OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-193-443-003

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable industrial injuries during the course and scope of his employment with Employer on January 3, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his January 3, 2022 industrial injuries.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period January 4, 2022 until terminated by statute.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant was responsible for his termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits after February 22, 2022.

STIPULATIONS

The parties agreed to the following:

1. If Claimant suffered compensable injuries while working for Employer, Concentra Medical Centers is the designated provider.

2. Claimant earned an Average Weekly Wage (AWW) of $1,346.15.

3. Any entitlement to TTD benefits will be offset by Claimant's receipt of unemployment benefits.

FINDINGS OF FACT

1. Claimant is a 53-year-old male who began working for Employer as a Building Engineer on November 11, 2021. He was responsible for building operations including electrical, plumbing and HVAC services. Claimant's job duties required lifting up to 50 pounds, crawling, kneeling, squatting and climbing.

2. On January 3, 2022 Claimant was at work pushing a cart up a hill transporting a large HVAC box. He slipped on ice and fell in somewhat of a "superman" position. Claimant struck his left knee on the ground and twisted his left hip. Because the accident occurred later in the day, he reported the incident to Employer's Assistant Property Manager [Redacted, hereinafter HN].

3. HN[Redacted] testified that on January 3, 2022 Claimant stated he had injured his left knee while moving boxes. She noted that Claimant reported the incident to her because she was the only person in the office. HN[Redacted] asked Claimant whether he wanted to complete an incident report, but he declined. Claimant recounted that he had a "bad knee," which he had previously injured, and there was no need for an incident report. Claimant planned to drive home, apply an ice pack and place a brace on his left knee.

4. Claimant has not worked for Employer since January 3, 2022. Employer placed Claimant on medical leave after the injuries.

5. On January 4, 2022 Claimant visited the Littleton Adventist Emergency Department for treatment. Claimant reported left lower back and left leg pain after he slipped and fell at work on the previous day. Claimant explained that when he fell on ice his left knee flexed and he landed on his left hip. He remarked that he has subsequently experienced numbness in his entire left leg as well as his left gluteal area. Physical examination showed no swelling or deformity. Claimant also exhibited normal range of left knee motion. An x-ray of the left knee noted that there was no acute bony abnormality.

6. On February 10, 2022 Claimant visited Thomas J. Corson, D.O at Concentra Medical Centers for an evaluation. He reported that on December 25, 2021 he was pushing a large load of AC filters on a dolly at work and slipped on ice. The momentum of the cart forced him to twist and land on his knees. Claimant injured his left leg from ankle to thigh. His hip was also sore with numbing pain. Dr. Corson assessed Claimant with a left hip strain, left knee strain and radicular pain of the left lower extremity. He determined that Claimant's work-related diagnoses included the following: (1) left hip strain; (2) left knee strain; and (3) radicular pain of the left lower extremity. Dr. Corson assigned work restrictions of no lifting, carrying or pushing/pulling in excess of 15 pounds. He also directed Claimant to sit 50% of the time, not use ladders and limit his use of stairs.

7. Employer's Human Resource Specialist [Redacted, hereinafter KL] testified at the hearing in this matter. Her job duties involved general human resource needs including recruiting, Worker's Compensation, payroll and performance management. KL[Redacted] noted that Employer initiated Claimant's background check on October 29, 2021. She explained that because of the COVID pandemic there were delays in completing background checks. The partial background check was not finished until December 1, 2022.

8. KL[Redacted] explained that on December 8, 2020 she spoke to Claimant about offenses that had been revealed on his partial criminal background check. A December 8, 2020 e-mail documented the conversation. Notably, the results revealed guilty pleas to the felonies of first degree forgery and theft by taking, and a nolo contendere plea to the misdemeanor of theft/shoplifting. KL[Redacted] sought court documentation from Claimant regarding the felony convictions and instructed him about how to dispute the misdemeanor. In the December 8, 2020 discussion with Claimant, KL[Redacted] recorded that he attributed the felonies to his association with his girlfriend

and denied the misdemeanor. KL[Redacted] asked Claimant whether there were any other items that might appear on the finalized background check and he replied "no."

9. On January 10, 2022 KL[Redacted] received an e-mail from [Redacted, hereinafter KS] stating that Claimant's background check had been completed and some discrepancies had been identified. In addition to the offenses delineated in the initial background check, the completed document revealed a misdemeanor theft by taking conviction with a disposition date of March 26, 2014. There was also a felony cocaine possession conviction and the misdemeanor of possession and use of drug related objects with disposition dates of July 28, 2015. The finalized check further revealed a felony cocaine possession conviction and the misdemeanor of possession of drug related objects with dispositions dated September 19, 2016. Finally, the background check showed a felony probation violation with a disposition date of August 28, 2017.

10. KL[Redacted] received the completed background check on January 12, 2022. She testified that, although Claimant had denied additional criminal activities would be revealed on the completed background check, the document reflected cocaine convictions. In fact, the completed background check showed two felonies and misdemeanors related to possession of cocaine and drug related objects, along with an additional felony for a probation violation.

11. KL[Redacted] subsequently engaged in e-mail correspondence with KS[Redacted] and [Redacted, hereinafter AL]. Based on the discussions, KS[Redacted] sent Claimant an adverse action letter on February 10, 2022. On February 22, 2022 [Redacted hereinafter KM] sent an e-mail to Claimant terminating his employment with Employer. She remarked that the termination was based on the contents of the background check because it was "not clear by our standards." KL[Redacted] elaborated that Claimant's termination was predicated on the extent of the offenses in the background check and his failure to disclose the cocaine convictions when asked if the completed background check would reveal any other offenses.

12. Claimant testified that the February 22, 2022 e-mail did not contain any specific reason for his termination from employment. He explained that he discussed the circumstances surrounding his cocaine conviction in the meeting with KL[Redacted] on December 8, 2020. Claimant remarked that it was his understanding that his explanation about the cocaine conviction was acceptable to Employer. Notably, Claimant denied a history of any felonies besides those related to cocaine. However, despite Claimant's testimony, his criminal history reveals felony forgery, felony theft by taking, and a felony probation violation. Claimant explained that the felony forgery charge was a conviction that was not supposed to be on his record. Furthermore, Claimant justified failing to mention the forgery conviction by stating that he only informed Employer of the most current charge on his record.

13. Claimant subsequently continued to receive treatment through Concentra. On February 25, 2022 he reported worsening left knee symptoms. After conducting a physical examination, Dr. Corson noted that, because Claimant's problems had been continuing for two months, it was imperative to reach a diagnosis. He referred Claimant

for a left knee MRI to determine whether any surgical pathology was present and avoid any further delay in treatment. Dr. Corson maintained that Claimant's objective findings were consistent with a work-related mechanism of injury.

14. On March 11, 2022 Claimant underwent a left knee MRI at Invision Sally Jobe and returned to Concentra for an evaluation. He reported that his symptoms were unchanged. Claimant continued to suffer constant aching pain in the left lateral hip, left buttock and left thigh. The left knee MRI revealed "a small 5 mm nondisplaced bony fracture fragment with adjacent bone marrow edema and soft tissue edema." The radiologist commented the fracture was not visualized on the prior radiographs from January 4, 2022, but the finding was age indeterminate and could be acute or subacute. David W. Hnida, D.O. concluded that Claimant's objective findings were consistent with a work-related mechanism of injury.

15. On March 22, 2022 Claimant underwent an orthopedic evaluation with Cary Motz, M.D. at Concentra. Claimant reported that on January 3, 2022 he landed directly on his left knee at work. He immediately experienced left knee and hip pain. Dr. Motz remarked that the left knee MRI had revealed a nondisplaced distal pole patella fracture with no internal derangement. He commented that the fracture was the source of Claimant's discomfort with stairs and kneeling. Furthermore, Claimant's left hip had some trochanteric bursitis that was not surprising because of limping. Dr. Motz was optimistic that Claimant's symptoms would improve, but considered a possible steroid injection into the trochanteric bursa. He remarked that Claimant's objective findings were consistent with a work-related mechanism of injury.

16. On April 26, 2022 Claimant returned to Dr. Hnida at Concentra for an examination. He reported that his left knee symptoms were much worse and he was experiencing significant difficulties with stairs. Claimant commented that he was also starting to suffer right knee pain and instability to the point where he has fallen several times. After performing a physical examination, Dr. Hnida assessed Claimant with a left patella fracture, left hip strain and trochanteric bursitis of the left hip. He referred Claimant for physical therapy. Dr. Hnida reiterated that Claimant's objective findings were consistent with a work-related mechanism of injury.

17. On June 14, 2022 Claimant visited Dr. Motz at Concentra for an examination. Claimant reported significant improvement in his left knee pain after a steroid injection five weeks earlier. After conducting a physical examination, Dr. Motz diagnosed Claimant with the following: (1) left knee healed inferior pole patellar fracture; (2) patellofemoral pain; and (3) mild, persistent left trochanteric bursitis of the left hip. He recommended physical therapy but a date of Maximum Medical Improvement (MMI) was unknown. Dr. Motz maintained that Claimant's objective findings were consistent with a work-related mechanism of injury.

18. Claimant's work restrictions have remained in effect throughout the duration of his medical treatment with Concentra. His restrictions include no lifting, carrying or pushing/pulling in excess of 15 pounds. He was also directed to sit 50% of the time, not use ladders and limit his use of stairs. Claimant testified that he has been unable to

perform his job duties of heavy lifting, crawling, kneeling, squatting, and climbing beginning January 3, 2022 through the date of hearing in this matter.

19. On July 20, 2022 Claimant underwent an independent medical examination with Allison Fall, M.D. Claimant recounted that he was pushing a cart up a hill with a large HVAC box on top when he slipped on ice and fell in somewhat of a superman position. His left knee struck the ground and his left hip twisted. Dr. Fall reviewed Claimant's medical records and conducted a physical examination. She assessed Claimant with the following: (1) left knee pain with grade 4 degenerative changes at the lateral tibial plateau and nondisplaced distal patellar pole fracture; (2) left hip muscular pain; and (3) occasional low back pain. She noted that Claimant's subjective complaints outweighed objective findings. Dr. Fall explained that she was unable to determine whether Claimant's bony abnormality at the distal pole of the patella was caused by the January 3, 2022 work incident because it was not visualized on initial x-rays. She was unable to state within a reasonable degree of medical probability that any of Claimant's complaints were caused by his work activities on January 3, 2022.

20. On November 8, 2022 the parties conducted the pre-hearing evidentiary deposition of Dr. Fall. She testified that the x-ray of Claimant's left knee taken on January 4, 2022 did not identify any bony abnormalities or fractures at the distal pole of the patella. Dr. Fall further remarked that the x-ray was sensitive enough to pick up a fracture if it had been present on January 4, 2022.

21. Dr. Fall explained that Claimant's January 4, 2022 physical examination at Littleton Adventist Hospital showed no swelling. If Claimant had suffered a fracture on January 3, 2022, then swelling would have been present. Claimant's physical examination was also not consistent with an acute injury or a distal pole patella fracture. Dr. Fall commented that Claimant's objective findings simply did not support a work-related injury and he does not require any additional medical treatment. She summarized that, based on the absence of x-ray findings, lack of swelling or tenderness on physical examination, and Claimant's ability to extend his knee on January 4, 2022, his patellar fracture must have occurred after January 4, 2022.

22. Claimant has established it is more probably true than not that he suffered compensable injuries during the course and scope of his employment with Employer on January 3, 2022. Initially, on January 3, 2022 Claimant was at work pushing a cart up a hill transporting a large HVAC box. He slipped on ice and fell in somewhat of a "superman" position. Claimant struck his left knee on the ground and twisted his left hip. On January 4, 2022 Claimant visited the Littleton Adventist Emergency Department for treatment. Although Claimant reported left lower back and left leg pain after he slipped and fell on ice at work on the previous day, a physical examination showed no swelling or deformity. Furthermore, an x-ray of the left knee noted there was no acute bony abnormality.

23. After Claimant received additional treatment through Concentra, on February 25, 2022 Dr. Corson ordered an MRI to determine whether any surgical pathology was present and avoid any further delay in treatment. The left knee MRI revealed "a small 5 mm nondisplaced bony fracture fragment with adjacent bone marrow

edema and soft tissue edema." The radiologist commented the fracture was not visualized on the prior radiographs from January 4, 2022, but the finding was age indeterminate and could be acute or subacute.

24. On July 20, 2022 Dr. Fall conducted an independent medical examination of Claimant and was unable to determine whether the bony abnormality at the distal pole of the patella was caused by the January 3, 2022 work incident. She reasoned that the bony abnormality was not visualized on initial x-rays. Dr. Fall concluded that she was unable to state within a reasonable degree of medical probability that any of Claimant's complaints were caused by his work activities on January 3, 2022. She subsequently testified that Claimant's January 4, 2022 physical examination was also inconsistent with an acute injury or a distal pole patella fracture. Dr. Fall thus summarized that, based on the absence of x-ray findings, lack of swelling or tenderness on physical examination, and Claimant's ability to extend his knee at the Littleton Adventist Emergency Department, his patellar fracture must have occurred after January 4, 2022.

25. Despite Dr. Fall's testimony, the record is replete with evidence that Claimant likely suffered compensable injuries during the course and scope of his employment with Employer on January 3, 2022. Initially, despite minor date discrepancies, the record reflects that Claimant has consistently maintained he sustained injuries to his left hip and knee as a result of a slip and fall on ice at work while he was using a dolly to push a large load of AC filters. Moreover, the Concentra medical records reveal that Claimant's treating physicians have attributed Claimant's injuries to his slip and fall. Specifically, Drs. Corson, Motz and Hnida all persuasively emphasized that Claimant's objective findings were consistent with a work-related mechanism of injury. Notably, the preceding physicians were aware of the absence of x-ray findings of a pole patellar fracture on January 4, 2022. However, because the subsequent MRI revealed a nondisplaced distal pole patella fracture, the Concentra physicians attributed the injury to Claimant's slip and fall at work. Based on Claimant's consistent account of his mechanism of injury, the MRI revealing a left knee nondisplaced distal pole patella fracture and the persuasive medical opinions of Drs. Corson, Motz and Hnida, Claimant likely suffered injuries at work on January 3, 2022. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

26. Claimant has demonstrated that it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits for his January 3, 2022 industrial injuries. His medical treatment at Littleton Adventist Emergency Department, Concentra and Invision Sally Jobe was designed to address the work injuries he sustained on January 3, 2022. Claimant specifically underwent examinations, physical therapy, injections and diagnostic testing to assess and treat the effects of his industrial injuries. All of Claimant's medical treatment was reasonable and necessary to cure or relieve the effects of his work injuries. Accordingly, Respondents are financially responsible for all of Claimant's reasonable, necessary and causally related medical benefits for his January 3, 2022 industrial injuries.

27. Claimant has proven that it is more probably true than not that he is entitled to receive Temporary Total Disability (TTD) benefits for the period January 4, 2022 until

terminated by statute. The record reveals that Claimant's January 3, 2022 industrial injuries 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. The record reveals that Claimant suffered injuries as a result of his slip and fall at work that impaired his ability to effectively and properly perform his regular employment.

28. Claimant's work restrictions have remained in effect throughout the duration of his medical treatment with Concentra. His restrictions include no lifting, carrying or pushing/pulling in excess of 15 pounds. He was also directed to sit 50% of the time, not use ladders and limit his use of stairs. Claimant credibly testified that he has been unable to perform his job duties including heavy lifting, crawling, kneeling, squatting, and climbing beginning January 3, 2022 through date of hearing. He has not returned to work for Employer and has not earned income from any other source since the slip and fall. Accordingly, Claimant is entitled to receive TTD benefits for the period January 3, 2022 until terminated by statute.

29. Although Claimant has established that he is entitled to receive TTD benefits, Respondents have demonstrated that it is more probably true than not that he was responsible for his termination from employment under the termination statutes. Claimant is thus precluded from receiving TTD benefits after February 22, 2022. Initially, on December 8, 2021 KL[Redacted] spoke to Claimant about offenses that had been revealed on his partial criminal background check. Notably, the results reflected guilty pleas to the felonies of first degree forgery and theft by taking, and a nolo contendere plea to the misdemeanor of theft/shoplifting. KL[Redacted] sought court documentation from Claimant regarding the felony convictions and instructed him about how to dispute the misdemeanor. In the December 8, 2020 discussion with Claimant, KL[Redacted] recorded that he attributed the felonies to his association with his girlfriend and denied the misdemeanor. KL[Redacted] asked Claimant whether there were any other items that might appear on a completed background check and he replied "no."

30. KL[Redacted] received the completed background check on January 12, 2022. She testified that, although Claimant had denied that any additional criminal activities would be revealed on the completed background check, the document reflected cocaine convictions. In fact, the finalized background check showed two felonies and misdemeanors related to possession of cocaine and drug related objects, along with an additional felony for a probation violation. Claimant explained that he discussed the circumstances surrounding his cocaine conviction in the meeting with KL[Redacted] on December 8, 2020. He denied a history of any felonies besides those related to cocaine. Despite Claimant's testimony, his criminal history reveals felony forgery, felony theft by taking, and a felony probation violation.

31. On February 22, 2022 Claimant was terminated from employment with Employer. The termination was based on the contents of the background check because it was "not clear by our standards." KL[Redacted] credibly elaborated that Claimant's termination was predicated on the extent of the offenses in the background check and his failure to disclose the cocaine convictions when asked if the completed background check would reveal any other offenses. Although Claimant stated that he disclosed his cocaine

charges to Employer on December 8, 2021, the record reveals that Employer was unaware of the convictions until a later date. Specifically, KL[Redacted] credibly explained that she was unaware of the cocaine charges on December 8, 2021 and did not receive information about the offenses until January 12, 2022. The extent of Claimant's criminal history and failure to disclose that additional criminal activities would be revealed on the completed background check reflects that he precipitated his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. Respondents has thus demonstrated that it is more probably true than not that Claimant is precluded from receiving TTD benefits for the period February 23, 2022 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. 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).

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. As found, Claimant has established by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on January 3, 2022. Initially, on January 3, 2022 Claimant was at work pushing a cart up a hill transporting a large HVAC box. He slipped on ice and fell in somewhat of a "superman" position. Claimant struck his left knee on the ground and twisted his left hip. On January 4, 2022 Claimant visited the Littleton Adventist Emergency Department for treatment. Although Claimant reported left lower back and left leg pain after he slipped and fell on ice at work on the previous day, a physical examination showed no swelling or deformity. Furthermore, an x-ray of the left knee noted there was no acute bony abnormality.

8. As found, after Claimant received additional treatment through Concentra, on February 25, 2022 Dr. Corson ordered an MRI to determine whether any surgical pathology was present and avoid any further delay in treatment. The left knee MRI revealed "a small 5 mm nondisplaced bony fracture fragment with adjacent bone marrow edema and soft tissue edema." The radiologist commented the fracture was not visualized on the prior radiographs from January 4, 2022, but the finding was age indeterminate and could be acute or subacute.

9. As found, on July 20, 2022 Dr. Fall conducted an independent medical examination of Claimant and was unable to determine whether the bony abnormality at the distal pole of the patella was caused by the January 3, 2022 work incident. She reasoned that the bony abnormality was not visualized on initial x-rays. Dr. Fall concluded

that she was unable to state within a reasonable degree of medical probability that any of Claimant's complaints were caused by his work activities on January 3, 2022. She subsequently testified that Claimant's January 4, 2022 physical examination was also inconsistent with an acute injury or a distal pole patella fracture. Dr. Fall thus summarized that, based on the absence of x-ray findings, lack of swelling or tenderness on physical examination, and Claimant's ability to extend his knee at the Littleton Adventist Emergency Department, his patellar fracture must have occurred after January 4, 2022.

10. As found, despite Dr. Fall's testimony, the record is replete with evidence that Claimant likely suffered compensable injuries during the course and scope of his employment with Employer on January 3, 2022. Initially, despite minor date discrepancies, the record reflects that Claimant has consistently maintained he sustained injuries to his left hip and knee as a result of a slip and fall on ice at work while he was using a dolly to push a large load of AC filters. Moreover, the Concentra medical records reveal that Claimant's treating physicians have attributed Claimant's injuries to his slip and fall. Specifically, Drs. Corson, Motz and Hnida all persuasively emphasized that Claimant's objective findings were consistent with a work-related mechanism of injury. Notably, the preceding physicians were aware of the absence of x-ray findings of a pole patellar fracture on January 4, 2022. However, because the subsequent MRI revealed a nondisplaced distal pole patella fracture, the Concentra physicians attributed the injury to Claimant's slip and fall at work. Based on Claimant's consistent account of his mechanism of injury, the MRI revealing a left knee nondisplaced distal pole patella fracture and the persuasive medical opinions of Drs. Corson, Motz and Hnida, Claimant likely suffered injuries at work on January 3, 2022. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

Medical Benefits

11. 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 treatment 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).

12. 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).

13. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his January 3, 2022 industrial injuries. His medical treatment at Littleton Adventist Emergency Department, Concentra and Invision Sally Jobe was designed to address the work injuries he sustained on January 3, 2022. Claimant specifically underwent examinations, physical therapy, injections and diagnostic testing to assess and treat the effects of his industrial injuries. All of Claimant's medical treatment was reasonable and necessary to cure or relieve the effects of his work injuries. Accordingly, Respondents are financially responsible for all of Claimant's reasonable, necessary and causally related medical benefits for his January 3, 2022 industrial injuries.

Temporary Total Disability Benefits

14. To prove entitlement to Temporary Total Disability (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 effectively and properly to 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 he is entitled to receive TTD benefits for the period January 4, 2022 until terminated by statute. The record reveals that Claimant's January 3, 2022 industrial injuries 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. The record reveals that Claimant suffered

injuries as a result of his slip and fall at work that impaired his ability to effectively and properly perform his regular employment.

16. As found, Claimant's work restrictions have remained in effect throughout the duration of his medical treatment with Concentra. His restrictions include no lifting, carrying or pushing/pulling in excess of 15 pounds. He was also directed to sit 50% of the time, not use ladders and limit his use of stairs. Claimant credibly testified that he has been unable to perform his job duties including heavy lifting, crawling, kneeling, squatting, and climbing beginning January 3, 2022 through date of hearing. He has not returned to work for Employer and has not earned income from any other source since the slip and fall. Accordingly, Claimant is entitled to receive TTD benefits for the period January 3, 2022 until terminated by statute.

Responsible for Termination

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

18. As found, although Claimant has established that he is entitled to receive TTD benefits, Respondents have demonstrated by a preponderance of the evidence that he was responsible for his termination from employment under the termination statutes. Claimant is thus precluded from receiving TTD benefits after February 22, 2022. Initially, on December 8, 2021 KL[Redacted] spoke to Claimant about offenses that had been revealed on his partial criminal background check. Notably, the results reflected guilty pleas to the felonies of first degree forgery and theft by taking, and a nolo contendere plea to the misdemeanor of theft/shoplifting. KL[Redacted] sought court documentation from Claimant regarding the felony convictions and instructed him about how to dispute the misdemeanor. In the December 8, 2020 discussion with Claimant, KL[Redacted] recorded that he attributed the felonies to his association with his girlfriend and denied the misdemeanor. KL[Redacted] asked Claimant whether there were any other items that might appear on a completed background check and he replied "no."

19. As found, KL[Redacted] received the completed background check on January 12, 2022. She testified that, although Claimant had denied that any additional criminal activities would be revealed on the completed background check, the document reflected cocaine convictions. In fact, the finalized background check showed two felonies and misdemeanors related to possession of cocaine and drug related objects, along with an additional felony for a probation violation. Claimant explained that he discussed the circumstances surrounding his cocaine conviction in the meeting with KL[Redacted] on December 8, 2020. He denied a history of any felonies besides those related to cocaine. Despite Claimant's testimony, his criminal history reveals felony forgery, felony theft by taking, and a felony probation violation.

20. As found, on February 22, 2022 Claimant was terminated from employment with Employer. The termination was based on the contents of the background check because it was "not clear by our standards." KL[Redacted] credibly elaborated that Claimant's termination was predicated on the extent of the offenses in the background check and his failure to disclose the cocaine convictions when asked if the completed background check would reveal any other offenses. Although Claimant stated that he disclosed his cocaine charges to Employer on December 8, 2021, the record reveals that Employer was unaware of the convictions until a later date. Specifically, KL[Redacted] credibly explained that she was unaware of the cocaine charges on December 8, 2021 and did not receive information about the offenses until January 12, 2022. The extent of Claimant's criminal history and failure to disclose that additional criminal activities would be revealed on the completed background check reflects that he precipitated his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Under the totality of the circumstances Claimant committed a volitional act or exercised some control over his termination from employment. Respondents has thus demonstrated that it is more probably true than not that Claimant is precluded from receiving TTD benefits for the period February 23, 2022 until terminated by statute.

ORDER

1. Claimant suffered compensable injuries on January 3, 2022 during the course and scope of his employment with Employer.

2. Respondents are financially responsible for payment of Claimant's reasonable and necessary medical expenses for the treatment of his industrial injuries.

3. Claimant shall receive TTD benefits for the period January 4, 2022 until February 22, 2022.

4. Claimant earned an AWW of $1,346.15.

5. Claimant's entitlement to TTD benefits shall be offset by his receipt of unemployment benefits.

6. Because Claimant was responsible for his termination from employment, he is precluded from receiving TTD benefits after February 22, 2022.

7. 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 https://oac.colorado.gov/resources/oac-forms*.

DATED: February 9, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-175-074-002

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he suffered an occupational disease in the form of Carpal Tunnel Syndrome (CTS) to his right wrist during the course and scope of his employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered an acute injury to his right wrist on April 15, 2021 during the course and scope of his employment with Employer.

FINDINGS OF FACT

1. Claimant is a 61-year-old male who works for Employer as a Facility Maintenance Mechanic. His job duties primarily involve building maintenance and HVAC repairs.

2. Claimant explained that on April 15, 2021 he was helping to remove materials from the roof of Employer's facility in preparation for a roofing project. He was using a dolly to move metal frames from a higher to lower level of the roof. When he was pushing the dolly down a ramp, he developed pain and numbness in his right wrist.

3. On April 16, 2021 Claimant completed a Workers' Compensation Notice. He reported that on the previous day, he was removing debris from Employer's roof in order to prepare for a roofing project. While transporting heavy metal in a cart Claimant experienced sharp twinges of pain in his right hand.

4. On April 16, 2021 Claimant visited personal medical provider Michael Schmitz, M.D. at Kaiser Permanente for an evaluation. He reported right wrist pain. Claimant noted that "he has been having on/off symptoms for over a year, and states that in the last 2-3 months has gotten worse at night. Affects his 1st-3rd fingers. Has purchased braces and have been somewhat affective." After a physical examination, Dr. Schmitz assessed Claimant "with a 2 month history of worsening right wrist pain concerning for carpal tunnel syndrome." He remarked that Claimant exhibited obvious features of right Carpal Tunnel Syndrome (CTS), including positive Phalen and Tinel signs, as well as atrophy of the thenar muscle. Dr. Schmitz placed Claimant in a right wrist brace and referred him for an EMG. The report contains no mention of work activities, lifting heavy objects or sharp pain.

5. On April 19, 2021 Claimant visited Authorized Treating Physician (ATP) John Raschbacher, M.D. at Midtown Occupational Medicine for an evaluation. Claimant reported that he had been developing digital numbness in his right hand for the past week. He did not describe any traumatic incident, heavy lifting or sharp pain. Dr. Raschbacher noted that Claimant had no symptoms before the April 15, 2022 event. After reviewing

Claimant's work history and conducting a physical examination, Dr. Raschbacher determined that Claimant's work activities caused him to develop right CTS. He referred Claimant to hand surgeon Thomas Mordick, II, M.D. for an evaluation.

6. On April 29, 2021 Claimant visited Dr. Mordick for an evaluation. He reported that, while carrying heavy buckets of material for a roofing project on April 15, 2021, he developed pain and numbness in his right hand. After conducting a physical examination, Dr. Mordick assessed Claimant with right wrist CTS and recommended nerve conduction studies. Based on Claimant's typical job duties as an HVAC worker, Dr. Mordick determined that he "probably qualifies for work-related [CTS], although a Job Demands Analysis [JDA] would be needed to make a formal decision regarding that."

7. On May 25, 2021 Claimant underwent electrodiagnostic studies of his right upper extremity with Eric Hammerberg, M.D. The findings were compatible with a diagnosis of severe right CTS. There was no evidence of cervical radiculopathy.

8. On June 15, 2021 Carlton M. Clinkscales, M.D. performed a records review of Claimant's claim. After considering Claimant's history, Dr. Clinkscales responded to the specific interrogatory of whether lifting heavy items on April 15, 2021 would have caused Claimant to develop CTS. His answer was "[m]aybe." Dr. Clinkscales noted that CTS is generally an overuse problem, but it can be associated with an acute incident. He explained that "severe" CTS is usually "a condition of more longstanding duration," but could be related to Claimant's April 15, 2021 work incident. He sought additional records from Kaiser to determine whether Claimant had pre-existing symptoms, a prior EMG, or previous surgical recommendations. Dr. Clinkscales noted that Claimant "claims no prior treatment and no prior recommendations, but some effort for confirmation would certainly be appropriate." He also requested a JDA before making a causation determination.

9. Throughout the remainder of 2021 Claimant continued to receive treatment from Dr. Raschbacher. Dr. Raschbacher maintained that the nature of Claimant's work activities caused him to develop right CTS. He cautioned that the longer Claimant's nerve was compressed, the less likelihood of a complete recovery.

10. On July 7, 2021 Respondent filed a Notice of Contest. Respondents specifically sought further investigation regarding the compensability of Claimant's claim.

11. On November 9, 2021 [Redacted, hereinafter JA] completed a JDA for the position of Facilities Maintenance Mechanic at Employer's facility. JA[Redacted] noted that Claimant is primarily responsible for maintenance of a variety of equipment and uses a number of different tools. Claimant spent about 90%-95% of his workday performing preventative maintenance and repairs on various machines in Employer's facility. The JDA also specified that Claimant spent about 5%-10% of his workday performing computer work.

12. Relying on the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), JA[Redacted] not find evidence of any Primary or Secondary Risk Factors involved in Claimant's job duties. JA[Redacted] conducted

specific studies calculating the amount of time Claimant spent performing each of his job duties. In considering Primary Risk Factors involving Force and Repetition/Duration involving six hours of lifting 10 pounds three times or more per minute, JA[Redacted] calculated that Claimant spent 2:49:06 during an eight-hour work shift engaging in the activity. She also determined that Claimant spent 2:33:36 during an eight-hour workshift using hand tools weighing two pounds or more. Finally, JA[Redacted] concluded that Claimant spent only 1:33:48 using a mouse each day.

13. Relying on the Primary and Secondary Risk Factors delineated in the *Guidelines*, JA[Redacted] explained that Claimant did not satisfy the requisite force and repetition/duration requirements to demonstrate a cumulative trauma condition. Claimant also did not exhibit the requisite Awkward Posture & Repetition/Duration, engage in computer work or use hand held vibratory tools for the thresholds enumerated in the *Guidelines*. Claimant also did not work in a cold environment.

14. After reviewing the JDA Dr. Mordick authored a note on November 23, 2021. He agreed that Claimant did not meet any risk factors for the development of a cumulative trauma condition "let alone any specific to carpal tunnel syndrome." Dr. Mordick thus concluded that Claimant's CTS was not likely work-related and should be treated through private health insurance.

15. On December 5, 2022 Dr. Clinkscales authored a letter after reviewing additional medical records. He remarked that, in his June 15, 2021 records review, he agreed it was possible Claimant's right CTS was related to his work activities. Although Dr. Clinkscales initially agreed with Dr. Raschbacher's impression that Claimant's CTS might be work-related, he concluded that the JDA "does not support work-relatedness in this particular case." He specified that the JDA did not identify any risk factors to support a cumulative trauma disorder based on the *Guidelines*.

16. On December 6, 2021 Claimant returned to Dr. Raschbacher for an evaluation. Dr. Raschbacher authored an addendum note stating that a JDA had been performed. After remarking that he was familiar with JDA's, Dr. Raschbacher maintained that Claimant's work activities caused him to develop right CTS.

17. On February 4, 2022 Claimant underwent a right CTS release through his private insurance.

18. Claimant testified at the hearing in this matter. He remarked that he experienced numbness and tingling in his right wrist after the April 15, 2021 incident, but denied ever previously experiencing similar symptoms. However, on cross-examination, Respondent's counsel presented Claimant with the Kaiser record dated April 16, 2021. The Kaiser document reflects that Claimant reported a one-year history of right wrist symptoms, including the purchase of splints, and his condition had worsened over the prior two to three months. Claimant responded that he "forgot" he had visited Kaiser. Further, he explained that the symptoms prior to April 15, 2021 only occurred at night when his wrists roll inward.

19. Claimant has failed to prove it is more probably true than not that he suffered an occupational disease in the form of CTS to his right wrist during the course and scope of his employment with Employer. A review of his job duties, the medical records and the persuasive opinions of Drs. Mordick and Clinkscales reflect that Claimant's job duties lacked the requisite duration, force or repetition to cause a cumulative trauma condition.

20. In her JDA JA[Redacted] noted that Claimant is primarily responsible for maintaining a variety of equipment and uses a number of different tools in Employer's primary facility. JA[Redacted] conducted specific studies calculating the amount of time Claimant spent performing each of his job duties. Relying on the Primary and Secondary Risk Factors delineated in the *Guidelines*, JA[Redacted] explained that Claimant did not satisfy the requisite force and repetition/duration requirements to demonstrate a cumulative trauma condition. Claimant also did not exhibit the requisite Awkward Posture & Repetition/Duration, engage in computer work or use hand held vibratory tools for the thresholds enumerated in the *Guidelines*.

21. After reviewing the JDA Dr. Mordick explained that Claimant did not meet any risk factors for a cumulative trauma injury, "let alone any specific to carpal tunnel syndrome." Dr. Mordick thus concluded that Claimant's CTS was not likely work-related and should be treated through private health insurance. Similarly, Dr. Clinkscales concluded that the JDA "does not support work-relatedness in this particular case." He specified that the JDA did not identify any risk factors to support a cumulative trauma disorder based on the *Guidelines*.

22. In contrast, Dr. Raschbacher remarked that Claimant's work activities caused him to develop right CTS. However, Dr. Raschbacher's report does not reveal whether he considered the JDA or even requested to review the report. In contrast, the record reflects that Drs. Mordick and Clinkscales performed a proper causation analysis pursuant to the *Guidelines*. A review of Claimant's job duties, in conjunction with the persuasive opinions of Drs. Mordick and Clinkscales, demonstrates that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant thus likely did not develop right CTS while working for Employer. His employment activities did not cause, intensify, or to a reasonable degree, aggravate his condition.

23. Claimant has failed to demonstrate that it is more probably true than not that he suffered an acute injury to his right wrist on April 15, 2021 during the course and scope of his employment with Employer. Initially, Claimant asserts that on April 15, 2021 he developed pain and numbness in his right wrist while removing debris from the roof of Employer's facility. Claimant subsequently visited ATP Dr. Raschbacher and reported that he had been developing digital numbness at the right hand for the past week. He did not describe any traumatic incident, reference heavy lifting or mention sharp pain. Dr. Raschbacher diagnosed Claimant with work-related right CTS and referred him to Dr. Mordick for an evaluation.

24. Dr. Mordick initially determined that Claimant's severe, right CTS probably constituted a work-related condition but sought a JDA to make a final determination.

Similarly, Dr. Clinkscales initially reasoned that Claimant's heavy lifting on April 15, 2021 might have caused severe CTS. He noted that CTS is generally an overuse problem, but it can be associated with an acute incident. He also explained that "severe" CTS is usually "a condition of more longstanding duration." Dr. Clinkscales also sought a JDA to assess causation. The record thus reveals that Drs. Mordick and Clinkscales were aware of Claimant's potential injury while lifting heavy materials on April 15, 2021, but did not determine that he suffered an acute injury. Instead, both physicians requested a JDA to ascertain whether Claimant's work activities over time caused him to develop severe CTS.

25. After reviewing the JDA, Dr. Mordick concluded that Claimant's right wrist CTS was not caused by his work activities for Employer. Although Dr. Clinkscales initially agreed with Dr. Raschbacher that Claimant's CTS might be work-related, he also determined the JDA "does not support work-relatedness in this particular case." Drs. Mordick and Clinkscales thus exercised medical judgment to reject a causal connection between Claimant's work activities and his development of severe right CTS. Importantly, Claimant's CTS was not caused by either an acute event on April 15, 2021 or through repetitive work exposure.

26. Claimant denied any prior right wrist symptoms to Dr. Raschbacher. He also testified that he experienced numbness and tingling in his right wrist after the April 15, 2021 incident, but denied ever previously experiencing similar symptoms. However, on cross-examination, Respondent's counsel presented Claimant with a Kaiser record dated April 16, 2021. The Kaiser document reflects that Claimant reported a one-year history of right wrist symptoms that had worsened over the prior two to three months. Accordingly, based on the medical records, persuasive medical opinions of Drs. Mordick and Clinkscales, and inconsistent statements about the development of right wrist pain, Claimant has failed to demonstrate that he suffered an acute right wrist injury while working for Employer on April 15, 2021. Claimant's work activities on April 15, 2021 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. His claim for Workers' Compensation benefits is thus 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).

Occupational Disease

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

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

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

6. Rule 17, Exhibit 5 provides an algorithm for evaluating Cumulative Trauma Conditions (CTC) pursuant to the *Guidelines*. In addressing applicability, the *Guidelines* note that "CTC's of the upper extremity comprise a heterogeneous group of diagnoses which include numerous specific clinical entities including disorders of the muscles, tendons and tendon sheaths, nerves, joints and neurovascular structures." W.C.R.P. Rule

17, Exhibit 5, p. 6. In determining a diagnosis when performing a cumulative trauma analysis the *Guidelines* delineate specific musculoskeletal conditions and peripheral nerve disorders. Nevertheless, the *Guidelines* provide that "[l]ess common cumulative trauma conditions not listed specifically in these Guidelines are still subject to medical causation assessment." W.C.R.P. Rule 17, Exhibit 5, p. 21.

7. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds of pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Finally, another Primary Risk Factor in the category of computer work involves mouse use in excess of four hours per day. Secondary Risk Factors require three hours of two pounds of pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing two pounds or more. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. If neither Primary nor Secondary Risk Factors are present, the *Guidelines* provide that "the case is probably not job related."
W.C.R.P. Rule 17, Exhibit 5, p. 24.

8. The *Guidelines* specify that "good" but not "strong" evidence that occupational risk factors cause CTS include a combination of force, repetition, and vibration, or a combination of repetition and force for six hours, or a combination of repetition and forceful tool use with awkward posture for six hours, or a combination of force, repetition, and awkward posture. There is also "good" evidence that the combination of two pounds of pinch or 10 pounds of hand force three times or more per minute for three hours causes CTS. "Some" evidence of occupational risk factors for the development of CTS include wrist bending or awkward posture for four hours, mouse use more than four hours, and a combination of cold and forceful repetition for six hours. Notably, there is good evidence that repetition alone for six hours or less is not related to the development of CTS. W.C.R.P. Rule 17, Exhibit 5, pp. 28-29.

9. As found, Claimant has failed to prove by a preponderance of the evidence that he suffered an occupational disease in the form of CTS to his right wrist during the course and scope of his employment with Employer. A review of his job duties, the medical records and the persuasive opinions of Drs. Mordick and Clinkscales reflect that Claimant's job duties lacked the requisite duration, force or repetition to cause a cumulative trauma condition.

10. As found, in her JDA JA[Redacted] noted that Claimant is primarily responsible for maintaining a variety of equipment and uses a number of different tools in Employer's primary facility. JA[Redacted] conducted specific studies calculating the amount of time Claimant spent performing each of his job duties. Relying on the Primary and Secondary Risk Factors delineated in the *Guidelines*, JA[Redacted] explained that Claimant did not satisfy the requisite force and repetition/duration requirements to demonstrate a cumulative trauma condition. Claimant also did not exhibit the requisite Awkward Posture & Repetition/Duration, engage in computer work or use hand held vibratory tools for the thresholds enumerated in the *Guidelines*.

11. As found, after reviewing the JDA Dr. Mordick explained that Claimant did not meet any risk factors for a cumulative trauma injury, "let alone any specific to carpal tunnel syndrome." Dr. Mordick thus concluded that Claimant's CTS was not likely work-related and should be treated through private health insurance. Similarly, Dr. Clinkscales concluded that the JDA "does not support work-relatedness in this particular case." He specified that the JDA did not identify any risk factors to support a cumulative trauma disorder based on the *Guidelines*.

12. As found, in contrast, Dr. Raschbacher remarked that Claimant's work activities caused him to develop right CTS. However, Dr. Raschbacher's report does not reveal whether he considered the JDA or even requested to review the report. In contrast, the record reflects that Drs. Mordick and Clinkscales performed a proper causation analysis pursuant to the *Guidelines*. A review of Claimant's job duties, in conjunction with the persuasive opinions of Drs. Mordick and Clinkscales, demonstrates that Claimant did not engage in forceful and repetitive activity for an amount of time that meets the threshold for a cumulative trauma condition. Claimant thus likely did not develop right CTS while working for Employer. His employment activities did not cause, intensify, or to a reasonable degree, aggravate his condition.

Acute Injury

13. 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.

14. 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).

Soto-Carrion v. C & T Plumbing, Inc., W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

15. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *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.

16. 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 provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms, it does not follow 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); *cf. 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).

17. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered an acute injury to his right wrist on April 15, 2021 during the course and scope of his employment with Employer. Initially, Claimant asserts that on April 15, 2021 he developed pain and numbness in his right wrist while removing debris from the roof of Employer's facility. Claimant subsequently visited ATP Dr. Raschbacher and reported that he had been developing digital numbness at the right hand for the past week. He did not describe any traumatic incident, reference heavy lifting or mention sharp pain. Dr. Raschbacher diagnosed Claimant with work-related right CTS and referred him to Dr. Mordick for an evaluation.

18. As found, Dr. Mordick initially determined that Claimant's severe, right CTS probably constituted a work-related condition but sought a JDA to make a final determination. Similarly, Dr. Clinkscales initially reasoned that Claimant's heavy lifting on

April 15, 2021 might have caused severe CTS. He noted that CTS is generally an overuse problem, but it can be associated with an acute incident. He also explained that "severe" CTS is usually "a condition of more longstanding duration." Dr. Clinkscales also sought a JDA to assess causation. The record thus reveals that Drs. Mordick and Clinkscales were aware of Claimant's potential injury while lifting heavy materials on April 15, 2021, but did not determine that he suffered an acute injury. Instead, both physicians requested a JDA to ascertain whether Claimant's work activities over time caused him to develop severe CTS.

19. As found, after reviewing the JDA, Dr. Mordick concluded that Claimant's right wrist CTS was not caused by his work activities for Employer. Although Dr. Clinkscales initially agreed with Dr. Raschbacher that Claimant's CTS might be work-related, he also determined the JDA "does not support work-relatedness in this particular case." Drs. Mordick and Clinkscales thus exercised medical judgment to reject a causal connection between Claimant's work activities and his development of severe right CTS. Importantly, Claimant's CTS was not caused by either an acute event on April 15, 2021 or through repetitive work exposure.

20. As found, Claimant denied any prior right wrist symptoms to Dr. Raschbacher. He also testified that he experienced numbness and tingling in his right wrist after the April 15, 2021 incident, but denied ever previously experiencing similar symptoms. However, on cross-examination, Respondent's counsel presented Claimant with a Kaiser record dated April 16, 2021. The Kaiser document reflects that Claimant reported a one-year history of right wrist symptoms that had worsened over the prior two to three months. Accordingly, based on the medical records, persuasive medical opinions of Drs. Mordick and Clinkscales, and inconsistent statements about the development of right wrist pain, Claimant has failed to demonstrate that he suffered an acute right wrist injury while working for Employer on April 15, 2021. Claimant's work activities on April 15, 2021 did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. His claim for Workers' Compensation benefits is thus denied and dismissed.

ORDER

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

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

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

DATED: February 14, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

1. Whether the doctrines of issue preclusion, claim preclusion and law of the case bar Claimant from litigating whether the Veteran's Affairs Medical Center is an authorized provider.

3. Whether Claimant has established by a preponderance of the evidence that the Veteran's Affairs Medical Center is an authorized provider.

FINDINGS OF FACT

1. Claimant is an 88-year-old male. On June 12, 2014 he suffered an admitted industrial injury while working for Employer. Specifically, while using wire cutters to cut electric wire, Claimant felt a pop in his right chest wall. While at home several weeks later, Claimant was walking downstairs, missed a step, and twisted his left knee.

2. Claimant received treatment at different medical facilities following his work injury. Some of Claimant's treatment was related to his industrial injury and some was not. He treated at the Veteran's Affairs Medical Center (VA) in October or November, 2014.

3. In April 2015 Claimant underwent a left knee total knee replacement (TKR). Following the TKR, Claimant fell and suffered ischemic strokes of the bilateral cerebellum. After a series of hospitalizations, Claimant ultimately had a wound in the left proximal lower leg near the medial tibia.

4. On July 30, 2019 Claimant was diagnosed with a MSSA infection and underwent an above-knee right leg amputation at Sky Ridge Medical Center. Claimant subsequently pursued medical care and treatment through the VA with regard to his prosthesis and prosthesis training prior to Respondent's admission of liability for the right leg amputation.

5. On March 2, 2020 Claimant underwent a follow-up Division Independent Medical Examination (DIME) with Kristin Mason, M.D. She determined that the amputation was related to Claimant's work-related TKR and he had not reached Maximum Medical Improvement (MMI).

6. On April 7, 2020 Respondent filed an Amended General Admission of Liability (GAL). The GAL acknowledged responsibility for medical benefits as well as Temporary Total Disability (TTD) benefits arising from the amputation.

7. On July 9, 2020 the parties proceeded to a hearing before Administrative Law Judge (ALJ) Timothy Nemechek at the Office of Administrative Courts. The issue at

the hearing involved whether Claimant had proven by the preponderance of the evidence that the treatment he received at the VA was authorized.

8. Subsequent to the hearing before ALJ Nemechek, Dr. Wakeshima made multiple referrals for Claimant to obtain prosthetic treatment through the VA. For example, on July 16, 2020 Claimant visited Dr. Wakeshima for a video evaluation. Dr. Wakeshima commented that Claimant was progressing with his prosthesis training through the VA. He explained that he had received a letter from Respondent's counsel dated March 25, 2020 requesting names of referrals in Workers' Compensation matters for physical therapy and prosthesis training. Dr. Wakeshima responded that, "if this is not being authorized to be performed to the [VA] (which is the preferred route) I would then recommend Hanger Orthodics and Prosthesis for prosthesis and Spaulding Rehabilitation or Swedish for prosthetic treating." He also noted that Claimant was attempting to have physical therapy for prosthesis training continued at the VA. Dr. Wakeshima believed treatment through the VA would be medically reasonable if it could be accomplished under Claimant's Workers' Compensation claim.

9. In his July 16, 2020 report Dr. Wakeshima detailed that Claimant has had excellent progress with prosthetic training through the physical therapy department at the VA. Dr. Wakeshima thus wrote Claimant a specific order for physical therapy through the VA. He also requested authorization for Claimant's prosthesis through the VA. Dr. Wakeshima detailed that Claimant had been working with the VA and was very comfortable continuing treatment. Moreover, he remarked that the VA has "significant experience with prosthetic limbs, including the elderly population and therefore should be able to set [Claimant] up with the lightest and most straightforward prosthesis for his above-knee amputation as recommended on Dr. Mason's DIME." Therefore, Dr. Wakeshima wrote Claimant "specific orders for physical therapy and prosthesis to be performed/made through the VA Medical Center. I have previously not written patient any orders for prosthetic training and prosthesis to Hanger orthotics or Spaulding rehab as this was a second choice and the primary and preferred choice is to have this accomplished through the VA Medical Center." Finally, on July 20, 2021 Dr. Wakeshima made a separate referral to the VA for an above knee amputation prosthesis "to be accomplished under his Workers' Compensation claim."

10. On August 28, 2020 ALJ Nemechek issued a Summary Order. He determined that Claimant failed to satisfy his burden of proof for payment of benefits to the VA. ALJ Nemechek specifically found in paragraph 20 of the Summary Order that there was no evidence that ATP Dr. Wakeshima referred Claimant to the VA. He also determined in paragraph 21 that there was insufficient evidence to conclude that Claimant's care at the VA was within the normal progression of medical treatment.

11. On December 9, 2021 Claimant returned to Dr. Wakeshima for an examination. Dr. Wakeshima noted that he had written a referral to the VA "to specifically address whether [Claimant] will need a new socket and document its cost as this replacement socket would be related to his work injury, and should be covered by Workers' Compensation." In a separate authorization request, Dr. Wakeshima reiterated that he referred Claimant to the VA to assess whether he required a new socket or

modifications to his prosthesis. He then asked the VA to document approximate costs and forward the request for authorization to Claimant's Workers' Compensation carrier.

12. On January 29, 2022 Dr. Wakeshima authored a note in response to a letter from Respondent's counsel. He remarked that he attended a SAMMS conference with the attorneys for both parties on January 1, 2022. Dr. Wakeshima noted that he submitted a referral directly to the VA prosthetic clinic on January 29, 2022. He specifically documented in the referral that the prosthesis might be covered under Workers' Compensation. Dr. Wakeshima also inquired in the referral whether Claimant required a new socket or further modifications to his prosthesis. He asked the VA to document estimated costs and forward the request for authorization to Claimant's Workers' Compensation carrier.

13. On February 10, 2022 Claimant again visited Dr. Wakeshima for a video appointment. Dr. Wakeshima further recounted the discussion at the SAMMS conference about authorized treatment through the VA. He explained that Claimant's attorney had informed him at the SAMMS conference that treatment at the VA would be authorized with a referral. However, Respondent's adjuster sent an e-mail to Dr. Wakeshima's office denying treatment through the VA. The adjuster specified that the VA does not work with Workers' Compensation carriers or follow Workers' Compensation statutes. She documented that Claimant should be referred for prosthesis care to a provider who accepts and treats patients under Workers' Compensation.

14. On March 10, 2022 Claimant again had a video appointment with Dr. Wakeshima. Dr. Wakeshima recounted that, although it had been difficult to acquire progress notes from the VA, Claimant's son was able to obtain them through the patient portal and could forward them. Notably, Dr. Wakeshima commented that there was now a formal request for prosthetic treatment through the VA. Nevertheless, he again remarked that the adjuster had previously stated Respondent would not work with the VA for Workers' Compensation claims.

15. On November 3, 2022 Claimant presented for a follow-up DIME with Dr. Mason. Dr. Mason determined that Claimant reached MMI on November 3, 2022 and assigned permanent impairment. Maintenance recommendations included prosthetic evaluation and adjustment. Dr. Mason remarked Claimant "is comfortable with VA Hospital. I would not necessarily change his treating providers at this point, but do agree that the comp carrier should be financially responsible for that treatment. I agree with Dr. Wakeshima continuing to follow him…"

16. The doctrines of issue preclusion, claim preclusion and law of the case do not bar Claimant from litigating whether the VA is an authorized provider. Initially, Claimant received treatment at different medical facilities following his work injury. Some of Claimant's care was related to his industrial injury and some was not. He began treating at the VA in October or November, 2014. On July 9, 2020 the parties proceeded to a hearing before ALJ Nemechek on whether Claimant had proven by the preponderance of the evidence that the treatment he received at the VA for his industrial injuries was authorized. On August 28, 2020 ALJ Nemechek issued a Summary Order. He specifically

found in paragraph 20 that there was no evidence that ATP Dr. Wakeshima referred Claimant to the VA. He also determined in paragraph 21 that there was insufficient evidence to conclude that Claimant's care at the VA was within the normal progression of medical treatment.

17. Subsequent to the hearing before ALJ Nemechek, Dr. Wakeshima made multiple referrals for Claimant to obtain prosthetic treatment through the VA. For example, on July 16, 2020 Dr. Wakeshima wrote Claimant "specific orders for physical therapy and prosthesis to be performed/made through the VA Medical Center. I have previously not written patient any orders for prosthetic training and prosthesis to Hanger orthotics or Spaulding rehab as this was a second choice and the primary and preferred choice is to have this accomplished through the VA Medical Center." Moreover, on December 9, 2021 Dr. Wakeshima noted that he had written a referral to the VA "to specifically address whether [Claimant] will need a new socket and document its cost as this replacement socket would be related to his work injury, and should be covered by Workers' Compensation." Moreover, on March 10, 2022 Dr. Wakeshima commented that there was now a formal request for prosthetic treatment through the VA. Dr. Wakeshima's preceding comments reflect that the record is replete with referrals to the VA for Claimant's prosthetic care subsequent to the hearing before ALJ Nemechek.

18. Relying on issue and claim preclusion as well as the law of the case doctrine, Respondent contends that ALJ Nemechek's determinations in his August 20, 2020 Summary Order preclude Claimant from asserting that he was referred to the VA for treatment. However, the issue sought to be precluded is not identical to an issue actually determined in the prior proceeding because Dr. Wakeshima's numerous referrals to the VA occurred after ALJ Nemechek's Summary Order. The legal and factual matters for determination of whether the VA was authorized changed when Dr. Wakeshima explicitly referred Claimant for prosthetic care at the VA. Respondent has thus failed to establish the first prong of issue preclusion. Moreover, claim preclusion does not apply because, based on Dr. Wakeshima's referrals, the claims for relief are not identical. Accordingly, Claimant is not barred from litigating the issue of whether he was referred to the VA for treatment.

19. Claimant has established it is more probably true than not that the VA is an authorized provider. In contrast, Respondent contends that Dr. Wakeshima did not exercise his independent medical judgment in making referrals to the VA but instead made the referrals because Claimant obtained treatment at the VA both before and after the Summary Order. However, the record contains ample evidence to support that Dr. Wakeshima used his independent medical judgment concerning the referrals to the VA. The record is replete with evidence that Dr. Wakeshima did not refer Claimant to the VA for nonmedical reasons. Because Claimant did not engage in manipulative behavior and Dr. Wakeshima exercised independent decision-making, the referrals occurred in the normal progression of authorized care.

20. In his July 16, 2020 report Dr. Wakeshima detailed that Claimant has had excellent progress with prosthetic training through the physical therapy department at the VA. Dr. Wakeshima thus wrote Claimant a specific order for physical therapy and

requested authorization for Claimant's prosthesis through the VA. He detailed that Claimant had been working with the VA and was very comfortable continuing treatment. Moreover, Dr. Wakeshima remarked that the VA has "significant experiences with prosthetic limbs, including the elderly population and therefore should be able to set [Claimant] up with the lightest and most straightforward prosthesis for his above-knee amputation as recommended on Dr. Mason's DIME." Furthermore, on January 29, 2022 Dr. Wakeshima noted that he submitted a referral directly to the VA prosthetic clinic. He specifically documented in the referral that the prosthesis might be covered under Workers' Compensation. Dr. Wakeshima also inquired in the referral whether Claimant required a new socket or further modifications to his prosthesis. He asked the VA to document estimated costs and forward the request for authorization to Claimant's Workers' Compensation carrier. On March 10, 2022 Dr. Wakeshima recounted that, although it had been difficult to acquire progress notes from the VA, Claimant's son was able to obtain them through the patient portal and could forward them. Notably, Dr. Wakeshima sought to review Claimant's progress notes to provide appropriate care and recommendations.

