ISSUES

1. Whether Claimant has proved by a preponderance of the evidence that the right L4-L5 microdiscectomy recommended by Dr. Nelson on December 21, 2023, is reasonably necessary to cure and relieve Claimant of the effects of his August 24, 2023 work injury.

FINDINGS OF FACT

1. Claimant is a fabricator who sustained an admitted low back injury while handling a heavy stone on August 24, 2023, for Respondent-Employer.

Prior History

2. Claimant had a prior history of low back injuries and pain, including prior low back injuries on May 14, 2020, and May 14, 2021. During the course of Claimant's treatment in 2021, Claimant underwent a lumbar spine MRI that showed a shallow disc bulge at L4-L5 with mild right-sided foraminal stenosis. Sacroiliac joint injections were also recommended at that time, which Claimant declined due to a fear of needles. In October 2021, Claimant was placed at maximum medical improvement for his 2021 injury and assigned an impairment rating and permanent work restrictions.

Post Injury

3. Following the August 24, 2023 injury, Claimant saw Dr. Scott Richardson at Concentra Medical Centers on August 28, 2023, with complaints of low back pain. Dr. Richardson diagnosed Claimant with a lumbosacral strain and recommended Claimant start acetaminophen, naproxen, tizanidine, and physical therapy. He assigned Claimant work restrictions of fifteen pounds lifting, thirty pounds pushing and pulling, only ground level work, and limited bending over and twisting of torso. (Respondent's Exhibit X).

4. Claimant saw Dr. Eric Vanzura two days later on August 30, 2023, reporting pain in his right lower lumbar area with spasms and felt "weird" in his anterior hip and upper anterior thigh areas. Dr. Vanzura diagnosed Claimant with a lumbosacral strain, lumbar back pain with radiculopathy affecting right lower extremity, and lower back injury. He assigned work restrictions of fifteen pounds lifting, thirty pounds pushing and pulling, only ground level work, limited bending over, no twisting of torso, and no overhead work. It was noted Claimant had a prior low back injury from May 2021, for which Claimant had been placed at maximum medical

improvement in October of that same year with an impairment with permanent work restrictions and recommendations for maintenance medical treatment.

5. On September 12, 2023, Alexandra France, PA-C, examined Claimant. Claimant reported that he continued to have anterior thigh pain that would come and go. PA France renewed the tizanidine prescription and referred Claimant for a lumbar MRI and X-rays, with consideration of ruling out a lumbar pathology in favor of a hip pathology. She recommended continued physical therapy and chiropractic care. She assigned work restrictions of no lifting over fifteen pounds, no pushing or pulling over thirty pounds, no driving forklifts, only ground level work, minimal bending over, and no overhead work.

6. Claimant underwent the lumbar MRI on September 25, 2023. The impression of the MRI was that of: "L4-L5 right paracentral disc extrusion, new since the prior MRI" and "[m]ilder spondylotic changes at other levels, with mild progression of findings at L3-L4 compared to the prior exam."

7. Claimant also saw Dr. Richardson that same day. Claimant reported intermittent pain in the midline lumbar area and anterior/lateral thigh region. Dr. Richardson reviewed the results of that day's lumbar MRI. He noted that there was a small right disc protrusion at L4-L5 that abutted the right L5 nerve root sleeve. Dr. Richardson continued Claimant on his medications and work restrictions but referred him for a physiatry consultation.

8. On October 2, 2023, Claimant saw physiatrist Dr. Nicholas Olsen at Concentra Medical Center. Claimant reported back pain from the past several weeks reaching as high as ten out of ten, as well as some weakness in his ankle. Dr. Olsen opined Claimant had clinical signs of L4-L5 radiculopathy and recommended a diagnostic and therapeutic right L4-L5 and L5-S1 transforaminal epidural steroid injection (ESI), which Claimant underwent several weeks later on October 31, 2023.

9. Claimant returned to Dr. Olsen on November 6, 2023, for a follow-up. Claimant reported that the ESIs made him feel worse and that they did not provide relief. Dr. Olsen recommended Claimant undergo an additional MRI and referral to an orthopedic surgeon. Claimant also saw PA France that same day, with the additional report that he now had new pain down his bilateral legs since the injection. Claimant also reported that the physical therapy was not helping.

10. Claimant underwent a repeat MRI later that day, which showed a decrease in size of the right central disc extrusion at L4-L5 with persistent moderate right lateral recess stenosis and possible impingement of the descending right L5 nerve roots, as well as moderate right foraminal stenosis at L4-L5.

11. On November 13, 2023, Claimant saw Dr. Matthew Gerlach at Front Range Orthopedics & Spine. Claimant described his low back pain as being located in

his right leg and low back transversely with radiation into the right leg. Dr. Gerlach noted that Claimant had undergone a prior MRI of the lumbar spine, physical therapy, orthopedic evaluations, medications, and chiropractic care. Dr. Gerlach noted that "[s]econdary gains include worker's compensation claim." Dr. Gerlach also noted that Claimant's MRI showed a small disc herniation at L4-L5 that had decreased in size since September. He felt that the small disc herniation did not correlate with Claimant's "diffuse low back pain" and therefore did not recommend a microdiscectomy surgery. Instead, he recommended a continuation of a conservative course of treatment.

12. Claimant saw Mychael Tyler Scott, PA-C, on November 21, 2023, with continued complaints of low back pain radiating down the right leg. However, Claimant began also reporting numbness down his left leg as well. PA Scott questioned whether there might be some hip pathology in light of the absence of evidence of a left-sided lumbar pathology on the MRI. PA Scott observed that Claimant "could potentially be a candidate for right-sided microdiscectomy. . . . However given the size of his disc herniation there is a good chance this could resolve on its own with time. Once he undergoes updated imaging studies he will follow-up in the clinic we will make further recommendations at that time."

13. On November 24, 2023, Claimant underwent right hip X-rays, which were normal.

14. Claimant saw Dr. Nelson on December 12, 2023. In his report, Dr. Nelson recounted Claimant's history of imaging and Claimant's current symptoms, noting that Claimant had begun using crutches. Claimant expressed an unwillingness to try ESIs again. Dr. Nelson recommended lumbar surgery.

15. Respondents sent a letter to Dr. Nelson on December 14, 2023, disputing the reasonableness, necessity, and relatedness of a lumbar microdiscectomy as recommended by Dr. Nelson on November 28, 2023, and indicating that Respondents had scheduled an independent medical examination to take place with Dr. B. Andrew Castro for December 16, 2023, pursuant to Rule 16-7-1(B), W.C.R.P.

16. Claimant saw Eric Busch, PA-C, and Dr. Alan Villavicencio at Boulder Neurosurgery Associates on December 21, 2023. Dr. Villavicencio felt that Claimant was a candidate for right L4-L5 microdiscectomy given Claimant's lack of improvement with conservative treatment and with Claimant's ongoing right leg paresthesias and foot weakness.

17. Also, that same day, Dr. Nelson submitted a request for prior authorization for a right L4-L5 microdiscectomy. Respondents denied the request in a December 27, 2023 letter to Drs. Villavicencio and Nelson, citing an IME currently scheduled with Dr. Qing Min Chen for January 2, 2024.

18. Dr. Chen conducted the IME sometime around January 2 or January 3, 2024. He issued a report setting forth his opinions. Dr. Chen felt that Claimant's work injury consisted of a lumbar spine strain superimposed on an acute and chronic disc herniation at L4-L5. Dr. Chen felt that Claimant was a surgical candidate for lumbar decompression due to bilateral lateral recess stenosis, particularly on the right side. However, he recommended a nerve conduction study to obtain objective data before proceeding, citing some concerns regarding Claimant's pain behaviors and lack of anatomical consistency in numbness and weakness patterns.

19. Claimant filed an Application for Hearing on January 18, 2024, challenging the denial.

20. Claimant ended up undergoing an EMG of the right lower extremity on February 6, 2024, with Dr. Justin Green at Front Range Center for Spine & Sports Medicine. Dr. Green's impressions were that of: "1. There is no electrodiagnostic evidence of ongoing denervation or ongoing axon loss in the right L3-S1 myotomes. I was unable to assess recruitment and motor unit action potential morphology in a number of anterior myotome muscles, and thus the study was incomplete. 2. There is no evidence to support the presence of an ongoing denervating right lower extremity radiculopathy, plexopathy, or mononeuropathy."

21. Dr. Chen reviewed the results of the EMG and issued an addendum on February 16, 2024, opining: "After reviewing the EMG findings, or lack thereof, I cannot recommend lumbar surgery. His subjective complaints are out of proportion to objective findings. The MRI scan was otherwise underwhelming. Injections have not been diagnostic. This makes this claimant a very poor candidate for surgery."

22. Claimant saw PA Scott again on March 15, 2024, and complained of pain and numbness radiating from the right side of his low back to the right groin and right posterolateral right thigh to his big toe, as well as lower extremity weakness. PA Scott noted that Claimant's straight leg raise would reproduce back and radicular pain on both sides. Claimant reported that the low back ESIs that he had undergone had worsened his symptoms in his lower extremity and that he subsequently experienced "left-sided facial swelling and blood clots in his eye."

23. At hearing, Dr. Chen testified that Claimant complained of circumferential numbness going down his right leg. He felt that when a single nerve in the back is being pinched, it does not cause circumferential numbness but instead causes pain in a particular distribution. Specifically, he felt that Claimant's complaints of numbness included the front of the leg, the back of the leg, the inside of the leg, the outside of the leg, and "the everything," explaining that such complaints were non-anatomic. He explained that an L5 nerve root impingement would result in numbness in a specific dermatome that would include a wrapping around the outside of the thigh to the front of the leg, then down to the top of the foot and into the great toe, possibly into the second or third toes on top.

24. Dr. Chen testified that MRIs and clinical symptoms do not always correlate perfectly and that sometimes findings on an MRI are incidental.

25. Regarding Claimant's incomplete EMG study, Dr. Chen testified that there was still sufficient information obtained from the EMG to determine an absence of ongoing axon loss in the right L3 to S1 myotomes, ruling out radiculopathy on the right side. Dr. Chen clarified that the incomplete portion of the EMG concerned only the recruitment of the "motor unit action potential morphology in a number of the anterior myotome muscles." However, Dr. Chen acknowledged that different muscle groups can be innervated by multiple nerve roots, making it challenging to pinpoint specific nerve damage through EMG and nerve conduction studies alone.

26. Last, Dr. Chen expressed concern during his testimony regarding surgical intervention due to Claimant's bilateral complaints not correlating with Claimant's right-sided-only disc herniation at L4-L5, implying that a microdiscectomy of the L4-L5 disc herniation would not address Claimant's symptoms.

27. Claimant testified on his own behalf at hearing. Claimant testified that due to the pain in his back and pain and weakness in his legs, he would like to proceed with the surgery. He also testified that he had problems walking, standing, and bending due to his injury. He testified that he had been limited in his daily activities, and that the surgery would help him function.

28. The Court finds Dr. Chen's testimony credible but not persuasive. Dr. Chen acknowledges that Claimant exhibits a genuine lumbar disc pathology at L4-L5 but opines based on other factors that the finding is incidental and does not correlate with Claimant's complaints. The Court finds Claimant's complaints genuine, even if probably exaggerated. However, the Court finds that notwithstanding Claimant's likely exaggerations, Claimant does have right lower extremity symptoms arising from a lumbar condition, more likely than not his L4-L5 disc herniation. Dr. Chen reasoned in part that the EMG results did not reveal "axon loss" in the right L3 to S1 myotomes, but also acknowledged that that EMGs alone are not perfect in pinpointing which nerves are involved as different muscle groups can be innervated by multiple nerve roots.

29. Ultimately, although Respondents have raised some doubts as to the likely efficacy of a microdiscectomy, the Court finds that there is a preponderance of the evidence that the procedure would provide Claimant with some relief of the effects of his work injury. Claimant has proved that it is more likely than not that the right L4-L5 microdiscectomy recommended by Dr. Nelson is reasonably necessary to cure and relieve Claimant of the effects of his August 24, 2023 injury.

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

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

Medical Benefits – L4-L5 Microdiscectomy

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.

In a dispute over medical benefits that arises after the filing of a general admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment. *Snyder v. Indus. Claim Appeals Office of the State of Colo.*, 942 P.2d 1337, 1339 (Colo. App. 1997).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo.App.2002)(upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

As found above, the Court finds and concludes that Claimant has proved that it is more likely than not that the right L4-L5 microdiscectomy recommended by Dr. Nelson is reasonably necessary to cure and relieve Claimant of the effects of his August 24, 2023 injury.

ORDER

It is therefore ordered that:

1. The right L4-L5 microdiscectomy recommended by Dr. Nelson is reasonably necessary to cure and relieve Claimant of the effects of his August 24, 2023 injury.

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

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

DATED: August 1, 2024.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-221-604-002

ISSUES

- Does the ALJ have jurisdiction to consider the issues endorsed in Claimant's February 6, 2024 Application for Hearing?

FINDINGS OF FACT

1. Claimant filed an Application for Hearing in this matter on February 6, 2024, endorsing compensability, medical benefits, AWW, TTD, and penalties. A hearing was held on June 12, 2024.

2. In an effort to more fully understand the procedural history of this claim while preparing to issue an Order, the undersigned reviewed the archived OAC file pertaining to a previous Application for Hearing filed by Claimant on January 24, 2023. The prior file was denominated WC 5-221-604-001.

3. Claimant's January 24, 2023 Application for Hearing endorsed compensability, medical benefits, average weekly wage, and TTD.

4. The file in WC 5-221-604-001 contains an Order to Show Cause issued by Judge Richard M. Lamphere for Claimant's failure to appear at a scheduled hearing on April 19, 2023. (Attached). Employer attended the hearing and was ready to proceed. After determining that Claimant had been served notice of the hearing, Judge Lamphere ordered as follows:

> Claimant is directed to show good cause for his failure to appear at the hearing within thirty (30) days of this Order. If Claimant fails to show good cause in writing within thirty (30) days, his January 24, 2023 Application for Hearing shall be dismissed with prejudice for lack of prosecution and the file will be closed by this order.

5. The OAC received no response to the April 19, 2023 Order to Show Cause from Claimant. As such, the issues of compensability, medical benefits, average weekly wage, and TTD were dismissed with prejudice.

6. This ALJ lacks jurisdiction to adjudicate the claim because the issue of compensability was dismissed with prejudice by the April 19, 2023 Order to Show Cause.

CONCLUSIONS OF LAW

Section 8-43-207(1)(n) empowers ALJs to "dismiss all issues in the case except as to resolved issues and except as to benefits already received, upon 30 days notice to all parties, for failure to prosecute the case unless good cause is shown why such issues should not be dismissed." Once issues in a claim are dismissed, ALJs lack jurisdiction to

award additional benefits unless the matter is reopened as permitted by law. *E.g., Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004). The issue of subject matter jurisdiction can be raised by any party at any time and cannot be waived. *Hasbrouck v. Industrial Commission*, 685 P.2d 780 (Colo. App. 1984). Any order issued in the absence of jurisdiction is void and unenforceable, even if no contemporaneous objection was raised at the hearing. *E.g., McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (ICAO, January 27, 2006). If a court determines that it lacks subject matter jurisdiction, it should address the issue *sua sponte*, regardless of whether the parties have raised it. *E.g*., *People in the Interest of J.C.S.*, 169 P.3d 240, 245 (Colo. App. 2007); *Shelter Mutual Ins. Co. v. Mid-Century Ins. Co*., 214 P.3d 489 (Colo. App. 2008).

As found, the ALJ lacks jurisdiction over this claim because all issues endorsed in Claimant's January 24, 2023 Application were dismissed with prejudice by Claimant's failure to respond to the April 19, 2023 Order to Show Cause. The issues that were dismissed with prejudice include "compensability," which is a threshold requirement for an award of any benefits in a workers' compensation claim.

ORDER

It is therefore ordered that:

1. Claimant's February 6, 2024 Application for Hearing is dismissed for lack of jurisdiction.

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 2, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

Patrick C.H. Spencer II
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-833-682-006

ISSUES

I. Whether Claimant established by a preponderance of the evidence that her claim should be reopened for medical benefits pursuant to section 8-43-303(2)(b), C.R.S.

II. Whether the August 9, 2023, MRI and nine physical therapy visits in 2023 and 2024 are reasonable and necessary to treat Claimant from the effects of her work injury.

FINDINGS OF FACT

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

Initial Work Injury

1. On August 23, 2010, Claimant sustained an admitted industrial injury, when she slipped on some steps and fell onto a landing. (See generally Ex. A; Ex. HH). Following her fall, Claimant was taken to Exempla Good Samaritan Center, where x-rays of her pelvis were taken. The x-rays showed Claimant had sustained left pubis and inferior pubic rami fractures. Claimant was admitted to the hospital for pain control.

Initial Conservative Medical Treatment

2. Claimant initially treated with Kaiser Permanente until she started treating with her employer designated authorized treating physician (ATP) Sander Orent, M.D., starting on November 15, 2010. (Ex. B, at 11-14; Ex. HH, at 1366). At her initial evaluation, Dr. Orent's impression was a pelvic fracture with ongoing urinary incontinence. Dr. Orent referred Claimant to William Ciccone II, M.D., an orthopedic surgeon, to treat her fractures and for pain management.

3. Claimant continued seeing Dr. Ciccone and Dr. Orent for conservative management while her hip fractures healed. (See generally Ex. B; P).

4. On April 13, 2011, Dr. Ciccone found that Claimant no longer needed any orthopedic follow-up after reviewing a CT scan taken on April 8, 2011, that revealed no acute abnormalities due to a subsequent fall, in addition to interval but incomplete healing of the bilateral sacroiliac fractures and ramus fractures. (Ex. P, at 1066).

5. Claimant continued to struggle with pain, functional limitations, and emotional issues. Consequently, Dr. Orent referred her to receive psychological counseling from Ronald Carbaugh, Psy. D.

6. On May 4, 2011, Claimant underwent a psychological evaluation with Dr. Carbaugh. He concluded Claimant had a pain disorder associated with psychological factors and a general medical condition; history of post-traumatic stress disorder; adjustment disorder, with depressed mood; and deferred other diagnoses. (Ex. K, at 923). Dr. Carbaugh said Claimant had a history of significant abuse, which can be a factor in the development of

chronic pain disorders. He also said that Claimant appropriately entered psychotherapy for the prior abuse issues and functioned well. However, Dr. Carbaugh noted past abuse could lead to heightened pain sensitivity. Dr. Carbaugh opined Claimant would likely benefit from a course of pain and adjustment counseling.

7. Claimant completed a number of pain and adjustment counseling sessions. In the psychological discharge summary on August 9, 2011, Dr. Carbaugh's diagnostic impressions were the same as on May 4, 2011. (Ex. K, at 931-32).

MMI and Maintenance Care

8. Following this conservative treatment, on August 25, 2011, Dr. Orent evaluated Claimant and found that she had reached maximum medical improvement (MMI) on July 28, 2011. (Ex. B, at 33-35). He assigned a 21% whole person impairment, which represented 15% for Claimant's pelvic fracture and 7% for her urinary incontinence. Dr. Orent assigned no work restrictions for Claimant at this time and released her to full duty as of August 24, 2011. (Ex. B, at 33).

9. For maintenance treatment, Dr. Orent stated that if the urinary incontinence worsened, Claimant may need to revisit the neurologist. (Ex. B, at 33-35). Dr. Orent also noted Dr. Ciccone opined it was possible Claimant will need surgery on her hip because of the injury, which should be considered a part of potential maintenance care. Dr. Orent stated maintenance care also included prescriptions for Vicodin and Vesicare.

10. On September 15, 2011, Respondent filed a Final Admission of Liability ("FAL") consistent with Dr. Orent's August 25, 2011 report. Following this, Claimant proceeded to receive continued maintenance treatment because her subjective complaints were persistent, despite repeated MRIs, CT scans, and x-rays of her pelvis continuing to show normal healing of her original fractures. (Ex. BB, at 1237). She received physical therapy, SI joint injections, and a right L5-S3 medial branch radiofrequency ablation. (Ex. BB, at 1237). She also underwent a transvaginal tape procedure and cystoscopy for the stress urinary incontinence issue on May 30, 2012, that provided relief from this condition. (Ex. B, at 45-49; Ex. H, at 759-768).

Subsequent Finding of MMI

11. After several years of additional medical treatment, Respondents filed another FAL on April 15, 2016, based on a March 31, 2016, medical report from Dr. Orent that found Claimant had reached MMI on March 31, 2016, with no additional impairment. (Ex. B, at 132-134). There was no mention of work restrictions associated with this medical record, other than that Claimant was "retired." Following this FAL, Claimant continued to receive additional maintenance treatment and eventually petitioned to reopen her case based on a worsening of her condition.

Reopening in 2019

12. On June 7, 2019, ALJ Timothy Nemechek issued an order finding that Claimant had failed to meet her burden of proof to show that her urinary incontinence condition had worsened and denied Claimant's petition to reopen as to that condition. (Ex. EE). However, he found that Claimant had met her burden of proof to reopen her claim based on a showing that the condition of her hip and sacroiliac (SI) joint had worsened. In reaching the conclusion that that the hip and SI joint had worsened, the ALJ noted that this "was a

close question, as Dr. Burris was a credible witness, particularly when describing the phenomenon of chronic pain and the waxing/waning of symptoms."

13. Following reopening, Claimant sought treatment at Kaiser until she again returned to Dr. Orent on March 9, 2021, after four and half years, who opined that he believed she was not at MMI and recommended repeating diagnostic testing. (Ex. B, at 141-145). As a result, an MRI of the sacrum and SI joints was taken on May 12, 2021, that revealed no sacral fracture and no acute abnormality in the sacroiliac joints. (Ex. S, at 1175). An MRI of the left hip was also taken the same day that revealed mild degenerative changes and tendinopathy, but no acute abnormalities and healed fracture in the left pubic bone. (Ex. T, at 1177). On the same day, an MRI of the lumbar spine revealed facet arthropathy in the lower lumbar spine, but no acute abnormalities and no evidence of neural impingement. (Ex. U, at 1180).

14. On September 13, 2021, Claimant was evaluated by spine surgeon, Dr. Pehler, who documented a normal examination and did not recommend surgical intervention. (Ex. V, at 1183- 84). Then, on January 25, 2022, she was evaluated by pain specialist, Dr. Arends, who documented a normal examination with the exception of positive Patrick's testing on the right. (Ex. W, at 1186-89). Despite this, Claimant exhibited significant pain complaints including right-sided lower back pain just to the right of the mid-line at the lumbosacral junction with pain that radiated down her right leg. Her symptoms were allegedly exacerbated with sitting and side laying. Dr. Arends provided diagnoses of chronic pain syndrome, sacroiliitis, lumbago, and lumbar spondylosis. He recommended a right SI joint injection which he performed that same day.

MMI Opinion with Work Restrictions and Maintenance Care Recommendations

15. On February 8, 2022, over a virtual visit, Dr. Orent again placed Claimant at MMI with stringent permanent restrictions due to her variety of medical challenges including no lifting greater than 15 pounds; 10 pounds repetitively; carrying 15 pounds; push/pull 15 pounds; cannot walk more than 200 yards; cannot stand more than 20 minutes; can sit for 2 hours but then has to lie down with H-Wave for 45 min and can repeat that cycle twice within a day; cannot crawl, kneel, squat or climb, requires accommodations for incontinence including immediate access to bathroom and cleaning materials. (Ex. Z, at 1198-1200-04).

16. Dr. Orent also recommended medical maintenance including following up with him every 4 months for the first year, transitioning to every 6 months in the second and third years, and on an as-needed basis after that. (Ex. AA, at 1202). He even noted that Claimant may require repeat sacroiliac injections every 4 to 6 months as needed with 3 to 4 sessions of physical therapy for the remainder of her life.

17. On April 2, 2022, Dr. Orent assigned a final impairment of 21% with no basis for apportionment. (Ex. AA, at 1202). Despite the length of Claimant's treatment, complaints, and alleged worsening over time, her medical impairment rating has always remained 21% at each impairment rating – which suggests her medical condition has remained stable over the past 14 years.

18. On April 18, 2022, Respondents filed another FAL consistent with Dr. Orent's final report that admitted to an open award of reasonable, necessary, and related maintenance medical benefits after MMI. (Resp. Ex. A).

Claim for Permanent Total Disability Benefits

19. On April 28, 2022, Claimant filed an Application for Hearing and endorsed the issue of permanent and total disability.

20. A hearing was held on November 4, 2022. At the hearing, Claimant testified that she had a hard time sitting for long periods of time (anything more than two hours); her incontinence was hard to predict and she had ongoing difficulties with that condition; she struggled with anxiety and depression; and she felt constantly fatigued. (Ex. HH, at 1378).

21. Following the hearing, ALJ Nemechek issued an Order denying Claimant's claim for permanent total disability benefits. (Resp. Ex. HH, at 1382). In denying her request for PTD benefits, ALJ Nemechek found that based on Claimant's background and work experience, there were jobs open and available to Claimant in the Denver labor market. ALJ Nemechek reached this conclusion despite Claimant's chronic pain and incontinence because of the availability of part-time and remote jobs, as well as positions in which Claimant could work a limited number of hours.

22. Claimant then appealed ALJ Nemechek's Order, which the Industrial Claim Appeals Office (ICAO) affirmed on January 17, 2023. (Ex. II).

Medical Treatment Since Placed at MMI in February 2022

23. After she was found at MMI by Dr. Orent on February 8, 2022, Claimant started treating exclusively with her primary care physician at Kaiser Permanente. (See Ex. JJ & KK).

24. Based on the medical records from Kaiser Permanente, it does not appear that her treatment has reached the level of maintenance care recommended at MMI by Dr. Orent. This suggests to the ALJ that her condition has not worsened since the most recent date of MMI because she has not sought the level of maintenance care Dr. Orent recommended for her sacroiliac condition. Claimant was seen several times for behavioral health and various medical issues that are unrelated to the injury in this case, until June 22, 2022, when she saw Vincent Bilello, M.D., for an injection for left trochanteric bursitis and hip pain. (Ex. KK, 1822- 1900). Through the rest of 2022, aside from some mention in her behavior health appointments, Claimant's medical notes from Kaiser Permanente contain little to no discussion of her hip pain or treatment for her work-related condition. (Ex. KK, 1734-1821).

