So door only opened 2-3 inches hit person outside door and she fell back to a seated ground position. It does not appear she hit her head. She appears conscious throughout and talking to coworkers. She did lay down at one point until the paramedics came. She was transferred to a stretcher sitting." (Ex. 12). Dr.

Frank's description of the video is consistent with the incident shown in Exhibit Y. On examination, he noted that Claimant's gait was still abnormal and "very non physiologic," and that Claimant would not raise her right arm above 80 degrees, and would not raise her right leg while seated. (Ex. 12).

42. On July 7, 2021, Claimant saw Scott Primack, D.O., for an IME at Respondents' request. Claimant reported ongoing issues with vision, memory, balance, anxiety, headaches, sleep, and use of her right arm and leg. Claimant further indicated that she had no previous problems with her right arm or leg, and no previous problems with headaches or vision. Dr. Primack described Claimant's clinical examination as "bizarre," writing: "It does not make any type of biomechanical or physiologic sense that she has knee flexion with equinovarus[6] at the right lower extremity." He also noted other anomalies in Claimant's presentation. For example, he indicated that Claimant's report of right-sided symptoms after a right-sided head injury "does not correlate with the anatomy and mechanics of the brain in reference to a head injury;" and that there was no spasticity "which one would see with a spinal cord or head injury." As with other providers, Dr. Primack also documented give-way weakness at Claimant's right leg, and a positive Hoover's test. Dr. Primack also reviewed the surveillance video (Ex. Y), and reached similar conclusions as Dr. Frank. (Ex. 9).

43. Dr. Primack indicated that Claimant had a non-physiologic right-sided paresis, and considered four potential diagnoses, including factitious disorder, conversion disorder/functional neurologic disorder[7], somatoform pain disorder, and malingering, none of which would be work related. Ultimately, he opined that Claimant's diagnosis was malingering based on his opinion that Claimant consciously misrepresented her functional capacity. He also opined that Claimant had reached MMI for a "mild contusion to the

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[6] Equinovarus is a condition where one walks without touching the heel to the ground and with the sole of the foot turned inward. *Taber's Cyclopedic Medical Dictionary* 668 (17th ed. 1989).

[7] Functional Neurologic Disorder is a condition where one has symptoms of altered voluntary movement or sensory function with clinical evidence of incompatibility between the symptom and recognized neurological or medical conditions causing significant distress or impairment, that is not better explained by another medical or mental disorder. (Ex. V).

head" without permanent residual impairment. (Ex. 9). Dr. Primack's hearing testimony was consistent with his report.

44. On July 9, 2021, Claimant self-reported to the Littleton Adventist emergency department for severe dizziness. On examination Claimant had good strength in both arms, and her left leg, and was able to lift her right leg briefly but immediately dropped it to the bed. The attending physician noted that she had dysmetria (difficulty controlling movements) of both upper extremities, but also indicated "I can't tell if this is functional, because she can use her fingers to send text a text message or call someone when she focuses." Claimant was evaluated for a potential stroke, and discharged after a head and neck CT, CTA and MRI imaging were unremarkable. (Ex. 5).

45. At a July 14, 2021 visit with Dr. Frank, Claimant reported her walking had improved, although she still had profound right body weakness. Dr. Frank noted that Claimant's gait was abnormal and non-physiologic. He further noted that Claimant would not flex the fingers of her right hand with grip testing, but could grasp and operate her walker brakes using her grip. (Ex. B).

46. On August 11, 2021, Dr. Frank reviewed Dr. Primack's IME report, and examined Claimant. Claimant reported her symptoms were worsening and perhaps spreading to the other side of her body. He documented abnormal elements of his examination, including a non-physiologic gait and a positive Hoover's test. He noted that Claimant "would almost fall multiple times during exam, but always would catch herself with a jerking like motion, and never actually fall." Dr. Frank diagnosed Claimant with concussion with loss of consciousness of unspecified duration, and dissociative and conversion disorder[8]. He released Claimant from care, noting that her condition had resolved and that she had reached MMI on August 11, 2021 with no residual disability. In explaining his opinion, he wrote: "Her symptoms and exam do not appear to correlate with her [mechanism of injury.] She obviously cannot work due to her current symptoms. She would be a hazard to herself and others. But at this point these symptoms may not be work related. She must follow up with providers of her choice to further get to the bottom of why she has her current symptoms. I agree with Dr. Primack's IME. His differential diagnosis of factitious vs. conversion disorder seems likely. I'm leaning toward a conversion disorder. But this

[8] Conversion disorder is synonymous with "functional neurological disorder."

would be better addressed by a psychiatrist or psychologist and monitored by her PCP. I opine this would not be considered work related." (Ex. 12).

47. On August 12, 2021, Claimant saw Nicholas Heter, D.O., at Cornerstone. Claimant reported being released by Dr. Frank, and requested a work release from Dr. Heter. She reported pain in her right hip and right shoulder, numbness from her right leg down, and an inability to "grasp anything" in her right hand. (Ex. 24).

48. On August 26, 2021, Respondents filed a Final Admission of Liability, consistent with Dr. Frank's August 11, 2021 report. (Ex. 1).

49. Over the following months, Claimant sought treatment primarily through Cornerstone and Spalding Rehabilitation, where she received physical therapy, occupational therapy, and speech therapy through January 2022. (Ex. 25 & 26). While Claimant's therapists noted some mild improvement, Claimant continued to experience difficulty with coordination, ambulation, photophobia, dizziness, right-sided strength, and balance. (Ex. 25 & 26). From August 2021 until October 2021, Claimant also underwent physical therapy at Mile High Physical Therapy, again with minimal, if any, improvement in her symptoms. (Ex. 27).

50. In November 2021, Claimant began treatment with optometrist Kerry Jarvis, O.D., at NeuroSight Vision Care. Dr. Jarvis indicated he evaluated Claimant while she was at Encompass. Claimant's primary complaint was light sensitivity. (Ex. 21). Claimant saw Dr. Jarvis nine times between January 31, 2022 and October 28, 2024. At each visit, Claimant reported that her photophobia was improved. However, the improvement appeared to be going from wearing tinted lenses full-time, to not needing them in her living room. Claimant reported no improvement in dizziness. Beginning in April 2023, Claimant reported to Dr. Jarvis that she was able to drive short distances during the day time, although he recommended she not drive in October 2024. (Ex. 21).

51. On January 20, 2022, Claimant attended a Division Independent Medical Examination (DIME) with Caroline Gellrick, M.D. Claimant reported significant symptoms, including loss or diminished of use of her right arm and leg, daily headaches, dizziness, increased pain with standing, sitting, and walking, and most activities of daily living. Claimant reported no history of right arm or leg weakness before January 24, 2021, and indicated that she lost consciousness for 30 minutes after the door contacted her. She

described the incident as occurring when Claimant was "walking back into the store when another employee coming the opposite direction was pushing a large cart through the swinging door. [Claimant] was unaware of the other employee coming through the door and was outside the door when one of the swinging doors flung open and hit [her] on the [right] side of the face and head. [She] was then knocked into a stack of boxes that had fallen to the floor."[9] (Ex. 6)

52. Dr. Gellrick noted that Claimant reported no strength in her right arm yet she observed Claimant gripping the handle on her walker and walking quickly with the walker when leaving the exam room and going to the parking lot, dragging her left foot. Dr. Gellrick opined that there was no objective etiology for Claimant's right arm or leg symptoms, that her right-sided weakness was "not anatomically or physiologically correct," and did not fit with being hit on the right side of the head. She noted Claimant's history of pre-existent symptoms in her right arm, and headaches, and that impairments for those issues would not be related to her worker's compensation case. Dr. Gellrick did not have the surveillance video but noted that if there was no loss of consciousness, it would contradict Dr. Parry's diagnosis of moderate TBI. (Ex. 6).

53. Dr. Gellrick opined that Claimant did not sustain a TBI, but did exhibit signs of depression and would benefit from medical management if a psychiatrist recommended it. She indicated that Claimant reached MMI on August 21, 2021, consistent with Dr. Frank's MMI date. She further indicated that Claimant's only impairment would be a 2% mental impairment. (Ex. 6).

54. Dr. Gellrick agreed with Dr. Frank that the mechanism of injury did not match the Claimant's ongoing right-sided extremity symptoms and gait abnormalities. She recommended a psychiatric examination with a board-certified psychiatrist to clarify whether Claimant's diagnosis was conversion disorder, factitious disorder, or malingering, but opined that it would not change the date of MMI. She also recommended an ENT evaluation and that Dr. Parry evaluate Claimant again after reviewing the video. (Ex. 6). In her testimony, Dr. Gellrick indicated that she was not aware that Dr. Parry was an IME doctor, and apparently believed she was one of Claimant's treating providers.

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[9] It is unclear whether this description of the incident was based on Claimant's report or Dr. Gellrick's interpretation of Claimant's medical records.

55. On May 23, 2022, Respondents filed a revised Final Admission of Liability, consistent with Dr. Gellrick's DIME report. (Ex. 1).

56. Following Dr. Gellrick's IME, on August 25, 2022, Claimant saw Linda Mitchell, M.D., at High Country Occupational and Travel Medicine to coordinate the recommended maintenance care. Claimant reported experiencing ongoing headaches, dizziness, memory issues, photophobia (indicating that she stays in the dark at home). Dr. Mitchell referred Claimant to an ENT (Nicolette Picerno, M.D.) and psychiatrist (Stephen Moe, M.D.), and follow up after those evaluations.

57. On September 6, 2022, Claimant returned to Dr. Parry for a follow up IME, for which Dr. Parry reviewed 711 pages of additional medical records including Dr. Gellrick's DIME report. Dr. Parry stated that Claimant continued to improve, indicating that, per a May 27, 2022 record from Dr. Jarvis, she no longer required sunglasses unless it was bright outside, and that Claimant had attempted to drive but had stopped driving due to increased dizziness.[10] As evidence of Claimant's improvement, she state that Claimant was now using a stroller walker with a seat, rather than a wheelchair, although her initial report contains no reference to a wheelchair, and references Claimant using a walker or stroller. Nonetheless, Dr. Parry indicated that Claimant's right side was "essentially nonfunctional" although Claimant was able to dress herself, and use a walker. She also noted that Claimant emphasized that she did strike her head and "remembers people afterwards being around her and applying ice to the forehead." (Ex. K).

58. Dr. Parry opined that the Claimant's multiple positive Hoover's tests are not appropriate measures of her condition, and are helpful in "clear-cut non-neurologic weakness. But totally inappropriate in a setting of hemiparesis with apraxia," the conditions with which Dr. Parry has diagnosed Claimant. (Ex. K).

59. Dr. Parry reviewed the surveillance video of the incident and concluded that the door contacting Claimant was "clearly enough to throw her backwards quite a ways and, in somebody who may have had some underlying asymptomatic changes from her previous extensive chemotherapy, the residual head injury is a direct result of her

[10] No record from Dr. Jarvis dated May 27, 2022 was included in the parties' exhibits. Claimant continued to report to Dr. Jarvis that she was able to drive short distances through October 2024.

accident." She further opined that the video was "sufficient to demonstrate exactly the mechanism of injury that would account for her current condition." Dr. Parry's description of the incident is inconsistent with the video evidence and is neither credible nor persuasive. (Ex. K).

60. On November 17, 2022, Claimant saw Jacob Koczman, M.D., at Colorado Cataract Laser and Vision for reports of blurred vision in both eyes, and extreme photophobia on the recommendation of Dr. Jarvis. Dr. Koczman indicated that Claimant's photophobia was "extreme for this far out from TBI," and recommended no vision therapy. He further noted that although Claimant reported extreme photophobia, she was able to look at her phone without reaction. (Ex. 17).

61. On January 3, 2023, Claimant saw Stephen Moe, M.D., a psychiatrist, on referral from Dr. Mitchell. Dr. Moe conducted a telemedicine appointment of Claimant through an interpreter, with Claimant's ex-husband present during the examination. Claimant reported that her overall condition was improved, but that she continued to experience problems using her right leg (for which she wore a brace) and right arm, balance issues, vision issues, headaches, dizziness, anxiety, and depression. (Ex. 18).

62. Dr. Moe opined that Claimant's "ongoing neurological-suggestive complaints, … are due in large part, if now wholly, to Functional Neurological Disorder (FND), the preferred term for what is also known as Conversion Disorder." He described FND as " involving "neurological deficits that are judged to be due to a potentially reversible disturbance of functioning rather than caused by structural brain injury." He noted that Claimant's depressive symptoms were relatively mild and that Claimant declined to consider antidepressant medication. Dr. Moe found Claimant at MMI for her psychiatric condition. He noted that Claimant's psychiatric impairments, such as inability to drive, suboptimal sleep, cognitive symptoms, and inability to work were due to FND rather an depressive disorder, and opined that Claimant did not merit a mental impairment rating. (Ex. 18).

63. On January 13, 2023, Claimant saw Dr. Picerno for evaluation of vertigo. In her initial examination, Dr. Picerno noted normal a normal examination, with the exception of "accessory nerve palsy of right shoulder" and abnormal gait due to using a walker. Dr.

Picerno attempted an audiogram, but noted the interpretation was not valid due to Claimant's inconsistencies in answers and not following redirections. (Ex. 19).

64. On May 12, 2023, Dr. Mitchell reviewed surveillance video of Claimant taken in February 2021. She noted that Claimant's behavior on the video was similar to her observations in her office. She noted that Claimant appeared to have right leg weakness with inconsistencies in her ability to lift the leg against gravity and weight bear. She also noted that there were inconsistencies with regard to Claimant's use of her right hand. She indicated that her appearance was consistent with a functional neurologic disorder or conversion disorder. (Ex. 10).

65. Claimant returned to Dr. Picerno on June 5, 2023. She reported that she was able to drive short distances, although indicated driving made her dizzy. Claimant also reported vertigo, imbalance, light sensitivity, dizziness with head movements and exposure to light, and requiring a walker. Dr. Picerno ruled out an inner ear disease as a cause of Claimant's symptoms, and recommended she follow up with a neurologist due to a likely central component. (Ex. 19).

66. On June 6, 2023, Claimant returned to Dr. Parry. Claimant reported that she no longer had headaches, but had limited movement of her right shoulder, that she was unable to drive, as well as ongoing cognitive and memory issues. Dr. Parry described Claimant has having a "substantial right hemiparesis," dragging her right leg, and that her right hand had marked spasticity with hyperreflexia and pathological reflexes. Despite the fact that Claimant reported to other providers such as Dr. Picerno and Dr. Jarvis that she was able drive, she reported to Dr. Parry that she was unable to drive at all, and Dr. Parry opined that "the ability to drive … would still be in the distant future." (Ex. 8).

67. Dr. Parry opined that "much of the denial of appropriate care in this case is based on inappropriate or biased conclusions made by individual providers where are then 'copied and pasted' into the narrative' of Claimant's injury." Dr. Parry stated the following: "Having the opportunity to see this patient on successive visits has reinforced my initial assessment. She sustained a sufficient impact to an already vulnerable brain – having recovered from 'chemo brain.' She has improved along the timeline and progression as would be seen in apraxia and spastic hemiparesis. She has also improved in her TBI

function around vestibular, visual, and cognitive parameters." Dr. Parry also opined that Claimant was still profoundly disabled with an extremely poor prognosis. (Ex. 8).

68. In her report, Dr. Parry further described her impression of the video surveillance, indicating that in her view, the video showed that Claimant was "pushed by a door being opened, and fell backward." She also indicated that Claimant had evidence of soft tissue swelling on her head from the door's impact, apparently referring to the January 24, 2021 CT showing "questionable mild soft tissue swelling in the *left* frontotemporal scalp." (Emphasis added). Dr. Parry opined, for the first time, that Claimant's injuries were consistent with a contrecoup injury.[11] Again, Dr. Parry opined that Claimant was more susceptible to injury due to her prior chemotherapy. She indicated that Claimant was "permanently disabled and unable to return to competitive work." She reviewed Dr. Moe's report, and implied that his conclusions were invalid because they were reached after a video evaluation with an interpreter, and "an assumption based on misinformation of an appropriate diagnosis." (Ex. 8).

69. On July 28, 2023, Dr. Mitchell responded to a communication from Respondent's counsel, indicating that Dr. Gellrick's recommendations that Claimant undergo ENT and psychiatric evaluations had been completed, and that no further treatment was recommended. Dr. Mitchell indicated that if there were no other recommendations for maintenance treatment, she would release Claimant from her care. (Ex. G).

70. On October 12, 2023, Claimant saw Dr. Jarvis for further evaluation. Claimant reported that her photophobia was improved, and that she was afraid to drive at night due to bright headlights, but that she could drive short distances during the daytime. (Ex. 21).

Dr. Gellrick's Deposition

71. The parties conducted Dr. Gellrick's deposition on April 16, 2024. Dr. Gellrick is a Level II accredited occupational medicine physician who is board-certified in family practice and addiction medicine. After the January 2022 DIME, Dr. Gellrick reviewed additional treatment records, including those from Spalding Rehabilitation, Cornerstone, Dr. Picerno, and Dr. Mitchell. She also reviewed Dr. Parry's reports from September 6,

[11] A "contrecoup" injury" is defined as "An injury to parts of the brain located on the side opposite that of the primary injury." *Taber's Cyclopedic Medical Dictionary* 445(17th ed.1989.

2022 and June 6, 2023, under the misconception that Dr. Parry is board-certified and was one of Claimant's treating providers, rather than an IME.

72. Dr. Gellrick testified that after reviewing these records and the January 24, 2021 video, she had changed her opinion and now believed Claimant sustained a TBI, was not at MMI, that Claimant required further rehabilitation and neurological follow-up to make further recommendations, and that a permanent impairment rating was premature. The opinions Dr. Gellrick expressed in her April 16, 2024 deposition conflict with those expressed in her DIME report of January 2022. Where a DIME physician offers conflicting opinions, the ALJ must resolve the conflict and determine Dr. Gellrick's opinion as a matter of fact.[12] The ALJ finds the opinions Dr. Gellrick expressed in her deposition constitute her final opinions.[13] Specifically, her final opinions are that Claimant sustained a TBI on January 24, 2021, and had not reached MMI as of April 16, 2024 for that condition.

73. Dr. Gellrick's opinions are based on the additional records she reviewed, and she did not re-examine Claimant. Her testimony makes clear that she gave substantial weight to Dr. Parry's reports, including her written opinions concerning "chemo brain," her opinion that Claimant sustained a contrecoup injury, and her characterization of Claimant's physical status and purported improvement with therapy. Dr. Gellrick testified that her opinion that Claimant sustained a TBI was based on Dr. Parry's reports. (Gellrick Dep., p. 25. l. 9-20), and that she considered Dr. Parry's report from June 2022 as "the most reliable report" she reviewed. (Id., p. 30, l. 7). Dr. Gellrick also relied, in part, on her own review of the video of the January 24, 2021 incident, but did not review the February 2021 surveillance video – Ex. 33.

74. When questioned about the inconsistency of the Claimant's right-sided symptoms after a right-sided head injury, Dr. Gellrick indicated that she had not previously considered that Claimant may have sustained a contrecoup injury, which the ALJ infers is based on Dr. Parry's speculation of a contrecoup injury. Dr. Gellrick testified that a contrecoup injury would require a blow to the right side of Claimant's head significant

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[12] *Rainwater v. Sutphin*, W.C. No. 4-815-042-04 (ICAO Sept. 9, 2014).

[13] *Andrade v. Indus. Claim Appeals Office,* 121 P.3d 328, 331 (Colo. App. 2005) (ALJ may properly consider DIME physician's deposition testimony in ascertaining final opinion).

enough to cause a contusion, and cited Dr. Parry's report of swelling of the parietal region of Claimant's head to support that such a blow occurred. (Gellrick Dep., p. 46, l. 16 – p. 47, l. 21). Dr. Gellrick did not appear aware that the swelling referenced by Dr. Parry was the questionable mild *left-sided* frontotemporal scalp swelling noted on the January 24, 2021 CT scan. She later testified that she did not find any documentation of bruising or swelling on the right side of Claimant's head. Throughout her testimony, and particularly cross-examination, Dr. Gellrick cited a contrecoup injury as a possible explanation for inconsistencies in Claimant' presentation, and non-physiologic responses such as give-way weakness.

75. Dr. Gellrick also cited Claimant having a "chemical brain,"[14] as a reason for the extent and severity of Claimant's symptoms, and implied that such a condition would leave Claimant vulnerable to injury from a less significant blow to the head, indicating "if a patient has a [chemo brain] anything is possible as far as neurologic insult." However, Dr. Gellrick testified that she does not know if Claimant has "chemo brain," is not qualified to diagnose the condition, and that it is outside her expertise. She then referred to "chemo brain" as a "preexisting condition [that] could have been present with a resultant work comp injury aggravating it." (Gellrick Dep., p. 45, l. 13-16). Ultimately, Dr. Gellrick acknowledged that no objective tests have been performed to explain the etiology of Claimant's right arm and leg symptoms.

76. Ultimately, Dr. Gellrick testified that based on her review of the incident video, and reports from Dr. Parry and Dr. Picerno, that it "made sense neurologically that the patient could indeed have the traumatic brain injury, which was more significant than realized at the beginning. (Gellrick Dep., p, 78, l. 5-21).

77. Claimant returned to Dr. Parry for a fourth time on February 11, 2025. Dr. Parry indicated that Claimant had improved in several areas, such as movement, vision, and speech. However, she also noted other areas in which Claimant had not improved, such as cognitive function, which Dr. Parry opined had plateaued. (Ex. 8).

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[14] While Dr. Parry referred to this as "chemo brain," Dr. Gellrick referred to the same concept as "chemical brain." For the purposes of clarity, the ALJ uses the term "chemo brain" throughout the rest of this Order.

78. On February 13, 2025, Jane Burnham, M.D., a neurologist, performed a record review at Respondents' request and issued a report of the same date. (Ex. A). She testified at hearing, and was admitted as an expert in neurology. Dr. Burnham testified that Claimant's symptoms and presentation are inconsistent with a brain injury. She reviewed Claimant's imaging films, and opined that there was no objective evidence of an intracranial injury. She testified that Claimant's imaging studies could be consistent with a mild TBI, or no injury at all, and that imaging was not consistent with the constellation of symptoms Claimant has reported. She also indicated that Claimant's clinical status and prolonged symptoms are not consistent with a mild TBI, and that Claimant does not fit the diagnostic criteria for a more severe TBI. She testified that the more-than-four-year duration of Claimant's symptoms is inconsistent with the expected recovery time for those symptoms. She testified, credibly, that the expected course of recovery for a mild TBI is that a patient's symptoms improve over a period of weeks. In this regard, Dr. Burnham's opinion is consistent with Dr. Polun's opinion at discharge from Encompass in February 2021 that Claimant was expected to improve within a few weeks and make a full recovery. She further noted, credibly, that Claimant's medical records do not demonstrate significant improvement of her function or symptoms since January 24, 2021, although Claimant did experience some slow, incremental improvement in some areas.

79. Dr. Burnham testified that a "loss of consciousness" means that a person is not arousable. Based on her review of the January 24, 2021 video, Dr. Burnham found no evidence of Claimant being unconscious after the incident. Ultimately, Dr. Burnham testified that there was no objective evidence that Claimant sustained a TBI. She testified that Claimant has an ongoing functional neurological disorder, which requires treatment. Dr. Burnham's testimony and opinions were credible.

Dr. Parry's Testimony

80. Dr. Parry testified at hearing and was admitted as an expert in neurology. She partially retired in 2015 and is not board-certified. When asked whether there was a connection between Claimant's chemotherapy and her current cognitive function, Dr. Parry responded: "Who knows?" (Hrg. Tr., p. 77, l. 2-6). She also testified that there was not enough evidence to support any type of relationship between chemotherapy and the

Claimant's injuries. (Hrg. Tr., p. 104, l. 24 – p. 105, l. 11). Dr. Parry's testimony regarding "chemo brain" was inconsistent with her written opinions.

81. Dr. Parry testified that Claimant has significant apraxia, which is a lack of coordinated movements, and indicated that Claimant's condition was consistent with apraxia. Yet, she offered no cogent, credible explanation for attributing Claimant's condition to the January 24, 2021 incident other than she could find no other reason for Claimant's symptoms than the incident.

82. When addressing the Claimant's inconsistent reports of the duration of any loss of consciousness, Dr. Parry defined "loss of consciousness" as any period during which a person asserted they could not recall the events that occurred, regardless of whether the person was communicative and responsive. The ALJ interprets Dr. Parry's definition of "loss of consciousness" as rendering the condition subjective, and at odds with the common understanding of the term. Moreover, this definition appears to conflict with Dr. Parry's April 6, 2021 report in which she indicated that Claimant experienced an "observable" loss of consciousness following the January 24, 2021 incident. Notwithstanding, there is no evidence that Claimant was using Dr. Parry's definition when reporting her own perceived loss of consciousness to her health care providers.

83. Taking into consideration Dr. Parry's reports and testimony, the ALJ finds that her opinions are not objective, and are neither credible nor persuasive. Instead, Dr. Parry's opinions are based, in large part, on Claimant's reports of her history, symptoms, and improvement (which the evidence demonstrates are unreliable), selective references to medical records, disregard or summary dismissal of the findings, conclusions, and competence of many of Claimant's treating health care providers, and unsupported medical theories. Based on Dr. Parry's testimony, there is no credible evidence that chemotherapy treatment resulted in Claimant having "chemo brain" or rendered her more vulnerable to injury.

84. At hearing, Claimant's daughter testified regarding Claimant's condition and limitations. She testified that Claimant had not driven at all since January 2021, and that she is unable to drive, and is unable to take care of her own personal needs. For example, she testified that Claimant is unable to open a water bottle or perform household chores, such as cooking or cleaning, that she requires that all produce and meat being pre-cut

and pre-washed, requires assistance dressing and bathing, and is unable to use stairs without assistance. Claimant's daughter also testified that before the January 24, 2021 work incident, Claimant was able to fully function without assistance and had none of the problems she exhibited after January 24, 2021. She testified that Claimant's ability to write with her right hand has been significantly affected by her injury and that she cannot grasp a pen. However, comparison of Claimant's signatures from before and after January 24, 2021 show no discernible difference. (*Compare e.g.*, Ex. X, p. 1071 to Ex. 5, p. 139).

85. Claimant testified that the incident occurred when she was walking through a double door, and the door struck her in the right upper side of her head, near the hairline. Claimant testified that she had both swelling and bleeding on her head after the incident, and that she had immediate nausea. Claimant testified that the door struck her so hard that she fell backward. She indicated that she was knocked unconscious after the accident for approximately one-half hour, but also recalled that coworkers gave her an ice pack (which occurred less than 11 minutes after the incident). Claimant testified that once she was in the hospital, she was very dizzy, was unable to walk without assistance, and had no feeling in the bottom of her foot. On cross examination, Claimant testified that she has difficulty using her right hand, and it is difficult for her to grip with her left hand. She indicated this affected her ability to eat and write. Claimant's testimony that she was knocked unconscious, and that the door struck her with sufficient force to knock her to the ground, and cause bleeding, is not supported by the video evidence or her contemporaneous medical records. Claimant further testified that she is currently able to drive short distances. Moreover, her recollection of events at hearing is inconsistent with having been rendered unconscious for one-half hour, or purported memory loss after the incident. Claimant's reports to her health care providers that she had no prior right arm or leg issues was inconsistent with her medical records. Overall, the Claimant's testimony was not credible.

Conclusions of Law

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to

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

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

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

Overcoming DIME on MMI

As found, after initially expressing the opposite opinions, Dr. Gellrick opined that Claimant sustained a TBI as a result of the January 24, 2021 incident, and that she has not reached MMI for that injury. Respondents contend that Dr. Gellrick's not-at-MMI opinion is incorrect. Respondents have established by clear and convincing evidence that the DIME physician's MMI opinion is incorrect.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Eng'g, Inc., supra*.

"Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge*, W.C. No. 4-914-378-02 (ICAO June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med, supra.*

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 (ICAO July 26, 2016).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort*

Transp. v. Indus. Claim Appeals Office, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools*, W.C. No. 4-974-718-03 (ICAO Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Indus. Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Indus. Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.*, W.C. No. 4-320-606 (ICAO Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Constr. Mgmt,*, W.C. No. 4-356-512 (ICAO May 20, 2004). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI.

Dr. Gellrick's opinion that Claimant is not at MMI is based on her determination that Claimant sustained a TBI, and requires additional treatment for this condition. This opinion relies heavily, if not exclusively, on Dr. Parry's opinions that Claimant had "chemo brain" leaving her more susceptible to injury, and that the incident was sufficient to cause a contrecoup injury which resulted in Claimant's profound symptoms.

There is no credible evidence that Claimant had "chemo brain" or was more vulnerable to a brain injury. The issue of "chemo brain" was Dr. Parry's speculation, which she admitted at hearing was not supported by medical evidence. Given that Dr. Gellrick relied on Dr. Parry's "chemo brain" hypothesis, the ALJ finds that the evidence is clear and free from substantial doubt that Dr. Gellrick's opinion that Claimant had "chemo brain" and was more susceptible to injury is highly probably incorrect.

The credible evidence also does not support the conclusion that Claimant sustained a contrecoup injury, as posited by Dr. Parry. Dr. Gellrick testified that such an injury would require a blow sufficient to propel the brain from one side of the skull to the other, and would produce a contusion. None of Claimant's treating health care providers

documented trauma to the right side of her head or a contrecoup injury, and there is no evidence that she was struck on the left side. There is also no evidence that Claimant sustained intracranial trauma on multiple imaging studies of her brain. The ALJ therefore concludes that Dr. Gellrick's opinions premised on a contrecoup injury are highly probably incorrect.

Without a contrecoup injury, no provider has offered a credible physiological explanation for Claimant's symptoms or their prolonged persistence, and particularly her right-sided deficits. Diagnoses of concussion or TBI appear to be based on Claimant's inconsistent accounts of the incident, loss of consciousness, and memory loss, none of which are supported by credible evidence, and also fails to account for Claimant's pre-incident conditions, which included similar symptoms such as memory loss, right-hand weakness and numbness, and headaches.

Video of the January 24, 2021 incident shows that, to the extent the door contacted Claimant's head, the contact was insufficient to cause head movement, internal or external trauma, or loss of consciousness. The ALJ credits Dr. Burnham's definition of loss of consciousness as being "unarousable." Claimant's accounts of loss of consciousness were inconsistent, ranging from a possible brief episode to waking in the hospital more than one hour later. The video evidence establishes that she was never unarousable after the incident. The ALJ credits Dr. Gellrick's initial opinion that the absence of a loss of consciousness is inconsistent with Dr. Parry's TBI diagnosis.

Although Claimant's descriptions of the mechanism of injury were somewhat consistent, they are not supported by the evidence. For example, Claimant reported to several providers that the cart pushed the door causing it to swing into her head, propelling her into a pile of boxes. The video shows that a lightweight door moved slightly and made minimal contact with Claimant, and does not show a cart pushing the door into Claimant. Given the door's limited movement – never passing the threshold toward Claimant – it is illogical to conclude that it generated sufficient force to propel a 116-pound person several feet across the room and to the ground.

Claimant's reports of memory loss are also inconsistent and conflicting. For example, on the morning of the incident, Dr. Polun documented that Claimant recalled all events. She later told Dr. Wasserman that she had no memory of the incident. Claimant's

medical records and testimony, however, demonstrate that she was able to describe her memory of the event to multiple providers, and recalled her co-workers finding her less than ten seconds after the incident. Claimant's purported inability to recall her birthday, the date, month, or year are also not credible.

As detailed throughout this Order, Claimant's treating providers documented numerous inconsistencies and non-physiological findings. Dr. Gellrick initially acknowledged and agreed that Claimant's symptoms were non-physiologic, and opined that she did not sustain a TBI. The evidence at hearing demonstrates that it is highly probable that the information upon which Dr. Gellrick based her reversal of this opinion is incorrect. That is, no credible evidence to supports a chemo brain, a contrecoup injury, or that the incident resulted in a TBI. Consequently, the ALJ concludes that Respondent have met their burden of establishing by clear and convincing evidence that Dr. Gellrick's opinion that Claimant was not at MMI is incorrect.

Determination of MMI Date

When an ALJ determines the DIME physician's opinion on the MMI date has been overcome, the question of the correct MMI date becomes a question of fact for the ALJ. *Lozano v. Alvarados, Inc.*, W.C. No. 4-904-266-06 (ICAO Feb. 27, 2017). Based on the totality of the evidence the ALJ finds that the Claimant reached MMI on August 11, 2021, the date assigned by Dr. Frank, and initially by Dr. Gellrick. Although Claimant may have initially sustained a minor head injury, the evidence establishes that there is no credible physiological basis for attributing her symptoms after that date to the January 24, 2021 incident. This is consistent with Dr. Gellrick's initial opinion, which the ALJ finds credible and persuasive. The August 11, 2021 MMI date is also consistent with Dr. Wasserman's opinion that post-concussive symptoms can take "a few months" to resolve, Dr. Polun's opinion that Claimant was expected to make a full recovery within weeks, and Dr. Burnham's testimony regarding the expected course of recovery from a mild TBI.

Temporary Total Disability Benefits

Because the Claimant reached MMI on August 11, 2021, Claimant has failed to establish an entitlement to temporary total disability benefits after that date, and her claim for temporary total disability benefits is denied and dismissed.

Order

It is therefore ordered that:

1. Respondents have established by clear and convincing evidence that the DIME physician incorrectly determined that Claimant had not reached MMI on April 16, 2024.
2. Claimant's date of MMI is August 11, 2021.
3. Claimant's request for additional temporary total disability benefits is denied and dismissed.
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 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: August 12, 2025

Steven R. Kabler
Administrative Law Judge

Office of Administrative Courts
State of Colorado
Workers' Compensation Nos. WC 5-266-439-001 and WC 5-272-924-001

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 on March 3, 2024 (WC No. 5-266-439-001)?

- 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 on March 5, 2024 (WC No. 5-272-924-001)?

- If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received at Glenwood Medical Associates was reasonable medical treatment necessary to cure and relieve Claimant from the effects of his injury.

- If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits beginning March 6, 2024 and continuing until terminated by law?

- Prior to the hearing, the parties stipulated to an average weekly wage ("AWW") of $1,120.00.

Findings of Fact

1. Claimant was employed by Employer as a Road Tech II. Claimant was hired by Employer in October 2023. Claimant testified his job duties as a Road Tech II included fixing anything that needed to be repaired at the transit stops or facilities.

2. Claimant testified that on March 3, 2024 he arrived at the Basalt Willits stop on Highway 82 to perform maintenance. Claimant testified that there had been a snow storm and that the crew had already shoveled the Basalt Willits stop, but had not salted the steps very well. Claimant testified he performed maintenance at the stop, then headed to the staircase that leads down to the tunnel that goes underneath Highway 82 and slipped on the stairs, fell and hit his head. Claimant testified he got up, brushed himself off, and continued working. Claimant testified that the fencing at the top of the stairs faces North and when the snow plows clear the road, the plows will spray the snow onto the steps which can then accumulate snow and ice on the steps.

3. Claimant testified that after the fall, he began experiencing headaches, tightness in his back and neck and general soreness. Claimant testified he did not report the injury to his employer on March 3, 2024. Claimant testified he worked his shift on March 4, 2024 and did not report his injury. Claimant testified when he arrived at work in the morning on March 5, 2024, he went to "the bunker" where his supervisor, Dustin Goodman, worked. Claimant testified that while speaking with Mr. Goodman and walking upstairs to his office, he got light headed and dizzy and nearly passed out. Claimant testified Mr. Goodman inquired about his symptoms and Claimant reported to Mr. Goodman that he had fallen two days earlier. Claimant testified Mr. Goodman did not ask about Claimant filing an injury report.

4. Claimant testified that later on March 5, 2024, he was servicing the Aspen High School transit stop that is located between Aspen High School and the Aspen Recreation Center. Claimant testified he noticed ice at the bus stop and checked for garbage. Claimant testified he got salt to soften the ice and got a shovel and ice chipper. Claimant testified that while chipping the ice, he heard a pop in his neck and got immediate symptoms down both arms and his vision got blurry. Claimant testified he took a break, then loaded up his tools, dropped some more salt on the ice, and went about his day. Claimant testified that when he stopped to use the bathroom facilities at the main hub in Aspen, he was starting to feel worse and worse.

5. Claimant then called Mr. Goodman and reported his injury. Claimant was instructed by Mr. Goodman that he needed to go to the hospital. Claimant testified he went back to Employer, had Angela Henderson and Maria Vasquez help him fill out forms and was taken by Ms. Henderson to the Valley View Hospital emergency room ("ER").

6. Claimant testified that the week before he slipped and fell on March 3, 2024, he had been out sick with a cold. Claimant described a feeling of fogginess associated with the cold.

7. Additionally, Claimant testified he had prior injuries associated with his time in the service when he fell off a helicopter. Claimant testified he had shoulder surgery in 2017 related to this injury. Claimant also had a prior workers' compensation claim when he worked for Habitat for Humanity in 2022. Claimant testified this injury involved a severed ulnar nerve and broken wrist resulting in surgery. While Claimant denied that the 2022 injury involved body parts outside of his left hand and wrist, but the medical records and settlement documents demonstrate that Claimant had complaints following his 2022 injury that included migraine headaches, cognitive problems, left hand, left forearm, right thumb, right hand, head/brain, bilateral shoulders, neck, back, right ankle, left thigh, along with feelings of anxiety, hopelessness and helplessness.

8. Following Claimant reporting his injury to Ms. Henderson, Ms. Henderson helped Claimant complete the forms reporting his injury to Employer. Ms. Henderson then drove Claimant to the ER.

9. Claimant presented to ER on March 5, 2025. Claimant reported to the ER that he fell down a flight of stairs striking his back and head. Claimant reported symptoms that included weakness, lethargy, visual changes, nausea and bilateral arm numbness. Claimant underwent a computed tomography ("CT") scan of his head that showed no intracranial bleed or significant trauma. A CT scan of Claimant's cervical spine showed no acute bony injury. Claimant also underwent x-rays which showed no evidence of any fractures and was diagnosed with a traumatic closed head injury and neck pain.

10. Claimant was examined on March 6, 2024 by physicians' assistant ("PA") Katy Mazza at Glenwood Medical Associates. PA Mazza noted Claimant's report of having fallen at work on March 3 striking his head, back, buttocks and legs. PA Mazza referred Claimant to Vail Valley Health for a magnetic resonance image ("MRI") of his brain, but Claimant walked out of the clinic before the examination was completed. Claimant was taken off of work by PA Mazza until his next evaluation.

11. Claimant was examined by Dr. Swenson on March 11, 2024 at Glenwood Medical Associates. Dr. Swenson noted Claimant was complaining of a headache that was most likely a concussion based on the description and associated symptoms. Claimant also complained of neck pain after a direct blow to the neck. Dr. Swenson recommended an MRI of the cervical spine, along with an MRI of the brain. Dr. Swenson continued Claimant off of work.