21. Simply because Claimant requested ATP Dr. Wakeshima for a referral because he was comfortable with care at the VA does not mean the referrals were outside the scope of the normal progression of treatment. Instead, the preceding chronology reflects that Dr. Wakeshima exercised his independent medical judgment in referring Claimant to the VA. Notably, there is substantial evidence in the record that Dr. Wakeshima accommodated Claimant's request for a referral to the VA based on his professional determination that further evaluation and treatment from the VA was appropriate. Dr. Wakeshima specified that the VA had significant experience with prosthetic limbs for the elderly population and could obtain the lightest and most straightforward prosthesis for Claimant. The VA thus became authorized as a result of ATP Dr. Wakeshima's referrals in the normal course of treatment.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

Claim Preclusion, Issue Preclusion and Law of the Case

4. Claim and issue preclusion are affirmative defenses that must be pled and proven by the party seeking to apply the doctrines. *Bristol Bay Prods., LLC v. Lampack*, 312 P.3d 1155, 1164 (Colo. 2013). Although issue preclusion was created as a judicial doctrine, it has been extended to administrative proceedings, where it "may bind parties to an administrative agency's findings of fact or conclusions of law." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001); see *Holnam v. Indus. Claim Appeals Off.,* 159 P.3d 795 (Colo. App. 2006*)*.

5. Issue preclusion is broader than claim preclusion in that it applies to a cause of action different from that involved in the original proceeding. However, issue preclusion is narrower than claim preclusion because it does not apply to matters that could have been litigated in the prior proceeding but were not. *Pomeroy v. Waitkus*, 183 Colo. 244, 517 P.2d 396 (1974). Issue preclusion bars re-litigation of an issue if:

> (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom [issue preclusion] is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Youngs v. Indus. Claim Appeals Off., 297 P.3d 964, 974 (Colo. App. 2012); *Feeley v. Indus. Claim Appeals Off.*, 195 P.3d 1154, 1156 (Colo. App. 2008). An issue can be identical for issue preclusion purposes if either the facts or the legal matter raised is the same. *Carpenter v. Young*, 773 P.2d 561, 565 n. 5 (Colo.1989).

6. A full and fair opportunity to litigate an issue requires not only the availability of procedures in the earlier proceeding commensurate with those in the subsequent proceeding, but also that the party against whom the doctrine is asserted has had the same incentive to vigorously defend itself in the previous action. *Sunny Acres Villa, Inc.*, 25 P.3d at 47. A party lacks the same incentive to defend where its exposure to liability is substantially less than at the prior proceeding. *Salida Sch. Dist. R-32-J v. Morrison,* 732 P.2d 1160, 1166-67 (Colo. 1987). In addition to the amount of potential money awards, significant variations in exposure may arise from differences in the finality or permanence of judgments. *Sunny Acres Villa, Inc.*, 25 P.3d at 47.

7. Claim preclusion bars re-litigation of previously decided matters and matters that could have been raised in a prior proceeding but were not. *Foster v. Plock,* 411 P.3d 1008, 1014 (Colo.App.2016). The elements of claim preclusion are: “(1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, (4) identity or privity of parties to the actions.” *Camus v. State Farm Insurance*, 151 P.3d 678, 680 (Colo. App. 2006). Claim preclusion blocks litigation of claims that were or might have been decided only if the claims are tied by the same injury. *Layton Construction Co. v. Shaw Contract Flooring Servs., Inc.*, 409 P.3d 602 (Colo. App. 2016).

8. The law of the case doctrine is a "discretionary rule of practice ... based primarily on considerations of judicial economy and finality." *Brodeur v. American Home Assurance Co.,* 169 P.3d 139, 149 (Colo. 2007). Under the doctrine, although a court is “not inexorably bound by its own precedents, prior relevant rulings made in the same case are generally to be followed.” *In re Bass,* 142 P.3d 1259, 1263 (Colo.2006). Therefore, "[w]hen a court issues final rulings in a case, the 'law of the case' doctrine generally requires the court to follow its prior relevant rulings." *Giampapa v. American Family Mut. Ins. Co.,* 64 P.3d 230, 243 (Colo. 2003).

9. As found, the doctrines of issue preclusion, claim preclusion and law of the case do not bar Claimant from litigating whether the VA is an authorized provider. Initially, Claimant received treatment at different medical facilities following his work injury. Some of Claimant’s care was related to his industrial injury and some was not. He began treating at the VA in October or November, 2014. On July 9, 2020 the parties proceeded to a hearing before ALJ Nemechek on whether Claimant had proven by the preponderance of the evidence that the treatment he received at the VA for his industrial injuries was authorized. On August 28, 2020 ALJ Nemechek issued a Summary Order. He specifically found in paragraph 20 that there was no evidence that ATP Dr. Wakeshima referred Claimant to the VA. He also determined in paragraph 21 that there was insufficient evidence to conclude that Claimant’s care at the VA was within the normal progression of medical treatment.

10. As found, subsequent to the hearing before ALJ Nemechek, Dr. Wakeshima made multiple referrals for Claimant to obtain prosthetic treatment through the VA. For example, on July 16, 2020 Dr. Wakeshima wrote Claimant “specific orders for physical therapy and prosthesis to be performed/made through the VA Medical Center. I have previously not written patient any orders for prosthetic training and prosthesis to Hanger orthotics or Spaulding rehab as this was a second choice and the primary and preferred choice is to have this accomplished through the VA Medical Center.” Moreover, on December 9, 2021 Dr. Wakeshima noted that he had written a referral to the VA “to specifically address whether [Claimant] will need a new socket and document its cost as this replacement socket would be related to his work injury, and should be covered by Workers’ Compensation.” Moreover, on March 10, 2022 Dr. Wakeshima commented that there was now a formal request for prosthetic treatment through the VA. Dr. Wakeshima’s preceding comments reflect that the record is replete with referrals to the VA for Claimant’s prosthetic care subsequent to the hearing before ALJ Nemechek.

11. As found, relying on issue and claim preclusion as well as the law of the case doctrine, Respondent contends that ALJ Nemechek's determinations in his August 20, 2020 Summary Order preclude Claimant from asserting that he was referred to the VA for treatment. However, the issue sought to be precluded is not identical to an issue actually determined in the prior proceeding because Dr. Wakeshima's numerous referrals to the VA occurred after ALJ Nemechek's Summary Order. The legal and factual matters for determination of whether the VA was authorized changed when Dr. Wakeshima explicitly referred Claimant for prosthetic care at the VA. Respondent has thus failed to establish the first prong of issue preclusion. Moreover, claim preclusion does not apply because, based on Dr. Wakeshima's referrals, the claims for relief are not identical. Accordingly, Claimant is not barred from litigating the issue of whether he was referred to the VA for treatment.

Authorization

12. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Indus. Claim Appeals Off.,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Indus. Claim Appeals Off.,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Off.,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020) (reasoning that surgery performed by an unauthorized provider was not compensable because the employer had furnished medical treatment after receiving knowledge of the injury).

13. If an ATP refers a claimant to his personal physician based on the mistaken conclusion that a particular condition is not work related, the referral may be considered valid because the risk of mistake falls on the employer. *Cabela v. indus. Claim Appeals Off.,* 198 P.3d 1277 (Colo. App. 2008). However, an ATP may limit the scope of a referral to a specific type of treatment, and if the provider to whom the claimant was referred provides treatment beyond the scope of the referral, the care is not in the normal progression of authorized treatment. Whether a referral is limited or general in scope presents a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Off.*, 198 P.3d 1274 (Colo. App. 2008); *Garcia v. Safeway*, W.C. 4-533-704 (ICAO, Mar. 19, 2004).

14. A referral that is based upon the treating physician's independent medical judgment and not manipulative behavior by the claimant is a referral in the normal progression of authorized treatment. *In Re Jurgens v. Prowers Medical Center*, W.C. 4-

576-630 (ICAO, June 24, 2004). In *City of Durango v. Dunagan,* 939 P.2d 496, 500 (Colo. App. 1997), the court of appeals determined that "the mere fact that the claimant requested that the authorized treating physician make a referral does not mean that said referral is outside the scope of the normal progression of treatment." To the contrary, the legal test is whether the treating physician exercised independent medical judgment in making the referral. *See Id.*; *In Re Sackett v. City Market*, W.C. 4-944-222-001 (ICAO, Apr. 21, 2015) (concluding that, where referral was made for non-medical reasons physician did not exercise his independent medical judgment and referral was unauthorized). Resolution of whether a physician exercised his independent medical judgment in making a referral is a question of fact for determination by an ALJ. *Rosson v. Owens*, W.C. 4-292-534 (ICAO, May 10, 2001).

15. As found, Claimant has established by a preponderance of the evidence that the VA is an authorized provider. In contrast, Respondent contends that Dr. Wakeshima did not exercise his independent medical judgment in making referrals to the VA but instead made the referrals because Claimant obtained treatment at the VA both before and after the Summary Order. However, the record contains ample evidence to support that Dr. Wakeshima used his independent medical judgment concerning the referrals to the VA. The record is replete with evidence that Dr. Wakeshima did not refer Claimant to the VA for nonmedical reasons. Because Claimant did not engage in manipulative behavior and Dr. Wakeshima exercised independent decision-making, the referrals occurred in the normal progression of authorized care.

16. As found, in his July 16, 2020 report Dr. Wakeshima detailed that Claimant has had excellent progress with prosthetic training through the physical therapy department at the VA. Dr. Wakeshima thus wrote Claimant a specific order for physical therapy and requested authorization for Claimant's prosthesis through the VA. He detailed that Claimant had been working with the VA and was very comfortable continuing treatment. Moreover, Dr. Wakeshima remarked that the VA has "significant experiences with prosthetic limbs, including the elderly population and therefore should be able to set [Claimant] up with the lightest and most straightforward prosthesis for his above-knee amputation as recommended on Dr. Mason's DIME." Furthermore, on January 29, 2022 Dr. Wakeshima noted that he submitted a referral directly to the VA prosthetic clinic. He specifically documented in the referral that the prosthesis might be covered under Workers' Compensation. Dr. Wakeshima also inquired in the referral whether Claimant required a new socket or further modifications to his prosthesis. He asked the VA to document estimated costs and forward the request for authorization to Claimant's Workers' Compensation carrier. On March 10, 2022 Dr. Wakeshima recounted that, although it had been difficult to acquire progress notes from the VA, Claimant's son was able to obtain them through the patient portal and could forward them. Notably, Dr. Wakeshima sought to review Claimant's progress notes to provide appropriate care and recommendations.

17. As found, simply because Claimant requested ATP Dr. Wakeshima for a referral because he was comfortable with care at the VA does not mean the referrals were outside the scope of the normal progression of treatment. Instead, the preceding

chronology reflects that Dr. Wakeshima exercised his independent medical judgment in referring Claimant to the VA. Notably, there is substantial evidence in the record that Dr. Wakeshima accommodated Claimant's request for a referral to the VA based on his professional determination that further evaluation and treatment from the VA was appropriate. Dr. Wakeshima specified that the VA had significant experience with prosthetic limbs for the elderly population and could obtain the lightest and most straightforward prosthesis for Claimant. The VA thus became authorized as a result of ATP Dr. Wakeshima's referrals in the normal course of treatment. *See In Re Jurgens v. Prowers Medical Center*, W.C. 4-576-630 (ICAO, June 24, 2004) (concluding that, where the claimant called the ATP and requested a referral to another neurosurgeon based on the recommendation of her personal chiropractor, the referral was made in the normal course of treatment and thus authorized); *Rosson v. Owens*, W.C. 4-292-534 (ICAO, May 10, 2001) (determining that ATP exercised independent medical judgment where his referral to a neurologist was based on the claimant's familiarity with the neurologist and the claimant suggested the referral).

ORDER

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

1. Claimant is not barred from litigating the issue of whether he was referred to the VA for treatment.

2. Based on ATP Dr. Wakeshima's referrals in the normal course of treatment, the VA is an authorized medical provider.

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

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

DATED: February 22, 2023.

DIGITAL SIGNATURE.
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-664-891-001

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that continuing medical maintenance benefits in the form of opioid medications are reasonable, necessary and causally related to her August 28, 2005 industrial injuries.

2. Whether Claimant has established by a preponderance of the evidence that medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to her August 28, 2005 industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a hairstylist and manager. On August 28, 2005 Claimant sustained a compensable injury to her left elbow when she slipped and fell at work. On February 10, 2010 ALJ Cannici issued an Order concluding that Claimant was permanently and totally disabled. Respondents began paying benefits pursuant to the Order and filed a Final Admission of Liability (FAL) on May 5. 2010. Claimant continued to receive maintenance care from her treating physicians. She had a Spinal Cord Stimulator (SCS) implant prior to reaching Maximum Medical Improvement (MMI).

2. On August 25, 2020 Respondents filed an application for hearing challenging the reasonableness and necessity of medical maintenance care. Respondents specifically disputed the reasonableness and necessity of opioid medications and Ketamine infusions that have been prescribed by Claimant's current Authorized Treating Physician (ATP) Paul S. Leo, M.D.

3. Respondents retained Nicholas K. Olsen as their medical expert in the present matter. On February 23, 2021 the parties conducted the post-hearing evidentiary deposition of Dr. Olsen. He explained that Claimant has been chronically using opioid medications since the date of her injury. In a report dated April 3, 2017 Dr. Olsen noted that Claimant had been on high doses of opioids for over eight years. He also commented that there was no evidence that her function had improved or the opioids had decreased her pain levels.

4. The medical records frequently reference MME levels. Dr. Olsen testified that MME stands for Morphine Milligram Equivalent. Each opioid has a conversion to MME. The MME thus serves as a standard to compare the strength of different opioids. Dr. Olsen remarked that it is generally accepted that the MME levels should be no higher than 60-90.

5. In 2017 Claimant received care from ATP Peter N. Reusswig, M.D. Claimant treated with Dr. Reusswig until he passed away. Claimant subsequently received treatment from Dr. Reusswig's partner ATP Amar Patel, M.D. beginning in 2018.

6. On July 11, 2018 Claimant visited Dr. Patel for an examination. Dr. Patel commented that Claimant had been on high dose opioid therapy for quite some time and was going to need to be weaned. The dose was simply too high. When Claimant returned to Dr. Patel on September 4, 2018 he again stated that Claimant's opioids were too high and it was necessary to start the weaning process.

7. On October 2, 2018 Claimant saw Physician's Assistant Joseph Shankland at Dr. Patel's office. PA-C Shankland reported that Claimant had a second SCS implant about three weeks before the appointment. Claimant had noticed about a 50% improvement in her pain. She was taking Hydromorphone 2 MG tablets and using five different fentanyl patches. PA-C Shankland remarked that: "Pt has already started a self taper at this time. Coming into today MME=190, after today it is MME=182. Will need to continue downward trend to get the pt below MME=120 or lower, overall goal is MME=90."

8. On December 4, 2018 Claimant returned to Dr. Patel for an evaluation. He explained that the second SCS device was helping with Claimant's back pain. In addressing weaning from opioids Dr. Patel remarked, "she has been on high dose opiates pending placement of this device (done by Dr. Beasley at BNA). Accordingly, we are going to continue weaning her. Today, Fentanyl TD reduced by 12 mcg. We will CONTINUE TO WEAN MONTHLY TO AN OME < 90. Continue Hydromorphone by mouth for now. Follow-up in 1 month. The patient appears to be using opiates appropriately, without evidence of misuse or diversion."

9. On February 5, 2019 Claimant saw Dr. Patel for an examination. Dr. Patel explained that he had a long discussion with Claimant and her husband about the goal of weaning and engaging in a minimum 4-6 week opiate free period. He remarked that Claimant could consider a Ketamine infusion that "would be excellent to assist with continuing to reduce opiates. We will see if this can get approved w/her insurance carrier."

10. On May 21, 2019 Claimant returned to Dr. Patel's office and visited Nurse Practitioner Susan Miget for an examination. Claimant reported body pain and repeated that her SCSs were not helping with pain. She reported pain levels of 8 out of 10. Claimant commented that Suboxone was making her feel sick and drunk. NP-C Miget switched Claimant from Suboxone and started her on Nucynta.

11. Claimant again visited Dr. Patel on July 2, 2019 for an examination. Dr. Patel noted that he and Claimant discussed the goal of completely weaning her from opioids within the next three months. Moreover, he also had an extensive discussion with Claimant and her husband about the reasonable option of Ketamine infusions based on her positive response to Nucynta. Dr. Patel noted that they had tried many other medications, including Gabapentin, Lyrica and Cymbalta, that were all discontinued due

to side effects. He reduced Claimant's Nucynta from 100 mg to 50 mg per day and Oxycodone from four to three per day.

12. On July 16, 2019 Claimant visited NP-C Miget for an evaluation. Claimant reported that her pain levels were 8 out of 10. NP-C Miget recounted that Claimant's husband specified Claimant had suffered severe pain since Dr. Patel had reduced her opioid medications. NP-C Miget detailed that every attempt to even slightly decrease Claimant's opioids had resulted in an immediate clinic follow-up visit to adjust medications back to previous levels. She had repeatedly asked Claimant to give any changes a few weeks to determine their effects. At the end of the visit, NP-C Miget adjusted Claimant's long-acting Nucynta back to 100 mg.

13. Dr. Patel testified at the hearing that in 2018 he sought to decrease Claimant's daily opiate pain medications. He explained that he attempted to substitute opiate medications with non-opiate treatments including Gabapentin, Lyrica, Cymbalta and Suboxone. However, after each trial of the non-opiate medications, Claimant quickly reported that she was experiencing difficult side effects and requested restoration of her opiate prescriptions. Claimant also complained that her SCS was no longer effective in mitigating her pain. Dr. Patel recommended a six-week period of abstinence from opiates because Claimant's system had become desensitized to their effectiveness. He emphasized that the goal of opioid reduction is to reach the lowest possible dose that achieves pain relief and maintains function. Dr. Patel recommended a series of Ketamine infusions to aid in abstinence. However, because of Claimant's resistance to his recommendations, Dr. Patel concluded Claimant and her husband were attempting to dictate medical care. He thus resigned as her physician. Dr. Patel summarized that Claimant needs to be completely weaned from opioid medications.

14. On September 16, 2019 Claimant began treatment with ATP Dr. Leo. On January 13, 2021 the parties conducted the pre-hearing evidentiary deposition of Dr. Leo. He noted that he sees Claimant at least monthly through Telehealth to monitor her opioid medications. Dr. Leo testified that Claimant suffers from Chronic Regional Pain Syndrome (CRPS). He recounted that Claimant was using Nucynta extended release 100 millligrams twice per day and five milligrams of Oxycodone up to four times each day for a total MME of 110. Claimant also takes a variety of non-opioid medications for her symptoms. He explained that Claimant's current medication regimen is reasonable and necessary to treat her work injuries. Dr. Leo commented that Ketamine infusions would hopefully help relieve Claimant's pain and reduce her dependence on opioids.

15. In a clinical note from October 24, 2020 Dr. Leo stated it was "absurd" that Respondents were trying to have Claimant wean off her medications "which are within the guideline for morphine equivalent and dose, and clearly helpful to her." Similarly, in his pre-hearing deposition, Dr. Leo explained that Claimant's MME of 110 was within the guidelines of between 90-120 MME's daily. He further elaborated that, even if Claimant's level of 90 MME is a "little above" the guidelines, the amount is "easily justified" and he did not "see any reason to decrease [Claimant] at this point" because it would not benefit her. Dr. Leo also acknowledged that he had not made any attempts to wean Claimant off

her opiates during treatment. He summarized that Claimant's current medication regime was appropriate.

16. Claimant testified at the hearing in this matter. She remarked that she still suffers from pain as a result of her work injuries. Claimant explained she is no longer using Fentanyl patches and has reduced her opioid use. She emphasized that she has consistently followed the recommendations of her physicians in reducing her opioid medications. Claimant would like to proceed with Ketamine infusions because the treatment may reduce her medications and alleviate her pain.

17. On February 23, 2021 the parties conducted the post-hearing evidentiary deposition of Dr. Olsen. Based on his evaluations of Claimant over the years, as well as a review of the extensive medical records, Dr. Olsen agreed with Dr. Patel that Claimant needs to be weaned from opioid medications. He explained that, given Dr. Patel's experience with Claimant and her husband during Dr. Patel's attempt to wean her from opioids, the weaning process could not be performed on an outpatient basis. Instead, weaning had to be done at an in-patient detoxification center. Dr. Olsen reasoned that, if Claimant did not accept the offer to attend an in-patient detoxification program, it would be unreasonable to allow Claimant to continue taking opioids. He explained that Claimant's intolerance to all prescribed non-narcotic medications suggests that she seeks to remain on opioid medications.

18. Respondents do not seek to terminate all of Claimant's medical maintenance benefits, but only her opioid medications. Claimant thus has the burden to prove the challenged treatment is reasonable, necessary and related to the industrial injury. The record reflects that Claimant has proven that it is more probably true than not that continuing medical maintenance benefits in the form of opioid medications are reasonable, necessary and causally related to her August 28, 2005 industrial injuries only for a six-month weaning period from the date of this order.

19. Initially, on August 28, 2005 Claimant sustained a compensable injury to her left elbow when she slipped and fell at work. Dr. Olsen persuasively explained that Claimant has used opioids dating back to her industrial injury. In a report from April 3, 2017 Dr. Olsen specified that Claimant had been on high doses of opioids for over eight years. He remarked that it is generally accepted that MME levels should be no higher than 60-90. Dr. Olsen also commented that there is no evidence that her function has improved or her pain levels have decreased. By July 11, 2018 ATP Dr. Patel also remarked that Claimant had been on high dose opioid therapy for quite some time and needed to be weaned. The medical records reveal that he continued to discuss the opioid weaning process with Claimant and her husband. Dr. Patel testified that it was apparent Claimant was fixated on staying on opioids. He remarked that Claimant and her husband had resisted all attempts to reduce opioids. Dr. Patel summarized that Claimant needs to be completely weaned from opioid medications. Finally, based on his evaluations of Claimant over the years, as well as a review of the extensive medical records, Dr. Olsen agreed with Dr. Patel that Claimant needs to be weaned from opioid medications.

20. In contrast, ATP Dr. Leo testified that Claimant's current medication regimen is reasonable and necessary to treat her work injuries. However, the medical records, in conjunction with the persuasive opinions of Drs. Patel and Olsen, reflect that Claimant necessitates weaning from opioids. Specifically, Claimant requires a reduction of opioids until her use of the medications ceases. Accordingly, Claimant has established that her use of opioids is only reasonable and necessary to treat her August 28, 2005 industrial injuries for a six-month weaning period. Claimant shall be weaned from opioids within six months from the date of this order. Respondents are thus only obligated to pay for opiate medications for the next six months while Claimant weans off her opiate medications. If Claimant is not fully weaned from her opiates after six months, then Respondents are no longer financially responsible for opioid medications under the present claim.

21. Claimant has established that it is more probably true than not that medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to her August 28, 2005 industrial injuries only for a six-month weaning period from the date of this order. The bulk of the evidence demonstrates that Ketamine infusions will reduce Claimant's reliance on opioids and thus aid in the reduction and cessation of opioid medications. Therefore, Respondents shall only be obligated to pay for Ketamine infusions for six months from the date of this order.

22. In a February 5, 2019 examination, Dr. Patel had a long discussion with Claimant and her husband about the goal of weaning and engaging in a minimum 4-6 week opiate free period. He remarked that Claimant could consider a Ketamine infusion that "would be excellent to assist with continuing to reduce opiates." Dr. Patel explained that Ketamine infusions constituted a reasonable treatment option to reduce Claimant's opioid reliance. On October 30, 2019 Dr. Leo reported that Claimant was getting relief from her SCSs and stated that "[i]f we can assure that she will have a Ketamine infusion we can then continue to decrease medications if that infusion is successful." Furthermore, Dr. Leo testified that Ketamine infusions would hopefully relieve Claimant's pain and reduce her dependence on opioids. Finally, Claimant noted she would like to proceed with Ketamine infusions with the hope that the treatment will reduce her medications and alleviate her pain.

23. In contrast, Dr. Olsen explained that there is a lack of evidence suggesting that Ketamine can do what the providers in the present matter suggest it can do. Despite Dr. Olsen's opinion, the medical records, in conjunction with the persuasive opinions of ATPs Drs. Patel and Leo, reveal that Ketamine treatment is a reasonable and necessary modality to reduce Claimant's reliance on opioids and facilitate the weaning process. However, the record reveals that Dr. Leo may not agree to reduce or wean Claimant from opioid medications. Notably, he did not "see any reason to decrease [Claimant] at this point" because it would not benefit her. Dr. Leo also acknowledged that he had not made any attempts to wean Claimant off her opiates during treatment. He summarized that Claimant's current medication regime was appropriate. Based on Dr. Leo's stated reluctance to wean Claimant from opioids, Respondents shall not be required to pay for Ketamine infusions for more than a period of six months. Accordingly, Claimant may only

receive Ketamine infusions for a six-month weaning period from the date of this order. If Claimant is not fully weaned from her opiates after six months, then Respondents are no longer financially responsible for Ketamine treatment under the present claim.

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).

Medical Maintenance Benefits

4. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest the liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013). Specifically, respondents are not liable for future

maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

Opioid Medications

5. As found, Respondents do not seek to terminate all of Claimant's medical maintenance benefits, but only her opioid medications. Claimant thus has the burden to prove the challenged treatment is reasonable, necessary and related to the industrial injury. The record reflects that Claimant has proven by a preponderance of the evidence that continuing medical maintenance benefits in the form of opioid medications are reasonable, necessary and causally related to her August 28, 2005 industrial injuries only for a six-month weaning period from the date of this order.

6. As found, initially, on August 28, 2005 Claimant sustained a compensable injury to her left elbow when she slipped and fell at work. Dr. Olsen persuasively explained that Claimant has used opioids dating back to her industrial injury. In a report from April 3, 2017 Dr. Olsen specified that Claimant had been on high doses of opioids for over eight years. He remarked that it is generally accepted that MME levels should be no higher than 60-90. Dr. Olsen also commented that there is no evidence that her function has improved or her pain levels have decreased. By July 11, 2018 ATP Dr. Patel also remarked that Claimant had been on high dose opioid therapy for quite some time and needed to be weaned. The medical records reveal that he continued to discuss the opioid weaning process with Claimant and her husband. Dr. Patel testified that it was apparent Claimant was fixated on staying on opioids. He remarked that Claimant and her husband had resisted all attempts to reduce opioids. Dr. Patel summarized that Claimant needs to be completely weaned from opioid medications. Finally, based on his evaluations of Claimant over the years, as well as a review of the extensive medical records, Dr. Olsen agreed with Dr. Patel that Claimant needs to be weaned from opioid medications.

7. As found, in contrast, ATP Dr. Leo testified that Claimant's current medication regimen is reasonable and necessary to treat her work injuries. However, the medical records, in conjunction with the persuasive opinions of Drs. Patel and Olsen, reflect that Claimant necessitates weaning from opioids. Specifically, Claimant requires a reduction of opioids until her use of the medications ceases. Accordingly, Claimant has established that her use of opioids is only reasonable and necessary to treat her August 28, 2005 industrial injuries for a six-month weaning period. Claimant shall be weaned from opioids within six months from the date of this order. Respondents are thus only obligated to pay for opiate medications for the next six months while Claimant weans off her opiate medications. If Claimant is not fully weaned from her opiates after six months, then Respondents are no longer financially responsible for opioid medications under the present claim.

Ketamine Infusions

8. As found, Claimant has established by a preponderance of the evidence that medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to her August 28, 2005 industrial injuries only for a six-

month weaning period from the date of this order. The bulk of the evidence demonstrates that Ketamine infusions will reduce Claimant's reliance on opioids and thus aid in the reduction and cessation of opioid medications. Therefore, Respondents shall only be obligated to pay for Ketamine infusions for six months from the date of this order.

9. As found, in a February 5, 2019 examination, Dr. Patel had a long discussion with Claimant and her husband about the goal of weaning and engaging in a minimum 4-6 week opiate free period. He remarked that Claimant could consider a Ketamine infusion that "would be excellent to assist with continuing to reduce opiates." Dr. Patel explained that Ketamine infusions constituted a reasonable treatment option to reduce Claimant's opioid reliance. On October 30, 2019 Dr. Leo reported that Claimant was getting relief from her SCSs and stated that "[i]f we can assure that she will have a Ketamine infusion we can then continue to decrease medications if that infusion is successful." Furthermore, Dr. Leo testified that Ketamine infusions would hopefully relieve Claimant's pain and reduce her dependence on opioids. Finally, Claimant noted she would like to proceed with Ketamine infusions with the hope that the treatment will reduce her medications and alleviate her pain.

10. As found, in contrast, Dr. Olsen explained that there is a lack of evidence suggesting that Ketamine can do what the providers in the present matter suggest it can do. Despite Dr. Olsen's opinion, the medical records, in conjunction with the persuasive opinions of ATPs Drs. Patel and Leo, reveal that Ketamine treatment is a reasonable and necessary modality to reduce Claimant's reliance on opioids and facilitate the weaning process. However, the record reveals that Dr. Leo may not agree to reduce or wean Claimant from opioid medications. Notably, he did not "see any reason to decrease [Claimant] at this point" because it would not benefit her. Dr. Leo also acknowledged that he had not made any attempts to wean Claimant off her opiates during treatment. He summarized that Claimant's current medication regime was appropriate. Based on Dr. Leo's stated reluctance to wean Claimant from opioids, Respondents shall not be required to pay for Ketamine infusions for more than a period of six months. Accordingly, Claimant may only receive Ketamine infusions for a six-month weaning period from the date of this order. If Claimant is not fully weaned from her opiates after six months, then Respondents are no longer financially responsible for Ketamine treatment under the present claim.

ORDER

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

1. Claimant shall receive opioid medications for a six-month weaning period from the date of this order. If Claimant is not fully weaned from her opiates after six months, then Respondents are no longer financially responsible for opioid medications under the present claim.

2. Claimant may receive Ketamine infusions for a six-month weaning period from the date of this order. If Claimant is not fully weaned from her opiates after six

months, then Respondents are no longer financially responsible for Ketamine treatment under the present claim.

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

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

DATED: February 28, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-193-745-002

ISSUES

I. Whether Respondent established by a preponderance of the evidence Respondent is entitled to withdraw its Final Admission of Liability (FAL) as a result of fraud.

II. Whether Respondent established by a preponderance of the evidence Claimant received an overpayment of worker's compensation benefits due to fraud and thus Respondent is entitled to repayment.

FINDINGS OF FACT

1. Claimant is a treasury clerk for Employer. Claimant has worked for Employer for approximately 15 years.

2. Claimant alleges she sustained a work injury on Friday, January 7, 2022 when she slipped and fell on ice in Employer's parking lot and twisted her ankle.

3. Claimant's scheduled start time is 6:00 a.m. Claimant testified at hearing she was running late to work on the morning of January 7, 2022 due to car trouble. She testified that that her common law husband, [Redacted, hereinafter DR], drove her to work that morning in a borrowed car.

4. At hearing, Claimant was shown Respondent's Exhibit F, an aerial view of her work location. Claimant testified that she and DR[Redacted] arrived in Employer's parking lot at approximately 6:25 a.m., entering through the [Redacted, hereinafter RC] entrance and pulling into a parking spot to the right of a large tree in front of her work building shown on the map. Claimant testified that upon exiting the vehicle, she slipped on ice, causing her ankle to go under the vehicle and twist. Claimant testified she initially believed she had just twisted her ankle. She testified DR[Redacted] then reminded her that they needed to pay a bill so she got back into the car. Claimant testified her and DR[Redacted] then exited Employer's parking lot and drove to a 7-11 store approximately one and a half blocks away. She testified she retrieved money from an ATM at the 7-11 store, gave DR[Redacted] the money, and proceeded to walk back to her work location while DR[Redacted] drove away. Claimant testified she walked back to work down 31st Street, turning into the work location through the entrance on 31st street.

5. Claimant testified that she was attempting to see if her ankle was "okay" while walking. Claimant testified that she did not report her alleged work injury to Employer on the date of the alleged incident because she thought she was okay. She testified that, upon arriving home after completing her shift on January 7, 2022, she experienced

swelling and bruising. She further testified that over the weakened she treated her ankle with ice and heat.

6. Claimant notified her supervisor of the alleged injury on the morning of Monday, January 10, 2022 and was sent for medical treatment.

7. Claimant presented to authorized treating physician (ATP) David Hnida, D.O. at Concentra on January 10, 2022 with complaints of persistent pain with no numbness or tingling. Physical examination of Claimant's ankle revealed ecchymosis and swelling laterally, tenderness in the lateral malleolus, and limited range of motion. X-rays revealed an avulsion fracture lateral malleolus. Dr. Hnida assessed Claimant with a right ankle fracture. He noted that the objective findings were consistent with Claimant's history and/or work-related mechanism of injury/illness. Dr. Hnida referred Claimant to an orthopedic specialist and released her to modified duty working seated duty only.

8. On March 4, 2022 ATP David Orgel, M.D. placed Claimant at maximum medical improvement (MMI) with no permanent impairment, restrictions or need for follow-up.

9. Based on Claimant's report of the injury, Respondent filed a FAL on April 13, 2022. Respondent noted $3,743.09 in TTD benefits paid for January 10, 2022 through February 24, 2022, and medical benefits paid totaling $2,407.15. Respondent further noted that it reserved the right to take credit for a TTD overpayment of $244.11 ($3,987.20 - $244.11 = $3,743.09). The FAL reflects an average weekly wage (AWW) $854.40.

10. Claimant does not dispute that she received a total of $3,987.20 in TTD benefits and $2,407.15 in medical benefits in connection with the alleged January 7, 2022 work injury.

11. DR[Redacted] testified at hearing on behalf of Claimant. He testified that he dropped Claimant off at work on the morning of January 7, 2022 and saw her fall. He testified that he and Claimant then went to a 7-11 store to retrieve cash and Claimant subsequently walked back to work. DR[Redacted] did not recall what time the alleged incident occurred. He testified that over the weekend he observed Claimant's leg, which appeared bruised and swollen. DR[Redacted] acknowledged that he and Claimant shared expenses, which would include repayment of worker's compensation benefits.

12. [Redacted, hereinafter DY] testified at hearing on behalf of Respondent. DY[Redacted] is the senior manager of Employer's treasury department and works in the same building as Claimant. DY[Redacted] reviewed Respondent's Exhibit F and testified that the numbers on the map correspond with Employer's exterior security cameras. DY[Redacted] explained that the map does not identify camera 61, which is located in the upper right hand corner of the map and covers the parking lot towards RC[Redacted], including the side of the treasury building with the large tree referenced by Claimant in her testimony. DY[Redacted] testified that he reviewed Employer's security camera footage taken from 6:00 a.m. to 7:00 a.m. on the date of the alleged incident. He testified that the video footage did not show Claimant entering or exiting Employer's parking lot in a vehicle, nor did it show Claimant slipping and falling. He testified that Claimant first

appeared on the video footage while walking outside of her work location at approximately 6:51 a.m.

13. The ALJ reviewed security camera footage from the date and time of the alleged incident, admitted as Respondent's Exhibit E. The footage contains views from multiple cameras (cameras identified on Respondent's Exhibit F as 05, 00, 1, 55, 58, as well as the camera identified by DY[Redacted] as camera 61), showing multiple angles of Employer's parking lot, the surrounding streets, and entrance to the building in which Claimant works. The footage specifically shows the area of Employer's parking lot where Claimant alleges DR[Redacted] dropped her off and she slipped and fell. At no point is Claimant observed entering or exiting the parking lot in a vehicle, entering or exiting a vehicle while in the parking lot, or slipping and falling whatsoever. The footage shows Claimant walking on a road outside of Employer's premises, walking into Employer's parking lot and entering her work building at approximately 6:51 a.m.

14. The ALJ also reviewed video footage from Employer's interior security cameras, which showed multiple areas of the workplace on the day of the alleged injury. Claimant is not observed limping or exhibiting any pain behaviors.

15. Claimant viewed part of the video footage at hearing. Claimant did not dispute the contents of the footage and offered no explanation as to why the footage did not show the alleged incident.

16. Claimant testified that her household income includes her wages and DR[Redacted] disability pay of approximately $1,100 per month. She testified to the following monthly household expenses: rent $1,050.00, car payment $400.00, Xcel energy $150.00, car insurance $200.00, and food $300.00. Claimant testified she could not afford to pay back any money owed to Respondent at a rate of $500 or $400 per month. Claimant did not identify a repayment amount she feels is feasible.

17. The ALJ credits the testimony of DY[Redacted], as supported by the records, over the testimony of Claimant and DR[Redacted].

18. Respondent proved it is more probably true than not Claimant knowingly made a false representation of material fact to Respondent for the purpose of obtaining worker's compensation benefits. Respondent relied upon Claimant's material misrepresentation in filing its FAL and paying benefits, only becoming aware of the false representation when reviewing video footage disproving Claimant's reported series of events.

19. Respondent proved it is more probably true than not Claimant received a total of $6,394.35 in medical and indemnity benefits to which she was not entitled due to fraud.

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).

Withdrawal of FAL

An ALJ may permit an insurer to withdraw an FAL and order repayment of benefits if the claimant fraudulently supplied false information upon which the insurer relied in filing the admission. §8-43-303 C.R.S.; *see also Renz v. Larimer County School Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996); *In re Arczynski,* WC 4-156-147 (ICAO, Dec. 15, 2005). Because admissions of liability may not ordinarily be withdrawn retroactively, §8-43-201(1) C.R.S. provides that the party seeking reopening bears the burden of proof by a preponderance of the evidence to establish the existence of fraud. *See Salisbury v. Prowers County School District*, WC 4-702-144 (ICAO, June 5, 2012). Where the evidence is subject to more than one interpretation, the existence of fraud is a factual determination for the ALJ. *In re Arczynski, supra*.

To prove fraud or material misrepresentation, the party must show: (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; (5) Action based on the representation or concealment resulting in damage. *Arczynski*, *supra*, citing *Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). Where the evidence is subject to more than one interpretation, the existence of fraud is a factual issue for resolution by the ALJ. *Arczynski, supra*; *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981).

As found, the preponderant evidence demonstrates Claimant knowingly provided false information to Respondent upon which Respondent relied in filing its admission of liability. Claimant reported to Employer that she slipped and fell in Employer's parking lot on January 7, 2022, injury her ankle. Claimant purports that the alleged incident occurred between 6:10 a.m. and 6:45 a.m. Video footage showing multiple areas of Employer's parking lot from 6:00 a.m. to 7:00 a.m. on January 7, 2022, including the specific area in which Claimant alleged the incident took place, establishes that no such incident occurred. The footage does not evidence anything similar to what Claimant purports took place, aside from her walking into Employer's parking lot from outside of Employer's premises. Claimant observed the footage at hearing, did not dispute the video footage, and provided no explanation for why the footage did not demonstrate the incident she reported.

In addition to the footage refuting Claimant's reports of the alleged incident, Claimant's testimony that she slipped and twisted her ankle in Employer's parking lot, left, and then elected to walk back to work on the ice and snow on a twisted ankle is incredible and unpersuasive. Moreover, Claimant is observed walking without any noticeable limp or pain behaviors on the video footage. Claimant's testimony is only corroborated by DR[Redacted], who has a shared financial interest with Claimant. That Claimant was ultimately diagnosed with a fracture is not dispositive of the fact that the fracture arose out of and occurred during the scope of Claimant's employment for Employer. The credible and persuasive evidence demonstrates that it is more probable than not the incident reported by Claimant did not occur and Claimant did not sustain a compensable work injury.

As found, Claimant knowingly made false representations to Employer indicating she sustained a work injury for the purpose of obtaining worker's compensation benefits. Respondent relied on Claimant's false representations in filing the FAL, pursuant to which Respondent paid Claimant's medical and indemnity benefits. Respondent was unaware of the falsity of Claimant's representations regarding the alleged incident until observing security footage. Based on the totality of the evidence, Respondent filed a FAL and Claimant received benefits to which she was not entitled based on Claimant's fraudulent misrepresentations. Accordingly, Respondent shall be permitted to withdraw its FAL.

Overpayment

Section 8-40-201(15.5), C.R.S, defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." Recovery of overpayments of benefits resulting from retroactive withdraws of admissions of liability based on fraud has been permitted. *See Stroman v. Southway Services, Inc.*, W.C. No. 4-366-989 (ICAO August 31,1999); *Vargo, supra*.

When the parties are unable to agree upon a repayment schedule, the ALJ may conduct hearings to require repayment of overpayments and to fashion a remedy with regard to overpayment at his or her discretion, including terms of repayment and schedule for recoupment. *See* §8-43-207(q), C.R.S., *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994).

Claimant received $3,987.20 in TTD benefits and $2,407.15 in medical benefits to which she was not entitled due to her fraudulent misrepresentations. As such, Respondent is entitled to recover an overpayment of $6,394.35.

Respondent requests a repayment rate of $500.00 per month. Claimant testified that she would not be able to afford a repayment rate of $400.00 to $500.00 per month, but did not otherwise propose what she considers to be a feasible repayment rate. Based on Claimant's total monthly household income and expenses, the ALJ concludes that a repayment rate of $300.00 per month is a reasonable schedule for repayment, ensuring that Respondent recoups the overpayment in a period under 24 months, while avoiding potential undue financial hardship on Claimant.

ORDER

It is therefore ordered that:

1. Respondent's admission of liability is hereby withdrawn.

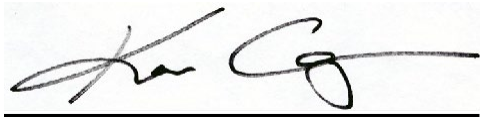
2. Claimant shall repay Respondent a total of $6,394.35 at a rate of $300.00/month until recovered in full.

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

DATED: February 2, 2023



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 5-204-039-001

ISSUES

I. Whether the ALJ has jurisdiction to address whether Claimant's neck and shoulders are causally related to Claimant's admitted industrial injury of April 20, 2022.

II. Whether the ALJ has jurisdiction to address Claimant's entitlement to temporary total disability (TTD) benefits from August 23, 2022 through November 16, 2022.

FINDINGS OF FACT

1. Claimant sustained an admitted an industrial injury on April 20, 2022 when he fell from a step ladder onto his outstretched arms.

2. It is undisputed Pamela J. Rizza, M.D. at Workwell is Claimant's primary authorized treating physician (ATP) in this claim. Dr. Rizza determined that Claimant sustained work-related bilateral wrist fractures.

3. Dr. Rizza referred Claimant to ATP Lisa Nash, M.D., who performed surgical repair of Claimant's right wrist on May 3, 2022.

4. Dr. Rizza subsequently diagnosed Claimant with work-related left carpal tunnel syndrome.

5. Respondents filed a General Admission of Liability (GAL) on May 17, 2022 admitting for medical benefits and TTD benefits beginning April 21, 2022, ongoing. Respondents filed a second GAL on July 6, 2022 reflecting an increase in Claimant's average weekly wage (AWW).

6. On August 23, 2022, Dr. Rizza completed a Physician's Report of Worker's Compensation Injury releasing Claimant to regular duty effective August 23, 2022.

7. Respondents filed a GAL on August 31, 2022 terminating TTD as of August 23, 2022, based upon Dr. Rizza's release of Claimant to full duty work.

8. On September 1, 2022 Dr. Rizza noted Claimant reported dizziness and neck pain and wanted to discuss a neck MRI that was ordered through his primary care physician. She wrote,

> Discussed the MRI of the neck needs to be addressed by Dr. Mistry as he ordered the test and was referred by his PCP. Shows degenerative changes, no evidence of compression fracture or trauma related changes.

> Discussed if he feels he needs other restrictions, to follow up with PCP/Dr. Mistry which is outside of his WC claim. May work full duty until CT release.
>
> (R. Ex. A, p. 57).

Dr. Rizza continued Claimant on regular duty.

9. On September 28, 2022 Claimant filed an Application for Hearing (AFH) endorsing the following issues: Medical Benefits, Authorized Provider, Reasonably Necessary, Average Weekly Wage, Temporary Total Benefits from April, 20, 2022, ongoing and Temporary Partial Benefits from April 20, 2022[1], ongoing.

10. At a follow-up evaluation on September 29, 2022 Dr. Rizza noted Claimant continued to request that his self-referral to Dr. Mistry and subsequent referrals made by Dr. Mistry be included in his worker's compensation claim. Dr. Rizza noted she reviewed Claimant's medical record and concluded it was not 51% medically probable Claimant's reported concussion symptomatology is directly related to the occupational injury he sustained on April 20, 2022. She continued Claimant on regular duty.

11. The ALJ takes administrative notice of the Office of Administrative Courts file that a Notice of Hearing was sent to the parties on October 25, 2022, notifying the parties of a January 20, 2023 hearing set in this matter.

12. Claimant underwent a left carpal tunnel release on November 17, 2022 performed by Dr. Nash.

13. On December 1, 2022, Respondents filed a GAL admitting for medical benefits and TTD benefits from November 17, 2022, ongoing.

14. Dr. Rizza placed Claimant at maximum medical improvement (MMI) on January 4, 2023 without permanent impairment or restrictions. She listed the following diagnoses: unspecified fracture of the lower end of the right and left radius, adjustment disorder with mixed anxiety and depressed mood; and carpal tunnel syndrome of the left upper limb. Dr. Rizza released Claimant for full duty work. Regarding maintenance care, she recommended one year of follow up for concerns related to Claimant's right wrist hardware or left wrist carpal tunnel surgery.

15. Respondents filed a Final Admission of Liability (FAL) on January 12, 2023, noting TTD benefits from 4/21/22 thru 8/22/22 and 11/17/22 thru 1/3/23. Respondents did not admit for post-MMI medical treatment or any permanent impairment.

16. On January 19, 2023, Claimant filed an Objection to the FAL and a Notice and Proposal and Application for a Division Independent Medical Examination (DIME).

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[1] The Application for Hearing lists a date of "4-20-200." Based on the date of injury, April 20, 2022, the ALJ infers that the typographical error is meant to refer to the date of April 20, 2022.

17. At the commencement of the hearing on January 20, 2023, Claimant's counsel identified the following issues for hearing: (1) whether Claimant is entitled to temporary indemnity benefits from August 23, 2022 through November 16, 2022, and (2) whether Claimant's neck and shoulder conditions are causally related to the April 20, 2022 industrial injury. Claimant's counsel specified he was not pursuing the issue of AWW.

18. Claimant contends that, despite being released to full duty work by his ATP, he was unable to work from August 23, 2022 through November 16, 2022 due to dizziness and other issues.

19. Respondents' counsel argued that the ALJ does not have jurisdiction to address the issues identified by Claimant's counsel at hearing, as ATP placed Claimant at MMI and a DIME is pending. Claimant's counsel disagreed that the ALJ does not have jurisdiction to hear the stated issues.

20. At hearing Claimant stipulated that Dr. Rizza is Claimant's ATP, that she placed Claimant at MMI, and that Claimant Dr. Rizza released Claimant to full duty work during the time period for which Claimant is currently requesting TTD benefits.

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).

Jurisdiction

Respondents contend the ALJ does not have jurisdiction to address whether any neck and shoulder conditions are causally related to Claimant's April 20, 2022 industrial injury, as a DIME is pending. Respondents rely in part on *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (January 27, 2006). In *McCormick*, the Panel vacated an ALJ's order that found Claimant, who had been placed at MMI by her ATP, sustained a temporary aggravation that had resolved and denied further curative medical treatment. The Panel held that the ALJ lacked jurisdiction to deny medical benefits after MMI in the absence of DIME, citing multiple other cases, including *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995); *Eby v. Wal-Mart Stores, Inc.*, W.C. No. 4-350-176 (Feb. 14, 2001) ("once an authorized treating physician places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits for the purposes of curing the industrial injury and assisting the claimant to reach MMI unless the claimant undergoes a DIME."); *Anderson-Capranelli v. Republic Industries, Inc.,* W.C. No. 4-416-649 (Nov. 25, 2002) (following MMI, "In the absence of a DIME the ALJ lacks jurisdiction to adjudicate a request for additional medical benefits to cure the effects of the injury."); *Cass v. Mesa County Valley School District*, W.C. No. 4-629-629 (Aug. 26, 2005) ("[I]f an ATP places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits to improve the claimant's condition unless a DIME has been conducted on the issue of MMI.").

Claimant argues that *McCormick* is not applicable, as it was decided in 2006, prior to the adoption of SB 09-168, which amended section 8-43-203(2)(b)(II)(A), C.R.S. to include the following italicized language:

> An admission of liability for final payment of compensation must include a statement that ... the claimant may contest this admission if the claimant feels entitled to more compensation, to whom the claimant should provide written objection, and notice to the claimant that the case will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing, including the selection of an independent medical examiner pursuant to section 8-42-107.2 if an independent medical examination has not already been conducted. If an independent medical

> examination is requested pursuant to section 8-42-107.2, the claimant is not required to file a request for hearing on disputed issues that are ripe for hearing until the division's independent medical examination process is terminated for any reason. *Any issue for which a hearing or an application for a hearing is pending at the time that the final admission of liability is filed shall proceed to the hearing without the need for the applicant to refile an application for hearing on the issue*. (emphasis added)

Claimant did not cite to, nor is the ALJ aware of, any authority supporting Claimant's argument that the language of section 8-43-203(2)(b)(II)(A), C.R.S. confers jurisdiction to the ALJ to address the relatedness of other body parts in this instance. Claimant's interprets section 8-43-203(2)(b)(II)(A), C.R.S. to effectively require proceeding to hearing on any issue for which a hearing or application for hearing is pending at the time a FAL is filed is inconsistent with the statutory provisions of Section 8-42-107(8)(b), C.R.S. and well established case law. Pursuant to Section 8-42-107(8)(b)(I), C.R.S. an authorized treating physician shall make the initial determination concerning the date of MMI. If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached MMI, an independent medical examiner may be selected. §8-42-107(8)(b)(II), C.R.S. Section 8-42-107(8)(b)(III), C.R.S. specifically provides, "A hearing on this matter shall not take place until the finding of the independent medical examiner has been filed with the division."

The Colorado Supreme Court has noted that the DIME procedure is "the only way for an injured worker to challenge the treating physician's findings -- including MMI, the availability of post-MMI treatment, degree of nonscheduled impairments, and whether the impairment was caused by an on-the-job injury..." *McCormick*, *supra*, citing *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003). MMI is defined as the point in time when the claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. A determination of MMI requires the physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (Mar. 15, 2017).

Claimant's request that the ALJ address whether certain body parts and conditions are causally related to the industrial injury and thus require reasonable and necessary curative treatment is, effectively, a challenge to the ATP's finding of MMI. Absent a DIME, the ALJ does not have the authority to proceed to a hearing on those issues. *Slevin v. Larimer County*, W.C. No. 5-053-718-002 & 4-957-677 (Feb. 18, 2020) (noting that "the request by the parties to have the ALJ rule on the relatedness of the TKA surgery intended to cure and improve the claimant's medical condition is a challenge to the authorized treating doctor's finding of MMI" and concluding that the ALJ was without jurisdiction to address whether a July 2017 injury caused the need for surgery when the claimant had been placed at MMI by his ATP four months prior to the hearing before the ALJ.); *In re Claim of Dean*, W.C. No. 4-988-024-01 (INov. 7, 2016).

The ALJ also lacks jurisdiction at this time to rule on an award of TTD benefits August 23, 2022 through November 16, 2022. Claimant contends he was unable to work during this time period and sustained wage loss as a result of alleged injuries that the ATP did not deem causally related to the industrial injury. As discussed, a challenge to MMI and its inherent causal determinations are the province of a DIME in these circumstances. Additionally, Claimant's TTD was terminated on August 23, 2022 pursuant to the termination statute, section 8-42-105(3)(a)-(d), C.R.S. Claimant argues that section 8-42-105(3)(a)-(d), C.R.S. only applies to when benefits can be terminated without a hearing, and that Claimant is not precluded from demonstrating entitlement to an award of TTD from August 23, 2022 through November 16, 2022.

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*, W.C. No. 4-995-488 (Apr. 23, 2019).

There is a distinction between the factors considered in an award commencing TTD benefits versus termination of TTD benefits. Once it is established that a claimant's attending physician has released her to full duty, the attending physician's opinion is conclusive, "unless the record contains conflicting opinions from attending physicians

regarding a claimant's release to work. *Burns v. Robinson Dairy, Inc.,* 911 P.2d 661, 662 (Colo. App. 1995); *Bestway Concrete v. Indus. Claim Appeals Off.,* 984 P.2d 680, 685 (Colo. App. 1999). In light of an attending physician's opinion releasing a claimant to full duty, any evidence concerning claimant self-evaluation of his ability to perform his job [is] irrelevant and should be disregarded by the ALJ. *Archuletta v. Indus. Claim Appeals Off.*, 381 P.3d 374, 377 (Colo. App. 2016).

Here, there is no dispute Claimant's ATP released Claimant to full duty on August 23, 2022. Accordingly, the ATP's opinion is conclusive, and the ALJ does not have jurisdiction at this juncture to award TTD benefits for August 23, 2022 through November 16, 2022.

ORDER

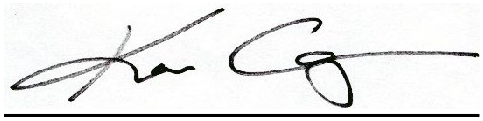
It is therefore ordered that:

1. The issues endorsed for hearing by Claimant are dismissed without prejudice for lack of jurisdiction.

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

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

DATED: February 9, 2023



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-214-137-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she sustained a compensable work injury arising out of and in the scope of her employment on August 6, 2022.

II. If compensable, whether Claimant proved by a preponderance of the evidence the treatment requested by authorized treating physician ("ATP") Hiep Lourdes Ritzer, M.D., including her referrals to Mile High Sports, Health Images, Orthopedic Centers of Colorado, and Eric K. Hammerberg, M.D., are all related to the August 6, 2022 industrial injury and necessary to cure and relieve the Claimant of the effects of her injury.

III. If compensable, whether Claimant proved by a preponderance of the evidence an entitlement to temporary partial disability ("TPD") benefits for the time period between August 17, 2022 through August 18, 2022.

IV. If compensable, whether Claimant proved by a preponderance of the evidence an entitlement to temporary total disability ("TTD") benefits from August 19, 2022, ongoing until terminated pursuant to statute.

V. If compensable, determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant is a 50-year-old woman who works for Employer as a personal shopper/curb assistant. Claimant began working for Employer on May 8, 2022. Claimant's job duties included picking product for orders and delivering the orders curbside to customers.

2. Claimant worked Tuesday through Saturday, 4:00 a.m. to 12:30 p.m.

3. Claimant testified that an AWW of $803.38 most accurately reflects her weekly wages, based on gross earnings of $9,525.84 earned between May 8, 2022 and July 29, 2022, a period of 83 calendar days.