25. On February 16, 2023, Claimant underwent an injection for the bursitis of her left trochanteric bursa, which had provided excellent relief for her previously. (Ex. KK, 1723).

26. Following the injection, at her annual wellness visit on March 23, 2023, Claimant did not mention worsening hip issues. (Ex. KK, at 1664-1674). Instead, Claimant mentioned she had sciatica and was taking oxycodone. (Ex. KK, at 1664).

27. Claimant continued her behavioral health treatment for several months until July 17, 2023, when a note from Dr. Bilello said that Claimant was seen for low back pain with bilateral sciatica. (Ex. KK, at 1616-1619). The note indicates Dr. Bilello referred Claimant to physical therapy. The treatment note, however, lacks any specific discussion of her

symptoms, physical examination, medical reasoning explaining why the physical therapy was reasonable and necessary, or a causation assessment connecting the need for additional physical therapy to Claimant's work injury.

28. On August 9, 2023, an MRI of Claimant's lumbar spine was taken. The MRI was taken due to a "flare up on low back pain due to a fall." It is not entirely clear whether he is relating to the original fall in 2010, or the most recent fall when claimant had a "fall on her front porch in May 2023." (Ex. 2, 488)

29. The MRI revealed minor multilevel discogenic degenerative change throughout the mid to lower lumbar spine with progressive changes at the L4-5 level. (Ex. KK, at 1606-1612). The L5-S1 level showed no evidence of disc bulge or herniation. The upper sacral levels were also noted as unremarkable. Despite this MRI being taken, there are no medical records from Kaiser that persuasively explain how the MRI is reasonable, necessary, and related to treat Claimant from the effects of her work injury.

30. On September 5, 2023, Claimant started physical therapy and reported low back pain with radiation into her left lower extremity for 13 years with prior physical therapy. (Ex. KK, at 1584). At this evaluation, Claimant reported she had fallen down a set of stairs and fractured her pelvis 13 years ago and she ambulated with a single point cane (SPC). Claimant also reported that she had fallen on her front porch 4 months earlier.

31. On September 25, 2023, Claimant was evaluated by Brian McIntryre, D.O., who she had not seen since 2019. (Ex. KK, at 1555-1566). Claimant reported that she was having pain in her left hemipelvis and buttock. Claimant also reported that she believed her symptoms had worsened since her prior pelvic fracture. She reported no radicular symptoms below her upper thigh and hamstring area. Claimant indicated that she used a "Rollator" walker for distances and uneven surface with some use of a cane and scooter. Claimant again reported that she had fallen more times since her work-injury. Dr. McIntyre opined that Claimant had left sacroiliitis that possibly overlapped with her low back facet arthropathy symptomatology. He recommended water walking in therapeutic pool setting, gentle range of motion of her bilateral lower extremities and low back as tolerated up to daily with active relaxation techniques, as well as local application of muscle rub and heating pad.

32. On November 22, 2023, Claimant underwent a sacroiliac joint injection, which was performed by Dr. McIntyre. (Ex. KK, at 1515-1516). This injection is consistent with the maintenance treatment recommended by Dr. Orent.

33. When Dr. Orent placed Claimant at MMI, Dr. Orent indicated that Claimant might require 3-4 physical therapy sessions after each injection as maintenance treatment. After the injection, Claimant attended physical therapy on the following dates and for the following conditions:

    a. November 27, 2023, for hip pain and low back pain with bilateral sciatica.[1]

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[1] On November 27, 2023, Claimant reported to her physical therapist the insidious onset of dizziness many years ago. She noted that she had seen an ear, nose, and throat (ENT) specialist who diagnosed her with bilateral hearing loss, and over the years dizziness is gradually getting worse with symptoms are on and off over the day. Claimant reported she had been using a cane or walker for balance.

b. December 4, 2023, for disequilibrium.[2]

c. January 5, 2024, for low back and left hip joint pain.[3]

d. February 23, 2024, for low back pain and sciatica. [4]

e. March 8, 2024, for low back pain with sciatica.

f. April 3, 2024, for low back pain and sciatica.

34. The ALJ finds that the physical therapy appointments on November 27, 2023, December 4, 2023, and January 5, 2024, are reasonable and necessary maintenance medical treatment to treat Claimant from the effects of her work injury. These three sessions are consistent with Dr. Orent's maintenance treatment recommendations – which was 3-4 sessions of physical therapy after each injection. However, the physical therapy sessions that occurred after January 5, 2024, are not reasonable and necessary to treat Claimant's hip condition – since the physical therapy provided during those appointments do not appear to be focused on treating her for the consequences of her hip injection, was directed towards her low back and bilateral sciatica – and Claimant failed to establish that physical therapy for her low back and sciatica was reasonable, necessary and related to her work injury.

35. On May 2, 2024, Dr. Bilello wrote a letter indicating Claimant sustained a work related in injury in 2010 and has had a "progressive loss of quality of life" over the last two years. He stated that over the last two years, Claimant has had the following changes:

- A significant decrease in her mobility and now has "limited ability to ambulate due to impaired balance and loss of leg strength" and that "patient is now reliant on a walker".
- Chronic pain requiring treatment with opioids.
- Limited ability to ambulate due to impaired balance and loss of leg strength, patient is now reliant on a walker.
- Difficulty with prolonged standing.
- Inability to perform many of the functional activities of daily life including such things as housekeeping (vacuuming, washing dishes, laundry).

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[2] Although the notes are not clear from the December 4, 2023, visit, it appears this appointment was directed towards balance issues, as well as low back pain and neck issues. But it was provided shortly after her injection, and is in line with the 3-4 sessions, after each injection, recommended by Dr. Orent for maintenance care.

[3] On January 5, 2024, Claimant again reported to her physical therapist, to whom she reported she was overall doing better. She even said that her low back and hip were not bothering her that much anymore but she did experience some additional pain when lying on her left hip.

[4] On February 23, 2024, Claimant reported falling again on February 12, 2024, landing on her tailbone when standing in room trying to take her boots off. (Ex. KK, at 1414). Apparently, this caused her low back pain to flare up and that she was having bilateral lower extremity pain.

- Standing long enough to prepare dinner has become increasingly difficult.
- Limited duration use of automobile.
- Sleep disturbance (interrupted due to pain).
- Worsening urinary incontinence.

36. Dr. Bilello's letter is not, however, found to be persuasive in support of Claimant's contention that her medical condition has worsened and that her case should be reopened for additional curative medical treatment. The ALJ does not find Dr. Bilello's letter persuasive for several reasons. First, he does not delineate Claimant's work-related injuries. Second, he does not indicate whether Claimant's work-related injuries and/or conditions have worsened and what caused them to worsen. Third, he does not set forth specific treatment that is reasonably necessary, and has a reasonable prospect, to cure Claimant from the effects of her alleged worsening work injury. Fourth, he does not set forth the objective findings that support Claimant's increase in subjective complaints and establishes that Claimant's work-related injury or condition has worsened and is in need of additional curative treatment. In essence, he merely repeats Claimant's subjective complaints. Lastly, he does not provide any semblance of a causation analysis on whether Claimant's subjective complaints are due to a worsening of her work-related injury and flow naturally and proximately from her 2010 work injury and require curative treatment – compared to maintenance treatment that is merely meant to relieve Claimant from the effects of her work injury. Moreover, he does not address whether her dizziness and subsequent falls might be the cause of the increase in her complaints.

John Burris, M.D. Opinions

37. John Burris, M.D., has a thorough familiarity with Claimant's condition and course of treatment as he performed three independent medical examinations (IME) of Claimant. The first one was performed on April 24, 2018, and the second one on June 28, 2022. (Ex. R; BB). Most recently, he saw Claimant for a third IME on April 16, 2024. (Ex. LL). The ALJ finds that Dr. Burris' opinions are particularly persuasive considering his review of Claimant's lengthy medical history, physical examinations, and explanation of his opinions.

Dr. Burris' First IME Report

38. In his first report, dated May 18, 2018, Dr. Burris recognized that Claimant had received extensive maintenance care, which he noted included "over 100 sessions of physical therapy, a TVT sling procedure to address her incontinence on 5/30/2012, 7 caudal injections, 6 right SI joint injections, and a right L5-S3 medial radiofrequency ablation." (Ex. R, at 1172). However, he noted that none of the intervention provided lasting benefit. Based on his review of Claimant's medical records and his examination of Claimant, Dr. Burris agreed with a previous IME performed by Dr. Carlos Cebrian, M.D., concluding that there was no objective evidence of a mechanical lesion to support her subjective complaints. Instead, he found that Claimant's complaints were not due to the injury sustained during her August 23, 2010, fall, but were instead due to her "maladaptive coping and pre-existing psychological state." He emphasized that the psychological evaluation by Dr. Carbaugh explained that Claimant's prior non-work-related medical

history, including trauma, clearly explained her ongoing subjective chronic pain complaints which were out of proportion to the objective findings. In the end, he found that due to her normal healing without complication and the absence of evidence of residual issues, there would be no physical basis for any permanent impairment, work restrictions, or maintenance care.

Dr. Burris' Second IME Report

39. In his second report dated June 28, 2022, Dr. Burris indicated that he had again examined Claimant and reviewed additional medical records since his previous IME, including new MRIs, which did not change his original opinion. (Resp. Ex. BB, at 1238). Instead, he noted that there remained no objective evidence to explain her subjective pain complaints. He went further and emphasized that over her 12-year course of extensive treatment, she had experienced no "appreciable consistent change in subjective complaints or functional status." To the contrary, "her subjective complaints have waxed and waned and expanded in a nonphysiologic manner[.]"

40. Notably, at his evaluation of Claimant just four months after she reached MMI, Claimant expressed significant subjective pain complaints. (Ex. BB, at 1208). Namely, Claimant reported 7/10 pain throughout the low back, buttock, and hip regions and urinary incontinence. She further reported intermittent tingling in both knees and feet including all toes (occurs approximately once a week after an active day, not currently present), global weakness, difficulty walking, balance issues, and inconsistent sleep. She even maintained that her pain varied between 6/10 to as high as a 10/10, which included achy, tight, sharp, shooting, burning, and stabbing pains. Her pain was worse with bending at the waist, sitting, and moving in general.

Dr. Burris' Most Recent IME Report

41. As noted above, Dr. Burris saw Claimant again most recently on April 16, 2024, for a third IME and review of additional medical records. (Ex. LL, at 1917-1954). The ALJ finds that Claimant's subjective complaints at this examination were similar to her prior subjective complaints at her previous IME with Dr. Burris. (Ex. LL, at 1920). She reported 8/10 pain throughout the low back and buttock regions and both upper legs, and urinary incontinence. She reported that her pain was even higher than normal due to the long drive to the appointment. She again reported diffuse weakness and approximately three times a week, with her pain extended down her left leg, primarily at night, and she has difficulty getting comfortable.

42. Of particular note, it appears that her pain was improved from the prior evaluation, varying between a 4/10 to as high as a 9/10, instead of 6/10 to as high as a 10/10 as previously reported.

43. In the end, after reviewing the additional records and examining Claimant, Dr. Burris confirmed that the opinions expressed in his original IME were again unchanged. (Ex. LL, at 1951- 53). He did not believe there was any objective evidence of a mechanical lesion that supported her subjective complaints. As he identified previously, Claimant complained of chronic conditions which were not likely due to the injuries sustained in the August 23, 2010, work injury, but due to her maladaptive coping and preexisting psychological state. He emphasized that Claimant's clinical course has not followed a

typical physiologic pattern associated with an acute musculoskeletal injury and has correlated closely with documented non-work-related psychosocial factors. Despite extensive treatment over about 14 years, there has been no appreciable consistent change in subjective complaints or functional status. Instead, he confirmed again that her subjective complaints have waxed and waned and expanded in a non-physiologic manner.

44. Dr. Burris believed that based on the normal healing that has occurred and has been documented by various modes of diagnostic testing with no evidence of residual issues, there was no objective physical basis for any permanent impairment rating, work restrictions or maintenance care. Indeed, given the lack of consistent benefit with the exhaustive treatments provided, he maintained that it was not likely that Claimant would benefit from any additional passive care. Instead, he believed that Claimant should be encouraged to actively and regularly participate in a self-directed home exercise program.

45. Finally, he confirmed that while Claimant has reported a worsening of her condition, there was simply no physiologic basis to associate this reported worsening to her work-related injury, especially given that the work-related injury healed about 14 years ago.

Dr. Burris' Hearing Testimony

46. Dr. Burris also testified at hearing as an expert in occupational medicine. The ALJ finds his opinions persuasive and credible that Claimant's condition has not worsened since she was placed at MMI on February 8, 2022.

47. Dr. Burris reiterated his opinion that there were no objective findings to support Claimant's current subjective pain complaints. (Hrg. Tr. 43:15-21). Dr. Burris explained that he found it particularly noteworthy when he examined Claimant and she exhibited a functional range of motion throughout her lumbar region with normal neurological function, including normal motor control, sensation, and reflexed. (Hrg. Tr. 42:8-14). These were significant because it suggested that there were no issues with the functioning of her nervous system. (Hrg. Tr. 42:15-23). In the end, and according to Dr. Burris, the only basis for Claimant's pain complaints was her subjective experience, which he explained was the result of a personal chronic pain condition. (Hrg. Tr. 43:22-45:10; 48:16-249:11).

48. In addition to his position that he does not believe Claimant's ongoing subjective complaints have any relationship to the work injury 14 years ago, Dr. Burris maintained that she remained at MMI based on Dr. Orent's February 8, 2022, report. (Hrg. Tr. 45:11-46:5). He also observed in his review of Claimant's medical records that no physician has opined that Claimant was no longer at MMI. (Hrg. Tr. 46:10-13). Even based on his review of a letter written by Dr. Bilello, there was no basis to argue that Claimant was no longer at MMI based on this report. (Hrg. Tr. 46:14-48:15). Specifically, he explained that Dr. Bilello did not causally relate claimant's alleged decline in her condition to her work injury and he did not offer any opinions on any treatment that would improve Claimant's condition – with which the ALJ agrees.

49. Dr. Burris also observed that Claimant's most recent MRI of her lumbar spine was remarkably stable and things were pretty much unchanged from an MRI taken five years before. (Hrg. Tr. 49:15-50:20). Indeed, he emphasized that there was no evidence of neural impingement, central canal stenosis, or neuroforaminal stenosis. He noted that

there was some degeneration of her lumbar spine but this would be expected naturally. (Hrg. Tr. 50:1-20). He also observed that this would have no relationship to the pelvic fracture in this case that occurred about 14 years ago, especially because those changes were one vertebrae and two disc levels above where the injury occurred.

50. Dr. Burris added that the MRI could count as maintenance care, when considering Dr. Orent's report, but not likely to improve someone's condition because it was strictly diagnostic. (Hrg. Tr. 50:21-51:8). Indeed, he even confirmed that no further treatment was likely to provide significant relief for Claimant's work-related condition, including injections or physical therapy. He explained that every time he has seen Claimant, her condition has remained essentially unchanged and any alleged worsening cannot be causally related to the work injury. (Hrg. Tr. 51:12-14).

51. As for any further injections, Dr. Burris explained that while she may have had a positive response, there was no documentation of any formal assessment to establish a diagnostic response. (Hrg. Tr. 52:4-54:11). He explained that this is critical to rule out a placebo affect which may explain Claimant's positive subjective response to these injections. Nevertheless, he maintained that these were still just recommended as maintenance care and there was no indication they would significantly improve Claimant's condition into the future.

52. Similarly, when speaking about physical therapy, Dr. Burris explained that Claimant's had undergone extensive physical therapy and he found no evidence that further physical therapy 14 years after her alleged injury would be consistent with the Medical Treatment Guidelines to improve her condition in any way and could again be offered through maintenance care if anything, as recommended by Dr. Orent. (Hrg. Tr. 54:12-56:2).

53. Finally, Dr. Burris observed that Claimant's unrelated psychological condition also appeared stable and any subsequent falls were dismissed by Claimant as inconsequential with no belief that these aggravated her condition. (Hrg. Tr. 56:25-58:15).

54. Overall, the ALJ finds Dr. Burris' opinions as set forth in his reports and his testimony to be credible and persuasive evidence that supports a finding that additional medical treatment is not reasonably expected to improve Claimant's condition, that Claimant's work-related injuries have not worsened, and that Claimant remains at MMI.

55. Although Dr. Burris indicated that the MRI at issue could be considered maintenance treatment, the ALJ does not find the August 9, 2023, MRI to be reasonable and necessary to treat Claimant from the effects of her work injury.

<u>Claimant's Testimony</u>

56. At hearing, Claimant testified and discussed her subjective impression that her condition has worsened because she cannot do a lot of things she did before, including use of walker, standing to cook, riding in a car for longer than an hour, and walking less. (Hrg. Tr. 24:6-24). She even indicated that her physical therapy was causing extra pain. (Hrg. Tr. 24:19-20). Claimant also downplayed the seriousness of any subsequent falls in her testimony. (Hrg. Tr. 28:1-7).

Reopening

57. Ultimately, the ALJ finds that even though Claimant subjectively maintains her condition has worsened, and Dr. Bilello has stated that Claimant has more symptoms at this time, and is less functional, Claimant has failed to establish that her work-related medical condition has worsened. The ALJ further finds that Claimant has failed to establish that additional medical treatment is reasonably expected to improve, or cure, Claimant's condition. Thus, Claimant remains at MMI.

Maintenance Medical Benefits

58. The Claimant underwent an MRI on August 9, 2023, for low back pain and sciatica. The ALJ, however, finds that Claimant failed to present sufficient evidence to establish that the MRI was reasonable and necessary to treat Claimant from the effects of her work injury.

59. When Dr. Orent placed Claimant at MMI again in 2022, he concluded that she would require maintenance medical treatment in the form of sacroiliac joint injections and 3-4 physical therapy sessions after each injection.

60. Claimant underwent a sacroiliac joint injection on November 22, 2023, as maintenance medical treatment for her work injury. After the injection, Claimant attended three sessions of physical therapy for her hip. The ALJ finds that the three physical therapy sessions Claimant underwent on November 27, 2023, December 4, 2023, and January 5, 2024, to be reasonable and necessary maintenance medical treatment to treat Claimant from the effects of her work injury.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be

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

I. Whether Claimant established by a preponderance of the evidence that her claim should be reopened for medical benefits pursuant to section 8-43-303(2)(b), C.R.S.

Section 8-43-303(1), C.R.S., authorizes the reopening of a claim on a number of grounds, including error, mistake, or a change in condition. The claimant bears the burden of proof to establish, by a preponderance of the evidence, that the worsening of their physical or mental condition is causally related to the industrial injury. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997); *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). However, a change of condition by itself is not sufficient to justify reopening, and the claimant must also establish that reopening is appropriate because the claimant's degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Richards v. Indus. Claim Appeals Office*, 996 P.2d 756, 758 (Colo. App. 2000).

By contrast, under *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1988), once respondents admit for maintenance medical benefits after MMI, the claimant is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity. In turn, once admitted, "[b]ecause future maintenance medical benefits are, by their very nature, not yet awarded, those benefits remain open and are not closed by an otherwise closed FAL." *Bolton v. Indus. Claim Appeals Office*, 487 P.3d 999, 1004-06 (Colo. App. 2019). Accordingly, since the issue of medical maintenance benefits has not closed based on the FAL, Claimant does not need to seek reopening to obtain future medical maintenance benefits as admitted under *Grover*. Instead, the claimant only needs to apply for a hearing in cases where respondents refused payment for specific maintenance treatment that has been denied as unrelated, unreasonable or unnecessary. *Walker v. Life Care Ceners of America*, W.C. No. 4-953-561-02 (March 30, 2017) (citing § 8-43-203(2)(d), C.R.S. (once any liability is admitted, payments shall continue according to admitted liability)).

Since reopening a claim to obtain general maintenance medical benefits is not possible because the issue of maintenance medical care is not closed, to justify reopening a claim to obtain further medical benefits, Claimant has to establish that her condition has worsened to the extent that she is no longer at MMI and there are further medical benefits that "are reasonably expected to improve the condition." *See Mockmore v. Joslins*, W.C. No.

4-343-875 (Apr. 8, 2005). Indeed, the Act expressly recognizes the distinction between maintenance medical benefits and further medical benefits to improve a claimant's condition. Namely, the Act provides that MMI means 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. However, the Act further clarifies "[t]he requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement."

In this case, the ALJ finds and concludes that Claimant's request to reopen her claim for further medical benefits pursuant to § 8-43-303(2)(b), C.R.S., is denied because (i) Claimant has not established by a preponderance of the evidence that her condition has worsened in a manner that can be causally related to her work injury; and (ii) the medical benefits Claimant has obtained and is seeking are maintenance medical benefits. As a result, Claimant has failed to establish by a preponderance of the evidence a basis to reopen her claim for medical benefits.

II. Whether the August 9, 2023, MRI and nine physical therapy visits in 2023 and 2024 are reasonable and necessary to treat Claimant from the effects of her work injury.

Claimant's claim does remain open for maintenance medical benefits. As found, Respondents admitted for maintenance medical treatment. Claimant requested the ALJ to find Respondents liable for the lumbar MRI performed on August 9, 2023, and nine physical therapy sessions provided through Kaiser Permanente between September 5, 2023, and April 3, 2024.

As found, Claimant failed to establish by a preponderance of the evidence that the August 2023, MRI was reasonable and necessary to treat Claimant from the effects of her work injury. As credibly indicated by Dr. Burris, Claimant has undergone an extensive amount of treatment over about 14 years and there has been no appreciable consistent change in her subjective complaints or functional status. Instead, Claimant's subjective complaints have waxed and waned and expanded in a non-physiologic manner. Thus, based on the facts of this case, performing an MRI based largely on Claimant's subjective complaints is not reasonable and necessary to treat Claimant from the effects of her work injury.

On the other hand, when Claimant was placed at MMI by Dr. Orent in 2022, he indicated that maintenance care could include sacroiliac joint injections, followed up by 3-4 sessions of physical therapy. In this case, Claimant underwent a sacroiliac injection on Noember 22, 2023. Thereafter, she underwent three physical therapy sessions for her hip pain which took place on November 27, 2023, December 4, 2023, and January 5, 2024. Based on the MMI report of Dr. Orent, the ALJ finds and concludes Claimant established by a preponderance of the evidence that these three physical therapy sessions are reasonable and necessary maintenance medical treatment to relieve Claimant from the effects of her work injury.

ORDER

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

1. Claimant's request to reopen her claim is denied.
2. The MRI is not reasonable and necessary medical treatment to treat Claimant from the effects of her work injury.
3. The three physical therapy sessions, which Claimant attended on November 27, 2023, December 4, 2023, and January 5, 2024, are found to be reasonable and necessary maintenance medical treatment to treat Claimant from the effects of her work injury.
4. 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 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 5, 2024

/s/ Glen B. Goldman

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable injury at work on October 31, 2019 (W.C. No. 5-155-269).

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to medical benefits reasonably necessary to cure and relieve her of the effects of her October 31, 2019 injury (W.C. No. 5-155-269).

3. Who is Claimant's authorized treating provider for Claimant's October 31, 2019 injury (W.C. No. 5-155-269).

4. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary disability benefits for her October 31, 2019 injury (W.C. No. 5-155-269).

5. Whether Respondents have proved by a preponderance of the evidence that temporary disability benefits should be terminated due to Claimant's responsibility for termination pursuant to §§ 8-42-103(1)(g) and 8-42-105(4), C.R.S., with respect to Claimant's October 31, 2019 injury (W.C. No. 5-155-269).

6. Claimant's average weekly wage for her September 20, 2019 injury (W.C. No. 5-155-262), her October 31, 2019 injury (W.C. No. 5-155-269), and her June 3, 2020 injury (W.C. No. 5-155-271).

7. Whether Claimant has proved by a preponderance of the evidence that penalties should be imposed on Respondents for failure to timely report injuries to the Division pursuant to § 8-43-101(1)(a), C.R.S., with respect to her September 20, 2019 injury (W.C. No. 5-155-262), her October 31, 2019 injury (W.C. No. 5-155-269), and her June 3, 2020 injury (W.C. No. 5-155-271).

PENDING MOTIONS

Respondents filed an Opposed Motion for Extension of Page Limit Requirement for Position Statement on June 12, 2024, citing the multitude of issues addressed at hearing. Respondents' Motion is denied for lack of good cause, as the facts of the case were adequately addressed in Respondents' Position Statement.

Claimant filed on June 24, 2024, her Motion to Review My IME Medical Report from Doctor Brian Shea. The Motion was filed after position statements were due and

the record had closed. Attached thereto was additional evidence offered by Claimant. The Motion did not contain a certification that Claimant had conferred with Respondents' counsel prior to filing the Motion as required by OAC Rule 16(B), nor did Claimant indicate in the Motion whether the Motion was opposed or unopposed, nor did Claimant provide any explanation as to why no conference had occurred. Therefore, Claimant's Motion is summarily denied.

Claimant filed on July 3, 2024, a Motion[1] requesting admission of additional evidence. The Motion was filed after position statements were due and the record had closed. Attached thereto was additional evidence offered by Claimant. The Motion did not contain a certification that Claimant had conferred with Respondents' counsel prior to filing the Motion as required by OAC Rule 16(B), nor did Claimant indicate in the Motion whether the Motion was opposed or unopposed, nor did Claimant provide any explanation as to why no conference had occurred. Therefore, Claimant's Motion is summarily denied.

FINDINGS OF FACT

1. Claimant is a former custodian for Respondent-Employer with five workers' compensation claims involving Respondent-Employer, three of which are at issue in this matter.