12. Claimant returned to Dr. Swenson on March 18, 2024. Dr. Swenson noted Claimant had a finding of weakness in the left upper extremity along with symptoms of radiculopathy in both arms. Dr. Swenson again recommended an MRI of the cervical spine, which had not yet been approved by insurance.

13. The MRI was completed on March 18, 2024 and demonstrated disc height loss at C4-C5 and a bulging disc at C5-C6. Moderate degenerative disc disease was also noted at the C4-C5 and C5-C6 levels. Dr. Swenson reviewed the MRI findings and noted that the findings were consistent with muscular spasm and was likely the cause of Claimant's severe pain. Dr. Swenson recommended a referral to massage therapy.

14. Claimant returned to Dr. Swenson on March 25, 2024 Dr. Swenson noted that the MRI of the cervical spina and brain were normal. Dr. Swenson noted Claimant's concussion symptoms were unchanged. Dr. Swenson recommended Claimant be referred to the traumatic brain injury ("TBI") clinic at Aspen Valley Hospital.

15. Claimant was examined by Dr. Felipe Ituarte on April 17, 2024. Dr. Ituarte reviewed Claimant's MRI image and noted the spondylosis and osteophyte formation at C5-C6 with posterior vertebral body osteophytes emanating from C4-C5 disc space. Dr.

Ituarte diagnosed Claimant with cervical radiculopathy and recommended conservative treatment including medication, physical therapy and possible injections.

16. Claimant was examined by Dr. Seale on April 23, 2024. Dr. Seale noted Claimant's symptoms were most consistent with severe muscle spasms resulting in significant pain. Dr. Seale noted the massage therapy had not resulted in significant long term relief and recommended changing Claimant's medications including stopping the methocarbamol and starting tizanidine and pregabalin. Additionally Dr. Seale recommended Claimant begin a course of physical therapy.

17. Dr. Coya Lindberg with Glenwood Medical Associates began treating Claimant on June 17, 2024. Dr. Lindberg noted Claimant presented with headache, nausea, photophobia, dizziness, sleep disturbance, mental fogging, and memory impairment along with cervical pain and spasm. Dr. Lindberg noted on examination Claimant had significant spasm in the neck, shoulders and upper back. Dr. Lindberg noted in this examination that the mechanism and injury were consistent with a work-related injury, but were complicated by prior extensive injuries and conditions including fibromyalgia, PTSD, and idiopathic peripheral neuropathy.

18. Dr. Lindberg noted on June 20, 2024 that Claimant had no significant relief with conservative therapy including physical therapy, trigger point injections, tizanidine, mand meloxicam.

19. Claimant was examined by Dr. Jeffrey Thornton on July 29, 2024. Dr. Thornton had previously examined Claimant in relation to his 2022 workers' compensation claim. Dr. Thornton recommended an electromyelogram ("EMG") study based upon Claimant's complaints of symptoms in his hand.

20. Claimant was evaluated by Dr. Stuart Kinsella with the Steadman Clinic. on August 22, 2024. Dr. Kinsella noted Claimant reported an accident history of neck pain since he fell on slippery stairs on March 3, 2024. Dr. Kinsella further noted that Claimant reported more significant pain started two days later after breaking up a block of ice. Claimant reported he had constant numbness, pain in his head and neck

radiating into both shoulders and arms along with headaches. Claimant reported a history of competing in mixed martial arts ("MMA") and bull riding. Dr. Kinsella reviewed Claimant's MRI and performed a physical examination and diagnosed Claimant with cervical radiculopathy and recommended non-steroidal anti-inflammatories ("NSAIDs"), oral steroids or a possible spinal injections. Dr. Kinsella further agreed with the recommendation for an EMG study.

21. Claimant eventually underwent the EMG study on October 21, 2024 under the auspices of Dr. Thornton. The EMG demonstrated a right median neuropathy across the wrist consistent clinically with carpal tunnel syndrome. There was also evidence of mild bilateral ulnar neuropathies localizing to the segments adjacent to the medial epicondyles bilaterally consistent with bilateral cubi9tal tunnel syndrome. Examination of the cervical paraspinous muscles during electromyography demonstrated that Claimant had difficulty relaxing these muscles indicating some paraspinous muscles spasm bilaterally.

22. Claimant underwent a cervical epidural steroid injection on December 19, 2024, but almost passed out when getting up. Reaction to the injection was noted in the records to include swelling in the face and muscle spasms. Claimant was referred to the ER due to the adverse reaction.

23. Respondents referred Claimant to Dr. Douglas Scott for an independent medical examination ("IME") on December 27, 2024. Dr. Scott reviewed Claimant's medical records, obtained a medical history, and performed a physical examination as part of his IME. Dr. Scott noted Claimant reported a history of slipping and falling on a flight of stairs on March 3, 2024 while at work, striking his back and the back of his head. Claimant denied losing consciousness, hopped up and, at the time, did not feel he had any injuries. Claimant reported to Dr. Scott a second injury on March 5, 2024 when he was using an ice chipper to break up ice and snow and felt a "pop" in hiss neck.

24. Dr. Scott summarized Claimant's medical treatment post injury and diagnosed Claimant with a possible closed head injury without a TBI which was now

expected to be resolved. Dr. Scott also diagnosed Claimant with a possible mild cervical neck muscle strain or contusion that was now expected to be resolved. Dr. Scott noted concerns with Claimant's significant pre-existing conditions and expressed a desire to review Claimant's prior and current VA medical records to help determine the causality of Claimant's complaints from his claimed March 3, 2024 work injury.

25. Claimant returned to Dr. Lindberg on February 10, 2025. Dr. Lindberg adjusted Claimant's medications and noted Claimant was doing head and neck myofascial pain physical therapy with the VA. Dr. Lindberg noted that Claimant appeared stiff in his neck.

26. Ms. Henderson testified at hearing in this matter. Ms. Henderson confirmed that she had filled out Claimant's written notice of injury based upon information that was provided to Ms. Henderson by Claimant because Claimant had informed Ms. Henderson that he could not fill out the forms. Ms. Henderson testified that after filling out the forms, she drove Claimant to the hospital.

27. Dustin Goodman testified at hearing in this matter. Mr. Goodman testified he was Claimant's supervisor. Mr. Goodman testified Claimant told him on March 5, 2024 that he had slipped on the stairs at the Willet stop on March 3, 2024, but did not report that he had any symptoms at that time.

28. Dr. Scott testified at hearing in this matter. Dr. Scott opined in his testimony that Claimant's testimony regarding the accident was different at the hearing than what Claimant told him during the IME. Dr. Scott testified he had asked Claimant about prior injuries and Claimant did not report an injury of September 14, 2022. Dr. Scott testified that he had reviewed Claimant's prior medical records that documented similar complaints to Claimant's current condition. Dr. Scott opined in his testimony that it was very likely that Claimant was symptomatic prior to his March 2024 injury. Dr. Scott opined that Claimant had no specific acute trauma to his neck and while Claimant may have had a muscle strain to his upper shoulder, he did not have a muscle strain to his neck.

29. The ALJ credits Claimant's testimony at hearing along with the medical records entered into evidence and finds that Claimant has established that it is more probable than not that Claimant sustained a compensable injury arising out of and in the course and scope of his employment with Employer when he slipped and fell on the stairs on March 3, 2024, landing on his back and striking his head. The ALJ finds that the onset of symptoms that Claimant experienced while chipping ice on March 5, 2024 was related to the fall on March 3, 2024 and does not represent a new accident or injury.

30. The ALJ credits Claimant's testimony regarding his symptoms after March 3, 2024 and finds that the medical treatment Claimant received after March 3, 2024, including the ER visit and the visit with Glenwood Medical Associates, represents reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the injury.

31. The ALJ notes that this case is complicated by Claimant's prior injuries and complaints related to those injuries, but finds that the evidence establishes that Claimant's injury on March 3, 2024 aggravated, accelerated or combined with Claimant's pre-existing condition to cause the need for medical treatment and disability.

32. Specifically, the medical records in this case demonstrate repeated references to Claimant demonstrating neck stiffness and spasm to his cervical spine on examination. Claimant has been diagnosed with post-concussive symptoms that remain under active care. The ALJ further notes that while Claimant did have prior injuries in this case, the evidence does not establish that Claimant had sought care for those injuries in the months prior to his March 3, 2024 work injury and Claimant had successfully passed a pre-employment physical for Employer prior to being hired by Employer. The ALJ finds and determines that the medical treatment and work restrictions provided to Claimant after March 3, 2024 were related to his March 3, 2024 slip and fall while at work.

33. The ALJ further credits Claimant's testimony at hearing along with the medical records entered into evidence which establish that Claimant was taken off of

work due to the restrictions related to the March 3, 2024 injury. Claimant has therefore established that it is more probable than not that he is entitled to an award of TTD benefits commencing March 6, 2024 and continuing until terminated by law or statute.

34. Specifically, Claimant was provided with a restriction that prohibited him from working by PA Mazza on March 6, 2024. This work restriction was continued by Dr. Swenson on his examination on March 11, 2024. These restrictions are found to be credible and persuasive and establish an entitlement to TTD benefits beginning March 6, 2024.

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. 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., 2016.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. To qualify for recovery under the Workers' Compensation Act of Colorado, a claimant must be performing services arising out of and in the course of his employment at the time of the injury. *See* Section 8-41-301(1)(b), C.R.S. For an injury

to occur "in the course of" employment, the claimant must demonstrate that the injury occurred within the time and place limits of the employment and during an activity that had some connection with the work-related function. *See Triad Painting Co. v. Blair*, 812 P.2d 638 641 (Colo. 1991). The "arising out of" requirement is narrower than the "in the course of" requirement. *See Id.* For an injury to arise out of employment, the claimant must show a causal connection between the employment and 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. *See Id.* at 641-642.

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 established by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment on March 3, 2024 when he slipped on the stairs at the Willet station and fell striking his head and back. As found, while Claimant had prior injuries to his neck and back, the injury on March 3, 2024 aggravated, accelerated or combined with Claimant's pre-existing condition to cause the need for medical treatment and disability.

6. As found, the March 5, 2024 onset of symptoms while Claimant was chipping ice is found to be related to the March 3, 2024 injury. As found, Claimant's testimony regarding the onset and worsening of symptoms following his March 3, 2024 injury is found to be credible and persuasive regarding this issue.

7. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

8. As found, Claimant has proven by a preponderance of the evidence that the medical treatment related to Claimant's cervical spine and concussion is found to be reasonable and necessary to cure and relieve Claimant from the effects of the March 3, 2024 work injury.

9. 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. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

10. As found, Claimant has established by a preponderance of the evidence that he is entitled to an award of TTD benefits beginning March 6, 2024 and continuing until terminated by law or statute. As found, Claimant was taken off of work by PA Mazza after his work injury. Those restrictions were later continued by Dr. Swenson at

his March 11, 2024 visit. As found, these restrictions establish an entitlement to TTD benefits for Claimant beginning March 6, 2024.

Order

It is therefore ordered that:

1. Claimant has established that he sustained a compensable injury arising out of and in the course of his employment with Employer on March 3, 2024 (WC No. 5-266-439-001).

2. Respondents are liable for the reasonable medical treatment necessary to cure and relived Claimant from the effects of his work injury pursuant to the Colorado Medical Fee Schedule. Specifically, the medical treatment from Glenwood Medical Associates is found to be reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury.

3. Respondents shall pay Claimant TTD benefits based on the stipulated AWW of $1,120.00 beginning March 6, 2024 and continuing until terminated by law or statute.

4. Claimant's claim for benefits for an injury occurring on March 5, 2024 is denied and dismissed (WC No. 5-272-924-001). Claimant's onset of symptoms on March 5, 2024 is found to be related to the March 3, 2024 work injury.

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

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. 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. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

DATED: August 14, 2025

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

Office of Administrative Courts
State of Colorado
Workers Compensation No. 5-261-474-002

ISSUE

> Claimant's entitlement to TTD benefits from November 1, 2024, to May 23, 2025.

FINDINGS OF FACT

1. Claimant suffered an injury on January 9, 2024, to his neck. Respondents denied compensability and after a hearing, the claim was determined to be compensable.

2. Respondents then filed a general admission of liability. Claimant appealed the order with respect to the denial of TTD by the ALJ based on a wage continuation plan that was applicable. The prior order noted that Claimant was provided work restriction by his authorized treating physician and continued to work in a modified capacity until March 13, 2024, when surgery was performed. Claimant has not worked anywhere since the surgery and no modified work was offered by the Employer.

3. After his neck surgery, Dr. Centi imposed restrictions of no lifting/carrying greater than 10 pounds, no pushing/pulling greater than 10 pounds and no overhead lifting. The employer was unable to accommodate these restrictions.

4. Claimant was provided post-operative care until he was placed at MMI on May 23, 2025, by Dr. Centi.

5. On November 1, 2024, the Claimant took early retirement since he was no longer receiving wage continuation since he had exhausted all disability benefits provided by the employer.

CONCLUSIONS OF LAW

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

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

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

4. A workers' compensation claimant is eligible for temporary compensation benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. Anderson v. Longmont Toyota, Inc., 2004, 102 P.3d 323. Under these facts the Claimant suffered an injury that resulted in disability as of March 13, 2024, until he was placed at MMI on May 23, 2025. The ALJ concludes that the Claimant's resignation was not "volitional conduct" which rendered him "responsible" for the loss of the employment within the meaning of §8-42-105(4). He was forced to retire to provide him income when the Employer sponsored disability benefits ceased.

ORDER

It is therefore ordered that:

1. The Claimant is entitled to TTD benefits from November 1, 2024, to May 23, 2025, when he was placed at MMI.

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

DATED: August 14, 2025

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

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

ISSUE

Whether Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on October 18, 2024 and whether his non-medical benefits should thus be reduced by fifty percent.

FINDINGS OF FACT

1. Claimant is employed as a school bus driver for the school district. Claimant sustained a compensable work injury on October 18, 2024 when he was exposed to exhaust from the school bus he was driving.

2. At the beginning of his employment, Claimant was given a copy of Lewis Palmer's Drivers Handbook. The Handbook requires a pre-trip vehicle inspection as well as a post-trip inspection when they return at 2:00 p.m. There is a third abbreviated inspection at the end of the day. The vehicle inspection checklist that is very detailed.

3. Respondents' witness Julie Abeyta is the operations manager for transportation for the Employer school district. She has worked for the school district for 15 years and has been in her current position for 5 years. She primarily supervises the bus drivers including the Claimant.

4. On October 18, 2024, Claimant heard a whirring sound while he was on his route and he called into dispatch to report it.[1] Ms. Abeyta sent a mechanic to determine what the problem was. The students were transferred to a substitute bus. Claimant drove the bus back to the bus barn. An incident report was filled out on the following Monday, October 21, 2024.

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1 Ms. Abeyta initially thought the exhaust incident occurred on September 27, 2024, but corrected herself on cross-examination that Claimant's exposure to exhaust occurred on October 18, 2024.

5. Prior to the incident, there was a whirring sound on the same bus. The bus was turned over to Capital Truck Repair on October 3, 2024 to determine the cause of the engine squealing. After inspection, the cause was determined to be an exhaust manifold gasket leak. It was repaired and the Employer received an invoice for $1,976.40. The process when a third party repairs one of the buses that the repair is reviewed by the Employer's mechanics. Then it is put back into service.

6. Ms. Abeyta was not aware of any safety rule that the Claimant violated in connection with his exposure to exhaust fumes.

7. Respondents failed to present any credible or persuasive evidence to support their theory that Claimant violated a safety rule by failing to identify the leaking exhaust clamp in his pre-trip or post-trip inspections.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Indus. Claim Appeals Off.,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003).

5. The willful violation of a safety rule may be established without direct evidence of the claimant's state of mind at the time of the injury because "it is a rare case where the claimant admits that the conduct was the product of a willful violation of the employer's rule." *Gargano v. Metro Wastewater Reclamation District*, W.C. No. 4-335-104 (ICAP, Feb. 19, 1999). Instead, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548, 550 (1968); *Miller v. City and County of Denver*. W.C. No. 4-658-496 (ICAP, Aug. 31, 2006).

6. Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado,* W.C. No. 4-559-275 (ICAP, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.* 907 P.2d at 719.

7. Generally, an employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAP, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, §35.04.

8. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on October 18, 2024. Ms. Abeyta's testimony that she was unaware of any safety rule violation is credible and persuasive.

ORDER

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

1. Respondents have failed to prove that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: August 14, 2025.

Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Colorado Springs
80906

Issue

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Lynn Parry, MD that Claimant has not reached MMI and sustained a 22% whole person impairment rating because of his February 9, 2024 admitted industrial injuries.

Findings of Fact

1. Claimant worked for Employer as a maintenance technician. On February 9, 2024 he was descending a flight of stairs at work. When he reached the bottom of the stairs, he slipped on ice. Claimant fell backwards and struck his upper back and head against the concrete surface. He experienced pain from his tailbone into his back.

2. After the accident, Claimant visited the Swedish Hospital Emergency Room for treatment. A CT scan revealed a compression fracture at the T3 level, but the cervical spine was normal. Claimant was also diagnosed with a right shoulder strain.

3. Claimant subsequently obtained medical treatment at Authorized Treating Provider (ATP) Medicine for Business & Industry (MBI). On February 13, 2024 he visited Brian Beatty, DO for an examination. After performing a physical examination, Dr. Beatty diagnosed Claimant with pain in the thoracic spine and an unspecified sprain of the right shoulder joint. He recommended conservative treatment with medications. Dr. Beatty determined his objective findings were consistent with a work-related mechanism of injury.

4. By April 17, 2024 Dr. Beatty noted that Claimant continued to improve and

was attending physical therapy twice weekly. Claimant still had shoulder pain while reaching overhead or away from his body, but his back pain in the right scapular region had improved. Dr. Beatty summarized that Claimant had returned to modified employment and could perform most of his job duties besides heavy lifting.

5. On May 1, 2024 Claimant returned to Dr. Beatty for an examination. Claimant reported that his right shoulder was feeling much better and denied any pain. He continued to attend physical therapy twice weekly. Dr. Beatty commented that Claimant could return to regular duty work. He took formal range of motion measurements with a goniometer confirming full shoulder range of motion. Dr. Beatty documented the following: "[f]lexion 170 degrees, extension to 40 degrees, abduction 170 degrees, adduction 30 degrees, external rotation 80 degrees and internal rotation 80 degrees." He also reported "5/5 strength in all planes."

6. On May 15, 2024 Dr. Beatty reported that Claimant continued to experience some upper back and right shoulder pain that had improved with physical therapy but plateaued. Claimant also tried some acupuncture that did not help. They discussed various options, and Claimant was scheduled to visit Jason A Gridley, DC for chiropractic treatment.

7. On May 29, 2024 Dr. Beatty commented that Claimant had some continued upper back pain but was feeling better. He was also working regular duty. Dr. Beatty administered a trigger point injection and Claimant would begin chiropractic care as soon as it could be scheduled.

8. By June 19, 2024 Dr. Beatty recounted that Claimant had improved with chiropractic care. He had attended two sessions and had four appointments remaining. Dr. Beatty again verified full right shoulder range of motion using a goniometer. He recorded the following measurements: "[f]lexion 170 degrees, extension 50 degrees, abduction 170 degrees, abduction 40 degrees, external rotation 80 degrees and internal rotation 80 degrees. He has 5/5 strength in all planes of motion." Claimant was working

regular duty and approaching Maximum Medical Improvement (MMI).

9. On July 3, 2024 Dr. Beatty noted that Claimant's right shoulder symptoms had improved, but he still had pain in the upper back. He remarked that Claimant had been to physical therapy and tried chiropractic treatment, but there was a small area of pain that persisted. Dr. Beatty determined that Claimant had reached MMI. He assigned a 3% permanent impairment rating for a specific disorder of the thoracic spine and a 3% impairment for range of motion loss. Combining the ratings yields a 6% whole person rating. Dr. Beatty did not provide any permanent impairment ratings for the right shoulder or cervical spine. He documented full strength and no range of motion deficits in the preceding areas and made it clear that all pain complaints were emanating from the compression fracture in the thoracic spine. Finally, Claimant did not require medical maintenance care.

10. On July 8, 2024 Claimant visited Dr. Gridley for his fourth chiropractic appointment. Claimant reported no real progress in improving his chronic pain in the upper right scapular region. Despite improvement in spinal function and mobility in the upper thoracic region, Claimant believed treatment was not improving his pain symptoms. Dr. Gridley did not believe any further treatment was likely to produce any benefit. There was also no correlation between Claimant's ongoing pain complaints and improved biomechanics.

11. On July 15, 2024 Dr. Gridley explained that Claimant had not noticed any appreciable change in pain symptoms after four chiropractic visits but had mobility improvements. Dr. Gridley placed a hold on further treatment pending any recommendations from Dr. Beatty.

12. On October 22, 2024 Claimant underwent a Division Independent Medical Examination (DIME) with Lynn Parry, MD. After reviewing Claimant's medical records and conducting a physical examination, Dr. Parry concluded that Claimant was not at MMI and needed treatment for separate ratable injuries to the right shoulder and cervical

spine. She reasoned that he had suffered persistent symptoms since his original date of injury and there were concerns about his ability to perform job duties. Dr. Parry noted that Claimant had suffered both spine and rib fractures because of the February 9, 2024 work incident. The fractures affected Claimant's shoulder girdle stability. Dr. Parry explained that to reach MMI, Claimant would need to visit an orthopedist with a shoulder specialization and undertake a therapy program.

13. Dr. Parry designated impairment ratings for the cervical spine, thoracic spine and right shoulder. She specifically assigned a 13% whole person impairment for the cervical spine consisting of a 4% rating for a specific disorder and a 9% rating for range of motion deficits. She also assigned a 4% whole person rating for the thoracic spine and a 7% whole person impairment for the right shoulder based on specific disorders and range of motion deficits. Combining Dr. Parry's ratings yields a 22% whole person impairment for Claimant's February 9, 2024 industrial injuries.

14. On February 26, 2025 Claimant underwent an Independent Medical Examination (IME) with Allison M. Fall, MD. Dr. Fall reviewed Claimant's medical records and performed a physical examination. She agreed with Dr. Beatty that Claimant reached MMI on July 3, 2024. He plateaued with treatment and had minimal residual objective findings. Dr. Fall detailed that Claimant's right shoulder symptoms had resolved and noted that Dr. Gridley had determined additional treatment would not improve Claimant's symptoms. Importantly, Dr. Fall remarked that the MRI scan of Claimant's right shoulder was consistent with age-related degenerative changes. She thus confirmed there was no radiological evidence for an impairment rating of the right upper extremity. Moreover, the medical records revealed that Claimant was not having any difficulties performing his regular job duties.

15. Dr. Fall explained that Dr. Parry made several errors in her DIME examination. Initially, Dr. Parry rated three separate areas of impairment although there was only one small area of pain in the right upper thoracic region. The ratings were duplicative and physicians are instructed to avoid duplication based on the American

Medical Association Guides to the Evaluation of Permanent Impairment Third Edition Revised (*AMA Guides*) and DOWC Level II training. She also questioned Dr. Parry's range of motion measurements because they were significantly different than hers and those performed by Dr. Beatty. Moreover, Dr. Fall noted Dr. Parry's incorrect use of the Fifth Edition of the *AMA Guides* instead of the required Third Edition Revised in Colorado for thoracic range of motion measurements. In summary, Dr. Fall agreed with Dr. Beatty that Claimant reached MMI on July 3, 2024 with a 6% whole person impairment rating for his thoracic spine.

16. Dr. Fall testified at the hearing in this matter. She maintained that Claimant reached MMI on July 3, 2024. He plateaued with treatment and had minimal residual objective findings. She agreed with Dr. Beatty's assessment that the shoulder pain had resolved and was not a permanent injury. Dr. Fall noted benign MRI findings and full range of motion measurements. Importantly, Dr. Fall agreed with Dr. Beatty that there was no separate ratable injury to the cervical spine because a secondary muscle spasm should not be separately rated. Notably, rating multiple body parts for a single pain generator is incorrect. She emphasized that it was clear error to rate body parts other than the thoracic spine under Colorado law. Regarding the T3 compression fracture, she supported the 6% impairment rating assigned by Dr. Beatty because it was consistent with Claimant's symptoms.

17. Dr. Fall also reasoned that Dr. Parry did not provide a specific reason for determining Claimant had not reached MMI. Dr. Parry noted that Claimant should visit an orthopedist with no explanation of any treatment. Dr. Fall emphasized that Dr. Parry mentioned “something vague” about whether there were additional approaches available given Claimant’s persistent problems. She explained that claimants are often placed at MMI when they still have symptoms. Nevertheless, they have reached a point in time where no active treatment is expected to improve their condition. Dr. Fall concluded there was simply no medical reason for Claimant to visit an orthopedist.

18. Dr. Fall maintained that Dr. Parry's opinions were "clearly wrong" based on

inconsistencies with treatment records, duplication of impairment ratings and incorrect use of the Fifth Edition of the *AMA Guides* for thoracic range of motion measurements. She specified that Dr. Parry's 11% shoulder rating did not make sense. Importantly, Claimant exhibited full range of motion on multiple occasions with formal testing by Dr. Beatty. She commented that Dr. Parry's subsequent finding of significant range of motion loss in the right shoulder lacked credibility. As a DIME physician she failed to explain the discrepancy as required by Colorado law. It was perplexing that Claimant would have full range of motion in the right shoulder over a month and a half time frame and then suddenly experience significant range of motion loss. Dr. Fall summarized that Claimant initially had a mild shoulder strain that resolved. Finally, she noted that Claimant did not injure his cervical spine on February 9, 2024 because Dr. Beatty never reported a diagnosis. Claimant also exhibited full range of motion of the cervical spine during his examinations with Dr. Beatty.

19. On June 23, 2025 Dr. Parry testified through an evidentiary deposition in this matter. She diagnosed Claimant with a cervical strain, a thoracic compression fracture, rib fractures, and a right shoulder strain. Dr. Parry also diagnosed occipital neuralgia due to percussive sensitivity and decreased sensation over the right occipital groove. She explained that Claimant's right shoulder dysfunction was related to the direct impact on his thoracic spine and rib cage, causing contusion and destabilization of scapular movements. Dr. Parry attributed Claimant's cervical strain to a whiplash-type injury during the work incident.

20. Dr. Parry clarified that she used the 3rd Edition of the *AMA Guides* for her impairment rating. Her only deviation involved the use of the 5th Edition, accepted by the DOWC, for rotational movements of the thoracic spine. Dr. Parry disagreed with Dr. Fall's assessment that Claimant was at MMI and her findings were duplicative. She remarked that Dr. Fall did not sufficiently address Claimant's continuing pain complaints, headaches, and neck pain. She also disagreed with Dr. Fall's opinion that the shoulder deficits were solely related to the thoracic spine injury. Dr. Parry further contested Dr. Fall's assertion that range of motion limitations did not justify impairment. She remarked

that Dr. Beatty did not address the shoulder strain in his impairment rating, and Dr. Fall was incorrect in suggesting that Claimant's right shoulder pain emanated solely from the thoracic spine.

21. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Parry that Claimant has not reached MMI and sustained a 22% whole person impairment rating from his February 9, 2024 admitted industrial injuries. Initially, on February 9, 2024 Claimant suffered a T3 compression fracture and a sprain of the right shoulder joint when he slipped at the bottom of stairs at work. After receiving conservative treatment including physical therapy, acupuncture and injections, ATP Dr. Beatty determined Claimant reached MMI on July 3, 2024. He assigned a 3% permanent impairment rating for a specific disorder of the thoracic spine and a 3% impairment for range of motion loss. Combining the ratings yields a 6% whole person impairment. Dr. Beatty did not assign permanent work restrictions or recommend maintenance care.

22. On October 22, 2024 Claimant underwent a DIME with Dr. Parry. She concluded that Claimant had not reached MMI and required treatment for separate ratable injuries to the thoracic spine, right shoulder and cervical spine. Dr. Parry explained that Claimant's right shoulder dysfunction was related to the direct impact on his thoracic spine and rib cage, causing contusion and destabilization of scapular movements. She attributed Claimant's cervical strain to a whiplash-type injury during the work incident. She specifically assigned a 13% whole person impairment for the cervical spine consisting of a 4% rating for a specific disorder and a 9% rating for range of motion deficits. Dr. Parry also assigned a 4% whole person rating for the thoracic spine and a 7% whole person impairment for the right shoulder based on specific disorders and range of motion deficits. Combining Dr. Parry's ratings yields a 22% whole person impairment rating for Claimant's February 9, 2024 industrial injuries.

23. Despite Dr. Parry's opinion, the record reveals clear and convincing evidence that Claimant did not suffer causally related, ratable injuries to his right shoulder and cervical spine on February 9, 2024. Absent a causal connection, it is highly probable

that Dr. Parry's MMI determination and impairment ratings were incorrect. Importantly, Claimant only suffered a compression fracture to the thoracic spine that caused pain to extend to other areas. The record does not reveal any injury to his cervical spine, and his right shoulder sprain resolved with treatment. Notably, Dr. Parry provided Claimant an 11% rating for shoulder range of motion loss even though Dr. Beatty had specifically performed detailed range of motion testing with a goniometer multiple times over an almost two-month period. Claimant demonstrated full range of motion and 5/5 strength in the right shoulder. Dr. Parry failed to explain why Clamant had full range of motion on several occasions over almost two months and then had significant deficits during her examination. Similarly, Claimant did not suffer a separate injury to the cervical spine. Dr. Beatty noted full range of motion in that area. Any pain complaints toward the cervical spine emanated from the compression fracture at T3 of the thoracic spine.

24. Importantly, Dr. Fall persuasively reasoned that Dr. Parry did not provide a specific reason for determining Claimant had not reached MMI. Dr. Parry noted that Claimant should visit an orthopedist with no explanation of any necessary treatment. Dr. Fall emphasized that Dr. Parry mentioned "something vague" about whether there were additional approaches available given Claimant's persistent problems. She explained that claimants are placed at MMI when they have reached a point in time where no active treatment is expected to improve their condition. Dr. Fall agreed with Dr. Beatty that Claimant reached MMI on July 3, 2024. He plateaued with treatment and had minimal residual objective findings.

25. Dr. Fall agreed with Dr. Beatty's assessment that Claimant's shoulder pain had resolved and was not a permanent injury. She noted benign MRI findings and full range of motion measurements. Dr. Fall also concurred with Dr. Beatty that there was no separate ratable injury to the cervical spine because a secondary muscle spasm should not be separately rated. Claimant simply did not injure his cervical spine on February 9, 2024. He also exhibited full range of motion of the cervical spine during his examinations with Dr. Beatty. Dr. Fall emphasized that it was clear error for Dr. Parry to rate body parts other than the thoracic spine under Colorado law. Regarding the T3 compression fracture,

she supported the 6% impairment rating given by Dr. Beatty because it was consistent with Claimant's symptoms.

26. Dr. Parry remarked that Dr. Beatty did not address the shoulder strain in his impairment rating and Dr. Fall was incorrect in suggesting that Claimant's right shoulder pain emanated solely from the thoracic spine. However, the record does not support her contention and is not consistent with the objective medical evidence. As the preceding analysis suggests, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Parry was clearly erroneous in her MMI and impairment determinations. The medical records and persuasive medical opinions of ATP Dr. Beatty and Dr. Fall reveal that on July 3, 2024 Claimant's underlying condition had become stable and no additional treatment would improve his symptoms. Dr. Parry was clearly incorrect in assigning impairment ratings for Claimant's right shoulder and cervical spine.

27. Because Respondents have overcome Dr. Parry's DIME opinion regarding MMI and permanent impairment, the determination of Claimant's correct rating is a question of fact for the ALJ based on the preponderance of the evidence. The overwhelming medical evidence and opinions reveal that Claimant reached MMI on July 3, 2024. The appropriate ratings are 3% for a specific disorder of the thoracic spine and 3% for range of motion loss. Combining the ratings yields a 6% whole person rating because of Claimant's T3 fracture. Finally, based on the persuasive opinions of Dr. Beatty and Dr. Fall, Claimant does not warrant permanent work restrictions or medical maintenance treatment.

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. In ascertaining a DIME physician's opinion, the ALJ should consider 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. "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc.,* 961 P.2d at 592. In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). 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).

8. "Maximum medical improvement" means a point in time when any medically determinable physical or mental impairment from an injury has become stable and no further treatment is reasonably expected to improve the condition. §8-40-201(11.5), C.R.S.; *see Golden Age Manor v. Indus. Comm'n*, 716 P.2d 153 (Colo.App.1985). MMI

represents the optimal point at which the permanency of a disability can be discerned and the extent of any resulting impairment can be measured. *Paint Connection Pul v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010).

9. If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *Trujillo v. Nestle USA Holdco, Inc.*, W.C. No. 5-225-262-001 (ICAO, Sept. 12, 2024); *see Deleon v. Whole Foods Market, Inc.*, WC 4-600-47 (ICAO, Nov. 16, 2006). Thus, once the DIME's rating has been overcome in any respect, an ALJ may calculate the claimant's impairment rating based upon a preponderance of the evidence. *Destination Maternity v. Burren*, 463 P.3d 266, 274 (Colo. 2020); *see Mosley v. Indus. Claimant Appeals Off.*, 78 P.3d 1151, 1153 (Colo. App. 2003) (once the DIME is overcome "the ALJ [is] free to consider the other medical evidence concerning claimant's permanent medical impairment"). When applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence." *Deleon v. Whole Foods Market, Inc.*, WC 4-600-47 (ICAO, Nov. 16, 2006). When the ALJ determines that the DIME physician's rating has been overcome, she may independently determine the correct rating. *Lungu v. North Residence Inn*, WC 4-561-848 (ICAO, Mar. 19, 2004).

10. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Parry that Claimant has not reached MMI and sustained a 22% whole person impairment rating from his February 9, 2024 admitted industrial injuries. Initially, on February 9, 2024 Claimant suffered a T3 compression fracture and a sprain of the right shoulder joint when he slipped at the bottom of stairs at work. After receiving conservative treatment including physical therapy, acupuncture and injections, ATP Dr. Beatty determined Claimant reached MMI on July 3, 2024. He assigned a 3% permanent impairment rating for a specific disorder of the thoracic spine and a 3% impairment for range of motion loss. Combining the ratings yields a 6% whole

person impairment. Dr. Beatty did not assign permanent work restrictions or recommend maintenance care.

11. As found, on October 22, 2024 Claimant underwent a DIME with Dr. Parry. She concluded that Claimant had not reached MMI and required treatment for separate ratable injuries to the thoracic spine, right shoulder and cervical spine. Dr. Parry explained that Claimant's right shoulder dysfunction was related to the direct impact on his thoracic spine and rib cage, causing contusion and destabilization of scapular movements. She attributed Claimant's cervical strain to a whiplash-type injury during the work incident. She specifically assigned a 13% whole person impairment for the cervical spine consisting of a 4% rating for a specific disorder and a 9% rating for range of motion deficits. Dr. Parry also assigned a 4% whole person rating for the thoracic spine and a 7% whole person impairment for the right shoulder based on specific disorders and range of motion deficits. Combining Dr. Parry's ratings yields a 22% whole person impairment rating for Claimant's February 9, 2024 industrial injuries.

12. As found, despite Dr. Parry's opinion, the record reveals clear and convincing evidence that Claimant did not suffer causally related, ratable injuries to his right shoulder and cervical spine on February 9, 2024. Absent a causal connection, it is highly probable that Dr. Parry's MMI determination and impairment ratings were incorrect. Importantly, Claimant only suffered a compression fracture to the thoracic spine that caused pain to extend to other areas. The record does not reveal any injury to his cervical spine, and his right shoulder sprain resolved with treatment. Notably, Dr. Parry provided Claimant an 11% rating for shoulder range of motion loss even though Dr. Beatty had specifically performed detailed range of motion testing with a goniometer multiple times over an almost two-month period. Claimant demonstrated full range of motion and 5/5 strength in the right shoulder. Dr. Parry failed to explain why Clamant had full range of motion on several occasions over almost two months and then had significant deficits during her examination. Similarly, Claimant did not suffer a separate injury to the cervical spine. Dr. Beatty noted full range of motion in that area. Any pain complaints toward the cervical spine emanated from the compression fracture at T3 of the thoracic spine.

13. As found, importantly, Dr. Fall persuasively reasoned that Dr. Parry did not provide a specific reason for determining Claimant had not reached MMI. Dr. Parry noted that Claimant should visit an orthopedist with no explanation of any necessary treatment. Dr. Fall emphasized that Dr. Parry mentioned “something vague” about whether there were additional approaches available given Claimant’s persistent problems. She explained that claimants are placed at MMI when they have reached a point in time where no active treatment is expected to improve their condition. Dr. Fall agreed with Dr. Beatty that Claimant reached MMI on July 3, 2024. He plateaued with treatment and had minimal residual objective findings.

14. As found, Dr. Fall agreed with Dr. Beatty's assessment that Claimant’s shoulder pain had resolved and was not a permanent injury. She noted benign MRI findings and full range of motion measurements. Dr. Fall also concurred with Dr. Beatty that there was no separate ratable injury to the cervical spine because a secondary muscle spasm should not be separately rated. Claimant simply did not injure his cervical spine on February 9, 2024. He also exhibited full range of motion of the cervical spine during his examinations with Dr. Beatty. Dr. Fall emphasized that it was clear error for Dr. Parry to rate body parts other than the thoracic spine under Colorado law. Regarding the T3 compression fracture, she supported the 6% impairment rating given by Dr. Beatty because it was consistent with Claimant's symptoms.

15. As found, Dr. Parry remarked that Dr. Beatty did not address the shoulder strain in his impairment rating and Dr. Fall was incorrect in suggesting that Claimant’s right shoulder pain emanated solely from the thoracic spine. However, the record does not support her contention and is not consistent with the objective medical evidence. As the preceding analysis suggests, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Parry was clearly erroneous in her MMI and impairment determinations. The medical records and persuasive medical opinions of ATP Dr. Beatty and Dr. Fall reveal that on July 3, 2024 Claimant’s underlying condition had become stable and no additional treatment would improve his symptoms. Dr. Parry

was clearly incorrect in assigning impairment ratings for Claimant's right shoulder and cervical spine.

16. As found, because Respondents have overcome Dr. Parry's DIME opinion regarding MMI and permanent impairment, the determination of Claimant's correct rating is a question of fact for the ALJ based on the preponderance of the evidence. The overwhelming medical evidence and opinions reveal that Claimant reached MMI on July 3, 2024. The appropriate ratings are 3% for a specific disorder of the thoracic spine and 3% for range of motion loss. Combining the ratings yields a 6% whole person rating because of Claimant's T3 fracture. Finally, based on the persuasive opinions of Dr. Beatty and Dr. Fall, Claimant does not warrant permanent work restrictions or medical maintenance treatment.