Prior History

4. Claimant has a history of seizure disorder and a congenital condition known as Chiari I malformation. Claimant treated with Eric K. Hammerberg, M.D. for the seizure disorder.

5. Claimant was involved in a motor vehicle accident ("MVA") in August 2018. On August 5, 2018 Claimant sought treatment at the emergency department of Denver Health after being involved in the MVA. Claimant complained of bilateral hip pain, as well abdominal pain, back pain and neck pain. There was no evidence of trauma to the head, cervical or thoracic spine, abdominal or extremities.

6. On September 5, 2018 Claimant reported to Dr. Hammerberg that after the MVA she experienced pain in her wrists, elbows, shoulders, neck, hips and feet. She complained of constant pain at the base of her neck into her bilateral shoulder blades, down into the left upper extremity and hand, also on the right side, as well as pain in the lower spine at the thoracolumbar junction and both hips. An EMG of upper extremities showed evidence of bilateral carpal tunnel syndrome.

7. On October 25, 2018 Claimant sought treatment at an emergency department for neck pain and nerve symptoms in her arms.

8. On November 29, 2018 Claimant reported increased neck pain after feeling a pop, as well as a "constellation of symptoms" which the provider noted Claimant believed was related to her Chiari I malformation. Claimant complained of blurry vision, numbness of the mouth and jaw, difficulty swallowing, clumsiness of hands, bilateral carpal tunnel syndrome, and tension headaches.

9. On December 19, 2018 Dr. Hammerberg noted Claimant's reports of pain in her posterior neck and over the left temporomandibular joint ("TMJ").

10. On April 30, 2019 Claimant presented to an emergency department at Lutheran Hospital with complaints of intermittent numbness and tingling to her bilateral upper extremities as well as headaches, shortness of breath and bilateral chest pain.

11. Claimant returned to the emergency department at Lutheran Hospital on May 1, 2019 for complaints of neck pain and headaches on her left side, with numbness, dizziness and tingling to the left side of her face as well as her left arm. A CT scan was negative for acute abnormalities.

August 6, 2022 Alleged Work Injury

12. Claimant alleges she sustained a compensable work injury while working for Employer at approximately 9:00 a.m. on Saturday, August 6, 2022. Claimant testified that she was putting a box containing three industrial-sized bottles of cleaning product into the bed of a pickup truck when the left handle of the box gave way. Claimant testified that the box containing the bottles jostled around, pushing her head back and jostling her body back and forth for a while until she was able to use her body to push the box against the truck and into the bed of the vehicle. Claimant estimates the box containing the bottles weighed approximately 30 pounds.

13. Claimant testified that after the incident she felt a lot of pressure in her back and right shoulder blade and "just did not feel right." She testified that she felt very off balance and did not have the energy she normally did.

14. Claimant did not report the incident to a supervisor that day and finished her work shift. Claimant testified she did not immediately report her injury because she did not know she was hurt at the time and because she was unaware of the process for reporting the injury. Claimant testified that the next morning she was in extreme pain in her shoulder blade and on her right side. Per her regular schedule, Claimant was off of work Sunday and Monday, August 7 and 8, 2022. Claimant called out of work on Tuesday, August 9, 2022 and went to her primary care physician at Carbon Health, who placed Claimant on work restrictions.

15. Claimant contacted [Redacted, hereinafter FM], [Redacted, hereinafter MH], on August 10, 2022 to report her injury and restrictions.

16. Claimant testified that she did not have any physical issues or limitations leading up to the incident on August 6, 2022.

17. The ALJ reviewed security footage from the date of the work incident, submitted by Respondents as Exhibits Kii, Kiii and Kiv. Video of the exterior of Employer's store and shows Claimant reaching for and unloading product from a grocery cart. The video angle does not capture the work incident. In-store security video of Employer's backroom shows Claimant coming into view at approximately 9:07 a.m., seven minutes after the alleged accident. Claimant is seen exhibiting a normal arm swing and gait. Thereafter Claimant is observed bending, lifting, pushing, twisting, walking, standing, and performing her job duties without any noticeable pain or discomfort.

18. On August 17, 2022 Claimant presented to Hiep Lelourdes Ritzer, M.D. at Employer's designated medical provider, SCL Health Medical Group. Claimant completed a pain diagram and visual analog scale on which she indicated she was experiencing right rib pain, right upper back pain, bilateral shoulder pain, bilateral chest pain, groin pain, left wrist pain, right wrist and hand pain, bilateral palm pain, jaw pain, bilateral ankle pain, and pain in all ten toes, at levels ranging from 6-10/10. Claimant reported to Dr. Ritzer that she was injured when lifting a box of bottles of Fabuloso into the back of a truck and the box slipped out of her left hand and jerked her around. She further reported experiencing an ache in her right shoulder blade and fatigue, with back stiffness that evening. Claimant complained of pain in her right scapular area, and right lateral chest wall, right elbow and lower neck. She reported that her left shoulder was achy but had improved, and that she also had some occasional headaches and dizziness. Examination of the upper extremities was normal with no swelling or palpable edema. Tenderness was reported in the xyphoid, right posterior paracervicals, right thoracic paraspinal musculature, right trapezius, lumbar paraspinal musculature and right elbow. X-rays of the cervical spine demonstrated multilevel cervical and thoracic degenerative changes without definite acute bony abnormality and mild thoracic spine dextroscoliosis. X-rays of the elbows were negative for acute bony abnormalities. Dr. Ritzer gave an assessment of thoracic myofascial strain, right-sided chest wall pain, right elbow pain and neck pain. She opined that Claimant's symptoms were consistent with a work injury. Dr. Ritzer referred Claimant for physical therapy and placed Claimant on work restrictions of seated duty only and lifting no more than five pounds.

19. Claimant testified she attempted to return to work after being placed on restrictions by Dr. Ritzer on August 17, 2022, but that she was unable to stand or sit for any extended amount of time.

20. Claimant returned to Dr. Ritzer on August 19, 2022 complaining of 10/10 pain. She reported that she could only sit for three to four minutes without experiencing severe pain. Dr. Ritzer restricted Claimant from all work.

21. On August 22, 2022 Dr. Ritzer noted that Claimant's pain still was not managed despite undergoing a Toradol injection two days prior. Claimant reported difficulty breathing, dizziness, nausea, and diarrhea. She complained of 9-10/10 pain mostly to the right scapular right lateral chest wall. Her neck pain and medial right elbow pain had improved. Dr. Ritzer ordered MRIs of the thoracic spine and chest and referred Claimant for chiropractic treatment.

22. On August 31, 2022 Claimant reported to Dr. Ritzer that after undergoing the recent thoracic MRI she developed pressure in her upper thoracic spine that radiated up her neck. She also reported experiencing lower back pain a day or so after the MRI, with pressure to the sacrum and tightness to both gluteus and radiation down the back of her bilateral knees. Claimant complained of a tingling sensation and numbness to the right side of her neck and radiating to below her right breast. She further reported difficulties breathing and numbness down her elbow into her hand. Dr. Ritzer documented that the thoracic MRI revealed: (1) T4-5 through T7-8 and T-9-10 small disc protrusions with moderate degenerative findings of the endplates throughout. Thecal sac narrowing is mild at multiple levels. (2) Facet arthropathy in the upper and lower thoracic spine resulting in mild foraminal narrowing. She noted that x-rays of the sternum were unremarkable and a CT scan of the chest demonstrated no acute findings. Dr. Ritzer transferred care of Claimant to Yusuke Wakeshima, M.D. at Mile High Sports Rehabilitation, noting that Claimant's subjective complaints were out of proportion to the objective findings. She opined that the new complaints of neck pain and lower back pain with radiation to the back of both knees were not work related.

23. Claimant first presented to Dr. Wakeshima on September 8, 2022. She reported right neck pain, right upper back pain, right thoracic spine pain, right periscapular pain, right-sided rib pain, right axilla pain, right shoulder pain, right medial elbow pain, and right hand paresthesias beginning after an 8/6/22 work injury. Claimant denied any pre-existing conditions in those regions prior to that date. Dr. Wakeshima documented a history of Chiari malformation. Claimant reported a mechanism of injury consistent to her testimony. Dr. Wakeshima noted that Dr. Ritzer had concerns about Claimant's expanding pain complaints and minimal mechanism of injury. He documented that Claimant had undergone multiple radiologic studies that were negative for acute abnormalities, including a thoracic spine MRI which demonstrated multilevel degenerative findings, but nothing predominantly right-sided that would lead one to suspect that she has a thoracic radiculopathy condition. Dr. Wakeshima assessed Claimant with: neck pain; upper back pain on right side; periscapular pain; right shoulder pain; pain in the right axilla; rib pain on the right side; right hand paresthesia;

right elbow pain; and pain in the thoracic spine. He referred Claimant for a cervical MRI, EMG of the right upper extremity and right shoulder MRI.

24. Claimant underwent the right shoulder MRI on September 15, 2022, which demonstrated supraspinatus tendinopathy with high-grade partial-thickness partial width bursal sided tearing.

25. Dr. Wakeshima subsequently referred Claimant to Dr. Griggs (changed to Ariel Williams, M.D.) for an orthopedic surgery evaluation.

26. On September 23, 2022 Claimant reported to Dr. Wakeshima experiencing a profound increase in pain since undergoing dry needling and massage therapy. Dr. Wakeshima noted that a cervical spine MRI obtained on 9/15/22 revealed cerebellar tonsillar ectopia, multilevel degenerative disc disease from C2-3 through C6-7, moderate stenosis of the central canal at C3-4 with no foraminal impingement, and mild stenosis and central canal at C4-5 with no foraminal impingement. He further noted that the right shoulder MRI revealed supraspinatus tendinopathy with high-grade partial- thickness partial width bursal tearing, mild infraspinatus tendinopathy, and acromioclavicular and glenohumeral joint osteoarthritis. Dr. Wakeshima referred Claimant for a brain MRI.

27. Dr. Williams evaluated Claimant on September 30, 2022. Claimant reported symptoms primarily in the medial elbow, scapula, axilla and upper chest wall. Dr. Williams noted,

> She has tremendous difficulty with range of motion on exam with a lack of tolerance of even passive range of motion and a feeling of active resistance that is not consistent with a adhesive capsulitis type picture. Her shoulder external rotation is actually quite well-maintained. She does have pain with shoulder provocative maneuvers but these actually localize more to the chest wall and axilla and to the shoulder itself. In short, based upon both her history and her physical exam, I do not think her rotator cuff tear is the primary issue for her at this point although she would benefit from physical therapy for her shoulder and upper extremity as a whole. She is not indicated for surgical intervention for her rotator cuff at this time. Physical therapy may also help with her elbow where I suspect she may have a flexor pronator strain. Dr. Wakeshima is planning on nerve conduction studies and I agree that this is appropriate. She will return to me in 6 weeks to re-evaluate her shoulder and see her progress with therapy, sooner if the nerve conduction study reveals a peripheral compressive neuropathy.

(Cl. Ex. 9, pp. 109-110).

28. Dr. Wakeshima reevaluated Claimant on October 7, 2022 and referred Claimant to Dr. Hammerberg for a neurological evaluation under her worker's compensation claim for reported worsening headaches and neck pain after the injury. He noted,

> The patient presents with diffuse pain issues which is difficult to localize. If the radiologist documents that there is been no sign of interval changes on her MRI of the brain from the MRI from 2007, and Dr. Hammerberg documents that there has been no significant change regarding her Chiari I malformation neurologic conditions since he has been treating her prior to her work injury, and she still reports diffuse pain issues, I will discuss with patient about being seen by Dr. DiSorbio of pain psychology for further assessment for the psychological aspect of her chronic pain condition.

(Cl. Ex. 6, p. 83).

29. Claimant saw Dr. Hammerberg on October 18, 2022. She reported that after the alleged work injury she experienced, *inter alia*, lightheadedness, dizziness, blurry vision, photophobia, phonophobia, difficulty swallowing, hand numbness, and pain in the lower back and left hip extending into the left knee. Dr. Hammerberg reviewed Claimant's 9/15/22 cervical spine MRI, 9/15/22 right shoulder MRI, and brain MRI obtained on 9/28/22. He concluded that there were no changes in Claimant's Chiari I malformation.

30. Claimant returned to Dr. Wakeshima on November 3, 2022 with complaints of right-sided neck, back, shoulder, elbow and hand pain, as well as right hand paresthesias. Claimant was now also complaining of pain in her left shoulder, elbow, wrist, groin and anterior hip region. Dr. Wakeshima performed an EMG of the right upper extremity and compared it to Claimant's September 2018 EMG. He opined that the EMG demonstrated slight worsening of Claimant's mild carpal tunnel syndrome. He referred Claimant back to Dr. Williams for assessment.

31. Surveillance video was taken of Claimant on November 21-23, 2022 and admitted into evidence as Respondents' Exhibit L-1. Claimant is observed in the front of her home and in her garage lifting and carrying items without apparent difficulty or noticeable pain.

32. On November 14, 2022 Lawrence Lesnak, M.D. performed an Independent Medical Evaluation ("IME") at the request of Respondents. Claimant reported a mechanism of injury consistent with her testimony. Claimant reported that her current symptoms were different than those from her 2018 MVA. On examination, Claimant complained of frequent diffuse right should girdle and axillary burning pains that occur with any movement of her right upper extremity, as well as constant diffuse right elbow soreness and pain, frequent swelling of the left groin, frequent swelling throughout the entirety of her left leg and thigh, constant pins and needles as well as pain involving all of her toes, her plantar feet and diffuse symptoms involving her left leg and left lateral ankle. Claimant also reported frequent diffuse bilateral hand numbness encompassing the entirety of both hands, diffuse right arm, lateral neck and chest pains, and constant right-sided jaw and anterior throat pain. She reported that one month after the work incident she developed a frequent cough. Claimant stated she experiences frequent popping sensations in the center of her chest associated with diffuse pins and needles and a burning sensation throughout the entirety of her anterior chest and breast region.

Claimant further reported low back pain and pressure and diffuse occipital and global head pain.

33. In connection with his evaluation, Dr. Lesnak performed a Computerized Outcome Assessment, designed to identify any potential psychosocial factors that might be affecting the claimant's symptoms, recovery, or perceived function. Dr. Lesnak noted that the results of his testing strongly suggested the presence of an underlying symptom somatic disorder/somatoform disorder in Claimant.

34. Dr. Lesnak noted Claimant's expanding pain complaints. He concluded that the right shoulder MRI on 9/15/22 evidenced some rotator cuff tendinopathy without documentation of any full-thickness tears and without any documented evidence of any injury or trauma-related pathology related to her work incident. Dr. Lesnak noted that other imaging, including the cervical and thoracic spine MRIs and CT scan of the chest, did not evidence any injury or trauma related pathology. Dr. Lesnak opined,

> [t]here is absolutely no medical evidence to support that she sustained any type of injury whatsoever as it would pertain to this reported occupational incident. Additionally, there is absolutely no medical evidence to support that she has any medical diagnoses (which would be confirmed with any reproducible findings) that would in any way pertain to this reported occupational incident of 08/06/2022.

(R. Ex. I, p. 337).

35. Dr. Lesnak opined that there was no medical evidence supporting a conclusion that Claimant requires any type of activity limitations or work restrictions. He noted that there was a complete lack of any reproducible findings on examination.

36. On November 18, 2022 Dr. Wakeshima noted,

> With the patient's diffuse pain issues I also informed her that we may consider at our next appointment of having her undergo a rheumatoid panel, sedimentation rate, and ANA for further assessment for any rheumatologic conditions that could be contributing to pain. However, this would then be exploring not work-related condition, and therefore I informed her that if Dr. Lesnak determines that she is at MMI, this most likely will not be authorized by her workers' compensation carrier. However if Dr. Lesnak determines that he is not sure of the ideology of her continued pain issues, then we will have this obtained to rule out any nonwork related issues. If this is positive then her current situation will be nonwork related and will need to be treated under her private health insurance and we will then discuss maximum medical improvement (MMI) issues.

(R. Ex. G, p. 223).

37. Claimant testified that prior to the work incident she had not been informed of any tear in her right shoulder. Claimant testified that she has been restricted from working completely since being removed from work by Dr. Ritzer on August 19, 2022. Claimant testified that she believes the work incident resulted in injury to all of the body parts she marked on the pain diagram at Dr. Ritzer's August 17, 2022 evaluation (referenced herein in Finding of Fact #18 and contained in Respondents' Exhibit F, p. 96).

38. Dr. Lesnak testified at hearing on behalf of Respondents as a Level II accredited expert in physical medicine and rehabilitation. Dr. Lesnak testified consistent with his IME report and continued to opine that Claimant did not suffer any work-related injury on August 6, 2022 that caused the need for medical treatment or restrictions. Dr. Lesnak testified Claimant suffers from a somatic disorder or somatoform disorder, which he explained results from poorly controlled psychological or psychiatric symptoms that manifest themselves as bodily pain complaints in the absence of identifiable anatomic pathology. Dr. Lesnak testified that, in Claimant's case, there are various subjective complaints but a lack of reproducible findings related to the August 6, 2022 work incident. He explained that none of the imaging, including the right shoulder MRI, indicates evidence of an acute injury or aggravation. Dr. Lesnak explained that the fact Dr. William's injection did not result in relief to Claimant indicates that Claimant's right shoulder pathology, which is unrelated to this work incident, is not even symptomatic. Dr. Lesnak testified that he reviewed surveillance video taken of Claimant and Claimant's presentation on the video was different than her presentation during his examination.

39. MH[Redacted] testified at hearing on behalf of Respondents. MH[Redacted] testified that employees receive training instructing employees to immediately report injuries to their manager. He testified that there are also posters above the time clock containing information regarding how to report work injuries to Employer. Regarding Claimant's AWW, MH[Redacted] explained that the "Other Earnings" category reflected in Claimant's wage records reflects a bonus paid to associates based on the store's quarterly earnings. He testified that the bonus is not guaranteed and depends on the store's circumstances. MH[Redacted] testified that the bonus is taxed as wages.

40. Claimant's wage records indicate Claimant earned the following gross earnings, including "other earnings", during the following pay periods:

Week Ending	**Gross Earnings**	**Other Earnings**
May 13, 2022	$1,472.22	$0.00
May 27, 2022	$1,552.68	$4.46
June 10, 2022	$1,621.08	$4.46
June 24, 2022	$1,670.67	$4.46

July 8, 2022	$1,633.14	$175.46
July 22, 2022	$1,576.05	$4.46
TOTAL	$9,525.84	

41. The ALJ finds the opinion Dr. Lesnak, as supported by the medical records, more credible and persuasive than Claimant's testimony and the opinions of Drs. Ritzer, Wakeshima and Williams.

42. Claimant failed to prove it is more probably true than not she sustained a work injury arising out of and in the scope of her employment on August 6, 2022.

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 failed to prove it is more probably true than not she sustained a compensable work injury on August 6, 2022. While Claimant is credible in her testimony that a work incident occurred on August 6, 2022, the preponderant evidence does not establish that the incident actually caused any injury resulting in disability and the need for medical treatment. Each of Claimant’s providers, Dr. Ritzer, Dr. Wakeshima, and Dr. Williams, have noted Claimant’s diffuse pain complaints. Dr. Ritzer transferred care to Dr. Wakeshima, specifically noting that Claimant’s subjective complaints were out of proportion to the objective findings. While right shoulder pathology is demonstrated on imaging, Dr. Lesnak credibly opined that none of the findings evidenced any acute trauma related to the work incident.

Claimant has a documented history of diffuse pain complaints to her wrists, elbows, shoulders, neck, hips, feet, thoracolumbar spine, TMJ, and chest, as well as other complaints such shortness of breath, photophobia, phonophobia, and dizziness. Many of these same complaints presented after the work injury, including expanding and diffuse complaints after undergoing an MRI. As acknowledged in her testimony, Claimant attributes her various symptoms to the work incident of August 6, 2022. Dr. Lesnak credibly testified that Claimant has somatoform disorder. Such condition does not automatically negate Claimant's reported symptoms or the existence of a work injury; however, it does call into question Claimant's expanding and diffuse subjective complaints in the absence of objective reproducible findings, as credibly noted by Dr. Lesnak. To the extent her providers opined Claimant sustained a work injury, the preponderant evidence indicates that such conclusion was based on Claimant's subjective reporting of the work incident and her symptoms. The ALJ is persuaded by Dr. Lesnak's opinion that no injury trauma related pathology occurred as a result of the August 6, 2022 work incident.

As the preponderant evidence does not establish that Claimant sustained a compensable work injury, the remaining issues of medical treatment, temporary indemnity benefits and AWW are moot.

ORDER

It is therefore ordered that:

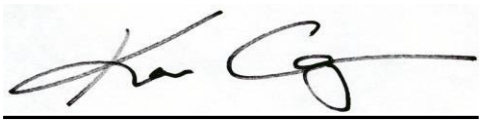
1. Claimant failed to prove by a preponderance of the evidence she suffered a compensable work injury arising out of and in the scope of her employment on August 6, 2022. Claimant claim for benefits is denied and dismissed.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order

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

DATED: February 16, 2023.



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 5-185-023-001

ISSUES

I. Whether Respondents proved by a preponderance of the evidence Claimant willfully violated a reasonable safety rule, resulting in a fifty percent reduction in Claimant's benefits.

FINDINGS OF FACT

1. Claimant works for Employer as a housekeeper. Claimant has worked for Employer in such capacity for separate periods of time over the course of 12 years. Claimant's first language is Spanish.

2. On October 6, 2021 Claimant sustained an admitted industrial injury to her right shoulder while lifting a bag of trash.

3. Claimant testified at hearing that, on the date of injury, she was lifting a trash bag of empty wine bottles at the Colorado Convention Center. Claimant testified that six people were typically assigned to clean a floor but, on the date of injury, only she and one other co-worker were assigned to a particular floor. Claimant testified that she "indirectly" told her supervisor she needed additional help with completing the tasks on her assigned floor by telling her co-worker, who was going on a lunch break at the time, to tell the supervisor she needed assistance. Claimant testified that she also asked [Redacted, hereinafter AR (last name unknown)], a supervisor with [Redacted, hereinafter XE], why extra people were not assisting with the cleaning on her assigned floor.

4. Claimant testified that she could not wait for her co-worker to return from his lunch break to assist in emptying the trash bins because the bins were getting full. She testified she first slightly lifted the trash bag to assess its weight. Claimant determined she was able to lift the trash bag by herself. Claimant proceeded to lift and move the bag onto a cart and at that time felt a pop and pain in her right shoulder. Claimant testified she initially did not think the bag was too heavy to lift and if she would have known the bag was so heavy she would not have attempted to lift it on her own. Claimant further testified that there was no one to ask for help lifting the bag because she was the only one on the floor at the time.

5. On October 6, 2021, Claimant completed an Employee Report of Incident in Spanish, translated to English by a co-worker, in which she stated,

> I told the XE[Redacted] Supervisor that I need help and he told me that my partner was in (*sic*) his break and that I was going to be fine doing the job own (*sic*). This when (*sic*) I went to pick a large trash bag from one of the

> bars full of beer cans that was way to (sic) heavy and this when (*sic*) my right arm pop and now it is hurting.

(R. Ex. E, p. 25).

6. Claimant's supervisor, [Redacted, hereinafter MD], completed a written statement on October 21, 2021 which read,

> October 6, 2021 around 7:50pm I saw [Claimant] dumping trash in her tilt cart by the escalator c lobby. I noticed that something was wrong with her and asked her if she was ok, she told me that she hurt her shoulder trying to lift a recycle bag from the bar. I told her that she needed to go to security and make a report. She told me that she didn't want to go, I told her that she had to go & I walked her to security. I asked her why she didn't ask for help and she told me that she saw AR[Redacted] the supervisor for XE[Redacted] across the floor but she didn't want to ask him because she didn't want him to tell her no & look at her crazy. I told her that she should have asked him or called me on the radio & asked me.

(Cl. Ex. 1, p. 5).

7. Respondents filed a General Admission of Liability ("GAL") on November 1, 2021 admitting for medical benefits and temporary total disability ("TTD") benefits. Respondents claimed a 50% reduction in Claimant's TTD benefits based on a safety rule violation. Respondents alleged Claimant violated a safety rule by failing to ask for assistance in lifting heavy items.

8. Claimant received yearly training from Employer, including ergonomics training from Employer on August 18, 2021, which included information on proper techniques for lifting. Safety tips included, "If the load is too heavy, too large, or too awkward…Stop and Get help" and "Lift properly using your legs, not your back. Get help to lift heavy objects." (R. Ex. D, pp. 13-14). Claimant signed the training attendance form attesting that she was responsible for, and understood, all of the information provided in the training.

9. [Redacted, hereinafter VK] testified at hearing on behalf of Respondents. VK[Redacted] is employed by Employer as an onboard trainer and infection prevention coordinator. VK[Redacted] explained that temporary employees through XE[Redacted], including AR[Redacted], do not supervise Employer's employees nor have any authority to instruct Employer's employees on their tasks. VK[Redacted] testified that he provided several training sessions to employees, including Claimant, regarding lifting and recycling. He testified that he ensured all employees understood the training by having them give a thumbs up, sideways, or down. He testified that Claimant indicated she understood the instructions and training by giving a thumbs up. VK[Redacted] testified that that no interpreter was present at his trainings because employees are required to be able to communicate effectively in English.

10. Claimant's job description specifically states that the ability to speak, understand, and read standard English and follow direction is required.

11. Claimant acknowledged that she attended and signed the attestation for the August 18, 2021 ergonomics training as well as a general safety training on September 9, 2021.

12. The ALJ finds that Employer had a reasonable safety rule adopted for the safety of the employees, of which Claimant was aware. Claimant's testimony that she did not she did not initially think the bag was too heavy to lift on her own is found credible. Respondents failed to demonstrate it is more probably true than not Claimant's violation of Employer's safety rule was willful.

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).

Safety Rule Violation

Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent (50%) reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado,* WC 4-559- 275 (ICAO, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimant's conduct. *See In re Heien*; WC 5-059-799-01 (ICAO, Nov. 29, 2018). However, a safety rule that is not enforced by the employer will not be enforced by the Workers' Compensation system. *Burd v. Builder Services Group Inc.*, WC 5-085-572 (ICAO, July 9, 2019).

Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado*, WC 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, WC 4-495-198 (ICAO, Oct. 20, 2003). "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez*, WC 4-561-352 (ICAO, Apr. 29, 2004). An employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, WC 4-418-465 (ICAO, Aug. 25, 2000). However, an employee's violation of a rule to make the job easier and speed operations is not a "plausible purpose." *Id.*; *see* 2 *Larson's Workers' Compensation Law*, §35.04. Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.*, 907 P.2d at 719.

As found, Respondents failed to prove it is more probably true than not Claimant willfully violated a reasonable safety rule adopted by Employer. The credible and persuasive evidence does establish Employer has a reasonable safety rule instructing employees to ask for assistance in lifting heavy items and Claimant was aware of the rule via Employer's training. Nonetheless, the preponderant evidence does not demonstrate Claimant's violation of the rule was willful. Claimant credibly testified that, prior to fully lifting and moving the trash bag, she first assessed the weight of the bag by picking it up slightly. Claimant determined she could lift the bag by herself. She credibly testified that, had she known the bag was that heavy or believed the bag was too heavy for her to lift, she would have left the bag there and not attempted to fully lift and move

it. Claimant ultimately misjudged the weight of the trash bag and proceeded to lift and move the item without assistance. Claimant was working without additional assistance of co-workers at the time and attempting to complete her tasks as the trash bins were getting full. Based on the totality of the circumstances, Claimant lifting the trash bag by herself due to underestimating the actual weight of the bag does not rise to the level of a deliberate intentional violation of Employer's safety rule. *See In re Bauer*, *supra* ("Further, the exercise of poor judgment within the realm of the claimant's legitimate discretion might well qualify as mere 'negligence' sufficient to preclude a finding of willfulness"). Accordingly, Claimant's non-medical benefits shall not be reduced by fifty percent.

ORDER

It is therefore ordered that:

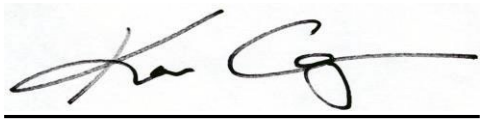
1. Respondents failed prove by a preponderance of the evidence Claimant willfully violated a reasonable safety rule adopted by Employer. Claimant's non-medical benefits shall not be reduced by fifty percent.

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

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

DATED: February 21, 2023



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 5-170-824-001

ISSUES

1. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant was employed by Employer for approximately twenty years as a mechanic. Claimant's job duties included performing tasks related to the repair and maintenance of recreational vehicles. Claimant sustained an admitted injury arising out of the course of his employment with Employer on April 22, 2021.

2. From April 12, 2020 through the end of 2020, Claimant received a weekly wage of $1,100. (Ex. C). Claimant testified that sometime in 2020, Employer lost another mechanic which required Claimant to take on additional job duties. Claimant testified that due to these additional responsibilities, Employer increased his wages.

3. Claimant's payroll records (Ex. C) demonstrate Claimant received multiple wage increases beginning with his January 4, 2021 paycheck. Claimant's weekly wage was increased as follows:

Paycheck Date	Weekly Wage	Wage Increase
1/4/2021	$1,200	$100
2/15/2021	$1,300	$100
3/8/2021	$1,400	$100
3/29/2021	$1,455	$55
4/19/2021	$1,555	$100

4. On the date of his injury, April 22, 2021, Claimant was being paid a weekly wage of $1,555.

5. Following his injury, Claimant received work restrictions from his authorized treating provider (ATP). Claimant was off work from the date of his injury until the week of June 13, 2021, when he returned and worked a reduced-hours schedule. Claimant remained on a reduced-hours schedule until April 2022. At that time, Employer ceased operations and laid-off its employees, including Claimant.

6. On May 6, 2022, Employer filed a General Admission of Liability (GAL) admitting to Claimant's $1,555.00 AWW, and paid Claimant temporary disability benefits based on that AWW. (Ex. A).

7. When Claimant's ATP released Claimant to return to work on a reduced-hours schedule in June 2021, Employer paid Claimant an hourly rate which was the equivalent of $1,555 per week (assuming a 40-hour per week schedule). (Ex. C).

8. Claimant testified that throughout his employment, he had semi-annual reviews with Employer. During those reviews, Employer never notified Claimant he would receive a pay increase. Claimant testified when he did receive a pay increase from Employer, the increased wage would appear on his paycheck without prior notice.

9. Claimant testified he had an annual review with Employer's owner, [Reduced, hereinafter JG], on April 3, 2021, and was promised a raise of $5.00 per hour to $1,755.00 per week, beginning May 3, 2021 because he was taking on more responsibility.

10. Claimant's hourly wages after returning to work in June 2021 did not reflect the purportedly promised wage of $1,755.00 per week. (Ex. C). Claimant testified he did not receive the wage increase because he did not return to work on a full-time basis following his injury, and was unable to perform his full pre-injury scope of work.

11. On April 25, 2022, Employer sent Claimant a letter notifying him Employer would be closing and employees would be laid off. The letter indicated the business was closing due to "the lack of parts and full time employees." (Ex. B).

12. The April 25, 2022 letter was signed by JG[Redacted] and contains the following signature block which identifies JG[Redacted] as "President":

JG[Redacted signature line]

13. On or about April 28, 2022, Employer ceased operations. At that time, Employer had five employees, including Claimant, Claimant's wife, JG[Redacted] and two other employees.

14. Claimant testified that JG[Redacted] began to experience a memory issues in December 2021, and ultimately that supply chain issues, and a lack of business lead to the closure of the business.

15. The ALJ does not find credible Claimant's testimony that he was promised a raise to $1,755 per week at his April 3, 2021 review. Claimant testified he had semi-annual reviews during his twenty-year tenure with Employer, and had never before been promised a raise during his annual review. Claimant offered no credible evidence why Employer purportedly deviated from this practice at his April 3, 2021 review. Moreover, Claimant received a wage increase after his April 3, 2021 review. Claimant's payroll records show his weekly wage on April 3, 2021 was $1,455 per week. (Ex. C). Claimant's pay was increased to $1,555 per week with his April 19, 2021 paycheck. (Ex. C).

16. In support of his contention that he was to receive a wage increase to $1,755 per week in May 2021, Claimant offered a letter dated December 27, 2021 addressed "To Whom it may concern," which states: "[Claimant] did not get his annual raise on May 3, 2021 due to his injury. [Claimant] was going to get a $5.00 per hour raise of $200.00 per week starting on the paycheck of May 10, 2021. To date he has still not received the raise he was promised back on April 3, 2021 at his yearly review." (Ex. 2).

17. The December 27, 2021 letter contains the following signature block, which identifies JG[Redacted] as "Owner":

Unknown[Redacted signature line]

18. The December 27, 2021 letter is not credible or persuasive evidence that Claimant would have received a wage increase but for his work injury. There are several discrepancies between the December 27, 2021 letter and the April 25, 2022 letter which cast doubt on the authenticity of the December 27, 2021 letter. The signatures purporting to be from JG[Redacted] on the December 27, 2021 letter and the April 25, 2022 letter are different. JG[Redacted] is identified on one letter as "President" and on the other as "Owner," and the letters contain different letterheads. (*Compare* Ex. B and Ex. 2). Finally, the December 27, 2021 letter was written at the time Claimant testified JG[Redacted] began to develop memory issues.

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. *Univ. Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder

should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

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

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S., requires the ALJ to calculate Claimant's average weekly wage based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly, or other earnings. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra; *Avalanche Indus. v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where the Claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity, the ALJ is vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*.

An ALJ may base an AWW determination "not only on the claimant's wage at the time of the injury, but on other relevant factor when the case's unique circumstances require." *Avalanche Indus, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008), *rev'd on other grounds, Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010). The ALJ's discretionary authority permits the ALJ to consider post-injury pay increases a claimant would have received absent the work-related injury. *See In Re Tibbs*, W.C. No. 4-422-333 (ICAO, Apr. 12, 2001); *Wheeler v. Archdiocese of Denver Management Corp*., W.C. No. 4-669-708 (Dec. 21, 2010). But, an ALJ may not base an award on speculation or conjecture. *Nanez v. Industrial Claim Appeals Office*, 444 P.3d 820 (Colo. 2018); *Upchurch v. Industrial Commission*, 703 P.2d 628 (Colo. App. 1985). To that end, the alleged post-injury wage increase must be "sufficiently definite" to support an increase in the AWW. *Tibbs, supra; Ebersbach v. UFCW Local No. 7*, W.C. No. 4-240-475 (May 5, 1997); *Romero v. Cub Foods*, W.C. No. 4-218-823 (Sept. 28, 2000).

Claimant has failed to establish, by a preponderance of the evidence that his admitted AWW of $1,555.00 is incorrect. The evidence establishes that Claimant's AWW at the time of injury was $1,555.00. Claimant's testimony that he was "promised" a raise

to $1,755 per week effective May 3, 2021 was corroborated by any credible evidence and is not credible. As found, Claimant testified he had never before been promised a pay raise, in contrast to the raise purportedly promised on April 3, 2021. The only corroborating document, December 27, 2021 letter, contains significant discrepancies from the April 25, 2022 letter, including different signatures, different headers, and different descriptions of JG's[Redacted] role, rendering the letter uncredible. The evidence presented does not establish that Claimant's alleged post-injury wage increase was sufficiently definite to support an increase in Claimant's AWW.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $1,555.00. Claimant's claim for an increased average weekly wage is denied and dismissed.

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

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

DATED: *nunc pro tunc* February 1, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-179-264-001

ISSUES

1. Whether Respondents established by a preponderance of the evidence that Claimant received an overpayment of indemnity benefits for which Respondents are entitled to repayment.

2. If Respondents established an overpayment, the terms of repayment.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of the course of her employment with Employer on April 29, 2021. As a result of her injury, Claimant was entitled to receive temporary total disability (TTD) benefits for the period of August 5, 2021 to December 6, 2021, a period of 17 5/7 weeks. Claimant returned to work on December 7, 2021. (Ex. B).

2. Claimant's average weekly wage (AWW) at the time of injury was $669.65. (Ex. C & D). Pursuant to § 8-42-105 (1), C.R.S., Claimant was entitled to TTD benefits at the rate of $446.43 per week (the "TTD Rate"). Based on the TTD Rate, Claimant's total TTD entitlement was $7,908.19.

3. Insurer began paying Claimant's TTD benefits at $669.65 per week, rather than the correct TTD Rate. (Ex. C). Insurer's "Payment Detail" (Ex. C) shows Insurer paid Claimant $669.65 per week for eight weeks (August 5, 2021 to October 6, 2021), and then paid the correct TTD rate for six weeks (October 7, 2021 to November 17, 2021). The Payment Detail does not document any payment of TTD after November 17, 2021. In total, Insurer paid Claimant $8,035.77 in TTD benefits. (Ex. C).

4. On January 19, 2022, Respondents filed a Petition to Modify Claimant's TTD payments seeking leave to pay Claimant at the TTD Rate. Respondents' Petition states Insurer paid TTD "at the correct rate of $446.43 from 9/16/21 - 10/6/21, however, Respondents returned to the admitted rate of $669.95 due to the absence of an Order or stipulation permitting such unilateral modification of TTD benefits." The Petition also states Insurer paid Claimant TTD benefits totaling $11,192.71 through December 7, 2021. (Ex. E).

5. The record does not contain an order from the Division granting or denying Respondent's Petition to Modify. However, on September 16, 2022, the Division sent a letter to Insurer which references a September 2, 2022 "admission," which apparently indicated Claimant's TTD payments from August 5, 2021 to December 6, 2021 were reduced from $669.65 to $446.43. The September 16, 2022 letter advised Insurer that benefits could not be reduced prior to the date of the Petition, and directed Respondents

to reinstate Claimant's TTD payment of $669.65 from August 5, 2021 to December 6, 2021. (Ex. A). The ALJ infers the Division issued an order permitting Respondents to reduce Claimant's TTD payments to the TTD Rate after January 19, 2022.

6. On October 10, 2022, Respondents filed a Final Admission of Liability (FAL), which indicates the Claimant was paid TTD at the rate of $669.65 from August 5 2021 to December 6, 2021, totaling $11,862.37. (Ex. B). The FAL also asserts an overpayment of $3,954.18. Attached to the FAL is a document entitled "Remarks" (Ex. B, p. 13), which purports to explain the overpayment calculation.

7. The "Remarks" document states: "$11,862.37 was erroneously paid in TTD benefits from August 5, 2021 to December 6, 2021 at the weekly rate of $669.65. In fact, the appropriate TTD rate was $446.43 for this time period and only $7,908.19 was owed in TTD benefits." (Ex. B., p. 13).

8. In the FAL, Respondents admit Claimant is entitled to permanent partial disability (PPD) benefits of $3,505.94. (Ex. B, p. 5). The "Remarks" document indicates the alleged overpayment of $3,954.18 would be applied to Claimant's PPD award. (Ex. B, p. 13). No evidence was admitted indicating Respondents have paid Claimant's admitted PPD benefits.

9. Multiple discrepancies exist between Respondents' Petition to Modify, the October 10, 2022 FAL, and Insurer's Payment Detail. First, the Petition to Modify indicates Insurer paid Claimant TTD benefits totaling $11,192.71 through December 7, 2021, while the October 10, 2022 FAL, indicates Insurer paid Claimant $11,862.37 for the same period. The Payment Detail, however, documents payments totaling $8,035.77, from August 5, 2021 to November 17, 2021, and includes no evidence of payments after November 17, 2021. (*Compare,* Exs. E, B., 13, and Ex. C).

10. Next, the Petition to Modify indicates Insurer paid the "correct rate of $446.43 from 9/16/21 - 10/6/21." (Ex. E). The Payment Detail, however, shows Insurer paid Claimant the incorrect rate of $669.65 for these dates. (Ex. C). The FAL "Remarks" document, on the other hand, indicates Claimant was paid $669.65 for the entire period of August 5, 2021 to December 6, 2021. (Ex. B, p. 13). Next, the Petition to Modify and FAL indicate Insurer paid Claimant TTD through December 6 or 7, 2021. The Payment Detail, however, does not document any payment after November 17, 2021. (*Compare*, Exs. E, B. p. 13, and C).

11. Respondents offered no testimony or other credible evidence at hearing explaining the discrepancies between the various documents. Given the inconsistencies, the ALJ finds neither the Petition to Modify nor the FAL to be credible evidence of the TTD benefits Insurer paid to Claimant. In contrast, Insurer's "Payment Detail" is a line-item listing of each TTD payment made to Claimant, and includes the date each payment was processed, the check number, the associated TTD time period, and the amount of each payment. Because no credible evidence was offered or admitted demonstrating TTD payments to Claimant after November 17, 2021, the ALJ finds that Exhibit C,

Insurer's Payment Detail is the only credible evidence of Insurer's payments to Claimant, and is the complete statement of TTD payments Insurer made to Claimant.

12. The credible evidence thus demonstrates Insurer paid Claimant TTD benefits totaling $8,035.77, not $11,192.71 or $11,862.37, as represented in the Petition to Modify and the FAL, respectively.

13. The credible evidence does not support Respondents' contention that Claimant received an overpayment of $3,954.18. Claimant was entitled to $7,908.19 in TTD benefits, and Respondents paid Claimant $8,035.77, resulting in an overpayment of $127.58 (*i.e.,* $8,035.77 - $7,908.19 - $127.58).

14. Claimant credibly testified that she was not aware she had received any overpayments and that if she was overpaid, she would repay the amount owed. Claimant further testified, credibly, that she is not currently employed, although she anticipated gaining employment within a few months.

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. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

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

Effect of Division Order

As found, Respondents filed a Petition to Modify with the Division, seeking to reduce Claimant's TTD payments to the TTD Rate. No order from the Division was offered or admitted into evidence. However, the ALJ infers from Ex. A, that an Order was issued permitting Respondents to reduce Claimant's PPD payments to the TTD Rate for benefits paid after January 19, 2022. Petitions to Modify are governed by W.C.R.P. 6, 7-CCR 1101-3, which does not authorize the retroactive modification of temporary disability benefits. However, ALJs are permitted to order repayment retroactively, pursuant to § 8-43-207 (q), C.R.S. Thus, the ALJ concludes that W.C.R.P. 6 does not bar the Respondents from recovery of an overpayment made prior to the Division's order.

Overpayment

Pursuant to § 8–43–303(1) C.R.S., upon a *prima facie* showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id.* In relevant part, the Colorado Workers' Compensation Act defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive. § 8-40-201 (15.5), C.R.S. (2021).[1] An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Section 8-42-113.5 (1)(c), C.R.S., authorizes insurers to seek and order for repayment of an overpayment, and ALJs are authorized to conduct hearings to require such repayments. § 8-43-207 (q), C.R.S. Respondents may retroactively recover an overpayment of benefits, and such recover is not limited to duplicate benefits. *In re Wheeler*, W.C. No. 4-995-488-004 (ICAO Apr. 23, 2019); *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

Respondents bear the burden of proof to establish, by a preponderance of the evidence, that a claimant received and overpayment, and that respondents are entitled to recovery of that overpayment. *City & Cty. of Denver v. Indus. Claim Appeals Off.*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002); See *In Re: Robert D. Scott,* W.C. No. 4-777-

[1] The General Assembly amended § 8-40-201 (15.5), C.R.S., effective January 1, 2022, removing the phrase "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive " from the definition of "overpayment." However, the matter before the ALJ is based payments prior to January 1, 2022, consequently the operative, applicable statute is the Worker's Compensation Act in effect prior to January 1, 2022. *See Stark v. Zimmerman*, 638 P.2d 843 (Colo 1981) (repeal of a statutory provision does not operate retroactively to modify vested rights or liabilities); *Martinez v. People*, 484 P.2d 792 (Colo 1971) (repealed statutory provisions remain in force as far as pending actions, suits and proceedings are concerned).

897, (ICAO Oct. 28, 2009). Respondents have established by a preponderance of the evidence that Claimant received $127.58 for TTD benefits to which she was not entitled. Accordingly, Respondents are entitled recover from Claimant the overpayment of $127.58.

Repayment

Under § 8-43-303 (1), C.R.S., upon a finding of an overpayment, an order of repayment is mandatory. When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Indus. Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994).

Insufficient evidence was admitted permitting the ALJ to determine whether Respondents have paid Claimant the $3,505.94 in PPD benefits to which she is entitled. If Respondents have not paid Claimant's PPD benefits, Respondents may take credit for the $127.58 overpayment against PPD benefits due and owing, less any accrued interest on the outstanding PPD benefits.

If Respondents have paid Claimant PPD benefits, Claimant shall repay Respondents $127.58. Claimant credibly testified she is currently unemployed, although she anticipates obtaining employment within a few months. The ALJ finds that requiring immediate repayment of the overpayment may impose financial hardship on the Claimant who is unemployed. Therefore, if Respondents have paid Claimant's PPD benefits in full, Claimant shall pay Respondents $127.58 within six months of the date of this Order.

ORDER

It is therefore ordered that:

1. Claimant received an overpayment in the amount of $127.58, for which Respondents are entitled to repayment.

2. If Respondents have not paid Claimant's PPD benefits of $3,505.94, Respondents may credit the overpayment of $127.58 against her PPD benefits.

3. If Respondents have paid Claimant's PPD benefits of $3,505.95 in full, Claimant shall repay the overpayment of $127.58 within six months of the date of this Order.

4. Respondents shall pay 8% interest on all sums not paid when due.

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

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

DATED: February 23, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-207-497-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his right shoulder arising out of the course of his employment with Employer.

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

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

4. Whether Respondents established by a preponderance of the evidence that Claimant was responsible for his own termination.

FINDINGS OF FACT

1. Claimant was employed by Employer as a truck driver for approximately five years. Claimant's job duties included driving a truck and making deliveries of products, including cement powder, liquid admix, and other materials used in construction.

2. Claimant alleges he sustained an injury to his right shoulder March 11, 2022 or March 17, 2022[1] while making a delivery to a [Redacted, hereinafter MM] facility in Fort Collins, Colorado. Claimant testified while opening a set of heavy, metal container doors his right shoulder "gave out."

3. Claimant initially testified his injury occurred at approximately 1:00 p.m., on March 17, 2022, and that he returned to Employer's terminal after 5:00 p.m. Claimant asserted he could not report his injury to either the terminal manager, [Redacted, hereinafter TS], or Employer's safety manager, [Redacted, hereinafter MK], because it was after hours, and neither TS[Redacted] nor MK[Redacted] was present at the terminal.

4. Claimant testified he did not work the two days after the injury and verbally reported his injury to TS[Redacted] when he returned to work the following Monday. Claimant testified he told TS[Redacted] he injured his shoulder and would need to see a doctor, and then went to work that day. Claimant testified he discussed his alleged injury with TS[Redacted] two additional times after the initial conversation. Claimant testified Employer did not refer Claimant to a physician, and did not offer medical treatment after these conversations. Claimant also testified that he initially did not want to pursue a workers' compensation claim and wanted to handle his injury under other insurance.

[1] The date of Claimant's alleged injury is in dispute, and is discussed below.

5. TS[Redacted] testified at hearing that he had no recollection of any conversation with Claimant regarding an injury to his right shoulder, and that Claimant did not report any injury in March 2022.

6. Over the next two months, Claimant continued to work for Employer, and had regular interactions with MK[Redacted]. MK[Redacted] testified that she and Claimant would smoke cigarettes together at the terminal, and during this time Claimant did not report the alleged injury to her, and she did not observe any behavior consistent with an injury. MK[Redacted] credibly testified that Claimant first reported an injury on June 6, 2022 or June 8, 2022.

7. Employer's policy requires all employees to immediately report all injuries in writing, and that employees could be terminated for not following this policy. Claimant agreed that this was Employer's policy, and that he was aware of the policy at the time of his injury. Claimant had been previously written up for failing to timely report an injury.

8. Notwithstanding his knowledge of this policy, Claimant did not immediately file a written report. Claimant first notified Employer of his alleged March 2022 injury on June 6, 2022, when he reported the injury to MK[Redacted], and completed the appropriate paperwork on June 8, 2022. On June 8, 2022, Employer terminated Claimant's employment for failure to timely report his alleged injury.

MEDICAL TREATMENT

Claimant's Prior Relevant Medical History

9. Claimant has a history of right shoulder issues that began in November 2018 when he fell on his right shoulder while fishing. Following that incident, Claimant sought and received treatment at the Veterans' Administration Medical Center (VAMC)[2]. At Claimant's first documented right shoulder examination on May 20, 2019, he reported a six-month history of right shoulder pain, with occasional numbness and tingling in the right elbow to the hand, and worsening pain with lifting. Claimant's examination was consistent with rotator cuff tendonitis. No MRI was performed, but an x-ray demonstrated mild degenerative changes. Claimant was referred for physical therapy for his right shoulder, which Claimant later indicated did not help. (Ex. N).

10. Following the November 2018 injury, Claimant received treatment at the VA, including participating in physical therapy. In October 2019, received a right shoulder subacromial steroid injection. (Ex. N). Claimant later returned to the VAMC, in April 2020, for evaluation of his right shoulder, and reported the steroid injection provided approximately one and a half months of relief. An MRI was recommended, but was not performed. (Ex. N). Claimant continued to report pain and issues with his right shoulder through at least April 1, 2020. No additional evidence was admitted indicating Claimant

[2] The admitted medical records from the VAMC contain numerous transcription or typographical errors, however, the ALJ is able to discern relevant information regarding Claimant's treatment and evaluations at the VAMC.

received treatment or evaluation for his right shoulder after April 1, 2020 at the VAMC, until May 2022.

Post March 2022 Treatment

11. Claimant's first documented medical treatment for his right shoulder after the alleged date of injury was on May 28, 2022, when he was evaluated at the VAMC by James Thompson, PA. At that visit, Claimant reported right shoulder pain present since February 2022, and was referred for an MRI. Claimant did not report his shoulder pain arose from his employment, that he sustained an injury while opening a container door, or that the injury occurred in March 2022. (Ex. N).

12. On June 21, 2022, Claimant underwent a right shoulder MRI. The MRI was interpreted as showing significant pathology in Claimant's right shoulder, primarily large, retracted tears of the supraspinatus and infraspinatus tendons. The specific MRI findings were:

> Acromioclavicular joint degenerative changes appear relatively significant. Significant superior humeral head migration. Bulk of the supraspinatus is torn and retracted to level of the AC joint with thickened edematous fibers more anteriorly possibly remaining intact. Infraspinatus tendon torn and retracted to level of the glenoid. Partially visualized supraspinatus and infraspinatus muscles appearing significantly atrophied with small surrounding-and internal-edema. Teres minor with small tearing through musculotendinous junction with possible partial tearing of the tendon. Subscapularis with moderate tendinosis and partial Interstitial tearing. Glenohumeral joint with effusion containing small debris. Small subcortical cystic changes with slight narrow edema involving the superolateral humeral head. There may be chronic degenerative superior labral tearing. Potential chronic partial humeral avulsion inferior glenohumeral ligament. Some laxity in the more proximal middle glenohumeral ligament may indicate partial tearing. (Ex. N).

13. Claimant's last documented medical visit for his right shoulder was on August 11, 2022, at the VAMC. Claimant was referred for a consult with neurosurgery for a consideration of a reverse TSA (total shoulder arthroplasty). (Ex. N). At hearing Claimant testified that surgery has been recommended and that he has not undergone the procedure because a new physician was assigned by the VAMC.

14. Claimant presented no credible testimony or medical reports opining that his shoulder pathology was causally related to a work-related injury.

15. Robert Messenbaugh, M.D., was admitted as an expert in orthopedic surgery, and testified at hearing. Dr. Messenbaugh performed an independent medical examination

(IME) of Claimant on October 18, 2022, a subsequent review of additional records, and issued two reports, dated October 18, 2022 and December 10, 2022. (Ex. K & L).

16. Based on his October 18, 2022 examination, and review of records, including Claimant's right shoulder MRI, Dr. Messenbaugh opined that Claimant had severe, chronic damage to his right shoulder, including a complete rotator cuff tear, retracted biceps tendon, and atrophy of the rotator cuff muscles. He noted that Claimant's right humeral head was pulled upward into the socket, which he opined was evidence of a severe chronic condition. He testified that the MRI did not show any damage caused by trauma in March 2022. Dr. Messenbaugh also testified that Claimant's VAMC records confirmed he had chronic right shoulder problems that existed prior to March 2022.

17. Dr. Messenbaugh further testified that given Claimant's preexisting shoulder condition, it was probable Claimant could experience pain opening a container door, but that it was unlikely that it would have caused any alteration of his shoulder anatomy or injury. Dr. Messenbaugh agreed that surgery on Claimant's right shoulder is indicated, but does not believe that the surgery is related to any alleged work injury. Dr. Messenbaugh's testimony was credible and persuasive.

DATE OF INJURY

18. As noted above, the date of Claimant's alleged injury is the subject of dispute. Claimant initially testified his injury occurred on March 17, 2022, at a MM[Redacted] facility in Fort Collins, Colorado at approximately 1:00 p.m., and that he returned to Employer's terminal after 5:00 p.m., on the date of injury.

19. Employer utilizes a tracking system for its drivers which creates a "Driver's Log" which records information regarding driver's start time and end time, driving time, and GPS locations throughout the day. Claimant's Driver's Logs for the month of March 2022 are contained in Exhibit S, pages 447 to 581. Claimant agreed his Driver's Logs were accurate.

20. Claimant's Driver's Logs show he was not in Fort Collins on March 17, 2022, and he returned to Employer's terminal at 10:39 a.m. on that day. Thus, the Driver's Logs are inconsistent with Claimant's initial testimony regarding the time and date of injury, and when he returned to Employer's terminal. After being questioned about this at hearing, Claimant reviewed his Driver's Logs, and indicated he now believed his injury occurred on March 11, 2022, not March 17, 2022.

21. Although the March 11, 2022 Driver's Log shows Claimant was in Fort Collins, the record indicates he left Fort Collins at 12:30 p.m., returned to the terminal at 1:44 p.m., not after 5:00 p.m., as he testified. Claimant's Driver's Logs for the month of March 2022 show Claimant did not return to the terminal after 5:00 on any date, and returned after 4:00 p.m., on only two dates (March 16, 2022 and March 28, 2022). Claimant was not in Fort Collins on either of those dates. (Ex. S).

22. After Claimant reported his injury in June 2022, he later completed a Worker's Claim for Compensation (WCC), on July 12, 2022. Two versions of the WCC form were

admitted into evidence: Claimant's Exhibit 1 and Respondents' Exhibit B. On Respondents' Exhibit B, the date of injury is listed as March 22, 2022. Claimant's version of the WCC is the same document as Respondents' version, except the date of injury is listed as March 1, 2022, in different color ink and different handwriting than the remainder of the form. (Compare Ex. 1 & Ex. B). No evidence was admitted explaining the discrepancy between the two WCC forms. Both WCC forms indicate Claimant reported an injury on April 22, 2022.

23. On June 20, 2022 and July 21, 2022, Respondents filed two Notices of Contest which list the date of injury as March 1, 2022. (Ex. 2). Similarly, Claimant's Application for Hearing and Respondents' Response to Application for Hearing also list the date of injury as March 1, 2022. (Ex. 3 & Ex. I). In response to written discovery, Claimant indicated the injury occurred on March 17, 2022, and that he reported the injury to TS[Redacted] when he arrived at Employer's Terminal on that date. (Ex. J).