2. Two of the claims are admitted claims with dates of injury of September 20, 2019, and June 3, 2020, with respective workers' compensation numbers of 5-155-262 and 5-155-271. The third claim at issue is a denied claim with a date of injury of October 31, 2019, with a workers' compensation number of 5-155-269.

3. Respondent-Employer was contracted to provide custodial services to the [Redacted, hereinafter BM] in Fort Collins, and Respondent-Employer assigned Claimant to work at those facilities. Claimant worked under the supervision of site manager, [Redacted, hereinafter OB], and team lead, [Redacted, hereinafter GM].

October 31, 2019 Injury (W.C. No. 5-155-269)

4. On October 31, 2019, Claimant left work to attend a physical therapy appointment for a prior July 7, 2019 injury.[2] She was to return to the BM[Redacted] facilities after her appointment to continue work.

5. While returning to work from her physical therapy appointment, Claimant diverted to [Redacted, hereinafter BT], a local restaurant,[3] to order dinner, pick it up, and return to work. The parking complex for BT[Redacted] was on the return route

[1] Claimant's Motion was in the form of e-mails, which attached documents she wished to submit to the Court.
[2] This is claim W.C. No. 5-174-107, which is not one of the claims at issue in this matter.
[3] BT[Redacted] was located at [Redacted, hereinafter AD]

from the physical therapy appointment. While exiting the car, Claimant slipped on ice and fell, injuring her left pinky finger and left ankle. Claimant did not end up ordering food from BT[Redacted], and she reported her injury to her employer upon returning to BM[Redacted] after the injury.

6. Both GM[Redacted] and OB[Redacted] would later testify that there was no indication this was a report of a work-related injury and that they believed that Claimant would file a lawsuit against the restaurant. OB[Redacted] testified that Claimant mentioned to her only that she had been injured when she slipped and fell at a restaurant parking lot, and that Claimant did not indicate that it was a work-related injury. Respondent-Employer did not provide Claimant with a designated provider list at that time.

7. Respondent-Employer's policies require that employees clock out when leaving for lunch and that employees should not take personal lunches after a medical appointment if they are on the clock. Claimant credibly testified that she was on the clock because she believed she did not have to clock out when attending medical appointments for her workers' compensation injury.

8. Because Claimant did not receive a designated provider list initially, Claimant sought treatment for her October 31, 2019 injury at Associates in Family Medicine Horsetooth Urgent Care the day after her injury with complaints related to her left hand, left hip, and left foot. An X-ray of Claimant's left ankle was "suspicious for nondisplaced fracture medial malleolus." An X-ray of Claimant's left hand resulted in an impression of "[d]isplaced oblique fracture with fifth metacarpal with overlying soft tissue swelling." Dr. Richard Henry Morgan splinted Claimant's left hand, referred her for an orthopedic evaluation, and recommended she remain off work. Nevertheless, Claimant continued working. The Court finds this treatment to have been reasonably necessary to cure and relieve Claimant of the effects of her October 31, 2019 injury.

9. On November 6, 2019, Claimant saw orthopedist Dr. Christopher Stockburger at Orthopaedic & Spine Center of the Rockies. Noting Claimant's fracture, Dr. Stockburger wrote in his report, "I typically treat most fifth metacarpal fractures nonoperatively, but I think this is one that may benefit from pinning." Claimant underwent a left fifth metacarpal open reduction and internal fixation (ORIF) on November 11, 2019, with Dr. Stockburger.

10. Thereafter, Claimant continued to follow up for treatment with Dr. Stockburger as well as with Dr. Mark Unger at Associates in Family Medicine.

11. Claimant filed a Workers' Claim for Compensation (WCC) for her October 31, 2019 injury on December 4, 2020, more than a year after the date of injury, and alleging a last date worked of November 10, 2019. Respondents filed the First Report of Injury (FROI) and a Notice of Contest (NOC) 122 days later on April 5, 2021.

12. The Court finds that Respondents first learned that Claimant claimed an October 31, 2019 lost-time work injury on the date Claimant filed her WCC, December 4, 2020. Respondents were, therefore, required to file a FROI by no later than December 14, 2020, pursuant to § 8-43-101(1)(a), C.R.S. (2019). The FROI being filed on April 5, 2021, was 112 days late.

13. Claimant was terminated by the Employer on March 31, 2021, at the request of BM[Redacted]. Claimant was terminated due as she was observed using a BM[Redacted] computer in violation of security policy. Claimant had a documented history of disciplinary actions leading up to her termination. OB[Redacted] testified that the computer incident was not the only factor in the decision to terminate Claimant. The other factors were:

    - Claimant violated workplace policy by refusing to follow her foreman, supervisor, or night lead's instructions.

    - Claimant was given an Employee Warning Report for "bad-mouthing" and making derogatory remarks to her co-workers. Specifically, other co-workers reported to OB[Redacted] that Claimant was talking negatively about GM[Redacted], claiming she was having an affair with someone on the site. This was corroborated by GM[Redacted] testimony at a later hearing.

    - In early March of 2021, GM[Redacted] observed Claimant using a BM[Redacted] computer and took a picture, then related her observations to OB[Redacted] and gave her the picture. OB[Redacted] testified that Claimant was using a family member's login information, with specific BM[Redacted] credentials. This observation was discussed directly with BM[Redacted] by the Employer management and BM[Redacted] requested that the Employer end the assignment of Claimant.

14. Claimant signed a Visitor Confidential Information and Internet Policy Terms on September 15, 2020, which stated that, if Claimant was logged into the Contractor's guest internet system, she was subject to Contractor's rules of use and requirements. BM[Redacted] policy prohibited unauthorized access using someone else's login information, and BM[Redacted] requested that Respondent-Employer terminate Claimant. Respondent-Employer's handbook prohibited employees from using client property, including computers. The handbook also indicated that Claimant's employment was terminable at will. Claimant would have signed the policy when she was hired, as the handbook is given to each employee upon hire. Claimant would have been, and was in fact, aware of the policy.

15. The Court finds that Claimant was responsible for her own termination on March 31, 2021. Any wage loss resulting from that termination is not attributable to Claimant's October 31, 2019 injury.

16. Regarding the injury in the parking lot at BT[Redacted] on October 31, 2019, Claimant credibly testified that her physical therapy appointment was at the Snow Mesa location, which is at [Redacted, hereinafter AA]. The Court takes judicial notice that this is 1.4 miles from the BM[Redacted] facility in Fort Collins.[4] Claimant also credibly testified that BT[Redacted] was across the street. The Court takes judicial notice that the deviation required merely turning into a strip mall to pick up the food before continuing on route back to the workplace. Therefore, the Court finds that the geographic deviation in Claimant's route was insubstantial. Claimant also credibly testified that she planned to grab the dinner as takeout rather than dining in, a factor which weighs in favor of the deviation being minor.

17. Ultimately, the Court finds that Claimant was in the quasi course of her employment at the time of the October 31, 2019 injury, and, although she had deviated from the quasi course of employment while stopping for dinner at BT[Redacted], the deviation was not substantial.

18. The Court therefore finds that Claimant has proved by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment on October 31, 2019, when she slipped and fell in the parking lot near BT[Redacted].

19. Claimant has proved by a preponderance of the evidence that the treatment she received at Associates in Family Medicine on November 1, 2019, was reasonably necessary to cure and relieve her of the effects of her October 31, 2019 injury.

20. The Court also finds that Claimant has proved by a preponderance of the evidence that Respondents did not provide Claimant with a timely designated provider list upon learning of Claimant's October 31, 2019 injury.[5] The right of selection passed to Claimant and Claimant selected through her conduct Associates in Family Medicine as her authorized treating physician. Therefore, the Court finds that Associates in Family Medicine is Claimant's authorized treating physician for her October 31, 2019 injury.

21. Claimant's wage records were admitted into evidence. Review of the wage records shows the following earnings:

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[4] *See* CRE 201(c). *See also Pahls v. Thomas*, 718 F.3d 1210, 1217 n. 1 (10th Cir. 2013)(taking judicial notice of a satellite image using Google Maps).

[5] Indeed, there is no credible evidence in the record that Respondents ever provided Claimant with a designated provider list, even after Claimant filed her Workers' Claim for Compensation.

Pay Period End	Gross Wages
1/15/2019	1154.31
1/31/2019	1495.04
2/15/2019	1444.81
2/28/2019	1256.14
3/15/2019	1378.69
3/31/2019	1249.69
4/15/2019	1290
4/30/2019	1551.23
5/15/2019	1335.15
5/31/2019	1610.9
6/15/2019	1241.63
6/30/2019	1549.62
7/15/2019	1486.73
7/31/2019	1280.33
8/15/2019	1135.2
8/31/2019	1285.16
9/15/2019	1067.48
9/30/2019	1080.38
10/15/2019	1154.55
10/31/2019	1512.53
11/15/2019	1210.99
11/30/2019	174.15
12/15/2019	0
12/31/2019	0

22. After her injury, but prior to her surgery, Claimant continued to work.[6] However, as documented in Dr. Unger's November 21, 2019 report, following her November 11, 2019 hand surgery, Claimant "has not been able to return to work due to her work demands."

23. This, in combination with Claimant's limited wage records, is consistent with Claimant beginning to have total lost wages beginning on November 11, 2019, and continuing at least through December 31, 2019, resulting from her October 31, 2019 work injury and disability. The Court therefore finds that Claimant was temporarily and totally disabled beginning November 11, 2019.

24. Claimant has therefore proved by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning November 11, 2019, and ongoing, subject to termination pursuant to § 8-42-105, C.R.S.

[6] Claimant testified, "And I have evaluation not to work like that, like, a note not to work until I see my orthopedist. I gave that to [Redacted, hereinafter JR], and he said I have to come to work. So I feel I -- I feel like threatened I might lose the job if I say no. So I keep working."

Average Weekly Wage

25. Claimant did not present any evidence of her average weekly wage for hearing. However, Respondents did provide wage records and W2s.

26. Claimant's W2s showed earnings of $28,993.40 earned in 2019, and $29,011.66 earned in 2020.

27. Based on this limited information from the parties, the Court finds the fairest method of determining Claimant's average weekly wage for each of the three injuries at issue in this matter is to divide Claimant's total earnings each year by fifty-two weeks.

28. Claimant's average weekly wage for claims W.C. Nos. 5-155-262 (date of injury of September 20, 2019) and 5-155-269 (date of injury of October 31, 2019) is $557.57. Claimant's average weekly wage for claim W.C. No. 5-155-271 (date of injury of June 3, 2020) is $557.92.

Late Reporting

29. For all three claims at issue in this matter, Claimant has alleged that Respondents failed to make a timely report of each of Claimant's injuries pursuant to § 8-43-101(1)(a), C.R.S. (2019 and 2020).

30. That section of the Act, as was in effect at the time of each of Claimant's injuries in this matter, required that an employer file a written report to the Division of Workers' Compensation, "[w]ithin ten days after notice or knowledge that an employee" sustained an injury "that result in fatality to, or permanent physical impairment of, or lost time from work for the injured employee in excess of three shifts or calendar days and the contraction by an employee of an occupational disease that has been listed by the director by rule."

31. On September 30, 2019, Respondent-Insurer sent Claimant a letter acknowledging receipt of Claimant's claim involving her September 20, 2019 injury. Respondent-Insurer sent similar letters on June 9, 2020, regarding the June 3, 2020 injury and on March 30, 2021, concerning the October 31, 2019 injury.

32. Claimant has not presented any credible evidence that Respondents had notice more than ten days prior to filing either of the FROIs that either of the claims with dates of injury of September 20, 2019, or June 3, 2020, involved an injury or occupational disease involving a permanent physical impairment or lost time from work in excess of three shifts or calendar days, or that either of the claims involved occupational diseases identified by Rule 5-2(B)(2), W.C.R.P. (2019 and 2020).

33. Therefore, Claimant has failed to prove by a preponderance of the evidence that Respondents violated § 8-43-101(1)(a), C.R.S. (2019 and 2020) with respect to the September 20, 2019 (W.C. No. 5-155-262), and June 3, 2020 (W.C. No. 5-155-271).

34. With respect to the October 31, 2019 injury, however, Claimant filed a WCC on December 4, 2020, more than a year after the date of injury, and alleging a last date worked of November 10, 2019. Respondents filed the FROI and a NOC 122 days later on April 5, 2021.

35. The Court finds that Respondents first learned that Claimant claimed an October 31, 2019 lost-time work injury on the date Claimant filed her WCC, December 4, 2020. Respondents were, therefore, required to file a FROI by no later than December 14, 2020, pursuant to § 8-43-101(1)(a), C.R.S. (2019). The FROI being filed on April 5, 2021, was 112 days late.

36. Claimant has not presented any credible evidence of harm resulting from Respondents' late filing of the FROI to the Division for her October 31, 2019 injury. Indeed, it is not apparent to the Court what harm, if any, she suffered as a result. Claimant herself delayed more than a year before filing her WCC, leading the Court to infer that Claimant herself experienced no sense of urgency in claiming benefits. Additionally, Respondents' late filing of the FROI with the Division did not in any way impede Claimant's ability to file an Application for Hearing or otherwise pursue benefits for her October 31, 2019 injury. Therefore, the harm, if any, is minimal.

37. The reprehensibility of the failure to timely file the FROI was insignificant. There is no credible evidence in the record that Respondents' delay in filing the FROI was intentional. The Court finds that it is more likely than not the result of neglect.

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

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

Compensability

An injury must “arise out of and occur in the course of” employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury “arises out of” the employment when it is sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the service provided to the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury is said to have arisen in the course of employment if the injury occurred while the employee was acting within the time, place, and circumstances of the employment. *Popovich*, 811 P.2d at 383.

Respondents argue that Claimant’s injury, even as alleged, did not arise out of and in the course of Claimant’s employment. Specifically, they argue that, where, as is the case here, a claimant is injured during off-premises lunchtime travel, the injury does not arise out of and in the course of employment.

Indeed, injuries sustained during off-premises lunchtime travel usually fall within the “going to and coming from rule,” and therefore, are not compensable. *Perry v. Crawford & Co.*, 677 P.2d 416 (Colo.App.1983). As in the “going to and coming from”

cases, exceptions exist where "special circumstances" demonstrate a "nexus" between the lunchtime travel and the circumstances of the employment. Such special circumstances have been found where the travel was at the behest of the employer, where the employer receives some special benefit from the travel, or where the employer provided the means of travel. *City and County of Denver School District No. 1 v. Indus. Comm'n*, 581 P.2d 1162 (Colo. 1978); *Berry's Coffee Shop, Inc. v. Palomba*, 423 P.2d 2 (Colo. 1967); *National Health Laboratories v. Indus. Claim Appeals Office*, 844 P.2d 1259 (Colo.App.1992).

Claimant, in turn, argues that her alleged injury did arise out of and in the course of her employment. Specifically, she argues that because she was permitted by her employer to obtain medical treatment while on the clock, then the injury while stopping for a meal on her return back to work occurred within the scope of her employment. In other words, Claimant argues that her injury arose in the quasi course and scope of her employment.

The quasi-course-of-employment doctrine applies to activities undertaken by the employee after a compensable injury. *Employers Fire Ins. Co. v. Lumbermens Mutual Casualty Co.*, 964 P.2d 591 (Colo.App.1998); *Excel Corp. v. Indus. Claim Appeals Office*, 860 P.2d 1393 (Colo.App.1993); *Salazar v. Industrial Claim Appeals Office of State of Colorado*, 508 P.3d 805 (Colo.App.2022). Although such injuries take place outside the time and space limits of the employment and ordinarily would not be considered employment activities, they nevertheless are related to the employment in that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury. *Turner v. Industrial Claim Appeals Office*, 111 P.3d 534 (Colo.App.2004); *Kelly v. Indus. Claim Appeals Office*, 214 P.3d 516 (Colo.App.2009).

"Because an employer is required to provide medical treatment and an injured employee is required to submit to it, a trip to the doctor's office becomes an implied part of the employment contract. Consequently, when an injured employee suffers additional injuries in the course of a journey to a doctor's office occasioned by a compensable injury, the additional injuries generally are held compensable." *Turner*, 111 P.3d at 536. However, "[a]warding compensation for a motor vehicle accident becomes more complicated when there is a deviation from the route of travel for medical treatment. *Kelly*, 214 P.3d at 518. In cases such as this one, the principles of deviation analysis involving a personal errand during a business trip "can be used to resolve the question of whether there is a deviation from the route of travel for quasi-course of employment medical treatment." *Id*. Therefore, the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *Id*.

As found above, Claimant credibly testified that her physical therapy appointment was at the Snow Mesa location, just 1.4 miles from the BM[Redacted] facility in Fort Collins. Claimant also credibly testified that BT[Redacted] was across the street. The Court takes judicial notice that the deviation required merely turning into a strip mall to pick up the food before continuing on route back to the workplace. Therefore, the Court

finds that the geographic deviation in Claimant's route was insubstantial. Claimant also credibly testified that she planned to grab the dinner as takeout rather than dining in, a factor which weighs in favor of the deviation being minor. Claimant was in the quasi course of her employment at the time of the October 31, 2019 injury, and, although she had deviated from the quasi course of employment while stopping for dinner at BT[Redacted], the deviation was not substantial.

Therefore, the Court finds and concludes that Claimant's October 31, 2019 injury arose out of and in the course of her employment with Respondent-Employer.

Medical Benefits

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

As found above, the Court concludes that the treatment Claimant received from Associates in Family Medicine on November 1, 2019, was reasonably necessary to cure and relieve Claimant of the effects of her October 31, 2019 injury.

Authorized Provider

Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, a claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Indus. Claim Appeals Off.*, 931 P.2d 570 (Colo.App.1996).

"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).

A copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven business days following the date the employer has notice of the injury. Rule 8-2(A)(1), W.C.R.P. If the employer fails to supply the required designated provider list in accordance with the WCRP, the injured worker may select an authorized treating physician or chiropractor of their choosing. Rule 8-2(E), W.C.R.P.

In situations where the claimant has signified by words or conduct that they have chosen a physician to treat the industrial injury, they have made a physician "selection." *Love v. HD Supplies Facilities Maintenance*, W.C. No. 5-217-323-001 (December 18, 2023).

As found, the Court concludes that Claimant has proved by a preponderance of the evidence that Respondents did not provide Claimant with a timely designated provider list upon learning of Claimant's October 31, 2019 injury, that the right of selection passed to Claimant, and that Claimant selected through her conduct Associates in Family Medicine as her authorized treating physician. Therefore, the Court finds and concludes that Associates in Family Medicine is Claimant's authorized treating physician for her October 31, 2019 injury.

Temporary Disability Benefits

Temporary total disability benefits pursuant to § 8-42-105, C.R.S., are designed to compensate an injured worker for wage loss while the employee is recovering from work-related injury. *Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson*, 938 P.2d 504 (Colo. 1997). A claimant bears the burden of establishing three conditions before qualifying for temporary total disability benefits: (1) that the industrial injury caused the disability; (2) that Claimant left work because of the injury; and (3) that the disability is total and last more than three working days. *City of Colorado Springs v. Indus. Claim Appeals Office*, 954 P.2d 637 (Colo.App.1997).

As found above, Claimant began to have a total loss of wages following her November 11, 2019 surgery, and lasting at least through December 31, 2019. She was therefore temporarily and totally disabled beginning November 11, 2019, and is entitled to temporary total disability benefits beginning November 11, 2019, and continuing until subject to termination pursuant to § 8-42-105, C.R.S.

Responsible for Termination

Respondents argue that TTD should be terminated effective March 31, 2021, on the theory that Claimant is responsible for her own termination of employment, and that temporary disability benefits should be terminated by virtue of § 8-42-105(4), C.R.S. That statute provides that "in cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the ***resulting*** wage loss shall not be attributable to the on-the-job injury." Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S. (emphasis added).

In order for a claimant to be responsible for termination, the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *Colorado Springs Disposal v. Indus. Claim Appeals Off.*, 58 P.3d 1061 (Colo.App.2002); *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo.App.1995). That determination must be based upon an examination of the totality of circumstances. *Id*.

Claimant was terminated on March 31, 2021, for violation of the Visitor Confidential Information and Internet Policy Terms, which Claimant signed on September 15, 2020, as well as for gossiping and insubordination. As found above, the testimonies of

GM[Redacted] and OB[Redacted] were more credible than Claimant's testimony. The Court finds and concludes that Claimant was responsible for her own termination on March 31, 2021. Any resulting wage loss shall not be attributable to Claimant's October 31, 2019 injury.

Average Weekly Wage

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 Corporation*, 867 P.2d 77, 82 (Colo. App. 1993); *Loofbourrow v. Indus. Claims Office of State*, 321 P.3d 548, 555 (Colo. App. 2011) *aff'd sub nom Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327; *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (May 7, 1997). In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury.

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

As found above, the fairest method of determining Claimant's average weekly wage for each of the three injuries at issue in this matter is to divide Claimant's total earnings each year by fifty-two weeks. The Court therefore finds and concludes that Claimant's average weekly wage for claims W.C. Nos. 5-155-262 (date of injury of September 20, 2019) and 5-155-269 (date of injury of October 31, 2019) is $557.57, and Claimant's average weekly wage for claim W.C. No. 5-155-271 (date of injury of June 3, 2020) is $557.92.

The weekly temporary total disability rate for Claimant's October 31, 2019 injury is $371.71.

Penalties

Section 8-43-304(1), C.R.S., provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S., is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo.App.2005).

Whether statutory penalties may be imposed under § 8-43-304(1), C.R.S., involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable.

The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo.App.1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo.App.2005). *See Pant Connection Plus v. Indus. Claim Appeals Off*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Claimant has alleged that Respondents failed to make a timely report of each of Claimant's injuries in this matter pursuant to § 8-43-101(1)(a), C.R.S. (2019 and 2020). That section of the Act, as was in effect at the time of each of Claimant's injuries in this matter, required that an employer file a written report to the Division of Workers' Compensation, "[w]ithin ten days after notice or knowledge that an employee" sustained an injury "that result in fatality to, or permanent physical impairment of, or lost time from work for the injured employee in excess of three shifts or calendar days and the contraction by an employee of an occupational disease that has been listed by the director by rule."

As found, Claimant has not presented any credible evidence that Respondents had notice more than ten days prior to filing any FROIs that either of the claims with dates of injury of September 20, 2019, or June 3, 2020, involved an injury or occupational disease involving a permanent physical impairment or lost time from work in excess of three shifts or calendar days, or that either of the claims involved occupational diseases identified by Rule 5-2(B)(2), W.C.R.P. (2019 and 2020).

Therefore, Claimant has failed to prove by a preponderance of the evidence that Respondents violated § 8-43-101(1)(a), C.R.S. (2019 and 2020) with respect to the September 20, 2019 (W.C. No. 5-155-262), and June 3, 2020 (W.C. No. 5-155-271).

With respect to the October 31, 2019 injury, Respondents first learned that Claimant claimed a lost-time work injury on the date Claimant filed her WCC, December 4, 2020. Respondents were, therefore, required to file a FROI by no later than December 14, 2020, pursuant to § 8-43-101(1)(a), C.R.S. (2019). The FROI being filed on April 5, 2021, was 112 days late. As found, the delay was unreasonable. Respondents are liable for penalties for violation of § 8-43-101(1)(a), C.R.S. (2019), for late reporting to the Division of the work injury.

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* W.C. No. 4-619-954 (May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly

disproportionate to the conduct in question. *Associated Business Products v. Indus. Claim Appeals Off.*, 126 P.3d 323 (Colo.App.2005); *Espinoza v. Baker Concrete Construction*, W.C. No. 5-066-313 (Jan. 31, 2020). When determining the penalty the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc*., W.C. No. 4-981-806 (July 1, 2019).

As found above, Claimant has not presented any credible evidence of harm resulting from Respondents' late filing of the FROI to the Division for her October 31, 2019 injury. Indeed, it is not apparent to the Court what harm, if any, she suffered as a result. Claimant herself delayed more than a year before filing her WCC, leading the Court to infer that Claimant herself experienced no sense of urgency in claiming benefits. Additionally, Respondents' late filing of the FROI with the Division did not in any way impede Claimant's ability to file an Application for Hearing or otherwise pursue benefits for her October 31, 2019 injury. Therefore, the harm, if any, is minimal.

Also, as found above, the reprehensibility of the failure to timely file the FROI was insignificant. There is no credible evidence in the record that Respondents' delay in filing the FROI was intentional, and it was, more likely than not, the result of neglect.

Given the lack of harm or reprehensibility, the Court concludes that the appropriate penalty is $0.50 per day for 112 days, totaling $56.00. Because of the lack of harm to Claimant, the penalty payments are to be apportioned as follows: 25% to Claimant, totaling $14.00; and 75% to the Colorado Uninsured Employer Fund, totaling $42.00.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury on October 31, 2019.

2. Claimant's treatment with Associates in Family Medicine on November 1, 2019, was reasonably necessary to cure and relieve Claimant of the effects of her October 31, 2019 injury.

3. Associates in Family Medicine is the authorized treating physician for the October 31, 2019 injury.

4. Claimant has proved that she is entitled to temporary total disability benefits at a rate of $371.71 per week beginning November 11, 2019, and continuing until termination pursuant to § 8-42-105, C.R.S., for her October 31, 2019 injury.

5. Claimant's average weekly wage for claims W.C. Nos. 5-155-262 (date of injury of September 20, 2019) and 5-155-269 (date of injury of October 31, 2019) is $557.57.

6. Claimant's average weekly wage for claim W.C. No. 5-155-271 (date of injury of June 3, 2020) is $557.92.

7. Claimant has failed to prove that penalties should be imposed on the claims with dates of injury of September 20, 2019 (W.C. No. 5-155-262), and June 3, 2020 (W.C. No. 5-155-271).

8. Respondents shall pay penalties in in the claim W.C. No. 5-155-269 (date of injury of October 31, 2019) in the amount of $0.50 per day for 112 days, totaling $56.00, to be apportioned as follows: 25% to Claimant, totaling $14.00; and 75% to the Colorado Uninsured Employer Fund, totaling $42.00.