Order

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

1. Claimant reached MMI on July 3, 2024.

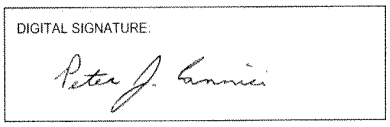
2. Claimant suffered a 6% whole person impairment rating consisting of 3% for a specific disorder of the thoracic spine and 3% for range of motion loss.

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: August 14, 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. 5-197-647-004

Issues

I. Whether Respondents have overcome the opinion of the Division IME physician regarding permanent impairment.

II. Whether Respondents have overcome the opinion of the Division IME physician regarding the date Claimant reached maximum medical improvement.

III. Whether Claimant is entitled to reasonable, necessary, and causally related maintenance medical benefits.

Findings of Fact

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

1. Claimant contracted COVID-19, while working as a registered nurse, for which Respondents have admitted liability.

Preexisting Conditions

2. In 2019, Claimant established care at Mercy Family Medicine. She noted a history of Type II diabetes with peripheral neuropathy, for which she was taking metformin, insulin injections, hydrocodone, and gabapentin. Claimant also indicated that she was concerned about her liver since an ultrasound showed she had fatty liver.

3. In 2020, Claimant contracted RSV and presented to the hospital with atypical pneumonia. She was admitted to the hospital with acute respiratory failure. At that time, she also had elevated red blood cells, likely due to an undiagnosed sleep apnea.

4. In 2020, Claimant also presented to Mercy Family Medicine and noted that she had a history of asthma, for which her medications were not working. At this time she was

diagnosed with an acute exacerbation of her asthma. There are not, however, medical records that establish the extent of her asthma - such as duration, severity, any persistent symptoms, or the extent of any treatment, etc.

5. In September 2021, Claimant's blood sugars were high after discontinuing medications due to cost.

6. On December 27, 2021, just two weeks before her work-related illness, Claimant reported an increase in symptoms attributable to her diabetes, as she reported increased bilateral lower extremity neuropathy, tingling in her hands, and decreasing right eye vision.

7. Despite having several preexisting conditions, Claimant did not have documented and persistent orthostatic intolerance, tachycardia, cognitive difficulties, bouts of shortness of breath, and low oxygen saturation levels. Moreover, she was not using supplemental oxygen.

8. Claimant's preexisting conditions did not prevent her from performing her job as a registered nurse. Claimant routinely completed twelve-hour shifts prior to contracting COVID-19.

Contraction of COVID-19 at Work

9. On January 9, 2022, Claimant contracted COVID-19 at work, while triaging patients in the emergency department.

Treatment and Evaluations after Contracting COVID-19

10. Within 48–72 hours of testing positive for the virus, Claimant developed low-grade fever, myalgias, and headache, which progressed to dyspnea on exertion. On January 12th, she was in the emergency room at Mercy Medical Center with a temperature of 102.4 °F, SpO_2 82% on room air, respiratory rate of 28 breaths per minute, and heart rate of 110 bpm. A physical examination documented diffuse bilateral crackles in her lungs. Claimant reported orthopnea-shortness of breath-and chest tightness limiting her walking to fewer than 50 feet.

11. On March 23, 2022, Claimant was seen by Dr. Jonathan Rudolf at Animas Surgical Hospital's outpatient clinic. At that visit, Dr. Rudolf recorded persistent dyspnea on

minimal exertion and orthopnea. He noted nocturnal desaturations with recorded SpO_2 (oxygen saturation) readings as low as 86% on room air overnight before improving to 94% on 3 L/min oxygen via nasal cannula. He diagnosed COVID-19 pneumonitis "almost certainly" work-related, initiated inhaled albuterol and fluticasone therapy, and prescribed nocturnal supplemental oxygen.

12. On April 20, 2022, Mercy Medical Center's outpatient pulmonary testing demonstrated entirely normal respiratory mechanics and gas transfer. Technicians noted that spirometry, lung volumes, and DLCO were normal and that the testing was unremarkable for flow volume loops.

13. On May 18, 2022, Claimant was evaluated by pulmonologist Barry Holcomb, M.D. On examination, he noted her pulmonary effort and breath sounds were normal. He further noted Claimant's January 7 and January 9 chest x-rays showed no focal abnormality, pneumonia, or pleural fluid. Dr. Holcomb's assessment was mild to moderate persistent extrinsic allergic asthma with "Post-Covid-19 reactive airway and asthma syndrome," likely triggered by previous COVID-19 infections.

14. On May 25, 2022, Claimant returned to Dr. Rudolf. At this visit, Claimant was upset about her lack of improvement. Dr. Rudolf noted that she became dyspneic after ambulating 20 yards and that her oxygen saturation dropped into the upper 80s. He also noted that her heart rate increased and remained elevated at or above 100 beats per minute, even at rest. Based on his assessment, he concluded that Claimant was unable to return to work. Moreover, he diagnosed her with post-COVID chronic dyspnea.

15. On June 20, 2022, Claimant was evaluated by cardiologist Andrew Carter, D.O., for complaints of progressive dyspnea on exertion. She reported a decline in functional capacity over the preceding six months, as well as nocturnal episodes of hypoxemia, with oxygen saturation readings below 70% during sleep as measured by her personal device, an iWatch. An EKG performed during the visit showed normal sinus rhythm. Dr. Carter recommended an overnight oximetry study and an exercise stress echocardiogram.

16. On August 30, 2022, Claimant underwent an IME with Dr. Lesnak, which was performed on behalf of Respondents. Dr. Lesnak was asked to determine Claimant's functional status, any ongoing work restrictions, and whether she had reached maximum medical

improvement. Dr. Lesnak obtained a medical history from Claimant, reviewed the available medical records, and conducted a physical examination. He noted that although Claimant reported a variety of subjective symptoms, including fatigue and cognitive complaints, his examination revealed no objective physical findings consistent with ongoing functional impairment. He also stated that neurological testing and cardiopulmonary evaluations, where available, were within normal limits or showed no abnormalities.

17. Dr. Lesnak stated that he found no objective evidence to support any current medical restrictions or functional limitations resulting from her COVID-19 infection. He indicated that the passage of time since the initial infection, the absence of sustained abnormal diagnostic findings, and Claimant's presentation during the examination did not substantiate any lasting impairment. Dr. Lesnak concluded that Claimant had reached maximum medical improvement. He further concluded that even if Claimant had contracted COVID-19 through work, there was no objective basis for imposing ongoing restrictions attributable to the condition. Moreover, he also indicated that the available evidence did not support a causal connection between Claimant's COVID-19 infection and her employment, concluding that her condition was not work-related.

18. On October 12, 2022, Dr. Rudolf, issued a report in response to Dr. Lesnak's IME. Dr. Rudolf disagreed with Dr. Lesnak's conclusions and noted that he had worked with Claimant in the emergency department before and during her illness and it was his opinion that Claimant had a classic case of Long COVID. Dr. Rudolf noted that he had personally treated Claimant both before and after her COVID-19 illness and attested to her prior ability to work full-time as a night-shift RN without performance issues or absenteeism. He described her current condition as a "classic case of long COVID," marked by a complicated and disabling course of illness with slow recovery. Importantly, Dr. Rudolf reported that Claimant experiences chronic resting tachycardia and oxygen desaturation with minimal physical exertion, such as walking down a hallway to his clinic - findings observed by Dr. Rudolf that are not addressed by Dr. Lesnak. Dr. Rudolf further emphasized that Claimant's preexisting conditions, while present, increased her susceptibility to a more severe COVID-19 outcome and do not undermine the causal relationship between her illness and her workplace exposure. Again, Dr. Lesnak did not

address these risk factors or the potential interaction between Claimant's underlying health and the severity of her post-COVID-19 symptoms.

19. As part of his evaluation of Claimant, Dr. Lesnak administered a "Computerized Outcome Assessment." This assessment appears to be a psychological screening tool designed to evaluate factors such as distress and symptom validity. The ALJ has significant concerns regarding Dr. Lesnak's use of this instrument in this case. First, his report indicates that he is board certified in physical medicine and rehabilitation and electrodiagnosis. There is no indication that he is a licensed psychologist, psychiatrist, or otherwise qualified to interpret psychological testing, nor is there evidence that the assessment was reviewed or interpreted by an appropriately credentialed expert. Second, the report fails to explain the clinical validity or relevance of this tool in the context of evaluating post-COVID-19 conditions, particularly in a patient with Claimant's complex medical history and persistent symptoms. The assessment is presented without any discussion of its applicability to the types of functional impairments typically associated with Long COVID. Third, the test appears to have been used not to understand the nature of Claimant's symptoms, but to discredit them. Dr. Lesnak uses the results to suggest that Claimant's symptom reports are exaggerated or unreliable, without exploring whether her distress could reasonably stem from her numerous documented medical conditions. Again, in this context, the assessment does not appear to be used as a clinical aid, but rather as a tool to cast doubt on Claimant's credibility. Thus, Dr. Lesnak's reliance on this screening tool - without psychological expertise, appropriate clinical context, or consideration of the broader medical record - appears to be a strategic misuse of this tool. Rather than providing a medically sound evaluation of the effects of Claimant's COVID-19 infection, he employs the assessment in a manner that attempts to characterize Claimant as malingering, dismissing both her subjective complaints and the objective findings of her treating physicians without substantive analysis. As a result, the ALJ finds that his approach undermines the objectivity of Dr. Lesnak's evaluation and diminishes the reliability and credibility of his opinions and conclusions.

20. On September 26, 2022, Claimant underwent an echocardiogram stress test. The test demonstrated Claimant had limited functional capacity for her age due to exercise-induced hypoxemia, even with supplemental oxygen. While there were no clinical

symptoms or objective evidence of myocardial ischemia, the testing demonstrated Claimant's supplemental oxygen during the test had to be increased from 2 Lpm to 6 Lmp due to her oxygen saturation levels decreasing to 84% during the test. Thus, the stress testing resulted in fatigue, chest tightness, and hypoxia-even with supplemental oxygen. Moreover, her symptoms of fatigue, chest tightness, and hypoxia resulted in Claimant stopping the test.

21. On September 26, 2022, Claimant also underwent a sleep study due to her dyspnea on exertion and nocturnal hypoxemia. The sleep study demonstrated mild to moderate obstructive sleep apnea as well as "hypoxemia independent of sleep apnea." It was also noted that Claimant's use of Norco, which she was taking for her preexisting neuropathy, might be contributing to her daytime somnolence and worsening sleep apnea. On the other hand, it was not noted that the Norco was impacting her hypoxemia. Based on the sleep study, it was recommended that Claimant continue with her oxygen supplementation.

22. On October 9, 2022, Claimant presented to Mercy Medical Center due to shortness of breath and severe fatigue. It was determined that Claimant was severely anemic and was diagnosed with microcytic anemia. Thus, Claimant was admitted to the hospital. During her hospitalization, she received three units of packed red blood cells to raise her hemoglobin. A GI consult was obtained for esophagogastroduodenoscopy (EGD). The EGD, performed by Dr. Todd Sheer on October 11, 2022, revealed large esophageal varices. Therefore, he placed seven bands around the varices, but yet no active bleeding source was identified. While hospitalized, the records also note that she was newly diagnosed with suspected NASH cirrhosis of the liver.

23. On October 18, 2022, Claimant returned to her pulmonologist, Dr. Holcomb, and he was made aware of her recent diagnoses of microcytic anemia and cirrhosis. At that time, his assessment included persistent extrinsic allergic asthma, likely triggered by her COVID-19 infections, to be treated with continued use of her inhalers. His assessment also included "post COVID-19 reactive airway and asthma syndrome as well as a component of long-hauler syndrome."

24. On January 17, 2023, L. Barton Goldman, M.D., conducted an IME of Claimant, via telemedicine, and issued a report dated March 9, 2023. The IME was requested by Claimant to assess whether she developed Long COVID as a result of her January 9, 2022, COVID-19 infection. Dr. Goldman conducted a comprehensive review of Claimant's medical records, including reports from her treating providers, hospitalization records, and diagnostic studies, and interviewed Claimant for almost 2 hours. A physical examination was not performed due to Claimant's compromised health and severe winter weather conditions, however, Dr. Goldman concluded that the information available was sufficient for him to render medically probable opinions.

25. Dr. Goldman noted that prior to January 2022, Claimant had multiple preexisting conditions, including diabetes mellitus, obstructive sleep apnea, chronic fatigue syndrome, and peripheral neuropathy. He further noted that despite these conditions, Claimant was working full time without restrictions as an emergency department nurse and functioning independently in her daily activities. However, he also noted that after Claimant contracted COVID-19 at work in early January 2022, she developed a constellation of symptoms including exertional and nocturnal hypoxemia, tachycardia, severe fatigue, musculoskeletal pain, cognitive impairment, and shortness of breath. He also noted that Claimant's symptoms persisted and progressively worsened over time.

26. Dr. Goldman concluded that Claimant's clinical course, history, and diagnostic studies were consistent with long COVID. He cited objective evidence from a stress echocardiogram performed in September 2022, which showed reduced functional capacity for Claimant's age and exercise-induced hypoxemia, as well as a sleep study documenting oxygen desaturation independent of her sleep apnea. He also noted a hospitalization in October 2022 for symptomatic microcytic anemia and respiratory failure, which he attributed to iron dysregulation – which he indicated is a condition reported in the medical literature as a recognized consequence of Long COVID. Dr. Goldman also considered Claimant's contention that her oxygen saturation levels dropped into the 70s during light exertion and that she required continuous or near-continuous supplemental oxygen.

27. Dr. Goldman also noted that the Claimant's history and symptoms could be consistent with postural orthostatic tachycardia syndrome (POTS). He recommended that, to help confirm or rule out this diagnosis, the Claimant undergo autonomic testing that includes a tilt table test. He also indicated that additional autonomic studies could be useful in evaluating for POTS. Moreover, he also concluded that POTS can occur as a consequence of COVID-19, noting that post-COVID or "long COVID" patients may present with symptoms consistent with POTS and that this possibility should be evaluated with appropriate autonomic testing such as a tilt table test. In addition, he concluded that if Claimant has POTS, additional treatment should be considered to improve her condition - such as a prescription of fludrocortisone, pyridostigmine, midodrine, or beta-blockers.

28. Dr. Goldman also reviewed and commented on Dr. Lesnak's report and conclusions. Dr. Goldman disagreed with the findings of Dr. Lesnak, who concluded that Claimant did not suffer from a work-related COVID infection and that her symptoms were attributable to preexisting conditions or community-acquired COVID. Dr. Goldman found that Dr. Lesnak's conclusions failed to account for objective clinical findings, the temporal relationship between Claimant's illness and her occupational exposure, and the growing body of medical literature supporting the diagnosis and functional impact of Long COVID. Dr. Goldman concluded that Claimant's COVID-19 infection most likely occurred in the course of her employment and that her ongoing symptoms, including diffuse myalgias and arthralgias, brain fog, increased anxiety and depression, dizziness, tachycardia and hypoxia are due to her occupational Long COVID.

29. Dr. Goldman also acknowledged that the medical evidence regarding Long COVID is evolving and primarily empirical in nature. He explained that his opinions are based on the current state of medical knowledge and the available literature, including studies addressing Long COVID symptomatology and occupational exposure. He noted that his conclusions could be subject to change with additional diagnostic testing or as the medical community's understanding of Long COVID continues to develop. Nevertheless, based on the records and information available at the time of his evaluation, Dr. Goldman provided medically probable opinions that were consistent with Claimant's clinical course.

30. The ALJ finds Dr. Goldman's opinions and conclusions to be reliable, credible, and persuasive. His analysis is grounded in Claimant's clinical presentation, medical records, and the current medical literature on Long COVID. The ALJ also acknowledges Dr. Goldman's candid recognition that his opinions could change as additional diagnostic testing is performed or as further research enhances the medical community's understanding of Long COVID. Nonetheless, his conclusions are supported by the evidence presently available in the record.

31. On March 2, 2023, Claimant returned to the Mercy Medical Center emergency department. Her primary complaints included shortness of breath. At that time, her oxygen saturation level was 92%, but yet that was while using 3L of oxygen. Claimant was admitted to the hospital. After further assessment, the final diagnosis was "severe persistent asthma with exacerbation." The records also indicate "Suspected postural orthostatic tachycardia syndrome (POTS) post COVID."

32. On June 28, 2023, Claimant was evaluated by Dr. Garcia, who noted a diagnosis of chronic respiratory failure (unspecified whether hypoxic or hypercapnic), restrictive lung disease, a history of asthma, and post-COVID syndrome. Dr. Garcia recommended continued use of supplemental oxygen and observed that Claimant was acutely dyspneic during the visit. In fact, due to the severity of her symptoms, and his assessment of her condition, Dr. Garcia recommended Claimant take an ambulance to the hospital. Although initially reluctant, Claimant ultimately agreed to have an ambulance called and to take her to the hospital. Under the assessment for restrictive lung disease, he indicated that it may be due to obesity. However, he listed obesity as the potential cause regarding his assessment of restrictive lung disease. Thus, the ALJ does not interpret that to mean he thought her obesity was the cause of the other conditions he diagnosed her with as well as all of her symptoms, such as hypoxia and tachycardia. Moreover, even if he did mean that all of her symptoms were due to her obesity, the ALJ does not find such hypothesis to be his final opinion since it does not appear that he was able to review all of her prior medical records, since her COVID-19 infection in 2022, and render a final opinion.

33. On July 12, 2023, Claimant returned to Dr. Rudolf. At this appointment, Dr. Rudolf stated that Claimant has a terrible case of Long COVID-19 with severe pulmonary disease. He further noted that Claimant is oxygen-dependent, and is repeatedly hospitalized for exacerbations, each time with only temporary improvement. He indicated that Claimant was scheduled to follow-up with a pulmonologist and the Oklahoma Long COVID clinic. Based on his assessment, he went as far as suggesting Claimant discuss the possibility of a lung transplant with the pulmonologist.

34. On July 26, 2023, Dr. Rudolf responded to a letter from Respondents' counsel inquiring about whether Claimant was at MMI. He stated that Claimant is not at MMI because Claimant will make general improvement and then have setbacks. He went on to state that her illness continues to devastate her, despite therapy. He also stated that since Long Covid is a relatively new disease, the science on it is lacking.

35. Between August 28, 2023, and October 17, 2023, Respondents conducted surveillance of Claimant, resulting in seven video recordings, Despite Dr. Rudolf's July 2023 note in his record that Claimant was doing poorly and required continuous oxygen support, none of the surveillance videos depict her using supplemental oxygen. Instead, the videos show Claimant engaging in various physical activities without apparent respiratory distress, including walking, moving trash, running errands, some very light yard work, and shopping. Her yardwork consisted of hosing her yard and spreading seed. Her shopping included pushing shopping carts and handling bags of what appears to be mulch. On September 20 and October 17, 2023, she appeared to use a vaping device during surveillance.

36. On October 18, 2023 - the day after the final surveillance recording – Dr. Rudolf states in his report that during a telephone consultation Claimant again reported that she experienced constant dyspnea and required continuous oxygen, which is inconsistent with her observed activities during the surveillance period in which she is not using oxygen. Dr. Rudolf also noted in his report that Claimant was heard to become easily winded, even when speaking on the telephone. At this appointment, he did discuss with Claimant that there is not likely any specific medical treatment that will improve her lung

function, exercise tolerance, and ability to work, and that she might be approaching MMI – upon which she will then be referred for an impairment rating.

37. On December 6, 2023, Dr. Rudolf responded to a letter sent from Respondents' attorney regarding the surveillance. Dr. Rudolf acknowledged reviewing a portion of the surveillance video but deferred making any new medical conclusions. He indicated that he discussed with Claimant at her last visit that she was approaching MMI, would be referred to a Level II physician for an impairment rating, and that she would need ongoing medical care and supplies such as oxygen.

38. On December 20, 2023, Claimant was evaluated by Dr. Rudolf. At this evaluation, it appears she revised her oxygen usage, stating she could tolerate short periods without oxygen. After reviewing the surveillance and noting that Claimant had been relatively stable for several months, Dr. Rudolf continued to diagnose her with symptoms consistent with Long COVID. He stated that Claimant's condition appeared permanent, with substantial limitations to her ability to work. He placed her at maximum medical improvement as of that date and recommended referral to a Level II physician for an impairment rating. Dr. Rudolf also concluded that Claimant would require ongoing medical care, including continued oxygen therapy, medications, and treatment by specialists in pulmonary medicine or Long COVID.

39. On February 12, 2024, Dr. Douglas Scott evaluated Claimant and concluded that she reached maximum medical improvement on January 24, 2022, and assigned her a 0% whole person impairment. He based his conclusion on pulmonary function testing from April 2022, which was within normal limits and included a stress test reflecting 4.4 METS. He attributed Claimant's ongoing symptoms to obesity, sleep apnea, and possible chronic fatigue, and concluded that no further treatment or restrictions were necessary.

40. Dr. Scott appears to have relied heavily on the video surveillance of Claimant performing isolated daily activities to support his conclusion of neither impairment nor need for maintenance medical treatment. He cited the surveillance video as evidence that Claimant functioned without difficulty yet failed to sufficiently reconcile them with the clinical record or address symptom variability. He also did not adequately explain why short periods of activity should outweigh any objective findings of functional limitation,

including exertional desaturation and tachycardia. Furthermore, he appears to have relied upon the Computerized Outcome Assessment test performed by Dr. Lesnak, which the ALJ finds neither reliable nor persuasive. In addition, as found and set forth below, after the evaluation by Dr. Scott, Claimant was taken to the emergency room and diagnosed with acute respiratory failure and acute hypoxemic failure and hospitalized. The fact that Claimant was apparently so sick during her evaluation with Dr. Scott, but yet Dr. Scott did not apparently notice anything significantly wrong with Claimant, tends to indicate he performed a very cursory and subpar examination of Claimant. As such, Dr. Scott's conclusions are not found to be persuasive regarding the date Claimant reached MMI, the extent of Claimant's permanent impairment, and need for ongoing medical treatment.

41. After the February 12, 2024, appointment with Dr. Scott, Claimant took a cab to the airport. While in the cab, Claimant developed shortness of breath and had the cab pull over and call an ambulance. Upon arrival, EMS found Claimant to be extremely tachypneic and in respiratory distress. Claimant was taken to the emergency room at Porter Adventist Hospital, where she was ultimately admitted and hospitalized through February 17, 2024. In the emergency room she was diagnosed with acute respiratory failure and acute hypoxemic failure. The following day, and after being admitted, her diagnosis included anemia (hemoglobin 8.4), diabetes mellitus, obesity, and NASH (nonalcoholic steatohepatitis). While hospitalized, she received IV iron therapy. Claimant also underwent bronchodilator therapy and it did relieve some of her symptoms, however, no definitive diagnosis of asthma or COPD was established. But the emergency room physician thought that it appeared Claimant had an exacerbation of something that developed due to her COVID.

42. On February 13, 2024, while hospitalized, the cause of Claimant's shortness of breath and acute hypoxemic respiratory failure was still unclear. Possible causes considered by the treating physicians were reactive air disease from Long COVID, hepatopulmonary syndrome due to her NASH liver disease, as well as her obesity.

43. While hospitalized, Claimant also underwent a transthoracic echocardiogram. Although a "bubble study" was also planned, it could not be completed. The ALJ finds that the echocardiogram and the attempted bubble study were additional diagnostic measures

undertaken to evaluate and determine the cause of Claimant's tachycardia and respiratory symptoms - such as Long COVID - and to determine treatment options to cure and relieve Claimant from her symptoms. Accordingly, these ongoing diagnostic efforts to determine the extent of her COVID complications and to determine treatment options are inconsistent with Claimant being at MMI as of December 20, 2023.

44. On April 26, 2024, Claimant was hospitalized at Comanche County Hospital in Oklahoma for reported wheezing and shortness of breath. Her hemoglobin had declined to 7.3. She was diagnosed with sepsis secondary to asthma/post-COVID syndrome exacerbation and received IV iron and a blood transfusion. No acute findings were identified on EKG or chest x-ray.

45. On July 28, 2024, through August 3, 2024, Claimant was hospitalized again for acute hypoxic respiratory failure. During this hospitalization, her hemoglobin was noted to be 8.1, and she received both blood transfusions and pulmonary treatment. Her diagnosis at discharge included, but was not limited to, acute asthma exacerbation and acute hypoxic respiratory failure requiring BIPAP, microcytic anemia, anxiety disorder, and decompensated liver cirrhosis and ascites.

46. Claimant's hospitalizations for worsening respiratory symptoms after Dr. Rudolf's MMI determination of December 20, 2023, is evidence that she was not at MMI. Furthermore, the continued diagnostic efforts - including additional testing to assess a potential relationship between her symptoms and COVID, and to determine treatment options to cure and relieve Claimant from her symptoms – is also evidence that Claimant had yet to reach MMI.

Dr. Mayer's Division Independent Medical Examination

47. On October 24, 2024, Dr. Annyce Mayer performed a Division Independent Medical Examination (DIME) and issued her report on November 22, 2024. In reaching her conclusions, Dr. Mayer reviewed approximately 1,357 pages of medical records and surveillance video of Claimant. She also conducted a physical examination and obtained a clinical history from Claimant. Dr. Mayer acknowledged the limitations in the records and noted that some diagnostic tests - such as a high-resolution chest CT or post-

bronchodilator pulmonary function testing - were not available. She further noted Claimant's self-reported memory issues and stated that the history provided was to the best of Claimant's recollection.

48. Dr. Mayer concluded Claimant contracted COVID-19 in the course and scope of her employment and developed Long Covid. She further concluded that the Long COVID caused, or partially caused, the following:

- Chronic airway manifestations of COVID-related pneumonia.
- Post-COVID-19 tachycardia, including symptoms consistent with postural orthostatic tachycardia syndrome (POTS).
- Fatigue and activity intolerance.
- Impaired cognitive status.
- Chronic hypoxemic respiratory failure, which she concluded was multifactorial, but partially caused by the work-related Long COVID conditions.
- Acute on chronic hypoxic respiratory failure, which recurred due to variable exacerbations of her Long COVID symptoms and other comorbid conditions.
- Situational anxiety and depression attributable to her post-COVID functional limitations and disability.

49. Dr. Mayer also determined that Claimant's post-COVID autonomic dysfunction was directly attributable to her work-related COVID-19 infection, manifested primarily as sinus tachycardia and postural tachycardia.

50. And while Claimant's pulmonary function tests and imaging did not show classic post-COVID abnormalities, Dr. Mayer concluded that the evidence that was available to her supports a diagnosis of airway manifestations of Long COVID.

51. Dr. Mayer also concluded that a number of conditions were probably not caused or were probably not aggravated by Claimant's work-related COVID-19. She concluded that:

- Claimant's pulmonary hypertension, diagnosed as probable Group 3, was likely pre-existing and not caused or aggravated by the work-related COVID-19

infection. Contributing factors included undiagnosed sleep apnea, nocturnal hypoventilation, obesity, and chronic opioid use.

- Claimant's portal hypertension was pre-existing, based on underlying mild hepatic cirrhosis, metabolic dysfunction-associated steatotic liver disease, risk factors such as obesity, type 2 diabetes, chronic hepatitis C infection, and possible autoimmune disease.
- Claimant's hepatopulmonary syndrome was probably preexisting, secondary to chronic liver disease and portal hypertension. However, she also stated that the course of the condition was likely accelerated by the work-related COVID-19 infection.
- Claimant's recurrent anemia was not caused by the COVID-19 infection, but rather likely secondary to portal hypertensive gastropathy and iron deficiency.
- Claimant's insulin-dependent diabetes, chronic pain from diabetic peripheral neuropathy, and diffuse lymphadenopathy of unknown cause as pre-existing or unrelated to the COVID-19 infection.
- Claimant had mild to moderate sleep apnea, and hypoxemia independent of sleep apnea, but did not attribute the development of sleep apnea to the COVID-19 infection.

Impairment Rating Provided by DIME Physician

52. Dr. Mayer performed a permanent impairment evaluation in connection with the Claimant's work-related COVID-19 exposure and resulting symptoms pursuant to the AMA Guides. She identified two distinct categories of work-related impairment: (1) impairment of the respiratory system, and (2) impairment due to autonomic dysfunction. Dr. Mayer concluded that both categories stem from the Claimant's occupationally acquired COVID-19 and resulting Long COVID.

53. In assessing Claimant's respiratory impairment, Dr. Mayer first considered the pulmonary function testing dated April 27, 2022. She acknowledged that the test was conducted 2.5 years earlier but determined it remained clinically appropriate for use in this case due to the chronic nature of Claimant's condition. The test results would place Claimant in Impairment Class 1 (0% whole person impairment) per Table 8. However, Dr. Mayer

determined that the pulmonary function testing also did not accurately reflect the extent of Claimant's functional impairment due to her ongoing post-COVID respiratory symptoms, including exertional shortness of breath and need for daily respiratory medications and supplemental oxygen.

54. Given Claimant's clinical presentation, Dr. Mayer found it more appropriate to rate Claimant's respiratory impairment under the asthma criteria in Table 9, as she indicated is permitted by the Guides when impairment is not directly related to lung function alone. She used the ATS Guidelines, as she indicated is required under Colorado's Level II accreditation curriculum. Dr. Mayer indicated that Claimant was using Albuterol daily as needed, and Symbicort, an inhaled corticosteroid, at a dosage presumed to be less than 800 mcg of beclomethasone equivalent.

55. Based on these factors, Dr. Mayer assigned a severity score of 2, which under the ATS-to-AMA translation places Claimant in Impairment Class 2, corresponding to a range of 10–25% whole person impairment. Then, considering Claimant's level of medication use and persistent symptoms, Dr. Mayer determined that a 13% whole person impairment was appropriate.

56. To evaluate Claimant's post-COVID tachycardia, Dr. Mayer considered and ruled out a cardiovascular-based impairment under the Cardiovascular System chapter, noting that Claimant's echocardiograms were otherwise unremarkable except for mild pulmonary hypertension, which she believed may have been preexisting. Instead, Dr. Mayer found the tachycardia and associated symptoms to be manifestations of post-COVID autonomic dysfunction, best rated as an episodic neurologic disorder under the Nervous System chapter.

57. Under the "Episodic Neurologic Disorders" section, impairment is rated based on the frequency, severity, and impact of episodes on activities of daily living. Dr. Mayer placed Claimant in Description 2, which corresponds to disorders that "interfere moderately with activities of daily living." Her rationale included:

    - Claimant's sustained elevated heart rate (129 bpm) during the standing resting portion of a cardiac stress test, which required supplemental oxygen increased from 2 to 6 liters during exercise due to desaturation to 84%.

- Dr. Mayer's direct observation of Claimant during the evaluation, which occurred on a "bad day" following a stressful early morning trip from Oklahoma to Denver. During the exam, Claimant's heart rate remained in the 130s despite emotional calming, and she appeared pale but had adequate oxygen saturation.
- Cognitive dysfunction, evidenced by a Mini-Mental State Exam score of 23.5 out of 30, which Dr. Mayer found abnormally low for Claimant's age and education.
- Although surveillance video showed Claimant performing basic activities without using supplemental oxygen (e.g., walking, light yard work, and driving), Dr. Mayer found those actions to be consistent with Claimant's report of what she could manage on a good day. She questioned one activity (moving large bags at a store) but could not determine the weight or context, so she did not heavily weigh that observation.

58. Based on the Claimant's medical records, her observations, physical examination, Claimant's reported history and symptoms, and the surveillance video, Dr. Mayer concluded that Claimant met the criteria for the maximum rating within Description 2 ("an episodic neurological disorder is of such severity as to interfere moderately with the activities of daily living") and assigned a 45% whole person impairment for the autonomic dysfunction. She did not find Claimant's condition to be so severe as to require confinement or constant supervision, which would have placed her in the next higher category.

59. Dr. Mayer combined the 13% respiratory impairment with the 45% neurological impairment using the Combined Values Table in accordance with AMA Guides and this resulted in a final total whole person impairment rating of 52%.

60. Dr. Mayer found no basis for apportionment, citing the absence of any documented preexisting respiratory disease or autonomic dysfunction. She noted that Claimant returned to full-time work as an emergency room nurse following a prior respiratory illness and was not using oxygen or respiratory medications prior to contracting COVID at work.

61. The ALJ finds that Dr. Mayer's impairment rating is reasonably supported by the medical record and Claimant's reported symptoms and limitations. The ALJ also finds that the

impairment rating provided by Dr. Mayer is based and supported by a reasonable interpretation and application of the AMA Guides based on the totality of the evidence presented.

MMI Determination by DIME

62. Dr. Mayer placed Claimant at MMI on November 22, 2024, the date of her report. Dr. Mayer stated that she placed Claimant at MMI at that time because in her medical opinion, she had not seen a previous medical report that put forth a well-reasoned medical opinion as to why Claimant should have been placed at MMI at an earlier date.

63. In her report, Dr. Mayer referenced the February 12, 2024, report from Claimant's hospitalization at Porter Hospital, which occurred after Dr. Rudolf placed Claimant at MMI. The report notes that [the doctor(s) concluded that Claimant "appears to have acute exacerbation of whatever this chronic issue from COVID has developed insider of [Claimant's] lungs." Dr. Mayer also referenced the February 13, 2024, report from Claimant's hospitalization at Porter, where Claimant underwent a transthoracic echocardiogram with agitated saline (bubble) contrast to assist in determining the cause of Claimant's symptoms. Although the "bubble" portion of the diagnostic test could not be performed, the ALJ finds that Claimant's hospitalization - prompted by an increase in symptoms combined with the provider(s)' statements indicating uncertainty as to the specific chronic pulmonary condition resulting from Claimant's COVID-19, constitutes evidence that Claimant's condition was not stable and that she was not at MMI when Dr. Rudolf placed her at MMI and that additional diagnostic testing was performed to identify the precise chronic condition caused by COVID-19, in order to guide appropriate treatment to cure and relieve Claimant from the effects of her work condition(s).

64. Dr. Mayer also noted in her report that additional medical treatment - including medications and therapy - to address Claimant's work-related autonomic dysfunction and post-COVID-19 tachycardia - was reasonably likely to improve Claimant's condition. She further observed that while the standard treatment approach for such conditions could be detrimental to patients with liver disease absent coordinated specialty care from a hepatologist, such coordinated treatment remained available. This acknowledgment that further treatment could cure or relieve the effects of Claimant's work-related conditions is

also inconsistent with Claimant being at MMI in December 2023 when Dr. Rudolf placed her at MMI.

Dr. F. Mark Paz IME

65. On April 22, 2025, Claimant underwent an IME that was performed by Dr. F. Mark Paz on behalf of Respondents. Dr. Paz performed a physical examination, reviewed Claimant's medical records, and reviewed surveillance video of Claimant. He also obtained a detailed history from Claimant. Claimant's complaints at the time of the IME included, but were not limited to, sleep disruption, cough, wheezing, shortness of breath, fatigue, chest tightness, palpitations, dizziness, nausea, numbness and tingling, depression, memory problems, increased heart rate, and pain in various locations.

66. Dr. Paz concluded that the sole work-related diagnoses were COVID-19 infection and shortness of breath that was contemporaneous with the acute illness.

67. Dr. Paz found that the following conditions were not causally related to Claimant's COVID-19 infection: obesity; peripheral neuropathy of the lower extremities; periumbilical hernia; rectus diastasis; elevated blood pressure; tachycardia; hypoxia; type 2 diabetes mellitus; nocturnal hypoxia; obstructive sleep apnea; cirrhosis; portal hypertension; esophageal varices; nonalcoholic steatohepatitis (NASH); vitamin D deficiency; severe microcytic anemia; iron deficiency; and splenomegaly. Dr. Paz attributed these conditions to pre-existing chronic illnesses, including poorly controlled diabetes mellitus type 2 and the natural progression of hepatic disease related to prior hepatitis C infection, and concluded that none of the conditions were aggravated or accelerated by the claimant's COVID-19 infection.

68. Dr. Paz attributed Claimant's current symptoms - particularly tachycardia, hypoxia, and fatigue - to her chronic microcytic anemia, hepatic disease, and complications of diabetes mellitus. He concluded that these are not causally related to the work-related COVID-19 infection of January 2022.

69. Dr. Paz indicated that he found no objective findings to support a diagnosis of post-acute COVID-19 syndrome or a related pulmonary or neurologic impairment. He further

concluded, based on reasonable medical probability, that there is no ongoing impairment or functional limitation causally related to the work-related COVID-19 infection.

70. He also did not set forth a basis to dispute the date of MMI assigned by Dr. Rudolf.

71. Based on his evaluation, and application of the AMA Guides, Dr. Paz found no rateable permanent impairment attributable to the work-related COVID-19 infection.

72. Dr. Paz disagreed with the impairment rating provided by Dr. Mayer in the DIME. While Dr. Mayer had assigned impairment based on diagnoses of asthma and autonomic dysfunction stemming from Long COVID, Dr. Paz concluded that these diagnoses are not supported by objective medical evidence, and that Claimant's tachycardia and other symptoms were instead attributable to anemia and not to any autonomic or pulmonary dysfunction.

73. Dr. Paz also noted that Claimant's presentation to medical providers included numerous subjective complaints not supported by objective clinical findings. He referenced an Outcomes Assessment completed by Dr. Lesnak, which suggested the presence of a somatoform disorder, and recommended a psychological or neuropsychological evaluation.

74. Additionally, during the IME, Claimant described functional limitations, including difficulty walking long distances, chronic back pain, and restricted use of the right upper extremity due to a non-work-related fall. However, Dr. Paz reviewed the surveillance video of Claimant and concluded that it was inconsistent with Claimant's reported limitations. He also concluded that her functional impairments are better explained by non-work-related chronic conditions, particularly chronic microcytic anemia.

75. Dr. Paz also concluded that Claimant does not require permanent work restrictions because of her COVID-19 infection. However, he noted that her non-industrial conditions, including diabetic neuropathy, anemia, chronic pain, and shoulder injury, may preclude work above the sedentary level.

76. Lastly, Dr. Paz concluded that no medical maintenance or ongoing treatment is required for the work-related Covid-19 exposure.

Dr. F. Mark Paz Testimony

77. Dr. Paz also testified at hearing and was qualified as an expert in occupational medicine and rehabilitation. Moreover, he is also Level II Accredited through the Colorado Division of Workers' Compensation.

78. His testimony was consistent with his written report. He maintained the same ultimate opinions regarding causation and relied on the same non-work related chronic medical conditions (hepatitis C, cirrhosis, and microcytic anemia) as the primary alternative explanation for Claimant's symptoms and any impairment.

79. In isolation, Dr. Paz' testimony and opinions were logical, consistent, supported by the medical record, and seemed credible.

80. Dr. Paz has been licensed to practice medicine since 1991. His residency training was in internal medicine. After his residency, he practiced critical care medicine by providing overnight coverage for intensive care unit patients at St. Anthony's Central Hospital between approximately 1993 and 1998. Then, in 1998 he transitioned into practicing occupational medicine full time. There is not, however, any indication that Dr. Paz is board certified in any area. Moreover, Dr. Paz does not treat patients with microcytic anemia, postural orthostatic tachycardia syndrome (POTS), or autonomic dysfunction and tachycardia. Thus, he appears to have little to no practical experience diagnosing and treating patients with those conditions. But, despite a lack of experience in diagnosing and treating patients with those conditions, Dr. Paz has concluded that the symptoms and impairments for which Dr. Mayer rated Claimant under the AMA Guides were caused primarily by Claimant's microcytic anemia and not her COVID infection.