24. Given the multiple discrepancies regarding the date of Claimant's alleged injury, ranging from sometime in February 2022, as reported to the VAMC, to April 22, 2022, the ALJ is unable to determine when, if ever, Claimant experienced pain in his right shoulder from opening a metal container.

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

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable right shoulder injury arising out of the course of his employment with Employer. Notwithstanding the multiple discrepancies related to the alleged date of injury, Claimant has failed to establish that he sustained an injury to his right shoulder arising out of the course of his employment with Employer. Dr. Messenbaugh credibly testified that Claimant has significant, pre-existing pathology in his right shoulder. His testimony is supported by the June 21, 2022 MRI which demonstrates significant pathology in Claimant's right shoulder, including multiple torn or potentially torn tendons, retraction of ligaments and displacement of the humeral head.

No health care provider credibly testified that the pathology in Claimant's right shoulder was consistent with an injury sustained by opening a heavy door, or that the pathology in Claimant's shoulder was caused by or aggravated by a work activity.

While Claimant may have experienced pain in his right shoulder while opening a metal container, Claimant has failed to establish that such an incident, if it occurred, caused a compensable injury. Claimant's testimony regarding the alleged injury was contradictory, inconsistent, and uncorroborated. Claimant testified that his right arm "gave out" when he opened a heavy, metal container door in March 2022, but he did not seek medical attention for his right shoulder until May 28, 2022, and did not report the alleged injury to Employer until June 2022. When Claimant did seek treatment, he did not report the injury as work-related, or indicate it was caused by opening a metal container door. Instead, Claimant reported that his right shoulder began to worsen in February 2022. Based on the totality of the evidence, Claimant has failed to establish it is more likely than not that he sustained a compensable injury to his right shoulder arising out of the course of his employment.

MEDICAL BENEFITS

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App.

2002). *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Id.*

Because Claimant has failed to establish a compensable injury, Claimant has failed to establish an entitlement to medical treatment for his right shoulder issues.

TEMPORARY TOTAL DISABILITY

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove her 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. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). 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 regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S. The existence of disability is a question of fact for the ALJ. No requirement exists that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Because Claimant has failed to establish a compensable injury, Clamant has not established an entitlement to temporary disability benefits.

CAUSE OF TERMINATION

Because Claimant has failed to establish a compensable injury or entitlement to TTD benefits, the issue of whether Claimant was responsible for his own termination is moot.

ORDER

It is therefore ordered that:

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

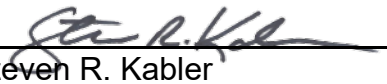
2. Claimant is not entitled to workers' compensation medical benefits.

3. Claimant is not entitled to temporary disability benefits.

4. The issue of Claimant's responsibility for termination is moot.

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: February 23, 2023



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

ISSUES

I. Whether Respondents established, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment thereby precluding his entitlement to TTD pursuant to C.R.S. §§ 8-42-103 (1) (g) and 8-42-105 (4) (a).

II. If Respondents failed to demonstrate that Claimant was responsible for his resulting wage loss, whether Claimant established, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits commencing July 29, 2022 and ongoing.[1]

FINDINGS OF FACT

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

1. Claimant is a former employee of Respondent-Employer. He was hired on October 19, 2015 (Ex. D), and was working as a foreman when he sustained admitted injuries to his low back and left shoulder on or about November 15, 2021. As his acute back pain improved, it was discovered that Claimant had also suffered a right inguinal hernia as a consequence of the industrial accident. (Ex. 5).

2. As noted, liability for these injures has been accepted. (Exs. E, F). Claimant was referred to physical therapy to treat his low back and shoulder injuries. He was also referred to a general surgeon to evaluate his inguinal hernia. These initial referrals were ignored resulting in the need to "redo" the referral and "reconsult" a different therapist and general surgeon. (Ex. 5, pp. 13, 31). Ultimately, Claimant would participate in therapy. He would also undergo a right inguinal hernia repair with Dr. Ihor Jurij Fedorak on February 3, 2022. (Ex. 6, p. 20). Claimant was off of work from February 3, 2022 through June 5, 2022, as he recovered from his injury and hernia surgery. (Ex. F). Claimant returned to work in a modified capacity following his surgery. Claimant continued to work within his restrictions as a foreman/supervisor doing office tasks and training others in the shop, from June 6, 2022, until he was fired by Employer on July 29, 2022[2].

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[1] Respondents stipulated that because Claimant was working in a modified duty capacity with physical restrictions, he would be considered temporarily disabled and entitled to TTD benefits commencing July 29, 2022 and ongoing if they failed to establish that he was responsible for the termination of his employment and subsequent wage loss. Nonetheless, Respondents also contend that Claimant is not entitled to TTD benefits because he is working in a family owned business.

[2] The ALJ credits Claimant's testimony to find that he was informed that his employment with Respondent-Employer was terminated on July 29, 2022, not July 28, 2022 as referenced in the Termination Report and testified to by [Redacted, hereinafter MW].

3. MW[Redacted] testified as the owner/operations manager of Respondent-Employer. MW[Redacted] testified that Claimant returned to work in a modified capacity after undergoing hernia surgery. According to MW[Redacted], Claimant returned to work as a foreman training others. He also worked in the office performing light duty tasks. In addition to his work for Employer, MW[Redacted] suggested that Claimant was self-employed in a variety of businesses including an adult object/lingerie shop co- owned with his wife, a vending machine business and as a car salesman.

4. MW[Redacted] testified that sometime in June, 2022, he initiated an investigation into Claimant's behavior at work after receiving complaints from employees of the company, including a worker that Claimant supervised. According to MW[Redacted], an employee under Claimant's supervision made "serious" accusations about Claimant's conduct in the workplace prompting MW[Redacted] to gather witness statements from Claimant's co-workers. Because none of the complaining witnesses testified at hearing and because Claimant objected to the introduction of the witness statements without authentication/foundation, which objections were sustained prior to hearing, the exact nature of the complaints are unknown. However, the evidence presented supports a finding that Respondents insist that Claimant inappropriately used his position as a foreman/supervisor to gain access the personnel file of a subordinate worker he was supervising to obtain her birthdate.

5. MW[Redacted] testified that company personnel files contain confidential identifying information about the employee, such as their driver's license and social security numbers and seemingly, in this case, their birthdates. According to MW[Redacted], Claimant had no authority to go "digging around" in the files to obtain this kind of information. Consequently, MW[Redacted] testified he considered Claimant's actions immoral. MW[Redacted] testified further that by accessing the personnel file to obtain confidential information about another employee of the company, Claimant violated company policy and safety protocols. After investigating the complaint, MW[Redacted] testified that he summoned Claimant to a meeting on July 28, 2022, during which he demanded that Claimant explain his actions. According to MW[Redacted], he advised Claimant that a complaint had been filed alleging that he had engaged in inappropriate workplace conduct and that he had misused company information. Claimant generally denied the allegations against him. Moreover, Claimant denied MW's[Redacted] contention that he (Claimant) mentioned the name of the person he suspected of making the complaints based upon a prior dispute between the two, i.e. between Claimant and the complainant. While MW[Redacted] referenced that a complaint had been filed, he would not confirm the identity the complainant(s) nor would he provide Claimant any details regarding the allegations of inappropriate conduct raised by the complaining party(ies). Indeed, MW[Redacted] testified that he only gave Claimant an "overview" of the allegations of inappropriate conduct made by the complainant(s). MW[Redacted] testified that he instructed Claimant to provide a written response to the allegations of wrongdoing within 24 hours.

6. Because he didn't know the nature of the allegations leveled against him and because he did not know how he had supposedly violated company policy, Claimant testified that he could not respond to the accusations. The ALJ infers from

Claimant's testimony that he needed more information regarding the allegations of inappropriate conduct and misuse of confidential information before he could provide the written response requested by MW[Redacted]. Nonetheless, the evidence presented supports a finding that MW[Redacted] took Claimant's reported inability to respond to the allegations as a refusal to provide a statement. MW[Redacted] testified that because Claimant refused to present any evidence, facts, or a statement refuting the allegations against him, he determined the complainant's assertions were true. Upon concluding that the allegations against Claimant were true, MW[Redacted] testified that he summarily terminated Claimant's employment on July 28, 2022.

7. MW[Redacted] testified that following the July 28, 2022 meeting with Claimant, he drafted a termination letter (Termination Report) and gave a copy of it to Claimant as he left the building. The Termination Report provides the following basis for Claimant's termination: "Other employees made allegations of inappropriate conduct in the work place and misuse of confidential company information. MW[Redacted], the owner, did an investigation and found the offense to be a terminateable (sic) offense." (Ex. 13).

8. Clearly the Termination Report does not identify any accusers or provide specific detail on the alleged inappropriate conduct Claimant supposedly carried out in the work place and no witness testified about these details. Consequently, the nature of the "inappropriate conduct" Claimant allegedly instigated is unknown. Moreover, the report does not provide detail on what confidential company information was allegedly accessed or how it was misused. As noted above, the evidence presented supports a finding that Respondents maintain that Claimant's decision to access the personnel file of a subordinate to obtain her birthdate constituted "misuse of confidential company information" because birthdates are treated as confidential information at the company and because Claimant purportedly obtained this information by accessing the complainant's personnel file. Indeed, during his testimony, MW[Redacted] clarified that he considered employee birthdates confidential company information and that by accessing the complainant's personnel file to obtain her birthdate, Claimant misused company information for his benefit, although the evidence presented fails to establish the nature of that benefit or how this information was "misused" other than that Claimant allegedly obtained the complainant's birthdate[3]. Because he considered Claimant's alleged conduct of obtaining a co-employee's birthdate from the personnel file a complete breach of trust between Claimant and the company rather than a safety rule per se, MW[Redacted] testified that he did not follow a progressive discipline protocol before terminating Claimant. Rather, MW[Redacted] testified that Claimant was simply fired.

9. MW[Redacted] testified that access to employee files is protected by lock and key. The cabinet where these files are kept is locked and has a sign on it providing that the files are confidential and that inappropriate or wrongful access could lead to

[3] Although a vague reference to a gift or gifts was raised during the testimony of MW[Redacted], no foundation for how this reference may have constituted inappropriate workplace conduct or misuse of confidential information was presented. Accordingly, the ALJ is disinclined to speculate on what role a gift or gifts may have played in Claimant's termination.

termination. There is only one key to the file cabinet and only three people have access to that key, i.e. MW[Redacted] and two other high level employees of the company, i.e. [Redacted, hereinafter LW] and [Redacted, hereinafter SR]. Anyone seeking access to the cabinet was required to go to one of the aforementioned persons and explain why access was necessary. If access was granted, the cabinet would be opened and the key-holder would monitor the employee requesting access as they reviewed and/or modified the contents of the personnel file selected. Filing of materials, such as performance evaluation reports, would be managed in the same fashion, specifically the supervisor for an employee would gain access to the personnel files of those employees under his direction from the gatekeeper who would then observe as the report would be placed in the file.

10. Based upon the evidence presented, the ALJ finds that MW[Redacted] probably had no direct knowledge regarding any breach of confidences on Claimant's part. Rather, the evidence presented persuades the ALJ that the information forming the basis of Claimant's termination, including the suggestion that Claimant accessed the complainant's personnel file to obtain her birthday, came from employee statements which MW[Redacted] simply concluded were true and which, as noted above, were not supported by witness testimony or introduced into evidence.

11. Claimant testified that he supervised 15 employees for Respondent-Employer. He testified further that as a supervisor, he was routinely granted access to the personnel files of those employees under his direction in order to review their past performance evaluations so he could recommend appropriate wage increases as part of his new performance review. Claimant testified that he was given access to the files by LW[Redacted], SR[Redacted] or MW[Redacted], who would supervise him as he reviewed the files. Claimant was never given the key to independently access the file cabinet. Based upon the evidence presented, the ALJ finds that Claimant was probably never left alone while reviewing subordinate employee files.

12. Claimant disputes that he participated in a meeting with MW[Redacted] on July 28, 2022. Rather, Claimant testified that the meeting took place on Friday, July 29, 2022 and that he was terminated during this meeting. Claimant testified that at the outset of this meeting, MW[Redacted] presented him with the July 28, 2022, Termination Report and asked him if he had anything to say. Claimant testified that he read the Termination Report and informed MW[Redacted] he had "no idea what [MW[Redacted]] was talking about." Based upon the evidence presented, the ALJ infers from Claimant's testimony that he had no understanding of the basis for the allegations raised in the termination report.

13. Claimant testified that MW[Redacted] refused to provide the names of any of the complainants whose statements formed the basis of the termination report. He testified further that he was unaware that someone was complaining about him prior to the July 29, 2022 meeting. Finally, Claimant confirmed MW's[Redacted] testimony that no details regarding the allegations of inappropriate work place conduct were provided during the meeting since MW[Redacted] considered those details confidential. Indeed,

when Claimant asked MW[Redacted] what he had done to get fired, MW[Redacted] purportedly responded, “You tell me.”

14. Claimant reported that he was given an opportunity to provide a written statement in response to the allegations contained in the Termination Report; however, he testified that he did not know what to write because he did not know who had complained about him and because he had no understanding of the nature of his alleged wrongdoing. As Claimant testified, he had no idea what he had done at the time he was handed the termination report.[4]

15. Claimant testified that after returning to work in a modified capacity, he retained his supervisory capacity and had to access personnel files to complete performance evaluations for the employees under his direction. Claimant testified that between his return to work and the date of his termination, he had to gain permission to access personnel and during this period MW[Redacted] would monitor him as he accessed/reviewed the file. Claimant was never denied access to personnel files during this same period, i.e. from June 6, 2022 to July 28, 2022. Claimant adamantly denied ever using confidential information contained in the personnel files for any other purpose than to evaluate those employees under his supervision.

16. Claimant testified that he was never trained in the management/protection of information contained in the personnel files. He also testified that he never considered the potential ramifications of unauthorized/inappropriate access to a file because he never would and did not access personnel files for anything but legitimate business reasons.

17. Claimant testified that he has not received any unemployment compensation benefits since his termination. He also testified that he could not return to his regular position as a working foreman for Employer given his current lifting limitations and physical restrictions.

18. Claimant testified that since his termination, he has not derived any income from the sale of cars. Indeed, Claimant testified that he did not work in the auto sales business at any time while working for Employer. Rather, Claimant testified that on one occasion during his employment with Respondent-Employer he had a personal vehicle that had broken down car in front of his house, which he decided to sell. Based upon the evidence presented, the ALJ is not convinced that Claimant has been or currently is employed as a car salesman.

19. Concerning the contention that he is self-employed as the owner of a vending machine business, Claimant testified that he maintained a single vending

[4] Although Claimant did not know the identity of the person(s) alleging misconduct or the substance of those accusations at the time he was asked to provide a written statement, he testified that through the litigation process he subsequently learned the identity of the complainant, recognized her to be a worker under his supervision and learned the basis for her complaint. Again, none of the details surrounding the complaint are known as the complaining witness did not testify.

machine containing soda, chips and candy at Employer's premises until he was terminated. Claimant testified that upon his termination he was instructed to remove his vending machine from Employer's building. Claimant testified that the vending machine is in his garage and that he has not derived any income from this or any other vending machine since being terminated by Employer. Based upon the evidence presented, the ALJ is not convinced that Claimant is independently employed in a vending machine business.

20. Claimant testified that his wife owns a clothing store that he has volunteered his time at both before and after his termination from Respondent- Employer. The shop does not sell lingerie. According to Claimant, he agreed to volunteer in the shop after his termination to help "keep her business afloat." Claimant testified that after his termination from Employer, he has volunteered his time in the shop six days a week, Monday through Saturday, 11:00 a.m. to 7:30 p.m. daily. Prior to his termination, Claimant he would spend approximately 4 hours volunteering at the store arriving there after his shift for Respondent-Employer.

21. The clothing shop has not turned a profit since its establishment and Claimant does not take a salary nor is he paid by the shop for his work there. Indeed, Claimant has never been paid for his volunteer time while working in the shop. Claimant does not have an expectation of being paid and he has no agreement with the shop that he will be paid for his time in the future.

22. Claimant testified that he works alone when volunteering his time in the shop. Claimant's volunteer duties include keeping the store open, stocking items, moving mannequins, organizing the items for sale, selling the store's items, assisting customers with their shopping, and completing customer purchases. Previously, the shop had an employee who would be paid $150.00 for 10 hours of work involving the same tasks Claimant is now performing on a volunteer basis. Claimant testified that the shop has had no employees since his termination on July 29, 2022, suggesting that the shop could not afford to pay any employee's. Claimant agreed that if he did not volunteer at the shop, it would be necessary to hire an employee if they could afford it but if not, the shop would close. Accordingly, Claimant agreed that his volunteer work allows the shop to remain open and devote more money to paying the shop's bills, rent, utilities, so it can remain a viable business. Nonetheless, the shop has not been profitable and Claimant has not derived any income for the time he spends working there.

23. Claimant denied that he experienced increased back pain as a result of moving mannequins. He also denied lifting items in excess of his assigned restrictions, testifying that the October 17, 2022 physical therapy note in these regards was inaccurate because his physical therapist misunderstood his reports to her. Finally, Claimant denied experiencing increased back pain following a break-in to his wife's apparel shop which required a cleanup. While he acknowledged the break-in, Claimant testified that the cleanup simply required sweeping the floors of the shop. Based upon the evidence presented, the ALJ finds that Claimant has not suffered subsequent injuries since being released to modified duty.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

C. 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 Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). 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). In this case, the ALJ credits the testimony of Claimant and MW[Redacted] regarding the housing/storage of confidential employee information in a protected filing cabinet. While the ALJ is convinced that Claimant routinely accessed the personnel files of the employees he supervised, the evidence presented fails to persuade the ALJ that he accessed those files inappropriately or that he gathered the personal information of an employee under his supervision, which he later "misused" for his personal benefit. Accordingly, Respondents have not carried their burden to establish that Claimant performed a volitional act which he would reasonably expect to cause the loss of his employment. See *Patchek v. Dept. of Public Safety*, W.C. No. 4-432-201 (ICAO, Sept. 27, 2001).

Responsibility for Termination

A. Because Claimant's injury in this case was after July 1, 1999, C.R.S. §§ 8-42-103 (1) (g) and 8-42-105 (4) (a), collectively referred to as the "termination statutes", apply to assertions that Claimant is responsible for his wage loss. These provisions state, "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." Under the termination statutes, a claimant who is responsible for the termination of modified or regular employment is not entitled to temporary disability benefits absent a worsening of condition, which reestablishes the causal connection between the injury and the wage loss. See *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004); see also *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo.App. 2002); *Grisbaum v. Industrial Claim Appeals Office*, 109 P.3d 1054 (Colo. App. 2005). As a result, the claimant loses the right to temporary benefits following the termination date. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo.App. 1994).

B. Since the termination statutes provide a defense to an otherwise valid claim for temporary disability benefits, Respondents shoulder the burden of proving, by a preponderance of the evidence, that Claimant is responsible for his termination and subsequent wage loss. *Colorado Compensation Insurance Authority v. Industrial Claims Appeals Office,* 20 P.3d 1209 (Colo.App. 2000). Claimant's suggestion that Respondents' failure to follow its own progressive disciplinary policy precludes a determination of whether he was responsible for his termination is unpersuasive. See generally, *Keil v. Industrial Claim Appeals Office*, 847 P.2d 235 (Colo.App. 1993) (employer's failure to follow its established discipline procedures did not prohibit a determination that an employee was responsible for termination). To the contrary, as noted in *Keil*, the dispositive issue is whether the employee performed a volitional act or otherwise exercised a degree of control over the circumstances resulting in discharge. Moreover, Respondents do not have to prove Claimant knew or should have known that his conduct would result in his termination. *Gonzales v. Industrial Commission*, 740 P.2d. 999 (Colo. 1987). Rather, it is necessary only that Respondents establish that Claimant is "responsible" for his/her termination and subsequent wage loss through a volitional act or the exercise of some control over the circumstances surrounding the termination.

C. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. See, *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control of the circumstances surrounding the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo.App. 1994). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo.App. 1996) (unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,*
W.C. no. 4-676-410 (ICAO, April 9, 2008). In other words, an employee is "responsible" for their termination if the employee precipitated the employment termination through a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety, supra.* A volitional act does not mean moral or ethical culpability. It simply means that the claimant performed an act, which led to his/her termination. *Gleason v. Southland Corp*., W.C. No. 4-149-

631 (ICAO, June 13, 1994). Thus, as noted above, the fault determination depends upon whether a claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo.App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo.App. 1995). In this case, Respondents assert that Claimant is responsible for his termination and subsequent wage loss after July 29, 2022 because he "inappropriately, without permission or business reason, and in violation of employer's policies and rules, wrongly accessed a coworkers confidential personnel file and obtained that employee's personal information . . .", namely that workers birthdate. According to Respondent- Employer, Claimant then used that information for his personal benefit. The ALJ is not persuaded.

D. The written "Termination Report" in this case provides that Claimant was terminated because "other employees made allegations that he engaged in inappropriate conduct in the work place" and because he misused confidential company information. In this case, the termination report does not identify any accusers or provide specific detail on the alleged inappropriate conduct Claimant supposedly instigated in the work place and no witness testified about these details. Moreover, the report does not provide detail on what confidential company information was allegedly accessed or how it was misused.

E. Although testimony was presented suggesting that Claimant accessed a file containing a subordinate coworker's birthdate, the ALJ finds this evidence to rest on the veracity and competency of other persons rather than MW[Redacted]. As found, MW[Redacted] probably had no direct knowledge regarding any breach of confidences based upon confidential information Claimant allegedly lifted from the complainant's personnel file. Rather, the evidence presented persuades the ALJ that the information forming the basis of Claimant's termination, including the suggestion that Claimant accessed the complainant's personnel file to obtain her birthday, came from employee statements which MW[Redacted] simply concluded were true and which, as noted above, were not supported by witness testimony or introduced into evidence. While there may be substantially more to the allegations leading to Claimant's dismissal, Respondents never produced a complaining witness to corroborate Claimant's alleged "inappropriate conduct" and MW[Redacted] did not testify about why the complaining witness statements led him to believe that personal information had been used inappropriately. Here, Respondents urge the ALJ to conclude that Claimant had to have obtained the complainant's birthdate from the personnel file simply because she complained and because he had regular access to the files. As presented, the evidence simply fails to establish that Claimant obtained the complainant's birthdate from her personnel file or that he used this information for an inappropriate reason. Consequently, the ALJ agrees with Claimant that it would indeed be a slippery slope to determine that Claimant performed a volitional act that he would reasonably expect to result in the loss of employment when the evidence presented regarding those alleged volitional acts was based upon the vague and unverified statements of coworkers who did not testify. Considering the entire evidentiary record, the ALJ concludes that Claimant probably did not exercise a degree of control over the circumstances

surrounding his termination by accessing and misusing confidential workplace information. Accordingly, Respondents have failed to establish that Claimant is responsible for the loss of his employment. While the evidence presented supports a conclusion that Claimant is not responsible for his termination and subsequent wage loss after July 29, 2022, Respondents assertion that Claimant is not entitled to TTD because he is working must also be addressed.

Claimant's Entitlement to Temporary Total Disability Benefits

F. 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).

G. As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo.App. 1995). As noted above, Section 8-42-103(1) (a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her 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 to effectively and properly perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998).

H. In this case, Respondents concede that Claimant was provided with work restrictions that impaired his ability to perform his regular employment. Indeed, Respondents noted that Claimant was working modified duty when his employment was terminated. Accordingly, Respondents stipulated that, if they failed to establish that Claimant was responsible for his termination he would be entitled to TTD commencing July 29, 2022 and ongoing, if not for the fact that he was self-employed and also working in a family business. Specifically Respondents contend that Claimant is employed selling cars, maintaining a vending machine business and working in a family owned apparel shop. The ALJ is not persuaded.

I. Although raised by Respondent's through the testimony of MW[Redacted], the evidence presented fails to support that Claimant is employed in vehicle sales or through an independent vending machine business. In fact, Respondents do not assert that Claimant is working in either capacity in their position statement. Rather, Respondents contend that Claimant is employed in the capacity as a "sales associate"

by his wife's apparel shop. Accordingly, Respondents contend that Claimant is not entitled to TTD.

J. Although Respondents recognize that Claimant is not remunerated for his time in the shop, they urge the ALJ find and conclude that Claimant is not entitled to TTD because the time he spends volunteering in his wife's apparel shop essentially constitutes a reinvestment of the wages that would normally be paid to an "employee" into the business which allows the shop to save money by devoting the payroll savings towards paying the shops bills, rent and utilities. Indeed, Respondents assert that the value of Claimant's volunteer time in the shop saves the business $765.00 in wages weekly, which is being reinvested into the organization to maintain its viability. Accordingly, Respondents contend that Claimant is actually employed by the shop. In support of their contention that Claimant is not entitled to TTD, Respondents argue that there is "no requirement that Claimant net any income from his employment and work" in the shop. Rather, Respondents note that Claimant is free to donate the value of his earnings to charity, refuse the money, give it away or as in this case, "reinvest it into his business." Based upon the evidence presented, the ALJ is not convinced that Claimant fits the definition of an employee working or under a contract for hire that would entitle him to any wages that he could refuse, donate or reinvest into his wife's business.

K. The Workers' Compensation Act (Act) defines "employee" in C.R.S. § 8-40-202(1)(b), as "[e]very person in the service of any person, association of persons, firm, or private corporation . . . under any contract of hire, express or implied . . . but not including any persons who are expressly excluded from [the Act]...." For purposes of Colorado's Workers' Compensation Act, an employer-employee relationship is established when the parties enter into a contract of hire. *Younger v. City and County of Denver*, 810 P.2d 647, 652-653 (Colo. 1991). In *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 593, 307 P.2d 805, 810 (1957), the Colorado Supreme Court stated that "[a] contract of hire is subject to the same rules as other contracts even though workmen's compensation laws are liberally construed in our state." Further, the Court held that "[a] contract is an agreement which creates an obligation. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation." *Id.* 134 Colo. at 592, 307 P.2d at 810 (quoting 17 C.J.S. 310, § 1a). However, the Court has also determined that "[a] contract of hire may be formed even though not every formality attending commercial contractual arrangements is observed as long as the fundamental elements of contract formation are present." *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384, 1387 (Colo. 1994); see also *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 220, 422 P.2d 630, 632 (1966).

L. In this case, Respondents contend that Claimant is "obligated" and "must" continue his work in the shop 8.5 hours per day, six days per week "for if he does not, the business will close and the investments in the business by he and his wife will be lost." Consequently, Respondents argue that there is, and has been since Claimant was terminated on July 29, 2022, an employee/employer relationship between himself and his wife's business. According to Respondents, merely because Claimant "[puts]

the earnings and income realized by this time, energies, efforts and hours back into the business' accounts, [rather] than his personal [bank] account or pocket" does not mean he is not an employee of the shop.

M. Based upon the evidence presented, the ALJ finds/concludes that Claimant is volunteering in his wife's business because the work he is performing for the shop is within his physical restrictions and he wants/needs something to do since being terminated because he has been unable to find other modified duty work. The ALJ is not convinced that the evidence presented supports a conclusion that Claimant is "controlled" by his wife's business and he "must" work there. Indeed, while Claimant spends a significant amount of time in the shop, the evidence presented supports a finding/conclusion that he does so by choice. Nothing about the evidence presented persuades the ALJ that Claimant could not simply walk away from the shop and chalk up any losses incurred by closure of the business as a bad investment. Simply put, the evidence presented fails to persuade the ALJ that Claimant is "duty-bound" to spend his time in the shop. Rather, the evidence presented supports a reasonable inference that Claimant spends time there because he has not been able to secure other work within his restrictions. Because Claimant has received no pay for his work in the shop, either before or after his industrial injury and subsequent termination and because he has no reasonable expectation of compensation in the future, the ALJ concludes that Claimant is acting as a volunteer for his wife's shop. Claimant's volunteer work for his wife's business does not satisfy the basic definition of him acting as an "employee" "in the service of" the employer under a contract of hire. Indeed, the ALJ is convinced that there is no mutuality of obligations between the shop and Claimant. Rather, if a party performs services without the expectation of remuneration, as is the case here, the person is a "volunteer," and not an employee within the meaning of the Workers' Compensation Act. See *Hall v. State Compensation Insurance Fund*, 154 Colo. 47, 387 P.2d 899 (1963). Because there was no contract between Claimant and the shop that created an employer/employee relationship, the ALJ concludes that Claimant could not demand compensation as an employee that he could refuse to take, donate or reinvest into the business.

N. As noted above, to receive temporary disability benefits, Claimant must prove that his injury caused a disability, that he left work as a result of the injury and that his temporary disability is total and lasts more than three regular working days. Sections 8-42-103(1) (a) and (b), 8-42-105(1), C.R.S. 2020; *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Because Respondents have stipulated that Claimant is disabled within the meaning of C.R.S. § 8-42-105, as evidenced by restriction of bodily function and the offer of modified duty to accommodate his restrictions, the analysis concerning Claimant's entitlement to TTD shifts to the question of whether Claimant suffered an actual wage loss.[5] In this case, the evidence presented supports a conclusion that Claimant has

[5] Even if Respondents had not stipulated that Claimant is disabled, Claimant's testimony combined with the content of his medical records persuades the ALJ that his low back injury and hernia has resulted in medical incapacity as evidenced by a loss/restriction in bodily function, which restriction has reduced his wage earning capacity as demonstrated by his inability to return to full duty employment based on the

suffered a wage loss as a direct result of his disabling low back/hernia injuries. Indeed, Claimant credibly testified that he is incapable of returning to his regular position for Employer and has been unable to secure other modified work within his restrictions for which he has derived pay since his employment was terminated. Accordingly, the ALJ concludes that Claimant has established that he has suffered an actual wage loss directly related to his industrial injury. Because Claimant's industrial injury caused a disability and he has suffered an actual wage loss as a result of his work injuries, he is entitled to TTD. C.R.S. §§ 8-42-103(1) (a) and (b); 8-42-1051); *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO, June 11, 1999).

O. 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)(a)-(d). Because none of the factors permitting TTD to be terminated under C.R.S. § 8-42-105(3) (a)-(d) have not been met, the ALJ is persuaded that Claimant is entitled to TTD benefits commencing July 29, 2022 and ongoing.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish, by a preponderance of the evidence, that Claimant is responsible for the termination of his employment and subsequent wage loss.

2. Respondent shall pay Claimant TTD benefits commencing July 29, 2022 and ongoing, at the appropriate TTD rate associated with Claimant's average weekly wage (AWW). The parties shall determine Claimant's AWW and the amount of the offsets to which Respondents are entitled. If the parties are unable to reach an agreement regarding the amount of the AWW or offset, either may apply for a hearing to determine the same.

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

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

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imposition work-related restrictions. Consequently, the ALJ would have concluded that Claimant is "disabled" within the meaning of C.R.S. § 8-42-105.

Dated: February 8, 2023

/s/ Richard M. Lamphere

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

NOTE: If you are dissatisfied with the 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.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-146-595-001

ISSUES

I. Whether Respondents produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Dr. Anjmun Sharma regarding permanent medical impairment.

II. Whether Claimant established, by a preponderance of the evidence, that he is entitled to maintenance care to cure and alleviate the ongoing effects of his August 26, 2020 admitted industrial injury.

III. Whether Claimant established, by a preponderance of the evidence, that he is entitled to a disfigurement award and if so, the amount of said disfigurement benefit.

FINDINGS OF FACT

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

1. Claimant suffered serious injuries in the course and scope of his employment on August 26, 2020, when the blade on a demolition saw he was using to cut down a flagpole bound between two metal layers on the pole causing the saw to kick back violently. Claimant lost his grip on the tool which subsequently came into direct contact with the left side of his chest. The saw traveled across Claimant's chest carving a path through the skin, muscle and bone of the left ribs and sternum while severely lacerating the lower portion of Claimant's left lung.

2. Fortuitously for Claimant, the jobsite was located on the grounds of a local hospital and he was close to the emergency room at the time of the accident. Claimant was able to ambulate to the emergency department room entrance where the severity of Claimant's injuries were assessed. Claimant was immediately transported to the operating room for hemorrhage control and further injury assessment. Following successful ligation of a completely severed mammary artery, Claimant underwent a thoracotomy with placement of two chest tubes to treat a left sided pneumothorax. Claimant was then airlifted to Parkview Medical Center in Pueblo, Colorado for hospitalization and additional treatment. (See generally, Resp. Exs. G, H and I).

3. After surgical repair and initial recovery from his chest wound, it was discovered that Claimant had also sustained an injury to his left shoulder during the August 26, 2020 accident. Claimant ultimately underwent additional surgery to repair a labral and subscapularis tear in the left shoulder.

4. Following extensive post-surgical care with his authorized treating provider (ATP), Dr. Thomas Centi, Claimant was placed at maximum medical improvement (MMI) on November 2, 2021. (Resp. Ex. A, p. 9). Dr. Centi assigned Claimant an 11% upper extremity impairment rating for reduced range of motion in the left shoulder. *Id.* at pp. 10-11.

5. Respondents filed a Final Admission of Liability (FAL) admitting to Dr. Centi's impairment rating on December 17, 2021. (Resp. Ex. A). Claimant objected to the FAL and requested a Division Independent Medical Examination (DIME). Dr. Anjmun Sharma was selected as the DIME physician.

6. Dr. Sharma completed the DIME on May 2, 2022. (Resp. Ex. E). Following his medical records review and physical examination, Dr. Sharma, assigned a 17% scheduled left upper extremity impairment rating and a 10% whole person impairment for a skin disorder pursuant to Chapter 13, Section 13.4, Table 1 at p. 232 of the AMA *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*) (hereinafter the Guides) (Resp. Ex. E, p. 23, 47).

7. Dr. Sharma assigned the aforementioned 10% whole person impairment for the residual scarring on Claimant's left upper torso and chest caused by the laceration from the saw blade. In allocating impairment for Claimant's scarring, Dr. Sharma noted:

> The patient does meet the criteria for skin disorders. Referencing page 231 (sic) of the AMA Guide, impairment classification for skin disease, the patient meets the criteria under Class II, 10 to 20% of the whole person. The patient belongs in Class II when signs and symptoms of skin disorder are present and intermittent treatment is required which I commented on in Section E of this report of the patient's subjective complaints of using a special cream and there are some limitation in the performance of some activities of daily living, which the patient has reported an (sic) which is commensurate with his current for (sic) functional activity status.[1]

(Resp. Ex. E, p. 47).

8. Dr. Sharma did not recommend maintenance medical treatment. (Resp. Ex. E, p. 47).

9. Dr. Carlos Cebrian performed an independent medical examination (IME) of Claimant at the request of Respondents on August 10, 2022. Dr. Cebrian also

[1] As referenced Section E of Dr. Sharma's DIME report notes that Claimant did not have "full range of motion" and reported "some pain" and "functional limitation in the performance of certain physical activities of daily living" associated with his scar. Claimant also reported that he is to "use a certain type of cream for soothing his symptoms", i.e. the pain related to his scar.

testified via pre-hearing deposition on October 21, 2022. Dr. Cebrian was admitted as an expert in occupational medicine. (Depo. of Dr. Cebrian, 6:19-21).

10. In his written IME report and throughout his deposition testimony, Dr. Cebrian opines that Dr. Sharma erred by assigning impairment for a Class 2 condition of the skin, i.e. for the scarring on Claimant's chest caused by the laceration from the saw blade on August 26, 2020 (See generally, Resp. Ex. F; Depo. of Dr. Cebrian, 15:6- 8).

11. During his deposition, Dr. Cebrian acknowledged that section 13.4 of the Guides, provides that if there is "any loss of function due to sensory deficit, pain or discomfort in the scar area, the scar should be evaluated according to criteria in Chapter 4 of the Guides. (Depo. of Dr. Cebrian, 16:20-25). Dr. Cebrian also noted that loss of function due to a scar, including loss of function due to limited motion in the scar area should be evaluated according to the criteria in chapter 3 or if in the chest, Chapter 5 of the Guides. (Depo. of Dr. Cebrian, 17:1-5). Because Claimant's scar was painful and having an effect on his range of motion which was limiting his functional abilities, Dr. Cebrian opined that any impairment associated with Claimant's scar would be rated in accordance with the principles in Chapter 3 of the Guides, which Dr. Cebrian noted is the chapter concerning extremities, involving the shoulder, elbow and wrist. *Id*. at ll. 6- 10.

12. Dr. Cebrian testified that Claimant did not meet the Guides to receive an impairment rating for his chest scar because even if the scar was causing some limitation in Claimant's ability to carry out his activities of daily living, there was no way to separate the range of motion loss due to Claimant's left shoulder injury from the range of motion loss attributable to Claimant's chest scar. (Depo. of Dr. Cebrian, 19:7- 15). Based upon the type of shoulder injury Claimant sustained and the surgery directed to that shoulder, Dr. Cebrian testified that the range of motion deficits Claimant was experiencing in the arm and chest wall were "exclusively" related to the shoulder injury. Alternatively, Dr. Cebrian opined that if there was range of motion loss due to the scar, it was "such a minimal component" that any range of motion loss from the scar would be accounted for in the range of motion loss attributable to the left shoulder. (Depo. of Dr. Cebrian, 19:16-22). Accordingly, Dr. Cebrian testified that to assign a separate rating for Claimant's scar would be duplicative. *Id*. at ll. 23-24.

13. In support of his opinions, Dr. Cebrian reasoned that although Claimant had some discomfort and thickness in his scar, the scar was not causing any abnormalities in his range of motion or difficulties with pushing, pulling, lifting, or engaging in overhead activity. Instead, Dr. Cebrian concluded that those issues were attributable to Claimant's left shoulder injury, and not from the chest scar itself. According to Dr. Cebrian, there must be a functional loss specific to the scar itself and not from another injured body part to receive a rating under Chapter 13 of the Guides. Indeed, Dr. Cebrian noted: "And related to [Claimant] there is nothing specifically that can be pinpointed to the scar in isolation that you would assign an impairment rating for that scar itself . . ." (Resp. Ex. F, p. 88, Depo. of Dr. Cebrian, 18:7-24).

14. Dr. Cebrian stated that “the scar itself wasn’t restrictive to the point that it was the scar that was preventing range of motion in [Claimant’s] shoulder”. (Depo. of Dr. Cebrian, 22:22-24). Instead, it was Claimant’s shoulder limitations that were restricting his range of motion. Specifically, Dr. Cebrian noted, Claimant’s “scar, the location of the scar wasn’t something that was causing [Claimant] to not be able to move his shoulder to the full extent. It was the shoulder joint itself”. (Depo. of Dr. Cebrian, 23:1-3).

15. During cross-examination, Dr. Cebrian admitted that there “may be residual effects” from Claimant’s scar, “but not to the point that it qualifies for a separate permanent impairment”. (Depo. of Dr. Cebrian, 31:22-24).

16. Dr. Sharma testified by deposition of November 4, 2022 as a Level II accredited physician with a board certification in family practice. (Depo. of Dr. Sharma, 6:7-13). Dr. Sharma testified that he did assign a Class 2 rating for Claimant’s scar because Claimant reported “using medication, anti-inflammatories for pain, sometimes over-the-counter gel, like Voltaren” and because “there’s limitations of performance of some activities of daily living”, such as “[p]utting on [his] shirt, taking off [his] shirt, perhaps brushing his hair, combing his hair, maybe even cleaning himself or cleaning parts of his body on his chest, maybe it’s hurting, also when he is cleaning his chest in the shower. (Depo. of Dr. Sharma, 13:4-14). Dr. Sharma made clear that Claimant’s functional limitations were caused by both the shoulder injury and the scar and he rated both based upon his review of the medical records, his physical examination and asking Claimant “questions with regard to his scar and activities of daily living”. (Depo. of Dr. Sharma, 14:12-25, 15:1-6).

17. Concerning Claimant’s need for ongoing medical treatment, Dr. Sharma testified that Claimant will need ongoing anti-inflammatories and over-the-counter preparations such as Voltaren gel to manage his pain which will “[mitigate] his symptoms of pain” and allow him to be as “functional as possible”. (Depo. of Dr. Sharma, 16:2-25; 17:1-3).

18. Dr. Sharma testified that his assignment of impairment related to Claimant’s chest scar was based on pain and loss of function not range of motion loss. (Depo. Dr. Sharma, 20:3-18).

19. Claimant testified that he has limited mobility of his left shoulder and chest wall describing a rough scar that felt wadded up. He reported persistent pain, aching and numbness in the left pectoralis muscle and chest wall. He admitted he did not need to go back to a doctor for the scar, that he had no scheduled appointments for treatment of scar, and that he was using oils and cream that were recommended, rather than prescribed.

20. The evidence presented supports a finding that none of Claimant’s authorized treating physicians have recommended that he undergo maintenance care.

Dr. Cebrian also concluded that no medical maintenance care was reasonable, necessary, or related to Claimant's August 26, 2020 injury. (Resp. Ex. F, p. 87). Dr. Cebrian reasoned that Claimant's lack of work restrictions indicated Claimant was "doing well, was stable, and there really wasn't any medical treatment that was going to make any difference with any of [Claimant's] ongoing complaints that he had". (Depo. of Dr. Cebrian, 13: 24-25, 14:1-3).

21. As noted above, Dr. Sharma did not indicate that Claimant required maintenance care in his DIME report. Nonetheless, the ALJ credits Claimant's testimony regarding his ongoing symptoms and the subsequent testimony of Dr. Sharma to find that Claimant probably requires ongoing over-the-counter analgesics, including topic analgesics, to manage the persistent pain associated with his chest injury and resultant scar. Without such analgesics, the ALJ is convinced that Claimant's condition will probably deteriorate further resulting in worsening pain and greater functional decline. Accordingly, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that he is entitled to a general order for ongoing maintenance treatment. The contrary opinions of Dr. Cebrian are unpersuasive.

22. Visual inspection of the left side of Claimant's body, including his left shoulder, left chest and left torso reveals the following scarring:

- A total of three (3) arthroscopic surgical scars located about the left shoulder. These scars are all thin in width and vary in length between ⅜ to ½ inch long. They also vary in color from being lighter than the surrounding skin to a light pink. While the scars on the front and outside of the shoulder appear to be of the same contour as the surrounding skin, the scar located on the upper back aspect of the left shoulder is slightly depressed.

- In addition to the left shoulder scarring, there is a large, variously pigmented, rough appearing and thickened scar which begins in the center of the chest wall in the area of the mid sternum and runs diagonally down the chest for approximately 14 inches terminating below the left pectoralis muscle on the lower aspect of the left ribs. This scar varies in width with some portions appearing up to ½-inch wide. Multiple pairs of lightly pigmented and slightly raised suture scars appear adjacent to and run along the length of this scar. There is a secondary surgical scar from Claimant's thoracotomy located below the left nipple. This scar extends from the left side of the chest wall over the pectoralis muscle for approximately 10 inches before it intersects with the aforementioned 14-inch scar described above. This surgical scar varies in width from ⅜ to ½ an inch, is red in color and raised when compared to the surrounding skin.

- Below the 10-inch scar on the left side of the torso are two additional scars the first appearing approximately 1 inch long by ⅜ inch wide. This scar is red in color and raised when compared to the color and contour of the surrounding skin. The second scar is approximately 3 inches long and

½ inch wide. This scar is pink in color and raised when compared to the surrounding skin.

CONCLUSIONS OF LAW

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

Generally

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

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

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo.App. 1990). 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); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

Overcoming Dr. Sharma's Impairment Rating Opinion

D. A DIME physician's findings regarding causation and whole person impairment are binding on the parties unless overcome by "clear and convincing evidence". *Section 8-42-107(8) (b) (III), C.R.S.*; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo.App. 1998). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*. In other words, to overcome a DIME physician's opinion concerning the cause of a particular component of a claimant's overall medical impairment or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt". *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual- Med v. Industrial Claim Appears Office, supra.*

E. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions, including whether the DIME appropriately utilized the AMA Guides in his opinions. *Section 8-43-301(8), C.R.S.*; *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo.App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). In this case, Dr. Sharma testified that he assigned a separate impairment rating for Claimant's chest scar on the basis that it was causing him pain which in turn restricted his ability to "fully and unreservedly" perform such activities of daily living as donning/doffing his shirt, brushing/combing his hair and cleaning parts of his body, including his chest because "it's hurting". (Depo. of Dr. Sharma, pp. 13-16, ll. 1-9). Respondents' challenge to the impairment rating opinion of Dr. Sharma centers on Dr. Cebrian's opinion that no specific functional deficits can be "pinpointed" to the scar in isolation that you would assign an impairment rating based upon a limitation of Claimant's activities of daily living. (Depo. of Dr. Cebrian, 18:7-15). While admitting that the scar may cause some discomfort and may be thickened creating some residual limitations (effects) in some areas, Dr. Cebrian testified that these factors were not what is causing Claimant's limitation with functional activities. *Id.* at ll. 16-19. Rather, Dr. Cebrian testified that Claimant's left shoulder injury is what is causing his limitations with pushing, pulling, lifting and reaching/lifting overhead because the shoulder injury is responsible range of motion loss and thus, Claimant's functional limitations. *Id*. at ll. 19-24. (See also, Resp. Ex. F, pp. 88-89). Because there is "no way to separate out what's coming from the shoulder (injury) and what's coming from the scar" when assessing the impairing components of the injuries in this case, Dr. Cebrian testified that Dr. Sharma erred when he assigned a separate impairment for the scar. (Depo. of Dr. Cebrian, 19:7-24). Indeed, Dr. Cebrian testified that given the type of shoulder injury Claimant sustained, along with the documented range of motion deficits in the left shoulder post-surgery, any "minimal component" of range of motion loss attributable to the scar would be completely subsumed in the range of motion impairment related to the left shoulder. Accordingly, Dr. Cebrian opined that assigning impairment for functional deficits based

upon range of motion loss caused by the scar, even if caused by pain and some residual effects, essentially amounted to impermissible impairment double dipping. (Depo. of Dr. Cebrian, 19:23-24; See also, Resp. Ex. F, p. 89).

F. Pursuant to the *AMA Guides, Section 1.2,* Structure and Use of the *Guides*, "[i]n practice, the first key to effective and reliable evaluation of impairment is a review of office and hospital records maintained by the physicians who have provided care since the onset of the medical condition". This same section of the *AMA Guides* continues by noting, "This information gathering and analysis serves as the foundation upon which the evaluation of a permanent impairment is carried out. It is most important that the evaluator obtain enough clinical information to characterize the medical condition fully in accordance with the requirements of the guides". *In Re Goffinett,* W.C. No. 4-677-750 (Industrial Claims Appeals Panel, Apr. 16, 2008). Based upon the evidence presented, including Dr. Sharma's DIME report, the ALJ is convinced that Dr. Sharma adhered to the principals of the Guides by conducting a thorough review the medical records to gather information to accurately and fully describe Claimant's medical condition. Indeed, Dr. Sharma testified that he rated both Claimant's shoulder and skin disorder, i.e. his scar based upon his review of the medical records, his physical examination and asking Claimant "questions with regard to his scar and activities of daily living". (Depo. of Dr. Sharma, 14:12-25, 15:1-6).

G. The Guides also provide a method for determining the impairing effect of scars following bodily injury. Indeed, Section 13.4 provides "If a scar involves a loss of sweat gland function, hair growth, nail growth or pigment formation, the effect of such loss on performance of the activities of daily living should be evaluated. Furthermore, any loss of function due to sensory deficit pain or discomfort in the scar area should be evaluated according to the criteria in Chapter 4. Loss of function due to limited motion in the scar area should be evaluated according to criteria in Chapter 3 or if the chest wall excursion is limited in Chapter 5". The ALJ agrees with Dr. Cebrian that the guidance for rating scars in Section 13.4 should be interpreted to indicate that if a scar is having an effect on range of motion, then the impairing nature of the scar should be rated pursuant to Chapter 3, which is an extremity chapter containing the extremities, including the shoulder.

H. Based upon the evidence presented, the ALJ is persuaded that Dr. Sharma followed the principles set out in Section 13.4 of the Guides. Furthermore, the ALJ is convinced that Dr. Sharma properly considered and appropriately used Table 1-Impairment Classification for Skin Disease when calculating Claimant's impairment rating. The difference between Dr. Sharma and Dr. Cebrian regarding impairment is not based on whether Dr. Sharma appropriately utilized the principles set out in the AMA Guides, but rather on Dr. Cebrian's belief/opinion that any functional deficits caused by range or motion loss owing to Claimant's chest scar, were already accounted for in the range of motion loss attributable to Claimant's shoulder injury.

I. While it is clear that Dr. Cebrian believes that Dr. Sharma has erred because there is nothing that specifically indicated that the scar was affecting

Claimant's functional activities and because Claimant's left shoulder range of motion was limited to the extent that there would be no effect from the scar on Claimant's range of motion and activities of daily living, the ALJ has considered all of the DIME physician's written and oral testimony[2] to find and conclude that Dr. Sharma did not believe that all the deficits in Claimant's functionality were due to the range of motion loss caused by Claimant's left shoulder injury and he cited specific examples of those activities he believed were impaired secondary to Claimant's extensive chest scar. Moreover, Dr. Sharma addressed Claimant's use of topical agents to treat the ongoing pain and sensitivity caused by the scar, which forms the basis for his ongoing functional limitations. As a result, the ALJ is not persuaded that Dr. Sharma erred in assigning a Class 2 permanent impairment based on Table 1 for Claimant's extensive chest scar. Indeed, after considering the totality of the evidence presented, including the DIME report of Dr. Sharma, the report of Dr. Cebrian along with the balance of the medical record, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that Dr. Sharma's determination that Claimant is entitled to a separate impairment for his chest scar is highly probably incorrect. Rather, the ALJ concludes that the evidence presented establishes a mere difference of opinion between Dr. Sharma, as the DIME physician and Dr. Cebrian regarding the impairing components of Claimant's extensive injuries. A difference of opinion does not rise to the level of clear and convincing evidence that is required to overcome Dr. Sharma's opinions concerning impairment. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000),* Consequently, Respondents request to set aside the impairment rating opinion of Dr. Sharma must be denied and dismissed.

Claimant's Entitlement to Maintenance Medical Treatment

J. The need for medical treatment may extend beyond the point of maximum medical improvement (MMI) where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent further deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). In *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra*. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition". If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in *Grover*".

K. While a claimant does not have to prove the need for a specific medical benefit, and respondents remain free to contest the reasonable necessity of any future treatment; the claimant must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra.* Indeed, a claimant is only

[2] When rendering his order, the ALJ should consider all of the DIME physician's written and oral testimony. See *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo.App. 1998).

entitled to such future benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); C.R.S. § 8-41-301(1) (c). 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 employment. *Snyder v. Industrial Claim Appeals Office,* 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 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*.

L. The question of whether the claimant met the burden of proof to establish his/her entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, Dr. Sharma indicated in his DIME report that Claimant did not require maintenance medical care. Nonetheless, he testified that Claimant was managing the pain associated with his chest scar with over-the-counter medications and other preparations, including Tylenol, Ibuprofen and Voltaren gel, which he needed to "mitigate" his pain symptoms to "allow him to be as functional as possible". (Depo. of Dr. Sharma, 16:2-9; 17:1-3 and 21:6-15). The ALJ credits Claimant's testimony and the opinions of Dr. Sharma to finds/conclude that Claimant's present condition will likely deteriorate and he will, more probably than not, experience functional decline without the continued use of the aforementioned over-the-counter analgesics, including Voltaren gel or an equivalent preparation. Accordingly, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that he is entitled to a general award of maintenance medical care. In concluding that Claimant has established his entitlement to maintenance medical benefits, the ALJ specifically rejects Dr. Cebrian's opinion that there "really [isn't] any medical treatment that [is] going to make any difference with any of [Claimant's] ongoing complaints . . . " Nonetheless, even with a general award of maintenance medical benefits, Respondents retain the right to dispute whether the need for future medical treatment is related to Claimant's compensable injury or whether that treatment is reasonable and necessary. *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

Claimant Entitlement to Disfigurement Benefits

M. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement", as used in the statute, contemplates that there be an "observable impairment of the natural appearance of [the] person". In this case, the ALJ finds and concludes that as a result of his August 26, 2020 work injury; Claimant has visible disfigurement to the body consisting of significant scarring as described in Finding of Fact, ¶ 22 above.

N. Respondents suggestion that Claimant would not be entitled to disfigurement if he received an impairment rating for the substantial scarring is unpersuasive. In concluding that Claimant is entitled to both an impairment rating for his chest scar and a disfigurement award for his disfiguring scarring, the ALJ finds the case of *Gonzales v. Advanced Component Systems*, 949 P.2d 569 (Colo. 1997) instructive. In *Gonzales*, the Court held that the impairment rating statute did not "preclude other recovery" available to the claimant under the disfigurement statute enumerated at C.R.S. § 8-42-108 for a functionally impairing and disfiguring facial scar. Analogous to the situation presented in *Gonzales*, the impairment assigned for Claimant's chest scar is to compensate him for the functional deficits caused by his injury while the disfigurement award is designed to compensate Claimant for the visible,
i.e. observable alteration in the natural appearance of his body. Accordingly, the ALJ is not convinced that Claimant's receipt of an impairment rating and a disfigurement award for the same scar constitutes a "duplicative" award as asserted by Respondents. Because visual inspection of Claimant's chest, left torso and left shoulder supports a finding that he has suffered an "observable impairment of the natural appearance of [the] person", the ALJ finds/concludes that he is entitled to a disfigurement award. Nonetheless, a question remains as to whether Claimant's disfigurement constitutes "extensive body scars" so as to trigger the second tier of disfigurement benefits as referenced in C.R.S. § 8-42-108 (2).

O. "Extensive" is defined as, "Widely extended in space, time, or scope; great or wide or capable of being extended". Black's Law Dictionary, *Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, Sixth Ed. 1990. The common and ordinary meaning of the word "extensive" is "having wide or considerable extent", with the term "extent" being defined as the "amount of space or surface that something occupies*". Webster's New Collegiate Dictionary*, (1973). In interpreting C.R.S. § 8-42-108 (2), the ALJ gives the terms and phrases used in the statute their plain and ordinary meanings, and has read them in context and construed them according to the rules of grammar and common usage. Based upon that interpretation the ALJ concludes that the statute contemplates that in order to trigger a second tier disfigurement award, there must be evidence of scars or alteration in the appearance of the body over a wide area. Without question, the residual scars located on Claimant's chest, torso and left upper injury are substantially unsightly and entitle him to a significant disfigurement award. Moreover, Claimant's disfigurement covers an expansive portion of the chest and left torso and is not limited/confined to these areas. Rather, there is an extension of the scarring associated with Claimant's injuries to his left shoulder. While the scarring on the left shoulder is not nearly as severe as the scarring on the chest/torso, it constitutes an expansion of the body parts beyond the chest, which have also been visibly altered due to Claimant's injuries. Accordingly, the ALJ finds/concludes that Claimant's scarring is "extensive" as contemplated by C.R.S. § 8-42-108 (2) (b). As these scars are normally exposed to public view, Respondents shall pay Claimant $7,800.00 for the above-described disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore ordered that:

1. Respondents' request to set aside the impairment rating opinions of Dr. Sharma is denied and dismissed.

2. Respondents shall provide all reasonable, necessary and related maintenance medical treatment to prevent deterioration of Claimant's present condition and otherwise relieve him from the ongoing chest pain related to his industrial injury, including the continued provision of over-the-counter analgesics such as Ibuproen, Tylenol and Voltaren gel or an equivalent preparation. Respondents retain the right to challenge any future request for maintenance treatment on the grounds that it is not reasonable, necessary or related to Claimant's November 26, 2014 industrial injury. *See generally*, *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo.App. 1995); Section 8-42-101 (1) (a), C.R.S.; *Hanna v. Print Expediters Inc., supra.*

3. Respondents shall pay Claimant $7,800.00 in disfigurement benefits.

4. Any and all issues not determined herein are reserved for future decision.

DATED: February 10. 2023

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

NOTE: If you are dissatisfied with the 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.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-201-484-001

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he suffered a compensable injury arising out of the motor vehicle accident on March 12, 2022?