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

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

DATED: August 8, 2024.

/s/ Stephen J. Abbott

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-255-183

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable work injury in the course and scope of his employment on or about October 11, 2023.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to reasonably necessary and related medical benefits, including the right shoulder surgery recommended by Dr. Stull.

III. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability ("TTD") benefits from October 17, 2023 through May 12, 2024?

IV. Whether Respondents proved by a preponderance of the evidence Claimant willfully misled Employer concerning his physical ability to perform the job, thus entitling Respondents to a penalty under § 8-42-112(1)(d), C.R.S.

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

FINDINGS OF FACT

1. Claimant is a 59 year old, is right-hand dominant male. Claimant alleges he sustained a work injury to his right shoulder while working for Employer on or about October 11, 2023.

Prior Work Injury

2. Claimant sustained a compensable work injury to his right shoulder on July 31, 2018 while employed by a different employer.

3. Steven Horan, MD evaluated Claimant on August 17, 2018. Claimant complained of right shoulder pain that started a few days ago at work with no memory of any specific injury. Dr. Horan noted an August 9, 2018 MRI showed a partial-thickness tear, damage to the biceps tendon and a substantial labral tear. Dr. Horan gave the following assessment: biceps tendon tear, incomplete tear of right rotator cuff, tear of right glenoid labrum and large labral tear with partial thickness rotator cuff tear, bicipital tendon injury. He noted there were questions as to whether this was a work-related injury. Claimant was to submit a workers' compensation claim and follow up as needed.

4. Claimant began treating with Theodore Villavicencio, MD at Concentra on August 27, 2018. Dr. Villavicencio assessed Claimant with a labral tear of the right shoulder and referred Claimant for physical therapy.

5. On September 19, 2018, Dr. Villavicencio released Claimant from care at maximum medical improvement (MMI) with no work restrictions. He noted Dr. Horan was recommending a labral repair, but causality had not been established.

6. Claimant subsequently underwent an independent medical examination (IME) that determined the July 31, 2018 injury was work-related. The insurer in that claim admitted liability and Claimant resumed medical treatment.

7. On November 26, 2018, Claimant underwent right shoulder surgery performed by Dr. Horan. Dr. Horan noted in his operative report he performed the following procedures: arthroscopic extensive debridement of the superior, anterior and posterior superior labrum anterior type IV lesion; arthroscopic subacromial decompression; biceps tenolysis; and debridement of rotator cuff.

8. Claimant continued to see Drs. Horan and Villavicencio post-operatively and treated with physical therapy and injections.

9. At a January 18, 2019 evaluation with Dr. Horan, Claimant reported pain and limited range of motion. Dr. Horan noted, "We discussed options and he says that overall the pain hurts and I would agree with this, just simply because of the degeneration that we saw when we went in there." Ex. V, p. 104. Dr. Horan performed a corticosteroid injection.

10. Claimant reported some pain but improvement and "wonderful" range of motion to Dr. Horan on March 1, 2019. Dr. Horan's assessment included primary osteoarthritis of the right shoulder. Dr. Horan performed a second injection, but noted that another injection could not be given for at least another eight months.

11. Claimant continued to report 4/10 pain to Dr. Villavicencio. On April 26, 2019, Dr. Villavicencio noted Claimant reported having "a lot of soreness and popping on shoulder, some tenderness on the top." Ex. Y, p. 123. On May 17, 2019, Dr. Villavicencio ordered additional physical therapy sessions.

12. At a July 10, 2019 follow-up evaluation with Dr. Villavicencio, Claimant again reported 4/10 pain and limited function. Dr. Villavicencio referred Claimant for a right shoulder MRI.

13. Claimant underwent a repeat right shoulder MRI on July 24, 2019 without comparison. The radiologist's impressions were as follows:

1. Full-thickness versus deep partial-thickness articular surface tear of the anterior supraspinatus tendon at the footplate measuring 15 x 11 mm in diameter with mild to moderate muscle atrophy.

2. Ruptured and retracted biceps tendon.

3. Deep partial-thickness articular surface tear of the superior subscapularis tendon at the lesser tuberosity measuring 19 x 17 mm in diameter with moderate atrophy of the upper third of the muscle.

4. Nondisplaced degenerative tear of the posterior glenoid labrum.

5. Moderate size joint effusion with synovitis.

Ex. Z, p 138.

14. On September 6, 2019, Claimant saw Nathan Faulkner MD at Colorado Orthopedic Consultants on the referral of Dr. Villavicencio. Claimant reported that, at some point in physical therapy, he heard a pop while doing overhead exercises and had recurrent pain since that time along with intermittent popping. Claimant rated his pain 6/10, reporting that the pain was worse at the end of the day, when lying on his side, when reaching above shoulder height, and when his arm was jerked. Claimant described the pain as constant and associated with weakness in his shoulder.

15. Dr. Faulkner noted x-rays obtained during this evaluation showed moderate AC DJD with well-maintained glenohumeral joint space. He reviewed the July 24, 2019 MRI and noted it showed "a near full thickness bursal-sided supraspinatus tear (B4). There is a split tear of the subcap with a previous biceps tenotomy. There is degenerative tearing of the posterior labrum with advanced AC DJD." Ex. AA, pp. 141-142.

16. Dr. Faulkner recommended Claimant undergo an additional surgery. He wrote,

> He underwent arthroscopic biceps tenotomy, subacromial decompression and debridement of partial thickness rotator cuff, and labral tearing on 11/26/2018, but has had persistent pain that has been refractory to physical therapy and subacromial steroid injections. MRI shows a high-grade partial thickness bursal-sided rotator cuff tear as well as AC DJD that are most likely the cause of his persistent pain and weakness. Given that, he has a labrum and this is in his dominant arm, as well as his failure of conservative treatment, I would recommend proceeding with right shoulder exam or anesthesia, arthroscopy, revision subacromial decompression, Mumford, rotator cuff repair, and possible labral repair. He presents today as a second opinion but he did express his preference to proceed with the surgery with me.

Ex AA, p. 142.

17. Dr. Faulkner opined that Claimant could not physically continue to perform his job duties without limitation, stating, "[h]e has significant pain and is limited with reaching out or up. He is also limited with how much he can lift." Id. Dr. Faulkner opined that MMI could not be determined at that time as Claimant needed additional surgical treatment.

18. At a follow-up evaluation with Dr. Villavicencio on September 11, 2019, Claimant reported 5/10 pain. Dr. Villavicencio noted,

> He improved some after surgery – then progress leveled off, followed by worsening pain
>
> Functional status remains limited by weakness/pain
>
> He had post-op MRI then Ortho Second opinoin [sic] with Dr Faulkner, planning on revision procedure- awaits approval

Ex. BB, p. 144.

19. Dr. Villavicencio imposed the following work restrictions: lifting up to 2 pounds occasionally, pushing/pulling up to four pounds occasionally, and no reaching above shoulders with the affected extremity.

20. Dr. Villavicencio maintained Claimant's work restrictions at an October 11, 2019 follow-up and noted another IME was scheduled to take place. No changes were noted at Claimant's November 14, 2019 follow-up with Dr. Villavicencio.

21. On November 22, 2019, Claimant underwent a respondents' IME with Timothy S. O'Brien. Claimant reported 4/10 pain at the tendons of the top of the right shoulder and difficulty getting full range of motion. Dr. O'Brien noted,

> He has had to give up a lot of activities such as scuba diving (he's an instructor), riding his Harley Davidson (he lives in Morrison, to take advantage of the mountains which are nearby) and he likes to ski and dance, and he can't do that. He learned the jitterbug as a kid (it's now called the swing), but he can't twirl because it's hard to position his arm above to the level and to the level of the shoulder.
>
> . . .
>
> He did try to go scuba diving and he got in the water and they put the gear on him, but it was very difficult.

Ex. CC, p. 160.

22. Dr. O'Brien concluded that the case "never should have been accepted as compensable. The surgery that had been performed never should have been performed because it was not addressing an acute injury that occurred in the workers compensation setting, but rather, it was addressing chronic and longstanding shoulder issues that were personal health issues." Exhibit CC, p.167.

23. Dr. O'Brien opined that no further treatment was necessary, noting that Dr. Faulkner's September 2019 request for surgery was not reasonable, necessary or related to the July 31, 2018 work incident and would fail if performed. He explained,

> The July 24, 2019 MRI scan demonstrates normal post-surgical changes. Pathology on an MRI scan is normal for age and it's normal given the fact that there was a November 2018 surgical intervention performed. Those MRI scan changes should not be utilized as a foundation upon which to base another recommendation surgery.

Ex. CC, p. 169.

24. Claimant returned to Dr. Villavicencio for a follow-up evaluation on January 20, 2020 reporting 3/10 pain with some popping sensation at physical therapy. Dr. Villavicencio reviewed Dr. O'Brien's IME report, noting Dr. O'Brien's opinion that Claimant never sustained a work-related injury and was at MMI with no further treatment indicated. Dr. Villavicencio discussed his own opinion regarding Claimant's need for the recommended surgery, stating,

> Initial claim was accepted and had surgery – needs revision – therefor I believe is related to claim regardless of Causality, I believe surgery is medically indicated and there are no other recommended tx options given his failure of post-op PT, MRI findings, persisting symptoms – if repeat surgery is not approved, he iwill (*sic*) be at MMI…

Ex. DD, p. 173.

25. At his February 7, 2020 follow-up with Dr. Villavicencio, Claimant reported 4/10 pain. He was still waiting to hear if surgery would be authorized. Restrictions remained in place.

26. Claimant last presented to Dr. Villavicencio on February 19, 2020. Claimant reported 3/10 pain in the anterior/lateral area with minimal pain in the biceps area and no distal pain/paresthesia. On examination of the right shoulder, Dr. Villavicencio noted tenderness in the bicipital grove, in the anterior shoulder and in the superior shoulder. Palpation revealed no crepitus and no warmth with pain. Active range of motion forward flexion was 110 degrees with pain, extension was 30 degrees with pain, abduction 110 degrees with pain, adduction 60 degrees, internal rotation 50 degrees with pain, and external rotation 40 degrees with pain. Flexion and abduction were 4/5 on the right with normal motor tone. Special tests were deferred. Dr. Villavicencio's final assessment was (1) S/P shoulder surgery, (2) superior glenoid labrum lesion of right shoulder, (3) traumatic complete tear of right rotator cuff, initial encounter.

27. Dr. Villavicencio noted the recommended surgery had not been approved and, therefore, placed Claimant at MMI. He wrote, "I did discuss case with Dr. Faulkner- No further recommendations other than the Surgery (could get through private insurance)." Ex. EE, p.179. Dr. Villavicencio assigned Claimant a 12% upper extremity impairment rating for range of motion deficits and the following permanent restrictions: "Lifting restrictions- all Occasional (lt; 3 hrs per day) 50 lbs floor to waist, 25 lbs waist to chest

and 10 lbs overhead (can amend PR in next year- May procedure [sic] through private insurance).” Ex. EE, p. 181. He did not recommend any maintenance care.

28. The respondents in the 2018 claim filed a Final Admission of Liability (FAL) on March 4, 2020 admitting for MMI as of February 19, 2020 and a 12% schedule upper extremity rating. Dr. Villavicencio’s February 19, 2020 narrative report and worksheets were attached to the FAL. The 12% scheduled upper extremity rating as admitted was worth $7,737.60. The FAL reflected $9,749 in wage loss benefits and $25,579.80 in medical benefits had paid on the claim at that time.

29. SN[Redacted] mailed the FAL to Claimant on March 4, 2020. Claimant testified at hearing the address listed for him in the March 4, 2020 FAL was and is his correct address, and he would have presumably read any documents sent to that address between 2018 to present. Claimant testified he does not recall reading documents regarding permanent work restrictions.

30. On March 17, 2020, Claimant entered into a Settlement Agreement for the July 31, 2018 work injury to his right shoulder and right bicep. Claimant accepted $9,900 in full and final settlement of the claim. ALJ Laura Broniak approved the Settlement Agreement on March 23, 2020.

31. Claimant testified he received and invested the settlement proceeds. He testified he did not undergo any surgery or set the funds aside for future medical treatment related to the July 31, 2018 workers’ compensation claim.

32. Claimant testified his understanding was that Dr. Faulkner recommended the additional surgery assist with range of motion. Claimant testified he did not undergo the revision surgery because he did not feel it was going to be beneficial to him just to increase his range of motion and he did not want to go back through surgery and physical therapy, which was very painful. Claimant testified he entered into the settlement because he did not want to undergo a second surgery and physical therapy, and he was doing “quite well” so he did not feel the need to do so.

33. Claimant testified that, between 2019 and 2023, he was doing well and did not have any right shoulder problems. Claimant testified that, despite having health insurance and a primary care physician, he did not seek medical treatment for his right shoulder between 2019 and 2023. Claimant testified that he would have underwent shoulder surgery under his private health insurance if he felt he needed to do so during that period.

34. Claimant testified that his hobbies include riding motorcycles, scuba diving, underwater photography and videography, and playing golf. He testified he had no issues participating in such activities between 2019 and 2023. He testified he had no issues secondary to his right shoulder with moving or manipulating the equipment for scuba diving or swimming between 2019 and 2023.

35. Claimant testified that he continued to work for the employer in the 2018 claim for some time, and then held one or more other jobs prior to obtaining employment with

Employer in 2023. He testified that one of the jobs required loading boxed car parts and another job involved moving motorcycles in a dealership. Claimant testified he had no issues performing any of these job duties. Claimant testified he was not aware of any ongoing work restrictions from the 2018 work injury.

October 11, 2023 Work Injury

36. Claimant applied for route salesman position with Employer in March 2023. The position involves fulfilling and delivering orders. The job duties require loading product into the back of a truck, including five-gallon jugs of cleaner or tire shine dressing and batteries weighing approximately 35 pounds.

37. As part of the interview and hiring process, Claimant completed an employment questionnaire in which he responded "Yes" to the question, "Can you lift & carry 50 to 80 pounds?" Ex. B.

38. Claimant testified he attested he could lift and carry such weight because he was doing well, never had a problem lifting, and did not feel such weight was out of his range.

39. [Redacted, hereinafter SR] testified at hearing for Respondents. SR[Redacted] is the office manager and co-owner of Employer along with her husband, [Redacted, hereinafter KR]. SR[Redacted] testified that she reviews resumes and sets up interviews with all applicants. SR[Redacted] testified that lifting 50 to 80 pounds is an essential job duty for a route salesman, which is why the written questions are asked and retained in the employment file.

40. SR[Redacted] further testified that she was present for part of Claimant's interview and that during that time there was no discussion of any lifting restrictions. Based on the employment questionnaire, it was her understanding Claimant was able to lift and carry 50 to 80 pounds.

41. Claimant interviewed with KR[Redacted] for the position. Claimant testified that during the interview he informed KR[Redacted] of his prior right shoulder surgery:

> During the interview actually, KR[Redacted] and I walked out to the shop, and at that time I was asking about the batteries, and I said "Are we going to have to lift those overhead," and he said no, and I said, "Oh," and we started talking a little bit more, and he said - - I told him I had rotator cuff surgery. And he goes, "Oh, I did as well," and we talked a little bit about that, and he says, "No, it's not a problem. You will not be lifting those overhead."

Hr. Tr. p. 24:9-17.

42. KR[Redacted] testified for Respondents at hearing as co-owner of Employer. KR[Redacted] testified that he has owned the business for 33 years, with two locations. KR[Redacted] testified that during the interview with Claimant, Claimant mentioned

having undergone a prior shoulder surgery. KR[Redacted] testified, however, that Claimant did not mention any issues with lifting nor did he indicate having any permanent work restrictions. KR[Redacted] testified that, prior to the October 2023 injury, Claimant was performing his job duties for Employer with no issues and was able to lift the liquid jugs and batteries with no problems. KR[Redacted] further testified that, prior to the October 2023 injury, Claimant did not complain of any right shoulder issues, request any accommodations, nor take any time off work for his right shoulder.

43. Claimant began working for Employer as a route salesman in April 2023.

44. On October 11, 2023, Claimant was involved in a collision while driving for work. Claimant was driving his work truck, a F-450 box truck, northbound on I-25 when a tire and rim came off of or underneath a semi-truck in front of Claimant, striking the front of Claimant's work truck.

45. Claimant testified that his work truck slowed quickly, taking the impact of the tire and the rim, and the impact blew out his left tire and bent the rim. Claimant testified he drove over the top of the tire.

46. Claimant testified that, when the collision occurred, both of his arms were on the steering wheel at approximately "10" and "2", referring to the position of the numbers on a clock face. He testified his left hand promptly fell off the steering wheel due to the worn steering wheel cover slipping. He testified that his right arm took the impact of the collision because his left arm fell off the steering wheel. Claimant testified his right arm was jammed on impact, with his shoulder "jammed back". Claimant testified he used his right arm to hold onto the steering wheel while attempting to pull over to the right to the side of the road. He further testified the steering wheel was shaking and moving right to left due to the flat tire and bent rim, jerking his right arm right to left on the steering wheel.

47. Claimant testified that, following the collision, his right arm felt jammed, there was stiffness and pain in his right arm, and it felt like it had been sprained.

48. Claimant reported the incident to KR[Redacted] who came to the site of the incident and replaced the rim and tire on Claimant's work truck. Claimant testified he reported to KR[Redacted] at that time he felt like he jammed his shoulder.

49. KR[Redacted] testified that, upon arriving at the scene, the work truck's tire was flat and the rim was bent and it appeared Claimant had "hit something pretty hard." Hr. Tr. p. 50:21-22. KR[Redacted] testified Claimant told him he thought he tweaked his shoulder and said it hurt.

50. KR[Redacted] changed the tire on Claimant's work truck and Claimant proceeded to finish his work shift on October 11, 2023. Claimant also completed his scheduled shifts on October 12 and October 13, 2023. Claimant was off work as scheduled over the weekend and returned to work on Monday, October 16, 2023. At that time, Claimant notified KR[Redacted] his shoulder was not doing well.

51. SR[Redacted] completed an Injury Report on October 16, 2023 noting an injury date of October 13, 2023. She wrote, “Injury to right shoulder while driving truck. Hit something on the road and it jerked the wheel out of his hand.” Ex. E, p. 19.

52. Claimant completed his scheduled shift on October 16, 2023. He testified he continued working after sustaining the injury because Employer was already down one driver and he did not want to put Employer in a position to be down two drivers.

53. Respondents provided Claimant a designated provider list. Claimant selected American Family Care (AFC) Urgent Care as his authorized treating physician (ATP).

54. Claimant first presented to Alicia Benitez, PA at AFC on October 17, 2023. Claimant completed a registration form at AFC, describing an incident that occurred on October 11, 2023 where a tire,

> [h]it my company truck on the right side tire and blew out the tire and bent the rim leaving my company truck undrivable. The owner came and replaced it. I told him then I hurt my shoulder. I was travelling at 65 miles an hour when I was hit by the rim and tire.

Ex. FF, p 190.

55. PA Benitez diagnosed Claimant with an unspecified injury of right shoulder and upper arm and referred Claimant for a right shoulder MRI. On the Physician’s Report of Worker’s Compensation Injury form, she marked that the objective findings were consistent with a history and/or work-related mechanism of injury/illness. She released Claimant to modified duty from 10/17/2023-10/24/2023 with temporary restrictions of 5-10 pounds lifting, no repetitive lifting, 5-10 pounds carrying, 2 pounds pushing/pulling, no repetitive motions or overhead with right arm, and avoid driving.

56. Claimant returned to AFC on October 24, 2023 with complaints of significant right shoulder pain. On examination of the right shoulder, Kaitlyn McDonald, PA-C noted reduced flexion, normal extension, reduced abduction, normal adduction, reduced internal rotation and reduced external rotation. There was no tenderness of the right shoulder or upper arm with upper extremity sensation intact. Claimant’s work restrictions were as follows: 15 pounds lifting, carrying, pushing/pulling; 10 pounds repetitive lifting; no reaching overhead.

57. On October 27, 2023, Claimant underwent a right shoulder MRI that was compared to his July 24, 2019 MRI. The radiologist’s impressions were:

> 1. Full-thickness tear of the supraspinatus tendon with a greater degree of delamination of the articular and bursal sided fibers, more conspicuous compared to previous imaging.
>
> 2. Tendinosis and intermediate grade articular sided tearing of the subscapularis tendon with grade 2/3 fatty atrophy of the cranial one third of the subscapularis muscle.

3. Severe acromioclavicular joint osteoarthritis with mild subacromial-deltoid bursitis.

4. Evidence of chronic rupture of the intra-articular biceps tendon.

Ex. GG, p. 199.

58. On November 2, 2024, PA Parsons included a chart addendum in the October 24, 2024 record stating,

> Reviewed MRI results with patient. I recommend orthopedic surgeon evaluation. Patient is telling me adjuster recommends level II provider but my medical opinion is that he be seen by a surgeon prior to this for concern of tear in shoulder that has not been properly evaluated by a specialist.

Ex. 5, p. 23.

59. Respondents filed a Notice of Contest on November 6, 2023 contesting the claim for further investigation/IME.

60. On November 21, 2023, Claimant reported minor improvements but continued mild right shoulder pain to PA Parsons. PA Parsons restricted Claimant to five pounds lifting, repetitive lifting, carrying, pushing/pulling. She referred Claimant for an orthopedic consultation.

61. On January 3, 2024, Mark S. Failinger, MD performed an IME at the request of Respondents. Claimant reported doing fairly well after his 2018 surgery. He complained of current 5-7/10 right shoulder pain with functional limitations.

62. On examination, Dr. Failinger noted mild diffuse atrophy of the deltoid, tenderness to palpation in the right greater tuberosity and the right bicipital groove. Mild infraspinatus fossa tenderness to palpation and minimal AC joint tenderness to palpation. Active forward flexion was 90 degrees on the right and 154 degrees on the left. Active extension was 40 degrees on the right 70 degrees on the left. Abduction was 65 degrees on the right and 155 degrees on the left. Adduction was 15 degrees on right and 35 degrees on the left. Internal rotation with the shoulder abducted 90 degrees. Internal rotation was not able to be performed on the right due to pain behaviors. Passive forward flexion of the right shoulder was 170 degrees with no restrictions and no significant pain. There was pain with Hawkin's, Speed's and O'Brien's tests. Abduction strength in the right shoulder was deferred due to pain behaviors. External rotation strength was 5/5 on the right.

63. Dr. Failinger reviewed medical records from May 23, 2018 to November 21, 2023, including the MRI films from July 24, 2019 and MRI report of October 27, 2023. Dr. Failinger noted that the July 24, 2019 MRI showed a full-thickness rotator cuff

tendon tear, consistent with a progression of the partial-thickness or “reim-rent” rotator cuff tear. He noted that, more specifically, Claimant was noted to have mild-to-moderate supraspinatus muscle atrophy and moderate atrophy of the upper subscapularis muscle. Dr. Failinger opined that these findings are consistent with chronic rotator cuff disease, as opposed to any acute tearing occurring. He explained that progression of pre-existing tearing would reasonably have occurred as well, due to the natural history and progression of rotator cuff disease.

64. Dr. Failinger noted the October 27, 2023 MRI revealed a,

> full-thickness supraspinatus tear that was ‘more conspicuous’ when compared to prior MRI scan of 7-24-2019, and it noted the subscapularis tendinosis with, once again, grade 2 atrophy of the cranial one-third of the subscapularis muscle and fatty atrophy of the teres minor muscle. AC joint severe arthritis was noted, with some AC joint effusion, but there was no glenohumeral joint effusion and only mild subacromial bursitis.

Ex II, p. 223.

65. He reamarked there were no records indicating Claimant followed up for treatment after being placed at MMI for the 2018 work injury nor any shoulder evaluations until the October 2023 work incident.

66. Dr. Failinger opined Claimant did not sustain any work injury as a result of the October 2023 incident. He explained,

> Given the above, with no sudden deceleration of his vehicle due to a direct impact from a frontal collision, and with the striking of his vehicle from the side which subsequently blew his tire, it is not with reasonable medical probability that the patient sustained any acceleration of a pre-existing and known essentially full-thickness or high-grade partial thickness tearing of his right shoulder rotator cuff that was present at case closure, and **which was not treated prior to case closure on 02-19-2020.** That is to say, [Claimant] was known to have ongoing right shoulder mid-range ongoing symptoms, per Dr. Faulkner’s report, and the patient was going to proceed with right shoulder surgery, but the right shoulder surgery was not authorized per the insurance carrier in 2019. Therefore the patient’s case was closed **without having undergone definitive surgical repair of the supraspinatus tear that was present at case closure.**
>
> . . .
>
> Although [Claimant] stated he was doing relatively well without significant symptoms following that closure of his right shoulder Workers’ Compensation injury case in 2020, including when he was working with [Employer], including lifting objects up to 70 or 100 pounds, it is not with reasonable medical probability that he was performing his work duties without symptoms, and that he had an asymptomatic shoulder. Patients

> who have supraspinatus tearing can lift objects up to chest level or below, but it is not probable that he was lifting these objects to chest level or above with any frequency, and without symptoms. In all cases, a full-thickness supraspinatus tendon tear, or a high-grade partial thickness tendon tear, will progress over time.
>
> . . .
>
> It is not with reasonable medical probability that [Claimant] sustained any injury to the biceps tendon in the work-related incident of 10-13-2023. [Claimant] had been recommended to undergo surgery by Dr. Faulkner due to the right shoulder full-thickness rotator cuff tear in 2020. Likewise, the patient was noted to have moderate effusion on 07-24-2019 according to the MRI report. The MRI scan performed on 10-27-2023 showed no joint effusion. With no joint effusion reported on the MRI scan performed after the October 2023 work incident, it is not with reasonable medical probability that any acceleration of the pre-existing rotator cuff tearing occurred. Rather, the progression of the tearing of the rotator cuff tendon reported on the 10-27-2023 MRI scan was most reasonably caused by ongoing degeneration, rather than due to any acceleration, or permanent aggravation, or pre-existing ongoing degenerative rotator cuff tendon tearing.