81. Moreover, Dr. Paz acknowledged during cross-examination that a June 2023 pulmonary function test reflected "severe pulmonary restriction," and that he did not recall reviewing that specific record. However, upon further review during his testimony, he stated that he considered the document but had not cited it in his report. He emphasized that he relied more heavily on the April 2022 pulmonary function test showing normal findings and stated that one isolated test showing restriction does not outweigh the weight of prior consistent findings across three years.

82. When shown a 2025 pulmonary function test during cross-examination, Dr. Paz acknowledged that Claimant's lung function appeared to improve with bronchodilator use. However, to minimize the clinical value of that information, he noted that the test also described her effort as "sporadic," potentially affecting its reliability. As a result, he stated that this finding did not meaningfully change his opinion, especially given the lack of consistent wheezing or other pulmonary signs in the objective physical exam findings documented by treating providers.

83. Dr. Paz' dismissal of the 2023 pulmonary function test that reflected severe pulmonary restriction and dismissal of the 2025 pulmonary function test showing improvement with bronchodilator use, demonstrates a bias against evidence that might support a causal connection between Claimant's COVID-19 infection and her current symptoms, and the impairment rating provided by Dr. Mayer.

84. Dr. Paz also disagreed with Dr. Mayer's methodology in her application of the AMA Guides. He concluded that the objective evidence did not support the pulmonary or autonomic rating provided by Dr. Mayer.

85. Although Dr. Paz presented opinions that were internally consistent and addressed certain aspects of the medical evidence, the ALJ finds that his opinions, when weighed against his acknowledged lack of expertise in the relevant conditions and his selective consideration of test results, do not rise to the level of clear and convincing evidence necessary to overcome the DIME physician's findings

Dr. Suzanne Kenneally IME and Testimony

86. On March 27, 2025, Dr. Suzanne Keneally performed a neuropsychological independent medical examination on behalf of Respondents and issued a report on April 10, 2025. She also testified at hearing and her testimony was consistent with her report.

87. The purpose of her examination was to determine the extent of Claimant's psychological and cognitive problems and whether they were the result of Claimant's COVID-19 infection. As part of her evaluation, Dr. Keneally interviewed Claimant, reviewed her medical records, and administered several psychological tests.

88. The psychological testing administered by Dr. Kenneally was found to be valid. Claimant's responses on the Beck Depression Inventory–II indicated severe levels of depression, and her scores on the Beck Anxiety Inventory were also in the severe clinical range. On the Pain Patient Profile, Claimant exhibited elevated levels of depression, anxiety, and somatization, with depression and anxiety being the most prominent elevations.

89. The neuropsychological testing revealed that Claimant met the criteria for mild neurocognitive disorder, with demonstrated deficits in processing speed, working memory, perceptual reasoning, new learning, and executive function.

90. However, Dr. Kenneally found that this broad range of cognitive deficits is atypical for a patient with Long COVID alone. She concluded that Claimant's multiple serious medical conditions were the more likely cause of her cognitive impairments.

91. Dr. Kenneally noted that severe depression and anxiety are known to impair cognitive clarity and speed, and recommended Claimant receive ongoing psychiatric care, including reevaluation of her medication and individual psychotherapy.

92. Dr. Kenneally concluded that the combined effect of these non-work-related conditions were more than sufficient to explain the cognitive deficits identified through the testing.

93. She further concluded that Claimant's current psychological and cognitive status is not solely attributable to her COVID-19 infection, but instead reflects the cumulative impact of her ongoing and severe medical conditions. Dr. Kenneally indicated that Claimant is unlikely to experience functional improvement without consistent psychological treatment and more effective medical management, along with a personal commitment to improving her health.

94. The ALJ finds that Dr. Keneally's report and testimony do not establish that Claimant's cognitive impairments are wholly unrelated to her COVID-19 infection. To the contrary, Dr. Keneally stated in her report that Claimant's current psychological status is not solely attributable to COVID-19, and in her testimony she indicated that Claimant demonstrates a broader range of deficits than is typically observed in individuals whose impairments are caused only by COVID-19. Thus, her testimony supports the conclusion that a portion

of Claimant's cognitive and psychological deficits are related to her COVID-19 infection, while additional deficits are attributable to other, non-work-related conditions. Moreover, the fact that Dr. Keneally found Claimant's presentation is atypical for "long COVID" due to the breadth of her symptoms does not preclude a finding that COVID-19 caused some of Claimant's cognitive problems. In addition, Dr. Keneally's determination that Claimant's psychological test results were valid also supports the finding that Claimant's reported symptoms are genuine and reliable, and weighs against any inference of exaggeration or malingering. As a result, the ALJ finds that Dr. Keneally's findings and opinions do not preclude a finding that at least a portion of Claimant's cognitive problems are attributable to her COVID-19 infection. In other words, Dr. Keneally's findings and opinions support a finding that a portion of Claimant's psychological or cognitive impairments are consistent with COVID-19.

Surveillance of Claimant

95. On August 23, 2023, surveillance was conducted of Claimant. The surveillance on this day shows Claimant driving and running errands as well as walking to and from her vehicle. Moreover, Claimant is driving at times, even though she had a passenger in the car, who looks like they would be able to drive if necessary. Claimant is also seen walking without any apparent distress and is not using any oxygen. The surveillance video from this day is striking, when compared to her medical records, such as the July 2023 report from Dr. Rudolf where he indicates Claimant is oxygen dependent and should consider a lung transplant. There is also additional surveillance from other days showing Claimant watering her yard, throwing down grass seed, shopping, and vaping. Thus, the surveillance does cast some doubt as to the reliability of some of the Claimant's statements to evaluators and medical providers. On the other hand, the DIME physician reviewed Claimant's medical records, interviewed Claimant, physically examined her, and reviewed the surveillance. In the end, the DIME physician concluded the surveillance showed Claimant on good days and it did not appear to influence her – one way or the other – in determining when Claimant reached MMI and the extent of her impairment. In addition, Dr. Rudolf reviewed some of the surveillance and it does not appear to have

caused him to question any of his prior diagnoses and the date he placed Claimant at MMI.

96. The ALJ finds that while the surveillance video raises legitimate questions about the consistency of Claimant's reported limitations and oxygen usage, it must be viewed in context. The surveillance captured Claimant during limited time periods that may represent her better days, as acknowledged by the DIME physician. Moreover, the objective medical findings documented during clinical examinations and testing - including measured oxygen desaturation levels, documented tachycardia, abnormal stress test results, and Dr. Kenneally's valid neuropsychological testing confirming cognitive deficits - provide independent support for the impairments found by the DIME physician. Notably, Dr. Kenneally's determination that the psychological test results were valid undermines any suggestion of malingering and supports the genuineness of Claimant's reported symptoms. These objective findings, obtained under controlled medical conditions, carry greater weight than surveillance footage of selected daily activities.

Claimant's Testimony

97. Claimant testified at hearing. During her testimony, she disputed the accuracy of numerous medical records. Specifically, she testified that:

- Medical records stating she returned to working 12-hour shifts after her COVID-19 infection were incorrect. She testified she only worked 4, 6, and 8-hour shifts when attempting to return to work and never successfully returned to full 12-hour shifts.
- Multiple medical records documenting that she was using oxygen "continuously" were incorrect. She testified she used oxygen at night consistently but only used it during the day "when needed."
- The stress test report stating she stopped the test due to fatigue was incorrect. She testified the test was stopped by medical personnel due to her heart rate increasing too rapidly in the first three minutes.
- Medical records stating she declined workup for esophageal varices were incorrect.

- Dr. Rudolf's December 14, 2022, note stating her multiple hospitalizations were due to a left arm infection and not related to her occupational illness was incorrect.
- Claimant acknowledged engaging in the physical activities shown in the surveillance videos, including yard work, shopping, and lifting bags of mulch. However, she testified these videos captured her on "good days" when she was able to function without supplemental oxygen. She also testified that while she purchased mulch, her husband was the one who spread it.
- When shown using what appeared to be a vaping device in surveillance videos, Claimant testified she was vaping melatonin (a product called "MELO") for anxiety, not nicotine.

98. Claimant's contention that multiple contemporaneous medical records are incorrect, combined with her explanation that the surveillance videos captured her only on "good days," raises questions about her reliability as a historian. These reliability concerns might, in turn, have impacted the DIME physician's evaluation, as Dr. Mayer relied in part on Claimant's reported history and subjective symptoms in reaching her conclusions.

99. However, the ALJ finds Claimant to be credible based on the totality of the evidence. This finding is supported by: (a) the entirety of the medical record documenting objective findings of symptoms and/or impairment; (b) the multiple medical conditions from which Claimant suffers, including documented COVID-19, cirrhosis, microcytic anemia, diabetes with neuropathy, and sleep apnea; (c) the documented variability of her symptoms throughout the record, with periods of improvement followed by acute exacerbations; (d) her multiple hospitalizations for respiratory failure and other serious conditions following her COVID-19 infection; and (e) Dr. Kenneally's neuropsychological testing, which was found to be valid, confirming genuine cognitive deficits and undermining any suggestion of malingering. While Claimant's testimony regarding the inaccuracy of multiple medical records raises the question about her reliability as a witness and historian when communicating with medical providers, the objective medical evidence and pattern of variable symptoms documented throughout the record support a finding that overall, she is credible, even if her recollection of specific events may be impaired by her documented cognitive deficits.

Maintenance Medical Treatment

100. Claimant requires ongoing medical treatment, such as supplemental oxygen, to relieve her from the effects of her work injury/disease and to prevent her condition from deteriorating.

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 Respondents have overcome the opinion of the Division IME physician regarding permanent impairment.

A DIME physician must apply the AMA Guides when determining the claimant's medical impairment rating. Section 8-42-101(3.7), C.R.S.; §8-42-107(8)(c), C.R.S. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

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. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). 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. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). 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. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

Ultimately, the questions of whether the DIME physician properly applied the AMA Guides, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office, supra*. Not every deviation from the rating protocols of the AMA Guides requires the ALJ to conclude that the DIME physician's rating has been overcome as a matter of law. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort*, W.C. No. 4-679-289 (ICAO April 3, 2009). Moreover, a mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO March 22, 2000).

The DIME physician, Dr. Mayer, assigned Claimant a combined whole person impairment rating of 52%, consisting of 13% for pulmonary/respiratory impairment and 45% for autonomic dysfunction, both of which she found directly related to the Claimant's occupational COVID-19.

Dr. Mayer assigned a 13% whole person impairment rating for pulmonary/respiratory impairment. In assessing and determining this impairment, Dr. Mayer first considered pulmonary function testing conducted on April 27, 2022. Although this testing was performed 2.5 years prior to her evaluation, Dr. Mayer determined it remained clinically appropriate due to the chronic nature of the Claimant's respiratory condition. The test results alone would place the Claimant in Impairment Class 1 (0% whole person impairment) under Table 8 of the AMA Guides. Dr. Mayer, however, went on to state that while Table 8 does include criteria for rating exercise testing based on VO2 max, the testing also indicated that Claimant was performing the test with supplemental oxygen that ranged from 2L to 6L due to a drop in Claimant's oxygen saturation to 84%. She also indicated the test was stopped at 4.4 METS because

Claimant had met the target rate of 91% of predicted maximum, but yet the reason for terminating the test was multifactorial. As a result, she concluded that the results did not provide an accurate reflection of the impairment to Claimant's respiratory system.

Pursuant to the discretion afforded to the DIME physician in applying the AMA Guides, as described by Dr. Mayer, she concluded that it was more appropriate to rate Claimant's impairment, as an impairment that is not directly related to lung function, but consistent with asthma or airways hyperresponsiveness under Table 9 of the AMA Guides. She documented the Claimant's daily use of Albuterol as needed and Symbicort at a dosage presumed to be less than 800 mcg of beclomethasone equivalent. Based on these factors, Dr. Mayer assigned a Severity Score of 2, translating to Impairment Class 2 under the ATS-to-AMA conversion table, corresponding to a range of 10–25% whole person impairment. Considering the Claimant's medication regimen and persistent respiratory symptoms, Dr. Mayer selected 13% whole person impairment within that range.

Dr. Mayer further assigned a 45% whole person impairment rating for autonomic dysfunction resulting from post-COVID tachycardia, which she found directly attributable to the Claimant's occupational COVID-19 infection. Dr. Mayer determined that the tachycardia and associated symptoms were neurologic in origin and best rated under the Episodic Neurologic Disorders section of the Nervous System chapter of the AMA Guides rather than as a cardiovascular impairment, given the absence of structural heart disease apart from mild, likely preexisting, pulmonary hypertension. Within that framework, Dr. Mayer placed the Claimant in Description 2, which applies to disorders that "interfere moderately with activities of daily living," and she assigned the maximum rating for that category. In determining the extent to which the tachycardia interfered with Claimants' ability to perform activities of daily living, Dr. Mayer considered the statements of Claimant, her medical records, and the surveillance video.

Based on the totality of the evidence, Dr. Mayer determined that a 45% whole person impairment was appropriate to reflect the severity and functional impact of the autonomic dysfunction, while not meeting the criteria for the next higher category, which would require confinement or constant supervision.

The Respondents rely primarily upon the opinions of Drs. Lesnak, Scott, Keneally, and Paz, Claimant's reliability regarding her statements to medical providers and evaluators, as well as the surveillance video of Claimant, to establish by clear and convincing evidence that it is highly probable that the impairment rating provided by Dr. Mayer is incorrect.

The ALJ has considered and weighed the entirety of the record, including the opinions of all treating and evaluating providers, the expert witnesses, the surveillance video, Claimant's representations to providers and the DIME physician, as well as her testimony. Upon review, the ALJ finds and concludes that Respondents have not met their burden to prove, by clear and convincing evidence - that is, evidence demonstrating it is highly probable that the impairment rating provided by Dr. Mayer is incorrect. Although the record contains differing medical opinions concerning the existence and extent of Claimant's permanent impairment, if any, and different opinions as to how the AMA Guides should have been applied in this case, the totality of the evidence does not establish that it is highly probable that the impairment rating provided by Dr. Mayer based on her application of the AMA Guides, is incorrect.

II. Whether Respondents have overcome the opinion of the Division IME physician regarding the date Claimant reached maximum medical improvement.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a

matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In this case, Dr. Rudolf placed Claimant at MMI on December 20, 2023. However, Dr. Mayer placed Claimant at MMI on November 22, 2024, the date of her report. Dr. Mayer stated that she placed Claimant at MMI at that time because in her medical opinion, she had not seen a previous medical report that put forth a well-reasoned medical opinion as to why Claimant should have been placed at MMI at an earlier date.

Dr. Mayer's report specifically references Claimant's February 2024 hospitalization at Porter Medical Center due to respiratory distress. She also references the diagnostic testing that was conducted during that hospitalization to identify any chronic conditions that may have resulted from the Claimant's COVID-19 infection and to determine the appropriate course of treatment. Thus, the February 2024 hospitalization constitutes evidence that the Claimant's condition may not have been stable at that time and that further diagnostic evaluation was necessary to assess ongoing effects of her COVID-19 infection and to develop a treatment plan to cure and relieve those effects. Thus, it is evidence that Claimant might not have been at MMI in December of 2023.

Dr. Mayer also concluded that additional medical treatment - including medications and therapy to address Claimant's work-related autonomic dysfunction and post-COVID-19 tachycardia - was reasonably likely to improve Claimant's condition. In addition, she also stated that although the standard treatment approach for such conditions could be detrimental to patients with liver disease absent coordinated specialty care from a hepatologist, such coordinated treatment remained available. Thus, her opinion that additional treatment was available that was reasonably likely to improve Claimant's condition is also inconsistent with Claimant being at MMI in December of 2023.

Respondents bear the burden of overcoming Dr. Mayer's opinion regarding the date Claimant reached MMI by clear and convincing evidence. Although other physicians, including Dr. Rudolf, concluded that Claimant reached MMI either prior to or on December 20, 2023 - the date on which Dr. Rudolf placed Claimant at MMI – the ALJ finds and concludes that these contrary opinions combined with the record do not meet the clear and convincing standard. Specifically, they do not establish that it is highly probable Dr. Mayer's MMI determination is incorrect. Rather, the differing medical opinions merely

reflect a divergence in professional judgment, the weight of which falls short of the evidentiary threshold required to overcome Dr. Mayer's opinion.

III. Whether Claimant is entitled to reasonable, necessary, and causally related maintenance medical benefits.

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

The Claimant continues to be symptomatic due to her COVID-19 infection. Her symptoms include, but are not limited to, low oxygen saturation levels that require supplemental oxygen. And although the extent of maintenance medical treatment is not currently known, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that maintenance medical treatment is reasonably necessary to relieve Claimant from the effects of her work-related condition or to prevent further deterioration of her condition.

ORDER

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

1. Respondents have failed to overcome the opinions of the DIME physician regarding the extent of Claimant's permanent impairment and the date she reached MMI.

2. Claimant has a 52% whole person impairment rating.

3. Claimant reached MMI on November 22, 2024.

4. Claimant is entitled to a general award of maintenance medical benefits. Therefore, Respondents shall provide Claimant maintenance medical treatment that is reasonable, necessary, and related to relieve Claimant from the effects of her work-related conditions or to prevent further deterioration of her conditions.

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

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

DATED: August 15, 2025

/s/ Glen Goldman

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

SUMMARY ORDER

A hearing in this matter was held on August 5, 2025, before Robin E. Hoogerhyde, Administrative Law Judge (ALJ), at the Office of Administrative Courts in Denver, Colorado, in Courtroom 3. [redacted] [redacted] (Claimant) was present and self-represented (*pro se*). Video Professor, Inc. and Twin City Fire Insurance Company (Respondents) were represented by Tiffany Scully Kinder, Esq. This matter was digitally recorded beginning at approximately 1:30 p.m.

Claimant filed an Application for Hearing in this matter on May 12, 2025. Claimant endorsed "other" on her application and wrote "I would like to speak to a magistrate in person at a hearing. I do not recall receiving a settlement or money. I need to contest a settlement please." Respondents' Response to the Application for Hearing endorsed "other" and stated "Statute of limitations – claim closed by approved settlement effective 8.21.2008."

At hearing, the ALJ advised Claimant that by proceeding *pro se* she would be held to the same standards as an attorney. *See, e.g.*, *Dyrkopp v. Indus. Claim Appeals Off.*, 30 P.3d 821, 823 (Colo. App. 2001). Claimant affirmatively stated she wished to proceed *pro se*. Respondents' Exhibits A-B were admitted into evidence without objection. Claimant did not offer any exhibits.

Respondents' Exhibit A is a signed settlement agreement between Claimant and Respondents that was approved by the Director of the Division of Workers' Compensation on August 21, 2008. Respondents' Exhibit B is a settlement check for $27,500.00 endorsed by Claimant's attorney and noting that it was placed in his COLTAF account. Based on this evidence, the ALJ asked Claimant to clarify the issue to be heard at hearing, namely whether she was seeking to reopen her claim under section 8-43-303, C.R.S., which states in part "a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact."

Claimant indicated that she was seeking information on whether she had received the proceeds of her settlement agreement. Claimant thanked Respondents for providing her with a copy of the signed settlement agreement and the endorsed check. Claimant stated that she had been unable to reach the attorney who represented her in 2008 to

find out if she had received the proceeds of the settlement. Claimant also stated that she has been diagnosed with schizophrenia, that in 2008 she was in and out of prison, and that she could not remember if she had received the proceeds of the settlement. Claimant asked multiple times if she was allowed to participate in Workers' Compensation and expressed concerns about potential criminal proceedings. Despite multiple promptings by the ALJ, Claimant was unable articulate any specific legal basis for her request for a hearing.

Construing Claimant's statement in her Application for Hearing that she "needed to contest a settlement" as a request to reopen her claim under section 8-43-303, C.R.S., to which Respondents did not object, the matter proceeded. Claimant presented her own testimony which reiterated her statements made when asked about her request for a hearing. Claimant also testified that she was injured at work and that she continued to suffer from that injury.

On cross-examination, Claimant testified she had no reason to believe that Respondents had not complied with the terms of the settlement agreement. The ALJ asked Claimant whether the signature on Exhibit A was her signature, which she testified it was. The ALJ also asked Claimant whether she had any reason to believe that her attorney had not sent her the proceeds of the settlement agreement in 2008, to which she testified no.

After the presentation of Claimant's evidence, Respondents moved for a directed verdict. Respondents argued that Claimant had failed to present sufficient evidence to reopen her claim. The ALJ granted the motion.

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 litigation. § 8-40-102(1), C.R.S. "An injured employee may settle all or part of any claim for compensation, benefits, penalties, or interest. If such settlement provides by its terms that the employee's claim or award shall not be reopened, such settlement shall not be subject to being reopened under any provisions of articles 40 to 47 of this title other than on the ground of fraud or mutual mistake of material fact." § 8-43-204(1), C.R.S. "The party attempting to reopen

an issue or claim shall bear the burden of proof as to any issues sought to be reopened." § 8-43-303(4), C.R.S.

The settlement agreement signed by Claimant states: "Claimant rejects, waives, and forever gives up the right to claim any and all benefits including but not limited to . . . The right to reopen this claim for any reason except as provided in C.R.S. § 8-43-303 on the grounds of fraud or mutual mistake of material fact." Ex. A p. 6.

At hearing the ALJ tried to clarify the relief Claimant was seeking. Claimant stated multiple times that she could not recall if she received the proceeds of the settlement agreement and that she was seeking information on whether she had gotten those proceeds. Claimant also asked multiple times whether she was legally allowed to participate in Workers' Compensation. Claimant did not contend that Respondents had not complied with the terms of the settlement agreement or that the settlement agreement was obtained through fraud or mutual mistake of material fact.

Claimant's requests at hearing for information on whether she had received the proceeds of the settlement does not articulate any specific legal claim under the Act for which the ALJ may provide relief. In essence, Claimant failed to present the ALJ with an actual controversy to decide. *Cf. Arnold v. Carey*, 60 Colo. 499, 499, 158 P. 303, 303 (1915) ("It is not within the province of an appellate court to decide abstract or hypothetical questions, disconnected from the granting of actual relief, or from the determination of which no practical result can follow."). To the extent Claimant was in fact seeking to reopen her claim to contest her settlement, the settlement agreement Claimant signed may be reopened only in the limited circumstances of fraud or mutual mistake of fact. However, Claimant did not allege fraud or mutual mistake of fact and did not present testimony or other evidence to support reopening her claim based on fraud or mutual mistake of fact.

Order

1. Claimant failed to prove her claim should be reopened under section 8-43-303, C.R.S.
2. All matters not determined herein are reserved for future determination.

This decision is final and not subject to appeal unless a full order is requested. The request shall be made at the Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado 80203 within ten (10) working days of the date of service of this Summary Order. § 8-43-215(1), C.R.S. Such a request is a prerequisite to review under section 8-43-301, C.R.S.

Pursuant to Office of Administrative Courts Procedural Rules for Workers' Compensation Hearings (OACRP) Rule 26(B), if either party requests a full order, both parties shall submit a proposed order containing specific findings of fact and conclusions of law within seven (7) days from the date the request for a full order was filed. OACRP Rule 26(B), 1 Code Colo. Reg. 104-3. The proposed orders shall be submitted by email, in Microsoft Word format, in 12-point type, Arial or Helvetica font, to oac-dvr@state.co.us. The proposed order shall also be submitted to opposing counsel and unrepresented parties by e-mail, facsimile, or same day or next day delivery.

SIGNED: August 19, 2025.

Robin E. Hoogerhyde
Administrative Law Judge

Office of Administrative Courts

State of Colorado

Workers' Compensation No. WC 5-199-434-004

Stipulations

At the outset of the hearing, the parties agreed to reserve litigation concerning Claimant's entitlement to maintenance medical care. The parties further stipulated that Claimant reached maximum medical improvement (MMI) on April 23, 2024. The parties' agreements/stipulations were accepted and approved.

Remaining Issues

I. Whether Respondents produced clear and convincing evidence to overcome the whole person impairment rating of Dr. Dwight Caughfield.

Based on the evidence presented, the ALJ orders as follows:

Overcoming the DIME

A. Respondents' request to set aside the impairment rating opinion of Dr. Caughfield is denied and dismissed. Pursuant to § 8-42-107(8), C.R.S., a DIME physician's opinions concerning permanent medical impairment are binding unless it is overcome by clear and convincing evidence. C.R.S. § 8-42-107(8)(b)(III); *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998). Clear and convincing" evidence has been defined as evidence which demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). In other words, to overcome a DIME physician's opinion regarding permanent medical impairment, the party challenging the DIME must demonstrate that the physician's determination in this regard is highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc.*, W.C.

No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

B. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The question whether the DIME properly applied the AMA Guides or other rating protocols is an issue of fact for the ALJ. *See McLane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999). Proof that a division independent medical examiner deviated from the AMA Guides does not compel the ALJ to find that the rating has been overcome by clear and convincing evidence. Rather, proof of such a deviation constitutes some evidence which the ALJ may consider in determining whether the challenge to the rating should be sustained. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Almanza v. Majestic Industries,* W.C. No. 4-490-054 (Nov. 13, 2003); *Smith v. Public Service Company of Colorado,* W.C. No. 4-313-575 (May 20, 2002). Moreover, § 8-42-101(3.7) provides that all physical impairment ratings must be calculated by reference to the AMA Guides. Section 8-42-101(3.5) (a)(II) requires the Director of the Division of Workers' Compensation ("Director") to establish impairment rating guidelines based on the AMA Guides. Pursuant to that directive, the Director promulgated numerous guidelines, many of which are contained in Desk Aid #11 – Impairment Rating Tips (Tips). The Tips contain the Director's recommendations when assigning impairment ratings. The Tips may be relevant to the impairment rating, so a physician's application of those tips goes to the weight the ALJ gives to an impairment rating. *Serena v. SSC Pueblo Belmont Op Co. LLC,* W. C. No. 4-922-344 (ICAO, December 1, 2015); *Kurtz v. JBS Carriers*, W.C. No. 4-797-234 (ICAO, December 7, 2011); *Oritz v. Service Experts, Inc.*, W.C. No. 4-657-974 (ICAO, January 22, 2009). The Industrial Claim Appeals Office gives

deference to the Workers' Compensation Division's interpretation of the AMA Guides as set forth in the Tips. *Serena, supra; Kurtz, supra; Lenox v. United Airlines*, W.C. No. 4-616-469 (ICAO, June 2, 2006). The rating tips recommend that impairment in cases involving a diagnosis of CRPS be determined by using the spinal cord table (Table 1, - Section A, pg. 109, AMA Guides). However, the "peripheral nerve tables may be used if the evaluator deems them more appropriate" (Table 14, pg. 46; Table 51, pg. 77, Table 10 pg. 42, AMA Guides) and in "unusual cases where severe vascular symptoms cause additional impairment of ADLs the physician may choose to combine additional impairment for the vascular tables with the neurological impairment." (Table 52, (p.79) and Table 16, (p. 47), AMA Guides). Nonetheless, "[r]ange of motion should not be used, when it is accounted for in the neurologic portion of the rating. A careful review of Dr. Caughfield's DIME report supports the conclusion that he followed, without deviation, the AMA guides and the recommended protocols for rating Claimant's impairment as set out by Desk Aid #11- Rating Tip 8. Here, Respondents contend, based primarily on the opinions and testimony of Dr. Larson, that Dr. Caughfield erred in concluding that Claimant had CRPS and because his CRPS diagnosis was highly probably incorrect, the impairment rating associated with this diagnosis was also incorrect. The ALJ is not persuaded.

C. The Medical Treatment Guidelines (Guidelines) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); *See also*, *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: "All health care providers shall use the Guidelines adopted by the Division". *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003). "Accordingly, compliance with the Guidelines is mandatory for medical providers." *Chrysler v. Dish Network*, W.C. No. 4-951-475-002 (ICAO, July 15, 2020). Despite this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. C.R.S. § 8-43-201(3). Indeed, Rule 17-4 (A) acknowledges that "reasonable medical care may include deviations from the Guidelines in individual cases."

Chrysler v. Dish Network, *supra.* Nonetheless, the Guidelines carry substantial weight and should be adhered to unless there is evidence justifying a deviation. *See Hall v. Industrial Claim Appeals Office, supra*; *See Logiudice v. Siemans Westinghouse*, W.C. No. 4- 665-873 (ICAO, January 25, 2011).

D. The Medical Treatment Guidelines (MTGs) for Complex Regional Pain Syndrome are found at WCRP 17, Exhibit 7. Pertinent sections provide:

- WCRP, Rule 17, Exhibit 7(G)(2): **Diagnostic Components of Clinical CRPS**: Patients who meet the following criteria for clinical CRPS, consistent with the Budapest criteria, may begin initial treatment with oral steroids and/or tricyclics, physical therapy, a diagnostic sympathetic block, and other treatments found in the Division's Chronic Pain Disorder Medical Treatment Guideline. All treatment should be periodically evaluated with validated functional measures. Patient completed functional questionnaires such as those recommended by the Division as part of Quality Performance and Outcomes Payments (QPOP, see Rule18-8) and/or the Patient Specific Functional Scale can provide useful additional confirmation. Further invasive or complex treatment will require a confirmed diagnosis. (Emphasis added).

E. To meet the criteria for initial treatment, the patient must establish the following:

- Continuing pain, which is disproportionate to any inciting event; and
- At least one symptom in 3 of the 4 following categories:

  -Sensory: reports of hyperesthesia and/or allodynia;

  - Vasomotor: reports of temperature asymmetry and/or skin color changes and/or skin color asymmetry;

- Sudomotor/edema: reports of edema and/or sweating changes and/or sweating asymmetry; or

- Motor/trophic: reports of decreased range-of-motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).

- At least one sign at time of evaluation in 2 or more of the following categories:

  - Sensory: evidence of hyperalgesia (to pinprick) and/or allodynia (to light touch and/or deep somatic pressure and/or joint movement);

  - Vasomotor: evidence of temperature asymmetry and/or skin color changes and/or asymmetry. Temperature asymmetry should ideally be established by infrared thermometer measurements showing at least a 1°C difference between the affected and unaffected extremities;

  - Sudomotor/edema: evidence of edema and/or sweating changes and/or sweating asymmetry. Upper extremity volumetrics may be performed by therapists that have been trained in the technique to assess edema; or

  - Motor/trophic: evidence of decreased range-of-motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).

- No other diagnosis that better explains the signs and symptoms. It is essential that other diagnoses which may require more urgent treatment, such as infection, allergy to implants, or other neurologic conditions, are diagnosed expediently before defaulting to CRPS.

- Psychological evaluation should always be performed as this is necessary for all chronic pain conditions.

(WCRP, Rule 17, Exhibit 7(G)(2) (a-e)).

F. To proceed with other invasive treatment, a patient should have a confirmed case of CRPS I or II. (WCRP, Rule 17, Exhibit 7(G)(3). Indeed, the MTGs provide:

- **Diagnostic Components of Confirmed CRPS**: Patients should have a confirmed diagnosis of CRPS to proceed to other treatment measures in this guideline.

  Both CRPS I and II confirmed diagnoses require the same elements. CRPS II is distinguished from CRPS I by the history of a specific peripheral nerve injury as the inciting event.

  Patient must meet the below criteria:

  a. A clinical diagnosis meeting the above criteria in 2, and

  b. At least 2 positive tests from the following categories of diagnostic tests:

    i. Trophic tests

      - Comparative x-rays of both extremities including the distal phalanges.

      - Triple phase bone scan.

    ii. Vasomotor/Temperature test: Infrared stress thermography.

iii. Sudomotor test: Autonomic test battery with an emphasis on QSART.

iv. Sensory/ Sympathetic nerve test: Sympathetic blocks.

G. In this case the evidence presented supports a finding/conclusion that the objective tests required by the Chronic Regional Pain Syndrome MTG to confirm a diagnosis of and treat CRPS were performed and that these tests resulted in positive findings for CRPS. The MTGs recognize that the diagnosis of CRPS continues to be "controversial". (WCRP, Rule 17, Exhibit 7(G)(1)). Moreover, the "clinical criteria used by the International Association for the Study of Pain is thought to be overly sensitive and unable to differentiate well between those patients with other pain complaints and those with actual CRPS". Dr. Caughfield recognized this when he concluded that Claimant met the Rule 17, Exhibit 7 criteria for a diagnosis of CRPS. Indeed, Dr. Caughfield noted:

> Although Dr. Larson did not believe there was evidence of CRPS in the lower limb, other specialist providers disagreed, and he does meet the Division CRPS guidelines requirements for a diagnosis of CRPS I. I appreciate Dr. Larson's opinion that the testing may be overly sensitive and therefore produce false results but per the treatment Guidelines, [Claimant] does meet the criteria in Rule 17, Exhibit 7 CRPS medical treatment guidelines for confirmed CRPA pages 20 and 21. He meets the requirements of Section G.2 with continued pain disproportionate to the injury (G.2.a), reports of allodynia and decreased range of motion (G.2.b), and allodynia/loss of range of motion on clinical examination by providers in the records. He also meets the criteria in section G.3 of a positive thermogram and response to sympathetic block. (Dr. Larson disagreed with Dr. Reinhard on whether the QSART was positive, but it is not needed to meet G.3 with other positive tests).

(RHE J, p. 247).

H. Pursuant to the *AMA Guides, Section 1.2, Structure and Use of the Guides*, in practice, the "first key to effective and reliable evaluation of impairment is a review of office and hospital records maintained by the physicians who have provided care since the onset of the medical condition." This same section of the *AMA Guides* continues by noting, "this information gathering and analysis serves as the foundation upon which the evaluation of a permanent impairment is carried out. It is most important that the evaluator obtain enough clinical information to characterize the medical condition fully in accordance with the requirements of the guides." *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008). In this case, Respondents suggest that the ALJ abandon the above referenced principles and disregard the content of the medical records and the opinions of multiple medical providers with substantial experience in diagnosing and treating CRPS in favor of Dr. Larson's opinion that Claimant does not have CRPS because Dr. Caughfield's physical examination did not reveal two or more clinical criteria used to diagnose CRPS and that "all the required findings must be made at a single exam for the diagnosis of CRPS to be made by a treating provider." (See Respondents Proposed Findings of Fact, Conclusions of Law and Order). Here, Dr. Caughfield adhered to the above-mentioned principals by conducting a thorough review the medical records to gather the necessary information to accurately describe Claimant's medical condition fully. Based upon this review and the findings from his clinical examination, Dr. Caughfield then exercised his independent judgment to conclude that Claimant met the criteria for a diagnosis of CRPS. While it is true that Dr. Caughfield's examination findings included normal coloring and hair growth and no temperature variation between the left and right lower extremity on this particular date, the results of Claimant's objective testing, i.e. his thermogram, response to sympathetic blockade and his QSART in combination with the findings on multiple clinical examinations performed by a number of different specialist providers, persuades the ALJ that Claimant's treating physicians were probably correct when they concluded that he has CRPS. Consequently, the ALJ is not persuaded that Dr. Caughfield erred when he concluded that Claimant suffers from CRPS, which he then rated in accordance with the AMA Guidelines by using the spinal cord table (Table

1, - Section A, pg. 109, AMA Guides) as recommended by Desk Aid #11, rating tip 8.

I. After considering the totality of the evidence presented, including the medical records of Dr. Reinhard, Dr. Primack, Dr. Finn, Dr. Murray and the DIME report of Dr. Caughfield, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that the Dr. Caughfield's impairment rating determination is highly probably incorrect. Indeed, Respondents do not allege that Dr. Caughfield erred regarding the methodology of how the impairment rating was calculated. Rather, Respondents contend that Dr. Caughfield rating is erroneous because the diagnosis of CRPS is highly probably incorrect. As noted above, the ALJ is not persuaded. While Dr. Larson has strong opinions regarding Claimant's diagnosis, the ALJ finds/concludes that differences in opinion among physicians are not unusual, nor do such differences in medical opinion reach the required level of "clear and convincing" evidence to prove that Dr. Caughfield's diagnostic and rating opinions are erroneous. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (ICAO, March 22, 2000); *Metro Moving & Storage*, 914 P.2d at 415 ("conflicts in the medical evidence are for the ALJ's resolution"); *Lopez*, W.C. No. 4-416-822 at 8-9 (the ALJ did not err in crediting the DIME and treating physicians over the claimant's expert, when the record did not compel crediting the expert over the others, and it supported concluding that the claimant did not overcome the DIME's impairment rating by clear and convincing evidence). Consequently, Respondents has failed to meet the required legal burden to set Dr. Caughfield's impairment rating determination aside. For similar reasons, the ALJ is not convinced that Dr. Caughfield's decision to assign psychological impairment in this case was highly probably incorrect. Accordingly, the request to set Dr. Caughfield's impairment rating aside is denied and dismissed.

Dated: August 19, 2025

/s/ Richard M. Lamphere_____

Richard M. Lamphere
Administrative Law Judge

Office of Administrative Courts
State of Colorado
Workers' Compensation No. WC 5-273-673-001

Issues

1. Whether Claimant established by a preponderance of the evidence that his right upper extremity impairment rating should be converted to a whole person impairment.

2. Whether Claimant established by a preponderance of the evidence entitlement to disfigurement benefits.

Findings of Fact

1. On May 6, 2024, Claimant sustained an admitted injury to his right shoulder that resulted in a right shoulder dislocation, Hill-Sachs fracture, Bankart fracture, rotator cuff tear and anterior-inferior labral tear. (Ex. A)

2. As a result of his workplace injury, Claimant required a right shoulder reverse total arthroplasty (RTA) and right biceps tendon release on September 16, 2024, performed by Daniel Heaston, M.D. An RTA is a surgery in which patient's shoulder joint is replaced with an implant that reverses the natural anatomical configuration. Specifically, the humeral head is removed and replaced with a "socket," and a prosthetic ball is placed at the glenoid, reversing the natural anatomy. (*See* Ex. E, and Ex. 5, p. 58).

3. Throughout his post-surgical treatment, Claimant completed pain diagrams for his physicians, which documented symptoms in the front and back of his right shoulder area. (Ex. C).

4. On February 7, 2025, Claimant's authorized treating physician (ATP) Mark Krisburg, M.D., placed Claimant at maximum medical improvement (MMI), and performed an impairment rating. Dr. Krisburg assigned Claimant a 30% impairment rating for the right shoulder RTA, and 13% impairment rating for decreased shoulder range of motion. The two ratings combine for a 39% upper extremity impairment rating, which corresponds to a 23% whole person impairment. Dr. Krisburg's range of motion impairment consisted

of a 3% rating for shoulder flexion, 1% for shoulder extension, 1% for shoulder adduction, 4% for shoulder abduction, 4% for internal rotation, and 0% for external rotation. (Ex. 3). Claimant's right upper extremity rating does not include any rating for range of motion deficits at the right wrist or elbow.