2. If Claimant suffered a compensable injury, is Claimant entitled to ongoing medical and indemnity benefits?

3. If Claimant suffered a compensable injury, is Claimant entitled to temporary partial disability benefits?

STIPULATIONS

The parties stipulate that Claimant was in travel status at the time of his March 12, 2022, motor vehicle accident.

FINDINGS OF FACT

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

1. Claimant is a 44 year-old man who is a national restoration project manager for Employer. Claimant resides in Alabama, but traveled to Colorado on January 1, 2022, for work.

2. On Saturday, March 12, 2022, Claimant was driving from the job site back to his hotel in Boulder. He was stopped at a light when he was rear-ended. Claimant was wearing his seatbelt, and the airbags did not deploy.

3. Claimant was driving a 2021 Dodge Ram, 4 x4, quad cab, half-ton pickup, and the vehicle that rear-ended him was a significantly smaller vehicle. Claimant thought the vehicle was a Ford Fusion. (Tr. 29:7-11). The impact did not cause Claimant to hit the vehicle in front of him, which was also stopped. Claimant's vehicle suffered very little damage. (Ex. 12). The driver who rear ended Claimant told the police he was going approximately five miles per hour. Claimant told subsequent medical providers that the car that hit him was going five miles per hour. (Ex. D).

4. Claimant called the police, and when they arrived, he said he felt fine. Claimant testified that while he was sitting in his vehicle waiting for the police to complete their report, the back of his neck started hurting. He reported this to the police, but declined to go the emergency room. (Tr.26:3-20).

5. Right after the accident Claimant tried to contact his managers, but no one was available. He texted [Redacted, hereinafter KP], the national operations

manager, told him he had been rear ended and asked KP[Redacted] to call him. (Ex. 5). KP[Redacted] called Claimant and provided him with Employer's insurance information.

6. The following day, Sunday, March 13, 2022, Claimant went to AFC Urgent Care in Boulder. He reported being in a motor vehicle accident the previous day. Claimant denied hitting his head or losing consciousness. He reported headaches and occasional dizziness with pain in his neck and left shoulder. Claimant was able to move his neck and shoulder normally. There was no swelling, and he had full range of motion in his neck and shoulder. Claimant was advised to rest for 48-72 hours and take Tylenol/Ibuprofen for pain. (Ex. B). Claimant testified that he felt the practitioner at AFC Urgent Care was dismissive of him. (Tr. 43: 20-25).

7. Claimant emailed [Redacted, hereinafter DH], Director of Risk Operations, and others on March 13, 2022. Claimant provided details regarding the accident, and stated he walked to urgent care that morning because his neck and shoulder were really sore, his back was stiff, he was light headed/dizzy and had a bad headache. Claimant further explained that the nurse practitioner told him the soreness was from the impact of the accident, but he should seek further care if he did not get better. DH[Redacted] agreed Claimant should be reevaluated if he did not improve, and she also suggested massage therapy. (Ex. 7).

8. Claimant testified he continued to work following his accident. He went back into the field on March 15, 2022, visited job sites and checked with supervisors about projects they were working on. (Tr. 81:3-25).

9. Claimant regularly communicated with Employer regarding his condition. On March 16, 2022, [Redacted, hereinafter NH], Loss Control Specialist for Employer, emailed Claimant and said "[a]s we discussed, please utilize our nurse triage program, WorkCare, in the event of future injuries, be they vehicle accident related or not. Obviously call 911 or go to the ER if the situation warrants." (Ex. 7). There is no evidence in the record that Claimant ever utilized WorkCare.

10. On Friday, March 18, 2022, nearly a week after the accident, Claimant had a telephonic meeting with NH[Redacted] and [Redacted, hereinafter MZ] from Employer's risk management department. DH[Redacted] recapped the meeting in an email to Claimant. According to the email, Claimant was to remain off-site that weekend, and the following Monday through Wednesday. If by Wednesday, Claimant needed more time off, he was to notify Employer. Claimant was to only work in the capacity of phone calls and emails. Claimant told Employer his dizzy spells were less frequent. He was instructed to notify Employer immediately if his pain worsened, and he was given a list of facilities to visit for massage/muscle therapy, including Concentra Urgent Care. (Ex. K). Claimant testified that NH's[Redacted] email "pretty much summarized" the meeting. (Tr. 41:24-42:1).

11. Claimant testified he told NH[Redacted] he was going to the doctor the next day, which would have been a Saturday, for a follow-up because he was still having issues. He testified his symptoms were not as severe, but still present. (Tr. 42:5-

22). The ALJ does not find this testimony credible. First, there is no mention of Claimant's plan to go to the doctor on a Saturday in NH's[Redacted] email summarizing the meeting with Claimant. Second, it is not logical that Claimant would go to a doctor for a "follow-up" on a Saturday. The only places claimant could have gone on a Saturday would be an urgent care or emergency room (ER). And by Claimant's own testimony, his symptoms were not severe.

12. On Saturday, March 19, 2022, Claimant went to Boulder Medical Center for an Urgent Care visit. Caroline Cooper, AP evaluated Claimant. Claimant told Ms. Cooper that he had been rear ended the previous week, and the driver was going five miles per hour. He complained of left shoulder and back pain, headaches, and neck stiffness. He denied any vomiting, and reported nausea one to two times throughout the week. According to Claimant, the nausea and dizziness ended on Thursday, March 17, 2022. Claimant denied the visit as a workers' compensation visit. According to the medical record, Claimant had left shoulder pain and neck pain, but he declined a work note or physical therapy order. Claimant was also assessed with a "concussion without loss of consciousness, sequela." Claimant was to rest for two weeks, and gradually increase physical exertion in a stepwise manner. Ms. Cooper ordered x-rays of Claimant's cervical spine and his left shoulder. (Ex. C). The x-rays revealed no acute injuries in any of these regions. (Ex. D).

13. Claimant spoke with MZ[Redacted] on March 20, 2022 and told her he went to Boulder Medical Center the previous day for another evaluation, and the doctor determined he suffered a concussion as a result of the accident. He also told MZ[Redacted] that the dizzy spells were back, and his balance was off. (Ex. 9). Claimant told Ms. Cooper, however, that he had not had any dizziness of nausea since March 17, 2022. (Ex. C).

14. The ALJ finds Claimant's subjective reports of dizziness and nausea were inconsistent, and not credible.

15. Claimant testified he fell in the shower and hit his head on March 21, 2022. According to Claimant, he was rinsing the shampoo out of his hair, and when he leaned back and closed his eyes, he got dizzy and lightheaded. (Tr. 48:7-22).

16. Claimant went to Foothills ER at Boulder Community Health that same day with a chief complaint of dizziness. The record notes Claimant's motor vehicle accident, and his "continuing worsening and new symptoms." The record also says Claimant took a Flexeril Saturday night and woke up vomiting with more dizziness. Claimant reported being dizzy and unsteady when he fell in the shower that morning and hit his head. He had no specific visual symptoms and no headache. Claimant had a CT scan of his head that revealed no significant intracranial abnormality. Dale Wang, M.D. noted '[n]ormal head and neck imaging. The dizziness and headache are symptoms that are more likely to be a concussion. Symptomatic treatment as discussed. Follow up in worker's compensation clinic." (Ex. 15). There is no evidence in the record that Claimant followed up in a worker's compensation clinic or utilized WorkCare as instructed by his Employer.

17. The very next day, on March 22, 2022, Claimant went to Boulder Medical Center for another urgent care visit. According to the medial record, Claimant went to the ER the previous day and was diagnosed with a concussion. There is no mention of Claimant falling in the shower and hitting his head, just that he had dizziness and vomiting due to the Flexeril he took. Claimant wanted to be cleared to go back to work that day. He reported feeling "great" and denied any dizziness, headaches, sensitivity to light, or blurred vision. Claimant was given a "work/school status note" stating he was cleared to return to work on March 22, 2022. (Ex. F).

18. Claimant spoke with MZ[Redacted] that day, and reported a general resolution of his symptoms. MZ[Redacted] noted on March 22, 2022, Claimant reported his headache and "dizzy spells" had resolved. (Ex. 9).

19. Claimant returned to work on March 22, 2022, and continued to report regularly to Employer how he was feeling. After a few days of work, on March 25, 2023, Claimant reported he was feeling "ok." Claimant noted he had been busy the past few days at work, but he reported no symptoms. (Ex. 9).

20. Claimant testified at hearing that he may have been misquoted by MZ[Redacted] on March 25, 2022 and he "believed" he told her that he was not feeling "a hundred percent and that [he] had been wearing a hard hat and [his] head was hurting at the time." (Tr. 58:4-21). Claimant's account of this conversation is not supported by the call log MZ[Redacted] kept.

21. On March 30, 2022, Claimant spoke with MZ[Redacted] and told her that his headaches were back, and he was not sure if wearing a hard hat applied pressure to his head. (Ex. 9).

22. Two days later, on April 1, 2022, Claimant went to Boulder Medical Center for an Urgent Care visit and reported having amnesia symptoms, worse headaches, and daily vomiting for the past six days. They sent Claimant to the ER because of his new and/or worsening symptoms, and provided Claimant information regarding local concussion clinics. (Ex. F and Ex. 16). There is no evidence in the record Claimant contacted WorkCare.

23. Claimant's chief complaint in the ER was a headache. The record notes that he had been seen previously for a headache and dizziness, and underwent a CT that was negative. According to Claimant, his symptoms had improved, but a week prior (approximately March 25, 2022) he worked quite hard, and woke up the next day with worsening of symptoms, including a headache, dizziness, and continued vomiting. David Whitling, M.D., ordered a brain MRI. Claimant's MRI showed no sign of acute pathology, but noted mild white matter disease within the periventricular regions in the right centrum semiovale. Dr. Whitling discussed with Claimant the likely diagnosis of post-concussion syndrome, and the need for self-care and follow up with a concussion specialist. Claimant was discharged that evening in "good" condition. (Ex. G).

24. Claimant was in the emergency room from 10:52 a.m. to 6:37 p.m. on April 1, 2022. (Ex. G). Claimant filed a Worker's Claim for Compensation on April 1, 2022. With respect to body parts injured, it stated "left shoulder, back, neck, head injury (ringing in ears, dizziness, difficulty in word finding, headaches, etc. . . .)" Under nature of injury it says "see medical records." [Redacted, hereinafter BP] signed the form for Claimant. (Ex. M). Claimant's counsel entered his appearance with the Division on April 1, 2022, and BP[Redacted] signed the certificate of service. (Ex. N).

25. There is no reference in Claimant's April 1, 2022, medical records of him having ringing in his ears or difficulty in word finding.

26. According to the phone log, Claimant called MZ[Redacted] from the ER, while he was waiting for an MRI. She noted that he was seeing a concussion specialist. Employer was fully in support of keeping Claimant off of work until he made a full recovery. They discussed sending Claimant back to Alabama to recover, but wanted clearance from the doctor that it was safe for him to fly. MZ[Redacted] advised Claimant not to drive until he was cleared to do so. (Ex. 9).

27. Claimant told the physicians in the ER on April 1, 2022, he had been vomiting for six days. Even though Claimant was in regular communication with MZ[Redacted], updating her regarding his symptoms, there is no evidence that anytime between March 25, 2022 and April 1, 2022 Claimant reported he had been vomiting, let alone daily. Additionally, there is no reference in the phone log regarding Claimant having ringing in his ears, or difficulty in word finding.

28. On April 5, 2022, three and a half weeks after the accident, Claimant was evaluated by Kathryn Reitz, D.O., at the Colorado Concussion Clinic. Dr. Reitz felt that based on the mechanism of injury, Claimant's high symptom score, and his abnormal concussion neurologic examination, Claimant suffered a concussion. She noted that Claimant had a concussion diagnosis related to the accident by at least three other providers. She opined that his high symptom score and medical history of diabetes and ADHD increased his risk of Post-Concussion Syndrome (PCS). According to Dr. Reitz, "PCS is defined as having the constellation of concussion symptoms present for longer than 3 months." (Ex. 19).

29. The medical professionals who diagnosed Claimant with a concussion made such a diagnosis based upon Claimant's subjective symptoms. The ALJ finds Claimant's description of his alleged concussion symptoms, to his Employer and medical providers, is vastly inconsistent and not reliable.

30. Claimant underwent an IME with Lawrence Lesnak, D.O. on June 27, 2022. Dr. Lesnak opined, to a reasonably degree of medical probability, that Claimant did not sustain "any type of cerebral concussion or mild traumatic brain injury or any injuries to his cervical spine structures or left shoulder" as a result of the motor vehicle accident on March 12, 2022. In reaching this opinion, Dr. Lesnak reviewed Claimant's medical records, including the imaging studies, and he personally examined Claimant. (Ex. A).

31. Dr. Lesnak acknowledged the white matter disease on Claimant's MRI, but opined it was "completely unrelated to his involvement in the motor vehicle collision on 03/12/2022." He noted this is a "very typical finding identified in hypertensive patients and is consistent with cerebral microvascular ischemia." (Ex. A).

32. Dr. Reitz, in response to Dr. Lesnak's opinions, asserted that "[w]hite matter changes can be seen with concussion." Dr. Reitz does not assert that the white matter on Claimant's MRI was caused by the alleged concussion, and she acknowledged not having a prior MRI to compare findings. (Ex. 19).

33. Dr. Reitz further opined "[t]he diagnosis of concussion does not require that a patient hit their head nor lose consciousness. If he did hit his head or did have a loss of consciousness then a diagnosis of concussion is more likely. But, concussion may be caused by whiplash or violent shaking to the body without direct head involvement." (Ex. 19). There is no objective evidence in the record that Claimant ever suffered whiplash or violent shaking. Dr. Reitz concludes Claimant "had an accidentwith enough force to cause sudden neurological change." (Ex. 19). There is no objective evidence in the record that Claimant suffered a "sudden neurological change" as a result of the March 12, 2022 motor vehicle accident. Claimant's alleged symptoms escalated three weeks after the accident. The ALJ finds Dr. Reitz's opinion credible, but not persuasive.

34. Dr. Lesnak was deposed on October 31, 2022, regarding the conclusions in his IME report, and his determination Claimant did not sustain a concussion. Dr. Lesnak testified "if there's any concussion, if there's any temporary or even permanent injury to the brain, the symptoms are always worst [sic] at the onset, immediately following the incident; and then they improve and hopefully recover." (Dep. Tr. 31:14-18).

35. Dr. Lesnak reviewed the several tests Dr. Reitz performed. He testified these tests lack any controls for validation. (Dep. Tr. 26:4-23). Many of them, for example, the cognitive and balance testing, are dependent upon Claimant's own efforts and his own report of symptoms. (Ex. 19). As found, Claimant's report of symptoms was inconsistent and not credible.

36. Dr. Lesnak also performed tests on Claimant. He noted Claimant's speech was "fluent without evidence of semantic or phonemic language errors." Claimant's closed-eye, finger nose testing showed no abnormalities, and the Romberg sign was negative. Claimant did not have any ocular nystagmus and a modified Hallpike-Dix test, which measures vertigo, reproduced no symptoms. Dr. Lesnak opined Claimant exhibited the ability to perform abstract thinking, multistep, mathematical calculations without difficulty, and also showed both short, and long-term memory recall. (Ex. 19).

37. John Hughes, M.D., conducted an independent medical examination of Claimant in June 2022. Dr. Hughes opined that Claimant presented with a "straightforward history" of head and cervical spine injuries. He further opined that Claimant suffered a closed head injury with concussion, improving over a course of

interdisciplinary care. Dr. Hughes concluded that Claimant was not at MMI. The ALJ finds Dr. Hughes's opinion to be credible, but not persuasive.

38. Considering the mechanism of injury, Claimant's performance on cognitive tests, his normal CT imaging and unremarkable MRI, Dr. Lesnak concluded that Claimant suffered no concussion. (Dep. Tr. 35:11-36:18). The ALJ finds Dr. Lesnak's opinion credible and persuasive.

39. Claimant also alleged injuries to his left shoulder and neck, but he has never been assessed as having more than shoulder and neck pain. (Ex. C). His thoracic spine MRI revealed only degenerative changes with "[n]o evidence of acute thoracic spine fracture or dislocation." The MRI of his cervical spine revealed only degenerative changes, with "[n]o evidence of acute cervical spine fracture or dislocation." The x-ray of Claimant's left shoulder revealed "[n]o evidence of left shoulder fracture or distortion." (Ex. D).

40. Claimant receives a base wage of $2,692.31 per pay period or $70,000 annually. (Ex. J). This translates to an average weekly wage of approximately $1,346.15. Claimant has continued to receive his regular salary every pay period following his March 12, 2022 motor vehicle accident, even though he has not been working. (Ex. H); (Tr. 96:21-25).

41. Based on the totality of the evidence, the ALJ finds that Claimant did not suffer a compensable injury as a result of the March 12, 2022 motor vehicle accident.

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 a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

Claimant has the initial burden to prove that he or she suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Also, with particular importance to this claim, it is not enough to establish merely that an "accident" occurred in order for a claim to be compensable. *Wherry v. City and County of Denver,* 2002 WL 596784, W.C. No. 4-475-818 (ICAO, Mar. 7, 2002). A claimant must also show that an "injury" resulted from the accident. *Id*. Injury is defined here as physical trauma caused by the accident. *Id*. A compensable industrial accident is therefore one in which an injury has resulted requiring the need for formal medical treatment or causing disability. *Id*.

While in travel status, Claimant was involved in a minor motor vehicle accident on March 12, 2022. Claimant's large pickup truck was rear ended by a smaller vehicle that was going approximately five miles per hour. Claimant's airbags did not deploy, he did not hit his head, nor did he lose consciousness. Claimant testified he continued to work following the accident, and went back out into the field on March 15, 2022. Claimant regularly communicated with Employer regarding any symptoms he was experiencing. Employer instructed Claimant to utilize the nurse triage program, WorkCare, in the event of any other issues related to the accident or not, and go to the ER if situation warranted. There is no evidence in the record that Claimant ever utilized WorkCare.

Initially, Claimant experienced headaches and occasional dizziness, but the nausea and dizziness ended on March 17, 2022. According to Claimant, his dizziness returned on March 20, 2022, and led to his falling in the shower and hitting his head, on March 21, 2022. Based on Claimant's description of his symptoms, he was diagnosed with a concussion. As found, Claimant's description of his symptoms was vastly inconsistent, and not reliable. For example, the day after Claimant went to the ER because he woke up with vomiting and dizziness prior to falling in the shower, Claimant was seeking a release to work. He told the providers her felt "great" and denied any dizziness, headaches, sensitivity to light, or blurred vision. Similarly, on April 1, 2022, Claimant went to the ER and complained of worse headaches and vomiting for six days.

Claimant however, never told Employer he was vomiting for six days even though he regularly communicated with Employer regarding his condition.

During Claimant's IME with Dr. Lesnak he displayed fluent speech, mathematical reasoning abilities, and also good long-term and short-term recall. There were no objective findings of a concussion during this examination. Dr. Lesnak performed a modified Hallpike-Dix test, looked at ocular nystagmus, had Claimant perform finger-to-nose testing and noted the lack of any Rhomberg sign.

This is consistent with imaging of Claimant's head. The CT scan from March 21, 2022 was normal, and he MRI from April 1, 2022 similarly showed no signs of any acute pathologies. While there was mild periventricular white matter disease, there is no objective evidence that this was caused by the accident.

Although there are multiple medical credible opinions, the ALJ finds Dr. Lesnak's opinion to be the most persuasive. Dr. Reitz relies heavily on Claimant's own reporting and efforts. And as found, Claimant's reporting of symptoms is inconsistent and not reliable. Considering the mechanism of injury, Claimant's performance on cognitive tests, his normal CT imaging and unremarkable MRI, Dr. Lesnak concluded that Claimant suffered no concussion. The ALJ finds Dr. Lesnak's opinion credible and persuasive. Based on the totality of the evidence, Claimant did not suffer a compensable injury.

ORDER

It is therefore ordered that:

1. Claimant did not suffer a compensable injury as a result of the March 12, 2022 car accident. Any claim for benefits or compensation is denied and dismissed with prejudice.

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

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

DATED: February 9, 2023

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

PROCEDURAL HISTORY

Respondents filed an Application for Hearing on September 8, 2022, primarily on the issue of overcoming the Division of Workers' Compensation Independent Medical Examination (DIME) physician's determination that Claimant had not reached maximum medical improvement (MMI). Other issues included medical benefits that are reasonably necessary and permanent partial disability benefits. Respondents clarified at hearing that waiver, overpayment and credit offsets were no longer issues for hearing, as Claimant's benefits were terminated as of July 8, 2022 when the authorized treating physician (ATP) placed Claimant at MMI and that the issues were listed because Respondents were concerned that Claimant may have been receiving benefits on another worker's compensation claim for her right upper extremity with a date of injury of August 25, 2019. He noted that Claimant's benefits on the prior claim had stopped prior to Claimant's date of injury in this matter. Counsel also mentioned that there were delays in obtaining both a DIME in the prior claim and the DIME with Dr. Orent for this injury. The DIME in this matter was requested by Respondents, took place on August 8, 2022 and a report was issued on August 29, 2022. No Final Admissions of Liability have been lodged in this claim.

Claimant filed a Response to Application for Hearing on October 7, 2022 on issues that included medical benefits that are reasonably necessary, average weekly wage, temporary disability benefits and, if Claimant was found to be at MMI, then permanent partial disability benefits and *Grover* medical benefits.

Claimant and Dr. Sander Orent, M.D. testified on behalf of Claimant, and John Aschberger, M.D. and Douglas Scott, M.D. testified on behalf of Respondents.

Claimant's exhibits 1 through 10 were admitted into evidence. Respondents' exhibits A through L, N, and P were admitted into evidence. Exhibits M, O and Q were not admitted.

Also submitted, post-hearing, was Respondent Addendum Report from Dr. Aschberger dated January 16, 2023 (Integrated Medical Evaluation report dated January 18, 2023). This exhibit was designated as Respondents' Exhibit R. During the hearing and following the DIME physician's testimony, Respondents made an offer of proof regarding Dr. Aschberger's potential rebuttal testimony. Respondents' moved for leave to submit this report, in lieu of a continued hearing, as further evidence for review, which was granted over Claimant's objection. Exhibit R was admitted.

Also discussed during the January 5, 2023 hearing was the outstanding Motion to Withdraw as Counsel by [Redacted, hereinafter BR]. The parties agreed that an order would be appropriate considering his passing and an order was issued on January 12, 2023.

A status conference was held on January 24, 2023 regarding evidentiary matters. The parties agreed to a submission deadline of February 8, 2023 for position statements or proposed orders. Claimant withdrew his motion to submit as supplemental exhibit the IME recording of Claimant's appointment with Dr. Kleinman. Respondents withdrew their request for submission of Respondents' Supplemental Exhibits 1 through 5. Those exhibits were stricken from the record by order of this ALJ dated January 24, 2023. There was no further discussion with regard to Dr. Aschberger's addendum report dated January 16, 2023.

STIPULATIONS OF THE PARTIES

The parties stipulated that Claimant is entitled to *Grover* maintenance medical care if Respondents meet their burden of proving by clear and convincing evidence that the DIME was overcome on the issue of MMI.

The parties further stipulated to an average weekly wage of $333.00 and that, if Claimant was found not at MMI in accordance to with the DIME physician's opinion, and that Claimant was entitled to continued temporary total disability benefits, the period of benefits should be from July 20, 2021 to present. The parties further agreed that the calculation of TTD would be agreed upon by the parties and this ALJ need not address the exact amount.

The stipulations of the parties were accepted and approved by this ALJ and are incorporated in this order.

ISSUES

I. Whether Respondents proved by clear and convincing evidence that the Division Independent Medical Examination (DIME) physician, Dr. Sander Orent, was incorrect in his determinations of maximum medical improvement (MMI).

II. If Respondents proved that Claimant is at MMI, whether Respondents proved by a preponderance of the evidence that the date of MMI was July 20, 2021.

III. Whether Respondents proved by a preponderance of the evidence that there was a non-work related intervening event that ended Respondents' liability towards Claimant.

IV. If Respondents failed to prove that Claimant was at MMI, whether Claimant is entitled to temporary total disability (TTD) benefits and interest from July 20, 2021 to the present and continued until terminated by law.

FINDINGS OF FACT

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

A. Generally

1. Claimant was 56 years old at the time of the hearing. She was employed as a housekeeper for Employer as of approximately May 2019. Her duties involved cleaning hotel rooms, including kitchenettes with microwaves and refrigerators. This ALJ noted that Claimant was short in stature and the medical records noted that she was four foot, eight inches tall[1] and has no formal education. Claimant had difficulty reaching the tops of the microwaves as they exceeded her height.

2. Claimant sustained an admitted work related injury of August 25, 2019 related to her right upper extremity. She was placed on modified duty that included working up to three hours a day, lift, push and pull up to 10 lbs. constantly, and no reaching above shoulder with the right upper extremity, could not grip, squeeze or pinch with the right upper extremity, should wear a splint or brace on the right upper extremity constantly, could do no sweeping, mopping or vacuuming with the right hand and no overhead work with the right arm.[2] The medical records suggest that Claimant was required to exceed her restrictions.

3. On February 15, 2020 Claimant was in the process of cleaning a microwave. She could not reach the top in order to clean, it due to her height. She stepped onto a chair with the left foot. She was cleaning with the left hand since she was restricted from using her right hand overhead. Her right leg slipped, then the chair slipped out from under her, causing her to lose her balance. She twisted her back and lower extremities then Claimant fell onto her left side, landing on her left hip and knee, injuring her right ankle, knees, lower back and hip. The medical records suggest that the chair landed on her.

B. Medical Records

4. Claimant was seen the same day at Concentra Fort Collins by Sheree Montoya, NP. She documented Claimant's mechanism of injury as follows:

> Left side posterior hip pain Pt states when she went to stand on a chair to clean the top of a refrigerator the chair fell on top of her causing her to fall down landing on her left side twisting her back and landing on her *left lateral knee* She has not treated with anything as it happened just prior to arrival. *[Emphasis added]*

5. Nurse Montoya noted that Claimant had burning pain radiating to the left buttocks, causing decreased lateral bending, decreased spine range of motion (ROM), decreased rotation. The symptoms were exacerbated by twisting, climbing stairs, and walking. On exam she noted that Claimant had joint stiffness, back pain, with tenderness in the left lumbar paraspinals and left sacroiliac joint. She also noted that claimant had abnormal thoracolumbar spine range of motion and a positive FABER test[3] on the left, but otherwise within normal limits. She diagnosed sacroiliac strain and prescribed ice, medications, physical therapy, and provided modified work restrictions. She noted that history and mechanism of injury were obtained directly from the patient and appeared to be consistent with presenting symptoms and physical exam.

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[1] Claimant reported to Psychologist Brady on August 3, 2020 that she was four foot six inches.
[2] Respondents' Exhibit D, Bates 295 through 298, PA Toth, January 18, 2020.
[3] Test to identify pathology within the hip, lumbar spine or sacroiliac region.

5. Claimant presented to Jeffrey Baker, MD, on February 17, 2020, with *complaints of left hip, left le*g, and lower back pain *with radiating pain to the knee*. The pain was worse when going up the stairs as she *gets a "pulling" sensation, lifting her leg*, and had difficulty sleeping through the night due to the pain. Claimant reported that she was under restrictions due to her prior workers' compensation claim and that Employer was having her work in excess of her restrictions, which is why she fell. On exam, Claimant had tenderness in the left sacroiliac joint and loss of range of motion, but had a negative exam otherwise. An *injection of dexamethasone sodium phosphate* was administered* and Claimant was diagnosed with sacroiliac strain. She was returned to modified work, including restrictions of 10 lbs. lifting occasionally, push/pull up to 20 lbs. occasionally, bend or twist occasionally and no climbing ladders.

6. Claimant was also seen by Nicholas Wright, DPT, in physical therapy on February 17, 2020. PT Wright noted Claimant was tender to palpation in the left quadrant of the paraspinals and the gluteus maximus, and had abnormal range of motion (ROM) in extension, bilateral thoracolumbar side bending, pain in the left low back and gluteus with resisted motion, pain in the low back with hamstring, gluteal and hip stretching. She had symptoms consistent with left lumbosacral contusion and experienced notable benefit from manipulation. Claimant retuned for therapy with Mr. Wright on February 18, 2020 and reported that her back pain was improving but that she continued to have pain in the lateral knee but had no symptoms distal to the knee. *He put a patch with dexamethasone on the left lateral knee*, noting that Claimant had a lateral collateral ligament (LCL) sprain. On February 19, 2020 Mr. Wright stated that Claimant reported decreased lateral knee and gluteal region pain but that the pain persists in the left low back.

5. On February 24, 2020, Claimant reported that she was still having notable pain to the left low posterior ribcage but the gluteal and lateral knee pain were both improving. Mr. Wright noted Claimant had *a "popping" sound occurring bilaterally in her knees and the left knee was painful*. Claimant continued with physical therapy complaining of both low back/SI joint as well as left knee pain.

6. Dr. Baker attended Claimant on February 25, 2020. Claimant complained of *sharp left lateral knee* pain with intermittent and variable degrees of intensity and dullness. Claimant informed Dr. Baker that the *injection in her left knee* did not make much difference.[4] *Associated symptoms included clicking, tenderness, and painful walking*. *Exacerbating factors included knee extension, direct pressure*, using stairs and walking. On exam Dr. Baker noted that there was *tenderness over and in the lateral tibial plateau of the left knee* with a slight flexion limitation, but was otherwise unremarkable. He also noted that Claimant continued to have tenderness in the left sacroiliac joint with limited range of motion. Dr. Baker diagnosed contusion of the left knee and referred Claimant to physical therapy. He also diagnosed sacroiliac strain. Claimant reported that physical therapy and the patches of lidocaine were helping. Claimant described her low back pain as burning and constant though did wax and wane.

5. Mr. Wright attended Claimant on March 17, 2020 and noted that Claimant's

[4] This ALJ infers that the injection of dexamethasone sodium phosphate administered on February 17, 2020 was for the left knee. See * above.

low back was painful to the point that it caused difficulty breathing. Claimant had pain to left" low back/glute" with resisted glute in prone, pain to left low back with hamstring, gluteal and hip external and internal rotation (ER/IR) with passive range of motion and stretching.[5] Mr. Wright noted that progress was slower than expected.

6. On March 24, 2020, Dr. Baker's diagnoses were sacroiliac strain and thoracic myofascial strain. He specifically noted as follows:

> [Claimant] is returning for a recheck of injury(s): Left thoracolumbar strain that occurred on 2/15/2020. This is her 2nd WC claim, she is being treated for her right wrist, shoulder and neck also. She reports that her boss makes her do activities that are outside her WC and that is why she fell. She was put on naproxen and *lidocaine patches but the patches were not approved.* She has done 12 PT visits and is progressing slower than expected. The pain is a left thoracolumbar area. She is applying the bengay and that is helping. Pain is sharp and worse with stairs, sleeping and *lifting her leg*. She has had 12 visits with PT and feels that it s (sic.) improving. She feels that she is about 70%. *Her Adjustor did call and stated that the knee would not be covered. (Emphasis added).*
>
> …
>
> There is left mid back pain. There is left lower back pain. The pain does not radiate. The symptoms occur intermittently. She describes her pain as sharp in nature. The severity of the pain is variable (constantly present but the level of intensity waxes and wanes). Associated symptoms decreased lateral bending, decreased rotation, decreased flexion, … Exacerbating factors include twisting, lifting and bending, but not sitting and not standing. Relieving factors include heat, rest, nonsteroidal anti-inflammatory drugs, physical therapy and muscle rub.

Claimant restrictions were changed to 20 lbs. lifting frequently, push/pull up to 40 lbs. frequently, bend and twist frequently, but was to perform no ladder climbing. He referred Claimant to chiropractic care for the lumbar spine.

7. On April 2, 2020 Claimant returned to manual therapy with Mr. Wright to address ongoing left hip mobility as it reduced the complaints of lumbar spine pain, stating that Claimant's *left hip dysfunction* almost certainly limited her lumbar spine recovery.

8. On April 7, 2020 Dr. Baker noted that "Her Adjustor did call and stated that the knee would not be covered." He also noted that Claimant was not currently working due to COVID-19. He noted Claimant had muscle pain, back pain, *muscle weakness*, night pain, and limited ROM.

9. On April 22, 2020, Claimant *complained of left knee and right leg pain* with walking. The pain was also in the left thoracolumbar area. She was applying the muscle rub and that was helping. Pain was sharp and worse with stairs, sleeping and lifting her leg. She was doing PT and felt that it was improving her function. Stephen Toth, PA, noted that Claimant was referred to a Chiropractor and that was currently on hold per DORA due to COVID-19. PA Toth also noted that Claimant's Adjustor called and stated that the knee would not be covered. She was not currently working also due to COVID-19. This ALJ noted that from this date forward, Claimant's providers did not mention either examining Claimant's knee or taking Claimant's complaints of knee pain. In fact,

[5] This ALJ infers that IR is internal rotation, ER is external rotation and PROM is passive range of motion.

the knee was left blank in some of the records.

> Physical Exam
> Constitutional: well appearing and well nourished.
> Head/Face: Normocephalic and atraumatic.
> Eyes: conjunctiva and lids with no swelling, erythema or discharge. Extraoccular movement intact.
> ENT: . No erythema or edema of the external ears or nose. Hearing is grossly normal.
> Neck: trachea midline, no JVD.
> Pulmonary: no increased work of breathing or signs of respiratory distress.
> Knee:
> Lumbosacral Spine: Appears normal. Tenderness present in left sacroiliac joint, but

10. Claimant continued with physical therapy for her lumbar spine and SI joint. On May 8, 2020 Claimant reported that she had low back pain upon standing from a prolonged sitting position. She was also *worried about dragging her left toes* when trying to walk quickly. Mr. Wright noted in the assessment that:

> Therapy Assessment:
> Overall Progress Slower than expected Today is the first time that I can remember [Claimant] reporting a concern with L toe dragging The complaint is with fast walking/running. As she hasn t (sic.) had any sign of DF weakness from radicular compression, I assume this complaint comes from altered mechanics, potentially due to lumbar stiffness I have provided her with a heel walking exercise to address this issue, but remain focused on the low back

11. Scott Parker, D.C., evaluated Claimant on May 13, 2020. He took a history of the mechanism of the injuries consistent with Claimant's hearing testimony. Claimant was complaining of left-sided thoracolumbar pain which she rated at 7/10, *left lateral knee pain* which aggravated her back, *numbness* traveling from the left gluteus musculature laterally *in the lower extremity to the left great toe and second toe* which was constant since this fall. He noted on exam that restrictions were palpated at left SI joint, L5 slightly to the left, T6-T7 anterior, the left T7 rib, T12 LP in the left, and L1 slightly to the left. He noted that Claimant had moderate muscle spasm palpated in the thoracic and lumbar regions, trigger points noted in the bilateral thoracic and lumbar regions and adhesions palpated throughout bilateral thoracolumbar fascia.

12. On May 27, 2020, Claimant reported to PA Toth that her back pain was worse with pain radiating down her left side radiating down her left glute. She noted that she had been tripping as a result of her *left foot giving way while walking*.

13. Claimant had multiple chiropractic visits focused on her lumbar, sacroiliac dysfunction and thoracolumbar pain. On June 3, 2020 Dr. Parker noted that Claimant continued with low back pain, that it was especially so when she would put on herpants or shoes. He documented that her pain was a 6/10. She complained that she continued to have *lower extremity numbness* though it was somewhat improved. Claimant was also complaining of *continuing knee pain* that was concerning to her. While Dr. Parker states Claimant had full range of motion of the lumbar spine, they were not documented as being with an inclinometer or whether it was passive or active range of motion, and Claimant complained of discomfort. Dr. Parker clearly examined the lower extremities because he stated that Claimant gave a "suboptimal effort." He also noted that there were adhesions are palpated in the bilateral thoracolumbar fascia, trigger points in the

bilateral thoracolumbar muscles and mild muscle spasm palpated.

14. PA Toth evaluated Claimant on July 8, 2020 and continued to diagnose thoracic myofascial strain, sacroiliac strain and radicular low back pain. He ordered lumbar and sacroiliac MRIs at this time. He noted that while Claimant did have improvement in her range of motion, that she was still stiff, having lower left back and hip pain and *numbness radiating down the left leg*. He ordered continued chiropractic care, and her HEP[6], noting that she declined dry needling due to concerns of risks, as noted in prior records. On July 17, 2020 PT Wright noted Claimant was tolerating the dry needling treatment.

15. Claimant continued with chiropractic care, due to continued low back pain, adhesions and muscle spasms in the lumbar spine, including when he released her from his care on July 29, 2020. What is apparent from reading Dr. Parker's records and the records from other providers at Concentra is that significant portions of the reports are likely copy and pasted information from prior records and this ALJ is disinclined to rely on every notation in Dr. Parker's reports stating that there was full range of motion despite "moderate muscle spasms," trigger points, and adhesions.

16. Claimant was evaluated by Molly M. Brady, PsyD. on August 3, 2020 pursuant to a referral from Mr. Toth to evaluate whether any mental or emotional factors could complicate the treatment of Claimant's medical condition, and to make recommendations with regard to treatment. The Behavioral Health assessment was initially recommended in January 2020 by Jon Erickson, M.D., who had completed an IME at Respondents' request regarding the 2019 claim. BHI 2 testing was valid though potentially indicated that psychological factors may have been contributing to Claimant's perception of pain and disability. Results also were indicative of the presence of an optimistic outlook, emotional control, or an unusual degree of acceptance with a likely support system. Dr. Brady wrote that "[G]iven that validity indicators do not suggest that [Claimant] is magnifying her sense of distress by responding in a biased manner, this may be an accurate report of her internal perception of emotional distress." Dr. Brady diagnosed Claimant with pain disorder and adjustment disorder with mixed anxiety and depressed mood. She noted that "the onset of the injury to [Claimant]'s right arm, a significant stressor, functioned to exacerbate that pre-existing anxiety and dysphoria to a significant extent." She opined that the majority of the symptoms of psychological adjustment developed related to her workplace injury.[7] Dr. Brady recommended interventions including relaxation training, mindfulness-based stress reduction training, biofeedback training, coping skill development to decrease psychological distress, stress management techniques, behavioral activation, and education on the interaction between psychological distress and physiological pain experiences. Claimant continued with psychologic treatment through April 12, 2021 and Dr. Brady recommended an additional 5 visits given Claimant's progress with treatment.[8]

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[6] Home exercise program.

[7] Specifically relating to the August 25, 2019 work related injury. Dr. Brady was engaged to treat Claimant under that claim.

[8] No other records were provided as exhibits after April, 2021. Exhibit D was the DIME packet provided under the 2019 claim and Dr. Lindenbaum (DIME) conducted his evaluation on May 27, 2022. This ALJ

17. Claimant had an MRI of the lumbar spine without contrast on August 14, 2020. Dr. Eric Nyberg read the results as follows:

> Disc Spaces:
> Lower thoracic spine: Mild disc bulges without significant spinal canal or foraminal stenosis.
> L1-2: Mild disc degeneration without spinal canal or foraminal stenosis.
> L2-3: Mild disc degeneration without spinal canal or foraminal stenosis.
> L3-4: Mild disc degeneration with broad disc bulge resulting in mild bilateral foraminal stenosis.
> L4-5: Mild disc degeneration with minimal disc bulge resulting in mild bilateral foraminal stenosis.
> L5-S1: Mild disc degeneration and bilateral facet arthrosis resulting in mild to moderate right and mild left foraminal stenosis.

18. Also on August 14, 2020 Claimant had a MRI of the pelvis. Dr. Andrew Mills noted that there was no acute or aggressive osseous abnormality, chronic degenerative changes of the lumbar spine at L3-S1 and patent appearance of the SI joint which showed minimal degenerative changes.

19. On August 18, 2020 Nurse Elva Saint advised Claimant to return to physical therapy for more PT as the left low back pain persisted. The *main concern at that point is was the left lower extremity (L LE) heaviness and quickness to fatigue as well as the left knee complaints.* Claimant gave good effort and tolerated the PT sessions, treatment and exercises well. Claimant completed her course of PT without much improvement. In fact the records show that Claimant slowly continued to deteriorate.

20. Claimant was seen on September 9, 2020 by PA Toth who documented that Claimant complained of back pain, d*ifficulty bearing weight on the left foot, and some numbness in left leg*. She also *complained of bilateral knee pain* and *was limping since seeing the chiropractor and states that is the reason for not going anymore*. Claimant denied "outside causation of injury including sports, hobbies, accidents or external employment." On system review, PA Toth documented *back pain and limping*, but found nothing abnormal during exam. PA Toth referred Claimant to a physiatrist for further evaluation.

21. On October 5, 2020, Claimant presented to Gregory Reichhardt, MD for evaluation of her low back injury and knee pain. Dr. Reichhardt reviewed the mechanism of injury, which was consistent with Claimant's testimony. He mentioned that Claimant was referred to Dr. Brady who diagnosed pain disorder and adjustment disorder with mixed anxiety and depressed mood. Upon exam, Claimant complained of low back pain across the L4-L5 level, diffuse *left gluteal pain*, lateral hip and *lateral thigh symptoms going down to the foot, with leg weakness and left knee pain*. Dr. Reichhardt's work-related impressions and diagnosis were low back pain, probably discogenic, with possible component of radicular involvement, causing left lower extremity pain and weakness, left knee pain with a February 15, 2020 mechanism of injury, pain disorder and adjustment disorder with mixed anxiety and depressed mood, and *right ankle pain*. *Dr. Reichhardt deferred to Concentra providers regarding the causation of any right lower*

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infers that no further treatment with Dr. Brady took place as Claimant was found to be at MMI as of December 4, 2020 in the 2019 claim.

extremity complaints. Dr. Reichhardt recommended trigger point injections for the lumbar spine, an *MRI of the left knee* and that she continue treating with Dr. Brady for the pain disorder and adjustment disorder. On the M-164 he also recommended an *EMG/NCV*[9] *study of the left lower extremity*.

22. Dr. Reichhardt noted on October 28, 2020 that Claimant had a normal left lower extremity electrodiagnostic evaluation. The study was negative for left-sided axons loss lumbosacral radiculopathy, lumbosacral plexopathy, peroneal or tibial mononeuropathy and for peripheral polyneuropathy. Dr. Reichhardt did not have a good explanation for the *lower extremity weakness* and recommended she see her PCP. Claimant requested the trial of trigger point injections. He also stated that future considerations would also be for a hip MRI arthrogram.

23. Dr. Baker followed up with Claimant on October 19, 2020 and noted on physical exam that Claimant had *left knee tenderness in the lateral femoral condyle*, in the *lateral hamstrings*, diffusely *over the lateral knee* and in the *lateral tibial plateau*, a positive lateral McMurray test and positive medial McMurray test.[10] He diagnosed sacroiliac strain, radicular low back pain and *strain of the left knee*. He *ordered the MRI of the left knee* and noted that the EMG/NCV was already scheduled. He also documented that he did not anticipate MMI until at least January 31, 2021.

24. Claimant proceeded with trigger point injections on November 18, 2020 over the bilateral L5 paraspinals, left gluteus maximus and left tensor fascial latae. His diagnosis did not change.

25. Claimant was evaluated by Dr. Reichhardt for an impairment evaluation with regard to her August 25, 2019 claim on December 4, 2020. He placed her at MMI for that claim and provided an impairment rating. He noted that Claimant had completed a Functional Capacity Evaluation on October 27, 2020 during which Claimant functioned at a "sub-sedentary level."[11]

26. On December 8, 2020 Claimant had an MRI of the left knee. Dr. Jamie Colonnello noted that the left knee medial and cruciate ligaments were intact, there was medial and patellofemoral compartment predominant chodrosis/osteoarthritis of the left knee, cartilage loss most pronounced at the medial compartment involving weight-bearing surfaces of the medial femoral condyle as well as joint effusion. This ALJ infers that the joint effusion is a sign of joint inflammation or aggravation of underlying joint osteoarthritis.

27. Claimant returned to see Dr. Reichhardt on December 11, 2020 and noted that she was having *weakness in the right leg* which she thought was *related to dry needling.* Claimant complained that they hit a nerve and one day after her second dry needling treatment, she had difficulty coordinating her right leg then got worse after her last chiropractic treatment and had paresthesias over the lateral aspect of the left lower leg. She was having *pain down the posterolateral aspect of both thighs*. Moderate pain behavior was noted. He observed Claimant to be somewhat angry, but he was not sure

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[9] Electromyography (EMG) and Nerve Conduction Velocity (NCV).

[10] McMurrays test is a test to assess knee injuries, including meniscal tears.

[11] The functional capacity evaluation (FCE) report is not contained in the exhibits in evidence.

if this was just her communication style. He noted giveaway weakness but overall normal strength with encouragement. His impression was probable discogenic pain, and he felt that there was a pain disorder with adjustment disorder and mixed mood and anxiety. The doctor was unclear why her legs were weak and the loss of coordination, and he recommended possibly a repeat MRI. She indicated that she was upset because she had not met the orthopedic doctor. Dr. Reichhardt recommended an evaluation with an orthopedist with regard to Claimant's left knee complaints. Multiple other evaluations occurred following this exam, he documented Claimant's distress at the failure to identify the causes of her pain and discomfort, provided a knee neoprene brace as well as topical medications for the knee, while awaiting the results of an IME as the orthopedic evaluation was not authorized. Claimant was insistent that her right lower extremity symptoms of weakness were related to dry needling, chiropractic care and the EMG testing.

28. An Independent Medical Evaluation (IME) took place on January 6, 2021 with Dr. Jon M. Erickson. He noted that he had previously evaluated Claimant regarding her 2019 upper extremity injuries, and those findings are not relevant in this matter.

29. Dr. Reichhardt attended her on January 28, 2021, rating her pain as 9 out of 10 with weakness in both legs and inability to walk. He felt that her leg weakness was related to the pain. The patient still wanted to see an orthopedist at that point.

30. Claimant underwent an IME with Dr. Douglass Scott on February 23, 2021. He noted that claimant had a lower back injury, and that Claimant informed him she had left knee pain as well as issues with the right leg. On exam, the left knee appeared normal, with no tenderness and had full range of motion and strength. He reviewed the medical records and drew multiple conclusions based on this analysis of the records, that are not persuasive to this ALJ. He conducted a physical examination and noted no swelling in the left knee and no crepitus and no deformity or tenderness to the left knee. He noted in his diagnosis that the right knee was unrelated to the original injury. The pain disorder was noted and he suspected there were psychological or somatoform disorders present. He noted that the changes on the MRI of the left knee of chondrosis/ osteoarthritis probably pre-existed the injury. He reviewed the mechanism of injury, and opined that it occurred without significant force or velocity as her right foot was on the floor and her given height of 4'8. He diagnosed her with a lumbosacral strain as he noted that the EMG was normal, without neurological impairment and did not appreciate an injury to either lower extremity. He stated that, based on Claimant's initial response to treatment for the low back, he opined Claimant had reached MMI on June 3, 2020 without impairment and required no further medical care after that date.

31. On February 11, 2021 Dr. Reichhardt noted Claimant had a mild gait alteration and discussed Claimant's left knee pain with PA Toth who advised Dr. Reichhardt that Claimant did not have immediate pain in her left knee following the accident and had not reported it until after 10 days of the injury. Relying of the accuracy of this information Dr. Reichhardt noted that the left knee condition was probably not related to her injury. As found, this is not credible, as Nurse Montoya documented on February 15, 2020 that Claimant landed on her left lateral knee and Dr. Baker documented on February 17, 2020, two days later, that Claimant complained of left hip, left leg, and lower back pain with radiating pain to the knee, with pain worse when going

up the stairs as she had a "pulling" sensation, lifting her leg. He further injected that knee with medication.

32. On April 8, 2021 Dr. Reichhardt recommend evaluation with Dr. Quickert for an SI joint injection as provocative maneuvers qualified her for the treatment, including tender to palpation, pain in the low back, pain over both sacroiliac areas, negative straight leg test, positive Patrick's maneuver, positive gapping and positive iliac compression tests. He also referred Claimant for x-ray of the lumbar spine to rule out a foreign body (dry needling needle). There were multiple subsequent records documenting symptoms of the left knee as sharp pain, worse with cold, constantly present, with symptoms of clicking, "popping" sound at the time of her injury, tenderness and painful walking. Documentation of joint pain, muscle pain, back pain, joint stiffness, muscle weakness, limping and night pain. Exams of the left knee showing tenderness diffusely over the anterior knee, diffusely over the anterolateral aspect, diffusely over the anteromedial aspect, in the lateral femoral condyle, in the lateral hamstrings, diffusely over the lateral knee and in the lateral tibial plateau.

33. Dr. Scott issued a Rule 16 UMR on April 23, 2021 noting that, based on Dr. Reichhardt's exam, it may be reasonable to perform an SI joint injection. However, based on his prior opinion, that Claimant was at MMI as of June 3, 202 and required no further care, it was not related to the February 15, 2020 work related injury.

34. Claimant had the x-ray performed at Banner Imaging on May 7, 2021, which was read by Dr. Gregory Reuter. It showed mild L5-S1 degenerative changes but no foreign body.

35. On June 24, 2021 Dr. Reichhardt recommended a trial of massage therapy. Claimant returned to Concentra on June 30, 2021 and Dr. Baker made a referral for massage therapy, which took place at Medical Massage of the Rockies between July 9 through August 3, 2021.

36. Claimant was evaluated by Julie Quickert, APRN[12] on June 25, 2021. She noted tenderness with light palpation of the lumbar spine and left SI joint, paraspinal tenderness and muscle tightness noted with light palpation, generally reduced ROM of L- spine, increased pain reported with forward flexion greater than extension, or bilateral flexion. Strength to the bilateral lower extremities was normal and equal, straight leg raise test was negative, FABER test was positive on the left and thigh thrust and Iliac compression test were positive. She recommended proceeding with the SI joint injection but, as Claimant requested ask about a guarantee that there would be no further complications, she did not proceed.

37. On June 28, 2021 Dr. Douglas Scott issued a report in response to a Rule 16 request for authorization from Dr. Timo Quickert/Nurse Quickert for the SI joint injection. He opined that the SI joint injection was not reasonably necessary or related to the February 15, 2020 work related injury as Claimant had reached MMI as of June 3, 2020.

38. On July 20, 2021, Dr. Reichhardt examined Claimant finding tenderness to palpation in the lumbar spine with mild lumbar paraspinal muscle spasm and decreased

[12] Advanced Practice Registered Nurse.

lumbar range of motion. Examination of the left knee also showed tenderness to palpation though no effusion or instability. Dr. Reichhardt's final impressions were that Claimant had a low back and left lower extremity pain and weakness. He related the lumbar spine and left knee pain mechanism of injury as related to the February 15, 2020 work related fall and injury. He opined that Claimant should be allowed to have an SI joint injection under maintenance care as well as physical therapy to review her home exercise program (HEP), medications, laboratory tests, and follow ups with an advanced practice provider.

39. Dr. Reichhardt placed Claimant at MMI as of July 20, 2021 and assigned permanent lifting, pushing and pulling restrictions of 20 pounds and limit bending and twisting at the waist to an occasional basis.

40. He assigned a 14% lower extremity rating based on range of motion limitations of the left lower extremity, and a 5% rating for arthritis for a total of 18% for the lower extremity. Claimant's lower extremity rating converted to a 7% whole person rating. He assigned Claimant a 5% whole person impairment for specific disorder and a 12% for loss of range of motion of the lumbar spine, which combined to a 16% whole person impairment. Dr. Reichhardt also issued a mental impairment rating of 1% whole person impairment. Claimant's combined impairments were 23% whole person related to the February 15, 2020 work related injuries.[13]

41. On July 30, 2021 Dr. Baker ordered the maintenance physical therapy to review a HEP, which took place with Brian Busey, MPT beginning as of August 5, 2021, through September 13, 2021, and February 15, 2022 through March 31, 2022. Mr. Busey noted Claimant had moderate antalgia, with abnormal range of motion. She was using a cane in the left hand due to her right "wrist injury." He noted that the overall response was that Claimant was not progressing.

42. Dr. Baker's final diagnosis as of August 20, 2021 were strain of the left knee, radicular low back pain, adjustment disorder. He stated that the objective findings were consistent with the history and work related mechanism of injury. His final work related restrictions were to limit lifting, pushing, pulling and carrying to 20 lbs., and limit bending and twisting at the waist to an occasional basis. These restrictions were consistent with Dr. Reichhardt's final restrictions given on July 20, 2021. Dr. Baker also recommended maintenance care, concurring with Dr. Reichhardt in this regard, including 6 follow up visits with a provider, 4 follow up visits with a PT, coverage of medications, and any lab tests to monitor for side effects, if needed over each for the next 2 years Availability of an SI injection and an Orthopedic consult for the left knee.

43. Respondents requested a DIME and Sander Orent, MD was selected to conduct the examination. Dr. Orent documented on August 10, 2022 that Claimant reported she had constant low back pain when walking, bending, sitting, and sleeping. The pain started at waist level and radiated down both legs. Dr. Orent noted marked weakness in the right leg and trouble raising her left leg. Claimant had pain and swelling

[13] While Dr. Reichhardt's narrative report notes that Claimant's mental impairment is "zero" the final combined impairment rating includes the 1% mental impairment. The 16% lumbar spine rating combined with 7% whole person for the left lower extremity is 22%. The 22% combined with the 1% is 23% whole person impairment in accordance with the *AMA Guides* Combined Values Chart at p. 254.

noted in both knees and her right ankle.

44. Dr. Orent's diagnoses were (1) Lumbar strain secondary to fall with symptoms of lumbar radiculopathy and some symptom magnification noted, but clear evidence of injury. (2) Bilateral knee contusions. The left occurring at the time of injury with swelling and notably an effusion in the joint on imaging and the right apparently manipulated by a chiropractor causing her ongoing pain and discomfort. This happened in the course and scope of her injury. He noted it strange that a chiropractor would be manipulating her knee. The diagnoses of the knees were bilateral knee strains, possible meniscal injuries and on the left exacerbation of preexisting osteoarthritis as the result of the fall with ongoing symptomology requiring further care. (3) A diagnosis of right ankle sprain. The swelling was obvious over the right lateral malleolus. His opinion was that the mechanism of injury was certainly consistent, there had been no intervening events, there was swelling over the joint and he believed the patient's history.