Ex. II, pp. 222-223.

67. Dr. Failinger opined that, without joint effusion, "it is not with reasonable medical probability any progression of the previous rotator cuff tendon tearing occurred, nor that any new pathology was created in the work incident". Id. at 223. He further opined that Claimant's symptoms were most reasonably due to a minimal sprain rather than any progression of pre-existing pathology. Dr. Failinger concluded that, although Claimant may require surgery, it is related to his pre-existing pathology and not the work incident.

68. Claimant returned to AFC on February 1, 2024. PA McDonald noted Respondents had yet to approve the orthopedic referral. She wrote,

> Pt still with impaired ROM of shoulder and impaired ability to comfortably and safely lift more than 5-10 lbs without pain. Although he did have a prior injury/surgery to the right shoulder, his current symptoms did not start until the work-related accident in October 2023, and his level is functioning drastically different from his baseline prior to the accident in October 2023. His job has no light duty positions available, and therefore he has been off of work, and his WC insurance has not been paying him WC pay.

Ex. 5, p. 29.

69. PA McDonald continued Claimant's weight restrictions and added avoiding repetitive shoulder movements, avoiding driving at this time, and avoiding overhead movements with right shoulder.

70. On February 15, 2024, PA McDonald recommended transfer of care of Claimant to Colorado Rehabilitation and Occupational Medicine (CROM). PA McDonald imposed maximum restrictions of 5 pounds for lifting, repetitive lifting, carrying, pushing/pulling, avoid repetitive shoulder movements, avoid driving, and avoid overhead movements.

71. CROM was unable to take Claimant on as a patient for this injury, citing a conflict of interest due to a prior IME.

72. On the referral of his ATP, Claimant presented to Phillip Stull, MD at Orthopedic Centers of Colorado on February 27, 2024. Claimant reported a history of a prior rotator cuff repair in 2019 with an excellent outcome and ability to return to full activities. He reported having no problems or pain in his right shoulder prior to the work injury. Regarding the mechanism of injury, Dr. Stull wrote, "He was involved in an auto accident and his right arm remained on the steering wheel and that his right arm and shoulder took a lot of force as the wheel was jerking violently. He reported the immediate onset of right shoulder pain and weakness." Ex. 6, p. 39. Claimant reported right shoulder pain particularly in the anterior and lateral aspects as well as night pain and difficulty sleeping on his side. He further reported difficulty reaching overhead, weakness with this activity, and difficulty reaching behind.

73. On examination of the right shoulder, Dr. Stull noted no deltoid or spinatus atrophy. There was painful arc of motion with a positive impingement test and tender AC joint. Range of motion measurements were noted as follows: elevation 170 degrees, abduction 140 degrees, external rotation 70 degrees, internal rotation to L4 extension 50 degrees. There was weakness in abduction, a nearly positive drop arm test, and difficulty with the liftoff maneuver.

74. Dr. Stull noted x-rays obtained at this evaluation showed an arthritic AC joint. The humeral head was not high riding and the glenohumeral joint was well maintained. He further noted, "I reviewed his recent MRI from October 2023 which is consistent with a full-thickness supraspinatus tear, tendinitis of the subscap tendon, AC joint arthritis, and rupturingor absence of the long head of the biceps tendon" Id.

75. Dr. Stull's impression was a right shoulder rotator cuff tear. He remarked, "The incident in question, the work related accident, appears to have caused the rotator cuff tendon tear." Id.

76. Dr. Stull recommended Claimant undergo right shoulder arthroscopic rotator cuff repair and related procedures noting, "It is very unlikely that the patient will do well with conservative measures such as cortisone injection or therapy. Surgical care is clearly indicated." Id.

77. Dr. Failinger issued an addendum to his IME report dated February 28, 2024 after reviewing the October 27, 2023 MRI images. Dr. Failinger opined, with reasonable medical probability, that "it does not appear" that any acceleration of the pre-existing disease that was present on the MRI scan of July 24, 2019 occurred in the motor vehicle incident of October 13, 2023. Dr. Failinger noted that Dr. Faulkner's request for

authorization to repair the full-thickness rotator cuff tear had been denied and that there was "no evidence that the patient underwent subsequent surgical repair…" Ex. KK. Dr. Failinger reiterated his conclusion that the changes visible between the 2019 and 2023 MRIs were "consistent with limited and expected progression of the tearing" with "no evidence of any acute nor subacute injury having occurred to those tendons." Ex. KK, p. 230.

78. On March 4, 2024, Dr. Stull submitted a surgery authorization request for the following procedures to treat a traumatic complete tear of right rotator cuff: Arthroscopy, shoulder, with acromioplasty, debridement, rotator cuff repair, and subacromial decompression; Excision, clavicle, distal, arthroscopic.

79. Respondents denied Dr. Stull's request for authorization to perform surgery on March 5, 2024, based on Dr. Failinger's IME report dated January 3, 2024.

80. Dr. Faulkner issued a letter dated June 5, 2024 discussing his opinion regarding Claimant's current claim. Dr. Faulkner noted he reviewed Claimant's primary care physician records from February 22, 2018 through November 6, 2023; MRI images and reports from both July 24, 2019 and October 27, 2023; his own medical records of September 6, 2019; Dr. Failinger's January 3, 2024 IME report; Dr. Stull's record of February 27, 2024; and AFC records from October 17, 2023 through February 15, 2024.

81. Dr. Faulkner opined that Dr. Stull's recommendation for surgery is reasonable and necessary and, more likely than not, related to the work injury. Comparing the difference between the 2019 and 2023 MRIs, Dr. Faulkner wrote, "The MRI appears to have progressed from a high-grade partial bursal-sided rotator cuff tear to a full-thickness tear. There is also more edema in and surrounding the torn supraspinatus tendon, which makes it more likely to be an acute exacerbation rather than a stable chronic injury." Ex. 6, p. 41.

82. Dr. Faulkner explained how the reported mechanism of injury could result in injury, stating,

> [Claimant] reported that his left arm slipped off the steering wheel at the time the tire hit his delivery truck, but his right hand held onto the steering wheel. The impact of the tire hitting the truck likely caused the steering wheel to suddenly turn, which is why Randy's left hand slipped off. His right arm/shoulder would have experienced a sudden eccentric contraction from having to hold the steering wheel with one hand. This mechanism is consistent with exacerbating a previously high-grade partial rotator cuff tear and could explain the progression seen on the MRI and his recurrent shoulder symptoms.

Ex. 6, p. 42.

83. Dr. Faulkner opined that it is more likely than not Claimant suffered an acute exacerbation of a cuff tear in the collision. He explained,

> Given [Claimant] was apparently asymptomatic for several years preceding this most recent work accident, which is supported by the fact that he did not seek care or treatment from any medical providers for his shoulder between 2020 and 2023, it is more likely than not that the work accident on 10/11/23 caused an acute exacerbation of his high-grade partial rotator cuff tear. This opinion is also supported by the fact [Claimant] was working a physical job for [Employer] that required him to lift 5-gallon jugs and batteries up to 100 lbs. prior to this work injury. Both of these facts make it less likely that the acute recurrence of his shoulder symptoms were just a natural progression of his pre-existing rotator cuff injury.

Id.

84. Claimant testified his right shoulder feels "much different" than it did in 2019 when the revision surgery was recommended. He testified he currently experiences constant pain over the top of his right shoulder and is limited in reaching overhead and towards his back if he lifts his arm to the side or backwards. He testified he has current restrictions of lifting up to five pounds and no overhead reaching.

85. Claimant further testified he did not return to work for Employer after October 16, 2023 because Employer could not accommodate his work restrictions. Claimant did not earn any income from October 17, 2023 to May 12, 2024 due to the work injury. Claimant further testified he began working for another employer on May 13, 2024 in a sedentary job.

86. Dr. Failinger testified at hearing on behalf of Respondents as a Level II accredited expert in orthopedic surgery, occupational medicine and causation. Dr. Failinger testified consistent with his IME reports. Dr. Failinger testified that the mechanism of injury described by Claimant at hearing and in the records would not have caused an acute aggravation or exacerbation of his pre-existing right shoulder condition. He noted that, while he may have experienced some pain, "he didn't tear anything further that day." Hrg. Tr. 64:14-17.

87. Dr. Failinger testified that he disagreed with Dr. Faulkner's June 5, 2024, letter insofar as he described a mechanism to explain some possible tearing that involved Claimant's arm being thrown upwards. Dr. Failinger testified that, based on Claimant's report and testimony, his arm would have been pulling the wheel down, which would not fire the tendon at issue.

88. Dr. Failinger further testified regarding his disagreement with Dr. Faulkner's opinions regarding the difference between the 2019 and 2023 MRIs, which he discussed in his IME reports. Dr. Failinger testified he agreed that the October 2023 MRI showed progression of Claimant's degenerative rotator cuff condition, but he strongly disagreed that there were any acute or subacute findings on the 2023 MRI to support an objective aggravation of the underlying condition following the October 2023 incident.

89. Dr. Failinger testified that the revision surgery recommended in 2019 was related to the 2018 work injury and should have been completed under the prior claim.

90. Dr. Failinger further testified that Dr. Villavicencio's work restrictions imposed in February 2020 with respect to lifting in Claimant's right upper extremity were designed to protect Claimant's shoulder, trying to prevent further damage with respect to his degenerative rotator cuff disease. Dr. Failinger noted that exceeding Dr. Villavicencio's work restrictions would likely result in additional symptoms and more rapid degeneration.

91. The ALJ finds the opinions of Dr. Faulkner and Dr. Stull, as supported by the medical records, and Claimant's testimony, more credible and persuasive than the opinion and testimony of Dr. Failinger.

92. Claimant proved it is more likely than not he sustained an injury arising out of and in the course and scope of his employment on October 11, 2023.

93. Claimant's gross earnings varied. Per Claimant's earnings records included in Exhibit D, the ALJ finds that a fair approximation of Claimant's wage loss and diminished earning capacity is an AWW based on Claimant's gross earnings during the 24-week period between April 28, 2023 and October 13, 2023. Between April 28, 2023 and October 13, 2023 Claimant earned $25,702.76, resulting in an AWW of $1,070.95.

94. Claimant proved it is more likely than not the October 11, 2023 work injury caused a disability lasting more three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss from October 17, 2023 through May 12, 2024.

95. Claimant proved it is more likely than not the surgery currently recommended by Dr. Stull is reasonable, necessary and related medical treatment.

96. Respondents failed to prove it is more likely than not Claimant willfully misled Employer regarding his ability to perform his job duties which led to the injuries sustained on October 11, 2023.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case

must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

As found, Claimant proved by a preponderance of the evidence he sustained a compensable work injury on October 11, 2023. There is no dispute Claimant was in the course and scope of his employment and performing his work-related duties when he was involved in the collision on October 11, 2023. Respondents argue that, while Claimant may have been involved in an accident, the incident did not result in any injury. Respondents contend there are not any new objective findings and the accident did not necessitate medical treatment beyond what was already recommended in 2019 for Claimant's pre-existing right shoulder condition. The ALJ disagrees.

The ALJ acknowledges the records demonstrate Claimant's complaints of continued pain and limited function leading up to the time he was placed at MMI in February 2020 for the July 2018 work injury. At that time, there remained right shoulder pathology, symptoms and a recommendation for surgery.

Nonetheless, over the course of the next three years, Claimant did not seek medical treatment for right shoulder complaints, credibly testified he was doing "quite well," and was able to perform various physical activities using his right shoulder, including lifting and scuba diving, without issue. As testified to by Claimant and KR[Redacted], prior to the October 2023 injury, Claimant did not request any accommodations and had no problem performing his physical job duties for Employer, which included lifting 35 pound batteries and 5 gallon jugs of liquid on a regular basis. The ALJ is persuaded by Claimant's testimony, as supported by other evidence, that he experienced an increase in pain, symptoms and functional limitations as a result of the October 2023 collision. Despite having permanent restrictions at the time of MMI in February 2020, Claimant's restrictions increased subsequent to the October 2023 incident.

Claimant has been consistent in his reports regarding the mechanism of injury in October 2023. Dr. Failinger opined that the reported mechanism of injury would not have caused an acute aggravation or exacerbation, there is no evidence of any acute nor subacute injury, and Claimant's condition and need for treatment is the result of the natural progression of his longstanding preexisting condition. Conversely, Dr. Faulkner credibly opined the mechanism is consistent with exacerbating a previously high-grade partial rotator cuff tear and that the findings on MRI, including edema in and surrounding the torn supraspinatus tendon, make it more likely to be an acute exacerbation rather than a stable chronic injury. The ALJ credits the opinion of Dr. Faulkner over that of Dr. Failinger in this case, as Dr. Faulkner is familiar with Claimant's 2018 work injury and prior recommendation for treatment. Dr. Faulkner's opinion is supported by the medical

records, the opinions of Claimant's authorized treating physicians, and Claimant's testimony.

Based on the totality of the evidence, Claimant proved it is more likely than not he suffered a compensable work injury on October 11, 2023 arising out of and in the course of her employment, resulting in disability and the need for medical treatment.

Medical Treatment

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

There does not appear to be any dispute from Respondents as to the reasonableness and necessity of the proposed right shoulder surgery. Dr. Failinger has opined that, while Claimant may require surgery, it is related to Claimant's pre-existing pathology and not the work incident.

Although there was a prior recommendation for revision surgery when Claimant was placed at MMI in February 2020, over the course of the next three years, Claimant did not seek right shoulder treatment and was able to perform various physical activities using his right shoulder. As discussed above, the preponderant evidence demonstrates the October 11, 2023 incident resulted in an acute exacerbation of Claimant's pre-existing right shoulder condition, resulting in his current disability and need for surgery. Accordingly, Claimant proved by a preponderance of the evidence the surgery recommended by Dr. Stull is reasonable, necessary and causally related to the October 11, 2023 work injury. Respondents are liable for the costs of the surgery recommended by Dr. Stull and other reasonably necessary and causally related medical treatment.

TTD

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular

employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

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

As found, Claimant proved it is more probable than not he is entitled to TTD benefits from October 17, 2023 through May 12, 2024. As a result of the October 11, 2023 work injury, Claimant's ATP restricted Claimant to lifting a maximum of five pounds lifting, and avoiding driving and repetitive shoulder movements. Claimant was unable to resume his prior work, as his regular job duties required lifting of more than five pounds and driving. Claimant credibly testified Employer was unable to accommodate his restrictions and no evidence was offered to the contrary. Due to the October 11, 2023 work injury and resultant disability, Claimant did not earn any wages from October 17, 2023 until he began other sedentary employment on May 13, 2024, entitling him to TTD benefits for such period.

AWW

Section 8-42-102(2) requires the ALJ to base the claimant's Average Weekly Wage (AWW) on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Campbell v. IBM Corp.*, *supra*.

Based on Claimant's earnings records, the ALJ concludes an AWW of $1,070.95 is a fair approximation of Claimant's wage loss and diminished earning capacity.

Penalty for Willfully Misleading Employer

Section 8-42-112 (1)(d), C.R.S. provides for a 50% reduction of indemnity benefits where "[t]he employee willfully misleads an employer concerning the employee's physical ability to perform the job, and the employee is subsequently injured on the job as a result of the physical ability about which the employee willfully misled the employer." Section 8-42-112(1)(d), C.R.S. is an affirmative defense on which the respondents have the burden of proof. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). The term "willful" means 'with deliberate intent' as opposed to mere thoughtlessness, forgetfulness, or negligence. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (1968); *Johnson v. Denver Tramway Corp.*, 171 P.2d 410 (1946).

As found, Respondents failed to prove Claimant's benefits should be reduced under § 8-42-112(1)(d). Respondents contend Claimant willfully misled Employer regarding his physical ability to perform the job by answering "Yes" to the question "Can you lift & carry 50 to 80 pounds?" in the employment questionnaire. Claimant credibly testified he answered that question in the affirmative because he believed he was able to lift such weight based on his functional status at the time. Moreover, Claimant credibly testified he did not recall reading the permanent restrictions included in Dr. Villavicencio's February 2020 MMI report. As testified to by both Claimant and KR[Redacted], Claimant did mention to KR[Redacted] undergoing a prior shoulder surgery. Here, the preponderant evidence does not establish Claimant willfully misled employer concerning his physical ability to do the job.

Even assuming, arguendo, the ALJ found Claimant willfully misled Employer, to impose a penalty under Section 8-42-112 (1)(d), the ALJ would also have to find that Claimant's injury was the result of the physical ability about which Claimant willfully misled Employer. Respondents argue Claimant willfully misled Employer about his physical ability, specifically, his ability to lift a certain amount of weight. Such physical ability, or lack thereof, did not result in the work injury at issue. Claimant was not performing any lifting or similar activities at the time of the injury. Here, Claimant was injured at the job as a result of colliding with an errant tire and rim while driving. Claimant was not subject to any driving restrictions nor was he physically unable to drive at the time of or leading up to the October 11, 2023 incident. Accordingly, the preponderant evidence does not establish Respondents are entitled to a 50% reduction of Claimant's indemnity benefits under § 8-42-112(1)(d).

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable industrial injury on October 11, 2023 arising out of and in the course and scope of his employment with Employer.

2. Respondents shall pay for Claimant's reasonable and necessary medical treatment related to the October 11, 2023 injury, including the surgery recommended by Dr. Stull.

3. Respondents shall pay Claimant TTD for the period October 17, 2023 through May 12, 2024.

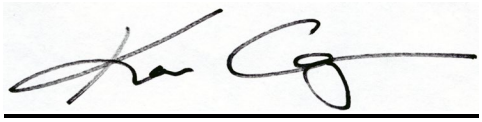
4. Claimant's AWW is $1,070.95.

5. Respondents are not entitled to a 50% reduction of Claimant's indemnity benefits under § 8-42-112(1)(d).

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

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

DATED: August 9, 2024



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-259-866-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable left arm injury during the course and scope of her employment with Employer on November 1, 2023.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her industrial injury.

3. A determination of Claimant's Average Weekly Wage (AWW).

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period November 1, 2023 until terminated by statute.

NOTICE OF PROCEEDINGS

1. Respondents failed to attend the July 30, 2024 in-person hearing in this matter. Therefore, prior to entering an order, the ALJ must consider whether Respondents had adequate notice of the proceedings.

2. Office of Administrative Courts Rules of Procedure for Workers' Compensation Hearings (OACRP) Rule 24 governs the entry of orders against non-appearing parties at hearings. Rule 24 provides, in relevant part:

> If a party fails to appear at a hearing after the OAC has sent notice of the hearing to that party, prior to entering any orders against the non-appearing party as a result of that hearing, the judge will consider:
>
> A. The addresses to which the notice of hearing was sent are the most recent addresses provided by the non-appearing party to either the OAC or the Division of Workers' Compensation; or
>
> …
>
> C. A copy of a record or other written statement from the OAC or the Division of Workers' Compensation containing the most recent address provided by the non-appearing party to either of those agencies shall be sufficient to create a rebuttable presumption that the non-appearing party received notice of the hearing.

3. On March 5, 2024 Claimant filed an Application for Hearing endorsing the issues of compensability, medical benefits and lost wages. The Application for Hearing was mailed to Respondents at the following: (1) [Redacted, hereainfter GO], [Redacted, hereinafter DV]; and

(2) [Redacted, hereinafter EG], DV[Redacted]. Notably, Exhibit 16 includes certified mail receipts reflecting that GO[Redacted] and EG[Redacted] received the Application for Hearing at the preceding address.

4. On June 5, 2024 the OAC sent a Notice of Hearing to Respondents at the following: (1) GO[Redacted], DV[Redacted]; and (2) EG[Redacted], DV[Redacted]. The Notice specified that the hearing would be conducted on July 30, 2024 at 8:30 a.m. at the OAC, 1525 Sherman Street, 4th Floor, Denver, Colorado 80203.

5. On July 25, 2024 Claimant filed a Case Information Sheet (CIS), again notifying Respondents of the July 30, 2024 hearing and the issues to be heard before the ALJ, The CIS was sent to the addresses Claimant had previously verified.

6. Respondents did not file a CIS prior to the hearing in this matter. They also did not submit any Exhibits.

7. Despite the preceding notice of the July 30, 2024 hearing, Respondents failed to appear. At the outset of the hearing, the ALJ reviewed the record to determine whether Respondents had received adequate and proper notice of the 8:30 a.m. hearing. Based on a review of the file, the ALJ was satisfied Respondents had proper and adequate notice of the matter. Because the case involved Claimant's Application for Hearing, the ALJ proceeded with the hearing.

8. The preceding chronology reflects that Respondents had adequate notice of the July 30, 2024 hearing in this matter. Claimant filed an Application for Hearing that was mailed to Respondents and confirmed by a certified mail receipt. The OAC sent a Notice of Hearing to Respondents at the addresses on file. Moreover, Claimant advised Respondents of the scheduled hearing through the filing of a CIS. The record thus demonstrates sufficient evidence to create a rebuttable presumption that Respondents received notice of the hearing. Respondents have failed to rebut the presumption. Because Respondents had adequate notice of the July 30, 2024 hearing but chose not to appear, entry of an order in this matter is appropriate.

FINDINGS OF FACT

1. Employer is a roofing company. Claimant began working for Employer on October 14, 2023. Her supervisors were [Redacted, hereinafter GD] and EG[Redacted]. Claimant's job duties involved traveling to job sites and helping with roof installation.

2. On November 1, 2023 Employer was replacing a metal roof on a house in Parker, Colorado. Claimant began shoveling snow on the ground while her coworkers prepared to remove snow from the roof of the structure. During the snow removal process, a coworker asked Claimant to hand him a drill. After Claimant retrieved the tool, she slipped and fell. Claimant landed on her left arm. EG[Redacted] was present during the fall. The incident occurred at approximately 10:30 a.m.

3. Coworkers transported Claimant to Denver Health for medical treatment. [Redacted, hereinafter AC] testified that he learned of Claimant's November 1, 2023 accident

at approximately 11:00 a.m. and was present for her emergency treatment.

4. Diagnostic imaging at Denver Health revealed an acute comminuted left distal radius fracture. After initially receiving conservative treatment, Claimant underwent surgical repair of her left wrist on November 20, 2023. During the healing process, Claimant was unable to work. Employer has not paid for any of Claimant's medical expenses or lost wages.

5. [Redacted, hereinafter CF] and [Redacted, hereinafter RF] also testified at the hearing in this matter. They corroborated Claimant's account after reviewing video of the accident that was admitted as Exhibit 19.

6. The record includes a letter dated April 30, 2024 from Alexander S. Lauder, M.D. at Denver Health. He explained that Claimant could immediately return to full duty employment with no restrictions. Dr. Lauder recounted that Claimant had sustained a left distal radius fracture in November 2023 while at work and has been unable to return to work since the injury/surgery. He commented that she has now healed sufficiently to return to work as tolerated. Dr. Lauder anticipated Maximum Medical Improvement (MMI) following a distal radius fracture at one year, or November, 2024, following surgery.

7. The record reveals that Claimant has incurred $7715.37 in unreimbursed medical expenses as a result of her November 1, 2023 industrial injury. The expenses include treatment for diagnostic testing, occupational therapy and left wrist surgery. The care constituted reasonable, necessary and causally related medical treatment designed to address her broken left wrist.

8. Claimant testified she earned $150.00 per day and worked six days each week. CF[Redacted] corroborated Claimant's earnings. An Average Weekly Wage (AWW) of $900.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

9. From the date of Claimant's work injury on November 1, 2023 through the date she was permitted to return to work as tolerated on April 30, 2024, totaled a period of 182 days or 26 weeks. Multiplying 26 weeks by an AWW of $900.00 equals lost wages totaling $23,400.

10. Since receiving Dr. Lauder's permission to return to work, Claimant has been seeking alternative employment because of her injury. She noted she can longer perform landscaping or roofing as a result of her left wrist/arm injury. Since May 1, 2024 Claimant has been seeking employment in areas including operating a cash register, caring for handicapped children at schools and working in a school kitchen. However, Claimant has been unsuccessful in procuring employment.

11. The period from May 1, 2024 through the date of the hearing in this matter on July 30, 2024 totaled 91 days or 13 weeks. Multiplying $900.00 by 13 equals lost wages of $11,700. Lost earnings of $23,400 plus $11,700 yields $35,100 in total lost wages.

12. Claimant has established it is more probably true than not that she sustained a compensable left arm injury on November 1, 2023 during the course and scope of her employment with Employer. Claimant credibly testified that on November 1, 2023 she injured

her left wrist when she slipped and fell at a job site. Supervisor EG[Redacted] was present during the fall. AC[Redacted] also corroborated Claimant's account and was present for her emergency treatment. Moreover, CF[Redacted]. and RF[Redacted] verified Claimant's account. Based on the credible testimony of Claimant and other witnesses, as well as a review of the record, Claimant suffered a disability that was proximately caused by injuries arising out of and within the course and scope of her employment with Employer on November 1, 2023.

13. Claimant has demonstrated it is more probably true than not that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. Initially, Claimant reported her injuries and coworkers took her to Denver Health for treatment. Because Employer did not respond to Claimant's request for medical treatment, she has incurred unreimbursed medical expenses totaling $7715.37 as a result of her November 1, 2023 industrial injury. The record reveals expenses for diagnostic testing, occupational therapy and left wrist surgery. The care constituted reasonable, necessary and causally related medical treatment designed to address Claimant's broken left wrist. Employer is thus financially responsible for the payment of Claimant's unreimbursed medical expenses.

14. Claimant has proven it is more probably true than not that she is entitled to receive Temporary Total Disability (TTD) benefits. The record reflects Claimant's November 1, 2023 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. From the date of Claimant's work injury on November 1, 2023 through the date she was permitted to return to work as tolerated on April 30, 2024, constituted a period of 182 days or 26 weeks. Multiplying 26 weeks by an AWW of $900.00 equals lost wages totaling $23,400. Initially, from the date of Claimant's work injury on November 1, 2023 through the date she was permitted to return to work as tolerated on April 30, 2024, constituted a period of 182 days or 26 weeks. Multiplying 26 weeks by an AWW of $900.00 equals lost wages totaling $23,400.