5. On February 26, 2025, Respondents filed a Final Admission of Liability (FAL) admitting to the 39% upper extremity rating. (Stipulation at hearing).

6. Claimant testified at hearing that he continues to have limited range of motion and strength in his right arm, including above-the-shoulder movements, and moving his arm behind his back. He also testified that he continues to be subject to weight restrictions. Claimant testified that he has ongoing pain in the base of his neck to the shoulder blade when he uses his arm in certain movements, and that he avoids some household activities like mowing, shoveling snow, and fence repair. Claimant testified that his pain level is normally 1/10, but he does experience spikes in pain with rapid or awkward movements.

7. On June 16, 2025, Claimant attended an independent medical examination (IME) with Qing-Min Chen, M.D., at Respondents' request. Dr. Chen noted that Claimant reported right shoulder pain that radiated into the shoulder blades, across the right shoulder, and some neck pain. Based on his review of medical records, Dr. Chen indicated that Claimant's only area of injury and pain was the right shoulder, and opined that the "impairment rating does not really necessitate a translation into whole person impairment rating as the upper extremity rating itself encapsulates the entirety of his occupational injury." (Ex. A).

8. Dr. Chen testified by deposition in lieu of live testimony. He explained the RTA procedure and how it results in a reversal of the natural anatomy, and that the surgery impacts anatomic structures beyond the glenohumeral joint. Dr. Chen testified that the shoulder implant associated with an RTA results in an "imperfect" shoulder, which inherently results in functional limitations of the affected shoulder when compared to the natural anatomy. In other words, the shoulder range of motion after an RTA is not the same as a normal shoulder. Dr. Chen further opined that Claimant's injury and the associated surgery did not result in an impairment beyond the Claimant's right shoulder, and that he believes that conversion to a whole person impairment is therefore not appropriate.

9. On June 30, 2025, Claimant attended a Claimant-sponsored “virtual” IME with Sander Orent, M.D. Dr. Orent opined that Claimant has ongoing symptoms medial to the glenohumeral joint (*i.e.*, beyond the arm at the shoulder) including symptoms in the trapezius and scapular areas, and has lost function of his right arm. He further indicated that Claimant’s surgery resulted in disruption of the tissues medial to the joint itself, based on the placement of screws to anchor the glenoid portion of the implant. Dr. Orent opined that Claimant’s impairment rating should be converted to a whole person impairment.

10. As the result of the September 16, 2024 surgery, Claimant has a visible scar located on the front area of his right shoulder, above the axial area. The scar is approximately four inches in length, and is discolored and slightly raised when compared to the surrounding skin. (Ex. 11).

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).

Conversion of Scheduled Impairment to Whole Person Impairment

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S. Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole-person medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The issue before the ALJ is whether the situs of Claimant's functional impairment is on or off the Act's schedule of impairment. The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO Feb. 4, 2015). Section 8-42-107(2)(a), C.R.S., provides that a loss of use of the "arm at the shoulder" is a scheduled impairment, but does not include the shoulder itself. *See Newton v. Broadcom Inc.*, W.C. No. 5-095-589-002 (ICAO Jul. 8, 2021). In other words, section 8-42-107(2)(a) defines the anatomical extent of the arm. Thus, the question is whether the injury has affected physiological structures beyond the

arm. *Brown v. City of Aurora*, W.C. No. 4-452-408 (ICAP Oct. 9, 2002). If functional impairment extends beyond the proximal termination of the arm, Claimant is entitled to whole person impairment. Claimant bears the burden of proof by a preponderance of the evidence to establish the site of the functional impairment beyond and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney, supra*; *In re Claim of Barnes*, W.C. No. 5-063-493 (ICAO April 24, 2020).

Claimant has established by a preponderance of the evidence that he has sustained an impairment of anatomical structures beyond the arm at that shoulder. The RTA surgery resulted in an alteration of Claimant's anatomy both at the glenoid and the humerus, by replacing and reversing the glenohumeral joint. The impairment rating assigned by Dr. Krisburg reflects that Claimant's shoulder joint has less motion than prior to his surgery. In other words, Claimant's glenohumeral joint does not function as it did prior to his injury. As confirmed by Dr. Chen, the Claimant's right shoulder is less functional than a natural shoulder due to the shoulder surgery. The situs of Claimant's functional impairment is the glenohumeral joint, which is medial to the arm, and represents a dysfunction of the shoulder, not the arm. Claimant's decreased range of motion is a manifestation of that functional impairment and is therefore not a scheduled impairment. Moreover, the symptoms Claimant experiences medial to the shoulder are also a manifestation of the impaired function of the shoulder. As found, Claimant's 39% right upper extremity impairment corresponds to a 23% whole person impairment. Claimant's request to convert his 39% scheduled impairment to a 23% whole person impairment is granted.

Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained disfigurement as a direct and proximate result of the May 6, 2024 injury in the form of surgical scarring.. Claimant is awarded $1,800.00 for disfigurement.

Order

It is therefore ordered that:

1. Claimant's 39% right upper extremity impairment rating is converted to a 23% whole person impairment.
2. Respondent shall pay Claimant $1,800 for permanent disfigurement. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.
3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: August 21, 2025

Steven R. Kabler
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-282-351-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that his average weekly wage was $1,095.00.

FINDINGS OF FACT

1. Claimant is a truck loader who sustained a low back injury on June 18, 2024, while unloading a truck for Respondent-Employer. Since his date of injury, Claimant has been receiving continuous temporary total disability benefits based on an average weekly wage of $233.31.

2. Respondent-Employer hired Claimant through Claimant's union as part of the union contract. The arrangement set forth in the contract was that Respondent-Employer would request workers to load or unload event equipment from trucks and the union would select and supply the employees. Workers hired by Respondent-Employer through the union were hired on a per-project basis and had no guarantee of further employment. Claimant was hired for two days of work loading and unloading trucks at a rate of $73.37 per truck with a two-hour maximum per truck, but Claimant testified that it typically took about an hour to unload a truck. Claimant was to work three trucks for a gross wage of $220.11. Claimant credibly testified that, had he not been injured, he would have "worked the show," meaning that he would have put his name back on the list for the installation of equipment for the event. He also credibly testified that he was scheduled to load the trucks back up in ten days. Claimant did not indicate how much he anticipated earning by working the event, though the Court infers that Claimant would have earned similar wages loading the trucks as he had unloading the trucks.

3. At the time of his injury, Claimant had worked as a truck loader for more than twenty years, and Claimant credibly testified that he never earned $155 per week nor could he live on such an income.

4. Claimant also had a prior workers' compensation claim arising from an injury in September 2021 while doing similar work. Claimant had been on temporary total disability benefits from that claim up through May 2024, at a rate of $747.70 and based on an admitted average weekly wage of $1,121.55. The average weekly wage admitted in that claim was based on earnings of $1,762.43 during an eleven-day period preceding that injury in September 2021. During Claimant's disability in that claim, Claimant earned wages of an unspecified amount for only three and a half weeks.

5. At a July 11, 2023 DIME for the September 2021 injury, Claimant reported that he had been unable to return to work, was homeless, and that his car had been impounded. The DIME physician determined that Claimant had not reached maximum medical improvement and recommended that Claimant limit lifting from floor to waist to no more than thirty pounds and avoid pushing or pulling more than forty pounds. Claimant settled that claim in May 2024. Notwithstanding the settlement, there is no evidence that Claimant's temporary work restrictions were ever relaxed.

6. While Claimant argues that the Court should base his average weekly wage on Claimant unloading three trucks per day for five days per week, the Court finds no persuasive evidence that but for the June 2024 injury Claimant would have been working five days per week. Claimant had not been working up until the day before his injury and there is no evidence Claimant had ever been released to full duty after his prior injury. Claimant's job prospects consisted of working the event for an unspecified duration and loading the trucks again in ten days, neither of which implicated five days of work per week.

7. Although Claimant credibly testified that he planned to work the event and earn additional money, he did not present any evidence as to how much money he anticipated earning by working the event. Additionally, while Claimant credibly testified that he would resume truck loading work ten days after completing the unloading of the trucks, Claimant provided no evidence as to how frequently he would perform such work or how much work he could anticipate on an ongoing basis, except that it would be more than the $155 per week admitted by Respondents.

8. To the extent that Claimant offers his weekly temporary total disability payment rate from his prior claim as his wage-earning capacity, the Court notes that indemnity benefits are, by definition, not "wages." Therefore, the Court does not consider Claimant's prior receipt of indemnity benefits in calculating Claimant's average weekly wage.

9. While the Court could consider Claimant's eleven days of wages from September 2021, Claimant has not proved that his wage-earning capacity as of June 18, 2024, was the same as it had been on September 21, 2021. Indeed, since September 2021, Claimant had been largely off work earning no wages at all, presumably due at least in part to his disability arising from his September 21, 2021 injury, and the most recent documented recommendation for work restrictions for the September 2021 injury were those assigned by the DIME physician. There is no evidence of any subsequent opinion that Claimant was able to work full duty. The Court is not persuaded that Claimant's earnings from September 2021 are a fair representation of Claimant's wage-earning capacity as of June 18, 2024.

10. The Court finds that Claimant has not met his burden to prove by a preponderance of the evidence that his average weekly wage was $1,095.00.

CONCLUSIONS OF LAW

Generally

1. 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.

2. 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).

3. 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).

Average Weekly Wage

4. 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 average weekly wage based on the claimant's earnings at the time of injury. *See* § 8-42-102(2), C.R.S.

5. Where the prescribed methods will not result in a fair calculation of a claimant's average weekly wage in the particular circumstances, § 8-42-102(3), C.R.S., grants an ALJ discretion to determine average weekly wage "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.

6. While Claimant argues that the Court should base his average weekly wage on Claimant unloading three trucks per day for five days per week, as found, there is no persuasive evidence that but for the June 2024 injury Claimant would have been working five days per week. Claimant had not been working up until the day before his injury and there is no persuasive evidence Claimant had ever been released to full duty after his prior injury. Claimant's job prospects consisted of working the event for an unspecified duration and loading the trucks again in ten days, neither of which implicated five days of work per week.

7. As found, although Claimant credibly testified that he planned to work the event and earn additional money, he did not present any evidence as to how much money he anticipated earning by working the event. Additionally, while Claimant credibly testified that he would resume truck loading work ten days after completing the unloading of the trucks, Claimant provided no evidence as to how frequently he would perform such work or how much work he could anticipate on an ongoing basis, except that it would be more than the $155 per week admitted by Respondents.

8. To the extent that Claimant offers his weekly temporary total disability payment rate from his prior claim as his wage-earning capacity, the Court notes that indemnity benefits are—by definition—not "wages." *Dearing v. Dismang Automotive LLC*, W.C. No. 5-218-007 (Nov. 12, 2024)(receipt of TTD while performing unpaid work for employer did not constitute "wages"). Therefore, the Court does not consider Claimant's prior receipt of indemnity benefits in calculating Claimant's average weekly wage.

9. While the Court could consider Claimant's eleven days of wages from September 2021, there is no persuasive evidence that his wage-earning capacity as of June 18, 2024, was the same as it had been on September 21, 2021. Indeed, since September 2021, Claimant had been largely off work earning no wages at all, presumably due at least in part to his disability arising from his September 21, 2021 injury, and the most recent recommendation for work restrictions for the September 2021 injury in the evidence were those assigned by the DIME physician. There is no evidence of any subsequent medical opinion that Claimant was able to work full duty. The Court is not persuaded that Claimant's earnings from September 2021 are a fair representation of Claimant's wage-earning capacity as of June 18, 2024.

10. As found, Claimant has not met his burden to prove by a preponderance of the evidence that his average weekly wage was $1,095.00.

ORDER

It is therefore ordered that:

1. Claimant has not met his burden to prove by a preponderance of the evidence that his average weekly wage was $1,095.00.

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

DATED: August 22, 2025

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

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* § 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.

Office of Administrative Courts

State of Colorado

Workers' Compensation Number 5-147-697-003

Issues

1. Has Claimant hava overame, ¥ clear a d convincing evidence, the findings of 1he Divisioo-sponsor independent medical examination (DIME) physician iegat i ig permanent impairment a d apportiorvnent, (mae specifically 1) the exclusion of a ski, condition a d 2) the apportionment of Claimant's unbar spine condition)?

2 Alternatively, have Respondents overame, ¥ dear a d convincing evidence, 1he findngs of the Division-sponsor8d independent medical examinatial (DIME) physician regarding permanent impairment (mar& specifically 1) the inclusion of Claimant's lumbar spine, a d 2) the inclusion *cl* Clainant's left shoulder)?

3. Has Claimant demonstrated, ¥ a preponderance of 1he evidence, that ha has sustained a serious permanent disfigursment 1D areas of the body normaly exposed t> public *vtfNi* pursuant 1D Section 8-42-108 (1), C.R.S.?

Findings of Fact

1. 0 , September 6, 2020, Claimant suffered a, injury while employed wtil Employer. Specifically, Claimant's injury occurred while performing maintenance YtOk a, a ◆i , elevalor. During the repair of the elevator, a large conveyor belt rigged t> a aane broke loose *Em* fell. *fts* t fell, the belt repeatedly struck Claimant dirsdly a, 1he head, back, a d shoulders. The foroe of this knocked Claimant against a catwalk while ha suspended i, a safety harness. Respa ldents hava admitted iabiity for Claimant's J.118 6, 2020 wak rpy.

Medical Treatment Prior to September 6, 2020

2. Following a motorcycle accident in 2011, Claimant had extensive surgery to his thoracic spine. Specifically, Claimant underwent a spinal fusion from T4 to T10, with placement of a corpectomy cage at the 17 level, two titanium rods, and multiple screws. Thereafter, Claimant took pain medications (including narcotics) to address ongoing thoracic spine pain.

3. In 2018[1], Claimant underwent treatment for chronic asthma. Additionally, those records reference thoracic spine pain and chronic low back pain.

4. In addition to treatment of his thoracic spine, Claimant also had prior treatment of his left shoulder. Claimant received at least two cortisone injections in the left shoulder in 2018[2] for non-work-related complaints. Additionally, Claimant had developed left shoulder pain "just prior"[3] to the September 6, 2020 injury.

5. Prior to September 6, 2020, a referral to neurosurgery for Claimant's thoracic and lumbar spine was made by Dr. Wang[4].

6. In addition, Claimant had a documented prior history[5] of allergies to penicillin and aspirin. These reactions included rashes in 2009 and 2014.

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[1] Medical records prior to the September 6, 2020 work injury were not offered into evidence by either party. However, the various treating providers and IME physicians in this case make reference to prior records. Additionally, during Claimant's testimony he was asked about various symptoms and treatment that he had prior to the work injury. The ALJ's recitation of such prior treatment are extrapolated from these reports and Claimant's testimony.

[2] See footnote 1.

[3] See footnote 1.

[4] See footnote 1.

[5] See footnote 1.

Medical Treatment Following the September 6, 2020 Injury

7. Immediately following the September 6, 2020 incident, Claimant was transported by ambulance to St. Anthony Hospital. At that time, Claimant reported headache, neck pain, mid-back pain, and right arm numbness. After imaging, Claimant was found to have fractures to the cervical spine and evidence of hardware failure in the thoracic spine from the prior T4 to T10 fusion. Specifically, there was a fracture in one of the titanium rods, which destabilized the T7 cage.

8. On September 10, 2020, Claimant underwent surgery to replace the broken rod and reinforce the fusion from T4 to T10. In the days following that surgery, Claimant developed an infection around the incision. This infection resulted in three debridement surgeries between September 20, 2020 and October 5, 2020.

9. Throughout much of this claim, Claimant's authorized treating physician (ATP) was Dr. Philip Smaldone. In November 2020, Dr. Smaldone noted that due to the infection, Claimant received vancomycin through a PICC line for six weeks, followed by two months of oral antibiotics. Between November 2020 and April 2021, Claimant underwent physical therapy.

10. On March 10, 2021, Dr. John Burris authored a report following his review of Claimant's medical records. In that report, Dr. Burris listed Claimant's diagnoses as "right cervical spine C7 superior articular facet fracture and potential end plate violation of pre-existing thoracic spine corpectomy and fracturing of hardware." Dr. Burris opined that no additional medication was needed to treat Claimant's condition. Dr. Burris also noted that an effort should be made to wean Claimant from the use of opioids.

11. On September 7, 2021, Claimant attended an independent medical examination (IME) with Dr. Burris. In connection with the IME, Dr. Burris reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. Burris listed Claimant's work related diagnoses as "C7 facet fracture, violation of prior T7 corpectomy, fracture of prior thoracic fusion rod, left shoulder pain/adhesive capsulitis and postoperative wound infection." More specifically, Dr. Burris opined that the prior thoracic

spine fusion was aggravated by the June 6, 2020 work injury. Dr. Burris also opined that Claimant had not yet reached maximum medical improvement (MMI) due to the delay i1 recovery created by the wound infection and related treatment.

12 On September 27, 2022, Claimant attended an IME with Dr. Lawrence Lesnak. Prior to issuing his IME report, Dr. Lesnak reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. n his IME report, Dr. Lesnak opined that Claimant's thoracic spine symptoms were related to the September 6, 2020 work injury. However, Claimant's low back symptoms and left shoulder symptoms are not related to the work injury. n support of these opinions, Dr. Lenak noted that Claimant did not report any low back symptoms until he was seen by Dr. Shoemaker i1 2022. Dr. Lesnak noted that this was 18 months after the work injury. With regard to Claimant's left shoulder, Dr. Lesnak noted that Claimant reported left shoulder symptoms prior to the work injury. n addition, Dr. Lesnak noted the June 7, 2021 note by Dr. Faulk that Claimant had full and pain free range of motion of the left shoulder. With regard to MMI, Dr. Lesnak opined that Claimant reached MMI by July 18, 2022. Dr. Lesnak assessed a permanent impairment rating of 20 percent, whole person. This was calculated as 13 percent for the thoracic spine, and eight percent for the cervical spine.

13. On November 1, 2022, Insurer sent a letter to Dr. Smaldone that asked him to review Dr. Lesnak's IME report and complete a questionnaire regarding Claimant.

14. On November 3, 2022, Dr. Smaldone completed the questionnaire. h that document, Dr. Smaldone indicated his agreement with Dr. Lesnak that claimant reached MMI. Dr. Smaldone stated that Claimant's thoracic spine condition was stable and that further treatment of the wound infection should be addressed as maintenance medical treatment. Dr. Smaldone also noted his agreement with Dr. Lesnak's assessment of a 20 percent whole person impairment rating.

15. On November 15, 2022, Respondents filed a Final Admission of Liability (FAL) admitting for an MMI date of July 18, 2022, and a whole person impairment rating of 20 percent.

16. On May 2, 2023, Claimant attended a Division sponsored independent medical examination (DIME) with Dr. Lynn Parry. In connection with the DIME, Dr. Parry reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. Dr. Parry determined that Claimant was not at MMI as it was her opinion that Claimant needed further workup to determine the cause of his rash {and potential treatment options) as well as further evaluation for his lumbar spine. Despite her determination that Claimant was not yet at MMI, Dr. Parry calculated a provisional impairment rating. Specifically, Dr. Parry assessed a whole person impairment of 45 percent, with a reduction to 37 percent due to apportionment. This 45 percent was calculated as 31 percent for Claimant's spine, a scheduled impairment of eight percent for the left upper extremity {which converts to five percent whole person); and five percent for Claimant's skin condition.

17. On June 7, 2023, the Colorado Division of Workers' Compensation (DOWC) DIME Unit sent Dr. Parry a letter regarding her DIME report. In that letter, Dr. Parry was instructed to further explain her impairment rating. Specifically, Dr. Parry was asked to clarify issues with regard to both the left shoulder range of motion, and Claimant's skin condition.

18. Thereafter, Dr. Parry issued an amended [6] DIME report. Dr. Parry continued to opine that Claimant was not at MMI. The provisional apportionment rating remained unchanged (45 percent before apportionment, and after apportionment 37 percent whole person).

19. On June 30, 2023, the DIME Unit sent a letter to the parties noting that the DIME physician determined Claimant was not at MMI.

20. Subsequently, Claimant attended a second DIME appointment with Dr. Parry on August 6, 2024. Again, Dr. Parry reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In her DIME report, noted Claimant's report that his neck and shoulder issues had improved, and his primary issues were in his thoracic spine and low back. Dr. Parry opined that Claimant reached MMI as of May 1, 2024.

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[6] This amended report is also dated May 2, 2023.

21. With regard to permanent impairment, Dr. Parry assessed an unapportioned whole person rating of 43 percent. That 43 percent included 40 percent for Claimant's spine; and eight percent for the left upper extremity (converted to five percent whole person). Dr. Parry did not include a rating for a skin condition. After apportionment, Dr. Parry assessed a whole person impairment of 30 percent. In explaining her reasoning on permanent impairment Dr. Parry noted that although Claimant's cervical spine condition had improved, he was entitled to a rating for a specific disorder, that being the facet fracture at C7, resulting in a four percent impairment. Dr. Parry further opined that although Claimant's left upper extremity had improved, he continued to have issues. Dr. Parry specifically noted that the impairment rating for the left upper extremity was assigned for decreased range of motion. Dr. Parry also noted that although a rash was present at the time of the examination, she opined that ceasing the use of antibiotics would resolve that issue. For Claimant's thoracic spine, Dr. Parry assessed a rating of 25 percent, which was reduced to 12 percent after apportionment.

22. With regard to Claimant's lumbar spine, Dr. Parry opined that it was a related body part. Dr. Parry noted that Claimant had received prior low back treatment from Kaiser Hospital. Dr. Parry opined that it was "clear from available notes that his predominant 'lumbar spine deficits' were in the upper lumbar spine and not below that." Dr. Parry further noted that following the work injury, Claimant complained of numbness and lower back pain. Dr. Parry identified this as a change from his "pre-accident injury". Dr. Parry further noted that following the work injury, Claimant's complaints were in his low back and pelvis, and not in his upper lumbar spine. Based upon this analysis, Dr. Parry assessed an unapportioned impairment rating of Claimant's lumbar spine of 17 percent, which was then apportioned to 12 percent.

23. On September 4, 2024, the DIME Unit authored a letter notifying Dr. Parry and the parties that the DIME report was incomplete. Specifically, Dr. Parry was informed that when calculating the impairment for Claimant's thoracic spine (using Table 53), she incorrectly combined sub values. Dr. Parry was asked to clarify the specific levels rated in her calculations.

24. On September 5, 2024, Dr. Parry issued an amended DIME report. This amended report contains the same opinions and analysis as Dr. Parry's August 6, 2024 report. In summary, Dr. Parry again identified Claimant's MMI date as May 1, 2024. Additionally, she continued to include the left upper extremity and lumbar spine as related body parts, with apportionment for both the thoracic and lumbar spines. Again, Dr. Parry did not include an impairment for a skin condition. With regard to permanent impairment, Dr. Parry calculated 36 percent, whole person, for Claimant's spine. This calculation included Claimant's cervical, thoracic, and lumbar spines. Dr. Parry again identified an impairment of eight percent of Claimant's left upper extremity (converted to five percent whole person). This resulted in an unapportioned whole person impairment of 36 percent. After apportionment, the rating was 24 percent, whole person. The change in the total impairment rating from the prior August 6, 2024 DIME report stems from Dr. Parry's recalculation of impairment for Claimant's thoracic spine. Specifically, Dr. Parry assessed a total Table 53 impairment of 15 percent, and a range of motion impairment of five percent, resulting in a combined impairment of 19 percent for the thoracic spine.

25. On September 5, 2024, the DIME Unit issued a notice that the DIME process was complete.

26. Relying upon Dr. Parry's September 5, 2024 DIME report, on September 18, 2024, Respondents filed an FAL admitting for the MMI date of May 1, 2024, and a whole person impairment rating of 24 percent.

27. On February 28, 2025, Dr. Stanley Ginsburg authored a report following his review of Claimant's medical records. In this report, Dr. Ginsburg opined that Dr. Parry erred in her calculation of Claimant's permanent impairment. Dr. Ginsburg determined that an impairment should be included for Claimant's skin condition. In addition, Dr. Ginsburg opined that Dr. Parry incorrectly calculated the appropriate apportionment. Specifically, Dr. Ginsburg found that Claimant's permanent impairment should be 36 percent, plus an additional five percent for the skin impairment, for a total whole person impairment of 39 percent.

28. On March 19, 2025, Claimant attended a second IME with Dr. Lesnak. As with the prior IME, Dr. Lesnak reviewed Claimant's medical records, obtained a history from

Claimant, and performed a physical examination. In his IME report, Dr. Lesnak opined that the only body parts that would warrant a permanent impairment rating would be Claimant's cervical and thoracic spines. Dr. Lesnak noted that at the time of the March 19, 2025 IME, Claimant did not have any rash or skin condition. Dr. Lesnak further noted that in Dr. Parry's 2024 DIME report, she did not include a rating for a skin condition. With regard to Claimant's lumbar spine, Dr. Lesnak noted that Claimant reported no low back symptoms until approximately 18 months after his work injury. Additionally, Dr. Lesnak opined that Claimant would not qualify for a Table 53 diagnosis for his chronic lumbar spine symptoms because no pain generator has been identified.

29. Dr. Lesnak's deposition testimony was consistent with his written reports. With regard to Claimant's skin condition, Dr. Lesnak testified that at the time of the 2025 IME, Claimant had no skin lesions or rashes, and had been off of antibiotics for three months. Dr. Lesnak reiterated his opinion that there is no evidence of a rash related permanent impairment.

30. With regard to Claimant's lumbar spine, Dr. Lesnak testified that none of Claimant's treating providers assessed permanent impairment for Claimant's lumbar spine. Dr. Lesnak further testified that Dr. Primack opined that Claimant's lumbar spine condition was not related to the work injury. Dr. Lesnak testified that he agrees with Dr. Primack on this issue. In support of this opinion, Dr. Lesnak noted that Claimant has a history of chronic low back pain: that immediately following an MRI of Claimant's lumbar spine showed no injury or trauma; and Claimant did not report low back pain to his ATPs until one and one-half years after the injury. Similarly, it is Dr. Lesnak's opinion that Claimant's left shoulder should not have been assessed an impairment rating. In support of his opinion, Dr. Lesnak noted that Claimant reported to Dr. Smaldone that he had injured his left shoulder prior to the work injury. Finally, for the reasons identified above, Dr. Lesnak testified that Dr. Parry erred in her assessment of a 24 percent whole person impairment rating. Dr. Lesank noted that at his initial IME he assessed a whole person impairment of 20 percent, which included Claimant's cervical and thoracic spines.

31. Both parties argue that the DIME physician's opinions should be overcome, but for different and conflicting reasons.

32. Claimant argues that because Dr. Parry included an impairment rating for a skin condition in her initial May 2, 2023 DIME report, she erred in her exclusion in her later reports. Claimant's reliance upon Dr. Parry's 2023 report and amended report is misplaced. As noted in both reports, Dr. Parry had determined that Claimant was not yet at MMI. Therefore, the impairment ratings included in those reports were provisional. Ultimately it is the opinions expressed in Dr. Parry's final DIME report dated September 5, 2024 that the ALJ must assess at this time. The ALJ finds that Dr. Parry's decision to exclude the skin condition was not in error. Dr. Ginsberg's opinion that the rash should have been included, is simply a difference of opinion. Based upon the foregoing, the ALJ finds that Claimant has failed to demonstrate that it is highly probable that Dr. Parry's decision to exclude the skin condition was incorrect.

33. Claimant also argues that Dr. Parry erred when she apportioned impairment of the lumbar spine. The ALJ finds that Dr. Parry's apportionment of Claimant's lumbar spine was not in error. Dr. Parry clearly considered Claimant's prior lumbar spine treatment in her analysis of whether or not the lumbar spine was a related body party. Dr. Parry's decision to include the lumbar spine, but then calculate an apportionment was within her discretion as the DIME physician.

34. Respondents argue that Dr. Parry erred when she included an impairment rating for Claimant's left shoulder and lumbar spine in her calculations. The ALJ finds that Respondents have also failed to demonstrate that it is highly probable that Dr. Parry's decision to include these body parts was in error. The ALJ finds that the conflicting opinions of Dr. Parry and Dr. Lesnak on the issues related to Claimant's lumbar spine are simply a difference of opinion. As noted above, Dr. Parry specifically opined that Claimant's lumbar spine was a related body part. The ALJ finds no error in that opinion. With regard to Claimant's left upper extremity, specifically the shoulder, Dr. Parry clearly assigned the impairment rating due to decreased range of motion. The ALJ is not persuaded by Dr. Lesnak's differing opinion on this issue.

Disfigurement

35. As a result of the surgeries Claimant has undergone since the work injury, he has scarring to his body. Specifically, Claimant has a visible disfigurement to the body consisting of a well healed surgical scar on his back in the area of his thoracic spine. That scar runs vertically down Claimant's spine and is 10 and one-half inches in length. The scar includes areas of skin puckering and indentation. In addition, there are multiple one-half inch horizontal staple scars on either side of the large vertical scar. Claimant also has a circular scar on his low back that measures approximately one-half inch in diameter.

36. Due to this scarring, the ALJ finds that Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view. Therefore, the ALJ also finds that Claimant has demonstrated that it is more likely than not that he is entitled to a disfigurement award.

37. During his testimony, Claimant also showed areas on his arms and legs where he currently has a skin irritation. The ALJ does not find that the presence of this rash warrants an addition to the disfigurement award in this case.

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. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

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

4. Section 8-42-107(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. See *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 her opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in her opinions.

5. Under Workers' Compensation Act of Colorado, the opinions of a DIME physician are given a great deal of deference. This deference is reflected in the higher burden of proof required to overcome the opinions of a DIME physician.

6. As found, Claimant have failed to overcome, by clear and convincing evidence, the findings of the DIME physician regarding permanent impairment and apportionment. As found, the opinions of Dr. Parry are credible and persuasive. As found, Dr. Parry did not commit any error when she excluded a skin condition from her impairment rating calculations. As found, Dr. Parry did not err when she included apportionment of the lumbar spine.

7. As found, Respondents have failed to overcome, by clear and convincing evidence, the findings of the DIME physician regarding permanent impairment. As found, the

opinions of Dr. Parry are credible and persuasive. As found, Dr. Parry did not err when she included impairment ratings for Claimant's left shoulder and lumbar spine i, her calculations.

8. Section 8-42-108 (11 C.R.S. provides that a claimant who suffers a serious and permanent disfigurement is entitled to additional compensation under the Workers' Compensation Act.

9. As found, Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view; specifically the scarring described herein. Therefore, Claimant has demonstrated, t,,, a preponderance of the evidence, that he is entitled to a disfigurement award. The ALJ orders that Claimant is entitled to a disfigurement award i, the amount of $5,686.96.

Order

It is therefore ordered:

1. Claimant has failed to overcome the opinions of the DIME physician a, the issues of permanent impairment and apportionment.

2 Respondents have failed to overcome the opinions of the DIME physician on the issue of permanent impairment

3. Respondents shall pay Claimant $5,686.96 for his disfigurement. Respondents shall be given credit for any amount previously paid for disfigurement i, connection with this claim, if any.

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

Dated August 11, 2025.

Cassandra M Sidanycz
Administrative Law Judge

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. 5-241-895-001

Issues

I. Whether Claimant overcame the opinion of the DIME physician that he is at MMI.

II. Whether Claimant established that he is entitled to have his lower extremity impairment rating converted to a whole person rating.

III. Whether Claimant overcame the impairment rating provided by the DIME physician.

IV. Whether Claimant established that he is entitled to a disfigurement award.

Findings of Fact

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

Claimant's injury and treatment

1. On June 7, 2023, Claimant sustained an admitted, work-related injury to his right lower extremity while working when another employee hit him with a tug (a small, motorized vehicle used to carry heavy packages), pinning his leg between the tug and a stationary guard or post.

2. Claimant was taken to UC Health Hospital where he underwent x-rays of his right leg, which included his tibia, fibula, and ankle. The x-rays demonstrated comminuted displaced fractures of the distal tibia and fibula, but the ankle appeared normal.

3. On June 8th, the day after the accident, Claimant underwent emergency surgery to repair his distal third tibial shaft fracture. The surgery required the use of hardware, which included screws and a tibial nail.

4. On June 28, 2023, Claimant started treating at Concentra and was seen by Dr. Garner. At this time, Claimant was non-weight bearing and was using crutches and a walking boot. At this appointment, Claimant complained of pain that was dull, constant, mild to moderate, and non-radiating. He also stated that direct pressure and any weight bearing aggravated his pain. Based on his assessment, Dr. Garner referred Claimant to physical therapy, which Claimant started on June 30, 2023.
5. On July 20, 2023, Claimant returned to UC Health and was seen by Jessie Larson, PAC, in orthopedics. At this appointment Claimant was cleared to weightbearing as tolerated in his cam boot but was still using crutches. At this time, Claimant's pain was primarily in his right ankle with ambulation, and PAC Larson noted soft tissue swelling around his right ankle.
6. On July 25, 2023, Claimant underwent physical therapy and received treatment that was directed towards his right knee and ankle.
7. On August 2, 2023, Claimant was seen by Hanna Bodkin, PA-C. At this appointment, Claimant continued to complain of right sided knee and ankle pain.
8. On September 5, 2023, Claimant returned to UC Health and saw Alisha Meserve, PAC. Claimant was weightbearing as tolerated and continued using a boot. He also continued to complain of right sided knee and ankle pain. Based on her assessment, she recommended that Claimant continue his physical and focus on aggressive knee and ankle range of motion, strengthening, and gait training. As of September 8, 2023, Claimant was no longer using his boot and had transitioned into an ankle brace.
9. On October 19, 2023, Claimant returned to UC Health and was seen by PAC Larson. At this appointment, it was noted that Claimant was continuing to improve-although slowly.
10. On December 19, 2023, Claimant returned to UC Health. At this appointment it was again noted that Claimant was doing well and continuing to make progress, although he did have occasional pain in his distal tibia near the fracture site. But it was documented that his knee and ankle had full range of motion.

11. On January 18, 2024, Claimant complained to his physical therapist about developing fairly intense lower back over the weekend. However, at the following visit on January 23, 2024, just one week later, it was noted that his lower back pain had resolved.

12. On February 27, 2024, Claimant returned to Concentra and saw Dr. Nelson. At this appointment, it was noted that Claimant had been evaluated by his specialist - his orthopedic surgeon - and that everything looked okay. Dr. Nelson also noted Claimant was about 75% of the way towards meeting the physical requirements of his job so he was referred for additional treatment in the form of work hardening.

13. On March 27, 2024, Claimant was again seen by Dr. Nelson. At this appointment, Claimant's pain level was noted to be the same. It was also noted that Dr. Nelson evaluated Claimant's gait and Claimant demonstrated a normal gait, was full weight bearing, and did not have any ataxia or shuffling. Based on Claimant's progression, he anticipated Claimant would be at MMI in about 6-12 weeks.

14. On April 11, 2024, Claimant returned to Dr. Nelson and due to his symptoms, he wanted to discuss the possibility of returning to physical therapy. At this visit, Dr. Nelson concluded that Claimant was almost sufficient for the safe return to regular duty. He noted Claimant finished 6 or 9 work conditioning sessions and reached 100% of his physical goals. Thus, he released him for a trial of full duty and referred him to Dr. Zimmerman for an impairment rating.

Placement at MMI and Impairment Rating

15. On May 9, 2024, Claimant was seen by Dr. Nelson and Dr. Zimmerman.[1] Dr. Nelson evaluated Claimant and placed him at MMI. He also documented his physical examination of Claimant's right leg and noted that Claimant had full range of motion, with pain, but that

[1] The medical reports from May 9, 2024, are somewhat confusing. The WC164 Report placing Claimant at MMI was completed by Dr. Nelson. There is also a report from that day listing Dr. Nelson as the provider. However, Claimant was referred to Dr. Zimmerman for an impairment rating on the same day, and Dr. Nelson's report appears to have incorporated the impairment rating calculated by Dr. Zimmerman. There is also a separate report from Dr. Zimmerman dated May 9, 2024, where he independently documents his assessment of Claimant's permanent impairment.

his strength, motor tone, and sensation were normal. He also documented that there was no atrophy. Regarding Claimant's right ankle, he found there was no tenderness, no crepitus, normal strength, and normal motor tone. He did, however, indicate in one section that Claimant's ankle range of motion was limited in all planes, but also stated in another section that it had full range of motion. He also evaluated Claimant's gait. He again found Claimant had a normal gait, was full weight bearing, and that he did not demonstrate any ataxia or shuffling. Dr. Nelson released Claimant to full duty, but assigned Claimant permanent restrictions which included no ladders, no uneven ground, and no stairs. He also stated that approximately 50% of each hour should be spent sitting and Claimant should be allowed to change positions while standing. Dr. Nelson also prescribed maintenance medical treatment that consisted of topical diclofenac gel and lidocaine ointment, ongoing medications for up to 6 months, follow up with orthopedics for the next 2 years, and possibly an EMG nerve conduction study to and quantify any nerve damage.

16. On May 9, 2024, Dr. Zimmerman assessed Claimant for any permanent impairment by using the AMA Guides. Dr. Zimmerman assessed Claimant with a 16% lower extremity impairment rating of his right leg, which converted to a 6% whole person impairment rating. Dr. Zimmerman calculated Claimant's impairment rating as follows:

> For range of motion deficits of the right ankle, he receives a 5% lower extremity impairment. Then, for tibial nerve damage below the mid-calf using Table 51, the patient receives a 15% impairment for sensory deficit and 15% impairment for motor deficit. Then, using Table 10, Item #2, a 25% modifier is multiplied by 15% for a total of 4% lower extremity impairment for sensory deficit. Similarly, using Table 11, Item 3, for 50% loss of strength is multiplied against 15% motor deficit, totaling 8% lower extremity impairment for motor deficits. These 2 values together total 12% for motor and sensory disorders. Finally, combining the 5% range of motion deficit with 12% motor and sensory deficits, total 16% lower extremity impairment. Then, using Table 46, this converts to 6% whole person.

17. Dr. Zimmerman also provided the same permanent work restrictions as Dr. Nelson. He also addressed maintenance medical treatment, and although he provided very similar

maintenance medical treatment recommendations, he provided a bit more explanation and detail. Dr. Zimmerman also said that maintenance treatment should include topical diclofenac gel and lidocaine ointment for up to 6 months and that they were being prescribed to reduce swelling, inflammation and pain which in turn was expected to maximize Claimant's function, tolerance for rehabilitation and activity plus improve his sleep. Dr. Zimmerman also recommended that Claimant be allowed to follow up with orthopedics anytime within the next 2 years for any questions or concerns. He indicated that an EMG/nerve conduction study may be requested by orthopedics at any time as part of maintenance to quantify any sensory or nerve damage. Lastly, he indicated that if any surgeries are recommended, the case should be reopened and then Claimant should ultimately be assessed for any additional impairment at the appropriate time.