45. Dr. Orent found Claimant was clearly not at MMI as she required a repeat MRI of the lumbar spine, repeat EMG nerve conduction studies to determine why her legs were so weak, consideration of hyaluronic or other viscosupplementation into the left knee and an MRI of the right knee and the right ankle. Further care would be dictated based on the findings of those studies. Regarding her lumbar spine, it was clear and obvious she had ongoing pain, and recommended repeat imaging. He also stated that injection into the SI joint was reasonable and should proceed given the changes noted on her imaging. In addition, she had a facet syndrome and possible discogenic pain in the lumbar spine which should be further sorted by a repeat MRI with further treatment as necessitated.

46. Dr. Orent assigned a provisional impairment rating to Claimant. He rated the lumbar spine, bilateral knees, and right ankle for a combined 50% whole person impairment without basis for apportionment. Claimant was also unable to work as she was barely able to ambulate or get out of a seated chair at the time of his examination.

47. Following the initial report, on August 18, 2022 Dr. Orent issues a supplemental report correcting an error regarding the impairment for the right lower extremity, but concluded the error was minor and, with the corrected rating, the final whole person impairment did not change.

48. Claimant was evaluated on November 11, 2022 by Dr. John Aschberger, for an IME requested by Respondents. Dr. Aschberger opined that Claimant had a upper motor neuron neurological problems, likely above the cervical spine. Dr. Aschberger opined that there had been progressive involvement affecting both lower extremities that may be explained by further workup. He further stated that Claimant's presentation showed deterioration probably affecting her presentation at the time of the DIME, affecting the impairment rating issued by Dr. Orent, and that it may not reflect the actual residual from the work injury alone. He further opined that Dr. Reichhardt's impairment would be the best estimate for the correct impairment.

49. Dr. Reichhardt did examine Claimant on November 14, 2022, following his conversation with Dr. Aschberger. He confirmed Claimant had lower extremity clonus and a positive right sided upper extremity Hoffman's, which had been negative previously. He noted that the clonus was likely caused by cervical spine impingement

and stenosis at the cervical spine level. He recommended Claimant be seen immediately by Salud Clinic. He did not related any cervical spine issue with her February 15, 2020 fall.

50. On December 14, 2022 Dr. Scott issued a supplemental report at Respondents' request. He reviewed further records and noted that his opinions had not changed with regard to the February 15, 2020 work related injury, opining that Claimant reached MMI as of June 3, 2020, and that any impairment provided by Dr. Orent was questionable, in light of Dr. Parker's findings on that date.

C. Claimant's Testimony

51. Claimant stated that she recalled her treatment at Concentra with multiple providers. She also recalled her care under Dr. Reichhardt, and that he took measurements of her movement. She also recalled seeing Dr. Quickert and that injections were recommended. She denied having declined to go through them only that the injections were not authorized by Insurer, so she was unable to have the injection. She continues to be open to having the injections. She recalled seeing an IME physician but did not recall his name. She recalled being released by Dr. Reichhardt but continued with physical therapy after that date for several months. Her condition with the weakness in her lower extremities continued to deteriorate and she started using a cane over a year before the hearing in this matter. She stated that she had recently returned to see Dr. Reichhardt due to her continued deterioration including her right ankle. She informed Dr. Reichhardt that she has had many falls due to the weakness in her lower extremities.

52. Claimant recalled when they tried to perform dry needling in her lumbar spine, they pinched a nerve and there was a lot of blood. The next day she could not move her right foot properly. Somehow, it affected her right leg. Since that time she has had greater weakness in both leg and has had many falls.

53. Claimant testified that prior to her work related injuries of August 25, 2019 and February 15, 2020 she was healthy and did not have any limitations or restrictions. However, she now has limitations caused by her injury and could not work at this time. Even when she was working, prior to being laid off due to COVID-19, her employer would violate her restrictions and make her perform activities outside of her restrictions.

54. In November 2022 she was called in for an evaluation with Dr. Reichhardt, who asked her questions related to the weakness in her lower extremities and for the name of her personal care provider (PCP). She noted that Dr. Reichhardt attempted to contact her PCP but could not reach her. He recommended that she schedule an appointment. Claimant scheduled the appointment and was evaluated by Katie at Salud Family Health in Fort Collins.

55. Claimant acknowledge that she had travelled due to an emergency to Mexico but was only there for approximately one month after she was released and no longer going to therapy. After she returned, she restarted therapy in the Spring of 2022. She testified that she started using a cane approximately a year before because the weakness in her legs caused her to be unstable and caused multiple falls.

D. Testimony of Dr. Douglas Scott

56. Dr. Douglas Scott testified at hearing on behalf of Respondents, Board Certified Occupational Medicine expert as well as a Level II accredited physician. He explained his examination of Claimant when he conducted the IME as well as review of the records. He opined that, based on the mechanism of injury and his consideration of the chiropractor's finding on June 3, 2020, Claimant reached MMI without impairment at that time. He stated that he disagreed with Dr. Orent's findings, especially with regard to the lower extremities, as they were not part of the initial injury in his opinion. Further, he question Dr. Orent's range of motion numbers.

57. He was of the opinion that Claimant was disqualified from receiving further care under the workers' compensation system because her current problems were not related to her work related injury. However, he did concede that a degenerative or chronic conditions did not disqualify Claimant from receiving benefit under the WC system. He further opined that Claimant should have been released to work without restrictions as of June 3, 2020 as she had a normal exam including the ability to perform a squat despite the pain. He noted that pain alone does not equate to injury or impairment.

E. Testimony of Dr. John Aschberger

58. Respondents also called Dr. John Aschberger to testify in this matter as a Board Certified expert in Physical Medicine and Rehabilitation as well as a Level II accredited physician. He noted he had reviewed the records and examined Claimant. He specified that at the time of the exam, Claimant was having difficulty walking and standing, and was assisted by her husband. He could not perform ROM measurements because she was not stable on her feet. He stated he found clonus of the left knee and bilateral ankles representing a possible upper motor neuron neurological finding. She had an abnormal gait.

59. Dr. Aschberger recalled that Claimant reported having worsening of condition following her treatment with the chiropractor, though there was some mention in the records that following a walk with a friend she had problems with walking. He further opined that the records did not support a left knee or left lower extremity injury. He opined that Claimant reported multiple falls and that they may constitute an aggravation or new injury. He agreed with Dr. Reichhardt's determination of MMI and impairment. He stated that the SI joint injection could provide some relief and could be done as maintenance medical care. He did not change his opinions relayed in his IME report.

F. Testimony of Dr. Sander Orent, DIME physician

60. Dr. Orent, a Board Certified Occupational Medicine and Internal Medicine expert as well as a Level II accredited physician, was called by Claimant as the Division selected DIME physician. Dr. Orent testified at hearing as a Board Certified Occupational Medicine and Internal Medicine expert as well as a Level II accredited physician. He stated that there were no upper motor neuron findings when he examined Claimant in

August 2022. He did identify severe lumbar dysfunction as well as bilateral lower extremity injuries. He noted that he considered the medical records as well as Claimant's reports of the injuries when he made the determination to related the right lower extremity and ankle injuries to the February 15, 2020 work related injury. He chose to believe Claimant's reports despite the lack of a specific report in the medical documentation that Claimant had been hurt either by the dry needling or the chiropractor's records, especially considering his examination and findings of swelling in the knees as the right ankle. He opined that something was going on in Claimant's spine that needed to be addressed as well as her lower extremities, especially considering that the weakness of her lower extremities has resulted in multiple falls. He opined that Claimant's ongoing deterioration required further investigation and that providers should not rely on 2 year old exams.

61. Dr. Orent stated that simply because a Claimant had an asymptomatic condition did not mean that the condition could not be aggravated, causing the asymptomatic condition to flare and become symptomatic. He opined that this is what happened when the chiropractor manipulated Claimant's knees. He failed to understand why the chiropractor, who was in charge of addressing lumbar spine issues, was addressing anything with regard to Claimant's knees. Now Claimant has effusion in both knees as well as an antalgic gait, which he related to the February 15, 2020 work injury.

62. Dr. Orent further considered the Claimant's adequate mechanism of injury and the sequelae caused by the ongoing injuries and treatment when making his causation analysis. He continued to opine that Claimant was not at MMI and required further diagnostic testing and medical care as stated in his report, including viscosupplementation in the knees, SI joint injection and even repeat MRI of the lumbar spine and repeat EMG, related to her February 15, 2020 admitted work injury as laid out in his DIME report. He stated that Dr. Scott and Dr. Aschberger simply disagreed with his opinions and that physicians frequently disagree with each other.

63. Dr. Orent testified persuasively that he took valid measurements of Claimant's lumbar spine at the time of his examination. He confirmed that the measurements were in fact the numbers he took during the examination and disputed Dr. Scott's opinion that it was not possible to obtain the numbers Dr. Orent actually obtained. Dr. Orent continued to opine that Claimant injured her lumbar spine and bilateral lower extremities, including her right and left knees and her right ankle. He appropriately provided a provisional rating as required by the Division in accordance with the requirements for a DIME physician. He considered the medical records, Claimant's testimony and the responses Claimant provided him at the time of her examination, as well as the mechanism of injury and the sequelae treatment she received to arrive at his opinions as laid out in his DIME report. He continued to opine that Claimant was not at MMI and required further diagnostic evaluation and treatment as he had previously laid out. His opinion did not change from that reflected in his DIME report despite the testimony of Drs. Scott and Dr. Aschberger. He stated that they simply have a different opinion.

64. Dr. Orent stated that, even if Claimant was found to be at MMI, that she continued to require medical care related to her work injury.

G. Ultimate Findings of Fact

65. As found, Respondents have failed to overcome by clear and convincing evidence the opinions of Dr. Sander Orent, the DIME physician in this matter. Dr. Sander considered the evidence, the facts as described by Claimant, the medical records, the mechanism of injury and examined Claimant in order to arrive at his opinions in this matter. Dr. Orent is credible and his opinions more persuasive than the contrary opinions provided by Dr. Aschberger and Dr. Scott. Claimant explained to Dr. Orent how her injury occurred, Dr. Orent reviewed the records and examined Claimant in order to perform a causality analysis and reach the determination that Claimant injured her low back, left lower extremity, her bilateral knees and her right ankle, all as a consequence of the February 15, 2020 work related injury. This includes further injury to her lower extremities caused by treatment while under the care of her workers' compensation authorized treating providers.

66. As found, Dr. Orent credibly concluded that, due to the progression of Claimant's symptomology, she required further medical care, including but not limited to repeat MRI of the lumbar spine, repeat EMG nerve conduction studies to determine why her legs are so weak, consideration of hyaluronic or other viscosupplementation into the left knee, SI joint injections and MRIs of the right knee and the right ankle. He opined that this diagnostic care and treatment are essential to cure and relieve Claimant from the effects of her February 15, 2020 admitted work related injury.

67. Drs. Aschberger and Scott did not disagree that Claimant needed further evaluations. In fact, they recommended Claimant seek further evaluation outside of the workers' compensation system with her PCP. However, neither were able to identify what exactly was happening to Claimant other than that she continuing to have complaints of pain in her low back, lower extremities including weakness. Those physicians simply concluded that since the treatment provided did not resolve her complaints that they were probably unrelated to the work injury. Dr. Orent credibly opined that Claimant continue to suffer from the work related injuries and required further care and diagnostic treatment and that Drs. Aschberger's and Dr. Scott's opinions were simply difference of opinions.

68. Dr. Scott is simply not credible in his opinion that, based on his understanding of the mechanism of injury, Claimant should have reached MMI as of June 3, 2020 when the chiropractor identified Claimant was able to perform a squat, despite Claimant's continuing symptoms. He relied heavily on Dr. Parker's notations. However, Dr. Parker's notes are suspect. From the initial exams on May 13, 2020 he stated that Claimant "transitions from a seated to a standing position without difficulty, pain complaints or pain behaviors." The phraseology of "transitioned from a seated to a standing position without difficulty, pain complaints, or pain behaviors" is commonly added in most of Dr. Parker's reports despite complaints of pain and symptoms. Dr. Parker clearly documents that Claimant was having significant pain with ratings at 6/10 and 7/10, with left lateral knee pain and numbness traveling from her gluteus musculature laterally in the left lower extremity to the left great toe and second toe. He noted significant loss of range of motion, positive Patrick's, Hibb's, Yeoman's, and hyperextension, and while he may not have provided significant chiropractic care to the lower extremity, his exam notes that he clearly examined the lower extremity,

manipulating them. On June 3, 2020 Dr. Parker documented that Claimant continued to have a 6/10 pain with activity and noted that she had palpable adhesions, trigger points and muscle spasms. Therefore, Dr. Scott's reliance of Dr. Parker's normal findings make his opinions not credible.

69. Claimant was under medical restrictions issued by her ATPs, including Dr. Reichhardt who stated as of July 20, 2021 that Claimant was limited in her ability to work including a 20 lbs. lifting, pushing and pulling limitation as well as limited bending and twisting. These restrictions are similar to Claimant's restrictions when she was laid off from her employment due to COVID-19. Further, both Dr. Aschberger and Dr. Reichhardt noted in their more recent reports that Claimant was not able to engage in employment at that time. This is consistent with Dr. Orent's opinion as well. Claimant has shown the she has been unable to return to her employment with Employer of injury or any other employment due to her work restrictions.

70. As found, Claimant's loss of employment was caused by a combination of her physical limitations, her restrictions and due to the COVID-19 pandemic. As found, from the totality of the evidence, including Claimant's credible testimony and the medical records, Claimant has proven that it was more likely than not that that she left work as a result of the disability related to this claim and has incurred an actual wage loss. This has caused a disability lasting more than three work shifts. Claimant has proven that it was more likely than not that there was a causal connection between a work-related injury which caused her subsequent wage loss. As found, Claimant continues to have work restrictions that limit her ability to return to her prior employment or any other employment.

71. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which

leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Whether Respondents overcame the DIME physician's opinion, that Claimant is not at MMI, by clear and convincing evidence.

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S.

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S. The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998). Clear and convincing evidence means evidence which is stronger than a mere preponderance. It is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A party meets this burden if the evidence

contradicting the DIME physician is “unmistakable and free from serious or substantial doubt.” *Leming v. ICAO,* 62 P.3d 1015 (Colo. App. 2002). A “mere difference of medical opinion” does not constitute clear and convincing evidence. E.g., *Gutierrez v. Startek USA, Inc.,* W.C. No. 4-842-550-01, *ICAO,* (March 18, 2016); *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523- 097, ICAO, (July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000). Further, a finding of MMI inherently involves issues of diagnosis because the physician must determine what medical conditions exist and which are causally related to the industrial injury*. Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). Because the determination of causation is an inherent part of the diagnostic process, the DIME physician's finding that a condition is or is not related to the industrial injury must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office, supra.*

If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*, (if DIME physician offers ambiguous or conflicting opinions on MMI, it is for ALJ to resolve such ambiguity and conflicts and determine the DIME physician's true opinion). A DIME physician's finding of MMI consists not only of the initial report, but also any subsequent opinion given by the physician. See *Andrade v. ICAO*, 121 P.3d 328 (Colo. App. 2005). Thus, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. ICAO*, 984 P.2d 656, 659 (Colo. App. 1998); *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005). Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician’s true opinion regarding MMI. Section 8-42-107(8)(b), C.R.S.; see *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175, ICAO, (May 25, 2005) [aff'd, *Resources One, LLC v. Industrial Claim Appeals Office* 148 P.3d 287 (Colo. App. 2006)]; *Leprino Foods Co. v. ICAO*, *134 P.3d 475 (Colo. App. 2005); In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*. Lastly, Respondents bear the burden of proof to overcome by clear and convincing evidence the DIME physician's finding that MMI had not been attained. See also *Viloch v. Opus Northwest, LLC*, W. C. No. 4-514-339, ICAO, (June 17, 2005); *Gurule v. Western Forge*, W. C. No. 4-351-883, ICAO, (December 26, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. ICAO, supra*. Since the DIME physician is required to identify and evaluate all losses and restrictions which result from the industrial injury as part of the diagnostic assessment process, the DIME physician's opinion regarding causation of those losses and restrictions is subject to the same enhanced burden of proof. *Qual-Med v. ICAO, supra.*

In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination [and true opinion] is incorrect and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical

opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., *supra*; *Shultz v. Anheuser Busch, Inc*., *supra.*

In the case at bench, Respondents' had the burden of proof to overcome Dr. Orent's opinions on MMI and causation. Respondents relied on the opinions of Drs. Scott and Aschberger, as well as other medical reports, to support their contentions. The ALJ found Drs. Scott and Aschberger were unpersuasive in their opinions with regard to causation and MMI, especially their diverging opinions. Dr. Aschberger put great emphasis on his findings that there was a clonus sign at the low extremities but more importantly at the right upper extremity. It is clear from the record that Claimant has continuously complained of right upper extremity problems related to the admitted August 25, 2019 work related injury. Dr. Aschberger's report makes little mention of his review of records from the 2019 claim or Claimant's symptoms in that case, which are extensive in this ALJ consideration and that case is not before the court at this time. Dr. Aschberger actually recommended further diagnostic work up with regard to Claimant's symptoms outside of the Workers' Compensation system considering his examination to determine if there was a true upper motor neuron condition, though he suspected there was. However, there was no specific diagnosis provided and little that shows that Dr. Orent is incorrect in his determination. Dr. Aschberger's opinion was, in fact, somewhat speculative and just a different opinion than Dr. Orent's. Dr. Aschberger's opinion amounted to a mere difference of medical opinion with those of Dr. Orent's, which does not rise to the level of clear and convincing evidence that is unmistakable and fee from serious or substantial doubts and is insufficient to show that it is highly probable the DIME physician's opinion on MMI is incorrect. See *In re Claim of Tomsha*, W.C. No. 5-088-642-002 (I.C.A.O. March 18, 2021).

With regard to Dr. Scott's opinions, he is simply not credible. In his estimation Claimant should have reached MMI within four months of her injury. In his opinion, based on his understanding of the mechanism of injury, Claimant should have reached MMI as of June 3, 2020 when the chiropractor identified Claimant was able to perform a squat, despite Claimant's continuing symptoms. He relies heavily on Dr. Parker's notations. However, Dr. Parker's notes are suspect and conflicting. From the initial exams on May 13, 2020 he stated that Claimant "transitions from a seated to a standing position without difficulty, pain complaints or pain behaviors," which is a phrase he frequently uses in his notes despite complaints of pain and symptoms. Dr. Parker clearly documents that Claimant was having significant pain with ratings at 6/10 and 7/10, with left lateral knee pain and numbness traveling from her gluteus musculature laterally in the left lower extremity to the left great toe and second toe. He noted significant loss of range of motion, positive Patrick's, Hibb's, Yeoman's, and hyperextension, and while he may not have provided significant chiropractic care to the lower extremity, his exam notes that he clearly examined the lower extremity, manipulating them. On June 3, 2020 Dr. Parker documented that Claimant continued to have a 6/10 pain with activity and noted that she had palpable adhesions, trigger points and muscle spasms. Therefore, Dr. Scott's reliance of Dr. Parker's normal findings make his opinions not credible.

As found, Dr. Reichhardt found Claimant at MMI as of July 20, 2021 based on a stagnated system. He was awaiting authorization for SI joint injections he recommended

with Dr. Quickert, which were denied. His hands were tied as he found his recommendations rejected and could offer nothing else. Further, Dr. Reichhardt relied on communications from Mr. Toth that Claimant had not complained of leg pain during the initial visits. Mr. Toth mislead Dr. Reichhardt in this matter. And while this ALJ was more persuaded by Dr. Reichhardt's opinion than by Dr. Scott or Dr. Aschberger, his opinion did not rise to the level of clear and convincing evidence that was free from doubt. It was simply a difference of opinion.

Respondents argued that because Dr. Brady mentioned that Claimant was wearing an ankle brace on August 3, 2020 and that clearly the somatic distress and pain magnification were the causes of Claimant's continuing symptoms, her continuing problems were not the work related injury. This is not persuasive. In fact, Dr. Brady diagnosed a pain disorder and adjustment disorder which were either caused by or aggravated by the work related claim of 2019.

Respondents also argued that Dr. Orent made a mistake, which was not corrected, following the Incomplete Notice of August 18, 2022. This is not correct. In fact, Dr. Orent did correct his mistake and issued a letter on the same day, including the revised summary form.[14] Immediately thereafter, the DIME Unit at the Division issued the "Notice: DIME Report "Not at MMI"" on August 25, 2022 to the parties.[15] As found, Dr. Orent's true opinion is found to be inclusive of this revised report.

Respondents also argue that based on Dr. Scott and Dr. Kleinman's opinions, Claimant's conditions were preexisting. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.* If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Industrial Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Industrial Commission*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, caused an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949);

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[14] See Claimant's Exhibit 7, bates 25, and Exhibit 8, bates 27-29.
[15] See Exhibit 9, bate 32.

Dietrich v. Estes Express Lines, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant credibly testified that, before her workers' compensation incidents, Claimant she was in good health and did not have any medical or health problems which affected her low back and bilateral lower extremities. Neither were any medical record in evidence presented that showed to the contrary. While the diagnostic testing showed Claimant clearly had degenerative conditions, those conditions were asymptomatic. Dr. Orent credibly testified that Claimant's current problems with her low back and bilateral lower extremities are related to her February 15, 2020 work related accident. He also credibly testified that the need for the recommended care was related to the claim. Further, he opined that it was not only the injuries she sustained at the specific date and time of the work related event or accident but the sequelae that results from those injuries were also related to the February 15, 2020 work related claim. In short, because Claimant was further injured during the course of her treatment for the work related injury, those additional injuries are also related to the February 15 2020 claim and compensable. While Dr. Parker's records did not record causing an injury to Claimant's right knee, he did examine them including doing range of motion of the knee. It is not surprising or unanticipated that he would not record causing an injury to a patient.

Lastly, Respondents argue that Dr. Orent was in error because he relied on Claimant's reports instead of pointing to particular medical records to substantiate his opinion.[16] As found, Dr. Orent did substantiate his opinions, first by stating that he acknowledge that Dr. Reichhardt obtained better range of motions but that Claimant's condition had clearly worsened since that time. Secondly, Dr. Orent's range of motion testing was valid and therefore no second set needed to be completed under the *AMA Guides*. Further, he opined that Claimant clearly explained what had occurred with regard to the reporting. Claimant did complain of her lower extremity weakness. The medical records show a pattern of Claimant's complaints, despite the providers being told by Insurer that the knee complaints were not compensable. Dr. Reichhardt also documented in his records that Claimant was complaining of bilateral lower extremity pain and weakness from his initial report of October 5, 2020, despite noting that it was not initially reported because Employer did not list it initially.

As Dr. Orent testified, chiropractors are not trained in range of motion for the purposes of evaluating MMI and impairment. Dr. Scott's opinion also ignores the reports that followed from Dr. Parker. Claimant reported she still experienced low back pain, but treatment was helpful. The fact that treatment continued to be helpful to Claimant shows

[16] Respondents specify in their brief that Dr. Orent's reliance of Claimant's statements is "outside of the Guides page 246." The AMA Guides have nothing on this page and the MTGs for both low back and lower extremities have less than 246 pages each.

that Claimant had not reached the level of maximum improvement. It is reasonable to believe additional care would continue to improve Claimant's condition. All of Dr. Parker's impressions noted "slowly improving (objective greater than subjective) low back pain/ lumbosacral strain and thoracolumbar pain complaints." By definition, Claimant had not reached a point of stability.

After considering the multitude of reports in evidence[17] from both the 2019 and the 2020 claims as well as the testimony of three experts, this ALJ concludes from the totality of the evidence, based on the heightened standard of proof, Respondents failed to show by clear and convincing evidence that Dr. Orent was in error.

C. Whether there was an Intervening Event

An intervening injury may sever the causal connection between the industrial injury and the claimant's condition. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). Further, the existence of an intervening event is an affirmative defense. Consequently, it is Respondent's burden to prove that Claimant's disability is attributable to the intervening injury or condition and not the industrial injury. *See Owens v. ICAO*, 49 P.3d 1187 (Colo. App. 2002); *see also Atlantic & Pacific Insurance Co. v. Barnes*, 666 P.2d 163 (Colo. App. 1983). Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.* It is also clear that, pursuant to the Court's conclusion in the *Owens* case cited above, that no compensability exists if the disability or need for treatment was caused as a direct result of an independent intervening cause. Whether Respondents have sustained their burden to prove Claimant's disability was triggered by an intervening event is a question of fact for resolution by the ALJ. *See City of Aurora v. Dortch*, 799 P.2d 462 (Colo. App. 1990).

Respondents stated that Claimant had an intervening event, speculating that something must have happened when Claimant was in Mexico on an emergency. Claimant testified that she had traveled to Mexico and stayed there for approximately one month but did not recall exactly when. She confirmed it was after she had been released from physical therapy in the fall of 2021 and when she restarted physical therapy in February 2022. However, there was no confirmation or credible evidence that Claimant suffered any accident or incident while she was in Mexico.

Claimant did testify that the weakness in her legs had caused her to fall multiple times. This was documented by Dr. Reichhardt in his November 2022 report. However, it has not been persuasively proven that it was more likely than not that Claimant's falls were caused by a condition other than the documented and diagnosed lumbar spine injury with radiculopathy or the bilateral lower extremity injuries diagnosed by Dr. Orent in his DIME report. The records are full of complaints that Claimant had weakness in her bilateral lower extremities. Dr. Aschberger and Dr. Reichhardt speculated that Claimant has some stenosis or upper motor neuron condition, but this has not been confirmed either, and no diagnostic testing has been completed to rule out the probability that the falls are a consequence of the weakness caused by the work related lower extremity

[17] There are approximately 1300 pages of records, including medical records and pleadings.

injuries or the radicular symptoms. Dr. Reichhardt continued to note in his November 14, 2022 report that Claimant had suffered a work related low back discogenic injury with radicular involvement and a left knee injury. He rated both. And these records and opinions were considered by the DIME physician. Nothing in those reports persuaded this ALJ that there was clear and convincing evidence of a diagnosis that was not work related as determined by Dr. Orent.

Respondents also point to the event Claimant reported when she was walking with a friend in April 2020 and was feeling pain in her knee. This ALJ finds no merit in this theory or suggestion as walking in and of itself is found not to be a causative intervening event. Claimant likely walked many places, including in her home, the medical providers buildings, and for every other activity of daily living. Even if Claimant had just been walking while in the course and scope of her employment that would likely not be considered a work related injury as there would be no cause and effect, no heightened risk.

This ALJ has insufficient evidence to determine that it is more probable than not that Claimant suffered an intervening event. Respondents have failed to show that it was more probable than not that Claimant had an intervening event at this time.

It is further found that Respondents have failed to overcome the determination of the DIME physician's opinion by clear and convincing evidence that there was no intervening event. Dr. Orent acknowledged reading the opinions of Dr. Aschberger and Dr. Reichhardt with regard to the clonus signs, as well as Dr. Aschberger's testimony and this information did not change his opinions.

D. Entitlement of Temporary Total Disability benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *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) 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) (citing *Ricks v. Industrial Claim Appeals Office*, 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.

Claimant was given work restrictions as of the date of her injury on February 15, 2020. She continued working until sometime in March 2020, when she was laid off from work due to the COVID-19 pandemic. This was a time when her employer failed to comply with her work restrictions. She continued on work restrictions when Dr. Reichhardt placed her at MMI on July 20, 2021. At that time she continued having work restrictions of 20 lbs. lifting, pushing and pulling, and limit bending and twisting at the waist to an occasional basis. In fact, Dr. Orent stated that he saw no possibility of Claimant engaging in any form of active employment at that time and Dr. Aschberger opined that Claimant could not work or was not employable. Claimant has established by a preponderance of the evidence that she is entitlement to TTD benefits as a result of her work related injury from the date she had previously been placed at MMI on July 20, 2021 until terminated by law.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents failed to prove by clear and convincing evidence that the DIME physician was incorrect. Claimant is not at maximum medical improvement.

2. Respondents shall pay for reasonably necessary and medical care related to the February 15, 2020 work injury, in accordance with the Colorado Fee Schedule, to cure and relieve her of the compensable injury.

3. Respondents shall pay temporary total disability benefits as of July 20, 2021 and continuing until terminated by law.

4. Respondents shall pay interest on any benefits at the rate of eight percent (8%) per annum for all benefits that were not paid when due.

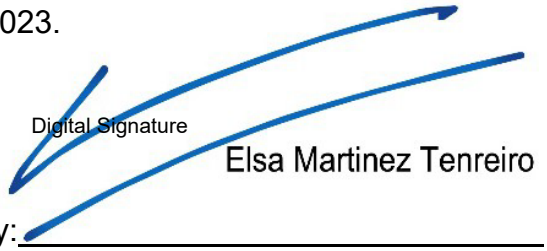
5. Claimant’s average weekly wage is $333.00 pursuant to the stipulation of the parties.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as

long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 17th day of February, 2023.



By: _____

Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-203-196-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that Claimant was injured in the course and scope of his employment on April 8, 2022.

IF THE CLAIM IS DEEMED COMPENSABLE, THEN:

II. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical benefits that are authorized, reasonably necessary and related to the April 8, 2022 work related injury.

III. If Claimant proved he is entitled to medical benefits, who is his authorized treating physician.

IV. Whether Claimant established what his average weekly wage (AWW) is.[1]

V. Whether Claimant established by a preponderance of the evidence he is entitled to temporary total disability benefits (TTD) or temporary partial disability (TPD) benefits.

VI. Whether Respondents proved by a preponderance of the evidence Claimant was terminated for cause or was responsible for his wage loss.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if compensability was established, then Claimant's agreed upon average weekly wage (AWW) was $507.59.

The parties further stipulated, if compensability was established, that they only require a general award for temporary disability and that the parties would calculate and/or negotiate the amounts due and owing as Claimant received unemployment benefits for which Respondents are entitled to an offset.

These stipulations are approved and become part of the order.

PROCEDURAL ISSUES

Claimant limited the period of temporary total disability benefits being requested from April 18, 2022 through June 8, 2022 and temporary partial disability benefits thereafter. Respondents asserted that temporary disability benefits would terminate as of April 26, 2022 if the authorized treating physician placed Claimant at maximum medical improvement.

Respondents also withdrew the issues of waiver, estoppel, latches and overpayment.

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[1] See stipulation.

FINDINGS OF FACT

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

A. Generally:

1. Claimant was 27 years old at the time of the hearing. He worked in the housekeeping department for Employer since approximately April 1, 2021. His job included high and low dusting, vacuuming, mopping, cleaning bathrooms, wipe down counters and surfaces, mirrors, ledges, cleaning bathrooms, and general housekeeping chores. He was hired to clean the office suites on the 2nd floor, the call center and the common areas (which did not include all hallways).

2. On April 8, 2022 Claimant was scheduled to work from 5:00 p.m., after they closed the medical care facility. That particular day he was assigned extra duties of cleaning baseboards of the lobby and hallways, in addition to his normal tasks. He started cleaning the hallway baseboards around 11:20 p.m., for which he had to bend over in awkward positions, kneeling and bent over, when he started feeling pain in his low back after starting the task. He started having pain in his lower back after approximately one half hour. However, he completed his tasks for the day, including taking out the trash, locking up the janitor closet and turning in his dirty rags around 12:20 a.m. on April 9, 2022.

3. His wife picked him up from work because he was unable to drive. He went home and started feeling excruciating low back pain but also nausea, vomiting, and had a fever. He did not see a medical provider and stated he wanted to see how he was feeling the following work day and whether he would recover quickly, as Saturday and Sunday were his days off. He did not report his symptoms to his employer at that time as he was concerned with losing his job. He had bed rest the whole weekend. He had not had a problem like this before but he assumed that the symptoms would get better by Monday. On April 9, 2022 his pain level was a 3/10 on a 10-point pain scale.

4. His back started to get worse and on Monday he called the human resource department (HR) and spoke with [Redacted, hereinafter MB], advising her that he would not be in to work as he was feeling sick. At that time, Claimant thought he might have COVID because of the nausea, vomiting and fever as well as back pain. He did not mention that he had any work related injury.

5. Claimant called his employer on multiple occasions to advise he would be unable to work. By April 14, 2022 his back pain was unbearable and he sought medical attention.

6. Claimant went to his primary care provider (PCP), but his regular provider, Dr. Moran was not available, so he was seen by Linsey Durrough, a nurse practitioner at Banner. By that time, his pain level was at around an 8/10 and was excruciating. Ms. Durrough provided him with a medical excuse letter, which he provided to Employer on April 14, 2022.

7. Claimant did not have any history of back pain or problems prior to April 8, 2022.

B. Medical Records:

8. On April 14, 2022 Claimant was evaluated by Nurse Practitioner Lyndsay Dorrough at Banner Heath BMG Health Clinic, Timnath Family Medicine,[2] under the direction of Dr. William Ratliff. Claimant provided a history as follows:

> [Redacted, hereinafter MA] Is a 26 year old male presenting with back pain. This started last week, Friday. Reports was squatting cleaning/installing baseboards at work and developed back pain after 1/2 hour of doing activity. Reports no heavy lifting at work, no popping sensation felt Reports no hx previous injury. Pain starts lower back and works up to mid back. Pain has been 9/10. Aleve did not help the pain. Does not wish to pursue workman's compensation evaluation at this time. States pain makes him feel nauseated. Has not worked since occurred. No radiation down legs, foot drop or incontinence.

Claimant reported pain in his mid and low back as well as nausea due to the pain, but no numbness, tingling or lower extremity symptoms. On exam Nurse Durrogh noted pain in the paraspinal muscles of the thoracic spine on the right side, muscle spasms on the right thoracic and lower back. Pain and limited range of motion (ROM) on extension and with flexion. She diagnosed thoracic back pain, lumbar back pain, and muscle spasms. She prescribed celecoxib, tizanadine, lidocaine patches and x-rays, and recommended he avoid lifting and twisting as well as a trial of heat, Epsom salts and rest. She advised if symptoms persist despite medication she would order physical therapy. She further stated that "If you chose to file workman's compensation claim (we are not covered), recommend filing with your company. We discussed if you file with workman's compensation this visit may not be covered under that insurance." Nurse Dorrough also provided Claimant with a note that stated that "['Claimant] was seen in clinic today. May return to work Monday April 18, 2022."

9. Dr. Curtis Henderson evaluated Claimant on April 18, 2022 at Banner Fort Collins Medical Center Emergency Department regarding his back pain. The history of illness was consistent with Claimant's testimony. On exam, Dr. Henderson found right-sided paravertebral musculature spasm, but most of Claimant's pain was left sided, some sacral discomfort, decreased range of motion due to the pain. Claimant was prescribed Toradol, Norflex IM and Norco. Dr. Henderson recommended rest in reclined position, restrict activity until reevaluated by specialist or PCP, outpatient physical therapy, use ice and heat, no lifting and return to ER if conditions worsen. He excused Claimant from work for one week with a return date of April 25, 2022. The discharge summary specified that Claimant should restrict activities, no lifting, rest in a reclined position, use ice and heat.

10. Respondent Insurer provided a designated provider list (DPL) indicating Claimant could choose from Concentra of Fort Collins, Banner Occupational Health in

[2] Claimant was previously seen at the clinic by Dr. Robert Moran on March 28, 2022 for a general checkup. No concerns were reported regarding low back or thoracic spine issues, though dysthymia (depression) was present.

either Greely or Loveland and UCHealth Occupational Medicine Clinic Harmony Campus. Employer provider a similar one. Neither of these DPLs were dated.

11. Claimant was seen on April 19, 2022 at Banner Occupational Health Clinic in Loveland by Bryan Copas, PA-C, for low to mid back pain radiating to the right shoulder. Claimant complained of fatigue, fever, trouble sleeping, dizziness, shortness of breath, wheezing, nausea, neck pain, scoliosis, joint pain, joint stiffness, joint swelling, muscle cramping, muscle pain, muscle weakness, and back pain. Claimant complained of problems walking, feeling dizzy, difficulty concentrating, and loss of memory. He advised he did not have preexisting conditions. Mr. Copas documented a mechanism of injury consistent with Claimant's testimony at hearing. Claimant reported that the following day (April 9, 2022) after his initial onset of symptoms, he developed nausea and a fever. On exam, Mr. Copas documented decreased range of motion (DROM) and loss of strength of T-spine and L-spine with all planes limited by 5-10 degrees except for rotations bilaterally which was normal. He reported tenderness and response to light touch was diffuse and without localization, he had slight scoliosis of lower T-spine to right (dextroscoliosis), and slight scoliosis of L-spine to left (levoscoliosis)[3], an exaggerated response to slightest touch over the bilateral SI joints as well as diffusely throughout back and posterior right shoulder. Mr. Copas diagnosed dorsalgia, specifically stating that "[T]he cause of this problem is not known at this time., (sic.) and No clear dominant pathology." He recommended restricted duty through April 26, 2022 including no bending, carrying, climbing, crawling, kneeling, lifting, repetitive lifting, pushing, pulling squatting, stooping or twisting. Lastly, he stated that claimant's symptoms should resolve with conservative care, regardless of the cause of the injury. This report was co-signed by Dr. Daniel Bates.

12. On April 19, 2022 [Redacted, hereinafter BP] issued the BP[Redacted] First Report of Injury, which includes a general first report comments. The note seems to have been written by an Employer representative stating as follows:

> The claimant worked on Friday 4/8 and then was off for his scheduled days off on 4/9 and 4/10. On 4/11 the claimant called off for their scheduled shift stating they were starting to get a sore throat and felt sick to their stomach. The claimant then called off again on 4/12 stating they were still feeling awful and would not be in. On 4/13 the claimant called off and stated they were still feeling pretty sick and thought it was the stomach bug. On 4/14 the claimant called in to call off again stating they were still not feeling well at which point they were informed they would need to provide a doctor's note since it had been more than 3 days in a row. They stated they would be providing a doctor's note after their appointment that afternoon. The doctor's note received did not stale anything about the reason for the absence. It just slated the claimant was seen and may return to work on April 18th. On April 18th the claimant stopped by our office to drop off a doctor's note that excused him from work until April 25th at which point in time he stated he was Injured at work and was experiencing back pain. The claimant failed to report this injury in a timely manner and it seems odd/suspicious that the claimant reported they had a stomach bug and then it turned into a back Injury 10 days later.

[3] Mr. Copas read the x-ray films of the T-spine and L-spine as demonstrating dextroscoliosis of lower T-spine and levoscoliosis of L-spine, consistent with his exam.

13. PA-C Andrea Hibma from UCHealth evaluated Claimant on April 21, 2022. Claimant reported that "[T]he injury occurred at approximately 11:20 pm as he was cleaning the baseboards in the hallway of an office" on April 8, 2022. He describe the movements as follows:

> He states that he initially bend at the waist to wipe the baseboards, but then started to crouch/kneel to clean. He states that he does typically clean the baseboards, but "it is not in my job description to clean baseboards in the hall". He typically cleans the baseboards in the lobby and suites only. MA[Redacted] states that he was doing this activity for approximately an hour. He states that about five minutes after he was finished he noticed pain to his entire back and went home.

Claimant reported "severe" ache and numbness to the anterior and posterior lower legs, right greater than left. He reported difficulty sleeping due to discomfort and that he had not returned to work yet. He also advised that he reported his injury to his employer the prior week. Claimant denied any prior back injuries. Ms. Hibma review the medical records of Claimant's visits with his PCP and Banner ER. Following exam, she diagnosed a thoracic myofascial strain and an acute myofascial lumbar strain, recommending physical therapy. Since Ms. Hibma noted that she believed Claimant's condition was related to activities of his employment but was not certain, she recommended a Level II physician evaluate Claimant to make a causation determination.

14. Claimant was evaluated by Paul Braunlin, P.T. on April 22, 2022 in the UCHealth Physical Therapy and Rehabilitation Clinic for his myofascial thoracic and lumbar strains, pursuant to a referral by PAC Andrea Hibman. Mr. Braunlin noted that Claimant was injured on April 8, 2022 when working in stooped position cleaning baseboards. He documented that Claimant was finishing up a dose of prednisone, which was helping, was taking a muscle relaxant, which was helping Claimant sleep. He indicated Claimant had pain levels that would range from a 3/10 to a 10/10, intermittent numbness into his thighs, and multiple functional limitations. On exam, Mr. Braunlin noted that Claimant had no altered gait thought slow, could stand and walk on his heels and toes, had a negative straight leg test, symmetrical quadriceps and Achilles reflexes. Mr. Braunlin provided 25 minutes of therapeutic exercises and Claimant's posture and gait improved.

15. On April 26, 2022 Claimant was evaluated at UCHealth Occupational Medicine Clinic, Harmony Campus, by Kimberly Siegel, M.D. in the discussion portion of her report she stated:

> [Claimant] reports worsening widespread pain involving the mid and lower back pain, right upper back, right neck, bilateral thighs, and right knee 2-1/2 weeks after onset of pain in the context of cleaning baseboards for 1 hour. He attributes this pain to bending and squatting and notes that it is not normally his responsibility to clean the baseboards in the hallway, though he does normally clean them in the lobby and suites. Frequent bending and squatting over 1 hour while performing a job task that he normally does in a different location is a questionable mechanism of injury. It is consistent with muscular soreness or minor muscular strain at most. It is not consistent with worsening diffuse back, neck, and lower extremity pain despite 2.5 weeks of rest (no work since date of injury). It is clear that MA[Redacted] does have thoracolumbar scoliosis (obviously pre-existing and not work-related) which may or may not account for some of his pain. However, I think

> nonorganic cause(s), such as psychosocial factors, are more likely. In my opinion, MA's[Redacted] current symptoms are not probably work-related.

Dr. Siegel discharged Claimant as she stated that "[T]he worker is discharged from care due to having symptomas (sic.) that are not probably work-related." She referred Claimant to consult his PCP or other provider outside the workers' compensation system for further evaluation or treatment. She specifically noted on the WC M-164 form that MMI was unknown at that time.

16. On April 26, 2022 Claimant's counsel wrote to Respondents demanding they continue to pay for Claimant's reasonably necessary and related medical benefits or the right to select a provider would pass to Claimant.

17. Respondents responded by stating that as of April 26, 202 the claim was denied and that no further medical care would be covered.

18. Respondents filed a Notice of Contest on April 27, 2022 denying that Claimant had a work related injury.

19. The following day, on April 28, 2022, Claimant was evaluated by Dr. William Ratliff of Banner Health Fort Collins regarding is lumbar and thoracic pain and scoliosis. Claimant reported that he had a follow up with workers compensation who advised his condition was not work related. Claimant provided a history consistent with his testimony at hearing. Claimant had some paraspinal thoracic and lumbar pain, but no midline tenderness of the thoracic and lumbar region. He had discomfort with rotation in both directions but no loss of ROM on exam. He diagnosed thoracic and lumbar back pain and scoliosis of the thoracolumbar spine. He recommended physical therapy and ordered MRIs.

20. On May 27, 2022 Dr. Ratliff issued a letter that Claimant was unable to return to work until May 31, 2022 with no lifting greater than 10 lbs., no bending over at the back for 4 weeks.

21. On May 19, 2022 Claimant was attended by Dr. John Shonk of the Neurosurgery Office at Banner Health. Dr. Shonk took the following history:

> Patient is a 26-year-old, right-handed, Hispanic male who reports onset of originally thoracic back symptoms and now on his pain diagram shows pain throughout the head, posterior and lateral neck across the shoulder blades and in between them going down into the lower thoracic and lumbar back wrapping around to the lateral rib cage at about the T7-T12 level and then across the obliques as well as the lumbar paraspinous muscles with paresthesias of anterior posterior thighs and right calf. Patient notes that this pain on my scale by his reporting is ranging from 2-10 out of 10 averaging 5 out of 10 is aching to burning to sharp and piercing in character with no radicular symptoms and no decreased sensation in the saddle region or decreased sensation or control of the bowel or bladder. Patient's pain is increased by holding a constant position, rapid movements, bending, twisting, stress as well as changes in weather to cold wet stormy. Patient has difficulty getting to maintaining sleep and to wake up very stiff in the morning.

Dr. Shonk noted that Claimant's injuries were brought on by cleaning baseboards on April 8, 2022.

22. Claimant had MRIs of his thoracic and lumbar spine on May 23, 2022, which were read by radiologist Malay Bhatt, M.D. The thoracic spine MRI showed no abnormalities other than mild a dextroconvex thoracic curvature at the apex of T10. The lumbar spine MRI showed mild diffuse disc bulges at L4-L5 and L5-S1, with trace inferior foraminal narrowing at L4-L5 and left facet hypertrophy; no high-grade canal stenosis and mild left foraminal narrowing at L5-S1, in addition to mild levoconvex lumbar bowing.

23. Claimant returned to see Dr. Shonk on May 31, 2022 regarding his bilateral sacroiliac joint arthropathy and cervical facet arthropathy with myofascial pain syndrome. Claimant complained of pain at a level of 2 out of 10, but also marked the posterior neck upper trapezius shoulders lumbar paraspinous muscles and some paresthesias in the lower extremities. He noted that the pain goes from aching to burning to sharp throbbing and piercing. Claimant had still not completed physical therapy or cervical facet blocks previously recommended. He principally wanted to go over the MRI results to determine if Claimant could return to his regular medium duty job cleaning. Dr. Shunk advised he saw no indication to prevent him from returning to his regular work though still recommended Claimant use good biomechanics and proceed with an SI joint injections.

24. Claimant returned to see Dr. Ratliff due to ongoing back pain on June 10, 2022. He reported Claimant attempted to return to work in housekeeping at a hotel but the pain in his mid and low back increased. He was released from work and advised to return part time the following week. He noted that Celebrex helped control his pain and continued with physical therapy. Dr. Ratliff recommended that when Claimant return to work only to light duty, refraining from bending at the waist and lifting greater than 10 lbs. for the following two weeks.

25. On June 24, 2022 Claimant was seen by Dr. Inhyup Kim at Banner Neurology Clinic for review of seizure history and possible recurrence. Dr. Kim recommended seizure medications. Claimant returned to see Dr. Kim on August 30, 2022 due to further seizures-like activity. Dr. Chelsea Risinger examined Claimant at Banner Fort Collins Medical Center on July 2, 2022 in the emergency room due to a reported seizure in a store, that caused Claimant to fall on his right knee and sprain his right hip. No significant findings and nothing regarding the low back. He was released from care.

26. Claimant was evaluated at Banner Health Fort Collins by Dr. Steven Broman regarding back pain on July 26, 2022. Claimant reported his back pain had gotten better but that he bent down and strained his upper back. Dr. Broman limited Claimant's activities and made a new referral to PT. Claimant followed up on August 22, 2022 with Dr. Benjamin Kober, who documented that Claimant was cleaning cabins the prior day and was walking without golf cart assistance at work. He noted that Claimant had an acute on chronic problem in the lumbar spine. He assessed back muscle spasm though physical exam was "largely unremarkable." Dr. Kober noted that Claimant had "some mild lower thoracic muscle spasticity with tenderness." He prescribed anti- inflammatory and muscle relaxers as well as further physical therapy.

27. Claimant was examined by Dr. Anjmun Sharma on September 12, 2022 for an independent medical evaluation (IME) at Claimant's request. Dr. Sharma documented a history of present illness relatively consistent with Claimants' testimony. He reviewed the records. Upon physical exam, Dr. Sharma noted mild paravertebral muscle spasm but otherwise a normal exam, including no Waddell signs and negative Faber and

Patrick's tests. Dr. Sharma opined that Claimant sustained a work related lumbar strain within a reasonably degree of medical probability from the activities he was performing on April 8, 2022 when he stood up from a stooped position. He noted that this was a common injury that occurs in the workplace. He recommended that Claimant be allowed to continue his physical therapy (PT) of approximately 6 to 12 visits. He did state Claimant did not require an MRI, would be at maximum medical improvement (MMI) at the conclusion of the PT sessions and that his prognosis was excellent.

28. Dr. Douglas Scott issued an IME dated October 18, 2022, as requested by Respondents, related to Claimant's complaints of thoracolumbar spine pain. He reviewed 540 pages of medical records. Dr. Scott noted that Claimant had a thoracolumbar myofascial or muscle strain related to the April 8, 2022 work activities. However, he opined that it resolved by April 28, 2022. He wrote a supplemental report on December 6, 2022. Dr. Scott testified that from his report and records, he believed claimant suffered a temporary and mild myofascial strain of the thoracolumbar spine on April 8, 2022.

29. Other medical records prior to Claimant's date of injury are not relevant to this case as they relate to other medical issues.

C. Claimant's Testimony

30. On April 18, 2022 Claimant went to his employer and completed a work incident report and reported the symptoms he believed were caused by the work he had performed bending and twisting awkwardly to clean the baseboards. He noted that his pain was a 3/10 when he left work on April 9, 2022 but was an 8/10 by the time he completed the accident report. He was assisted in completing the report by his wife, who explained some of the terminology. This was after he had been seen at the emergency room earlier that day by Dr. Henderson.

31. Claimant explained that he was scared of losing his job, as he did not have any other job, needed to support his family and that was why he did not report the injury before this. He explained that he was not able to perform the job at that time due to his pain and back injury. If he could not perform his job, he believed he would have been terminated. Claimant did not return to work for Employer.

32. Claimant stated that the pain became so severe by April 18, 2022 that his wife called an ambulance and he was taken to the emergency room. Claimant was evaluated by Dr. Henderson. Claimant indicated that he advised Dr. Henderson that he was hurt while cleaning baseboards, bending in awkward positions, twisting his back, while feeling discomfort doing the job.

33. He stated that when he was cleared to return to work, his employer would not take him back, so he went to work for a chain hotel in the housekeeping department starting on June 9, 2022. He worked there until approximately June 15, 2022 but the pain due to flare-ups did not allow him to continue that employment.

34. He then found another job with a commercial camping cite company, around the first week of August, also as a housekeeper. He was able to continue that employment until around the end of August. He left because of a back pain flare-up that caused low back pain that did not allow him to perform his work anymore.

35. He started working for a commercial space building around September 1, 2022 performing janitorial tasks that were more varied and allowed him to continue work there through the date of the hearing. This last employer was aware of his back pain and injury, and knew he was being seen by his doctors and physical therapy for back related problems. They were able to accommodate him with different tasks that would not cause the symptoms to flare-up. This job is limited to light vacuuming and doing wipe downs, which allows him to avoid bending and twisting.

36. Claimant stated that since the April 8, 2022 accident he has had flare-ups if he does anything that might exceed his physical abilities, which flare up his condition and cause further temporary flare-ups.

37. Claimant was provided with a designated prover notification letter on April 18, 2022 and he chose to be seen by Dr. Brian Copas at Banner Occupational Health Clinic in Loveland. But after seeing Copas, Claimant was seen by a different provider, Dr. Siegel's assistant, PA Hibma at UCHealth Harmony on April 21, 2022. Then on April 26, 2022 Claimant was seen by Dr. Siegel. When Dr. Siegel opined that Claimant's back issues were not work related, she referred Claimant to be seen by his PCP. He was attended by Dr. Ratliff who referred him to physical therapy.

D. Employer Records and Witness Testimony:

38. The Front Desk Receptionist, [Redacted, hereinafter BR], handled the incoming phone calls, performed general office work, and would send out communications. She would receive the calls from employees that were calling off from work. When she would receive one of these calls, she would write down the pertinent information, the description of who was calling and why, and then would send a message to the employee's manager or to HR. BR[Redacted] spoke with Claimant on April 11, 2022, when he called in to work to advise that he was not well, had a sore throat and was sick to his stomach. BR[Redacted] advised that Claimant did not report a work injury nor that he was having back pain at the time of the call.

39. The next day, April 12, 2022 [Redacted, hereinafter LH], the HR administrative assistant since November 16, 2021, took the call from Claimant when he called off from work again. LH[Redacted] issued an email that Claimant was "still feeling awful and won't be in to work tonight. I have updated his timesheet and asked him to call tomorrow to let us know how he is feeling." She advised that Claimant had not made any statements with regard to his back pain or that he had any work injury at that time.

40. Then on April 13, 2022 Claimant called again and spoke with BR[Redacted], to advise he was "pretty sick" and thought he had the stomach flu. BR[Redacted] advised LH[Redacted] by email. She did recall that Claimant never reported that he had back pain.

41. On April 14, 2022 Claimant spoke with [Redacted, hereinafter AC], the HR Manager for Employer since 2016, who advised the staff, including BR[Redacted] and LH[Redacted], that Claimant had called out sick again. She noted that Claimant had a doctor's appointment that afternoon and advised the staff and Claimant that he had to provide the doctor's note at that point.

42. When LH[Redacted] received the doctor's note, it did not mention a work related injury nor that he was having back pain. When LH[Redacted] would receive any paperwork or medical reports from employees, she would generally scan them and send them to the HR Manager who worked off-site.

43. LH[Redacted] advised the staff by email, when she received the doctor's note, that Claimant could return to work beginning April 18, 2022.

44. The next time BR[Redacted] had any interaction with Claimant was when he went to the office on April 18, 2022 to report the injury. She directed him to LH[Redacted] and had no further interactions with Claimant.

45. On April 18, 2022, when Claimant went into the office to report the injury, LH[Redacted] stated that she printed out the forms and gave Claimant and his wife the workers' compensation paperwork to fill out and the designated provider list (DPL). The DPL was not marked up when she provided it to Claimant.[4] Once the accident report was filled out she scanned and sent the paperwork to AC[Redacted]. The Employee Accident Report stated that

> Team lead had me do lobby baseboards and hallway baseboards on the same night by myself, was rushed to do it. CEO of surgery center mentioned just the lobby baseboards needed to be wiped by the Team. Bent over for a full hour wiping them down. Afterwards my back started getting stressed. April 9th, back pain started from a 3-10. Didn't realize this would get worse until today. I didn't want to lose this job. Back pain is at an 8-10 as of lately.

He noted that his back pain was in his spine, lower back, left and right shoulder.

46. LH[Redacted] advised the staff that Claimant had hurt his back and had a doctor's note that he could return to work beginning Monday, April 25, 2022, after he was evaluated by his PCP.

47. On April 19, 2022 AC[Redacted] completed a "Management Accident Investigation Report." She noted the following:

> [Claimant] was assigned to wipe down baseboards in his area of work after a customer complaint was received that the baseboards were very dusty and hadn't been cleaned in awhile (sic.). [Claimant] states he was bending over/kneeling to wipe/clean all of the baseboards for about an hour of his shift. [Claimant] worked from 5pm-12:40am. [Claimant] said his back felt a little sore at the end of his shift. Then on 4/9 [Claimant] states he was even more sore and by 4/18, his pain was an 8/10 and his entire back hurt.

48. Employer made a record of a conversation with Claimant on April 20, 2022 stating that Claimant had called to update Employer regarding his injury. AC[Redacted], the HR Manager, had spoken to Claimant and Claimant had informed her that he had seen his PCP, and reported that "his back was very messed up and he was possibly going to need surgery or something."