15. Claimant also credible explained that she has been unable to perform her job duties between May 1, 2024 and the date of hearing on July 30, 2024. Claimant has been seeking alternative work because of her injury. She noted she can longer perform landscaping or roofing as a result of her left wrist/arm injury. Since May 1, 2024 Claimant has been seeking employment in areas including operating a cash register, caring for handicapped children at schools and working in a school kitchen. However, she has been unsuccessful in procuring employment. The period from May 1, 2024 through the date of the hearing in this matter totaled 91 days or 13 weeks. Multiplying $900.00 by 13 equals lost wages of $11,700. Lost earnings of $23,400 plus $11,700 yields $35,100 in total lost wages. Claimant is entitled to receive TTD benefits in the amount of 66.67% of her lost wages. Multiplying $35,100 by 66.67% equals $23,401.17 in TTD benefits. Claimant has not been released to MMI and shall continue to receive TTD benefits until terminated by statute.

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).

Compensability

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

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

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

injury and work activities.

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician may provide diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms, there is no mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has established by a preponderance of the evidence that she sustained a compensable left arm injury on November 1, 2023 during the course and scope of her employment with Employer. Claimant credibly testified that on November 1, 2023 she injured her left wrist when she slipped and fell at a job site. Supervisor EG[Redacted] was present during the fall. AC[Redacted] also corroborated Claimant's account and was present for her emergency treatment. Moreover, CF[Redacted] and RF[Redacted] verified Claimant's account. Based on the credible testimony of Claimant and other witnesses, as well as a review of the record, Claimant suffered a disability that was proximately caused by injuries arising out of and within the course and scope of her employment with Employer on November 1, 2023.

Medical Benefits

9. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

10. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the

injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

11. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her industrial injury. Initially, Claimant reported her injuries and coworkers took her to Denver Health for treatment. Because Employer did not respond to Claimant's request for medical treatment, she has incurred unreimbursed medical expenses totaling $7715.37 as a result of her November 1, 2023 industrial injury. The record reveals expenses for diagnostic testing, occupational therapy and left wrist surgery. The care constituted reasonable, necessary and causally related medical treatment designed to address Claimant's broken left wrist. Employer is thus financially responsible for the payment of Claimant's unreimbursed medical expenses.

Average Weekly Wage

12. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury, the ALJ may elect to apply §8-42-102(3), C.R.S. and determine whether fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability instead of the earnings on the date of injury. *Id.*

13. As found, the record reveals Claimant earned $150.00 per day and worked six days each week. An AWW of $900.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

14. 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 in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical

incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions 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.

15. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits. The record reflects Claimant's November 1, 2023 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. From the date of Claimant's work injury on November 1, 2023 through the date she was permitted to return to work as tolerated on April 30, 2024, constituted a period of 182 days or 26 weeks. Multiplying 26 weeks by an AWW of $900.00 equals lost wages totaling $23,400.

16. As found, Claimant also credible explained that she has been unable to perform her job duties between May 1, 2024 and the date of hearing on July 30, 2024. Claimant has been seeking alternative work because of her injury. She noted she can longer perform landscaping or roofing as a result of her left wrist/arm injury. Since May 1, 2024 Claimant has been seeking employment in areas including operating a cash register, caring for handicapped children at schools and working in a school kitchen. However, she has been unsuccessful in procuring employment. The period from May 1, 2024 through the date of the hearing in this matter totaled 91 days or 13 weeks. Multiplying $900.00 by 13 equals lost wages of $11,700. Lost earnings of $23,400 plus $11,700 yields $35,100 in total lost wages. Claimant is entitled to receive TTD benefits in the amount of 66.67% of her lost wages. Multiplying $35,100 by 66.67% equals $23,401.17 in TTD benefits. Claimant has not been released to MMI and shall continue to receive TTD benefits until terminated by statute.

ORDER

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

1. Claimant sustained a compensable left arm injury during the course and scope of her employment with Employer on November 1, 2023.

2. Claimant received reasonable, necessary and causally related medical benefits for her November 1, 2023 work injuries. Respondents are financially responsible for Claimant's medical treatment including unreimbursed medical expenses totaling $7715.37.

3. Claimant earned an AWW of $900.00.

4. As of the date of hearing in this matter, Claimant has incurred $35,100 in lost wages because of her November 1, 2023 work injury. Multiplying $35,100 by 66.67% equals $23,401.17 in TTD benefits. Respondents are financially responsible for Claimant's TTD benefits and continuing wage loss until terminated by statute.

5. 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 9, 2024.

DIGITAL SIGNATURE:
Peter J. Cannici

_____

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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that on March 14, 2023 he suffered an injury arising out of and in the course and scope of his employment with Employer?

If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of an umbilical hernia is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

If the claim is found compensable, what is Claimant's average weekly wage **(AWW)?**

FINDINGS OF FACT

1. Claimant works for Employer as a garden associate. He began his employment in April 2021.

2. On March 14, 2023, Claimant was assigned the job task of stocking boxed lawnmowers. This activity involved the use of a Ballymore lift/platform. Claimant testified that due to the size of the lawnmower boxes and the size of the lift, it was necessary to turn the boxes while lifting. Claimant also testified that he performed this activity of moving and lifting lawnmowers throughout his entire shift on March 14, 2023.

3. Toward the end of his shift on March 14, 2023, Claimant began to feel some soreness in his abdomen. Claimant testified that at that time his pain felt like he had "done 20 sit-ups".

4. On March 15, 2023, Claimant noted that his abdominal pain was worse and there was a hardness above his belly button. Prior to the start of his scheduled shift on March 15, 2023, Claimant reported his pain to Employer. Employer referred Claimant for medical treatment.

5. On March 15, 2023, Claimant sought treatment in the emergency department (ED) of North Suburban Medical Center. At that time, Claimant reported experiencing approximately one day of gradual onset of lower abdominal pain. At that time, a computed tomography (CT) scan was performed on Claimant's abdomen and pelvis. The CT scan showed body wall edema, bilateral fat containing inguinal hernias, with the left hernia also containing a portion of the bladder. Dr. Jesse Swan noted that Claimant's abdominal pain could indicate an infection or herniation. Dr. Swan noted that

the inguinal hernias were an incidental finding. Dr. Swan discussed with Claimant the need to follow up with general surgery to discuss hernia repair.

6. During this claim, Claimant's authorized treating provider (ATP) has been Concentra Medical Centers (Concentra). On March 20, 2023, Claimant was seen at Concentra by Dr. Nancy Strain. On exam, Dr. Strain noted that Claimant had a large reducible umbilical hernia. As a result, Dr. Strain referred Claimant for a general surgery consultation. Despite this referral, Dr. Strain opined that Claimant was not a good surgical candidate. Dr. Strain assessed work restrictions of no lifting over ten pounds. In the medical record of that date, Dr. Strain noted Claimant's report that in 2014 he was diagnosed with a left inguinal hernia, but he did not pursue surgery at that time.

7. On March 23, 2023, Claimant returned to Concentra and was seen by Dr. Mechelle Viola-Lewis. At that time, Claimant reported abdominal symptoms that included a pinching sensation. Claimant also reported to Dr. Viola-Lewis that his surgical appointment was canceled.

8. Medical records admitted into evidence indicate that prior to March 14, 2023, Claimant was diagnosed with a "unilateral inguinal hernia" Specifically, on December 27, 2017, Dr. Tanner Mathias noted this condition and Claimant's report that it was "uncomfortable, not painful." Thereafter, on April 14, 2022, Claimant reported to Nurse Practitioner Onna Klooster that he had an inguinal hernia "for years". Claimant further reported to NP Klooster that he was told that he would need to lose weight before a hernia repair could be performed.

9. Claimant testified that he was aware of his pre-existing inguinal hernia and the surgical recommendation related to that condition. Claimant further testified that the inguinal hernia did not cause him any issues prior to March 14, 2023.

10. On November 2, 2023, Claimant attended an independent medical examination (IME) with Dr. F. Mark Paz. In connection with the IME, Dr. Paz reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his November 18, 2023 IME report, Dr. Paz opined that Claimant's umbilical hernia was not caused by his lifting activities at work on March 14, 2023. Dr. Paz further opined that the hernia was pre-existing, and was not aggravated or accelerated by Claimant's work activities on March 14, 2023. Dr. Paz noted that the likely cause of the umbilical hernia was that Claimant has a rectus abdominis diastasis as a result of his weight. Dr. Paz explained that the abdominis diastasis "is secondary to a tear along the fibrous tissue between the right and left rectus abdominal muscles." Dr. Paz further noted that the abdominis diastasis predated March 14, 2024.

11. With regard to the pre-existing left inguinal hernia, Dr. Paz opined that it was not causally related to the March 14, 2023 work incident. Nor was Claimant's left inguinal hernia aggravated or accelerated at work on March 14, 2023. Dr. Paz noted a prior surgical recommendation regarding the left inguinal hernia. Dr. Paz further noted that Claimant "did not qualify as a surgical candidate" at the time of that referral.

12. Dr. Paz's testimony was consistent with his IME report. Dr. Paz testified that Claimant has three total hernias. Dr. Paz reiterated his opinion that Claimant's work activities on March 14, 2023 did not cause the umbilical hernia or the inguinal hernias. Dr. Paz explained that the cause of Claimant's hernias is Claimant's morbid obesity. Dr. Paz further testified it is possible to develop an umbilical hernia from lifting. However, it is more likely that Claimant's umbilical hernia was caused by Claimant's morbid obesity. Dr. Paz testified that the umbilical hernia likely predated the lifting event. Dr. Paz also testified that Claimant's umbilical hernia was not aggravated by Claimant's work activities on March 14, 2023. Finally, Dr. Paz testified that even if Claimant's condition was work related, because of comorbidities, Claimant is not a surgical candidate.

13. The ALJ credits the medical records and the opinions of Dr. Paz. The ALJ specifically credit's Dr. Paz's opinions that Claimant's work activities on March 24, 2023 neither caused Claimant's hernias, nor aggravated or accelerated the need to treat these hernias. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that he suffered a work injury on March 14, 2023.

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 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. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *SubsequentInjury 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 March 14, 2023 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. Paz are credible and persuasive.

ORDER

It is therefore ordered that Claimant's claim regarding a March 14, 2023 date of injury is denied and dismissed.

Dated August 12, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence that she sustained a compensable injury to her right knee on June 30, 2023.

II. If Claimant established that she sustained a compensable right knee injury, whether she also established that she is entitled to all reasonable, necessary, and related care for her right knee.

III. Whether Claimant established that she is entitled to Temporary Total Disability (TTD) benefits beginning July 5, 2023 and ongoing.

IV. What is Claimant's Average Weekly Wage?

FINDINGS OF FACT

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

1. Claimant was employed by the employer on June 30, 2023 and was a "trainee" on that date. Employer delivers groceries to convenience stores. The groceries were delivered to the convenience stores in "totes". After such a delivery to a [Redacted, hereinafter SN], Claimant was using a dolly to return empty totes to the delivery truck and slipped and fell at the top of the ramp. The ramp was wet from rain. The fall was unwitnessed. The dolly she was pulling up the ramp fell on her right knee. A man who was outside the SN[Redacted] pulled the dolly off of her. [Redacted, hereinafter HE], who was working with Claimant in the trailer did help her up from a seated position shortly after Claimant slipped and fell. [Redacted, hereinafter TR] also saw the Claimant sitting on the ramp and she told him that she slipped and fell on the ramp.

2. Claimant did not seek immediate treatment. She continued to work until the end of that shift.

3. On July 5, 2023 Claimant sought treatment at Centura Health Urgent Care. She had been working that day with two different trainers and as they started running more loads down, her knee started locking up and she was limping. Her knee has swollen up and she could not walk. It was also throbbing. The doctor who initially saw her included in her history that there was no trauma or injury. The doctor opined that the Claimant likely had a torn meniscus.

4. Claimant reported the injury to [Redacted, hereinafter CY] and [Redacted, hereinafter ME] in Human Resources on July 6, 2023. She was referred to Concentra for

further treatment. She was also told to fill out a safety report with [Redacted, hereinafter JS]. She did that after going to Concentra.

5. On July 6, 2023, Claimant was seen by Kristen Hitz, NP at Concentra. Claimant gave a history that she had injured herself while she was walking backwards up the ramp to her truck at work. The ramp was wet when she slipped. On physical exam Claimant had tenderness over the medial knee, limited range of motion (ROM), and swelling in the knee. Ms. Hitz gave work restrictions of no crawling, no kneeling, no squatting, & no climbing. She was instructed to use crutches and wear a brace on her right knee. Ms. Hitz opined that the injury was work related.

6. On July 11, 2023, Claimant saw Dr. Peterson at Concentra. Dr. Peterson wrote in his report that Claimant had an effusion grade of 1 and joint hypertrophy. There was tenderness over the anterior knee, diffusely over the lateral knee, and diffusely over the medial knee. Claimant had full range of motion. Dr. Peterson diagnosed Claimant with a sprain of ligament of right knee, as well as swelling. He opined that Claimant was 25% of the way toward meeting her physical job requirements. He prescribed a knee brace and crutches. He restricted the Claimant from crawling, squatting, kneeling and climbing. He also recommended applying heat and ice to the knee. . Dr. Peterson also indicated in his report that his objective findings were consistent with a work injury.

7. Claimant could not perform her usual job duties within the restrictions given by Ms. Hitz and Dr. Peterson. Claimant was not offered any modified job duties.

8. Claimant was terminated on July 6, 2023 for sustaining a “preventable injury”. Claimant’s last day of work was July 5, 2023. On the termination form, Claimant requested a hearing to appeal the dismissal. No hearing was ever offered/held. There is nothing on the form that was filled out by Claimant and JS[Redacted] provides any details as to why the injury was preventable. To the contrary, there is no indication on the incident report filled out by Claimant and signed by JS[Redacted] that the Claimant did anything that caused or contributed to the accident. (Exhibit B, p. 111). The space after that question is blank.

9. Claimant testified that she has not worked anywhere since July 5, 2023.

10. After treating at Concentra, Claimant was referred to Dr. Simpson, an orthopedic surgeon for evaluation. Dr. Simpson saw her initially on August 15, 2023. He took a history which included that she worked for [Redacted, hereinafter MC] as a truck driver. She had just started working there when she injured herself. She was walking backward pulling a loaded hand dolly. It slipped and landed on her knee. She started having pain on the inside of her knee: having problems with stiffness and tightness in her knee. Dr. Simpson reviewed an MRI of the knee that was taken on July 19, 2023. It showed what looked to be a chondral fissure. He explained that it is like a crack in the cartilage that went all the way through. He also noted some marrow edema below the fissure. Based on these observations, Dr. Simpson concluded that the fissure was

traumatic in nature as opposed to degenerative. Dr. Simpson recommended a new brace, physical therapy and a steroid injection.

11. Dr. Simpson next saw Claimant on September 19, 2023. Claimant's knee pain was worse. The recommendations for the brace and steroid injection had been denied. She also did not receive physical therapy.

12. A notice of contest was filed on July 25, 2023. The reason given was Injury/Illness not work-related.

13. Claimant returned to Concentra on January 26, 2024 and saw Dr. Peterson. Dr. Peterson noted that the steroid injection recommended by Dr. Simpson had not been performed. Dr. Peterson did the injection. The injection helped with the pain, but did not completely alleviate the pain. A second injection was administered by Dr. Peterson on February 28, 2024.

14. At the request of Respondents, Claimant was evaluated by Dr. Stull, an orthopedic surgeon. Dr. Stull evaluated Claimant on November 30, 2023. Dr. Phillip Stull testified as an expert in orthopedic surgery. Dr. Stull opined that the chondral fissure was caused by degenerative changes and pre-existing arthritis. He based this opinion on his review of the MRI imaging which according to him demonstrated more diffuse, degenerative change rather than a discrete chondral fissure, along with some mild subchondral edema. (Pg. 12, ll. 6-13) Contrary to Dr. Simpson's opinion, Dr. Stull did not believe the subchondral edema to be an acute finding in this case due to the presence of arthritis in the kneecap. (Pg. 12, ll. 17-21) furthermore, Dr. Stull opined that the chondral fissure was not caused by the dolly falling on her knee, and that Claimant would have had symptoms immediately had that been the case. (Pg. 20, ll. 21-25; Pg. 21 ll. 14-25) However, he conceded on cross that a chondral fissure could cause intermittent swelling, pain with walking, pain climbing stairs, and occasional buckling or giving way when weight was placed on the knee. He also conceded that causation is sometimes difficult to determine, and that history of the injury is important.

15. According to the payroll records, between 6/18/23 & 7/1/23, Claimant's gross income was $1,328.29. From 7/2/23-7/15/23 her gross income was $1,187.57. Adding these two weeks together and dividing by two gives an average weekly wage of $1,257.93.

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 little question that slip and fall occurred while the Claimant was performing work duties. The issue is whether Claimant sustained an injury from that slip and fall. Although, at first blush, the lack of immediate treatment causes some concern as to whether the Claimant sustained an injury. However, the lack of immediate treatment is explained by Dr. Simpson who points out that it can take several days to a week for symptoms of a chondral fissure to manifest themselves, as knee cartilage does not have nerve endings and it takes several days for an inflammatory response to develop. This explains why there was a short delay in treatment and reporting to the employer that the slip and fall resulted in an injury.

E. The "arising out of" element required to prove a compensable injury is narrow and requires a claimant to show a causal connection between his/her employment and the injury such that the injury has its origins in work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001)*; Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for examination of the causal connection or nexus between the conditions and obligations of employment and the claimant's injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which 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).

F. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he/she sustained a work-related injury or occupational disease. Indeed, an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

G. Assuming that Dr. Stull is correct that Claimant may have suffered from pre-existing degeneration in the right knee, the presence of a pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-

existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

H. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent, as asserted by Respondents in this case, the natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Based upon the evidence presented, the ALJ is convinced that the increased symptoms and disability Claimant experienced on July 5, 2022 were a consequence of an aggravation and the industrially based acceleration of her underlying right knee degeneration. I conclude that Dr. Simpson's analysis is credible and persuasive. The ALJ rejects Dr. Stull's contrary opinions as unpersuasive.

Medical Benefits

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

J. 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). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). I conclude that the

treatment at Concentra and with Dr. Simpson to be reasonable, necessary and related to the Claimant's work injury of June 30, 2023.

Claimant's Entitlement to Temporary Total Disability Benefits

K. 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); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office,* 30 P. 3d 872 (Colo. App. 2001).

L. 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). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions, which impair the Claimant's ability effectively, and properly to perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

M. Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(d)(I) which states: "The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

N. In this case, Claimant has established that she was injured at work. I conclude that her testimony is credible with respect to the slipping incident despite that lack of reference to the specific incident to the initial medical providers. The evidence presented also supports a conclusion that Claimant was given physical restrictions to no crawling, kneeling squatting or climbing. The evidence presented persuades the ALJ that Claimant's restrictions were not accommodated. Consequently, she suffered a wage loss. While Respondents assert that Claimant was terminated for violation of a safety rule, they provided no credible evidence that Claimant violated a safety rule based on their assertion that the incident/injury was "preventable".

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that she sustained a compensable injury to her right knee.

2. The Claimant's Average Weekly wage is $1,257.93 with a corresponding TTD rate of $838.62.

3. Respondents are liable for Claimant's treatment with Concentra and Dr. Simpson. This includes the steroid injections recommended by Dr. Simpson, the knee brace and an additional course of physical therapy.

4. Respondents shall pay temporary total disability benefits beginning July 5, 2022 and ongoing until properly terminated.

5. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

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

DATED: August 14, 2024

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

ISSUES

1. Whether Claimant has proved by a preponderance of the evidence that he preserved his right to a Division independent medical examination (DIME) under § 8-43-203(2)(b)(II), C.R.S.

2. If Claimant did not preserve his right to a DIME, whether Claimant proved by a preponderance of the evidence that there exists a mistake or error justifying reopening the August 29, 2023 Final Admission of Liability (FAL) to permit Claimant to pursue a DIME.

3. Whether Claimant proved by a preponderance of the evidence that penalties should be imposed for Respondents' alleged failure to make a timely exchange of the claim file in violation of § 8-43-203(4), C.R.S.

FINDINGS OF FACT

1. Claimant sustained an admitted work injury to multiple body parts on May 18, 2023, when he was involved in a motor vehicle accident. He was placed at maximum medical improvement by his authorized treating physician on August 23, 2023.

2. Upon learning that he had been placed at maximum medical improvement, Claimant contacted Claimant's counsel for legal representation.

3. On August 26, 2023, a Saturday, Claimant completed a Workers' Claim for Compensation (WC15), which contained Claimant's complete address, including his unit number.

4. Respondent, a self-insured and self-administered employer, filed a FAL on August 29, 2023. On the certificate of service for the FAL was Claimant, with an address of [Redacted, hereinafter FN]." The address did not list a unit number. The FAL was e-mailed to the Division. The adjuster, [Redacted, hereinafter TS] would later testify that the FAL was sent by U.S. Mail to Claimant's address as listed on the FAL. Her claim notes documented an intake several months earlier that captured that same address without a unit number. Because the FAL was sent to an incomplete address, the Court finds that Claimant did not receive the August 29, 2023 FAL by mail.

5. Two days later, on August 31, 2023, Claimant's counsel filed an Entry of Appearance. Along with the copy sent to TS[Redacted], Claimant's counsel included a cover letter in which he requested a copy of Respondent's claim file. Claimant's counsel also advised in the cover letter that "Claimant objects to each Final Admission of Liability that has been filed."

6. On September 15, 2023, Claimant's counsel sent an e-mail to TS[Redacted] stating:

> *Hi TS[Redacted],*
>
> *Am I correct that you are the claims representative handling the above captioned file for [Redacted, hereinafter JH]? Have you received our entry of appearance? I'm not showing that we have received any documentaton [sic] back, including the file.*
>
> *JH[Redacted] informed me that he may have been placed at MMI at his last visit on 8/24/23, but it wasn't clear based on his recollection, and we don't have the medical records. Can you please forward to me all medical records in your possession, and let me know if JH[Redacted] has been placed at MMI and if an FA is forthcoming?*

7. The record does not contain a response e-mail. However, there is a letter dated September 18, 2023, from TS[Redacted] to Claimant's counsel, purporting to be a cover letter for a copy of the claim file being mailed to Claimant's counsel. The address listed is "[Redacted, hereinafter NE]." The Court finds that it was intended to be sent to Colorado Springs and that TS[Redacted] misspelled "Springs" as "Spsgs." TS[Redacted] would later testify that she mailed the file instead of e-mailing it because the file was small and because Claimant's counsel did not request an electronic copy. However, whether TS[Redacted] did not send the file or whether the file simply did not reach Claimant's counsel's office because it was not properly addressed, the Court finds that Respondent did not effectively produce the copy of the claim file on September 18, 2023.

8. On November 9, 2023, [Redacted, hereinafter CC], a paralegal and team lead for the workers' compensation team for Claimant's counsel, e-mailed TS[Redacted] advising that they had received no response regarding their August 31, 2023 request for the claim file. CC[Redacted] demanded that the file be exchanged by no later than Monday, November 13, and that failure to provide the claim file by that date would result in a request for penalties.

9. The following day, November 10, 2023, TS[Redacted] sent an e-mail to CC[Redacted] with a link containing an electronic copy of the claim file. In her e-mail, TS[Redacted] wrote, "I have sent you the file via OneDrive this time." The Court finds that this was the first time the FAL was effectively served on Claimant.

10. Several days later, on November 14, 2023, Claimant filed a Notice and Proposal and Application for Division Independent Medical Examination (WC77) to challenge the FAL.

11. Claimant testified at hearing on his own behalf. Claimant testified that the address on the FAL that was listed for him was incomplete, as it did not contain the unit number. Claimant clarified while preparing his taxes for last year, he corrected his address with his employer.

12. Claimant testified that, although he remembered speaking with TS[Redacted] on the phone, he did not have any specific recollection of providing TS[Redacted] with his mailing address. However, he later testified that he believed that he likely gave TS[Redacted] his complete address when they spoke.

13. Claimant also testified that he had been sent mail in the past from a prior employer but would not always receive the mail due to the mail sometimes not including the unit number in the address. However, Claimant also testified that he received all the medical records TS[Redacted] mailed him, even though TS[Redacted] did not have Claimant's complete mailing address.

14. The Court finds Claimant's testimony that he would not always receive mail that did not include his unit number to be credible. Although Claimant received all the medical records sent to him from the adjuster even without the unit number on the address, the Court finds this to be consistent with Claimant's testimony insofar as Claimant did not testify that he never receives mail if the unit number is not included, but rather that he sometimes would not receive mail when the unit number was not included on his address.

15. CC[Redacted] testified at hearing as well. She testified that she was the one responsible at Claimant's counsel's office for monitoring all of the incoming FALs.

16. CC[Redacted] testified that when a new workers' compensation client would be taken on, the office would contact the Division and the insurer and then mail out an entry of appearance to the Division and the adjuster assigned to the claim. Along with the entry of appearance mailed to the adjuster, the office would send a cover letter that requested a copy of the claim file. CC[Redacted] testified that the office's practice was to follow up with the adjuster if the claim file has not been received within 15 days.

17. CC[Redacted] testified that the first time she became aware of an FAL on the file or of the September 18, 2023 letter was when she received the November 10, 2023 e-mail from TS[Redacted] with a copy of the claim file. Upon receiving the claim file and seeing the September 18, 2023 letter, CC[Redacted] reviewed the storage area for a copy of the hard file that was supposedly sent to the firm, but she did not find one in storage. When asked what the chances were that such a file, if received, was misplaced, CC[Redacted] testified that the odds were zero,

noting that it was a 300-page claim file and is not a package that would have been misplaced or missorted.