Treatment after being placed at MMI

18. On June 13, 2024, Claimant returned to UC Health and was seen by Lisa Allison Malyak, M.D. At this appointment it was noted that Claimant had pain to the proximal interlocking screw if he hits it on something, but yet his primary pain was overlaying the lateral distal interlocking screw and fracture. He also complained of ongoing paresthesias and decreased sensation of his foot. X-rays were taken and demonstrated a stable callus formation at the distal tibial fracture site without evidence of hardware failure, loosening, or malalignment. Overall, Claimant was continuing to progress. It was suggested that if his pain continued and plateaued, they could perform a CT scan to further evaluate his ongoing pain. It was also noted that if Claimant developed symptomatic hardware overlying the interlocks, they would discuss possibly taking the hardware out. Dr. Alfonso reviewed the assessment and plan of Dr. Malyak and concurred.

Division Independent Medical Examination

19. On September 30, 2024, Claimant underwent a Division Independent Medical Examination (DIME). The DIME was performed by Paul Ogden, M.D., and he issued his report on October 20, 2024. Dr. Ogden obtained a history from Claimant, reviewed his medical records, and performed a physical examination.

20. Dr. Ogden noted that Claimant indicated his current pain was 5 out of 10. He also indicated Claimant completed an anatomic pain diagram and shaded various areas involving his right lower extremity. In addition to symptoms involving his right lower extremity, Claimant also said that there was some pain in his left ankle. Claimant also mentioned that his left knee has been sensitive since he developed Osgood-Schlatter, a preexisting condition, but yet there were no specific problems at this time. Claimant stated that he felt he had recovered to about 75% of normal. Claimant also told Dr. Ogden that he was considering having the hardware that was used during the surgery removed.

21. Dr. Ogden performed a physical examination of Claimant. He specifically noted that Claimant's gait was normal and that he can walk normally on his toes and heels. He also noted there was atrophy on Claimant's right quad and calf as compared to the same muscles on the left. He went on to describe the scars from Claimant's injury and surgery, which included a 4 cm x 1 cm axially oriented scar over the right quadriceps tendon, a small surgical scar over the right medial tibia, small surgical scars over the medial and lateral malleoli and sutured lacerations of the distal tibia, and a scar over the anterior distal tibia. He also tested Claimant' strength and found it was five out of five in all areas tested in the lower extremities. He tested for sensation and found it was intact except for the dorsal right foot at the fourth and fifth toes up into the distal anterior ankle and the dorsal foot. He stated that Claimant had minimal sensation to fine touch, but normal sensation of the medial and lateral foot as well as the sole of his right foot. He also evaluated Claimant's knees and found no evidence of ligament problems.

22. Dr. Ogden noted that although he was requested to also evaluate Claimant's left knee and ankle, he could not identify any specific injury or impairment related to Claimant work accident. Moreover, he did not note any pathology involving Claimant's left ankle but did indicate that Claimant's left knee has been sensitive since he developed Osgood-Schlatter syndrome. Therefore, he did not provide any impairment ratings of Claimant's left knee or ankle.

23. Dr. Ogden also considered the possibility that Claimant will have to have the hardware removed. Dr. Ogden concluded that such procedure could be performed as maintenance treatment.

24. Based on his assessment, Dr. Ogden concluded and agreed that Claimant is at MMI and agreed with the MMI date of May 9, 2024, provided by Dr. Nelson.

25. Dr. Ogden then proceeded to assess Claimant's impairment using the AMA Guides and the Division of Workers' Compensation Desk Aid 11, which addresses normalization. Dr. Ogden concluded that Claimant has an 8% lower extremity impairment rating, which converted to a 3% whole person impairment rating. He also concluded that Claimant has a 1% skin disfigurement due to scarring. Then he combined the 3% whole person rating with the 1% whole person rating for a 4% whole person impairment rating. In assessing Claimant's impairment, he applied normalization principles and measured Claimant's left ankle as well, which resulted in a 0% impairment for Claimant's ankle. He also measured Claimant's right knee but did not apply normalization principles because Claimant has preexisting Osgood-Schlatter syndrome, which Dr. Ogden noted had resulted in Claimant having some chronic left sided knee pain. His assessment of Claimant's impairment is as follows:

> Ankle:
>
> Ankle impairment is calculated using table 37 on page 66 for ankle plantar and dorsal flexion. Table 38 on page 67 is used for subtalar joint motion of inversion and inversion. Right ankle dorsiflexion 10° is a 4 percent impairment. Normalization for the left ankle 10° dorsiflexion results in a 0% impairment after subtracting 4 from 4. Plantar flexion of 40° is a 0% impairment. Inversion of 30° is a 0% impairment. Eversion of 10° is a 2% impairment, however normalization of the left ankle which also has 10° of eversion results in a 0% impairment. Adding ankle impairments results in a 0% ankle impairment.
>
> Knee:
>
> The knee impairment rating is completed using table 39 on page 68 for flexion and extension. 130° of flexion is a 7% impairment. Normalization cannot be used because of prior Osgood-Schlatter syndrome, some chronic

knee pain on the left. 0° of knee extension is a 0% impairment. Total knee impairment 7%.

Peroneal Nerve:

Peripheral nervous system impairment is consistent with the superficial peroneal nerve. Figure 77 on page 73 is used to identify the root of origin. Table 51 provides the maximum sensory and motor loss for the specific nerve. Table 10 and table 11 are used for grading schemes for sensory and motor impairment from page 42. The superficial peroneal nerve accounts for a 5% maximum sensory deficit. This is a category two from table 10, 25% sensory impairment. Multiplying 25% times 5% rounds to a one percent lower extremity peripheral sensory impairment. I cannot identify a motor impairment.

Combining lower extremity impairments of seven with one results in an 8% lower extremity impairment. Lower extremity units are converted to whole person units using table 46 on page 72. This is a 3% whole person impairment.

Surgical Scars:

He has multiple surgical scars, including a 1X4 cm scar on the right patellar tendon as well as multiple smaller scars over the shin. On page 232 table one the impairment classification for skin disease would be class one with signs of a skin disorder (surgical and traumatic scars), and with treatment there is no limitation. At this time, the scars have been well treated and there is no limitation. However, this qualifies for a one percent person additional whole person impairment.

The final combined whole person impairment is 4%.

Independent Medical Examination performed by Dr. Allison Fall

26. On March 13, 2025, Claimant underwent an Independent Medical Examination that was performed by Allison Fall, M.D. Her IME included obtaining a history from Claimant,

reviewing his medical records, performing a physical examination, and then assessing his impairment under the AMA Guides.

27. Dr. Fall noted Claimant's current symptoms. She stated that Claimant said he experienced persistent numbness at the top of his foot following the surgery. He also said he had ongoing pain originating from a surgical screw located at the upper aspect of his tibia, with radiation of pain above the kneecap. He also stated that he had been trying to get the screw removed for the past year and had seen the surgeon in September of the previous year regarding this issue.

28. Claimant also described intermittent, achy pain around the ankle. Claimant also stated that he was unable to walk for more than approximately 15 minutes without developing increased pain that extended upward to the knee, accompanied by a sensation that his leg was going to "fall apart." He also said he was unable to run or jump, despite attempts to do so.

29. The Claimant went on to describe a sense of weakness and numbness in his right foot, which he attributed to nerve-related issues. He rated his pain at 3 out of 10 on the day of evaluation, with a reported pain range of 2 out of 10 at its least and 8 out of 10 at its worst. He indicated that his pain was typically worse in the evening and was aggravated by constant movement, but stretching and icing provided some relief. He also indicated that due to his symptoms, he was no longer able to participate in activities he previously enjoyed, such as coaching, although he was working on starting, or was working at, his own business. There is no indication in her report Claimant complained of additional problems with his back, left knee, or left ankle and that he also indicated the new symptoms were due to any overcompensation for his right sided injuries.

30. Dr. Fall also performed a physical examination. Her examination included measuring Claimant's knee range of motion, bilaterally. Although she did not list range of motion measurements for either of Claimant's ankles, she did indicate in her report that his hindfoot range of motion was normal. She also noted Claimant did not have an antalgic gate.

31. She then assessed Claimant's MMI status and impairment. Regarding MMI, Dr. Fall agreed with the treating providers and the DIME physician that Claimant reached MMI as of May 9, 2024, following extensive physical therapy and functional rehabilitation.

32. Regarding impairment of the right knee, Dr. Fall disagreed with the DIME physician's conclusion that the left leg could not serve as a valid baseline for comparison or normalization. She reasoned that even if the Claimant had a history of bilateral Osgood-Schlatter's disease, it would have affected both knees symmetrically and thus the left knee remained a reasonable reference. Based on the difference in flexion - 130° in the right knee versus 140° in the left - she assigned a 3% lower extremity impairment rating for the right knee after subtracting or normalizing a 4% baseline impairment from a total of 7%.

33. Regarding the right ankle, Dr. Fall found no basis for a permanent impairment rating because the tibial fracture did not extend through the ankle joint and Claimant's hindfoot range of motion was normal.

34. Regarding any nerve damage, Dr. Fall agreed with the DIME's 1% lower extremity impairment rating for sensory deficit or pain in the distribution of the superficial peroneal nerve.

35. Dr. Fall stated that the nerve-related impairment, when combined with the 3% knee impairment, resulted in a total lower extremity impairment of 4%, which converts to a 2% whole person impairment under Table 46.

36. Dr. Fall rejected the assignment of a 1% impairment rating for skin disease by Dr. Ogden. She noted that the surgical and traumatic scars, although present, were well-treated and not associated with any functional limitations. As such, she concluded there was no ratable impairment for skin under the applicable classification system of the AMA Guides.

37. In the end, Dr. Fall concluded that Claimant had a total of 4% lower extremity impairment, converting to a 2% whole person impairment. Dr. Fall also stated that she found no evidence of loss of function above the right leg. Lastly, she stated that removal of the screw could be pursued as maintenance care.

Claimant's testimony

38. Claimant testified that prior to his work-related injury, he had no functional impairments involving his right knee, right ankle, left knee, left ankle, or lower back. He stated that each of these body parts exhibited full range of motion and were free of pain or limitation.

39. Claimant testified that he currently experiences multiple symptoms in his right knee, including pain, instability, weakness, limited range of motion, and what he described as "excruciating" pain beneath the kneecap, which he attributes to the implanted hardware. He also testified that his right ankle now demonstrates decreased range of motion, numbness, tightness, temperature sensitivity, instability, weakness, and intermittent swelling. He also reported noticeable muscle atrophy in the right calf.

40. Claimant testified that over time he developed new symptoms involving his left knee, left ankle, and lower back, which he attributes to overcompensating for the injuries to his right leg. He described his back as feeling tight and reported experiencing shooting pain that radiates from his calves, which he stated interferes with both walking and lying down. The physical therapy records from January 18, 2024, do reflect a complaint of back pain; however, records from the following week indicate that his back pain had resolved. There is no credible evidence that after January 2024 Claimant continued to report or receive treatment for back pain. Notably, Claimant did not request the Division Independent DIME physician to evaluate his back, and the DIME report does not reference any complaints of ongoing back pain related to overuse, overcompensation, or an altered gait. Furthermore, Claimant was evaluated by Dr. Fall in March 2025, and her report does not indicate that Claimant reported symptoms involving his back at that time.

41. Claimant testified that the hardware in his right knee causes pain that interferes with his daily activities, including climbing stairs and performing household tasks. He indicated that he has discussed the possibility of hardware removal and expressed an interest in undergoing that procedure. The medical records confirm that Claimant consulted with Dr. Malyak and Dr. Alfonso in June 2024, after being placed at MMI, and that hardware removal was discussed. It was also discussed that a CT scan would be necessary before proceeding with any hardware removal. However, the medical records do not indicate Claimant returned to Dr. Malyak or Dr. Alfonso to obtain the CT scan and determine

whether hardware removal was appropriate. Moreover, there is no indication that Claimant's surgeon has recommended and sought authorization for surgery to remove the hardware.

42. Claimant testified that his injuries have adversely affected his overall function and mobility. He stated that he has difficulty with walking, particularly up stairs, and with tasks such as placing items on high shelves. He further testified that his physical restrictions - including limitations against climbing ladders, walking on uneven surfaces, kneeling, and squatting - led to the loss of his job with Employer. While the ALJ credits Claimant's testimony that his injury and restrictions have affected his ability to perform certain activities of daily living, the ALJ finds that Claimant's functional impairment is limited to his right lower extremity.

43. Claimant also testified that, despite undergoing gait training at Concentra, he continues to walk with a limp. However, the medical records do not corroborate this testimony. The treatment records from Dr. Nelson indicate that when placed was placed at MMI, he evaluated Claimant's gait and found it was normal. Additionally, both the DIME report by Dr. Ogden, and the March 2025 IME report from Dr. Fall, note that upon examination of Claimant's gait – it was normal or not antalgic.

44. Claimant testified that the surgical scars on his ankle remain sensitive to heat, cold, and physical touch. He reported that contact with the scar causes numbness and tightness radiating to the foot, which he attributes to possible nerve damage. He also stated that he must use specialized lotions to prevent the scar from becoming irritated, inflamed, or reopening.

45. Based on the totality of the evidence, the ALJ finds that Claimant's testimony concerning symptoms involving his left knee, left ankle, and lower back - allegedly caused by an altered gait or overcompensation - is not supported by the medical record and is therefore not credible. Although earlier treatment records document that Claimant exhibited an altered gait during recovery, those symptoms had resolved by the time he was placed at MMI by Dr. Nelson. Moreover, subsequent evaluations by the DIME physician, Dr. Ogden, and IME physician, Dr. Fall, both noted that Claimant's gait was normal. In addition, while Claimant reported back pain in January 2024, those complaints were short-lived and

resolved the following week. Furthermore, although Claimant requested the DIME, Claimant did not ask the DIME physician to evaluate his back. In addition, neither the DIME report nor Dr. Fall's report reference back pain or other symptoms due to overuse or compensatory measures. Accordingly, the ALJ does not find credible Claimant's assertion that he developed and continues to suffer from back pain, left knee pain, or left ankle pain as a result of an altered gait or overcompensation. Thus, the ALJ does not find that Claimant has functional impairment of a portion of his body beyond his right lower extremity.

46. On the other hand, the ALJ does credit Claimant's testimony that he continues to experience pain in his lower right extremity and that he is interested in having the hardware removed.

47. However, due to a lack of corroborating and credible medical evidence, the ALJ does not credit Claimant's testimony regarding the severity and extent of his current symptoms - such as instability, weakness, and excruciating pain beneath the kneecap - as indicative of his condition at the time he was placed at MMI by Dr. Nelson or when he was evaluated by the DIME physician, who likewise concluded that Claimant was at MMI.[2]

Scars and Disfigurement

48. Claimant has a number of scars on his right lower extremity due to his work injury and the resulting surgery. The scars, each of which is different in color and texture compared to the surrounding skin, include the following:

- A surgical scar above his kneecap that is approximately 2 ½ inches long by 1/3 of an inch wide. A surgical scar below his kneecap that is approximately ¾ of an inch in diameter.
- A surgical scar below his kneecap that is approximately ¾ of an inch in diameter.
- A surgical scar on the inside of his ankle, plus three arthroscopic port scars.
- A scar on the outside of his ankle that is approximately two inches in diameter.

[2] Whether Claimant's condition has worsened since he was placed at MMI by Dr. Nelson and evaluated by the DIME physician is not an issue before the ALJ.

- A surgical scar on the front of his ankle – top of his foot – that is approximately ½ inch in diameter.

49. Claimant does have some atrophy of his right calf, and the ALJ finds that atrophy is due to his work injury.

50. At the hearing, Claimant also alleged he has a limp due to his work injury. In response to this allegation, the ALJ requested Claimant to walk in the courtroom to observe any apparent limp. During this demonstration, the ALJ observed Claimant limping and walking at a pace that appeared slower than normal walking speed. However, despite these observations, the ALJ finds that Claimant has not developed a permanent limp, or abnormal walking speed, due to his work injury. As found above, when Claimant reached MMI, the medical records indicate that his gait was evaluated and found to be normal. Additionally, both the DIME report by Dr. Ogden and the March 2025 IME report from Dr. Fall documented that upon examination, Claimant's gait was normal and not antalgic. Based on this medical evidence, the ALJ finds that Claimant has not suffered disfigurement due to an altered gait or abnormal walking speed.

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 Claimant overcame the opinion of the DIME physician that he is at MMI.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Off.,* 5 P.3d 385 (Colo. App. 2000).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Off., supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding regarding MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Here, Claimant has failed to meet this heightened burden. Claimant's challenge to Dr. Ogden's MMI determination is not supported by credible evidence. First, Claimant's testimony regarding ongoing symptoms in his left knee, left ankle, and lower back - which he attributes to overcompensation and altered gait - was found not credible and is unsupported by the medical record. The medical evidence establishes that any gait abnormalities had resolved by the time Dr. Nelson placed Claimant at MMI, and both Dr. Ogden's DIME evaluation and Dr. Fall's subsequent IME documented normal gait upon examination.

Second, while the ALJ credits Claimant's testimony regarding continued pain in his right lower right extremity and his interest in having the hardware removed, the ALJ does not credit Claimant's testimony regarding the severity and extent of his current symptoms, including claims of instability, weakness, and excruciating pain beneath the kneecap. This lack of credibility regarding symptom severity, and extent of symptoms, directly undermines Claimant's contention that Dr. Ogden erred in finding Claimant reached MMI as of May 9, 2024.

Third, the medical records do not support Claimant's contention that the date of MMI assigned by Dr. Ogen is wrong. For example, Claimant's back pain complaints were documented as resolved within one week in January 2024. Plus, Claimant did not ask Dr. Ogden to evaluate his back on the form requesting the DIME, and neither Dr. Ogden's DIME report nor Dr. Fall's March 2025 IME report reference ongoing back pain or

compensatory injuries that require medical treatment. Moreover, Dr. Fall evaluated Claimant and also concluded Claimant reached MMI on May 9, 2024, and the ALJ finds her assessment to be persuasive and supported by the medical records.

Fourth, regarding the hardware removal issue, while Claimant expressed interest in the procedure and consulted with Dr. Alfonso in June 2024, the record does not establish Claimant pursued the recommended CT scan, or that Dr. Alfonso formally recommended and requested authorization for the procedure. Moreover, both Dr. Ogden and Dr. Fall acknowledged the possibility that Claimant might require hardware removal in the future. However, each expressly characterized such a procedure as maintenance treatment. The mere possibility of future elective hardware removal, without more, does not establish Claimant was not at MMI on May 9, 2024, as determined by Dr. Ogden.

Based on the credibility findings regarding Claimant's testimony and the lack of persuasive corroborating medical evidence supporting Claimant's position, Claimant has failed to produce credible evidence showing it is highly probable that Dr. Ogden's MMI determination was incorrect.

While Claimant did sustain a serious injury, and underwent a significant surgery, the issue before the court is whether Claimant reached MMI on the date assigned by Dr. Ogden. Whether Claimant’s condition has worsened since being placed at MMI is not before this ALJ.

As a result, Claimant failed to establish by clear and convincing evidence that Dr. Ogden erred in placing him at MMI as of May 9, 2024.

II. Whether Claimant established that he is entitled to have his lower extremity impairment rating converted to a whole person rating.

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, the claimant is entitled to medical impairment benefits paid as a whole person. *See* § 8-42-107(8), C.R.S. Whether the claimant has suffered a loss set forth on the schedule under § 8-42-107(2), C.R.S., or a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is determined on a case-by-case

basis. *See DeLaney v. Industrial Claim Appeals Off.*, 30 P.3d 691, 693 (Colo. App. 2000).

Thus, the ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS*, W.C. No. 4-573-459 (Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars*, W.C. No. 4-922-066-04 (Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of his body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson -Wood*, W.C. No. 4-536-198 (June 20, 2005); *Vargas v. Excel Corp.*, W.C. 4-551-161 (Apr. 21, 2005). Moreover, in certain circumstances, a lower extremity injury for which an extremity impairment rating has been provided may be converted to a whole person impairment rating when the work-related injury causes a limp that functionally impairs the back, resulting in back pain. *See Webb v. Circuit City Stores, Inc.*, W.C. No. 4-467-005 (August 16, 2002). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, WC 4-657-285 (Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (Dec. 28, 2006).

In this case, the ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that his work injury caused functional impairment of a part of the body not found on the schedule. In this case, Claimant's functional impairment is limited to his right lower extremity – which is on the schedule. Although Claimant contends that his work injury caused functional impairment of part of his body not found on the schedule, i.e., his back, the ALJ finds that Claimant's back pain was short lived and had resolved by the time he had reached MMI. Thus, Claimant failed to establish by a preponderance of the evidence that his right lower extremity rating should be converted to a whole person.

III. Whether Claimant overcame the impairment rating provided by the DIME physician.

When a DIME physician provides both scheduled and non-scheduled (i.e., whole person) impairment ratings, distinct evidentiary standards apply to each type of rating. The heightened burden of proof established by § 8-42-107(8)(c), C.R.S., applies only to non-scheduled impairments and does not extend to scheduled injuries. As such, a DIME physician's whole person rating is presumed correct and may be overcome only by clear and convincing evidence. In contrast, a challenge to a scheduled extremity rating is governed by the preponderance of the evidence standard.

This distinction arises from the statutory scheme, which treats scheduled and non-scheduled impairments differently for purposes of determining permanent disability benefits. See § 8-42-107(8)(c), C.R.S.; *Delaney v. Indus. Claim Appeals Off.*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998). The Industrial Claim Appeals Office has reaffirmed this interpretation in multiple decisions, holding that the statutory presumption in favor of the DIME's opinion does not apply to scheduled injuries. *See Ortega v. Trax Constr.*, W.C. No. 5-144-050 (ICAO Nov. 20, 2023); *Hackbarth v. A.W. Farrell & Sons*, W.C. No. 4-737-890 (ICAO Nov. 20, 2012).

Whole Person Rating for Surgical Scars

Dr. Ogden provided Claimant with a 1% whole person impairment rating for his scars pursuant to the AMA Guides. The finding of a DIME physician concerning a claimant's medical impairment rating must be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's findings must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and* Storage *Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

However, Claimant is not challenging the 1% rating Dr. Ogden assigned for Claimant's surgical scars. And while Respondents have submitted the report of Dr. Fall

in which she contends Dr. Ogden misapplied the AMA Guides by assigning Claimant a 1% whole person impairment rating for his surgical scars and erred by assigning Claimant an 8% lower extremity rating instead of a 4% rating, Respondents have not taken the position that Dr. Odgen erred and that his opinion should be overturned and that the rating provided by Dr. Fall should be adopted by the ALJ. Instead, Respondents contend Claimant has failed to overcome the opinion of Dr. Ogden and that the rating provided by Dr. Odgen's should stand. Therefore, neither party is challenging the 1% whole person rating provided by Dr. Ogden for Claimant's surgical scars.[3] As a result, there does not appear to be the need for the ALJ to address this portion of his rating.

Extremity Rating for Claimant's Right Leg

The central issue is whether Dr. Ogden properly applied the AMA Guides in assessing Claimant's right lower extremity impairment rating. Dr. Ogden assigned a 7% lower extremity impairment for Claimant's right knee based on reduced flexion and a 1% lower extremity impairment for superficial peroneal sensory deficit, resulting in an 8% lower extremity impairment, or 3% whole person impairment.

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[3] To the extent the analysis is required, the ALJ finds and concludes that there is insufficient evidence under either standard to establish Dr. Ogden erred in providing Claimant a 1% whole person impairment rating under the AMA Guides. Dr. Fall's assertion that no impairment should be assigned because the scars are "well-treated and not associated with any functional limitations" misinterprets the AMA Guides' rating criteria for skin disorders. Under Table 1 on page 232 of the AMA Guides, Class 1 skin disorders explicitly encompass "signs or symptoms of a skin disorder (surgical and traumatic scars) are present, and with treatment there is minimal to no limitation, in the performance of the activities of daily living." Moreover, this Class 1 category allows for the provision of a 0-5% whole person impairment rating. Thus, Dr. Ogden correctly identified that Claimant's surgical scars fall within this Class 1 category, which qualifies for a 0-5% whole person impairment rating despite the absence of functional limitations. The AMA Guides specifically contemplate that visible scarring constitutes a ratable impairment even when well-treated and causing no functional limitation. Therefore, Dr. Ogden's 1% rating is consistent with the plain language and application of the AMA Guides. (ALJ can take judicial notice of the AMA Guides and Desk Aid 11. *See Serena V. SSC Pueblo Belmont Op Co. LLC*., W.C. No. 4-922-344-01 (Dec. 1, 2015))

As noted above, the increased burden of proof, i.e., clear and convincing evidence, required by the DIME procedures does not apply to scheduled injuries, such as Claimant's right lower extremity. Thus, Claimant must prove by a preponderance of the evidence that Dr. Ogden misapplied the AMA Guides by assigning this rating. Whether a physician has properly applied the AMA Guides is a question of fact for the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Moreover, The Division of Workers' Compensation Desk Aid #11 provides guidance for assessing impairment using contralateral joint measurements, a method known as normalization, when the opposite joint better reflects the patient's pre-injury baseline. The Desk Aid is not binding but may be applied at the physician's discretion. *Hackbarth v. A.W. Farrell & Sons*, W.C. No. 4-737-890 (Nov. 20, 2012).

Dr. Ogden did not note any pathology in Claimant's left ankle, and the record contains no credible medical evidence establishing preexisting pathology of that joint. Therefore, Dr. Ogden' use of the left ankle as a baseline was reasonable. Conversely, Dr. Ogden properly declined to apply normalization to the knee due to preexisting Osgood-Schlatter disease affecting the left knee. The ALJ finds Claimant did not submit sufficient evidence to establish by a preponderance of the evidence that Dr. Ogden erred in assessing Claimant's permanent impairment for his lower extremity.

The record also supports Dr. Ogden's assessment of a 1% impairment for the superficial peroneal nerve. While Dr. Zimmerman provided a higher rating, a preponderance of the evidence does not establish that Dr. Ogden's rating - based on his physical examination and review of the medical records - was incorrect.

Accordingly, the ALJ finds and concludes Claimant has not met his burden of proving by a preponderance of the evidence that Dr. Ogden misapplied the AMA Guides in assessing his impairment. As a result, the ALJ finds and concludes that Claimant sustained an 8% permanent impairment rating of the right lower extremity.

IV. Whether Claimant established that he is entitled to a disfigurement award.

Disfigurement benefits are provided for in § 8-42-108, C.R.S. and are awarded for the observable consequences of an industrial injury. *Arkin v. Industrial Comm'n*, 145 Colo. 463, 358 P.2d 879 (1961).

Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Based on the ALJ's observations and findings, Claimant has sustained a number of scars involving his right lower extremity. In addition to scaring, his right calf also developed some atrophy. As a result, the ALJ finds and concludes Claimant is entitled to disfigurement benefits under § 8-42-108(1). Thus, based on the totality of the overall appearance of his right lower extremity, which includes numerous scars and some atrophy of his calf, the ALJ awards Claimant $4,500.

Order

It is therefore ordered that:

1. Claimant failed to overcome the opinion of the DIME physician regarding MMI. Thus, Claimant reached MMI on May 9, 2024.
2. Claimant is entitled to an 8% lower extremity impairment rating. Claimant's scheduled impairment rating shall not be converted to a whole person.
3. Claimant is entitled to a 1% whole person impairment rating for his scarring.
4. Claimant shall be paid $4,500 for his disfigurement pursuant to § 8-42-108, C.R.S.

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: August 25, 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 5-199-434-004

Stipulations

At the outset of the hearing, the parties agreed to reserve the issues of average weekly wage and temporary disability benefits. The parties' agreements/stipulations were accepted and approved.

Remaining Issues

I. Whether Claimant established, by a preponderance of the evidence, that she sustained compensable injuries to her hips and low back on either, or both, October 5, 2022, and March 14, 2024.

II. If Claimant established that she suffered compensable hip and low back injuries, whether she also established, by a preponderance of the evidence, that she is entitled to reasonable and necessary medical benefits to cure or relieve the effects of these industrial injuries.

Based on the evidence presented, the ALJ orders as follows:

Compensability

A. A "compensable injury" is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.,* W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must

establish that the condition for which she 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. 2011), aff’d *Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); Section 8-41-301(I)(b), C.R.S.

B. The phrases "arising out of” and "in the course of" are not synonymous and a claimant must meet both requirements for a claimed 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 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals*, supra; *Deterts v. Times Publ'g Co*., 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Conversely, the "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). Here, there is little question that Claimant’s alleged injuries occurred within the time and place limits of her employment and during activities related to Claimant’s duties as a housekeeper working in Respondents’ hotel, namely, moving a mattress while setting up a guest room and removing wet bed sheets and towels from a washing machine to a dryer. While the evidence presented supports a finding/conclusion that Claimant was injured in the course and scope of her employment, it is necessary to address whether her symptoms/injury arose out of that employment.

C. As noted, the term "arises out of” refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* There is no presumption that an injury, which occurs in the course of employment, also arises out of the employment. *Finn v. Industrial Commission*,

165 Colo. 106, 437 P.2d 542 (1968). The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996).

D. In this case, Respondents argue, based primarily upon the opinions of Dr. Chen, that Claimant's injuries are not compensable because the records he reviewed contained only "minimal" medical documentation regarding Claimant's alleged injuries and an absence of any objective evidence to suggest that Claimant sustained a work injury. Thus, Respondents contend that even if Claimant's work duties caused a lumbar injury, this injury would have self-resolved within three months with activity modification and without the need for medical treatment. Accordingly, Respondents maintain that Claimant failed to present sufficient evidence that she sustained an injury requiring medical treatment, i.e., arising out of her employment on either October 5, 2022, or March 14, 2024. The ALJ is not persuaded.

E. In this case, the totality of the evidence presented persuades the ALJ that Claimant's hip/low back injuries have their origins in her work-related functions as a housekeeper, i.e. doing laundry and moving a mattress and are sufficiently related to those functions, so as to be considered part of her service to Employer. Based upon the evidence presented, the ALJ is convinced that not only did Claimant's injuries occur within the time and place limits of her employment, but also that her symptoms and need for treatment "arose out of" her work duties as a housekeeper for Employer. Even Dr. Chen testified that Claimant was "injured" on October 5, 2022, before walking back this testimony by adding that when he used the term "injured," he was referring to the incident itself and not specific injury. The fact that Claimant may have suffered a low back "strain", which Dr. Chen felt would "self-resolve" after three months does not negate the compensable nature of those injuries or compel a finding that they are not work-related as suggested by Respondent. Claimant is not required to prove the occurrence of a dramatic event to prove a compensable injury. *Martin Marietta Corp. v. Faulk,* 158 Colo.

441, 407 P.2d 348 (1965). Even a "minor strain" can be a sufficient basis for a compensable claim if, as is the case here, it arose from a claimant's work activities and caused him/her to seek medical treatment. The ICAO's decision in *Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2004) is instructive regarding the minimal extent of an injury that can satisfy the basic threshold requirement of compensability. In Garcia, the claimant felt pain in her abdomen and hip while lifting a piece of glass at work. The employer referred the claimant to Dr. Caughfield, who diagnosed a lumbar strain, but opined she had already reached MMI. The ALJ found that the claimant suffered a "minor back sprain," but also found the sprain had "resolved" within five days of the incident. The ALJ denied the claim on the grounds that the claimant failed to prove she suffered a compensable "injury." The ICAO reversed, and held that the claimant had established a compensable injury as a matter of law.

F. In this case, the evidence presented supports a finding/conclusion that Claimant experienced a sudden onset of pain while performing a work-related functions on October 5, 2022. These work-related duties caused symptoms in Claimant's low back and hips prompting her to report an injury to Employer and request medical attention. Claimant was directed to a Chiropractor where she complained of low back and hip pain related to moving a mattress at work. Between October 5, 2022, and March 14, 2024, Claimant continued to experience pain but was doing better until she sustained a second work injury on March 14, 2024. On that date, Claimant was removing heavy, wet bed sheets and towels from a washing machine to a dryer and putting them up on shelves. While performing these work duties, Claimant felt a burning pain beginning in her low back and progressing to her hips and feet prompting her to seek treatment through the Arkansas Valley Regional Medical Center and subsequently through Prowers Medical Center and Valley Wide Health Systems, Inc. Claimant attributed this pain to her work duties and noted that her pain was increased above that she was feeling before the March 14, 2024, incident involving wet heavy laundry. Based upon the totality of the evidence presented, the ALJ is convinced that a logical causal connection exists between Claimant's work duties on October 5, 2022, and March 14, 2024, and her hip/low back

symptoms and need for treatment. Accordingly, the ALJ is persuaded that the claimed injuries are compensable.

Claimant's Entitlement to Medical Benefits

G. 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, 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*. As noted above, Claimant has proven that she suffered compensable injuries to her hips/low back. Moreover, the evidence presented persuades the ALJ that the treatment Claimant received through Lamar Family Chiropractic, Arkansas Valley Regional Medical Center, Prowers Medical Center (Tracy MacEachern, M.D.) and Valley Wide Health Systems, Inc. (Glenn R. Waite, M.D.) was related to her compensable October 5, 2022 and March 14, 2024 injuries and that this treatment was otherwise reasonable and necessary to relieve her of the effects of these injuries. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her hip and low back injuries.

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

Dated: August 26, 2025

/s/ Richard M. Lamphere_____

Richard M. Lamphere
Administrative Law Judge

This decision is final and not subject to appeal unless a full order is requested. The request for a full order shall be made with the Office of Administrative Courts, 2864 S. Circle Drive, Suite 810, Colorado Springs, CO 80906, within ten working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

If a party makes a request for a full order both parties shall submit a proposed full order containing specific findings of fact and conclusions of law within five working days from the date of the request. The proposed full order must be submitted by e-mail in Word or Rich Text format to OAC-CSP@state.co.us. The proposed order shall also be submitted to opposing counsel and unrepresented parties by e-mail, facsimile, or same day or next day delivery.

Office of Administrative Courts

State of Colorado

Workers' Compensation Number 5-299-164-001

Issues

1. Has Claimant demonstrated, by a preponderance of the evidence, that on January 20, 2025, he suffered an injury arising out of and in the course and scope of his employment with Employer?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment he received following the injury constitutes reasonable medical treatment necessary to cure and relieve him from the effects of the work injury?

Findings of Fact

1. Employer operates a bakery. Claimant's job duties include preparing mix for the production lines. Claimant prepares the mix by placing 50 pound bags of flour, sugar, and other ingredients into an industrial size mixing bowl. When full of mix, the bowl weighs between 450 and 600 pounds. Claimant testified that some days he prepares 15 batches of mix, on other days he can make up to 80 batches.

2. Claimant testified that on January 20, 2025, he was performing his normal job duties preparing mix when he was injured. Claimant further testified that as he was placing flour into the large bowl, the bowl began to fall over, and he attempted to catch the bowl. In doing so, Claimant felt a pain in his lower abdomen, groin, and back. Claimant testified that the pain was so severe that he fell to the floor.

3. Following this incident, Claimant was transported to the emergency department (ED) at UC Health. Emergency service personnel noted a protrusion to the right lower abdomen and that the right lower quadrant was "tender to the touch". At the hospital,

Claimant's complaints were listed as right lower quadrant pain and into the inguinal region "after falling onto a metal item at work".

4. Following a computed tomography (CT) scan of Claimant's abdomen, he was diagnosed with acute perforated appendicitis. The CT scan also showed a small hiatal hernia, as well as a "small right", and "tiny left" fat containing umbilical hernias. Claimant was admitted to the hospital and underwent a laparoscopic appendectomy. The surgery was performed by Dr. Kristy Lynn Hawley.

5. Following the surgery, Claimant was released from the hospital on January 22, 2025. At that time, Claimant was given a two week lifting restriction of 10 pounds. In addition, Marly Stross-Tallman, PA-C authored a letter excusing Claimant from work until February 4, 2025, with no restrictions.

6. On February 3, 2025, Claimant sought treatment in the ED at UC Health. Specifically, Claimant was seeking a note to provide to Employer. On examination, Dr. Lesley Osborn noted "fullness over right groin" and opined that this could be indicative of a hernia. The February 3, 2025 medical record contains the following statement: "you may have a small fat containing hernia." Claimant was instructed to follow up with his primary care provider (PCP) or with his surgeon.

7. Also on February 3, 2025, Dr. Osborn authored a note that indicated that Claimant was scheduled to see his surgeon on February 10, 2025, and was excused from work until February 11, 2025.

8. On February 10, 2025, Claimant was seen at the Surgical Clinic at UC Health by Taryn Ketels, NP. The purpose of this visit was a post-surgical follow-up. NP Ketels noted that Claimant was doing well and his incisions were healing. At that time, Claimant complained of pain at the site of the umbilical incision and swelling in the right inguinal area. NP Ketels noted the prior imaging finding of a small fat containing hernia. In the medical record of that same date, Claimant's condition was noted to be "not an emergency" and he was discharged with instructions to contact outpatient financial assistance. Claimant testified he was told he would need to speak with Employer to schedule another surgery.

9. Claimant testified that between February 10, 2025 and April 16, 2025, he did not seek medical treatment because of his financial limitations.

10. On April 16, 2025, Claimant sought urgent care treatment at Denver Health. At that time, Claimant reported lower abdominal pain, pain and swelling in his right groin, low back pain, constipation, and rectal bleeding. On examination, Dr. William Drew noted tenderness over the right and left lower abdomen and the presence of a hernia. He further noted that there was "palpable fullness and tenderness in the right inguinal region" which was an indication of a possible inguinal hernia. Dr. Drew ordered x-rays of Claimant's abdomen which showed no acute abnormalities, and no bowel obstruction. Claimant was prescribed medications to address constipation and instructed to follow up with the surgeon that performed the appendectomy.

11. On May 7, 2025, Claimant was seen by Dr. David Yamamoto as his authorized treating physician (ATP) for this claim. At that time, Dr. Yamamoto identified Claimant's diagnoses as right inguinal hernia, lumbar strain, right sided sciatica, and depression. Dr. Yamamoto assigned work restrictions of no lifting, pushing, or pulling more than 10 pounds; no repetitive lifting or carrying over five pounds; and minimal bending at the waist. In addition, Dr. Yamamoto referred Claimant to Dr. Medina at Colorado Hernia Center for a surgical consultation.

12. On May 21, 2025, Claimant returned to Dr. Yamamoto. At that time, Dr. Yamamoto noted the pending prior referral to Colorado Hernia Center, and made a new referral to Gastroenterology of the Rockies. Claimant's work restrictions were unchanged.

13. On June 17, 2025, Claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak. In connection with the IME, Dr. Lesnak reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. Lesnak opined that the January 20, 2025 incident at work did not result in an injury to Claimant, nor did it aggravate any pre-existing condition. Dr. Lesnak further opined that Claimant's need for an emergency appendectomy was not related to the incident at work on January 20, 2025. Dr. Lesnak noted that during his examination of Claimant at the IME, Claimant "exhibited severe pain behaviors" when Dr. Lesnak attempted to examine his right

lower abdomen. Dr. Lesnak further noted that Claimant had no tenderness to palpation in the right groin or right inguinal area. Dr. Lenak opined that Claimant's subjective complaints were not objectively reproducible.