49. On April 26, 2022 LH[Redacted] reported to AC[Redacted], that Claimant and his wife had been into the office on April 18, 2022 and requested to fill out a worker's

[4] LH[Redacted] specifically noted that someone had made notations by the doctors' names in the DPL included in the exhibits for hearing. (Exhibit 11)

compensation form for his back that “he had injured from work.” She had given them the appropriate paperwork to fil out for his injury as well as a copy of the DPL, advising Claimant that he would need to “visit them as well.” LH[Redacted] stated that “I did ask him why he didn’t report it sooner, he said that the back pain started on the 9th, but it wasn’t bad, then it got bad so he decided to report it. He told me he was scared of losing his job if he reported it, but was in too much pain to ignore it.”

50. The HR Manager testified that Claimant was not terminated for reporting an employment related injury. She stated that Claimant provided an “off-work” note releasing him from work through April 25, 2022, but Claimant did not return to work on April 26, 2022, or thereafter and his employment was ultimately terminated at the beginning of June for failing to attend work and communicate regarding his absences. The HR Manager, who was found credible, testified that had Claimant communicated regarding ongoing work restrictions or worker’s compensation treatment, his employment would not have been terminated.

E. Ultimate Findings

51. As found, Claimant is credible with regard to the cause of injury. Claimant has proven by a preponderance of the evidence that he injured his low back and thoracic back in the course and scope of his employment causing a work related injury while bending over and crouching cleaning baseboards for Employer on April 8, 2022. This is supported by Claimant’s testimony as well as medical records from Nurse Durrogh, Dr. Henderson, PA Copas, PA Hibma, and Dr. Anjmun Sharma. Dr. Siegel is specifically not found credible. Her analysis that Claimant has psychological overlay though stating Claimant’s injury may be consistent with muscular soreness or minor muscular strain is contradictory and found not persuasive. Further, her reliance on the fact that Claimant performed the duty of cleaning baseboards in areas he was generally assigned to is not persuasive. Claimant’s testimony that he did not generally perform the additional tasks of cleaning baseboards in the hallways, in addition to his normal tasks was persuasive, especially in light of the fact that this was supposed to be a team duty, but Claimant was advised to perform it quickly and on his own, which he did in the limited time he was given.

52. As found, Claimant was provided a DPL on April 18, 2022 when he made a claim for his work-related injuries. Claimant chose to see medical providers at Banner Occupational Health Clinic in Loveland. PA Copas was the provider that examined Claimant on the April 19, 2022 and Dr. Bates was the co-signer of his report. Neither party indicated that Claimant had been provided with permission to change medical providers at that time, and no change of physician form was provided among the exhibits. As found Claimant was not authorized to change providers, therefore, neither UCHealth Occ. Med. Harmony Clinic nor Dr. Siegel were authorized treating providers. As found, since Dr. Siegel was not an authorized treating provider, the referral she made to Claimant’s PCP, Dr. Ratliff was also not authorized. Neither was Claimant authorized to change providers to PA Hibma at UCHealth Occ Med, Dr. Chunk from Banner Neurology or any other providers that were not within the chain of referral from PA Copas and Dr. Bates.

53. As found, while the physical therapy ordered by PA Hibma was reasonably necessary and related to the April 8, 2022 work related injury, it was not authorized or within the chain of referral.

54. As found, Claimant has proven that he was entitled to medical benefits that are reasonably necessary and related to cure and relieve Claimant from the effects of the work related injury of April 8, 2022.

55. As found, Claimant was placed on medical restrictions by PA Copas and Dr. Bates on April 19, 2022. While other providers have given other restrictions or taken them away, Claimant credibly testified that he was unable to return to janitorial duties that required him to bend and twist, and ultimately found employment on June 1, 2022. Claimant is entitled to temporary total disability benefits from April 18, 2022 through May 31, 2022. Claimant did not return to employment with Employer and failed to communicate with Employer about his absences. Respondents showed Claimant was responsible for his termination and wage loss beginning June 1, 2022.

56. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

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

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment or working conditions. *See, Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77, 81 (Colo. App. 1993).

The Act imposes additional requirements for compensability of a claim based on an occupational disease. A compensable occupational disease must meet each element of the four-part test mandated by Section 8-40-201(14), C.R.S. that defines "occupational disease" as:

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

This section imposes additional proof requirements beyond that required for an accidental injury by adding the "equal exposure" element, the "peculiar risk" test, which requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The employment must expose the claimant to the risk causing the disease "in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The conditions of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*. *Id*. at 824. If the condition resulted from multiple or concurrent causes, the respondents may mitigate their liability by proving an apportionment of benefits. *Id*. If the claimant proves that the hazards of employment caused, intensified, or aggravated the disease process "to some reasonable degree," the burden shifts to the respondents to prove the existence of nonindustrial causes and the extent to which they contribute to the disability or need for treatment. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992); *Vigil v. Holnam, Inc*., W.C. No. 4-435-795 & 4-530-490 (August 31, 2005).

The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *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 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

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

The Division has adopted the MTGs to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to

employers. W.C.R.P. Rule 17, Exhibit 1 effective as of April 30, 1993 and most recently updated effective January 30, 2022. Under Sec. 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the MTGs when furnishing medical treatment. The ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining if requested medical treatment is reasonably necessary or work-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTGs are not definitive. *See Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive).

As found, Claimant has proven by a preponderance of the evidence that his thoracic and lower back injuries were a direct result of his job functions as a janitor for Employer and required medical treatment. Claimant suffered a work-related injury to his mid and low back on April 8, 2022 within the course and scope of his employment.

C. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

As found, Claimant has shown he was injured within the course and scope of his employment with Employer sustaining a compensable injury to his low and thoracic spine for which he requires medical care that is reasonably necessary and related to the injuries. Respondents are liable for the authorized medical care within the chain of referral.

D. Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado 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. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, 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." 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 Office,* 148 P.3d 381, 383 (Colo. App. 2006). Furthermore, W.C.R.P. 8-3(A) specifies that "[w]hen emergency care is no longer required the provisions of section 8-2 of this rule apply."

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020).

As found, was attended at the Banner Fort Collins Medical Center Emergency Department on April 18, 2022 for urgent medical care. This provider is authorized under the emergency care provision.

However, as further found, Claimant selected a provider on the DPL provided by Employer on April 18, 2022. Claimant was attended by Bryan Copas, PA-C, on April 19, 2022 at Banner Occupational Health Clinic in Loveland, supervised by Dr. Daniel Bates. The report recommended conservative care. Claimant proceeded with physical therapy which was reasonably necessary and related to the injury. Claimant failed to show that PA Hibma and Dr. Siegel were authorized treating providers within the chain of referral. Neither has Claimant shown that he was authorized to change providers to other providers including Dr. Ratliff. Claimant's authorized treating provider is Banner Occupational Health Clinic, Dr. Bates and PA Copas.

E. Average Weekly Wage

An ALJ may choose from two different methods set forth in Section 8-42-102, C.R.S. to determine a claimant's average weekly wage (AWW). The first method, referred to as the " default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." Sec. 8-42-102(2), C.R.S. The default provision in Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993); *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Ebersbach v. United Food & Commercial Workers Local No. 7,* W.C. No. 4-240-475 (ICAO May 7, 1997); *Vigil v. Industrial Claim Appeals Office*, 841 P.2d 335 (Colo.App.1992).

As found, the parties stipulated to an average weekly wage of $507.59, which is accepted and adopted as Claimant's AWW.

F. Temporary Disability Benefits and Voluntary termination

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbois* Logic, 952 P.2d 831 (Colo. App. 1997).

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide 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."

As found, Claimant showed by a preponderance of the evidence that he was entitled to temporary disability benefits. Claimant was initially taken off work and testified that he was unable to return to full employment due to his work restrictions and his back pain. Claimant has shown by a preponderance of the evidence that he was off work from the date he reported the incident on April 18, 2022 through May 31, 2022.

Further, Claimant testified that he was able to return to modified work on June 1, 2022. Respondents argued that Claimant would have been accommodated had Claimant remained in contact with Employer and that Employer did not terminate the employment but that Claimant failed to show upon release to employment as of June 1, 2022. The

HR manager was credible in her testimony that Claimant was at fault for his wage loss and, but for his actions, Employer would have continued to employ Claimant. Respondents have shown by a preponderance of the evidence that Claimant was at fault for his wage loss as of June 1, 2022.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has shown that he sustained a compensable work related injury on April 8, 2022 while in Employer's employment.

2. Respondents shall pay for reasonably necessary and related medical benefits for his thoracic and low back strain.

3. Dr. Bates and PA Copas at Banner Occupational Medicine are Claimant's authorized treating providers.

4. Claimant has shown he is entitled to temporary total disability benefits beginning April 18, 2022 through May 31, 2022.

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

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

DATED this 22rd day of February, 2023.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-199-642-002

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she sustained work related injuries in the course and scope of her employment on February 16, 2022.

IF CLAIMANT SUSTAINED A WORK RELATED INJURY, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that she established a refusal to treat for nonmedical reasons and the right to select a physician passed to Claimant, who selected Karin Gallup, N.P. at La Casa of Denver Health.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on May 2, 2022 on the issues of compensability, medical benefits, AWW and TTD benefits from February 21, 2022 until terminated by law.

Respondents filed a Response to Claimant's May 2, 2022 Application for Hearing on June 14, 2022. No additional issues were listed.

Following the October 11, 2022 hearing, this ALJ issued Findings of Fact Conclusions of Law and Order dated October 31, 2022, which was served upon the parties on the same day.

Respondents filed a timely Petition to Review on November 18, 2022 and requested a transcript of the hearing. The transcript was filed with the OAC on January 5, 2023 and a briefing schedule issued on January 12, 2023. Respondents filed a Brief in Support of Petition to Review on February 1, 2023. Claimant filed a Reply Brief on February 14, 2023. This Supplemental Findings of Fact, Conclusions of Law and Order follows.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if the claim was deemed compensable, then the average weekly wage was $800.00 based on $20.00 per hour, 40 hours a week. The temporary total disability benefits (TTD) rate would be $533.33.

The parties further stipulated that, if the claim was deemed compensable, then Claimant would be entitled to TTD from February 21, 2022 until terminated by law. The parties agreed that, if TTD was paid, Respondents were entitled to an offset for short-term disability benefits beginning February 21, 2022 through August 19, 2022 in the

amount of $250.00 per week, which would result in a payment of TTD of $283.33 per week while the offset lasted.

The parties also agreed that Concentra was an authorized treating provider.

The stipulations of the parties are accepted by this ALJ and shall become part of the order in this matter.

FINDINGS OF FACT

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

1. Claimant was 45 years old at the time of the hearing. Claimant was a machine operator for Employer since approximately August of 2021. She began her work through a temporary agency then was hired by Employer permanently in January 2022. She would fill the machine casings with molding powder. After the material was "cooked" she would take them out of the casings and trim the remnants of plastic parts with a tool that had a wood handle and a metal blade of approximately three to four inches long and about two inches wide. The blade was provided by her employer. She would generally start her work at 3:00 p.m. and work to 11:00 p.m.

2. Claimant had a slip and fall injury while at work for a prior employer, a hospital, where she performed housekeeping duties. She injured her low back, but not in the same way as in this case. It was higher up on her spine. She was prescribed a steroid that help her problem really well. The injury resolved and she was released from care.[1]

3. On December 2, 2019 Claimant was seen at Denver Health for a UTI and complained of back pain. The provider suspected muscle strain but made no recommendations nor provided treatment.

4. In December 2020 Claimant had a slip and fall on snow and injured her left foot. The fracture was reduced in the emergency department and she wore a cast for several weeks. She was again evaluated on December 17, 2020 for ankle pain and x-rays. There was no mention of a low back problem during this visit. Further, of note, there have been several left foot incidents as far back as September 12, 2017, including an old left fifth metatarsal fracture of unknown age.

5. Claimant was assessed by telehealth on January 8, 2021 due to complaints of lower back problems. However, those complaints clearly resolved by the next visit as there was no mention in the February 1 or February 2, 2021 follow ups and evaluations.

6. On September 17, 2021 Claimant injured her left knee, which occurred while working for the temporary agency, who had placed Claimant at Employer's business to perform work as a machine operator. She last treated for that claim on March 9, 2022 for the last time in follow up of a third viscosupplementation injection. Claimant has not

[1] Claimant did not recall the date and no records were provided for this event as it was remote.

sought any further care for that left knee injury. There was no mention of the low back pain.

7. While working for Employer, Claimant would take her breaks in her car because she would frequently be making personal phone calls on one of her 15-minute breaks and she did not like to do that in the breakroom. The employees were allowed to take their breaks anywhere on the Employer's premises. Claimant's car was required to be parked in the Employer's parking lot, which was enclosed by a fence and part of Employer's premises.

8. On February 16, 2022, while working for Employer, Claimant was taking her break and she slipped on the snow, without warning. She landed hard on her buttocks. She had been going to her car when the fall happened. She has had pain in her lumbar region and her buttocks since that time and the pain seemed to be deep in the bone at the base of her spine or buttocks, causing pain to radiate to her low back and cause muscle spasms. She stated that she sat in her car a while on her break. She had her tool in her back pocket, which she generally takes out when she sits in her car. After her break, she got out of her car to return to work, forgetting her blade. When she realized she left her blade in her car, she returned to get it to continue working.

9. Claimant testified she told the man, who was training her on the machine she was working at, about her fall while on break on February 16, 2022. She laughed it off but her pain slowly increased during her shift. She mentioned her fall again, letting him know her back pain was getting worse, but he did not seemed to care about the incident

10. As the days went on, the pain in her buttocks and low back continued to worsen. Claimant called the HR Department to advise the HR representative about the injury and requested medical attention. Claimant did not hear back from the HR representative on where Employer wanted her to go for care so she determined to go to an urgent care facility for treatment as her low back pain continued to worsen.

11. On February 22, 2022 Claimant presented at Federico F. Pena Family Health Center – Urgent Care at Denver Health for an evaluation of her low back pain, where she was treated by Amy N. Quinones, N.P. Nurse Quinones treated Claimant for "acute back pain" and took Claimant off of work from February 22, 2022 to February 24, 2022.

12. When Claimant took the note from Nurse Quinones to Employer, she was advised she could not return to work until she was fully recovered. Her Employer did not contact her after this conversation to follow up or provide her with a designated provider list.

13. On March 4, 2022 Claimant returned to Denver Health where she was evaluated by Alicen M. Nelson, M.D., whose assessment was that of "bilateral low back pain without sciatica occurring after a fall three weeks ago."

14. At the March 4, 2022 visit, Claimant had two trigger point injections in the low back area. The working diagnosis was that of chronic bilateral low back pain without sciatica.

15. On March 9, 2022 Employer filed a Workers Compensation "First Report of Injury or Illness" (FROI) stating that Claimant had injured herself on February 16, 2022, that the time of the injury occurred at approximately 6:00 p.m., and that Employer was notified on February 16, 2022 of the injury. The report documented that Claimant had "slipped on the snow, fell on her bottom, hurting her back." The report was filed by the HR manager and indicated that Claimant had reported the injury to another Employer representative (PC) on February 16, 2022.[2]

16. On March 11, 2022 Claimant had her first visit with authorized treating physician ("ATP") Theodore Villavicencio, M.D. at the Concentra Medical Centers in Lakewood where ATP Villavicencio took a history of injury as follows:

> Reason for Visit
> Chief Complaint: The patient presents today with new injury, slip and fall on 02/16/2022 injured back, reports that she has pain in back and night pain.

At that visit, Dr. Villavicencio assessed that Claimant had a lumbar contusion and a strain of the lumbar region. He started her on a muscle relaxer, and provided her work restrictions of lifting 10 lbs. and pushing/pulling up to 20 lbs. with no forward bending, noting that she should be working only sedentary office type work. He gave the opinion that Claimant's objective findings were "consistent with history and/or work-related mechanism of injury/illness." In fact, all the Work Status reports from March 11, 2022 through April 19, 2022 all show the same causation analysis. Dr. Villavicencio also indicated that MMI was unknown.

17. On March 16, 2022 Claimant started physical therapy at the Concentra offices in Lakewood with Christi Galindo, P.T. This was the first of six visits programed. She documented Claimant's back pain was 3/10 but could rise to about a 7/10. The impairments identified during the examination prevented Claimant from performing her standard activities of daily living and/or work activities. Ms. Galindo noted abnormal range of motion, pain, abnormal muscle performance and gait. She proceeded with therapeutic exercises, neuromuscular reeducation, manual therapy and therapeutic activities. The treatment was provided by Austin Lyons SPT under Ms. Galindo's supervision.

18. Respondents filed a Notice of Contest on March 18, 2022, stating that the injury or illness was not work related.

19. On March 25, 2022 Claimant returned to Concentra and this time was evaluated by ATP Autumn Schwed, D.O. who noted that Claimant indicated that physical therapy "is not helping, but got cupping which has helped" and that Claimant was 25% of the way to meeting the physical requirements of her job. Dr. Schwed referred Claimant to Dr. Samuel Chan, a physiatrist, for an evaluation.

20. Dr. Schwed also referred Claimant for an MRI and noted that the indications were for back pain and sacrococcygeal disorder. The MRI was performed on April 1, 2022. It was read by Dr. Scot E. Campbell as showing a disc bulge at the L3-4 level with left paracentral small extrusion, mild facet arthropathy, mild left subarticular recess

[2] This ALJ infers that the trainer advised the HR representative despite Claimant's impression that he did not seem to care about the fall.

stenosis, and mild right neural foraminal stenosis. He noted a central disc protrusion at L4-5 with mild facet arthropathy, mild right subarticular recess stenosis and mild right neural foraminal stenosis. He also noted a right paracentral protrusion at the L5-S1 level with mild facet arthropathy. Dr. Campbell concluded that Claimant had degenerative disc disease and facet arthropathy without high-grade stenosis or nerve root impingement.

21. Claimant was evaluated by Dr. Samuel Chan on April 12, 2022.[3] Claimant described pain in the low back spine as well as radiation into the groin but not the lower extremities. On exam, he noted that Claimant's pain was centered around the PSIS and the sacral sulci. Claimant was also positive for Patrick's, Gaenslen's, FABER's, and Yeoman's[4] testing. Dr. Chan concluded that Claimant's exam was most consistent with sacroiliac joint dysfunction and recommended sacroiliac joint injections should her symptoms persist. He also diagnosed lumbar contusion and strain of the lumbar region. He indicated Claimant was to return in four weeks. He also noted that objective findings were consistent with the work-related mechanism of injury.

22. On April 19, 2022 Claimant returned to Concentra where she was evaluated this time by Chelsea Rasis, PA-C. ATP Rasis noted that the muscle relaxer (Flexeril) helped at night with the low back pain and that cupping therapy was also providing temporary relief, stating that Claimant had more sessions scheduled. ATP Rasis documented that Dr. Chan had offered Claimant cortisone injections and that Claimant was looking into the side effects. ATP Rasis ordered six visits of chiropractic care and six acupuncture sessions. ATP Rasis continued the prior sedentary restrictions.

23. Claimant's last visit with Concentra was on May 13, 2022, when Claimant was released from care by PA Rasis required more treatment as a "Specialist Referral" was to "Consult and Treat," that Claimant should "continue medications as directed" and that Claimant's "work restrictions" were "to be managed by her PCP" (primary care provider).

24. Claimant testified that PA Rasis advised Claimant to go to her PCP for further care as the claim had been denied by the Insurer. Rasis did not allow Claimant to return to Concentra for further care. Rasis further advised Claimant that Claimant's PCP would have to provide any further medical care, such as the injections, work restrictions and that Claimant was being released to her PCP's care. As found, Concentra, by and through PA Rasis, was no longer willing to treat Claimant for her work-related injuries due to the denial of the claim by insurer.

25. Claimant started physical therapy on June 9, 2022 at Select Physical Therapy pursuant to Karen Gallup's referral. Jon Baird, PT noted that Claimant had a slip and fall in February 2022 and landed on her "butt." He documented that Claimant had had lumbar back pain, left greater than right, ever since then. Mr. Baird noted that Claimant ambulated slowly with a stiff spine pattern, a slight flexed trunk and would stand with an increased lumbar lordosis. He provided exercise education and training, as well

[3] Pages are missing from this report.
[4] Medical tests used to detect musculoskeletal abnormalities and inflammation of the lumbar vertebrae, but more commonly the sacroiliac joint.

as manual intervention modalities. He recommended ongoing therapy for a period of 3 months.

26. Claimant's return visit to Denver Health, documented in the evidence presented, was for June 23, 2022, following Concentra's refusal to continue to treat Claimant at Concentra Medical Centers. She was evaluated by Morris M. Askenazi, M.D. who indicated that Claimant continued to have significant pain and limitations and would be unable to work at that time. He ordered continued physical therapy for the following two months. He stated Claimant should be on work restrictions of no lifting more than 5 pounds overhead, no repetitive bending, limited reaching/stretching, and anticipated the limitations to continue for the following two months.

27. Following Concentra's refusal to treat, Claimant's counsel wrote to Respondents indicating that if Claimant could not get follow-up care at Concentra, Claimant was requesting to change physician to Karin Gallup, N.P. at La Casa-Denver Health, based on that refusal to treat. Based on the letter to Respondents' counsel dated June 24, 2022, a copy of the May 13, 2022 Work Activity Status Report was provided to Respondents on May 17, 2022. Respondents failed to act on this information. Further, on June 24, 2022 Claimant's counsel advised Respondents' counsel that Claimant was "treating with Karin Gallup at La Casa. [W]e are designating her as a treating physician unless we hear differently from you."[5] No credible evidence indicated that Respondents provided a new designated provider following either communication.

28. Claimant credibly testified that she had had previous episodes of back pain, which typically resolved quickly. As found, immediately prior to February 16, 2022 Claimant had no ongoing medical care for back pain and was symptom free.

29. As found, there was a medical record from Denver Health which references back pain on January 8, 2021 and resulted from the fall where Claimant injured her left ankle. At the follow-up visit on February 1, 2021, however, there was no reference to back pain, but rather only to the old metatarsal fracture of Claimant's left foot. Claimant credibly testified that she had no problems with her low back immediately prior to the work injury.

30. Claimant is found to be credible and persuasive by the ALJ. As found, Claimant was injured in the course and scope of her employment when she slipped and fell in Employer's parking lot while on her break. This is specifically not considered a deviation as Claimant was allowed to take her breaks on any area of Employer's premises and the parking lot was within Employer's premises.

31. As found, Claimant injured her low back, coccygeal area as well as her SI joint, causing a need for medical care and disability benefits.

32. Also as found, from the documents in evidence, Claimant's last appointment at Denver Health was on July 19, 2022. She was advised that they anticipated proceeding with steroid injections into her lumbar spine. She was advised that she needed to await the scheduling of the injections but had not received a call back with the scheduled

[5] It is inferred that the statement in the letter that "*Ms. Rasis* is treating with Karen Gallup at La Casa" is in error and that it is Claimant that was treating with her.

appointment to the date of the hearing. As found, Claimant continues to require medical attention related to her compensable work related injury of February 16, 2022.

33. Further, as found, Concentra refused to continue seeing her and Respondents did not provide a new designated provider willing to provide further medical care for the work related injuries. Claimant has shown that the right to select a medical provider passed to Claimant, that Claimant selected Nurse Gallup at Denver Health and that the Denver Heath system, including Nurse Gallup are authorized treating providers.

34. Claimant has remained under temporary work restrictions which the employer could not accommodate, but have paid some benefits to Claimant, as noted by the stipulation of the parties, through the Employer funded short-term disability benefits for the period of February 21, 2022 through August 19, 2022. Claimant continued to be off work in accordance with documentation from the medical providers at Denver Health.

35. Any evidence or testimony not consistent with the above findings is specifically found not relevant, credible or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. Sec. 8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). 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. Industrial Claim Appeals Office,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001).

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.

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). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014). 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. Industrial Claim Appeals Office*, *supra*. 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); *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008).

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.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms does not 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); *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997). 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*, *supra*.

Respondents requested that this ALJ assume that the Concentra medical providers were not furnished with the Claimant's prior history of low back pain, as set forth above, for consideration in regard to whether there was objective findings consistent with the history and work-related mechanism of injury. For example, Dr. Villavicencio on March 11, 2022 noted that Claimant had "[N]o significant past medical history." This could mean either that Dr. Villavicencio reviewed the past history and did not find it significant or that no history was provided at all. Nothing in the report provides guidance to this ALJ and therefore, this ALJ has inferred and found that Dr. Villavicencio determined that the past history was *not a significant* factor in his determination of causality as Claimant's prior conditions or symptoms were resolved and not continuing problems.

Claimant's was credible and persuasive in her description of her injuries, symptoms and pain complaints cause by the February 16, 2022 slip and fall at work. The arguments made by Respondents regarding Claimant's veracity are not persuasive. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable low back injury during the course and scope of her employment with Employer on February 16, 2022 when she fell in the designated parking lot for employees

and landed on her bottom. This is supported by the opinions of Nurse Quinones, Dr. Chan, Dr. Villavicencio and Dr. Schwed and the Work Status Reports covering March 11 through April 12, 2022 indicating that Claimant's objective findings were consistent with a history of work-related mechanisms of injury. It is even supported by the Employer's First Report of Injury filed by Employer's HR representative on March 9, 2022. Claimant has shown that it was more likely than not that there was a direct causal relationship between the accident she sustained on February 16, 2022, the subsequent injuries to her low back and sacral area and the disability as well as the need for treatment.

Moreover, although the records reflect that Claimant suffered at times from back symptoms prior to February 16, 2022, those incidents did not cause the need for significant medical care and Claimant credibly testified that they were short lived symptoms that did not require the care that has been consistent since Claimant's injury of February 16, 2022. Accordingly, Claimant's work injuries were proximately cause by the February 16, 2022 accident and aggravated, accelerated or combined with any pre-existing conditions to produce the need for medical treatment. Thus, Claimant suffered compensable lumbar and sacral injuries during the course and scope of her employment with Employer on February 16, 2022.

C. Authorized Medical Benefits

Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. Sec. 8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, 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."

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 Office, 148 P.3d 381, 383 (Colo. App. 2006). Furthermore, W.C.R.P. 8-3(A) specifies that "[w]hen emergency care is no longer required the provisions of section 8-2 of this rule apply."

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan, supra*. Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020).

As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonably necessary and causally related medical benefits for her work related injuries caused by the fall of February 16, 2022, including for her low back, SI joint and sacrococcygeal injuries. Respondents noted that they had notice of the injury on February 16, 2022. However, there is no record that Respondents provided Claimant a designated provider list within the allowed seven days.[6] Claimant went to the Denver Health Medical Center (DHMC) --Urgent care and was evaluated by Nurse Quinones for acute low back pain on February 22, 2022[7], and Claimant provided Nurse Quinones' medical note to Employer. Claimant then followed up with DHMC on March 4, 2022 and was treated with injections by Dr. Nelson. Further, Claimant's care at Denver Health Urgent Care was reasonable and necessary emergent care. Claimant was not provided an appointment with Concentra until March 11, 2022.[8] Claimant eventually saw Dr. Villavicencio on March 11, 2022 at Concentra and he found that Claimant's mechanism of injury was work related and that she required medical care.

Claimant argued at hearing that Concentra's refusal to treat was for nonmedical reasons, and thus the right to select a physician passed to Claimant. Claimant selected La Casa which operates under the auspices of Denver Health. Respondents argued at hearing and in their position statement that because the Claimant was under a denial of care there was no obligation to designate a treating provided willing to treat and that the designated provider remained designated, and thus they did not waive the right to select

[6] Seven days from February 16, 2022 was February 24, 2022.

[7] The February 22, 2022 visit would normally be considered only an emergency visit.

[8] The parties stipulated that Concentra was an authorized treating provider. Respondents failed to designate a provider until well after the date of injury and notice, and later than the seven day period required by statute. Respondents knew of the accident as of February 16m 2022 but did not designate a provider until March 11, 2022. Claimant's choice of DHMC for the initial urgent care visit and all the follow up medical care at DHMC, indicated that DHMC should be an authorized treating provider initially, before Claimant was referred to Concentra.

the medical provider. Sec. 8-43-404(5), C.R.S. implicitly contemplates that the Respondents will designate a physician *who is willing to provide treatment*. *Ruybal v. University Health Sciences Center*, 768 P.2d 1259, 1260 (Colo. App. 1988). If the employer fails to timely tender the services of a physician, the right of selection passes to the claimant and the selected physician becomes an ATP. *See Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987); *Garrett v. McNelly Construction Company, Inc.*, W.C. No. 4-734-158 (ICAO, Sept. 3, 2008). Whether the ATP refused to treat the claimant for nonmedical reasons, whether the insurer received notice of the refusal to treat and whether the insurer "forthwith" designated a physician who was willing to treat the claimant are questions of fact for resolution by the ALJ*. Garrett v. McNelly Construction Company, Inc.*, *supra; Ruybal*, 768 P.2d at 1260.

Here, it is specifically found that PA Rasis, as a Concentra representative, refused to treat Claimant. Claimant was credible and persuasive in her testimony that PA Rasis advised Claimant her claim was being denied and that Concentra would no longer treat her for her injuries. As found, PA Rasis in effect, referred Claimant to her primary care provider (PCP). Claimant's counsel sent a letter to Respondents that specifically notified Respondents of Concentra's refusal to treat. No other persuasive evidence that Respondents responded to the notice was within the records or evidence provided at hearing. Claimant identified her PCP to be the providers at Denver Health Medical Center's Clinic La Casa and specifically Nurse Gallup. As further found, the refusal to treat and Respondents' failure to identify a provider that was willing to treat Claimant caused the right of selection to pass to Claimant and Claimant designated Nurse Gallup of DHMC, who is now Claimant's treating provider.

Respondents argue that once they had designated a provider, in this case Concentra, that Claimant did not have the ability to select a new provider because the claim was contested and an obligation to designate a new provider would cause a "chilling effect" on Respondents' "right to legitimately contest the claims." However, the statutory requirement under Sec. 8-43-404(10)(a) set out the requirements when an authorized physician refuses to provide medical treatment to an injured worker that requires medical treatment to cure and relieve the effects of the work injuries. It actually requires the designated provided to provide notice to Employer or Insurer of the denial of care, explaining the reasons. As found, this did not occur in this case. The statute specifically states that the ALJ has jurisdiction to resolve disputes regarding whether a refusal to provide medical care was for nonmedical reasons, and this ALJ found that Claimant was credible in her testimony that PA Rasis had referred Claimant to her PCP due to nonmedical reasons, specifically because the claim was denied.

Section 8-43-404(10)(b) further elucidates the process by stating that if the Insurer receives notice that an ATP has refused to provide the necessary medical care, which in this case they did by letter of Claimant's counsel advising them of the refusal, Respondents had fifteen calendar days to designate a new provider *willing to provide medical treatment*. Respondents were provided with PA Rasis' Work Activity Status Report no later than May 17, 2022 indicating that PA Rasis was affirming that Claimant required more treatment as a "Specialist Referral" was to "Consult and Treat," that Claimant should "continue medications as directed" and that Claimant's "work restrictions"

were “to be managed by her PCP.” Counsel’s letter was written on June 24, 2022 stating they would select a new provided unless Insurer responded to the notice of refusal to treat. No response was provided other than inference that the claim was on a notice of contest. As found, this ALJ had the jurisdiction to determine that PA Rasis was acting on behalf of the Concentra provider in advising Claimant they would no longer treat because of the denial of the claim and fully determined that this refusal to treat was for nonmedical reasons.

Lastly, this ALJ declines to reweigh the evidence in this matter. As ultimately found, Claimant showed by a preponderance of the evidence that Claimant was entitled to select a physician of her choosing that was willing to treat Claimant for her work related injuries. Claimant showed that it was more likely than not that selection of an ATP passed to the Claimant and that Nurse Gallup and DHMC was authorized.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has shown by a preponderance of the evidence that she sustained compensable work related injuries to her low back, coccyx and SI joint within the course and scope of her employment on February 16, 2022.

2. The Stipulations of the parties are approved and become part of this order.

3. Claimant’s average weekly wage is $800.00.

4. Respondents shall pay temporary total disability benefits at the rate of $533.33 beginning February 21, 2022 until terminated by law.

5. Pursuant to the parties’ stipulation, Respondents may take an offset due to payment of short-term disability benefits in the amount of $250.00 per week from February 21, 2022 to August 19, 2022.

6. Respondents shall pay interest at the statutory rate of eight percent (8%) on all benefits that were not paid when due.

7. Claimant is entitled to medical benefits that are reasonably necessary and related to the February 16, 2022 injuries to her low back, coccyx and SI joint. As stipulated by the parties, Concentra is an authorized treating provider. Further, Claimant’s care at Denver Health Urgent Care was reasonable and necessary emergent care.

8. Claimant has shown by a preponderance of the evidence that selection of provider passed to Claimant due to a refusal to treat for nonmedical reasons and that La Casa--DHMC and Nurse Gallup are now authorized treating providers.

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

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

DATED this 23rd day of February, 2023.

Digital Signature

By: Elsa Martinez Tenreiro

Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the right to select a treating physician passed to Claimant due to Respondents failure to comply with Section 8-43-404(5)(a) or WCRP 8-2?

- Whether Claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary disability benefits?

- What is Claimant's appropriate average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on March 19, 2020. Claimant testified at hearing that after work, she slipped on snow and fell onto her back. Claimant testified she began driving her car and after 7-8 minutes, her leg started to get numb. Claimant testified that when she got home, she was unable to get out of her car and needed assistance to get into her home.

2. Claimant began her employment with Employer in January 2020. Prior to her employment, Claimant passed a pre-employment physical examination which required her to complete certain lifting activities.

3. Claimant testified she arrived at work the next day and the director noticed she was walking "badly" and she informed the director what had happened. Claimant testified she was provided with a packet and told to go to Concentra. Claimant testified she reported the injury to [Redacted, hereinafter SG] on March 20, 2020.

4. The Designated Provider List entered into evidence at hearing is signed by Claimant and dated March 20, 2020. The Designated Provider List offers Concentra Aurora North and Midtown Occupational Health Services as designated providers. Concentra Aurora North is circled on the Designated Provider List. Claimant testified at hearing that she did not circle Concentra on the Designated Provider List. Claimant testified that in addition to the Designated Provider List, she was provided with a map that was colored and provided Claimant with directions to only the Concentra Aurora North facility. Claimant testified she was not provided with a choice of providers to choose from, but was instructed by Employer to go to the Aurora North location for treatment.

5. SG[Redacted] testified at hearing that in addition to the Designated Provider List, Claimant was provided with a map of the two medical facilities. A copy of the map was entered into evidence by Respondents at hearing. Claimant testified that

the map entered into evidence was not provided to her with the Designated Provider List, but was a colored map and she was instructed to go to the Concentra listed on the Designated Provider List.

6. SG[Redacted] testified that when she provided Claimant with the Designated Provider List, she printed Claimant's name on the line where the Employee's name is to be printed. SG[Redacted] testified that Claimant stated that she would go to the Concentra that was close to the Employer's location. SG[Redacted] denied providing Claimant with a colored map or being aware of any colored map being given to any employee.

7. SG[Redacted] testified at hearing that she did not recall whether she circled the Concentra Aurora North location on the Designated Provider List or if Claimant circled the Concentra Aurora North location on the Designated Provider List. But SG[Redacted] testified that Claimant indicated to her that she would seek medical treatment at the Concentra Aurora North location. SG[Redacted] testified that after Claimant indicated that she wanted to treat at the Aurora North location, SG[Redacted] informed Claimant that there were other locations where Claimant could seek treatment. SG[Redacted] testified that in addition to the Designated Provider List, she provided Claimant with a second page that includes a map of the Denver area with various Concentra locations. SG[Redacted] testified that sometimes injured workers may elect to seek medical treatment at a clinic that is closer to their home as opposed to the Concentra Aurora North location. SG[Redacted] testified that after indicating that Claimant could go to other locations, Claimant again stated that she wanted to go to the Aurora North clinic for treatment.

8. Claimant denied at hearing receiving the second page with the list of Concentra clinics from SG[Redacted]. Claimant testified she was only provided with a colored map that had the Aurora North location on it and no other locations.

9. Claimant testified that she went to the Concentra Aurora North location on March 20, 2020 for medical treatment. According to the medical records entered into evidence at hearing, Claimant was seen by Dr. Birge at Concentra on March 20, 2020. Claimant reported a history of slipping and falling at work with complaints of back pain. Claimant denied leg weakness or leg numbness. Dr. Birge reported no radicular symptoms. Claimant was diagnosed with a lumbar strain, cervical strain, lumbar contusion and coccyx contusion. Clamant was referred for an x-ray and provided prescribed cyclobenzaprine. Dr. Birge also took Claimant off of work until March 21, 2020.

10. Claimant returned to Concentra on March 21, 2020 and was evaluated by Dr. Shackelford. Claimant reported her low back pain persisted unchanged. Claimant reported she had vomited that morning which Dr. Shackelford indicated could be due to the Flexeril. Claimant was prescribed ibuprofen and allowed to return to work on modified duty on March 23, 2020 with restrictions that she be allowed to sit 90% of the time with no squatting or kneeling and limited bending at the waist.

11. Claimant testified that she returned to work for Employer and worked with restrictions until May 1, 2020. Claimant testified that after May 1, 2020 she was sent home due to the pandemic. This testimony was confirmed by the testimony of [Redacted, hereinafter KG], the human resources representative from Employer, who confirmed that Claimant was furloughed as of May 1, 2020 due to the pandemic.

12. Claimant returned to Concentra on March 25, 2020 and reported her back felt the same as it did on the previous visit. Claimant was examined by nurse practitioner ("NP") Kleberger who noted Claimant had attended on physical therapy appointment. NP Kleberger noted on examination that palpation revealed bilateral muscle spasms of the cervical spine with tenderness in the lumbar spine and muscle spasm on palpation. NP Kleberger recommended that Claimant continue with physical therapy.

13. Claimant next returned to Concentra on April 3, 2020 and was examined by NP Kleberger. NP Kleberger noted that on examination, Claimant had no muscle spasm on palpation of her cervical spine and minimal muscle spasm on palpation of her lumbar spine. NP Kleberger noted Claimant had achieved roughly 25% of anticipated healing. Claimant was instructed to continue to follow up with physical therapy.

14. Claimant returned to Concentra on April 13, 2020 and was examined by Dr. Cava. Claimant reported to Dr. Cava that while her neck pain had improved, she was still having issues with her low back pain. Dr. Cava noted Claimant reported some radicular type symptoms and recommended a magnetic resonance image ("MRI") of the lumbar spine.

15. Claimant underwent the MRI of the lumbar spine on April 24, 2020. The MRI showed a tiny bulge in the L2-L3 disc which indented on the thecal sac. A small perineural cyst or dilated nerve root sleeve associated with the exiting right L2 nerve root was also noted. Tiny perineural cysts or dilated nerve root sleeves were also noted with the exiting L3 nerve roots. A mild disc bulge asymmetric to the right which indented on the ventral thecal sac was noted at the L4-L5 level and was possibly compressing the traversing right L5 nerve root.

16. Claimant returned to Concentra on April 27, 2020 and was evaluated by NP Hedien. Claimant reported that her leg pain was feeling a lot better, but was still having pain in her back. NP Hedien referred Claimant to a physiatrist for a possible injection. NP Hedien reported that Claimant was 50% back toward meeting the physical requirements of her job. Claimant was released to return to work with lifting restrictions of 5 pounds constantly and pushing/pulling restrictions of 10 pounds constantly.

17. Claimant returned to Concentra on May 4, 2020 and was evaluated by Dr. Kawasaki. Dr. Kawasaki noted that Claimant reported pain in her low back, left greater than right with pain along the sacral and coccygeal region along with numbness in her toes. Dr. Kawasaki noted that the MRI showed disc bulges most prominently at L4-5

with potential L5 nerve impingement, which would correlate with Claimant's symptoms. Dr. Kawasaki recommended a trial of chiropractic treatment and, if there was no relief from the chiropractic treatment, she could be considered for potential interventional pain procedures including injections.

18. Claimant began the chiropractic treatment with Dr. Aspegren on May 12, 2020. Claimant underwent six chiropractic treatment with Dr. Aspegren between May 12, 2020 and May 29, 2020.

19. Claimant was examined by Dr. Cava on May 19, 2020. Dr. Cava noted Claimant had completed 10 physical therapy appointments and had a repeat evaluation with Dr. Kawasaki set for June 4, 2020. Claimant did not attend the medical appointment with Dr. Kawasaki on June 4, 2020.

20. Respondents filed a medical only General Admission of Liability on June 3, 2020.

21. Claimant testified she tried to cancel the June 4, 2020 appointment but was only provided with the option of rescheduling the appointment for another time. [Redacted, hereinafter RW], the receptionist for Concentra, testified at hearing in this matter. RW[Redacted] testified that Claimant called and cancelled the June 4, 2020 appointment because she was sick. RW[Redacted] testified that if a patient called to cancel an appointment they would require the patient also reschedule the appointment. RW[Redacted] testified Claimant's appointment was rescheduled for June 16, 2020 and then rescheduled for June 30, 2020. Claimant did not attend these appointments. Additional appointments were made for Claimant with Dr. Cava at Concentra for December 4, 2020 and December 29, 2020. Claimant failed to attend these appointments as well.

22. Claimant was provided an offer of modified employment with Employer on July 3, 2020. Claimant returned to work for Employer until August 25, 2020. KG[Redacted] testified that on August 25, 2020 Employer became aware that Claimant had permanent restrictions from an earlier workers' compensation case and KG[Redacted] requested that Claimant provide employer with updated work restrictions before they would allow her to return to work.

23. Claimant was examined at Swedish Hospital Medical Center on July 6, 2020. Claimant had previously sought treatment at Swedish Hospital on June 18, 2020 for follow up for a brain tumor which Claimant had last treated in January 2020, but did not receive medical treatment for her low back on this visit. Claimant reported a history of low back pain with right leg numbness after a fall. Claimant was referred for an MRI of the lumbar spine.

24. The MRI was performed on July 27, 2020 and was compared to a prior MRI from November 29, 2017. The July 27, 2020 MRI showed internal resolution of disc bulges that were present on the November 29, 2017 MRI and a disc bulge at the

L4-L5 level that results in right greater than left subarticular zone stenosis contacting the descending L5 nerve roots.

25. Claimant sought medical treatment with Dr. Lynn Parry on August 10, 2020. Claimant testified she was told of Dr. Parry by her attorney. Dr. Parry reviewed Claimant's medical records from Concentra and performed a physical examination. Dr. Parry diagnosed Claimant with a sacral contusion, right sacroiliac ("SI") joint dysfunction, and right sciatica. Dr. Parry agreed that Claimant was not a surgical candidate and would not likely benefit from epidural steroid injections or other pain procedures. Dr. Parry recommended therapy directed at core stabilization, a trial of an SI belt as well as one consistent health care provider. Dr. Parry provided Claimant with work restrictions of no repetitive lifting over 10 pounds, no repetitive bending or twisting, no stairs, an adjustable chair with lumbar support and the ability to change positions on an as needed basis.

26. Claimant underwent an independent medical examination ("IME") with Dr. Burris on August 25, 2020. Dr. Burris reviewed Claimant's medical records, obtained a history of the injury and performed a physical examination in connection with his IME. Dr. Burris noted that Claimant was complaining of low back pain and right leg pain and numbness. Claimant denied any past injuries, pain or problems involving her low back.

27. Dr. Burris diagnosed Claimant with lumbosacral contusion/strain. Dr. Burris opined that the findings on the April 24, 2020 MRI were degenerative in nature and, more likely than not, pre-existing and unrelated to the March 19, 2020 incident. Dr. Burris recommended additional therapy for Claimant including consideration for pool therapy that would allow Claimant to transition to a self-directed home exercise program.

28. Dr. Burris testified at hearing consistent with his medical report. Dr. Burris noted that Claimant denied any prior injuries to her low back, which Dr. Burris noted was inconsistent with the medical records. Dr. Burris testified that because of the issue involving the prior medical treatment to her low back, he would rely only on objective evidence with regard to Claimant's injury. Dr. Burris testified that the objective evidence shows Claimant has full range of motion of the lumbar spine and normal strength and there was no objective evidence that would justify a finding of work restrictions.

29. Employer provided Claimant with a letter in November 2020 that requested Claimant provide them with documentation of permanent restrictions from a prior injury or medical documentation stating that Claimant no longer needs the medical restrictions.

30. Claimant was examined by Dr. Yamamoto on November 25, 2020. Dr. Yamamoto reviewed Claimant's medical records in connection with his evaluation. Dr. Yamamoto did not indicate Claimant having a prior low back injury in connection with his evaluation. Dr. Yamamoto completed a Fitness for Duty / Accommodation Form in connection with his examination. The Fitness for Duty form indicated that Claimant had

lifting restrictions of 10 pounds with restrictions on pushing and pulling of up to 12-15 pounds. Dr. Yamamoto noted that Claimant could perform her previous job with the 10 pound lifting accommodations and the ability change positions.

31. Claimant testified at hearing that she had a prior injury to her mid back, but denied any prior injury to her low back. However, medical records entered into evidence demonstrate Claimant was seeking medical treatment for low back pain on September 28, 2017 with Dr. Rabinowitz. Claimant reported to Dr. Rabinowitz that she had low back pain with pain into her left thigh and left toes. Claimant reported the back pain was not new, but was worse. Claimant was diagnosed with sciatica of the left side associated with disorder of the lumbar spine and left leg weakness. Claimant was referred for an MRI of the lumbar spine. Claimant was seen on October 30, 2017 by Dr. Mendez and reported she had back pain that started 4-5 months ago and located in her left lower back and radiates towards her glutes.

32. Claimant's testimony that she did not have low back pain prior to her date of injury is found to be not credible or persuasive.

33. Claimant testified that she continued to work for Employer until August 25, 2020 when she was told by human resources that her restrictions were a problem. Claimant testified that she was provided with a piece of paper and was told she needed to call the number on the piece of paper. Claimant testified she called the number and spoke to ["Redacted, hereinafter MC"] who informed Claimant that the issue was not with her most restrictions from her worker' compensation injury, but were related to prior work restrictions Claimant had received. Claimant testified she has not worked since August 25, 2020.

34. Claimant returned to Swedish Medical Center on April 27, 2021 and was evaluated by Dr. Killan. Claimant reported complaints of low back pain with radiating pain in her right buttock and down her right leg. Claimant was diagnosed with a lumbar strain and it was noted that Claimant was neurovascularly intact and there was nothing to suggest a lumbar radiculopathy or sciatica.

35. Claimant eventually underwent a lumbar interlaminar epidural steroid injection on August 27, 2021 under the auspices of Dr. Pasto.

36. [Redacted, hereinafter HC], the cash management supervisor for Employer, testified at hearing in this matter. HC[Redacted] testified that Claimant was working for Employer processing deposits in a modified duty capacity. HC[Redacted] testified that there were times when Claimant would leave work early because Claimant reported she was in too much pain to complete her shift. HC[Redacted testified there was an occasion where Claimant was given a written record for a mistake and Claimant reported it was difficult for her to concentrate at work. HC[Redacted testified she told Claimant to address this issue with her doctor. HC[Redacted testified Claimant continued working on modified duty until August 25, 2020.

37. The wage records entered into evidence at hearing demonstrate that Claimant began her employment with Employer on January 21, 2020. In the 8 2/7 weeks between when she started and her March 19, 2020 injury date, Claimant earned $5,023.72 in earnings. This equates to an AWW of $606.31.

38. Respondents elicited testimony from Claimant at hearing regarding a prior workers' compensation injury she sustained which resulted in a settlement. Claimant testified that the prior workers' compensation injury involved her hands and her hands improved after she settled her claim. Claimant testified she settled this claim in July 2010.

39. With regard to the issue of authorized treating physician, Claimant argues at hearing that Respondents provided Claimant with a list of only two physicians, and therefore did not provide a list of providers in compliance with Section 8-43-404(5)(a), C.R.S. Claimant argues that the failure of Respondents to properly provide Claimant with a list of four physicians or four clinics available to treat Claimant results in the right of selection of medical provider passing to Claimant. Claimant therefore argues that her designated authorized treating physician is Dr. Parry. The ALJ is not persuaded that Claimant has demonstrated that Respondents failed to comply with Section 8-43-404(5)(a), C.R.S.

40. Conflicting testimony was presented at hearing as to what was provided to Claimant by SG[Redacted] after her workers' compensation injury. Based on the testimony and evidence presented at hearing, the ALJ credits the testimony of SG[Redacted] over the testimony of Claimant regarding what was provided to Claimant following her work injury and finds that Respondents have complied with Section 8-43-404(5)(a), C.R.S. The ALJ credits the testimony of SG[Redacted] and finds that Claimant selected the Aurora North Concentra clinic to serve as her medical provider for her workers' compensation injury. The ALJ credits the testimony of SG[Redacted] and finds that Claimant was provided with the second page that included the list on Concentra clinics in Colorado and was informed by SG[Redacted] that she could select any of the Concentra clinics listed on second page of the document.

41. With regard to the issue of temporary disability benefits, Respondents argue that Claimant has failed to demonstrate that her wage loss was related to her workers' compensation injury. In support of this argument, Respondents note that Dr. Burris opined that Claimant's records documented prior low back complaints and Claimant had full range of motion and normal motor strength of her lumbar spine.

42. However, in this case, Claimant sustained an admitted injury to her low back which resulted in medical treatment and restrictions from her authorized treating provider. Claimant was off of work until March 25, 2020 and then returned to work for employer in a modified duty position. Claimant was furloughed from work on May 1, 2020 due to the pandemic, but at that time, Claimant still had work restrictions as set forth by her authorized treating physician. The fact that Claimant had work restrictions

set forth by her treating physician when she was furloughed due to the pandemic establishes that Claimant's work injury contributed to her wage loss.

43. Employer became aware of Claimant having work restrictions related to a prior work related injury in August 2020. Employer than requested that Claimant get a full release to return to work or documentation of the prior restrictions as reflected in the November 2020 letter. Notably, however, Claimant had passed a pre-employment physical for Employer and had been found to be capable of performing the required job duties for Employer in January 2020.

44. Moreover, Claimant's restrictions that she was working with as of August 25, 2020 were related to her March 19, 2020 work injury with Employer, not related to any other injury. Because these work restrictions were related to Claimant's work injury with Employer, Claimant is entitled to an award of temporary disability benefits.

45. The ALJ notes that Dr. Burris opined that Claimant had no work restrictions related to her work injury. However, Dr. Burris is an IME physician in this case and his opinion regarding Claimant's work restrictions are not a defense to temporary disability benefits where the treating physician has established work restrictions related to Claimant's injury.

46. The ALJ therefore finds that Claimant has demonstrated that it is more likely than not that her injury on March 19, 2020 resulted in work restrictions that contributed to Claimant's loss of wages.

47. According to the wage records, Claimant was off of work with restrictions related to her work injury from May 1, 2020 through June 24, 2020. Claimant returned to work on June 25, 2020 for 2.5 hours and earned $39.38. Claimant was then off of work from June 26, 2020 to July 11, 2020.

48. Claimant returned to work on July 12, 2020 and worked until August 25, 2020. Claimant earned her regular wages during the period of July 12, 2020 through August 25, 2020, but was not earning the same weekly rate. Specifically, Claimant earned $3,635.90 during this period of 6 2/7 weeks. This equates to a weekly rate of $578.44. Claimant is entitled to an award of temporary partial disability benefits for this period of time based on Claimant's loss of earnings. The ALJ further finds that Claimant has established that the loss of earnings was related to the work restrictions set forth by the authorized treating provider in this case.

49. Employer advised Claimant on August 25, 2020 that she could not return to work until she had a release to return to work without restrictions from her prior permanent restrictions. However, at this time, Claimant was still on restrictions from her designated authorized provider (Concentra Aurora North). Therefore, Claimant is entitled to an award of TTD benefits commencing August 25, 2020 and continuing until terminated by law or statute.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40- 102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). 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, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

4. "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). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion…." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

5. As found, Claimant reported her injury to Employer and was provided with a list of physicians authorized to treat Claimant for his injury, which included Concentra Aurora North, Midtown Occupational Health Services and the Concentra clinics on the second page of the Designated Provider List. The ALJ further finds that Claimant selected the Concentra Aurora North clinic to serve as her authorized treating provider.

6. The medical treatment Claimant received from Dr. Parry and Swedish Medical Center is found to be outside the chain of authorized providers and Respondents are not responsible for the cost of this treatment.

7. As found, Claimant's request to change her authorized provider to Dr. Parry is denied.

8. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

9. Section 8-42-102(2) states in pertinent part:

> (d) Where the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage shall be determined from said daily wage in the manner set forth in paragraph (c) of this subsection (2).

10. As found, the ALJ calculates Claimant's AWW based on the wage records entered into evidence to be $606.31.

11. To prove entitlement to temporary total disability ("TTD") benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, 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).

12. As found, Claimant has proven by a preponderance of the evidence that she is entitled to an award of TTD benefits commencing May 1, 2020 through June 24, 2020 and from June 26, 2020 through July 12, 2020. And from August 26, 2020 and continuing until terminated by law or statute. As found, the medical records from Concentra establish that Claimant was on work restrictions related to her admitted work injury.

13. To prove entitlement to temporary partial disability (TPD) benefits, claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

14. As found, Claimant earned $39.38 on June 25, 2020. Claimant's AWW being $606.31, this results in a daily wage of $86.61. Because Claimant earned $39.38 on June 25, 2020, Claimant is entitled to temporary partial disability benefits in the amount of $31.49 for June 25, 2020 ($86.61 - $39.38 = 47.23 x 2/3 = $31.49).

15. As found, Claimant earned $3,635.90 for the period of July 12, 2020 through August 25, 2020 for a weekly wage of $578.44. Claimant is entitled to an award of $207.74 in temporary partial disability benefits for the period of July 12, 2020 through August 25, 2020 ($606.31 - $578.44 = $27.87 x 6 2/7 = $406.11 x 2/3 = $207.74).

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD benefits based on an AWW of $606.31 for the period of May 1, 2020 through June 24, 2020 and from June 26, 2020 through July 12, 2020. And from August 26, 2020 and continuing until terminated by law or statute.

2. Respondents shall pay Claimant TPD benefits in the amount of $31.49 for June 25, 2020. Respondents shall pay Claimant TPD benefits in the amount of $207.74 for the period of July 12, 2020 through August 25, 2020.

3. Respondents shall pay the reasonable medical treatment necessary to cure and relieve Claimant from the effects of his industrial injury including the treatment from Concentra North Aurora.

4. Respondents are not responsible for the cost of Claimant's medical treatment with Dr. Parry or Swedish Medical Center.

5. Claimant's request for a change of physician to Dr. Parry is denied.

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

DATED: February 15, 2023

Keith E. Mottram
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 5-212-146-001

ISSUES

- Did Claimant prove that he sustained a compensable injury to his neck, right arm and right shoulder on June 16, 2022?
- Did Claimant prove entitlement to medical benefits?

FINDINGS OF FACT

1. Claimant worked for Employer [Redacted, hereinafter CH], the owner of the company. Claimant's job is very physically demanding. He would work 12 to 14 hours per day.