18. TS[Redacted] testified at hearing as well. She testified that when there is a reported work injury, she contacts the injured worker and conducts an intake, in which she confirms that she has the correct name, date of birth, telephone number, position, employee identification number, and home address. TS[Redacted] confirmed that because Respondent is self-insured, she already has a lot of the information, and that she simply confirms that it is correct.

19. While reviewing the intake form she completed, TS[Redacted] confirmed that the address listed on there, which did not include a unit number, would have been the mailing address as Claimant reported it to her. She testified that had Claimant given her a unit number, she would have included that. She testified that the address that she had, which did not have a unit number, was the address that she sent everything to during the course of the claim, including the temporary total disability check. When asked whether that check had been cashed, she testified, "That is my understanding, yes."

20. TS[Redacted] testified that she would mail documents to Claimant via USPS and that no mail she had sent Claimant had ever been returned to her, though mail had been returned in other cases. In those instances, TS[Redacted] testified that her office's practice was to contact the recipient to resolve the address issue.

21. When asked why the September 18, 2023 letter was not signed, TS[Redacted] testified that she probably missed it because she was rushing. She was also asked what she did with the cover letter and claim file after she stuffed the envelope, to which she responded, "As best I could recall I would have mailed it. To be honest with you, I mean I can't say, you know -- mail a lot of stuff out, so."

22. Regarding the FAL, TS[Redacted] testified that she e-mailed a copy to the Division, but did not e-mail a copy to Claimant, instead mailing it to Claimant, because e-mailing the FAL to a claimant is not normal nor required procedure.

23. TS[Redacted] was also asked about why she did not document in her claims notes initially that Claimant's counsel had filed an entry of appearance and why she did not document in her claims notes that she sent out the September 18, 2023 letter. She responded that she tries to document everything, as it is best practice, but that it is not always possible. She also testified that "Sometimes you think you did and you didn't, so."

24. TS[Redacted] testified that she received notice of Claimant's counsel's entry of appearance on August 31, 2023. However, she acknowledged that on September 11 and 18, 2023, when sending medical records to Claimant, she mistakenly neglected to send a copy to Claimant's counsel.

25. The Court finds Claimant's testimony more credible than the testimony of TS[Redacted] to the extent that their testimonies conflict. Specifically, the Court finds that TS[Redacted], in her work, appears to have been so overwhelmed during the course of this claim as to be prone to mistakes. For example, TS[Redacted] acknowledged that her failure to sign the September 18, 2023 letter was likely something she missed due to rushing, that she would sometimes think she had documented something in the claim file when she in fact had not, and that she forgot to copy Claimant's counsel when producing medical records on two occasions shortly after Claimant's counsel had filed an entry of appearance. This is consistent with TS[Redacted] testimony that she did not have a specific recollection of mailing out the September 18, 2023 letter, as TS[Redacted] was likely overwhelmed with work such that she does not recall with specificity what she has done and instead has to rely on what she documented contemporaneously.

26. Ultimately, Court finds that November 10, 2023, was the first time the FAL was effectively served on Claimant and that Claimant's November 14, 2023 Notice and Proposal and DIME Application was therefore submitted within thirty days of service of the FAL.

27. The Court also finds that Respondent did not produce a copy of the claim file until November 10, 2023, seventy-one days after Claimant's counsel's request for a copy of the file. The file production was fifty-six days late. Based on communications with Claimant's counsel, Respondent should have known that it was in violation of § 8-43-203(4), C.R.S., in failing to produce a copy of the claim file within fifteen days.

28. Based on the totality of the evidence, which leads the Court to find that TS[Redacted] was so overwhelmed during the course of this claim as to be prone to mistakes, the Court finds that the delay in producing the claim file was the result of neglect rather than being in any way intentional. While not excusable, the reprehensibility of the failure to comply with § 8-43-203(4), C.R.S., is less troubling than it would be had it been deliberate.

29. On the other hand, the Court notes that had Respondent timely produced a copy of the claim file, Claimant would have received a copy of the FAL by September 15, 2023, still with thirteen days to either file an Application for Hearing or Notice and Proposal and Application for DIME to challenge the FAL. As a consequence partially of the failure to timely produce a copy of the claim file, the parties find themselves in this dispute regarding whether Claimant's November 14, 2023 Notice and Proposal was timely, resulting in a delay in the DIME process and the need for expenditure of resources of all parties and this Court in resolving the dispute. While certainly not catastrophic, the harm resulting from Respondents' failure to produce the claim file in a timely fashion is also not insubstantial.

30. A mitigating factor here is Claimant's failure to request a copy of the claim file from the Division upon Claimant's counsel's entry of appearance. As evidenced in Claimant's counsel's September 15, 2023 e-mail, Claimant's counsel suspected that Claimant had been placed at MMI and that there may exist an FAL on the claim. Reasonably diligent counsel could also attempt to obtain a copy of the Division's file to verify whether such an FAL existed. While it certainly does not in any regard absolve Respondent of its responsibility to produce a copy of the claim file as required by § 8-43-203(4), C.R.S., it is a mitigating factor when this Court considers the ways in which the harm could have been avoided.

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

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Timeliness of DIME Application

A claimant must file a written Objection to FAL and file an AFH or a Notice and Proposal and DIME Application within thirty days of the FAL in order to challenge any of the benefits admitted in the FAL. Section 8-43-203(2)(b)(II), C.R.S. Where a Claimant fails to file an AFH within thirty days of the FAL, the claim is closed as to all issues endorsed in the FAL. *Id.*; *Liggins v. McDonald Waterproofing Inc.*, W.C. No. 4-924-286-03 (June 5, 2015).

As found above, Claimant did not receive a copy of the FAL until receipt of the claim file on November 10, 2023. The reason for Claimant's not having received a copy of the FAL was Respondent's failure to serve the FAL on Claimant at his correct address, including the unit number, as well as Respondent's failure to mail a copy of the claim file to the correct address for Claimant's counsel on September 18, 2023.

Where an FAL is not properly served, the appropriate remedy is that the time for the claimant to challenge the FAL is tolled. *See Stoewer v. Douglas Colony Group, Inc.*, W.C. No. 4-937-085-03 (January 21, 2016).

In *Stoewer v. Douglas Colony Group, Inc.*, a carrier failed to serve a copy of the FAL on the claimant's counsel, despite having notice of the claimant's counsel's change of address. The ICAO panel held that the appropriate remedy was that the statutory period for challenging the FAL began to run as of the date that the claimant's attorney in fact received the FAL. *Stoewer* at *6.

In the present case, Claimant's counsel did not receive a copy of the FAL until TS[Redacted] e-mailed a copy to him on November 10, 2023. Therefore, Claimant had until December 10, 2023, to request a hearing or a DIME to challenge the FAL pursuant to § 8-43-203(2)(b)(II), C.R.S. Claimant requested a DIME on November 14, 2023. Therefore, Claimant's request for a DIME to challenge the August 29, 2023 FAL was timely.

Penalties

Section 8-43-304(1), C.R.S., provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S., is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo.App.2005).

Whether statutory penalties may be imposed under § 8-43-304(1), C.R.S., involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo.App.2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo.App.1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo.App.2005). *See Pant Connection Plus v. Indus. Claim Appeals Off*, 240 P.3d 429 (Colo.App.2010). A party establishes a *prima facie* showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a *prima facie* showing, the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Claimant argues that Respondent unreasonably violated § 8-43-203(4), C.R.S., by failing to produce a copy of the claim file within fifteen days of Claimant's request.

As found above, Respondent produced a copy of the claim file fifty-six days late. Based on communications with Claimant's counsel, Respondent should have known that it was in violation of § 8-43-203(4), C.R.S., in failing to produce a copy of the claim file within fifteen days.

However, as found, the delay in producing the claim file was the result of neglect rather than being in any way intentional. The reprehensibility of the conduct was not as troubling as it would have been if it were deliberate and tends to weigh in favor of a lesser penalty.

On the other hand, as found above, the failure to produce the claim file in a timely fashion resulted in a delay of the DIME process, and the need for expenditure of resources of all parties and this Court in resolving the dispute. The harm is, therefore, not insubstantial. Though, as found and acknowledged above, the harm could have been prevented had Claimant also requested a copy of the Division's file upon suspicion of an FAL being filed, which would likely have resulted in the production of the FAL to Claimant within the thirty days allotted for objection to the FAL. *See Duran v. Russell Stove Candies*, W.C. No. 4-524-717 (April 13, 2004)(In cases where there is substantial compliance with the statutory notice requirements the time for contesting the FAL is not extended until the date of actual receipt.)

Therefore, Respondent is liable for penalties of $60 per day for each day from September 15, 2023—the day claim file was due to be exchanged—through November 9, 2023—the day before Respondent produced a copy of the claim file. Considering the degree of harm to Claimant individually, the penalty payments are to be apportioned as

follows: 50% to Claimant, totaling $20 per day; and 50% to the Colorado Uninsured Employer Fund, totaling $20 per day.

ORDER

It is therefore ordered that:

1. Claimant's November 14, 2023 Notice and Proposal and Application for DIME was timely and shall proceed.

2. Respondent shall pay penalties of $60 per day for each day from September 15, 2023, through November 9, 2023. The penalties payments shall be apportioned 50% to Claimant and 50% to the Colorado Uninsured Employer Fund.

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 14, 2024.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-256-731-001

ISSUES

I. Whether Claimant was an employee of [Redacted, hereinafter SM], or an independent contractor, on January 25, 2023, when he was injured on a jobsite in Steamboat Springs, Colorado.

II. Whether Respondents are liable for non-emergent medical treatment between the date of injury and November 20, 2023, the date a claim for compensation was filed with the Division of Workers' Compensation.

III. Temporary disability benefits

a. Whether Claimant is entitled to temporary total disability benefits from January 25, 2023, until May 1, 2023, and again from November 15, 2023, when he was terminated, through March 28, 2024, when Claimant started a new job.

b. Termination for cause: Whether Claimant is entitled to temporary total disability benefits from November 15, 2023, through March 28, 2024.

c. Whether Claimant is entitled to temporary partial disability benefits from April 1, 2024, ongoing.

IV. Whether Claimant should be penalized up to one day's compensation for each day he failed to report his workers' compensation claim in writing.[1]

STIPULATIONS

- Claimant's average weekly wage is $1,261.12
- Claimant withdrew all penalty allegations set forth on his application for hearing.

FINDINGS OF FACT

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

1. Claimant testified, and the ALJ finds Claimant's testimony to be credible.
2. [Redacted, hereinafter MS] owns SM[Redacted], a construction company. He knows Claimant by the name "[Redacted, hereinafter JY]." SM[Redacted] primarily provides framing, siding, and window installation for builders.

[1] Respondents contend the penalty should run from January 25, 2023, to November 20, 2023.

3. On January 25, 2023, Claimant, who was 25 years old, was working with a crew of other SM[Redacted] workers. They were performing framing work on an 8,000 square foot home that was being built by another contractor in Steamboat Springs, Colorado. The crew that he was working with included himself, his father, his brother, his cousin, and a friend, all of whom lived in Craig, Colorado.

4. When Claimant started working for SM[Redacted], in June 2022, he was performing general labor work and was paid $25.00 per hour. At some point, Claimant started working as a framer. On the date of the accident, Claimant was working as a framer, was being paid $30.00 per hour, and working approximately 50 hours per week.

5. In order to get paid, Claimant would submit to MS[Redacted] the number of hours he worked each day and then MS[Redacted] would issue a check payable to Claimant every two weeks. At the time of the accident SM[Redacted] was paying Claimant as an independent contractor. Therefore, no taxes were being deducted from his paychecks. Moreover, for 2022, Claimant received a Form 1099 from SM[Redacted].

6. In order to get to work, Claimant was driven by his father in a truck that SM[Redacted] provided to Claimant's father. The company truck was provided to Claimant's father so he could transport people living in Craig, Colorado, to the jobsite in Steamboat. Despite providing transportation to the jobsite, SM[Redacted] did not mandate how Claimant or others got to and from the jobsite.

7. While working for SM[Redacted], SM[Redacted] gave Claimant and the other co-workers various t-shirts and other items with the SM[Redacted] Logo. SM[Redacted] did not, however, require Claimant or the other workers to wear this clothing on the jobsite as a uniform.

8. Claimant's job required lifting heavy lumber and was physically demanding.

9. On January 25, 2023, Claimant was working with his father, brother, cousin, and a friend on a crew for SM[Redacted]. Claimant's father was using a telehandler forklift to lift a wall frame into place. While lifting the wall into place, the wall fell from the telehandler, it slipped off and the wall fell on Claimant and trapped him beneath.

10. A co-worker, [Redacted, hereinafter JR], pulled Claimant out from under the wall and then called 911. Claimant was taken by ambulance to UCHealth Emergency Care at Yampa Valley Medical Center. He was diagnosed with significant traumatic injuries to his chest and spine. Due to the extent of his injuries, and the inability of the Yampa Valley Medical Center to fully manage his condition, Claimant was airlifted by Classic Air Care, LLC, to UC Health-University of Colorado Hospital-Anschutz Medical Center, where Claimant underwent spinal surgery. Claimant remained in the hospital for about 10 days. During his hospitalization, MS[Redacted] talked with Claimant. Thus, MS[Redacted] knew about the accident, knew that it happened on his jobsite while Claimant was performing work for his company, and knew Claimant required medical treatment. Despite this knowledge, neither MS[Redacted], nor anyone else at SM[Redacted] provided Claimant a designated provider list at any time to treat him for his injuries until November 28, 2023, which was shortly after Claimant filed his written Workers' Claim for Compensation on November 20, 2023.

11. The medical treatment provided to Claimant after the accident at Yampa Valley Medical

Center, as well as the airlift to UC Health-University of Colorado Hospital-Anschutz Medical Center, where Claimant underwent spinal surgery, is found to be reasonable and necessary.

12. Claimant followed up with AMC Spine Center and UC Health Outpatient Services in Aurora, Colorado, with Dr. Angelina Burger. Dr. Evalina Burger said Claimant will require the temporary hardware used during his back surgery will have to be removed one year after the accident.

13. From the date of injury, January 25, 2023, through approximately the date he terminated his relationship with SM[Redacted], November 15, 2023, the medical records list the guarantor as Claimant, and the primary insurance as either Colorado Medicaid, Medicaid ER Health First (with a subscriber ID provided) or UCHealth Hospital Discounted Care.

14. Due to his injuries, Claimant was unable to perform his regular job duties and did not work for about three months.

15. On May 2, 2023, Claimant returned to work at SM[Redacted] and was performing light duty work for $30.00 per hour.

16. In October 2023, and after the work accident, MS[Redacted] offered Claimant the chance to be considered an employee, which involved a slight reduction of his hours to 40 per week, but Claimant would be provided sick days and some type of insurance. The Claimant accepted this offer by signing some papers and began working 40 hours per week as an employee.

17. On approximately November 14, 2023, MS[Redacted] told Claimant that he had to sign a document. According to MS[Redacted], the document required Claimant to confirm he was an independent contractor before June 2023, which would include the date of the work accident. This is consistent with Claimant's belief that the document required Claimant to accept full responsibility for the January 2023 accident. Claimant refused to sign the document, which in essence required Claimant to declare he was an independent contractor, and not an employee, on the date of the accident. Signing the document could have precluded Claimant from claiming and obtaining workers' compensation benefits for his work injury. In other words, MS[Redacted] was asking Claimant to relinquish his right to claim workers' compensation benefits for his work injury. Claimant reasonably refused to sign the document. Moreover, Claimant's decision was objectively reasonable, i.e., a reasonable person under the same circumstances would have refused to sign the document. Based on Claimant's reasonable refusal to sign the document, MS[Redacted] terminated Claimant from his modified duty position on November 15, 2023.

18. After being terminated, Claimant did not work from November 15, 2023, until approximately March 29, 2024, when he started working at the [Redacted, hereinafter HN] Hotel in Craig Colorado, for $16.00 per hour. While working for HN[Redacted], Claimant's work injury still precluded him from performing his job duties as a framer. Since there is no indication Claimant had been released to full duty when he started this new job, the ALJ finds that Claimant's injury continued to contribute to his wage loss when he started working at the Hampton Inn.

19. SM[Redacted] hired [Redacted, hereinafter BC], which is owned by JR[Redacted], to manage the company's construction projects on a day-to-day basis. JR[Redacted]

oversaw the quality of Claimant's work, and others, to make sure the framing was done properly, consistent with the plans, and that the project was moving along on time. He also determined who each worker would work with, when they could take a lunch break, and when they could leave. Moreover, JR[Redacted] would read the blueprints for Claimant, and others, and then tell them what to frame and where to frame. Based on this relationship, the ALJ finds that JR[Redacted] was an agent of SM[Redacted], with actual and express authority to act on behalf of SM[Redacted] to oversee and direct Claimant's work, and did so, while Claimant was working on the house in Steamboat Springs. On the day of the accident, JR[Redacted] was onsite managing the project when the accident occurred.

20. When Claimant went to work for SM[Redacted], Claimant did not have a corporate entity, sole proprietorship, or any other separate and independent business that provided framing, or similar services to anyone else. Nor did Claimant hold himself as having such a business. Moreover, Claimant did not have a business card–or anything else-indicating he was a building contractor or framer providing framing or similar services to the public.

21. There is no credible evidence that while working on the house in Steamboat for SM[Redacted], Claimant had any other construction or framing jobs that took him away from his work for SM[Redacted].

22. There is not a written contract or document between Claimant and SM[Redacted] indicating Claimant was an independent contractor.

23. Claimant was required to perform framing work consistent with the blueprints of the builder and of sufficient quality. As found above, to make sure the work conformed to the blueprints and was of sufficient quality, his work was overseen and managed by JR[Redacted], who was hired by SM[Redacted] to manage the project.

24. Claimant was paid by the hour-and not by the job. Thus, he was not paid a fixed or contract rate to perform the job. SM[Redacted] also paid Claimant with checks made out to Claimant. They were not made out to an entity, business or tradename, i.e., a business of Claimant.

25. Claimant brought some of his own power tools to the jobsite. However, to complete the framing work, large equipment was required and it was provided by SM[Redacted]. The large equipment included a man-lift, a large compressor, a large saw for cutting beams, a large construction generator, and the telehandler forklift Claimant's father was using to hold the wall when it fell on Claimant. Without this large equipment, Claimant could not complete or perform the full duties of a framer for SM[Redacted] at the jobsite in Steamboat.

26. In order for Claimant to work for [Redacted, hereinafter MM], MM[Redacted] required Claimant to obtain his own Liability Insurance. In light of this requirement, Claimant obtained his own liability insurance. There is not, however, any credible evidence that Claimant carried liability insurance before MM[Redacted] made it a condition of working for MM[Redacted] and Claimant started working for MM[Redacted].

27. After the accident, the Respondents did not provide Claimant with a list of medical providers willing to treat Claimant until November 28, 2023, which was shortly after Claimant filed his written Workers' Claim for Compensation on November 20, 2023.

However, MS[Redacted] knew right after the accident that Claimant had been injured while performing work for his company. In fact, MS[Redacted] talked to Claimant shortly after the accident while Claimant was in the hospital. Based on the circumstances as found above-in paragraphs 19 through 26 - a reasonably conscientious employer or manager would believe that the Claimant might be considered an employee and entitled to workers' compensation benefits. As a result, MM[Redacted]' duty to provide Claimant with a list of medical providers willing to treat Claimant was triggered after the emergent treatment was no longer being provided and before Claimant filed a written claim for compensation on November 20, 2023. Thus, the right to select a treating provider passed to Claimant.

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. 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 was an employee of SM[Redacted]., or an independent contractor, on January 25, 2023, when he was injured on a jobsite in Steamboat Springs, Colorado.

Pursuant to §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 services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document that complies with the statute. *See* §8-40-202(2)(b), C.R.S.

If the evidence establishes that Claimant was performing services for pay, and there is no written document establishing Claimant's independent contractor status, the burden of proof rests upon the Respondents to rebut the presumption that Claimant was an employee. *Baker v. BV Properties, LLC,* W.C. No. 4-618-214 (ICAO, Aug. 25, 2006). The question of whether Respondents have overcome the presumption and established that Claimant was an independent contractor is one of fact for the ALJ. *Nelson v. Industrial Claim Appeals Off. of Colo.,* 981 P.2d 210 (Colo. App. 1998)

Section 8-40-202(2)(b)(II), C.R.S. enumerates nine factors to be considered in evaluating whether an individual is deemed an employee or independent contractor. However, the test considered by the Colorado Supreme Court in the unemployment insurance case of Indus. Claim Appeals Office v*. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014) concerning whether a worker is an employee or an independent contractor applies to Workers' Compensation claims. The test requires the analysis of not only the nine factors enumerated in §8-40-202(2)(b)(II), C.R.S. but also the nature of the working relationship and any other relevant factors. *Pella Windows & Doors, Inc. v. Industrial Claim Appeals Off.*, 458 P.3d 128 (Colo. App. 2020). The *Softrock* decision noted indicia that would normally accompany the performance of an ongoing separate business in the field and included whether: the worker used an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance. *Softrock Geological Services*, 325 P.3d 565.

The nine factors in § 8-40-202(2)(b)(II), C.R.S. are:

1. Require the worker to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document.

2. Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed.
3. Pay a salary or at an hourly rate instead of at a fixed or contract rate.
4. Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract.
5. Provide more than minimal training for the individual.
6. Provide tools or benefits to the individual; except that materials and equipment may be supplied.
7. Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established.
8. Pay the service provider personally instead of making checks payable to the trade or business name of such service provider.
9. Combine the business operations of the person from whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

The existence of any one of these factors is not conclusive evidence that the individual is an employee. § 8-40-202 (2)(b)(III). Likewise, it is not necessary that all the elements be met in order for the Court to find that Claimant is not an employee. *See Nelson v. Industrial Claim Appeals Off.*, 981 P.2d 210 (Colo. App. 1998), *cert. den*. Section 8-40-202(a) notes, "For purposes of this section, the degree of control exercised by the person for whom the service is performed over the performance of the service or over the individual performing the service shall not be considered if such control is exercised pursuant to the requirements of any state or federal statute or regulation."

In this case, Claimant was performing services for pay for MM[Redacted] and no written document was offered as evidence to establish a rebuttable presumption regarding Claimant's independent contractor status. Therefore, it is MM[Redacted] burden of proof to establish Claimant was both free from direction and control in the performance of services and customarily engaged in an independent business related to the service performed.

In this case SM[Redacted]:

- Did not require Claimant to work exclusively for their company. But, since Claimant was working approximately 50 hours per week, there was very little time for Claimant to work for someone else. Moreover, there is a lack of credible evidence that Claimant sought out additional framing work from others as an independent contractor or employee while working for MM[Redacted]

- Did require the work to be performed at a certain quality level, which was overseen by Mr. Bonner, an agent of MM[Redacted]. MM[Redacted] also, through Mr. Bonner, read the blueprints for Claimant and told him where and what to frame. He also controlled their working hours and when to take lunch and their breaks.
- Did pay Claimant at an hourly rate, instead of at a fixed rate or contract rate.
- Did not have the right to terminate the work of Claimant during a contract period unless Claimant violated the terms of a contract or failed to meet the specifications of a contract.
- Did supply some tools and equipment to Claimant - such as a large saw to cut beams. MM[Redacted] also supplied equipment such as a man-lift, forklift, and a generator to supply power for the tools used by all of the workers.
- Did not dictate the time of performance for Claimant to complete the job.
- Did pay Claimant personally rather than making checks payable to the trade or business name of the Claimant.
- Did not combine the business operations of MM[Redacted] with the Claimant.

Regarding the *Softrock* Factors:

- It was not established that Claimant used an independent business card, listing, address, or telephone number.
- It was not established that Claimant had a financial investment in the project where there was a risk of suffering a financial loss on the project;
- It was established that Claimant did use some of his own tools to perform some of the framing duties for the Steamboat project. But it was also established that MM[Redacted] provided some heavy-duty equipment that allowed Claimant to perform the job.
- It was not established that Claimant set the price for performing the job or employed others to complete the project.
- It was established that Claimant was paid an hourly rate and worked with coworkers, but he did not employ any workers to assist in performing the work on the Steamboat Springs project.
- It was established that Claimant did carry liability insurance.

Claimant established by a preponderance of the evidence that he was paid for the framing services he provided MM[Redacted] and that there is no written document establishing Claimant's independent contractor status. As result, it is Respondents

burden to establish by a preponderance of the evidence that Claimant was an independent contractor at the time of the accident.

Based on the totality of the evidence, the ALJ finds and concludes that Respondents failed to meet their burden of proof. Respondents failed to establish Claimant was both free from direction and control in the performance of the services he provided to MM[Redacted] and customarily engaged in an independent business related to the service performed. As found, MM[Redacted] required the work performed by Claimant to be performed at a certain quality level, which was overseen by Mr. Bonner, an agent of MM[Redacted], and Mr. Mangus also directed Claimant where and what to frame, and controlled when they had to get to work, when they could take breaks, and when they could leave.

Moreover, Respondents failed to establish Claimant was customarily engaged in an independent business of, or related to, framing. For example, MM[Redacted] paid Claimant directly–personally-and did not pay him via a trade or business name. MM[Redacted] also paid Claimant at an hourly rate and not at a contract rate for performing a particular scope of work – regardless of the time spent completing the work. Nor was it established that Claimant used an independent business card, a business listing, a business address, or a business telephone number. It was also not established that Claimant had a financial investment or interest in the project. Thus, he did not have any financial risk based on the success or failure of the project. Plus, there is no credible evidence that Claimant set the price for performing the job. Instead, MM[Redacted] paid Claimant an hourly wage. Lastly, it was not established that Claimant employed others to complete any of the framing work. Instead, MM[Redacted] provided the additional co-workers necessary to complete the framing work.