14. Dr. Lesnak's testimony was consistent with his report. Dr. Lesnak reiterated his opinion that Claimant's work activities on January 20, 2025 did not cause his perforated appendix or the small right inguinal hernia. Dr. Lesnak explained that the Claimant has bilateral inguinal hernias, which is likely a congenital condition. Dr. Lesnak further explained that it is very common for individuals to have inguinal hernias, even from birth. Dr. Lenak also testified that at the IME Claimant had no complaints on palpation of his groin area. In discussion of Claimant's appendix, Dr. Lesnak stated that nothing at work caused Claimant's appendix to burst, rather it just happened to occur while Claimant was at work. With regard to Claimant's lumbar spine, Dr. Lesnak testified that Claimant's symptoms are not consistent with a lumbar strain.

15. As an initial matter, the ALJ finds Claimant's testimony regarding the onset of his symptoms to be credible. However, the ALJ finds that the symptoms and treatment related to Claimant's perforated appendix are not causally related to his work duties. Specifically, the ALJ finds that the incident involving the falling bowl on January 20, 2025 did not cause Claimant's appendix to become perforated.

16. With regard to Claimant's symptoms that persisted after the appendectomy, and for which he sought treatment on April 16, 2025, the ALJ is not persuaded that there is a causal connection between Claimant's job duties, and/or the January 20, 2025 incident at work, and those later symptoms. Specifically, the ALJ is not persuaded that a previously asymptomatic hernia became symptomatic as a result of Claimant's job duties. In this regard, the ALJ credits the medical records and Dr. Lesnak's opinions.

17. For all of the foregoing reasons, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that on January 20, 2025, he suffered an injury arising out of and in the course and scope of his employment with Employer.

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. 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. *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 failed to demonstrate, by a preponderance of the evidence, that on January 20, 2025, he suffered an injury arising out of and in the course and scope of his employment with Employer. As found, the medical records and the opinions of Dr. Lesnak are persuasive on this issue.

Order

It is therefore ordered that Claimant's claim regarding a January 20, 2025 alleged work injury is denied and dismissed.

Dated August 27, 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 via email to either **oac-ptr@state.co.us** or to **oac-dvr@state.co.us**. If the Petition to Review is emailed to either of the aforementioned email addresses, 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.**

[redacted] The ALJ noted that the following notices and pleadings were mailed to Respondent at both the [redacted], Colorado and the [redacted], Colorado addresses identified above:

1) A hearing confirmation was sent on June 3, 2025.
2) A Notice of Hearing was sent on June 4, 2025.
3) Claimant's Opposed Motion to Compel referencing the August 20, 2025 hearing was sent on August 5, 2025.
4) Claimant's Case Information Sheet referencing the August 20, 2025 hearing was sent on August 13, 2025.

Based upon these findings of the ALJ, the hearing commenced as scheduled. At the conclusion of the hearing, the ALJ directed Claimant to file a position statement no later than August 29, 2025. Claimant's position statement was received by the Office of Administrative Courts in Grand Junction, Colorado on August 22, 2025.

In this order, [redacted] will be referred to as "Claimant"; and Rocky Mountain Advanced Construction, Inc. will be referred to as "Employer" or "Respondent". Also in this order, "the ALJ" refers to the Administrative Law Judge; "C.R.S." refers to Colorado Revised Statutes; the "Act" refers to the Colorado Workers' Compensation Act at Section 8-40-101, *et. seq.*, C.R.S.; "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-3, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

Issues

1. Has Claimant demonstrated, by a preponderance of the evidence, that on January 29, 2025, he suffered an injury arising out of and in the course and scope of his employment with Respondent?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that at the time of Claimant's injury Respondent did not have workers' compensation insurance coverage?

3. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment he has received for his right lower extremity (including, but not limited to, treatment at Montrose Memorial Hospital and Western Slope Orthopaedics), constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

4. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning January 30, 2025, and ongoing until terminated by law?

5. If the claim is found compensable, what is Claimant's average weekly wage (AWW)?

6. At the time of the hearing, Claimant withdrew the endorsed issue of penalties, without prejudice.

Findings of Fact

1. Claimant began working for Respondent Employer on October 7, 2024 as a laborer. Claimant was always assigned to perform work at 201 S. Nevada Avenue, Montrose, Colorado, 81401. Claimant testified that Matthew Weedman is the owner of Respondent company. During the time that Claimant performed work for Respondent, Mr. Weedman was also the owner of the property at 201 S. Nevada Avenue, Montrose, Colorado, 81401.

2. Claimant was paid $15.00 per hour, and his hours varied each day. Claimant's coworker, Robert McCormick, tracked his own and Claimant's work hours on a daily basis. These hours were recorded by Mr. McCormick on a calendar.

3. These hours were submitted to Mr. Weedman and he would then issue checks to Claimant and Mr. McCormick. These checks were issued from the checking account of Respondent's business name.

4. On January 29, 2025, Claimant was performing his normal job duties at 201 S. Nevada Avenue. Specifically, he was working on the roof. As he was attempting to descend a ladder, the ladder slid down the driveway, losing contact with the roof. As a result, the ladder and Claimant fell approximately 15 feet to the ground. As he fell, Claimant's right leg became tangled in the ladder.

5. Mr. McCormick was present and witnessed this fall. He immediately contacted Mr. Weedman who was inside the home at 201 S. Nevada Avenue. Mr. McCormick and Mr. Weedman assisted Claimant into Mr. McCormick's vehicle and Mr. McCormick transported Claimant to Montrose Memorial Hospital for emergency medical treatment.

6. At Montrose Memorial Hospital, Claimant underwent x-rays and was diagnosed with Grade 1 open tibial fracture and a fibular fracture. Due to the emergent nature of Claimant's injury, Dr. C. Kelly Bynum performed "I and D with external fixation" and multiplander external fixation of the right distal tibia-fibia pilon. Claimant testified that the surgery performed on January 29, 2025 was intended to stabilize his foot and ankle.

7. Claimant was released from the hospital on January 30, 2025, with a work restriction of no weight bearing on the right leg. In addition, Claimant was referred to an orthopedic specialist for further treatment.

8. On February 6, 2025, Claimant was seen by Dr. Joshua Bagley at Western Slope Orthopaedics. At that time, Dr. Bagley noted that imaging showed a highly comminuted right distal tibia plafond fracture with comminution at the articular surface. Dr. Bagley further noted that the fracture extended proximally into the diaphysis. Dr. Bagley recommended that Claimant undergo surgery, however due to the amount of swelling present at that time, Claimant was instructed to elevate his foot and return in one week.

9. On February 13, 2025, Claimant returned to Dr. Bagley. At that time, Dr. Bagley recommended that Claimant undergo surgical fixation of the pilon and distal fibula fracture.

10. The recommended surgery was performed by Dr. Bagley on February 22, 2025. Specifically, Claimant underwent right tibial plafond open reduction and internal fixation; right fibula open reduction and internal fixation; and removal of the external fixator device.

11. On July 11, 2025, Claimant underwent a third surgery of his right lower extremity. This surgery was also performed by Dr. Bagley. Claimant testified that the third surgery was necessary because one of the plates from the February 2025 surgery was broken and had to be replaced. As a result of the July 11, 2025 surgery, Claimant attended the hearing in this matter on crutches and a cast on his right foot and ankle.

12. Claimant testified that since his injury he has been prescribed pain medications. Claimant also testified that he has not yet undergone physical therapy. Claimant has not returned to any form of employment since his January 29, 2025 work injury.

13. Claimant testified that since January 29, 2025, all of his medical treatment has been paid for by Medicaid.[1]

14. Claimant also testified that although he assumed Respondent had workers compensation insurance, no proof of insurance has been provided to him. Additionally, he has not been contacted by an insurer for Respondent.

15. Claimant's former coworker, Mr. McCormick, testified regarding the January 29, 2025 incident. His testimony was consistent with Claimant's testimony regarding the incident and transportation of Claimant to obtain medical treatment. Mr. McCormick also testified regarding the records he kept of Claimant's work hours and how those hours were provided to Respondent.

16. Absent any persuasive evidence to the contrary, the ALJ credits the calendar admitted into evidence and the testimony of Claimant and Mr. McCormick regarding Claimant's work hours. Therefore, the ALJ finds that between November 11, 2024 and January 29, 2025, Claimant worked the following hours, and was paid the following gross wages:

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[1] Billing information related to the July 11, 2025 surgery (the third surgery) was not yet available at the time of the hearing.

11/11/24-11/17/24	11.5 hours worked	$172.50
11/18/24-11/24/24	29.5 hours worked	$442.50
11/25/24-12/1/24	10.5 hours worked	$157.50
12/2/24-12/8/24	31.5 hours worked	$472.50
12/9/24-12/15/24	25.5 hours worked	$382.50
12/16/24-12/22/24	0 hours worked[2]	$0.00
12/23/24-12/29/24	10.5 hours worked	$157.50
12/30/24-1/5/25	10 hours worked	$150.00
1/6/25-1/12/25	13 hours worked	$195.00
1/13/25-1/19/25	25 hours worked	$375.00
1/20/25-1/26/25	5.5 hours worked	$82.50
1/26/25-1/29/25[3]	5.5 hours worked	$82.50
Totals	178 hours worked	$2,670.00

17. The ALJ credits the medical records and the testimony of Claimant and Mr. McCormick and finds that Claimant has demonstrated that it is more likely than not that on January 29, 2025, he suffered an injury arising out of and in the course and scope of his employment with Respondent

18. Absent any persuasive evidence to the contrary, the ALJ also finds that at the time of Claimant's injury on January 29, 2025, Respondent did not have workers's compensation insurance.

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[2] Claimant credibly testified that during this week he had no hours because he was sick with Covid.

[3] Date of injury.

19. The ALJ further credits the medical records and Claimant's testimony and finds that Claimant has demonstrated that it is more likely than not that treatment he has received for his right lower extremity (including, but not limited to, treatment at Montrose Memorial Hospital and Western Slope Orthopaedics), constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury

20. With regard to lost wages, the ALJ also credits the medical records and Claimant's testimony and finds that Claimant has demonstrated that it is more likely than not that as a result of the January 29, 2025 work injury he has not returned to employment. Therefore, Claimant has also successfully demonstrated that he is entitled to temporary total disability (TTD) benefits.

21. With regard to Claimant's average weekly wage (AWW) the ALJ calculates that Claimant earned a total of $2,670.00 during the 12 week period of November 11, 2024 and January 29, 2025. However, the ALJ also notes that for one of those weeks Claimant had no hours or earnings because of illness. Additionally, Claimant's final week of employment was a partial week due to his injury. The ALJ also notes that the week just prior to Claimant's injury he only worked 5.5 hours. When reviewed with the other weeks, this was an outlier. Therefore, the ALJ has calculated Claimant's AWW to be $278.33. This calculation was reached as follows, the total of $2,670.00 less the last two weeks[4] of Claimant's employment (which was $165.00) for a total of $2,505.00. When this total is divided by nine weeks,[5] it equals an AWW of $278.33.

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

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[4] As the ALJ deems these weeks to not be reflective of Claimant's average wages.

[5] The ALJ has removed one week that had no hours due to illness.

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. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation. . . under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. Under Section 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the

6. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see 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.*

7. As found, Claimant has demonstrated, by a preponderance of the evidence, that on January 29, 2025, he suffered an injury that arose out of and in the course and scope of his employment with Respondent. As found, the medical records and the testimony of Claimant and Mr. McCormick are credible and persuasive.

8. As found, Claimant has demonstrated, by a preponderance of the evidence, that at the time of Claimant's January 29, 2025 work injury, Respondent did not carry workers' compensation insurance.

9. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008).

10. As found, Claimant has demonstrated, by a preponderance of the evidence, that treatment he has received for his right lower extremity (including, but not limited to, treatment at Montrose Memorial Hospital and Western Slope Orthopaedics), constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury. As found, Claimant's testimony is credible and persuasive on this issue.

11. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by

a claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

12. As found, Claimant has demonstrated, by a preponderance of the evidence, that as a result of his work injury, he has experienced wage loss and is therefore entitled to TTD benefits. The ALJ finds that Claimant is entitled to TTD benefits beginning January 30, 2025 and ongoing until terminated by law. As found, the medical records and Claimant's testimony are credible and persuasive on this issue.

13. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

14. Section 8-42-102(2), C.R.S. requires the ALJ to base a claimant's AWW on their earnings at the time of the injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon their AWW on a date other than the date of the injury. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

15. As found, Claimant's AWW for this claim is $278.33. As found, the calendar records of Claimant's hours worked and the testimony of Claimant and Mr. McCormick are credible and persuasive on this issue. The ALJ exercised her discretion in calculating Claimant's AWW to best reflect Claimant's average earnings at the time of the injury.

16. Finally, the ALJ notes that Section 8-42-101(4), C.R.S. specifically provides:

> Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

Order

It is therefore ordered:

1. Claimant suffered a compensable injury on January 29, 2025.

2. Respondent did not have workers' compensation insurance at the time of Claimant's injury on January 29, 2025.

3. Respondent shall pay for reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury. Such reasonable and necessary medical treatment includes, but is not limited to, the treatment Claimant received for his right lower extremity at Montrose Memorial Hospital and Western Slope Orthopaedics.

4. Claimant is entitled to temporary total disability (TTD) benefits beginning January 30, 2025, and ongoing until terminated by law.

5. Claimant's average weekly wage (AWW) for this claim is $278.33.

6. Respondent shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

Dated August 27, 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 via email to either **oac-ptr@state.co.us** or to **oac-dvr@state.co.us**. If the Petition to Review is emailed to either of the aforementioned email addresses, 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 5-199-434-004

Issues

The following issues were raised for consideration at hearing:

I. Whether Claimant's claim of injury occurring December 30, 2022, is barred by the time limitations set forth in C.R.S. § 8-43-103(2).

II. If the December 30, 2022, claim is not time barred, whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his mid-back and ribs entitling him to reasonable, necessary and related medical benefits.

III. If the December 30, 2022, claim is not time barred, and Claimant proved the compensable nature of his alleged injuries, whether he also established, by a preponderance of the evidence, that he is entitled to an award of temporary total disability (TTD) benefits.

IV. If the December 30, 2022, claim is not barred by the time limits set out in C.R.S. § 8-43-103(2) and Claimant established that he sustained compensable injuries to his mid-back and ribs, what was his average weekly wage (AWW) at the time of his December 30, 2022, industrial injury?

Based on the evidence presented, the ALJ orders as follows:

The Statute of Limitations

A. Issue I: Is Claimant's claim involving an alleged December 30, 2022,

injury barred by the time limits set forth in C.R.S. § 8-43-103(2)?

A valid claim for compensation can be dismissed if a claimant waits too long to pursue his/her claim. *See Grant v. Industrial Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987). Section 8-43-103(2) provides for a two-year statute of limitation for filing a notice claiming compensation with the Division of Workers' Compensation that begins to run after the injury and up to three years from the injury if Claimant demonstrates a reasonable excuse for failing to file such notice claiming compensation. The statute provides in in relevant part:

> [T]he right to compensation and benefits . . . shall be barred unless, **within two years after the injury** . . . a notice claiming compensation is filed with the division. **This limitation shall not apply . . . if it is established . . . within three years after the injury . . . that a reasonable excuse exists for the failure to file such notice**.

C.R.S. § 8-43-103(2) (2024). (Emphasis added).

B. The notice must apprise the Division and respondents of the claimant's intent to seek compensation. The preceding requirement is not satisfied by the employer filing a first report of injury, the Division's assignment of a claim number, claimant's counsel's entry of appearance or the claimant's service of interrogatories. *Packard v. Industrial Claim Appeals Office and City and County of Denver,* 456 P.3d 473 (Colo. App. 2019). However, application of the statute of limitations requires a determination of the date the statute began to run under the "discovery rule." Under that rule, the statute of limitations for filing a workers' compensation claim does not commence until the claimant knew, or reasonably should have recognized, the nature, seriousness and probable compensable character of the alleged injury. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). The "probable compensable character" element reflects the requirement that the claimant appreciate the causal relationship between the employment and the

condition. *Becirovic v. Residence Inn*, W.C. No. 5-002-866-01 (Aug. 3, 2017). The "seriousness" of the injury refers to the claimant's recognition of the "gravity of the medical condition." *Burnes v. United Airlines*, WC 4-725-046 (ICAO. Apr. 17, 2008). The question of when the claimant recognized the nature, seriousness, and probable compensable character of the injury is one of fact for determination by the ALJ. *Id.* In this case, the evidence presented persuades the ALJ that Claimant recognized the nature, seriousness and probable compensable character of his alleged injury after reporting it and seeking medical attention on January 3, 2023. Given Claimant's assertion that he was injured at work and could not perform the full range of his work duties, the ALJ is convinced that he was aware of the nature, seriousness and compensable character of his alleged injury. Accordingly, the ALJ is persuaded that the limitation period detailed in § 8-43-103(2), began to run as of January 3, 2023.[1]

C. In this case, Claimant waited 773 days (after the statute began running on January 3, 2023) to file an application for hearing claiming entitlement to benefits. This is substantially outside the 2-year limit enumerated in C.R.S. § 8-43-103(2) and Respondents have requested dismissal as a consequence. Importantly, Claimant did not present evidence of a reasonable excuse for failing to timely file a notice claiming compensation, i.e. an Application for Hearing or a Worker's Claim for Compensation. While the "statute does not require that the reasonable excuse be one that is legally watertight", the Colorado Supreme Court has distinguished between a claimant's reasons for delayed filing and legally excusable reasons for failing to act. See, *City and County of*

[1] 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. 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 the 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). While Claimant testified that he lost 2 ½ months from work, the medical records support a conclusion that be began losing time from work based upon the opinion of a non-authorized provider after the ATP (authorized treating provider) under the workers compensation case returned him to full duty work as of January 13, 2023. Prior to his release to full duty work on January 13, 2023, Claimant was consistently returned to modified duty work. Consequently, the ALJ is not convinced that Respondents were required to report Claimant's injury as a lost time claim.

Denver, Police Dept. v. Phillips, 166 Colo. 312, 319, 443 P.2d 379, 383 (1968); *Armour & Co. v. Indus. Comm'n*, 149 Colo. 251, 256, 368 P.2d 798, 800 (1962) and *Monks Excavating & Redi-Mix Cement v. Kopsa*, 367 P.2d 321 (Colo. 1961). Among the most legally sound excuses are a claimant's reliance on a physician's opinions about the severity of the injury and the employer's advice, or other employer or insurer conduct that results in failure to file a claim, *e.g., Valdez*, 688 P.2d at 1137; *see Industrial Comm'n v. Newton Lumber & Mfg. Co.*, 135 Colo. 594 (Colo. 1957)(holding that the First Report of Injury form showing the employer's knowledge of the injury and its details along with employer providing the incorrect address on the form such that the claimant did not receive claim forms in the mail amounted to a reasonable excuse for claimant's untimely claim); *see also Prager v. Lakeridge Theater*, 483 P.2d 408 (Colo. App. 1971)(finding that the untimely filing of a claim may be excused because the employer or employer's insurer misled claimant into thinking he had no claim). As noted, Claimant presented no persuasive evidence regarding a reasonable excuse surrounding his failure to timely file the required notice with the division as outlined in C.R.S. § 8-43-103(2). The fact that Claimant may have been ignorant of the requirement to file a notice claiming compensation with the division provides no relief concerning dismissal of his claim. Ignorance of the law has long been held to be no excuse for failure to file a claim within the statute of limitations' time frame. To the contrary, claimants are presumed to know their legal rights, and a mistake in this regard does not constitute an excuse for filing a claim after the statute of limitations has run. *See Paul v. Industrial Commission*, 632 P.2d 638 (Colo. App. 1981; *Ramos v. Sears Roebuck Co*., W.C. No. 4-156-827 (February 10, 1994). Thus, a claimant's misunderstanding of his legal rights does not provide a basis for establishing a "reasonable excuse" for extending the statute of limitations under § 8-43-301(2), C.R.S. *Patt v. City of Wheat Ridge,* W.C. No. 4-180-739 (July 24, 1997). In this case, the evidence presented supports a finding/conclusion that Claimant did not file notice with the division asserting entitlement to benefits within two years of his alleged injury. Indeed, Claimant did not file his application for hearing asserting entitlement to benefits for 773 once the statute of limitation began running on January 3, 2023. Moreover, Claimant's ignorance of the law does not exempt him from the statutory provisions of the Workers' Compensation Act, nor does it create a "reasonable excuse"

for extending the statute of limitations under § 8-43-301(2). Accordingly, the ALJ concludes that Claimant's claim for compensation is time barred. Because Claimant's claim is time barred, his application for hearing is dismissed. Consequently, this Summary Order does not address Claimant's remaining contentions regarding compensability and entitlement to benefits, including medical and lost wage benefits.

So Ordered this 27th day of August 2025.

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge

This decision is final and not subject to appeal unless a full order is requested. The request for a full order shall be made with the Office of Administrative Courts, 2864 S. Circle Drive, Suite 810, Colorado Springs, CO 80906, within ten working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

If a party makes a request for a full order both parties shall submit a proposed full order containing specific findings of fact and conclusions of law within five working days from the date of the request. The proposed full order must be submitted by e-mail in Word or Rich Text format to OAC-CSP@state.co.us. The proposed order shall also be submitted to opposing counsel and unrepresented parties by e-mail, facsimile, or same day or next day delivery.

Office of Administrative Courts
State of Colorado
Workers' Compensation No. WC 5-276-183-001

Issues

I. Whether Claimant has proven by a preponderance of the evidence that the left knee replacement is reasonable, necessary, and causally related to the industrial injury.

Findings of Fact

1. This claim involves an admitted June 17, 2024, injury to Claimant's left lower extremity. Claimant had been a nurse for 47 years. Before working with the Employer, Claimant performed similar job duties with previous employers, which include both office work, patient care, and nursing, etc. Outside of work, Claimant enjoys hiking, swimming, and quilting. Before her work injury, Claimant was performing all functions of her job without issue. In November 2023, Claimant began working for the Employer as a patient care manager and nurse.

2. On June 17, 2024, Claimant tripped and fell while performing her job duties. She was taken to the emergency room (ER) at Longmont United Hospital immediately following the injury. At the hospital, Claimant reported left hip, pelvis, and thigh pain after falling directly on her left hip. The medical records from that day documented that Claimant had prior left knee problems and wore a brace for it. Claimant was admitted to the hospital for further evaluation and treatment. *Claimant's Exhibit 4, pages 15-23*.

3. The same day Claimant underwent left hip, left femur, and left knee x-rays, which revealed an acute subcapital fracture of her left femoral neck and mild left knee tricompartmental osteoarthritis with a small left knee joint effusion. *Claimant's Exhibit 5, pages 33-36*. George William Chaus, MD, an orthopedic surgeon, evaluated Claimant to discuss her potential for surgery. She reported no prior relevant medical history. Dr. Chaus recommended that Claimant undergo a left hip open reduction and internal fixation (ORIF). *Claimant's Exhibit 6, pages 40-44*. The next day, June 18, 2024, Claimant underwent the left hip ORIF surgery. On June 19, 2024, Claimant was

discharged home with a front wheel walker. *Claimant's Exhibit 4, pages 24-32; Claimant's Exhibit 6, pages 45-46*.

4. On June 28, 2024, Claimant treated at Concentra and reported the nature of her injury and surgery. Claimant's symptoms included pain as well as difficulty with weight bearing and walking. However, using a walker helped to relieve her symptoms. The treating provider placed Claimant on work restrictions and referred her back to Dr. Chaus for post-operative care. *Claimant's Exhibit 7, pages 75-80*.
5. On July 2, 2024, Claimant returned for a follow-up with Dr. Chaus, who noted that Claimant felt she was improving since the surgery, and he also noted her use of the walker. *Claimant's Exhibit 6, pages 47-48*.
6. On July 5, 2024, Claimant returned to Concentra and reported that her staples were removed so she would be able to begin physical therapy the following week. Her provider placed an order for physical therapy. *Claimant's Exhibit 7, pages 81-87.*
7. On July 9, 2024, Claimant had her initial physical therapy evaluation at Pro Active PT. It was noted that Claimant was using a walker for stability, balance, and weight bearing complications due to pain. *Claimant's Exhibit 8, pages 138-144*.
8. On July 11, and July 16, 2024, it was noted at her physical therapy sessions that Claimant was using her walker to off-weight her left lower extremity. *Claimant's Exhibit 8, pages 146-149*.
9. On July 23, 2024, at a physical therapy session, Claimant reported left knee pain. Claimant continued attending physical therapy as requested by her providers and consistently reported left knee pain and instability. *See Claimant's Exhibit 8, pages 154-184.*
10. On July 24, 2024, Respondents filed a General Admission of Liability, admitting for both medical and wage loss benefits. *Claimant's Exhibit 1, page 4*.
11. On July 25, 2024, Claimant treated at Concentra with Lori Long Miller, MD. Dr. Miller noted that Claimant's left hip recovery is being limited by her left-sided knee pain. She noted that Claimant had some knee pain after the fall, but was using a walker, and once she stopped using the walker and transitioned to a cane, her knee pain got

worse. She also noted that Claimant twisted her knee when she fell. As a result, Dr. Miller ordered a left knee MRI. *Claimant's Exhibit 7, pages 88-91*.

12. On July 30, 2024, Claimant underwent a left knee MRI, which revealed:

    - Tricompartmental chondromalacia, worst within the patellofemoral and medial tibiofemoral compartments.
    - No meniscal or ligamentous tear.
    - Intra-articular body in the posterior joint space measuring 0.7 x 0.5 x 0.9 cm.

    Claimant's Exhibit 5, pages 36-38.

13. On August 16, 2024, Claimant returned for a follow-up with Dr. Chaus, who noted Claimant's left hip was improving and that she was still using a cane for some balance issues. Dr. Chaus reviewed the radiologist report of Claimant's hip MRI, which revealed a healing femoral neck fracture. *Claimant's Exhibit 6, pages 49-51*.

14. On August 19, 2024, Claimant treated with Dr. Miller and reported persistent left knee pain. Dr. Miller reviewed her left knee MRI results and referred Claimant to a knee surgeon. *Claimant's Exhibit 7, pages 92-100*.

15. On August 27, 2024, Claimant treated with Robert Fitzgibbons, MD, at OCR, for a left knee evaluation. Claimant denied any prior left knee problems before her fall at work. Claimant described the onset of her pain as sudden following the incident at work and had been occurring for 6 weeks. Dr. Fitzgibbons noted Claimant's use of a cane. He reviewed Claimant's MRI and opined that an injection would not give her any significant long-lasting relief so he requested authorization for a left total knee arthroplasty. *Claimant's Exhibit 6, pages 52-59*.

16. On September 6, 2024, Respondents' retained expert witness, Qing-Min Chen, MD, performed a medical records review. Dr. Chen opined that Claimant had yet to undergo any conservative treatment to her left knee, so it was not appropriate to jump straight to a total knee arthroplasty. Additionally, Dr. Chen opined that the need for the knee replacement was unrelated to Claimant's work injury because he saw no

evidence of an aggravation of Claimant's preexisting condition, or any sort of bone contusion on her MRI. *Respondents' Exhibit K, pages 212-214*.

17. On September 19, 2024, Claimant returned to Dr. Miller at Concentra and reported ongoing left knee pain/symptoms. Dr. Miller ordered additional physical therapy. *Claimant's Exhibit 7, pages 101-105*.

18. On October 1, 2024, Claimant underwent a depo-medrol cortisone injection to her left knee that was administered by Dr. Fitzgibbons. *Claimant's Exhibit 6, pages 60-61*.

19. On October 14, 2024, Claimant followed up with Dr. Miller and reported the injection to her knee seemed to help but it did not last long. Dr. Miller noted that Claimant's physical therapy had been denied. *Claimant's Exhibit 7, pages 106-110.*

20. On October 29, 2024, Claimant treated with Dr. Fitzgibbons who documented the steroid shot only gave Claimant four days of relief. Dr. Fitzgibbons reiterated that the only solution to her knee problems would be a total knee arthroplasty. *Claimant's Exhibit 6, pages 62-65.*

21. On November 5, 2024, Claimant returned to Dr. Miller and recounted her appointment with Dr. Fitzgibbons. She stated that Dr. Fitzgibbons told her she likely has floating particles in her knee from the fall, she needs a knee replacement, and no more therapy or injections would solve her issue. Claimant reported that she is discouraged because she wanted to return to work, but her employer will not allow her to return until she is healed. Dr. Miller referred Claimant for pain management. *Claimant's Exhibit 7, pages 116-122*. On November 12, 2024, Claimant treated with Dr. Chaus, who noted continued left hip improvement. *Claimant's Exhibit 6, pages 66-68.*

22. On December 3, 2024, Claimant treated with Nicholas Olsen, DO, and reported after she started therapy, she began to notice extension of her left knee caused increased left knee pain and instability. Dr. Olsen noted that Claimant denied any complaints of left knee pain before her injury. She stated her left knee was her good knee. She had difficulties with her right knee in the past, but never the left. Dr. Olsen made a causation determination regarding her left knee. He concluded that based on Claimant's history, medical records, and his examination, it appeared that Claimant

did sustain an injury to her left knee due to her fall on June 17, 2024. Dr. Olsen offered the possibility of genicular nerve blocks. *Claimant's Exhibit 9, pages 186-189*.

23. On January 8, 2025, Dr. Olsen wrote to the adjuster explaining the purpose of the nerve block. He stated that this was a diagnostic test and if both tests were positive, Claimant may be a candidate for a radiofrequency neurotomy. *Claimant's Exhibit 9, pages 190-191*. On January 14, 2025, Claimant underwent a left knee femoral genicular nerve block and left medial tibial genicular nerve block with Dr. Olsen. *Claimant's Exhibit 10, pages 201-202*.

24. On January 28, 2025, Claimant followed up with Dr. Olsen to review the results of the nerve block injections. Dr. Olsen reported that the injection was nondiagnostic and that she was not a candidate for the neurotomy. *Claimant's Exhibit 9, pages 192-193*.

25. The conservative treatment Claimant underwent, which included physical therapy, a genicular nerve block, and a cortisone injection, failed to relieve Claimant's knee symptoms.

26. On February 4, 2025, Dr. Fitzgibbons documented Claimant's continued and unimproved left knee condition, opined it was a result of her work injury, and again requested authorization for a left total knee arthroplasty. Dr. Fitzgibbons emphasized that this surgery "is the only chance we have of getting this patient back to her regular job with no restrictions." *Claimant's Exhibit 6, pages 69-73*. Respondents maintained their denial of Dr. Fitzgibbons surgery authorization request. *Respondents' Exhibit M, pages 220-222.*

27. On March 6, 2025, Dr. Chen performed a second records review. He maintained his prior opinions and stated that her need for surgery is unrelated to this work injury. *Respondents' Exhibit L, pages 216-218*.

28. On March 10, 2025, Claimant applied for hearing on reasonable and necessary medical benefits. *See Claimant's Exhibit 2, pages 6-8*. On April 9, 2025, Respondents filed a Response to Claimant's Application for Hearing. *Claimant's Exhibit 3, pages 10-13.*

29. At Hearing, Claimant testified the ER record indicating that she has a history of left knee problems is inaccurate. Claimant denied ever injuring her left knee before her work injury. Claimant denied ever wearing a left knee brace. Claimant denied ever seeing a doctor or undergoing any treatment of any kind to her left knee before her work injury. Claimant testified that she fractured her right kneecap back in high school (Claimant is 63 years old) and from time to time would wear a right knee brace to work. Claimant testified that on the day of her work injury, she was not wearing a right knee brace.

30. Claimant also stated that she started to notice left knee pain/symptoms once she started physical therapy following her left hip surgery. She stated the physical therapist was working on range of motion in her left leg, and when the physical therapist tried to extend and abduct her left knee, Claimant screamed out in pain. Claimant testified she failed all conservative treatment, continues to experience significant left knee pain, and she has never returned to baseline. She testified that before June 17, 2024, she had no left knee issues and could perform all functions of her job without issue.

31. The ALJ finds Claimant's testimony to be credible. Thus, the ALJ finds Claimant did not have any problems with her left knee before her work accident, and the symptoms described in the ER record is an error and relates to her right knee. The ALJ also finds that Claimant was non-weight-bearing and using a walker to off-load her left lower extremity after her hip surgery. As a result, Claimant was not fully using her left lower extremity and the limited use is a reasonable explanation for why her knee symptoms did not emerge until the physical therapist was bending Claimant's knee approximately five weeks after the accident.

32. The ALJ finds that the timing of the onset of Claimant's left knee symptoms is consistent with her recovery process following left hip surgery. Due to her non-weight-bearing status and the support provided by the walker, the injury to her knee caused by the fall remained asymptomatic until Claimant started bearing more weight on her left leg and more stress was applied during physical therapy. In other words, once her rehabilitation advanced to active mobilization and she became more weight-bearing, the previously latent symptoms from her knee injury manifested. As a result, the delay

in symptom onset does not undermine the causal relationship between the fall, the left knee condition, and the need for surgery.

33. On July 7, 2025, Dr. Chen testified by deposition. Dr. Chen maintained his opinions. He testified that he never conducted an IME, so he has neither physically seen Claimant nor spoken with her to discuss her medical history, the injury itself, or any of her symptoms. Dr. Chen testified that for there to be an aggravation of a preexisting condition, there must be objective proof of aggravation, like a bone fragment coming loose on the day of the injury. Dr. Chen testified that, since there is no evidence of such on the MRI, there is no aggravation from the work injury. He testified that if the ER report was truly inaccurate, and it should have said right knee instead of left knee, that would weaken his argument. He testified that the knee and the hip have referred pain to one another, so the knee can cause hip pain and the hip can cause knee pain. He stated that if a patient has a broken hip and they're complaining of knee pain, he would treat the hip prior to addressing the knee. He stated that enough force from a fall could break the hip and injure the knee. Finally, Dr. Chen stated that when considering whether to perform a knee surgery on a patient, he is looking for both pathology and symptoms.

34. The issue in this case is whether the left total knee arthroplasty recommended by Dr. Fitzgibbons is reasonable, necessary, and causally related to Claimant's admitted industrial injury. Claimant contends that she injured her left knee on June 17, 2024, at the same time she injured her hip. She asserts she has no history of left knee injuries, pain, symptoms, or limitations. Although the ER report refers to some prior left knee issues, Claimant testified that this was inaccurate. All of Claimant's medical records, apart from this single report, are consistent with the assertion that Claimant has no prior left knee issues. The ALJ finds Claimant's testimony credible and persuasive. The ALJ finds it more likely than not that the ER report is inaccurate and that Claimant did not have any prior left knee issues.

35. In support of their denial of the recommended knee surgery, Respondents rely on Dr. Chen's opinion that Claimant has a history of left knee problems, failed to report knee symptoms within the first month of her injury, and that the work injury did not aggravate her underlying knee condition. The ALJ does not find Dr. Chen's opinion credible or

persuasive. Dr. Chen opined that no objective evidence of aggravation exists. However, the left knee x-ray taken on Claimant's date of injury revealed joint effusion. Moreover, the MRI that was taken approximately six weeks after the work accident also demonstrated a loose body within the knee joint. These findings appear to represent objective findings to support Claimant's contention that the work accident aggravated her preexisting knee arthritis and proximately caused the need for her knee replacement. Nevertheless, pain can be evidence of an aggravation of a preexisting condition and Claimant's fall at work caused her knee pain – which continues. Therefore, Dr. Chen's assertion that there must be objective evidence, via the MRI, for him to conclude that an aggravation occurred, and there is none, is not found to be persuasive. The ALJ finds it is unlikely that Claimant's left knee coincidentally became symptomatic following her traumatic work injury. The ALJ finds it more likely than not that Claimant's work injury aggravated Claimant's pre-existing, asymptomatic left knee condition and proximately caused her need for treatment in the form of a knee replacement.

36. Dr. Chen testified that if Claimant underwent conservative treatment and her symptoms persisted, a total knee replacement could be considered reasonable and necessary. As found, Claimant did undergo conservative treatment - including physical therapy, a cortisone injection, and genicular nerve blocks - all of which failed to provide lasting relief. Accordingly, the ALJ credits this portion of Dr. Chen's testimony. Moreover, the record lacks credible evidence that any alternative treatment is reasonably expected to cure and relieve Claimant from the effects of her knee injury. Therefore, the ALJ finds that the recommended total knee replacement is both reasonable and necessary.

37. The ALJ finds the reports of Drs. Fitzgibbons, Olsen, Miller, and all other Concentra treating providers credible and persuasive. While the first mention of left knee pain was about a month after the injury occurred, Claimant was primarily non-weight bearing following her left hip surgery. The ALJ finds the ER record mentioning prior left knee issues is likely inaccurate. Outside of the one ER record, Claimant's reporting of her medical history, pain, symptoms, and limitations has been consistent. None of Claimant's treating providers have called into question the relatedness of her left knee

injury. Claimant has objective evidence of tricompartmental chondromalacia, along with subjective reports of pain, symptoms, and functional limitations. Before the work injury, Claimant had no left knee pain or symptoms and had no issue performing her job. Claimant's left knee condition was asymptomatic before June 17, 2024. It is not likely that Claimant's left knee coincidentally became symptomatic following her admitted work injury. Rather, it is more likely than not that Claimant injured her left knee when she fell onto her left side, breaking her hip. Claimant's left knee is now symptomatic and affecting her ability to perform her job. Based on the totality of the evidence, the ALJ finds the mechanism of Claimant's injury to be consistent with her left knee injury and need for surgery. Claimant has been consistent in her reporting of pain, was asymptomatic before June 17, 2024, and she has since become symptomatic. As found, the left knee surgery recommended by Dr. Fitzgibbons is reasonable, necessary, and causally related to Claimant's admitted industrial injury.

Conclusions of Law

The purpose of the Workers' Compensation Act (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 any litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the right of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. 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. Indus. Claim. Apps. 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' 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*, 57 P.2d 1205, 1209 (Colo. 1936); CJI, Civ. 3:17 (2013).

Medical Benefits

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office*, 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indem. Co*., 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. Indus. *Comm'n v. Jones,* 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indem. 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).

An aggravation of a preexisting condition is compensable. *Subsequent Inj. Fund v. Thompson*, 793 P.2d 576 (Colo. 1990). If there is a direct causal relationship between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Indus. Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Indus. Comm'n*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*.

Pain is a typical symptom from the aggravation of a preexisting condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a

compensable injury. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment they would not otherwise have required. *Cambria v. Flatiron Construction*, W.C. No. 5- 066-531-002 (May 7, 2019) (citing *Merriman v. Industrial Comm'n*, 210 P.2d 448 (Colo. 1949)). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the preexisting condition. *Finn v. Indus, Comm'n*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the preexisting condition. *F.R. Orr Const. v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Co.*, W.C. No. 4-177-843 (March 31, 2000).

In *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990), the claimant suffered from a cancerous condition that compromised the strength of the humerus bone in his arm. While at work, the sudden opening of a door caused Claimant to quickly move his arm. That sudden movement, combined with the weakened condition of the bone, led to the fracture of his arm. The Court determined the claimant's injury should be analyzed under the "employment risk" category, not the "personal risk" or "neutral risk" categories. The Court determined it was the sudden opening of the door, not the cancerous condition, which caused Claimant's injury and need for treatment. Therefore, the claimant's injury inherently fell under the "employment risk" category of injuries. *Vicory*, 825 P.2d at 1168-1169.

In the matter of *Enriquez v. Americold d/b/a Atlas Logistics*, W.C. No. 4-960-513 (October 2, 2015), the ICAO upheld an ALJ's finding that the claimant sustained a compensable knee injury when he stepped off a nine-inch-high pallet jack. Like the Court in *Vicory*, the ICAO analyzed Claimant's injury under the "employment risk" category, finding the claimant's injury was inherent to his employment.

In *Cambria v. Flatiron Construction*, W.C. No. 5-066-531 (May 7, 2019), the ICAO upheld an ALJ's determination that the claimant sustained a compensable knee injury when he was carrying a 20-pound metal cage, stepped forward with his right leg to put down the cage, and felt a pop in his knee. The claimant had a history of right knee problems, including a 2014 right knee surgery. The ALJ determined the claimant's injury aggravated, accelerated, and combined with the claimant's preexisting condition to produce a disability and need for treatment. The ALJ determined the claimant's injury was inherent to his work activities and analyzed the claim under the "employment risk" category of injuries, determining the claimant's injury was not precipitated by a preexisting condition. The ICAO affirmed the ALJ's determination that the claimant sustained a compensable knee injury.

Claimant bears the burden of proof to establish all elements of her claim by a preponderance of the evidence. The ALJ finds and concludes that Claimant has met that burden.

Specifically, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that she sustained an injury to her left knee when she fell at work on June 17, 2024. Although Claimant may have had some preexisting, asymptomatic degenerative changes in her left knee, there is no credible evidence that she experienced any left knee pain, symptoms, or received treatment prior to the industrial injury.

The ALJ further finds and concludes that Claimant established by a preponderance of the evidence that the June 17, 2024, fall permanently aggravated, accelerated, and combined with Claimant's preexisting condition, proximately causing her current left knee symptoms and need for medical treatment. Claimant also established by a preponderance of the evidence that the total knee replacement recommended by Dr. Fitzgibbons is reasonable and necessary to cure and relieve the effects of her work-related left knee injury.

As a result, the ALJ finds and concludes that Claimant has proven by a preponderance of the evidence that the left total knee arthroplasty is causally related to

her admitted industrial injury and constitutes reasonable and necessary medical treatment.

Order

It is therefore ordered that:

1. Claimant proved by a preponderance of the evidence that the left total knee arthroplasty recommended by Robert Fitzgibbons, M.D., is reasonable, necessary, and related to her admitted industrial injury.

2. Respondents shall pay for the surgery and all related medical treatment subject to the Division of Workers' Compensation Medical Fee Schedule.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: August 28, 2025

/s/ Glen Goldman
Glen B. Goldman
Administrative Law Judge

Office of Administrative Courts
State of Colorado
Workers' Compensation No. WC 5-230-123-006

Issues

1. Whether Claimant established by a preponderance of the evidence that Respondents are subject to penalties for failing to provide a list of designated providers pursuant to § 8-43-404(5)(a)(1)(A), C.R.S., and WCRP Rule 8-5(A).
2. Determination of Claimant's authorized treating physician (ATP).

Findings of Fact

1. Claimant sustained an admitted injury arising out of the course of her employment with Employer on February 6, 2023. Following the injury, Claimant was initially seen in the St. Joseph Hospital emergency department.

2. On February 9, 2023, Claimant contacted Insurer through an online portal, and requested a list of approved medical providers. (Ex. 5, p. 20). Later that day, Insurer's adjuster responded through the online portal and provided Claimant with a list of four medical providers from which Claimant could choose her authorized treating physician. (Ex. 5, p. 20). The providers included Concentra Medical Center on Church Ranch Blvd, in Westminster, CO, Advanced Urgent Care (Occ Med, on Wadswoth Pkwy in Westminster, Concentra Medical Center on 84th Avenue in Thornton, Colorado, and Advanced Urgent Care & Occ Medicine on Federal Blvd, also in Westminster. (Id.)

3. On February 13, 2023, Claimant went to one of the Advanced Urgent Care facilities where she was informed that the facility would only do an initial visit, and would not see her because she had already seen another provider. However, Claimant ended up seeing Erin Layman, P.A., at the Advanced Urgent Care facility on that day. (Ex. C).

4. After the visit, PA Layman issued a WC 164 form, which indicated that Claimant would need to be seen by an approved worker's compensation physician. (Ex. C).

5. After some additional communication in which Claimant informed the assigned adjuster that Advanced Urgent Care would not provide follow up care, on February 17, 2023, the adjuster indicated that Claimant should go to any Concentra location. (Ex. 5).

6. On February 21, 2023, the adjuster indicated that one of the Concentra locations

provided on the initial list was a billing office, and not a provider, but that Claimant could be seen at any Concentra location, as well as Midtown Occupational Medicine, or Care Now Urgent Care. (Ex. 5, p. 26).

7. On February 22, 2023, Claimant went to a Concentra location, and saw Gordon Arnott, M.D., who prescribed prednisone, referred Claimant to physical therapy, and imposed work restrictions. (Ex. 51). Over the course of the next several months, Claimant saw providers at Concentra, including Melissa Ginsburg, NP, and Nicholas Olsen, D.O., and attended physical therapy. (Ex. 52, Ex. 13).

8. On May 2, 2023, after seeing Dr. Olsen, Claimant emailed the adjuster indicating she wanted to select her own medical provider. (Ex. 16, p. 78). Claimant repeated this request over the next few days in emails to the adjuster. On May 9, 2023, the adjuster told Claimant she would need to submit a change of physician form from the Division's website. (Ex. 16, p. 80). No credible evidence was admitted demonstrating that Claimant submitted such a request.

9. The next documented event in the record was on July 25, 2023, when Claimant returned to Concentra and saw Dr. Olsen again. (Ex. 11). Claimant returned to Dr. Arnott on July 31, 2023, and continued to see providers at Concentra through at least January 2024, these providers included Dr. Olsen, Dr. Arnott, Ms. Ginsburg, physiatrist John Aschberger, M.D., neurosurgeon Michael Rauzzino, M.D., Kimberley Abernethy, M.D., and Paul Plocek, M.D.. (Ex. 11, 12, 14, 15, 18, 19, 20, and 21).[1]

10. On January 17, 2024, Claimant saw Paul Plocek, M.D., at Concentra, who indicated that Claimant had not improved and without further improvement with physical therapy, she would possibly be at maximum medical improvement (MMI). He referred Claimant for a functional capacity evaluation (FCE) and for an impairment rating (Ex. 21).

11. On March 26, 2024, Claimant saw Samuel Chan, M.D., for an impairment rating. Dr. Chan assigned Claimant a 3% whole person impairment. (Ex. 24, Ex. 29).

12. Ultimately, Dr. Abernethy placed Claimant at MMI effective May 31, 2024, and adopted Dr. Chan's impairment rating. (Ex. 28 & Ex. 29).

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[1] The record contains few complete medical records for these visits, and consists primarily of HICF forms, explanation of benefits letters, and work activity status reports, with some partial narrative medical records, and is thus insufficient for the ALJ to ascertain the nature of these visits.

13. On June 20, 2024, Respondents filed a Final Admission of Liability (FAL) admitting for a 3% permanent impairment rating, MMI date of May 31, 2024. (Ex. 29).

14. Sometime between November 24, 2024 and January 29, 2025, Claimant attended a Division Independent Medical Examination (DIME), with Dr. McLaughlin where she was found not at MMI. The DIME physician also recommended additional physical therapy, and further evaluations including psychology, pain management, and neuropsychological testing. (See Ex. 32, Ex. 34). The record does not contain records of the DIME, although Ex. 61 appears to be a portion of Dr. McLaughlin's report.

15. On January 29, 2025, Claimant emailed Respondents' counsel and indicated that she would like to address the issue of changing her ATP. (Ex. 32). On January 30, 2025, Respondent's counsel indicated that Claimant's requests to change physicians had been received, and that Respondents would respond within 20 days. (Ex. 32). No credible evidence was admitted indicating that Claimant filed a formal request to change physicians with the Division, or identified the physician or physicians she proposed as a new ATP at that time.

16. On February 17, 2025, Respondents filed an Application for Hearing (AFH), seeking to overcome Dr. McLaughlin's DIME opinion. (Ex. 33).

17. On February 19, 2025, Respondents' counsel sent a letter to Dr. Abernethy requesting referrals to providers not affiliated with Concentra to provide the treatment recommended by Dr. McLaughlin. (Ex. 34).

18. On March 5, 2025, Respondents' counsel emailed Claimant indicating she had not received referrals from Dr. Abernethy, and that three providers Claimant had already seen (Dr. Chan, Dr. Olsen, and Dr. Aschberger) were all ATPs who specialized in pain management, and thus Claimant would not require a referral from Dr. Abernethy to see those physicians. (Ex. 35).

19. On March 7, 2025, Claimant returned to Dr. Abernethy, who referred Claimant to Dr. Jo Kim for a psychological evaluation. (Ex. 38)

20. On March 19, 2025, Respondents' counsel sent Claimant a link to to access the Request for Change of Physician WC197 form from the Division's website. (Ex. 41).

21. On March 24, 2025, Claimant filed a Request for Change of Physician with the Division, seeking to change her ATP to Dr. Samantha Matney. (Ex. 43).

22. On April 2, 2025, Respondents submitted their response to the Request for Change of Physician and agreed to Claimant's request. Respondents' counsel also sent a letter to Dr. Matney indicating that the parties had agreed that Dr. Matney would be Claimant's ATP. (Ex. E, Ex. F).

23. On April 9, 2025, Claimant filed an AFH, indicating that Dr. Matney had declined to accept the designation as Claimant's ATP. (See April 9, 2025 AFH, and Ex. 45).

24. Also on April 9, 2025, Respondents' counsel emailed Claimant indicating that Dr. Matney's declination constituted "a refusal to treat for non-medical reasons," thereby obligating Respondents under § 8-43-404(10)(b), C.R.S. to designate a new ATP willing to provide medical treatment within 15 days. Respondents then designated Dr. Robert Kawasaki as Claimant's new ATP. In the email, Respondents' counsel represented that Dr. Kawasaki was in the same practice as Dr. Matney, and was willing to assume Claimant's care. (Ex. G).

25. Later on April 9, 2025, Claimant emailed Respondents' counsel indicating she objected to the appointment of a new ATP, asserting that an ATP had never been lawfully designated, and that the issue of ATP designation was pending before the OAC by virtue of Claimant's April 9, 2025 AFH. Claimant also stated objections based on Dr. Kawasaki's purported affiliation with Concentra. (Ex. H). No credible evidence was admitted demonstrating that Claimant saw Dr. Kawasaki at any time.

26. On April 11, 2025, Respondents' counsel notified Claimant by email that, due to Claimant's objections to Dr. Kawasaki, Respondents would were willing to designate a different provider – Gregory Reichhardt, M.D. Respondents' counsel also communicated Respondents' disagreement with Claimant's contention that no ATP had been lawfully designated. (Ex. I). By letter date April 11, 2025, Respondents' counsel notified Dr. Reichhardt that he had been designated as Claimant's new ATP. (Ex. J).

27. On April 18, 2025, Respondents' counsel notified Claimant that after communications with Dr. Reichhardt's office, she learned that Dr. Reichhardt was no longer accepting patients for treatment. Respondents requested that Claimant propose names of providers with whom she would be willing to treat, and Respondents would attempt to agree on a provider. (Ex. 46).

28. On April 25, 2025, Claimant responded to Respondents' counsel, objecting to any

attempt to designate an ATP, or to require to Claimant to select an ATP, because the issue of "judicial review of ATP designation" was then pending before the OAC. (Ex. M).

29. At 11:45 a.m., April 30, 2025, Respondents' counsel emailed Claimant indicating that Respondents "must appoint a new ATP today" and provided Claimant with the names of four providers near Claimant's home who were willing to accept patients. She further indicated that if Claimant did not communicate her preference from the list provided, one of the providers would be randomly selected as Claimant's new ATP. (Ex. 47)

30. On April 30, 2025 at 3:59 p.m., Claimant emailed Respondents' counsel again stating her position that Respondents did not have authority to designate an ATP because of the pending matter before the OAC set forth in Claimant's April 9, 2025 AFH. (Ex. O).

31. At 4:11 p.m. on April 30, 2025, Respondents' counsel emailed Claimant indicating that Respondents were designating Dr. Bryan Alvarez as Claimant's new ATP. (Ex. P). The same day, Respondents' counsel sent Dr. Alvarez a letter indicating that he had been designated at Claimant's ATP. (Ex. Q).

32. Claimant responded to the Respondents' designation of Dr. Alvarez at 7:38 p.m., on April 30, 2025 with arguments similar to those she had previously communicated. (Ex. R). No credible evidence was admitted demonstrating that Claimant has seen Dr. Alvarez.

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 impro-ability) 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).

Request for Penalties

Claimant has failed to establish by a preponderance of the evidence that Respondents are subject to penalties for violation of § 8-43-404(5)(a)(1)(A), C.R.S. Respondents' obligation to provide a list of designated providers is contained in Section 8-43-404(5)(a)(I)(A), C.R.S., which states:

> In all cases of injury, the employer or insurer shall provide a list of at least four physicians or four corporate medical providers or at least two physicians and two corporate medical providers or a combination thereof where available, in the first instance, from which list an injured employee may select the physician who attends the injured employee. At least one of the four designated physicians or corporate medical providers offered must be at a distinct location from the other three designated physicians or

> corporate medical providers without common ownership. … If the services of a physician are not tendered at the time of injury, the employee shall have the right to select a physician or chiropractor.

WCRP 8-2 contains requirements for compliance with the statute. Specifically, the employer or insurer must provide a written designated provider list to the injured worker in a verifiable manner within seven business days of the date the employer has notice of the injury. The Rule further requires that the designated provider list "must include contact information for the insurer of record including address, phone number and claims contact information." WCRP 8-2(B). The penalty for a respondent's failure to provide an injured worker with a list of designated providers is that the injured worker is permitted to select his or her treating physician. *Marquez v. Patricia M. Dempsey Trust*, W.C. No. 5-054-279-01 (ICAO Dec. 17, 2018); WCRP 8-2(E).

To establish entitlement to the penalty, and therefore the right to select her own physician, Claimant must establish that Respondents failed to comply with § 8-43-404(5)(a)(I)(A). Claimant's penalty claim is premised on the allegation that Respondents did not provide her with a list of designated providers that was compliant with § 8-43-404(5)(a)(1)(A), C.R.S. Claimant's position statement does not make clear whether Claimant contends Respondents failed to provider her any list of designated providers, that the list of providers she received from Insurer's adjuster through the on-line portal was technically deficient (*i.e.*, did not comply with the requirements of WCRP 8-2(B), or that the list provided to her was deficient because the two designated providers were unwilling to provide care for her workplace injury, or some combination of these.

Respondents provided Claimant with a list of four medical providers on February 9, 2023, within the seven-day requirement of WCRP 8-2. Thus, Respondents, at least nominally, complied with § 8-43-404(5)(a)(1)(A). The provided list included four providers, although the two Advanced Urgent Care facilities were unable or unwilling to serve as Claimant's ATP, and one of the Concentra facilities was a billing location, and not the location of a provider who could treat Claimant. While facially compliant with the Act, Respondents provided Claimant with a list of one provider willing and able to serve as Claimant's ATP. Thus, the list provided did not comply with the requirement of § 8-43-404(5)(a)(1)(A), because it did not include four providers from whom Claimant could

select a physician to attend to her injuries.

Although on February 17, 2023, Respondents provided Claimant with the names of additional physicians who could serve as her ATP, this list was provided more than seven business days after Respondents received notice of Claimant's injury, and was ineffective to constitute a compliant designated provider list. Thus, the ALJ concludes that the right of selection of ATPs passed to the Claimant on February 15, 2025, the eighth business day after Claimant's injury.

Once the right of selection passed to Claimant, she sought treatment through Concentra and continued to treat with Concentra for more than one year, thereby selecting Concentra as the authorized corporate medical provider facility to provide her care. Where a claimant has signified "by words or conduct that [s]he has chosen a physician to treat the industrial injury," she has made a physician "selection." *In re Claim of Murphy-Tafoya*, W.C. No. 5-153-600-001 (ICAO Sep. 1, 2021). Thus, Claimant availed herself of the remedy for Respondents' failure to provide a compliant designated provider list. Consequently, any present claim for penalties related to the initial provision of a designated provider list is moot.

Notwithstanding, Claimant's current request for penalties is time-barred by under § 8-43-304(b)(5), C.R.S., which provides: "A request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty." Claimant's request for penalties was first asserted in her April 9, 2025 Application for Hearing. Consequently, Claimant may only seek penalties based on facts she learned or reasonably should have learned after April 9, 2024.

Claimant knew or reasonably should have known the facts upon which her penalty claim is based no later than February 21, 2023. In her emails to Respondents on February 21, 2023, Claimant reported that the Advanced Urgent Care facilities were unwilling to provide treatment beyond an initial evaluation. Thus, she knew or reasonably should have known on that date that Respondents had not provided a list compliant with § 8-43-404 (5)(a)(I)(A), and was obligated seek penalties within one year of that date. Claimant failed to do so. Any penalty claim Claimant may possess related to deficiencies in the physician designation is time-barred. Accordingly, Claimant's request for penalties is denied.

Determination of Claimant's Authorized Treating Physician

As noted above, regardless of whether Respondents' initial designated provider list was non-compliant, Claimant elected to seek treatment through a corporate medical provider – Concentra -- for a period of more than one year. As such, contrary to Claimant's contentions, Concentra was Claimant's lawfully self-designated ATP.

On March 24, 2025, Claimant exercised her right under § 8-43-404(5)(a)(VI)(A), C.R.S., and WCRP 8-7, to request permission to change physicians to Dr. Matney. Respondents timely granted permission and notified Dr. Matney of her designation as Claimant's ATP on April 1, 2025. By virtue of Claimant's request, and Respondents' agreement to that request, Dr. Matney became Claimant's ATP. However, it is undisputed that Dr. Matney refused to accept Claimant as a patient. Because Claimant never saw Dr. Matney, her declination constitutes a refusal to treat for non-medical reasons, which triggered Respondents' obligation to appoint a new ATP under § 8-43-404(10), C.R.S. Respondents timely designated Dr. Kawaski on April 9, 2025, at which point, Dr. Kawasaki became Claimant's properly-designated ATP.

Claimant's contention that filing an AFH requesting that an ALJ designate an ATP rendered any designation by the Respondents a nullity is without merit. The filing of an AFH does not relieve the Respondents of the statutory obligation under § 8-43-404(10), C.R.S., to appoint a new ATP once it is determined that an ATP refused treatment for non-medical reasons. Moreover, the appointment of Dr. Kawasaki was necessitated by Claimant's requesting to change physicians to Dr. Matney, who refused to treat her.

Further, Claimant's contention that Respondents did not properly provide a designated provider list in the first instance is a moot point. Once Respondents agreed to Claimant's request to change physicians, Dr. Matney became Claimant's ATP rendering any perceived issues with the initial designated provider list irrelevant. Claimant requested and received the relief she requested – appointing Dr. Matney as her ATP.

Respondents' attempts to accommodate Claimant and appoint a different ATP after Claimant raised her objections to Dr. Kawasaki are also ineffective. Just as nothing in the Act authorizes an injured worker to dictate who a respondent may designate as an ATP, nothing in the Act authorizes Respondents to unilaterally change an ATP designation once properly made, even where a Claimant objects. The ALJ concludes that

the purported designations of Dr. Reichhardt and Dr. Alvarez are of no legal effect, and represent Respondents' attempt to address Claimant's concerns regarding Dr. Kawasaki's alleged affiliation with Concentra. While nothing would prevent Respondents from authorizing treatment from these providers, they also had no power to unilaterally de-authorize Dr. Kawasaki or appoint a different primary ATP. Thus, the ALJ concludes that Claimant's properly designated ATP is and remains Robert Kawasaki, M.D.

Claimant's Request to Change ATPs

Claimant now requests that Dr. Yani Zinis be designated as her ATP. Although Claimant contends she never had a legally designated ATP, that allegation is incorrect. As found, Claimant initially self-designated Concentra, then was granted permission to change to Dr. Matney, and then Respondents properly exercised their right (and obligation) to designate Dr. Kawasaki.

Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." § 8-43-404(5)(a), C.R.S.; *Tovar v. Swift & Co.*, W.C. No. 4-597-412 (ICAO July 24, 2008). Because § 8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (ICAO, May 5, 2006). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id*. An ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683, (ICAO Nov. 27, 2007). Because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretionary authority to determine whether the circumstances justify a change of physician. *Loza v. Ken's Welding*, WC 4-712-246 (ICAO Jan. 7, 2009); *Pedro Gutierrez Lopez v. Scott Contractors*, W.C. No. 4-872-923-01 (ICAO Nov. 19, 2014).

Claimant has failed to establish a reasonable or appropriate basis to change her ATP to Dr. Zinis. Despite the objections raised in her April 9, 2025 email regarding Dr. Kawasaki, no credible evidence was admitted indicating that Claimant has ever seen Dr.

Kawasaki, or that he is unable, unwilling or unqualified to treat Claimant. Instead, Claimant's objections appear to be based on concerns regarding Concentra, and her desire to litigate this issue. Beyond representations in her position statement, Claimant offered no credible evidence of Dr. Zinis' specialty, qualifications, willingness to accept workers' compensation patients, or his willingness to treat her. Moreover, Claimant's request to change physicians to Dr. Zinis is denied.

Order

It is therefore ordered that:

1. Claimant's request for penalties is denied.
2. Claimant's ATP is Robert Kawasaki, M.D.
3. Claimant's request to change physicians to Dr. Zinis is denied.
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 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: August 28, 2025

Steven R. Kabler

Administrative Law Judge

Office of Administrative Courts
State of Colorado
Workers' Compensation No. WC 5-191-594-002

Issues

- Whether Respondents are entitled to a neuropsychological evaluation pursuant to Colorado Rules of Civil Procedure ("C.R.C.P.") 35?

- Whether the ALJ should strike the Division-sponsored Independent Medical Examination ("DIME") report due to the fact that a neuropsychological examination was not obtained prior to the DIME?

Findings of Fact

1. Respondents filed a Motion for Examination pursuant to C.R.C.P. 35 on February 24, 2025, requesting a neuropsychological evaluation with Brent Van Dorsten, Ph.D. The parties proceeded to a prehearing conference with PALJ Carpenter on February 26, 2025 where Respondents argued for an Order compelling Claimant to attend the examination with Dr. Van Dorsten. PALJ Carpenter denied the Motion and Respondents appealed the Prehearing Conference Order.

2. PALJ Carpenter noted in his Order that Dr. Van Dorsten refuses to record his examinations and therefore denied compelling Claimant's attendance at the examination pursuant to Section 8-43-404(2)(a), which requires that all examinations be recorded. PALJ Carpenter further noted that because Claimant had not been assigned a cognitive impairment rating by the treating physician and because Claimant had not yet undergone the DIME, it was unknown whether the DIME would provide a cognitive rating, there was not good cause to compel Claimant to attend the neuropsychological examination at this time.

3. Respondents sought to hold the pending Division-sponsored Independent Medical Examination ("DIME") in abeyance pending the hearing that would involve the appeal of PALJ Carpenter's Order. PALJ Royce Mueller denied that motion on April 4, 2024.

4. Claimant sustained an admitted injury on December 15, 2021 when he fell and struck his head on asphalt. As a result of his injury, Claimant received a litany of medical treatments for cervical pain, shoulder pain, headaches and his psychological condition. Respondents eventually obtained an independent medical examination ("IME") with Dr. Parsons on December 2, 2024. Dr. Parsons concluded that Claimant was at Maximum Medical Improvement ("MMI"). Dr. Parsons provided Claimant with a permanent impairment rating of 6% whole person for occipital neuralgia and 1% of the right upper extremity.

5. Respondents provided Dr. Parsons IME report to Claimant's treating physician, Dr. Olsen, who agreed that Claimant was at MMI. Respondents filed a final admission of liability ("FAL") on December 27, 2024 admitting for the PPD rating provided by Dr. Parsons and Dr. Olson. Claimant objected to the FAL and requested a DIME.

6. Claimant obtained a records review IME report from Dr. Orent on January 6, 2025. Dr. Orent opined that Claimant was not at MMI and recommended Claimant be referred to a headache specialist to further investigate potential treatments for posttraumatic migraine headaches. Dr. Orent also recommended Claimant receive a neuropsychological evaluation.

7. Dr. Olson referred Claimant to Summit Headache Clinic on January 27, 2025.

8. Respondents then sought to compel Claimant's attendance at an examination with Dr. Van Dorsten. Claimant declined, noting Dr. Van Dorsten's refusal to record the IME as required by statute. Based on the rulings by PALJ Carpenter and Mueller, Claimant was not compelled to attend the evaluation and the

DIME process was not held in abeyance. Respondents, as an offer of proof at hearing, noted that Dr. Van Dorsten has now agreed to record a portion of the neuropsychological evaluation.

9. Claimant underwent the DIME examination on May 6, 2025 performed by Dr. Yamamoto. Dr. Yamamoto found Claimant was at MMI and provided Claimant with an impairment rating of 14% whole person for the cervical spine, and 25% whole person for the traumatic brain injury with 3% whole person for anxiety/psychiatric. This provided Claimant with a final impairment rating of 38% whole person.

10. Based upon the evidence presented at hearing, the ALJ finds that Claimant should be compelled to attend a neuropsychological evaluation pursuant to C.R.C.P. 35 with Dr. Van Dorsten when Dr. Van Dorsten refuses to comply with the Colorado Workers' Compensation Act involving examinations as set forth by Section 8-43-404(2)(a).

11. Notably, while Respondents have presented an offer of proof that Dr. Van Dorsten would agree to record part of the evaluation, Section 8-43-404(2)(a) specifically requires that any examination "shall be recorded in audio in their entirety and retained by the examining physician until requested by any party." Insofar as Dr. Van Dorsten has not agreed to fully comply with Section 8-43-404, C.R.S., the ALJ will not compel Claimant to attend an examination with Dr. Van Dorsten.

12. The ALJ rejects Respondents request for the ALJ to extend the Colorado Rules of Civil Procedure 35 regarding examinations to compel the attendance of the Claimant at an examination where the doctor performing the examination has indicated that he will not comply with Section 8-43-404(2)(a), C.R.S. Certainly, Dr. Van Dorsten cannot be compelled to record his examinations if he chooses not to record the examination in its' entirety. However, the court will not compel Claimant to attend an examination where it is indicated by the doctor performing the examination that he will not comply with the requirements of Section 8-43-404, C.R.S.

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 probably true 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, C.R.S., 2016.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-43-404, C.R.S., provides in pertinent part:

> (1)(a) If in case of injury the right to compensation of articles 40 to 47 of this title exists in favor of an employee, upon the written request of the employee's employer or the insurer carrying such risk, the employee shall from time to time submit to examination by a physician or surgeon or to a vocational evaluation, which shall be provided and paid for by the employer or insurer, and the employee shall likewise submit to

examination from time to time by any regular physician selected and paid for by the division.

...

(2)(a) The employee shall be entitled to have a physician, provide and paid for by the employee, present at any such examination.... All such examinations shall be recorded in audio in their entirety and retained by the examining physician until requested by the parties. Prior to commencing the audio recording, the examining physician shall disclose to the employee the fact that the exam is being recorded. If requested, an exact copy of the recording shall be provided to the parties....

4. C.R.C.P. 35 provides in pertinent part:

When the mental or physical condition ... of a party ... is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in his or her custody or legal control.

5. The ALJ notes that the language of C.R.C.P. 35 is much more lenient than the restrictions set forth in Section 8-43-404, C.R.S., and finds that the intent of Section 8-43-404 would be circumvented by extending C.R.C.P. 35 to allow for an examination of Claimant with a doctor who failed to comply with the strict restrictions set forth in subsection (2)(a) of Section 8-43-404, C.R.S. The ALJ finds that such an order would be improper in this case.

6. As found, based upon the evidence presented at hearing in this matter, Claimant will not be compelled to attend an examination with Dr. Van Dorsten. The evidence fails to establish that Dr. Van Dorsten will comply with the plain language of Section 8-43-404, C.R.S. Therefore, Claimant will not be compelled to attend an examination with Dr. Van Dorsten.

7. The ALJ further finds that the request to vacate the DIME performed by Dr. Yamamoto is likewise denied. Dr. Yamamoto properly performed the DIME in accordance with the DIME process and there is no reason to vacate the DIME report in this case.

Order

It is therefore ordered that:

1. Respondents request to have Claimant attend an examination with Dr. Van Dorsten pursuant to C.R.C.P. 35 is denied.

2. Respondents request to have the DIME of Dr. Yamamoto vacated is denied.

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**. 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. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

DATED: August 29, 2025

Keith E. Mottram

Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

Office of Administrative Courts

State of Colorado

Workers' Compensation No. 5-286-644-002

Issues

- Did Claimant prove he suffered a compensable injury on June 15, 2024?
- If the claim is compensable, did Claimant prove entitlement to temporary partial disability benefits?
- What is Claimant's Average Weekly Wage (AWW)?

Findings of Fact

1. Claimant works for Employer as a Lead Driver Trainer. His duties include driving large commercial trucks used to transport mobile storage containers.

2. On June 15, 2024, Claimant was driving a work truck westbound on the 6th Avenue Freeway when another vehicle crossed multiple lanes of traffic in front of his truck. The truck's autobrake system engaged, causing the truck to slow. Dashboard cam video and other telemetry data showed that Claimant's truck was traveling at approximately 42 m.p.h. when the other vehicle crossed into his lane. The truck slowed to 38 m.p.h. over approximately three seconds, and there was no collision between Claimant's truck and the other vehicle. The truck has an "air ride" seat, which cushions and minimizes transfer of forces to the driver. Claimant moved slightly forward in his seat, and the seat lifted upward during the incident, but there was no sudden movement of Claimant's head or neck. Claimant continued driving with no immediate signs of discomfort. Approximately two minutes later, Claimant laterally flexed his neck from side to side and rubbed the back of his neck. His movements appear consistent with minor neck stiffness or discomfort.

3. Claimant reported the incident to his supervisor and was referred to Concentra. Claimant saw Dr. Paul Plocek at Concentra on June 15. Claimant said he injured his neck when his "truck autobrake engaged, causing him to jerk forward hard." Claimant also reported "his head went forward/back hard." The physical examination was largely benign, except for tenderness in the right and left trapezius and right rhomboid muscle. Cervical range of motion was normal despite reported of pain. Claimant reported

a prior neck injury “years ago” that resolved with injections, but said, “this feels different.” Dr. Plocek diagnosed neck and upper back strains. He prescribed a muscle relaxer and referred Claimant to physical therapy.

4. Claimant had previously injured his neck and shoulders in 2017 while working as a trash collector. He was put at MMI in December 2019, with an 11% right upper extremity rating, a 25% left upper extremity rating, and a 2% cervical spine rating. A cervical MRI in February 2020 showed multilevel degenerative disc disease and foraminal narrowing. In April 2020, Claimant requested a referral to a spine surgeon regarding his neck. Claimant settled his claim in November 2020 but continued to seek treatment for his symptoms under Medicaid.

5. Claimant underwent a cervical MRI on June 28, 2024. It showed multilevel degenerative changes, most prominent at C5-6 and C6-7, with spinal and foraminal stenosis.

6. Claimant was evaluated by Dr. Robert Kawasaki on August 9, 2024. In describing the accident, Claimant told Dr. Kawasaki, “The auto brakes on the truck engaged and brought him to an abrupt stop. He reports the stop that he was not expecting caused him to move forward and backward and he feels he had a whiplash injury.” Claimant described ongoing neck pain, headaches, muscle “twitching,” dizziness, and numbness in his arms, all of which he attributed to the work accident. Dr. Kawasaki reviewed the June 28 cervical MRI and noted a previous cervical MRI from 2022. Claimant did not recall having an MRI in 2022. Dr. Kawasaki saw no significant interval changes when comparing the two MRIs. Dr. Kawasaki characterized the mechanism of injury as “mild,” but nevertheless opined it caused a “whiplash” that aggravated Claimant’s underlying preexisting condition. He recommended electrodiagnostic testing and encouraged the primary ATP to consider a psychological evaluation based on the potential for delayed recovery.

7. Dr. Kawasaki performed EMG/NCV testing on September 6, 2024. It showed bilateral carpal tunnel syndrome, which Dr. Kawasaki opined “is not relatable to this claim.” There was no electrodiagnostic evidence of cervical radiculopathy or brachial plexopathy. He recommended chiropractic treatment.

8. Claimant followed up with Dr. Kawasaki on October 11, 2024. He reported ongoing neck pain and bilateral upper extremity symptoms. He also complained of low back pain and right leg numbness and tingling that started at least two months after the accident. Claimant believed all of his symptoms were related to the June 15, 2024, incident. Dr. Kawasaki commented that the incident in question was not even a motor vehicle accident, and Claimant's vehicle merely auto braked. While there may have been some type of whiplash mechanism, this could not have caused the multiple problems Claimant was experiencing. Dr. Kawasaki requested records from Claimant's prior workers' compensation claim to clarify what treatment he had previously received.

9. Claimant saw Dr. Kawasaki again on October 25, 2024. He described the accident as an "abrupt stop to avoid a T-bone accident," resulting in a whiplash injury. Dr. Kawasaki had received medical records related to Claimant's 2017 injury and prior treatment for the cervical spine, including bilateral facet injections at C2-3, C3-4, and C4-5. Based on Dr. Kawasaki's impression that Claimant suffered a whiplash mechanism of injury, he opined the current cervical symptoms were related to the accident and referred Claimant for bilateral C2-3 and C3-4 medial branch blocks.

10. On November 21, 2024, Dr. Kawasaki reviewed the dashcam footage of the June 15, 2024 incident. Dr. Kawasaki noted that Claimant had "minimal motion" when the brakes engaged, with no sudden deceleration or abrupt stop as Claimant had described. Dr. Kawasaki opined that there was no injurious event, and no medically probable injury occurred. Because Claimant suffered no injury, he required no additional treatment on an industrial basis. Dr. Kawasaki opined Claimant was at maximum medical improvement as of the date of the reported incident, with no impairment.

11. At Claimant's request, Respondents sent Dr. Kawasaki a longer version of the video that included Claimant rubbing the back of his neck. The additional footage did not change Dr. Kawasaki's opinions. He reiterated that Claimant did not experience any sudden force sufficient to cause a whiplash injury.

12. Claimant saw Dr. John Hughes on February 26, 2025, for an IME at the request of his counsel. Claimant told Dr. Hughes he was "thrown around" when his truck's automatic braking system caused a "sudden deceleration." Dr. Hughes did not have access to the video footage or any pre-injury medical records. Dr. Hughes agreed with

Dr. Kawasaki that the June 2024 cervical MRI showed no significant changes compared to the 2022 MRI. He also agreed that Claimant's reported low back pain and bilateral carpal tunnel syndrome were unrelated to the to the work incident. However, crediting Claimant's description of the accident, he opined Claimant sustained "cervical spine injuries." Dr. Hughes recommended medial branch blocks and a vestibular evaluation for complaints of vertigo and dizziness.

13. After reviewing the dashcam footage of the incident, Dr. Hughes further opined that, even though the braking event was "low energy in nature," he believed the forces were sufficient to cause a "cervical strain/sprain."

14. Shaun Jeffs, M.S., P.E., performed a Vehicle Dynamics and Biomechanical Analysis for Respondents on May 28, 2025. Based on his analysis, Mr. Jeffs calculated the peak braking deceleration to be 0.15 G, which he characterized as a "normal, average level of braking" that people experience daily while driving. He noted that during the braking event, Claimant's body moved forward as a single unit, with his head and neck remaining in a relatively neutral position relative to his torso. This motion was within normal physiological ranges and insufficient to cause a musculoskeletal injury. Mr. Jeffs used a Mathematical Dynamic Model (MADYMO) simulation program to reconstruct the event and calculate the forces on Claimant's body. The analysis concluded that Claimant's head experienced linear accelerations of less than 2 Gs, less than the acceleration experienced during activities like a voluntary head shake or falling into a chair. The compressive force on the cervical spine was about 13.5 pounds, significantly less than forces experienced during everyday activities such as running or simply sitting down in a chair.

15. The opinions of Dr. Kawasaki and Mr. Jeffs are credible and persuasive.

16. Claimant failed to prove he suffered a compensable injury on June 15, 2024. The neck symptoms that Claimant reported on and after June 15, 2024, reflect manifestations of his underlying, preexisting multi-level degenerative cervical spine condition, without contribution from his work activity.

Conclusions of Law

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). A pre-existing condition does not disqualify a claim for compensation if a workplace accident or exposure aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). But the mere fact that an employee experiences symptoms at work does not compel a conclusion that the symptoms were caused by the employment. *Garamella v. Paul's Creekside Grill, Inc.*, W.C. No. 4-519-141 (March 6, 2002). Rather, the claimant must prove the symptoms were proximately caused by their work activity. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

As found, Claimant failed to prove he suffered a compensable injury on June 15, 2024. Dr. Kawasaki's final opinions are credible and persuasive. Dr. Kawasaki's opinions are supported by the credible analysis and conclusions of Mr. Jeffs. The braking incident that Claimant experienced was insuffient to cause an injruy or aggravate or accelerate his preexisting condition. Claimant's ATPs, including Dr. Kawasaki, initially supported causation because they were under the mistaken belief that Claimant's seat whipped forward, his head was "jerked backward and forward" and he was "thrown about" by a sudden, hard deceleration. In fact, the movement of Claimant's head and neck during the braking event was not appreciably more substantial than innocuous postural movements of daily living or the other minor bumps and dips in the road he experienced while driving that day. Once Dr. Kawasaki saw the video of the incident, he immediately retracted his causation opinion and determined Claimant was at MMI since the date of the alleged injury, with no impairment. Claimant has a lengthy history of neck problems, and extensive degenerative changes shown on serial MRIs predating the accident. Claimant's preexisting condition is a far more likely explanation for his symptoms than the incident at work. The neck symptoms that Claimant reported on and after June 15, 2024, reflect manifestations of his underlying, preexisting multi-level degenerative cervical spine condition, without contribution from his work activity.

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: August 29, 2025

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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