The ALJ has considered the fact that Claimant did carry liability insurance from July 29, 2022, through June 9, 2023. That said, based on the totality of the evidence, the ALJ does not find that Claimant purchasing the insurance-just to work for MM[Redacted]-establishes he was customarily engaged in an independent business related to, or including, framing. For example, there was no credible evidence that demonstrated Claimant carried liability insurance before MM[Redacted] requested Claimant obtain it as a condition of employment. Thus, the court is not willing to conclude that Claimant carrying liability insurance, and obtaining it so he could work for MM[Redacted], establishes Claimant was an independent contractor when considering the totality of the evidence.

The ALJ has also considered Respondents' argument that the medical records demonstrate and support their position that Claimant was an independent contractor because the records indicate that Claimant's primary insurance is either Colorado Medicaid, Medicaid ER Health First (with a subscriber ID provided) or UCHealth Hospital Discounted Care. The ALJ does not, however, consider such evidence to be persuasive in determining whether Claimant was an employee or an independent contractor under the Workers' Compensation Act on the day of the accident.

Based on the totality of the evidence, the ALJ finds and concludes that Claimant was an employee of MM[Redacted] on the date of the accident and his claim is compensable.

II. Whether respondents are liable for non-emergent medical treatment between the date of injury and November 20, 2023, the date a claim for compensation was filed with the Division of Workers' Compensation.

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance upon receiving notice of the work injury. *Yeck v. Indus. Claim Appeals Off.*, 996 P.2d 228 (Colo. App. 1999). *See also Rogers v. Indus. Claim Appeals Off.*, 746 P.2d 565 (Colo. App. 1987). The Workers' Compensation Act requires that Respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. If the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Off.,* 148 P.3d 381, 383 (Colo. App. 2006). *See also Sincavage v. High Country Exteriors*, Inc. W.C. 4-684-642 (March 8, 2007)(Even though Respondent alleged Claimant was an independent contractor, a reasonably conscientious employer or manager would believe that the claimant might be considered an employee, given that he had been performing work for High Country on a consistent and almost exclusive basis, and should have provided a designated provider list.)

In this case, Mr. Mangus knew immediately after the accident that Claimant had been injured while performing work for his company. In fact, Mr. Mangus talked to Claimant shortly after the accident while Claimant was in the hospital. Based on the facts found above, a reasonably conscientious employer or manager would believe that the Claimant might be considered an employee and entitled to workers' compensation benefits.

Therefore, SM[Redacted] was required to provide Claimant with a list of medical providers willing to treat Claimant after the emergent treatment had been provided and before Claimant filed his written claim for compensation on November 20, 2023. In this case, Respondents did not provide Claimant with a list of medical providers willing to treat Claimant until November 28, 2023, which was shortly after Claimant filed his written Workers' Claim for Compensation on November 20, 2023, and after Claimant had received emergent care. As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that after the emergency treatment was provided, the Respondents had a duty to provide Claimant with a list of designated providers – and

the Respondents failed to do so in a timely manner. Therefore, the right of selection passed to Claimant and Claimant was free to select a treating provider – and did so.

III. Whether Claimant is entitled to temporary total disability benefits from January 25, 2023, until May 1, 2023, and again from November 15, 2023, when he was terminated, through March 28, 2024, when Claimant started a new job.

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

TTD from January 25, 2023 through May 1, 2023

In this case, Claimant was seriously injured on January 25, 2023. After his injury, Claimant was hospitalized and underwent back surgery. He was hospitalized for approximately 10 days. Due to his work injury, Claimant was unable to perform his regular job duties. On May 2, 2023, Claimant returned to work for SR Mangus and was working modified employment.

There is no indication Claimant had been placed at MMI, released to regular employment, or failed to begin an offer of modified employment before May 2, 2023. As a result, Claimant is entitled to TTD from January 25, 2023, through May 1, 2023.

Whether Claimant is entitled to TTD from November 15, 2023,

through March 28, 2024, due to his termination from employment

After Claimant started working modified duty on May 2, 2023, Claimant continued working modified duty for SR Mangus until he was terminated on November 15, 2023. As of November 15, 2023, Claimant was still unable to perform his regular job duties. Then, on March 29, 2024, Claimant began working for a new employer.

As found, on approximately November 14, 2023, MS[Redacted}, of SM[Redacted], told Claimant that he had to sign a document to continue working for SM[Redacted]. The document required Claimant to confirm he was an independent contractor before June 2023, which would include the date of the work accident. Claimant reasonably believed that the document required Claimant to accept full responsibility for the January 2023 accident by affirming that he was an independent contractor, and not an employee, on the date of the accident. Thus, Claimant reasonably believed that signing the document would relinquish his right to claim and obtain workers' compensation benefits due to his work accident. Moreover, Claimant's decision was objectively reasonable, i.e., a reasonable person under the same circumstances would have refused to sign such a document because it would potentially waive significant legal protections and rights regarding his workers' compensation claim. Based on Claimant's reasonable refusal to sign the document, Mr. Mangus terminated Claimant on November 15, 2023.

Under the termination statutes in §§8-42-105(4) & 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. Industrial 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*, WC 4-631-681 (ICAO, Apr. 24, 2006). To establish that Claimant was responsible for his termination, Respondents must demonstrate by a preponderance of the evidence that the Claimant committed a volitional act or exercised some control over his termination under the totality of the circumstances. *See Padilla v. Digital Equip.*, 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 Pub. Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

However, every decision made by a Claimant that results in their termination, is not considered a volitation act that makes them at fault for their termination and terminates their right to temporary disability benefits. In other words, an employer's decision to terminate a Claimant, based on an employee's decision to not follow an employer's policies, standards, or requirements, does not automatically trigger the termination statutes and preclude an award of temporary disability benefits. *See Stearns v. F.S. Inc.*, W.C. 4-605-877 (April 11, 2005.) In other words, an employer cannot implement an unreasonable policy or requirement for continued employment – and then terminate a claimant - and preclude an award of temporary disability benefits due to the Claimant's refusal to abide by an unreasonable policy or requirement. For example, in *Bell v. Industrial Claim Appeals Off.*, 93 P.3d 584 (Colo. App. 2004) the court addressed a similar issue in an unemployment case in determining whether the Claimant was at fault for her termination of employment. In *Bell*, the court held that the Claimant was not at fault for her termination that resulted from her refusal to sign an agreement that "waived significant legal protections and rights. *Bell* at 586.

In this case, on November 15, 2023, Claimant refused to sign a document that could have hindered, or precluded, his ability to claim and obtain workers' compensation benefits. Due to his refusal to sign the document, he was terminated. Thus, like the

situation in *Bell*, Claimant was asked to sign a document that could have waived significant legal protections and rights. The ALJ finds and concludes that Claimant's refusal to sign the document was objectively reasonable. Therefore, the ALJ finds and concludes that Respondents failed to establish by a preponderance of the evidence that Claimant is at fault for his termination and subsequent wage loss.

In addition, there is no credible evidence that at the time of his termination, Claimant could perform his regular job duties as a framer. There is also a lack of credible evidence that Claimant had been placed at MMI or released to full duty by one of his treating physicians at the time of his termination. As a result, the Claimant has established by a preponderance of the evidence that he is entitled to temporary disability benefits from November 15, 2023, through March 28, 2024, since he obtained new employment at the Hampton Inn Hotel on March 29, 2024.

IV. Whether Claimant is entitled to temporary partial disability benefits as of March 29, 2024, when he started working at the Hampton Inn Hotel for $16.00 per hour.

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

In this case, Claimant began working for the Hampton Inn Hotel on or about March 29, 2024, and was being paid $16.00 per hour. At the time Claimant was hired, Claimant was unable to perform his regular job duties as a framer due to his job duties. As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that he is entitled to temporary partial disability benefits as of March 29, 2024.

V. Whether Claimant should be penalized up to one day's compensation for each day he failed to report his workers' compensation claim in writing.[2]

In this case, Claimant was injured on January 25, 2023, and did not notify the Employer of his injury in writing until he filed a Workers' Claim for Compensation on or about November 20, 2023.

Section 8-43-102(1)(a), C.R.S. delineates that an employee who sustains an injury from an accident "shall notify the said employee's employer in writing of the injury within four days of the occurrence of the injury." If the employee fails to report the injury in writing "said employee may lose up to one day's compensation for each day's failure to so report." Because the statute uses the word "may," imposition of a penalty for late reporting is left to the discretion of the ALJ. *In re Johnson*, WC's 4-490-900 and 4-642-480 (ICAO, Dec. 7, 2006).

[2] Respondents contend the penalty should run from January 25, 2023, to November 20, 2023.

In this case, the Employer knew about the accident the day it occurred. Moreover, even though the Employer contended Claimant was an independent contractor, the Employer should have known Claimant might be considered an employee and entitled to workers' compensation benefits and seek such benefits at some point under the facts and circumstances of this case. Moreover, the employer did not establish that they were prejudiced in some way by Claimant's failure to timely report the injury in writing.

As a result, the ALJ finds and concludes that Respondents did establish by a preponderance of the evidence that Claimant failed to timely report his work injury in writing and that he did not report it in writing until November 20, 2023. However, the ALJ will not penalize Claimant by reducing his compensation – in any amount - for each day he failed to report his injury in writing based on the facts and circumstances of this case.

ORDER

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

1. Claimant was an employee of MM[Redacted], on January 25, 2023, and suffered a compensable injury.
2. Respondents shall pay for Claimant's reasonable and necessary medical treatment to cure and relieve him from the effects of the injury. This includes the treatment provided at UCHealth Emergency Care at Yampa Valley Medical Center, the airlift bill from Classic Air Care, LLC, and all non-emergent treatment.
3. Respondents shall pay Claimant temporary total disability benefits from January 25, 2023, through May 1, 2023, and again from November 15, 2023, when he was terminated, through March 28, 2024.
4. Respondents shall also pay Claimant temporary partial disability benefits from March 29, 2024, and continuing, until terminated by law.
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, 2024.

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 5-258-294-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable back injury during the course and scope of her employment with Employer on November 2, 2023.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonable and necessary medical benefits that are causally related to her November 2, 2023 back injury.

3. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period November 3, 2023 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 63-year-old part-time customer service clerk for Employer. She was hired by Employer on October 1, 2023.

2. On November 2, 2023 Claimant's supervisor [Redacted, hereinafter HE] asked her to relieve fellow employee [Redacted, hereinafter SW] at Employer's fuel station so he could take a break. The fuel station is a structure in which the attendant assists customers who purchase fuel and other items. The door to the building opens outward.

3. Claimant drove to the fuel station and SW[Redacted] unlocked the door so she could enter the building. After she told him he could take his break, he exited the structure.

4. Claimant explained that she assisted customers until SW[Redacted] returned to the fuel center. Claimant began opening the door to permit SW[Redacted] to enter, but he "grabbed the top of the door and yanked it open." Because she was holding the handle when the door opened outward, she was dragged forward. Claimant heard a pop and immediately suffered back pain.

5. Claimant left the fuel center and drove back to Employer's customer service desk. She reported the incident to HE[Redacted] and completed an Incident Report.

6. HE[Redacted] testified that she did not directly witness the event, but Claimant appeared to be suffering tremendous pain. Claimant's demeanor was completely different than when she had left to relieve SW[Redacted] at the fuel center.

7. HE[Redacted] spoke to SW[Redacted] shortly after the incident. He commented that nothing out of the ordinary occurred at the fuel center and Claimant was fine when he

returned from his break. SW[Redacted] also testified that Claimant had not exhibited any signs of pain or tears.

8. Claimant admitted that she had previously suffered back problems. She underwent lumbar surgery in 2007, but the November 2, 2023 incident was the first time she had injured the left side of her back. Furthermore, Claimant acknowledged that she had filed three previous Workers' Compensation claims. One claim involved the shoulder, another was for the foot, and the other related to the 2007 lumbar surgery.

9. Contrary to Claimant's testimony, the record reveals she has filed numerous prior Workers' Compensation claims. Notably, the Colorado Division of Workers' Compensation file, as reflected in Respondent's Exhibit H, demonstrates that Claimant has filed a total of 15 Workers' Compensation claims. Claimant specifically filed prior Workers' Compensation claims for her lumbar spine in 2006, 2007, 2012, and 2017. Claimant testified that she did not remember filing the preceding claims and was surprised that the current matter was the fifth one involving her back.

10. In Claimant's written discovery responses, she stated that the only prior medical treatment for her back was lumbar surgery in 2007. She also specifically denied receiving medical treatment for her back in 2023 prior to the November 2, 2023 incident. However, the record is replete with evidence that Claimant underwent repeated lower back treatment throughout 2023 prior to the present matter.

11. On February 9, 2023 Claimant visited Physician's Assistant Lauren Norheim. Claimant had been seen two days earlier for back pain and was scheduled to visit a spine specialist in March. Claimant reported severe pain and difficulty with movement.

12. On February 20, 2023 Claimant visited Daniel Robert Possley, D.O. She reported stepping out of the shower on February 7, 2023 and feeling her back pop. Claimant experienced sudden, severe pain that required her to go to the emergency room. Although Claimant's condition improved, she continued to suffer constant, achy pain.

13. On April 18, 2023 Claimant visited Salud Family Health Centers. She reported significant back pain. Claimant noted she was supposed to get another lumbar MRI and undergo injections. If the treatment did not help, she would possibly need surgery. Claimant was unable to perform activities of daily living without pain and was only able to undertake sedentary work.

14. On August 18, 2023 Claimant participated in a telehealth visit with Physician's Assistant Alexandra Miller. Claimant had been receiving steroid injections for chronic back pain. She had also received her first right-sided lumbar nerve block injection on August 14, 2023. Claimant noted she was in significant pain that was making it difficult to work and move. She had an appointment scheduled with a spine specialist for August 24, 2023 and a left-sided back injection set for August 28, 2023. PA-C Miller diagnosed Claimant with a bulging lumbar intervertebral disc.

15. On September 29, 2023, or slightly over one month before her accident in the

present matter, Claimant returned to, Salud Family Health Centers. Katherine Rufner, M.D. assessed Claimant with right-sided sciatica and lower back pain at multiple sites. Dr. Rufner referred Claimant for 12 weeks of physical therapy for her symptoms.

16. After the November 2, 2023 work incident, Claimant first obtained medical treatment on November 6, 2023 through Authorized Treating Provider (ATP) Concentra Medical Centers. Claimant explained that, while she was holding Employer's fuel station door handle with her right hand, a coworker pulled the door outward from the other side. The incident pulled her forward. Claimant immediately developed lower back pain with radicular symptoms into her legs and feet. After conducting a physical examination and diagnostic testing, Physician's Assistant Nathan Adams diagnosed Claimant with a strain of the muscle, fascia and tendon of the lower back. He concluded that objective findings were consistent with a history and/or work-related mechanism of injury. PA-C Adams assigned temporary work restrictions.

17. On November 6, 2023 Claimant also underwent an MRI of her lumbar spine. The imaging revealed a left L4-L5 disc bulge with impingement of the left L5 nerve root and chronic L3 inferior endplate deformity suggestive of an old compression fracture.

18. On November 10, 2023 Claimant visited Daniel Robert Possley, D.O. at SCL Heath Medical Group. He remarked that Claimant returned for an assessment of her lumbar pain that had worsened following a November 2, 2023 work incident. Claimant specifically recounted that, while holding a fuel station door handle, a coworker aggressively opened the door outward. The incident caused severe lower back pain that radiated into her feet. Dr. Possley noted that on February 7, 2023 Claimant was stepping out of the shower and felt a pop in her back. She experienced severe back pain and could not move. An MRI revealed a possible L3 compression fracture or congenital abnormality. He recounted that, since the February 7, 2023 accident, Claimant's back pain had improved but continued. She had also fallen twice since the February 7, 2023 fall. Dr. Possley diagnosed Claimant with a lumbar disc herniation with radiculopathy as well as lumbar foraminal stenosis. He recommended surgery in the form of a bilateral L3-L4 laminectomy and a left L4-5 discectomy.

19. On December 4, 2023 Claimant visited Mechelle D. Viola-Lewis, M.D. at Concentra for an examination. Dr. Lewis assessed Claimant with spinal stenosis of the lumbar region and an acute myofascial strain of the lumbar region. She noted that her objective findings were consistent with a history and/or work-related mechanism of injury. Dr. Lewis remarked that Claimant was scheduled to undergo lower back surgery with Dr. Possley on January 10, 2024.

20. Insurer denied Dr. Possley's surgical request. Nevertheless, Claimant underwent the procedure through her private health insurance.

21. On May 21, 2024 Claimant underwent an Independent Medical Examination (IME) with Anant Kumar, M.D. Dr. Kumar reviewed Claimant medical records and performed a physical examination. He concluded that Claimant's described mechanism of injury did not likely cause an industrial injury to her lower back while working for Employer on November 2, 2023.

22. Claimant recounted that on November 2, 2023 she was covering the fuel center for a coworker on break. She was holding the fuel station door handle when her coworker pulled the door from the outside and swung it outward. Although Claimant did not fall, the abrupt pull on the door caused immediate back pain. Claimant denied any previous Workers' Compensation injuries. Furthermore, Dr. Kumar commented that Claimant had provided a history that was inconsistent with medical records.

23. Dr. Kumar explained that Claimant had been experiencing lower back pain and bilateral lower limb radiculopathy prior to the November 2, 2023 work incident. He determined that it was unlikely that a pull on Claimant's right arm could cause a disc herniation at the L4-L5 level. Although Claimant's surgery may have been warranted based on her MRI, her symptoms were not causally related to the November 2, 2023 incident because of her chronic back condition and lack of a correlation between symptoms and clinical findings.

24. Dr. Kumar also testified at the hearing in this matter. He maintained that Claimant's lower back condition was not causally related to her November 2, 2023 work accident. He explained that an L4-L5 disc herniation would not cause bilateral leg numbness. Claimant has had bilateral lower limb radiculopathy since 2006, even though she testified that she had never previously suffered left-sided symptoms. Dr. Kumar specifically noted that Claimant had left-sided back symptoms in 2006, 2012, 2017, 2020, and 2023. He could not correlate Claimant's November 2, 2023 mechanism of injury with her symptoms. Dr. Kumar reasoned that the November 2, 2023 incident was similar to some of her previous Workers' Compensation claims involving innocuous incidents that resulted in multiple complaints. In the present matter, Claimant's subjective symptoms do not correlate with objective findings.

25. Claimant has failed to establish it is more probably true than not that she suffered a compensable lower back injury during her course and scope of her employment with Employer on November 2, 2023. Initially, Claimant explained that, while she was holding Employer's fuel station door handle with her right hand, coworker SW[Redacted]. pulled the door outward from the other side. The event pulled her forward. Claimant immediately developed lower back pain with radicular symptoms into her legs and feet. Claimant visited ATP Concentra on November 6, 2023. After conducting a physical examination and diagnostic testing, PA-C Adams diagnosed Claimant with a strain of the muscle, fascia and tendon of the lower back. On November 10, 2023 Dr. Possley at SCL Heath remarked that the November 2, 2023 accident caused severe lower back pain that radiated into her feet. An MRI revealed a possible L3 compression fracture or congenital abnormality. Dr. Possley recommended surgery in the form of a bilateral L3-L4 laminectomy and a left L4-5 discectomy. Claimant underwent the procedure through her private health insurance on January 10, 2024. Despite Claimant's contentions and Dr. Possley's surgical procedure, the medical records and persuasive opinions reflect that Claimant's back symptoms are not causally related to her job duties for Employer. Instead, the bulk of the medical records reveal that the natural progression of Claimant's pre-existing lower back condition and degenerative pathology caused her need for treatment.

26. The record reveals significant concerns about Claimant's credibility. Contrary to Claimant's testimony, she has filed numerous prior Workers' Compensation claims. Notably, the Colorado Division of Workers' Compensation file, as reflected in Respondent's Exhibit H,

demonstrates that Claimant has filed a total of 15 Workers' Compensation claims. Claimant specifically filed prior Workers' Compensation claims for her lumbar spine in 2006, 2007, 2012, and 2017. Furthermore, Claimant specifically denied receiving medical treatment for her back in 2023 prior to the November 2, 2023 accident. However, the record demonstrates that Claimant received significant lower back treatment throughout 2023 prior to the present matter. Notably, on September 29, 2023, or slightly over one month before the fuel station incident, Dr. Rufner assessed Claimant with right-sided sciatica and lower back pain at multiple sites. Dr. Rufner referred Claimant for 12 weeks of physical therapy. Even after Claimant reviewed a copy of the September 29, 2023 medical record on cross-examination, she did not remember the treatment or any other care for her back in 2023.

27. Dr. Kumar persuasively reasoned that the medical records and Claimant's mechanism of injury did not suggest she sustained an injury or aggravation of her back condition while holding Employer's fuel station door handle on November 2, 2023. Dr. Kumar's opinion regarding causation is based on Claimant's full medical history, a physical examination and a review of diagnostic studies. Dr. Kumar explained that Claimant had been experiencing lower back pain and bilateral lower limb radiculopathy prior to the November 2, 2023 work incident. He determined it was unlikely that a pull on Claimant's right arm could cause a disc herniation at the L4-L5 level. Although Claimant's surgery may have been warranted based on her MRI, it was not causally related to the November 2, 2023 incident. Notably, Dr. Possley remarked on November 10, 2023 that on February 7, 2023 Claimant was stepping out of the shower and felt a pop in her back. She suffered severe back pain and experienced recurrent symptoms and falls. The persuasive opinion of Dr. Kumar reveals that on November 2, 2023 Claimant again suffered a recurrence of her chronic back condition. There was simply a lack of correlation between her symptoms and objective clinical findings. Dr. Kumar reasoned that Claimant's mechanism of injury was simply too minor to cause or aggravate her pre-existing lower back condition.

28. Based on the medical records and persuasive medical opinion of Dr. Kumar, Claimant has failed to demonstrate she likely suffered a lower back injury while working for Employer on November 2, 2023. Moreover, Claimant's lack of credibility in failing to disclose her medical history renders her testimony dubious. Claimant's work activities thus did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. It is likely that the natural progression of Claimant's pre-existing back symptoms and degenerative pathology caused her need for treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the

claim is later deemed compensable. *Id.* Although a physician may provide diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms, there is no mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to establish by a preponderance of the evidence that she suffered a compensable lower back injury during her course and scope of her employment with Employer on November 2, 2023. Initially, Claimant explained that, while she was holding Employer's fuel station door handle with her right hand, coworker SW[Redacted] pulled the door outward from the other side. The event pulled her forward. Claimant immediately developed lower back pain with radicular symptoms into her legs and feet. Claimant visited ATP Concentra on November 6, 2023. After conducting a physical examination and diagnostic testing, PA-C Adams diagnosed Claimant with a strain of the muscle, fascia and tendon of the lower back. On November 10, 2023 Dr. Possley at SCL Heath remarked that the November 2, 2023 accident caused severe lower back pain that radiated into her feet. An MRI revealed a possible L3 compression fracture or congenital abnormality. Dr. Possley recommended surgery in the form of a bilateral L3-L4 laminectomy and a left L4-5 discectomy. Claimant underwent the procedure through her private health insurance on January 10, 2024. Despite Claimant's contentions and Dr. Possley's surgical procedure, the medical records and persuasive opinions reflect that Claimant's back symptoms are not causally related to her job duties for Employer. Instead, the bulk of the medical records reveal that the natural progression of Claimant's pre-existing lower back condition and degenerative pathology caused her need for treatment.

9. As found, the record reveals significant concerns about Claimant's credibility. Contrary to Claimant's testimony, she has filed numerous prior Workers' Compensation claims. Notably, the Colorado Division of Workers' Compensation file, as reflected in Respondent's Exhibit H, demonstrates that Claimant has filed a total of 15 Workers' Compensation claims. Claimant specifically filed prior Workers' Compensation claims for her lumbar spine in 2006, 2007, 2012, and 2017. Furthermore, Claimant specifically denied receiving medical treatment for her back in 2023 prior to the November 2, 2023 accident. However, the record demonstrates that Claimant received significant lower back treatment throughout 2023 prior to the present matter. Notably, on September 29, 2023, or slightly over one month before the fuel station incident, Dr. Rufner assessed Claimant with right-sided sciatica and lower back pain at multiple sites. Dr. Rufner referred Claimant for 12 weeks of physical therapy. Even after Claimant reviewed a copy of the September 29, 2023 medical record on cross-examination, she did not remember the treatment or any other care for her back in 2023.

10. As found, Dr. Kumar persuasively reasoned that the medical records and Claimant's mechanism of injury did not suggest she sustained an injury or aggravation of her

back condition while holding Employer's fuel station door handle on November 2, 2023. Dr. Kumar's opinion regarding causation is based on Claimant's full medical history, a physical examination and a review of diagnostic studies. Dr. Kumar explained that Claimant had been experiencing lower back pain and bilateral lower limb radiculopathy prior to the November 2, 2023 work incident. He determined it was unlikely that a pull on Claimant's right arm could cause a disc herniation at the L4-L5 level. Although Claimant's surgery may have been warranted based on her MRI, it was not causally related to the November 2, 2023 incident. Notably, Dr. Possley remarked on November 10, 2023 that on February 7, 2023 Claimant was stepping out of the shower and felt a pop in her back. She suffered severe back pain and experienced recurrent symptoms and falls. The persuasive opinion of Dr. Kumar reveals that on November 2, 2023 Claimant again suffered a recurrence of her chronic back condition. There was simply a lack of correlation between her symptoms and objective clinical findings. Dr. Kumar reasoned that Claimant's mechanism of injury was simply too minor to cause or aggravate her pre-existing lower back condition.

11. As found, based on the medical records and persuasive medical opinion of Dr. Kumar, Claimant has failed to demonstrate she likely suffered a lower back injury while working for Employer on November 2, 2023. Moreover, Claimant's lack of credibility in failing to disclose her medical history renders her testimony dubious. Claimant's work activities thus did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. It is likely that the natural progression of Claimant's pre-existing back symptoms and degenerative pathology caused her need for treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

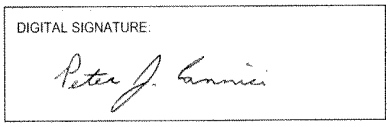
ORDER

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

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

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

DATED: August 20, 2024.



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