2. On June 16, 2022, Claimant left his house early that morning and went to Denver to pick up containers and load them on the trailer. He was strapping the container down on the flatbed trailer and was tightening the straps. He had placed 4 straps on the container and was tightening the fifth strap with a winch and bar. The fifth strap snapped when it broke and he fell down when the strap tension released. After the fall, he experienced pain. He immediately call the owner of the Employer, CH[Redacted], and told him about the incident. CH[Redacted] asked him if he needed an ambulance and the Claimant indicated that he did not. He said he would drive home and see how it felt. When he arrived at the yard in Del Norte, he told CH[Redacted] that he thought he had a rib "out" and would go see the chiropractor for an adjustment.

3. The Claimant testified that when he fell, he fell on to his side he hit his right shoulder and elbow. The fall knocked the wind out of him. He laid there on his back for a while after falling. The immediate pain was in his knuckles and elbow and from the middle of his back all down his right side including his right shoulder. After he went home, he took a hot bath and took Advil dual action for the pain. He experienced trouble breathing, which he attributed to having a rib "out". He had experienced having a rib out previously but lower down in his torso.

4. CH[Redacted] testified at hearing. He is the owner of [Redacted, hereinafter HI]. His company sells or rents shipping containers and storage. Claimant works for his company. He has worked for him for approximately three years. His job duties include truck driving and some mechanical work. He worked ten to twelve hours per day. He confirmed that Claimant reported the work related incident where he fell down when a

strap broke on June 16, 2022. Although the pain Claimant experienced did not seem serious at the time, it worsened over time, according to the Claimant. CH[Redacted] did not observe the Claimant work on a daily basis, but Claimant would tell him that his pain was worsening. Based on his experience, when a strap breaks one could be injured. M CH[Redacted] did not doubt that the Claimant injured himself in the way he described.

5. Claimant had seen chiropractors on occasion prior to this incident for ribs going out, hips going out, and preventative care. However, Claimant testified that the symptoms he felt after the June 16, 2022 incident were completely different, in severity than the symptoms he felt previously. Specifically, his right hand is now numb, and he has pain from his shoulder all the way down his right arm. He also has pain between his shoulder blades.

6. When he saw the chiropractor, Dr. Poindexter, after the incident, Dr. Poindexter told him that his number 1 rib was out and he popped it back in. Additionally, Claimant testified that he complained of numbness and tingling in his right hand. Claimant saw him the following week and he tried the same treatment, without relief. Claimant returned to him on the third week and the chiropractor said he was not going to do the adjustment and recommended an MRI before he provided any more treatment. The pain was not going away despite the chiropractic treatment. The Claimant continued to work in pain taking Tylenol or dual action Advil to control the pain. CH[Redacted] would notice that the Claimant was in pain when he drove with him. Claimant had to drive with his hand above his head since it was painful to have his arm down by his side. After he received the results of the MRI, CH[Redacted] told him he should remain off work until he took care of the problem since he needed him back healthy.

7. The MRI performed on July 11, 2022 showed, among other findings, a suspected free disc fragment in the right C7-T1 foramina with moderate foraminal narrowing. (Claimant Exhibit 6).

8. After Claimant received the MRI results, he met with Dr. Poindexter, to discuss the results. He took Dr. Poindexter's advice to take it easy, relaxing, keeping a pain [Redacted, hereinafter PI] and Claimant submitted a statement regarding what happened in the original incident. CH[Redacted] did not want Claimant to return to work until he received a clearance to return to work from the doctors. Claimant began treatment with Dr. Tasha Alexis at the ROMP clinic in Alamosa on July 18, 2022.[1] She took a history that the claimant injured himself when he was strapping down a load and the strap broke and slammed the patient to the ground. (Claimant Exhibit 3). The Claimant presented to the clinic for neck pain. Dr. Alexis also noted that Claimant's chiropractor recently ordered

[1] Although Claimant refers to the treating facility as the "ROMP" clinic, the medical records indicate that the facility's name was SLV Health Occupational Medicine.

an MRI due to the fact that the Claimant was not improving and the MRI showed a suspected extruded free disc fragment in the right C7-T1 foramina with moderate foraminal narrowing. She provided restrictions of no lifting, carrying or pushing or pulling greater than 25 pounds. She referred Claimant to Dr. Timothy for further evaluation and treatment.

9. [Redacted, hereinafter JH] began seeing Dr. Timothy on August 11, 2022 following the referral from Dr. Alexis. Dr. Timothy noted that JH[Redacted] had right arm pain complaints and that he had sought treatment with his chiropractor and had then sought medical care following an MRI that showed cervical spine pathology. Dr. Timothy diagnosed JH[Redacted] with radiculopathy, site unspecified, paresthesia of skin and other cervical disc displacement, high cervical region. Dr. Timothy recommended consultation with a qualified pain management specialist for a cervical epidural steroid injection at C7- T1 for a HNP/extrusion. JH[Redacted] was also referred to a back surgeon. Dr. Timothy assigned bilateral neck restrictions of no overhead work, pushing/pulling of up to 25 lbs. and lifting up to 25 lbs. He also assigned right shoulder restrictions of limited use, no overhead work and no work above chest height, pushing pulling up to 25 lbs. and lifting up to 25 lbs. (Plaintiff's Exhibit 3, pp. 16 -20).

10. Dr. Timothy referred Claimant to Denver Spine and Pain Management. He received an injection from Dr. Bainbridge at that facility.

11. Claimant testified that after he received the right C7-T1 transforaminal Epidural injections, administered on 10/26/2022 by Dr. Bainbridge, he reported his pain as 1/10. Prior to that, his pain was reported as 8/10. This is consistent with Dr. Bainbridge's chart note of October 26, 2022. (Plaintiffs Exhibit 8, pp. 77-78). Following the injection, Claimant was able to regain some functionality and use of his right hand. He testified that his hand/arm is still numb and it hurts but following the injection, he can now hold things and shift gears again when driving his truck. Claimant testified that he had never had the problems of right hand numbness or difficulty prior to the June 16, 2022 injury.

12. The injection helped his symptoms and the pain is no longer debilitating. Following the injection, he was able to return to work on November 11, 2022. Dr. Timothy allowed him to return to work with restrictions including no lifting above his head. He allowed him to drive as long as he could maintain control of his right hand.

13. Dr. Timothy testified at hearing. Dr. Timothy's specialty is physical medicine and rehabilitation, occupational medicine and is Level II accredited. He was accepted as an expert in those areas.

14. Dr. Timothy last saw Claimant on November 10, 2022 and his assessment was that Claimant had radiculopathy, site unspecified, and he had right sided disc extrusion at C7-T1, based on imaging. He recommended physical therapy.

15. Dr. Timothy testified that JH's[Redacted] pain and numbness complaints were consistent with the findings on JH's[Redacted] MRI reading at C7-T1. Dr. Timothy was in agreement with Dr. Bainbridge's treatment plan and recommendations that he provided in his initial evaluation of September 9, 2022.

16. With respect to causation, Dr. Timothy stated that his medical history reflected that JH[Redacted] reported that he was injured when a strap he was tightening down broke and he fell to the ground. Dr. Timothy further stated that given the type of pressure or loads on those straps that the strap breaking certainly could be the cause of injury, even though the mechanism of injury may not be typical of that type of injury. Dr. Timothy further testified that JH's[Redacted] injuries and the treatment he had provided as a result of those injuries, were caused by Mr. JH's[Redacted] June 16, 2022 work injury.

17. Dr. Poindexter also testified at hearing. Dr. Poindexter's specialty is chiropractic medicine. He provided chiropractic treatment to the Claimant. He last saw Claimant on July 11, 2022. At that time, he was treating him for radiculopathy of the right arm and hand and low back pain. He first saw him on August 29, 2021, prior to the work-related incident. At that time he provided conservative care including normal chiropractic adjustments. The first time he treated him post-injury was on June 24, 2022. His complaints after his injury included pain that was more intense that prior to his work injury. However, his records did not document any change in treatment pre-injury and post-injury. But, he does recall the Claimant mentioning the increased pain post-injury. Dr. Poindexter also noted that the frequency of visits had increased, post-accident. Claimant was also not responding to treatment as he previously had and at that point, Dr. Poindexter recommended an MRI since there was something different in Claimant's presentation and response to treatment. After review of the MRI, he concluded that further chiropractic was not appropriate and a surgical consult would be appropriate. It was Doctor Poindexter's opinion that the Claimant's injuries were work related. Unfortunately, since Dr. Poindexter's chart notes are not consistent with his testimony, with the exception of the recommendation for an MRI, I must look elsewhere to determine if the Claimant sustained a compensable work related injury.

18. Dr. Michael Janssen performed a medical records examination and gave his opinion that "it would give high suspicion that this may not be an occupational-related

condition specifically." Dr. Janssen stated he was asked to comment on whether the mechanism of injury correlated and if this would be a work -related condition. In response, Dr. Janssen stated "It is impossible to completely say, but C7-T1 disc herniations are less common than the rest of the subaxial cervical spine. This is an extruded disc fragment. They can occur with normal activities of daily living and occur spontaneously, and they can also occur with trauma". Dr. Janssen also states that it is impossible to directly correlate whether this is truly a compensatory injury or an incidental finding. (Plaintiff's Exhibit 9, pp. 80-81).

19. Claimant currently continues to have pain in from his mid-back all the way into his right hand. His right hand currently is numb and it hurts. But, he is able to drive and shift gears and hold things without dropping them since the injection.

20. After consideration of the evidence, I find Dr. Timothy's opinions that the injuries and treatment were caused by his June 16, 2022 work injury to be credible and persuasive. I find his opinions as to causation to be more persuasive than those of Dr. Janssen.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." Section 8-40-201(1). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical

treatment or causes a disability. *Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The fact that the employer provides treatment after an employee reports symptoms does not automatically establish a compensable injury. The claimant must prove the symptoms and need for treatment were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment*. E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

In this case, there is no question that an incident occurred on June 16, 2022. The question is whether the Claimant's post-accident symptoms are attributable to the incident or are as a result of the natural progression of his degenerative conditions, for which he treated prior to the incident. I conclude, based on the credible and persuasive evidence that Claimant proved he suffered a compensable injury to neck, right shoulder and right arm as the result of the incident that occurred within the course and scope of his employment on June 16, 2022.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

The parties have indicated that in addition to compensability, the second issue to be determined is whether the medical treatment provided related to the claimed work injury. There appears to be no question that the treatment provided was reasonable and necessary. The real issue is whether the treatment is related to the incident that occurred on June 16, 2022 or the natural progression of his preexisting condition. I conclude that the treatment provided by the authorized treating physicians were reasonable, necessary and related to the work injury.

.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury to his neck, shoulder and right arm on June 16, 2022.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule to cure and relieve Claimant from the effects of his neck, right shoulder and right arm injuries.

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(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 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: February 2, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-135-286-003

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that the left sacroiliac (SI) joint injection recommended by Dr. Ellen Price is reasonable medical treatment necessary to maintain the claimant at maximum medical improvement **(MMI).**

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to reimbursement of costs pursuant to Section 8-42-101(5), C.R.S. Specifically, the claimant has requested cost reimbursement in the amount of $230.35.

FINDINGS OF FACT

1. The claimant was injured while working for the employer on March 8, 2019. The claimant injured his low back when he bent and twisted to pick up iron and plywood at a muddy job location. This is an admitted claim.

2. The claimant's authorized treating provider (ATP) for this claim is Work Partners Occupational Health. Throughout this claim, the claimant has primarily seen Erica Herrera, PA-C with Work Partners Occupational Health.

3. The claimant has undergone three surgeries related to the March 8, 2019 injury. On July 1, 2020, Dr. James Gebhard performed a microdiscectomy at the L4-L5 level. On June 23, 2021, Dr. Michael Janssen performed a disk replacement at the L4- L5 level. On January 10, 2022, Dr. Janssen performed a left sided LS foraminotomy for disk herniation removal and performed a left 51 foraminotomy. Following each surgery, the claimant participated in physical therapy.

4. On June 20, 2022, the claimant was seen by Dr. Laurie Marbas at Work Partners Occupational Health. On that date, Dr. Marbas placed the claimant at maximum medical improvement **(MMI).** In addition, Dr. Marbas assessed a whole person impairment rating of 31 percent. This impairment rating was related to the claimant's thoracic spine range of motion, and spondylosis of the claimant's lumbar spine. Dr. Marbas also listed a number of maintenance medical treatment modalities including medications, physical therapy, pool therapy, psychologist/therapist, pain medicine specialist, neurosurgeon, and Work Partners.

5. On January 9, 2023, the respondents filed a Final Admission of Liability (FAL) admitting for the MMI date of June 20, 2022, and the impairment rating of 31 percent whole person. In addition, the respondents admitted to "future medical care that is reasonable, necessary and related to the compensable claim."

6. As part of the recommended maintenance medical treatment, on August 24, 2022, the claimant was seen by pain management specialist, Dr. Ellen Price. On that date, Dr. Price noted that the claimant's treatment history includes physical therapy, massage, use of a TENS unit, medications, and surgical history. On examination, Dr. Price noted that the claimant had tenderness at the left sacroiliac (SI) joint on palpation. Dr. Price diagnosed bilateral sacroiliitis, left greater than right. Dr. Price recommended the claimant use an SI joint belt. She also recommended a left SI joint injection.

7. On September 21, 2022, the claimant returned to Dr. Price. On examination, Dr. Price noted tenderness at both of the claimant's SI joints. She also noted a positive Gaenslen's test and a positive Faber maneuver. Dr. Price opined that the claimant's main pain complaint was coming from his SI joint pain. Dr. Price noted that "[i]t is not uncommon for people with disk replacements or fusions to have hypermobility below the level." On that date, Dr. Price recommended that the claimant undergo bilateral SI joint injections. [1]

8. The respondents denied authorization for the recommended left SI joint injection.

9. Dr. Price continued to recommend SI joint injections for the claimant when she saw him on October 19, 2022.

10. At the request of the respondents, Dr. Brain Mathwich reviewed the claimant's medical records and opined regarding the recommended left sided SI joint injection. Dr. Mathwich opined that the claimant does not meet the Colorado Medical Treatment Guidelines (MTG) for SI joint injection. Specifically, Dr. Mathwich listed the requirements of the MTG for SI joint injection: "1. At least 3 months of pain, unresponsive to 6 weeks of conservative therapy. 2. Confounding psychological risk factors have been screened for and clinically addressed 3. Three positive physical examination findings consistent with SI joint origin pain" For each item listed, Dr. Mathwich found that the claimant does not meet these requirements. Specifically, Dr. Mathwich stated that the claimant has not undergone at least six months of conservative therapy. Dr. Mathwich also noted that the claimant has significant psychiatric issues. Finally, Dr. Mathwich noted that Dr. Price noted a positive Faber maneuver "but did not perform additional SI joint examinations."

11. The respondents relied upon Dr. Mathwich's report and denied authorization for the requested left SI joint injection.

12. On January 17, 2023, Dr. Price authored a letter regarding the recommended SI joint injections. In that letter, Dr. Price stated that she recommended the SI joint injections because the claimant has "chronic pain because of his sacroiliac joint". Dr. Price noted that this is appropriate treatment when there is a positive Gaenslen test or a positive Faber test. Dr. Price reiterated that "it is very common that

[1] Only the recommended **left** St joint injection is before the ALJ at this time.

patients have sacroiliac joint dysfunction after they have had disk replacements or fusions."

13. PA Herrera testified at the hearing. PA Herrera explained that there are various tests used to diagnose sacroiliitis. Those tests include the Fortner finger sign, the Gaenslen test, and a Faber test. PA Herrera testified that it is her understanding that Dr. Price performed all of these tests on the claimant and each was positive. PA Herrera also testified that SI joint injections are both therapeutic and diagnostic.

14. The claimant testified that his current symptoms include pain in the middle of his low back that radiates into his left leg and left hip. Specifically, the claimant indicated he has pain in his left upper buttock area below his beltline.

15. The claimant has requested cost reimbursement in the amount of $230.35 related to the denial of the left sided SI joint injection.

16. The ALJ credits the medical records and the claimant's testimony. The ALJ credits the opinions of Dr. Price over the contrary opinions of Dr. Mathwich. The ALJ specifically credits Dr. Price's statement that "it is very common that patients have sacroiliac joint dysfunction after they have had disk replacements or fusions." The ALJ also credits PA Herrera's testimony regarding the methods used in diagnosing sacroiliitis. The ALJ finds that the claimant has demonstrated that it is more likely than not that the recommended left sided SI joint injection is reasonable medical treatment necessary to maintain the claimant at **MMI.**

17. As the requested medical treatment has been found to be reasonable and necessary to maintain the claimant at **MMI,** the claimant has successfully demonstrated that he is entitled to costs related to pursuit of this treatment.

CONCLUSIONS OF LAW

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

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and

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

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

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

5. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

6. As found, the claimant has demonstrated, by a preponderance of the evidence, that the left St joint injection recommended by Dr. Price is reasonable medical treatment necessary to maintain the claimant at **MMI.** As found, the medical records, the claimant's testimony, the opinions of Dr. Price, and PA Herrera's testimony regarding the methods used in diagnosing sacroiliitis, are credible and persuasive on this issue.

7. The claimant has requested costs related to the current Application for Hearing. Section 8-42-101(5), C.R.S. provides:

> If any party files an application for hearing on whether the claimant is entitled to medical maintenance benefits recommended by an authorized treating physician that are unpaid and contested, and any requested medical maintenance benefit is admitted fewer than twenty days before the hearing or ordered after application for hearing is filed, the court shall award the claimant all reasonable costs incurred in pursuing the medical benefit. Such costs do not include attorney fees.

8. As found, the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to reimbursement of costs pursuant to Section 8-42-101(5), C.R.S. related to the requested left SI joint injection

ORDER

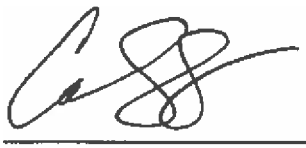
It is therefore ordered:

1. The respondents shall pay for the recommended left SI joint injection, pursuant to the Colorado Medical Fee Schedule.

2. The respondents shall pay the claimant $230.35 for reimbursement of costs.

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

Dated February 21, 2023.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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 26. 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 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.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-199-776-001

ISSUES

- Did Claimant prove she[1] suffered a compensable occupational disease to her bilateral upper extremities?

- Did Claimant prove treatment provided by Dr. William Schroeder on or after February 11, 2022 was authorized and reasonably needed to cure and relieve the effects of the compensable injury?

FINDINGS OF FACT

1. Claimant works for Employer as a public defender. Claimant's residence and primary office are in Salida, but she regularly appears in courts across the 11th Judicial District, including Fremont, Park, and Custer counties.

2. Claimant uses a small, employer-supplied laptop computer for data entry and drafting documents. Claimant does not have a legal assistant or paralegal to generate documents and does all her own typing. She spends approximately four to six hours per day typing pleadings, correspondence, emails, and detailed case notes.

3. Claimant works at a variety of desks, tables, and other workspaces, depending on whether she is at her Salida office or in one of the courthouses. Although the specific dimensions of each space are different, the ergonomics of each setup can fairly be described as "poor." The ergonomic deficiencies are compounded by the fact that Claimant is quite tall.

4. In her main office, Claimant has no keyboard tray and was typing with the laptop on a fixed-height desk. Eventually she fashioned a makeshift "standing desk" from a cardboard box to allow a less uncomfortable typing posture.

5. Claimant started having wrist and right elbow pain in late January 2022. She perceived the onset of symptoms to be associated with her work activities, particularly typing and mousing.

6. Claimant approached management about improving the ergonomics at her workstation in the Salida office. Employer arranged for a virtual ergonomic assessment to be completed online. Employer agreed to improve the furniture in Claimant's office, but the process was delayed by supply issues and logistical concerns related to an upcoming office move. Claimant investigated dictation software because "it physically hurt to type, [which] was very much part of her job."

[1] Claimant's preferred pronouns are she/her/hers.

7. There is no persuasive evidence Employer referred Claimant to a designated provider despite receiving notice of a potential work-related injury. Therefore, Claimant sought treatment from her personal provider.

8. Claimant saw her PCP, Dr. William Schroeder, on February 11, 2022. Examination of the upper extremities showed positive Phalen's and Tinel's tests bilaterally, worse on the right. Dr. Schroeder opined Claimant's clinical presentation was consistent with bilateral carpal tunnel syndrome (CTS). He referred Claimant to a hand specialist, physical therapy, and ordered an EMG. That same date, Dr. Schroeder noted significantly elevated liver enzymes and long-standing hypertension. He ordered more lab tests and prescribed a beta-blocker.

9. After the appointment with Dr. Schroeder, Claimant advised his supervisor, [Redacted, hereinafter DZ], that he had "officially" been diagnosed with CTS and referred to a hand specialist. Claimant asked DZ[Redacted] if he preferred any specific doctors but was not given any names of providers or clinics.

10. On February 15, 2022, Claimant emailed management that she and DZ[Redacted] were exploring solutions that would allow Claimant to continue working. She had tried dictation software but discovered that numerous corrections required almost as much keyboarding as simply typing the documents from scratch.

11. Claimant saw Becky Pack, an orthopedic PA-C, on February 18, 2022. Claimant described bilateral forearm and hand pain, worse on the right. Claimant stated the symptoms were exacerbated by typing, using a computer mouse, and heavy lifting. Examination showed positive Tinel's bilaterally. Ms. Pack diagnosed bilateral CTS and cubital tunnel syndrome and ordered an EMG. She also recommended an ergonomic evaluation of Claimant's workstation and restricted her to "light duty."

12. Around that time, Claimant continued discussions with management about ergonomic solutions. Employer planned to purchase the legal version of Dragon software in hopes it would be more efficient.

13. Claimant had an initial OT evaluation on February 24, 2022 at Heart of the Rockies Occupational Therapy. She reported increased bilateral upper extremity symptoms "when engaged in computer tasks on a daily basis." Claimant explained she spent approximately 4-6 hours each day working on the computer. Examination showed mild reduction in wrist ROM, and mild tenderness to palpation around both wrists, proximal forearms, and elbows. Tinel's was positive at both wrists and the right elbow. The therapist recommended therapy for "overuse syndrome with tendonitis and medial/ulnar nerve compressions." She also recommended nighttime splinting and "ergonomic changes to current workstation to improve BUE alignment and protection with repetitive typing/computer tasks to avoid increased overuse symptoms."

14. That same day, DZ[Redacted] emailed upper management about a part-time schedule he worked out with Claimant, which they believed struck a reasonable balance between giving Claimant's "hands a rest" while not placing excessive stress on

the other attorneys in the office from covering Claimant's caseload. DZ[Redacted] stated if the part-time schedule were not approved quickly, he would put Claimant on sick leave and reassign her cases. Management responded it needed additional information and time to review the request. As a result, DZ[Redacted] advised the office staff that Claimant's caseload would be reassigned. DZ[Redacted] hoped the reassignment would be only temporary and the part-time plan would eventually be approved.

15. Claimant was evaluated by Dr. Edmund Rowland, an orthopedic hand specialist, on February 25, 2022. She reported bilateral arm pain and occasional numbness and tingling. Examination of the right elbow showed tenderness over the common extension tendon origin, lateral epicondyle pain with resisted wrist extension, and tenderness around the ulnar nerve. The left elbow was unremarkable. Tinel's was positive at both wrists. Dr. Rowland was not convinced Claimant had CTS and cubital tunnel syndromes, and "would think more along the lines of an overuse tendonitis, lateral epicondylitis, etc." He diagnosed "likely overuse" right lateral epicondylitis, and probable radial, median, and ulnar "neuritis." Claimant wanted to avoid surgery and was hoping for nonoperative solutions "likely ergometric adjustment and/or therapy with a break from mousing and keyboarding."

16. Electrodiagnostic testing was performed on March 8, 2022. It showed mild right median neuropathy at the wrist consistent with the clinical diagnosis of CTS. No electrodiagnostic abnormalities were found in the elbows or left wrist.

17. Dr. Rowland reviewed the electrical testing data and stated Claimant's CTS would be characterized as "the mildest of mild as the numbers are nearly normal." He maintained that Claimant suffers primarily from tendinopathy and nerve irritation rather than a true compressive neuropathy. He concluded, "I do believe [Claimant's] symptoms come down to an overuse phenomenon. It is my medical advice that [she] figures out a way to type less." Dr. Rowland recommended Claimant continue working with the occupational therapist to adjust her workstation and implement a regimen of frequent breaks and regular stretching "to minimize the symptoms created by prolonged typing. I would like [her] to limit typing if at all possible."

18. On April 28, 2022, Dr. Schroeder documented Claimant's hypertension had been brought under control with medications.

19. Claimant was off work from late February to approximately the end of July 2022. Claimant's upper extremity symptoms improved significantly while she was off work but recurred "almost immediately" when she returned to regular work.

20. Dr. Carlos Cebrian performed an IME for Respondent on August 24, 2022. Dr. Cebrian diagnosed right CTS, bilateral wrist tendonitis, and bilateral elbow epicondylitis. Relying on the DOWC Cumulative Trauma Disorder Medical Treatment Guidelines (MTGs), Dr. Cebrian concluded none of the conditions were caused by Claimant's work. He opined Claimant's work involved no primary or secondary risk factors identified in the MTGs. He noted the MTGs state that typing up to seven hours per day "at an ergonomically correct workstation" is not a risk factor for CTD. Although four hours

of mousing per day is an established risk factor for CTS, Claimant does not meet that criterial because she only used a mouse for approximately one hour total with breaks. Dr. Cebrian speculated that Claimant's hypertension or elevated liver enzymes may be causative of her mild right CTS and tendinopathies.

21. Dr. Schroeder responded to Dr. Cebrian's IME on September 9, 2022. He "totally disagreed" with the "unfounded" conclusion that Claimant's condition is not work-related. Dr. Schroeder thought his opinions should be given more weight because they are based on a long-term treatment relationship.

22. Claimant's testimony regarding the onset and progression of symptoms and their temporal relationship to her work activities is credible.

23. The causation opinions of Dr. Rowland and Dr. Schroeder are credible and more persuasive than the contrary opinions of Dr. Cebrian.

24. Claimant proved she suffered a compensable occupational disease involving her bilateral upper extremities.

25. Claimant proved the evaluations and treatment provided by Dr. Schroeder, Heart of the Rockies Occupational Therapy, and Ms. Pack were reasonable needed to cure and relieve the effects of her compensable injury.

26. Claimant proved Dr. Schroeder, Heart of the Rockies Occupational Therapy, and Ms. Peck are authorized providers. Claimant had the right to select his own treating physician because Employer did not refer him to a designated provider after receiving notice of the injury.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a

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

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

The Division has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. Under § 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the MTGs when furnishing medical treatment. The ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining if requested medical treatment is reasonably necessary or work-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

As found, Claimant proved she suffered a compensable occupational disease affecting her bilateral upper extremities. The causation opinions of Dr. Rowland and Dr. Schroeder are more persuasive than the contrary opinions offered by Dr. Cebrian. Claimant's testimony is credible. Claimant has consistently reported that her wrist and elbow symptoms were directly associated with her work activity. Although Claimant is not a medical expert, she is in the best position to say how her body responded to particular stimuli. Additionally, Claimant's condition improved when she stopped working but recurred "almost immediately" when she returned to regular work activities, which also supports a causal relationship. Dr. Cebrian's mechanical application of the MTG causation matrix is unpersuasive in this case. First, the MTGs are not binding on the ALJ in the face of persuasive contrary evidence regarding an individual claimant. In any event, the MTGs do not categorically state that computer work can never cause CTS, nerve irritation, or tendinopathy. Rather, the MTGs provide that computer work up to seven hours per day at an *"ergonomically correct"* workstation is not a risk factor for CTD. WCRP 17, Exhibit 5, § D.3 (emphasis added). None of Claimant's regular workspaces can fairly be described as "ergonomically correct." In fact, the ergonomics in her main office were so poor she resorted to building a jerry-rigged "standing desk" with a cardboard box.

Moreover, even if we concluded that Claimant's upper extremity symptoms were not caused by her work, her symptoms were aggravated and perpetuated by work activities, which ultimately prompted her to seek treatment and caused disability. Accordingly, Respondent would still be liable for a compensable aggravation irrespective of direct causation.

There is no persuasive evidence that Claimant was "equally exposed" to the injurious employment hazards outside of work. Therefore, Claimant proved a compensable occupational disease.

B. Medical benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

Besides proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith," or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). The obligation to designate a physician arises when the employer receives information indicating to a reasonably conscientious manager that a potential compensation claim might be involved. *Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984).

As found, Claimant proved the evaluations and treatment provided by Dr. Schroeder, Heart of the Rockies Occupational Therapy, and Ms. Pack were reasonably needed to cure and relieve the effects of her compensable injury. Additionally, Claimant proved Dr. Schroeder, Heart of the Rockies Occupational Therapy, and Ms. Peck are authorized providers. Claimant had the right to select her own treating physician because Employer did not refer her to a designated provider after receiving notice of the injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is compensable.

2. Respondent shall cover treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to treatment on and after February 11, 2022 by Dr. William Schroeder, Heart of the Rockies Occupational Therapy, and PA-C Beth Pack.

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review

electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(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 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: February 2, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-168-369-004

ISSUES

- Did Claimant prove his claim should be reopened based on a change of condition?
- Did Claimant prove a reverse total shoulder arthroplasty recommended by Dr. John Pak is reasonably needed and causally related to the admitted industrial injury?

FINDINGS OF FACT

1. Claimant worked for Employer since 2017 as a building engineer. He performed maintenance on a wide variety of physical plant systems such as HVAC, electrical, plumbing, and landscaping. The job was physically demanding, requiring heavy lifting and frequent use of the upper extremities, including overhead work.

2. Claimant suffered an admitted injury to his right shoulder on June 1, 2020 while manipulating a 150-pound steel plate to repair a loading dock leveling system. Claimant lifted the plate and felt a painful pop in his right shoulder.

3. Claimant's case is complicated by a prior work-related right shoulder injury in September 2011. The prior injury involved a torn rotator cuff and biceps rupture. Claimant had surgery for the rotator cuff tear, but the biceps was irreparable. He was put at MMI by his ATP for that claim, Dr. Daniel Peterson, on May 9, 2012. At the final appointment, Claimant reported improvement after surgery. He was working full duty but still had occasional "twinges" of pain with certain movements, and slight weakness with overhead work.[1] Examination that date showed positive impingement test and "mild" weakness. Dr. Peterson commented that Claimant had "surprisingly good strength recovery at this point for as large an RTC tear as he had." He anticipated Claimant's strength and ROM would continue to improve over time. Dr. Peterson assigned an 11% upper extremity rating for range of motion deficits. Claimant was released to work without restrictions.

4. There is no persuasive evidence Claimant sought any additional medical care for the right shoulder between May 2012 and the June 1, 2020 injury with Employer. Claimant performed physically demanding work without difficulty during that interval.

5. After the June 1, 2020 accident, Employer referred Claimant to Concentra for authorized treatment. The initial examination showed reduced range of motion and positive painful arc, Hawkins, drop arm, and empty can tests. Claimant was diagnosed with a right shoulder "strain." He was advised to wear a sling constantly and referred to physical therapy. He was given work restrictions of no use of the right arm.

[1] In 2012, Claimant was performing similar facilities maintenance work for a different employer.

6. Claimant saw Dr. Peterson at his third visit to Concentra, who has remained the primary ATP since. On June 15, 2020, Claimant discussed the prior injury with Dr. Peterson and stated, “his shoulder does not feel the same way as his previous injury.”

7. Claimant had a right shoulder MRI on June 17, 2020. It showed severe rotator cuff pathology, including supraspinatus, subscapularis, and infraspinatus tears, extensive fatty atrophy of the subscapularis muscle and lesser atrophy of the supraspinatus and infraspinatus.

8. After reviewing the MRI report, Dr. Peterson referred Claimant to Dr. Michael Simpson, an orthopedic surgeon.

9. Claimant saw Kimberly Anne Dial Shenuk, PA-C in Dr. Simpson’s office on June 19, 2020. Claimant reported his pain was improving with PT and NSAIDs. Ms. Shenuk reviewed the MRI images and opined, “there is definitely chronic involvement on top of his acute injury. There is fatty atrophy in the subscapularis, supraspinatus, and infraspinatus muscle bellies. He denies any weakness or significant pain prior to this injury.” Ms. Shenuk requested medical records from Concentra and scheduled Claimant to see Dr. Simpson.

10. Dr. Simpson evaluated Claimant on June 29, 2020. He reviewed the MRI images and confirmed the supraspinatus, infraspinatus, and subscapularis tendon tears. He noted fatty deposition in the subscapularis muscle but no atrophy of the infraspinatus. He also saw some atrophy of the supraspinatus “but more muscle than fat.” Dr. Simpson opined, “The subscap[ularis tear] is definitely chronic. Supraspinatus probably has some degree of chronicity, the infraspinatus less so.” Dr. Simpson advised Claimant that any surgery could be “quite complicated depending on what is chronic and what is acute.” He thought it reasonable to treat the “acute component” of Claimant’s “multi-tendinous tear” to maintain as much function as possible. However, the “chronic aspects” were not repairable and would likely require a capsular reconstruction or shoulder replacement arthroplasty. Dr. Simpson did not think surgery was warranted immediately because Claimant was functioning relatively well. He gave Claimant a subacromial Toradol injection and asked him to return in three weeks to further discuss the possibility of surgery.

11. Claimant returned to Dr. Simpson on July 20, 2020. His symptoms had improved in the interim with PT and the injection. Examination showed some weakness to external rotation but good supraspinatus and subscapularis compensatory function. Dr. Simpson did not recommend any surgery “at this point.” He opined Claimant’s condition may deteriorate with time and indicated Claimant could follow up periodically over the next 12 months if needed.

12. Dr. Peterson put Claimant at MMI on July 27, 2020. Claimant told Dr. Peterson he did not want surgery and thought he could return to his regular duties. Range of motion measurements showed no additional impairment compared to the 2011 rating. Dr. Peterson assigned a 0% rating after apportionment and released Claimant to full duty. Dr. Peterson opined, “[Claimant] will need medical maintenance care with Dr. Simpson

every 3 months over the next 2 years to monitor the RTC tear and determine if he will eventually need surgery."

13. Claimant returned to his regular job after MMI. Although he had no formal restrictions, Employer assigned a co-worker to help with overhead work and heavy lifting.

14. Claimant initially had no difficulty completing his work, with the co-worker's assistance. But approximately four weeks after being put at MMI, his shoulder started to become "irritated" and "agitated" by the end of his shifts. This became progressively worse over the next several months.

15. Claimant contacted Dr. Simpson's office in late November or early December 2020 for an appointment to evaluate his increased symptoms. Dr. Simpson's schedule was booked out several months, and the first available appointment was in March 2021.

16. Claimant saw Dr. Simpson on March 24, 2021. Claimant reported "worsening pain" and "more limited function in his shoulder." He was having difficulty lifting and carrying objects, and had his symptoms had reached the point that "simply trying to play the piano is hard for him." Dr. Simpson referred Claimant to Dr. John Pak for consideration of a reverse total shoulder arthroplasty.

17. Claimant was evaluated by Trisha Finnegan, NP in Dr. Pak's office on March 31, 2021. Claimant described a 9-month history of "ongoing and progressive shoulder pain" since the June 2020 work injury. He was having difficulty performing activities of daily living because of daily 8/10 pain and right shoulder weakness. Physical examination showed reduced range of motion and significant weakness of the rotator cuff muscles. It is unclear whether Dr. Pak personally saw Claimant at that appointment, but he at least reviewed the MRI images and discussed the case with Ms. Finnegan. Based on that review, Dr. Pak recommended a right shoulder reverse total arthroplasty. Dr. Pak did not discuss causation. However, his office submitted a surgical preauthorization request to Insurer under this claim.

18. Dr. Adam Farber performed an IME for Respondents on July 27, 2021. Dr. Farber reviewed the MRI images and saw no evidence of any acute injury or structural anatomical change. Instead, he opined that all pathology is pre-existing and unrelated to the June 1, 2020 injury. He noted Claimant's symptoms improved significantly within two months of the accident and he returned to work without restrictions. Dr. Farber concluded the work accident caused a temporary symptomatic exacerbation, but no structural aggravation of Claimant's longstanding, pre-existing rotator cuff pathology. Dr. Farber opined Claimant's ongoing symptoms and limitations reflected the natural progression of the failed rotator cuff repair in 2011. Although a reverse total shoulder arthroplasty may be appropriate treatment for Claimant's condition, he believes it is not causally related to the June 1, 2020 work accident.

19. Claimant had a DIME with Dr. Matthew Brodie on September 15, 2021. Dr. Brodie provided a somewhat confusing discussion of causation with respect to surgery.

He noted that Claimant improved after the 2011 injury and "had the capacity for unrestricted work" before the June 2020 injury. Additionally, Claimant sought no treatment for the shoulder "during the 9-year timeframe preceding the current work injury" despite performing physically demanding work. Dr. Brodie concluded, "it is medically probable that the claimant suffered a substantial aggravation or a new injury." He opined that without an MRI immediately before the June 2020 work injury, the post-injury findings cannot be "dated" to a specific injury date. However, he agreed that at least some of the MRI findings predated the work injury. Dr. Brodie concluded he could not provide a "definitive causal assessment" based on the available documentation, and ultimately adopted the July 27, 2020 MMI date originally assigned by Dr. Peterson.

20. Respondents files a Final Admission of Liability (FAL) based on Dr. Brodie's DIME. Claimant timely objected to the FAL and requested a hearing. The parties reached a stipulation that was approved on April 13, 2022. Respondents agreed to file an amended FAL and Claimant agreed not to object. The amended FAL closed all issues except medical benefits after MMI.

21. Claimant returned to Dr. Peterson on May 2, 2022. Dr. Peterson noted Claimant had "gotten worse" since last seen in July 2020 and a reverse total shoulder arthroplasty had been recommended. He observed supraspinatus and infraspinatus atrophy on gross inspection of the shoulder. Range of motion was significantly less than at the time of MMI, and strength testing showed "marked weakness" of the supraspinatus and infraspinatus. Dr. Peterson opined, "his claim should be re-opened as he is no longer at MMI." Dr. Peterson noted Claimant had worked five years for Employer doing building maintenance without difficulty before the work injury, and opined, "he clearly had a new injury at this company and unfortunately to restore him to previous ability and function it has now become clear that his only option is a RTSA." The arthroplasty was necessary "to restore him as much as possible to pre-injury function and pain level." He added, "I gave him 24 months of medical maintenance care . . . and in fact he has gotten worse and now he is in need of further surgery. This should not be surprising or contested." Dr. Peterson referred Claimant back to Dr. Pak.

22. Claimant was re-evaluated by Ms. Finnegan on May 9, 2022. He reported ongoing significant pain and difficulty with ADLs. Claimant reiterated that "prior to his [June 2020] injury he had been doing quite well with no difficulty performing activities of daily living or work duties." After reviewing the case with Dr. Pak, Ms. Finnegan again recommended a reverse total shoulder arthroplasty. She opined, "the patient was not having any difficulty prior to his work injury in regard to his function and mobility of his right shoulder. He denies any pain prior to his injury. Given his mechanism of injury and chronicity[2] of symptoms with failure to respond to conservative modalities, surgical intervention is indicated."

23. Dr. Farber performed a second IME for Respondents on June 28, 2022. Claimant reported 7/10 shoulder pain, aggravated by activities such as writing, playing

[2] The ALJ infers that Ms. Finnegan was referring to "chronicity" of symptoms since the June 2020 work accident.

piano, moving his fingers, fishing, and golfing. He also described weakness with lifting. His pain was worse than at the prior IME. Dr. Farber reviewed a handful of additional records, and stated his opinions were unchanged from the first IME.

24. Dr. Farber testified at hearing consistent with his reports.

25. Dr. Peterson testified in a post-hearing deposition on January 5, 2023. Dr. Peterson described objective evidence of worsening between July 2020 and May 2022, including "definite" deterioration of shoulder range of motion and strength. He disagreed with Dr. Farber that Claimant's shoulder pathology is entirely pre-existing. Instead, he agreed with Dr. Simpson's characterization of the condition as "acute on chronic." Dr. Peterson emphasized that Claimant "did extremely well" after the 2011 surgery and performed heavy work without difficulty until the June 1, 2020 injury. He agreed with Dr. Simpson and Dr. Pak that a reverse total shoulder arthroplasty is the most appropriate treatment at this juncture because a lesser surgery would not likely provide significant functional benefit.

26. Claimant's testimony is generally credible.

27. The opinions of Dr. Peterson, Dr. Simpson, Dr. Pak, and Ms. Finnegan are credible and more persuasive than the contrary opinions offered by Dr. Farber.

28. Claimant proved his condition worsened after July 27, 2020 and he is no longer at MMI.

29. Claimant proved the reverse total shoulder arthroplasty recommended by Dr. Pak is reasonably needed to cure and relieve the effects of his injury. Claimant proved the shoulder arthroplasty is causally related to the admitted June 1, 2020 work accident. Although Claimant had underlying, pre-existing rotator cuff pathology, the work injury aggravated, accelerated, and combined with the pre-existing condition to produce the need for surgery.

CONCLUSIONS OF LAW

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. A "change in condition" refers either to a change in the condition of the original compensable injury, or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). If a claimant's condition has changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from a separate cause. *Goble v. Sam's Wholesale Club*, W.C. No. 4-297-675 (May 3, 2001). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. When a claimant seeks reopening based on a change of condition after MMI, a prior DIME determination is entitled to no special weight. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). The claimant must prove a basis to reopen by a preponderance of the evidence. Section 8-43-304(4).

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

As found, Claimant proved his condition worsened after July 27, 2020 and he is no longer at MMI. Although Claimant was not completely symptom-free when put at MMI, his pain levels were low, and returned to work, albeit with a helper for overhead tasks and heavy lifting. Within a month of MMI his shoulder started becoming "irritated" and "agitated" by the end of his shifts. By the time he was able to get back in with Dr. Simpson in March 2021, his symptoms were significantly worse, and his functional ability had deteriorated. At that point, Dr. Simpson thought surgery was probably warranted and referred Claimant to Dr. Pak for consideration of arthroplasty. Claimant's condition continued progress over the next year, and was clearly worse when he saw Dr. Peterson in May 2022 than he had been at MMI in July 2020. Dr. Peterson persuasively explained that Claimant's subjective descriptions of worsening are corroborated by objective clinical findings.

Although it is fairly obvious that Claimant's condition worsened after MMI, the more challenging question involves causation. Claimant undeniably had significant underlying rotator cuff pathology before the June 1, 2020 injury. But his shoulder was asymptomatic (or at most minimally symptomatic), required no treatment, and did not impede his ability to perform physically demanding work. That status changed when Claimant lifted the heavy plate at work on June 1, 2020. Although Claimant's symptoms improved with therapy and an injection, they never entirely resolved, and progressively worsened over the next several months.

The ALJ credits the opinions of Dr. Simpson and Dr. Peterson that the work accident probably caused some acute tearing and further progression of the underlying condition. But even if Dr. Farber is correct that all pathology shown on the MRI was pre-existing, that is not the end of the analysis. A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if it the symptoms were triggered by work activities and caused the claimant to need treatment she would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). Regardless of the underlying condition of his rotator cuff before the work accident, Claimant was not a candidate for an arthroplasty because he

had no symptoms and functional impairment. No one performs arthroplasties on asymptomatic and nondisabling shoulders, no matter how damaged they might be. Although Claimant's shoulder improved relatively quickly with PT and an injection, he remained symptomatic to some degree. He never fully returned to his pre-injury baseline level of symptomlogy and function, and started slowly worsening relatively quickly after returning to work. Evenentually the shoulder was bad enough that he sought additional evaluation and treatment. Claimant proved the worsening of his condition reflects the natural progression of the June 1, 2020 work injury.

Claimant also proved the reverse total shoulder arthroplasty is reasonably needed. Dr. Simpson, Ms. Finnegan, and Dr. Pak are persuasive that a lesser surgery is unlikely to help Claimant, and an arthroplasty is the most appropriate course of treatment.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen is granted.

2. Insurer shall cover the right reverse total shoulder arthroplasty recommended by Dr. John Pak.

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(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 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: February 17, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-113-937-001

ISSUES

- Did Claimant prove his claim should be reopened based on a change of condition?
- Did Claimant prove an L4-S1 lumbar fusion recommended by Dr. James Bee is reasonably needed and causally related to the admitted work injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a delivery driver, delivering oxygen concentrators, cylinders, and associated supplies to patients' homes. The job was physically demanding and required lifting and carrying 70 pounds on a regular basis. Before going to work for Employer, Claimant performed essentially the same job for a different oxygen supply company, from approximately 2007 to 2018.

2. Claimant suffered an admitted low back injury on July 15, 2019 while moving multiple oxygen tanks down a flight of stairs. Claimant was using a two-wheeled dolly with an integrated rack, loaded with approximately 10 cylinders. Approximately halfway down the staircase, Claimant fell and felt a pop and sharp stabbing pain in his back. He rested for a few minutes, and then finished moving the tanks back to his delivery van. The injury occurred on his last stop of the day, so he returned to the warehouse and reported the injury to his manager. The manager told Claimant to "keep me posted if anything comes of it."

3. Claimant worked his regular job for approximately 10 days after the injury. The symptoms gradually worsened until he stopped working on July 26. Claimant requested treatment and was referred to Emergicare.

4. Claimant saw Dr. Michael Dallenbach at his initial appointment on July 30, 2019. Physical examination showed decreased lumbar range of motion, bilateral lumbosacral paraspinal muscle spasm, positive straight leg raise testing, and decreased strength with dorsiflexion and plantar flexion of both ankles. X-rays showed approximately 7 mm of anterolisthesis of L5 on S1, but no fracture was noted. Dr. Dallenbach diagnosed a soft tissue strain and gave Claimant a Toradol injection. He assigned work restrictions of no lifting more than 10 pounds, referred Claimant to physical therapy.

5. At the initial PT evaluation on August 1, 2019, Claimant described low back pain with radiating pain into his right buttock. The therapist noted some mild radicular symptoms on the right.

6. At a follow-up with Dr. Dallenbach on August 7, 2019, Claimant described ongoing 7/10 back pain. He was performing sedentary modified duty and the prolonged sitting was making his back pain worse. Dr. Dallenbach adjusted Claimant's restrictions to alternate sitting and walking.

7. Claimant continued PT with gradual improvement in his back pain. On August 23, 2019, the therapist documented Claimant's "main pain" was right "sciatic" pain.

8. On August 26, 2019, Claimant reported diminished strength and motion on the right side, despite slow improvement in his pain. Physical exam confirmed decreased ROM and strength on the right. Dr. Dallenbach ordered a lumbar MRI.

9. A lumbar MRI was completed on August 31, 2019. It showed significant degenerative disc and facet changes at L4-5 and L5-S1 that were "potentially causing symptoms" in a bilateral L4 and L5 distribution. The MRI also showed mild degenerative changes from T11-12 through L3-4, which the radiologist opined were not clinically significant.

10. Claimant followed up with Dr. Dallenbach on September 4, 2019 to review the MRI results. Dr. Dallenbach documented abnormal weakness on the right side in an L4-5 distribution. He referred Claimant to Dr. Michael Sparr, a physiatrist.

11. Claimant saw Dr. Sparr on September 19, 2019. He described ongoing 5-7/10 pain. The greatest pain was in the right central back and buttock, increased with bending, sitting on hard surfaces, and standing for more than 20 minutes. He described radiating pain intermittently into the right central buttock and posterior thigh with occasional cramping in his dorsal leg. He denied numbness and tingling or perceived weakness in the leg. Physical examination showed moderate tenderness over the lower lumbar paraspinal muscles and facets, particularly at L4-5 and L5-S1. Claimant was "exquisitely" tender over the right SI joint and surrounding gluteal muscles. Sacroiliac positive tests were markedly positive. Neurological examination of the legs was normal. Dr. Sparr diagnosed SI dysfunction causing right sacroiliitis and gluteal myofasciitis, with an element of trochanteric bursitis. Dr. Sparr also noted Claimant "may be experiencing some intermittent right L5 radiculitis but it is not obvious on today's examination." He noted the spondylolisthesis shown on x-rays predated the work injury. He recommended an SI joint injection and trochanteric bursa injection. He also advised Clamant to reinitiate PT.

12. On September 25, 2019, Dr. Dallenbach documented Claimant was working modified duty and doing his best to alternate positions to manage his pain. Claimant reported pain radiating down his leg. Physical therapy was helping. Claimant was eager to return to regular work but was concerned about prolonged sitting and going up and down stairs to deliver oxygen supplies.

13. Dr. Stephen Scheper performed a right SI joint injection on October 8, 2019. Claimant saw Dr. Dallenbach the next day, October 9. He described "notable improvement" after the injection. Claimant was pleased because Dr. Sparr had said it might take a couple of weeks for the injection to take effect. Contemporaneous notes from the physical therapist also documented significant benefit from the injection.

14. Claimant followed up with Dr. Sparr on October 24, 2019. His back and leg pain were significantly improved after the SI joint injection. His major pain that day was in

the right lateral buttock. He was doing aggressive deep tissue therapy, which had been beneficial. Physical examination findings were improved compared to before the injection. Dr. Sparr administered a trochanteric bursa injection.

15. On December 3, 2019 Dr. Sparr documented Claimant had responded well the injections and was only using ibuprofen once per day. Dr. Sparr switched to meloxicam to reduce the possibility of any adverse GI side effects. Claimant was still having radiating pain down through the buttocks. Dr. Sparr opined Claimant may be a candidate for epidural steroid injections in the future, but "for now," he recommended trigger point injections and aggressive manual therapy.

16. The trigger point injections and therapy were somewhat helpful.

17. At Dr. Sparr's recommendation, Claimant underwent bilateral L3, L4, and L5 medial branch blocks on February 28, 2020. Claimant had a "minimal" diagnostic response, leading Dr. Sparr to conclude that Claimant's primary issue was SI joint dysfunction. He recommended right SI joint lateral branch blocks, to be followed by a rhizotomy if the blocks were successful.

18. The lateral branch blocks were completed on May 15, 2020.

19. On May 28, 2020, Dr. Sparr documented Claimant had an "excellent diagnostic response" to the lateral branch blocks. He opined Claimant's "persistent rather severe lumbosacral pain" was probably related to ongoing SI joint dysfunction. Dr. Sparr thought Claimant was an excellent candidate for SI joint rhizotomy.

20. SI joint rhizotomies were performed on June 23, 2020. At a follow-up with Dr. Sparr on July 7, Claimant reported significant improvement and "very minimal pain" since the procedure. He was participating in physical therapy and massage.

21. Dr. Dallenbach left practice in approximately April or May 2020 and Dr. Anthony Stanulonis took over as Claimant's primary ATP.

22. On July 15, 2020, Claimant told Dr. Stanulonis he was still enjoying significant benefit from the rhizotomies, with only occasional radicular pain in the right leg. However, he was having some radicular symptoms on the left leg with prolonged sitting and standing. Dr. Stanulonis ordered massage therapy.

23. On August 14, 2020, Dr. Stanulonis noted Insurer had delayed authorization for therapy, but Claimant had finally started therapy the day before. Claimant reported less sciatic pain on the right compared to before the rhizotomies, but he was having more radicular symptoms on the left. The leg symptoms were worsened by prolonged standing.

24. Dr. Timothy O'Brien performed an IME for Respondents on October 22, 2020. Dr. O'Brien stated there was "not a shred of objective data to support [Claimant's] representation that an injury occurred." Nevertheless, he opined Claimant suffered a minor lumbosacral strain, which fully resolved within six weeks. He likened Claimant's injury to a paper cut and opined such minor injuries "heal reliably 100% of the time." In

Dr. O'Brien's opinion, further treatment was neither reasonably needed nor causally related to the work accident. Rather, Dr. O'Brien thought Claimant's ongoing symptoms were solely related to pre-existing degenerative changes in his spine. Dr. O'Brien advised Claimant to "assume responsibility for his own level of health," and opined that "Western Medicine" had nothing to offer that could not be better obtained by exercise and weight loss. Dr. O'Brien concluded Claimant was at MMI, with no impairment, no restrictions, and no need for further care.

25. Dr. Stanulonis reviewed Dr. O'Brien's report on November 13, 2020. He disagreed that Claimant had only a minor injury that healed in six weeks. Dr. Stanulonis thought Claimant may benefit from a left SI rhizotomy and a surgical evaluation. He referred Claimant back to Dr. Sparr and referred him to Dr. James Bee, a spine surgeon.

26. Claimant was evaluated by Dr. Bee and Dr. Bee's PA-C, Nathan Carpenter, on November 24, 2020. Claimant described constant pain in his low back and stated, "the longer he stands, moves, or works, it goes down the back of both legs, right leg greater than left, causing him to have difficulty walking and weakness." Examination of the lumbar spine showed diminished muscle tone, pain to palpation, and reduced range of motion. Claimant walked with a "slow, hunched over gait." Strength and sensation were normal bilaterally. X-rays obtained in the office showed disc space collapse at L4-5 and L5-S1, anterolisthesis of L5 on S1 and an "obvious" pars defect at L5-S1. Flexion and extension x-rays showed subtle instability. Dr. Bee wanted a new MRI before making any determination regarding surgery. However, he also noted Claimant's severe obesity "makes surgery difficult." He recommended "intensive weight-loss" and consideration of a gastric bypass.

27. The updated MRI was completed on December 2, 2020. Claimant returned to Dr. Bee on December 9, 2020. The MRI showed similar pathology at L4-5 and L5-S1 compared to the prior MRI. The degenerative changes at other spinal levels were again characterized as "mild." Despite the significant pathology, Dr. Bee advised that, "given his size, moving forward with surgical intervention is really not safe at this point. I think he needs to drop a significant amount of weight in order to make surgery safe." He noted Insurer had declined the referral for a gastric bypass consultation, and advised Claimant to explore the procedure through his PCP. He asked Claimant to return in six months, at which time they could entertain surgical intervention if Claimant were still symptomatic after a significant weight loss.

28. Dr. Stanulonis put Claimant at MMI on January 29, 2021 with a 13% whole person impairment rating. He opined, "[Claimant's] permanent work restrictions should be reevaluated and adjusted one year after any lumbar spinal surgery." He recommended medical treatment after MMI including "any recommended injections, spine surgeon eval and recommendations for lumbar surgery in the next 2 years after significant weight loss." Dr. Stanulonis referred Claimant to Dr. Bissell for ongoing pain management.

29. Claimant had his initial appointment with Dr. Bissell on February 8, 2021. Dr. Bissel noted Claimant's PCP had recently referred him to Dr. Fisher to discuss gastric bypass surgery. Claimant described aching, numbness, pins and needles, and stabbing

pain in his low back radiating into both legs. He explained his back has been painful "ever since" the work accident despite numerous conservative modalities including physical therapy, dry needling, ice, heat, TENS unit, NSAIDs, Tramadol, Biofreeze, and Lidocaine patches. Dr. Bissell prescribed a lumbar brace and several medications.

30. Respondents filed a Final Admission of Liability (FAL) on March 26, 2021. The FAL admitted for medical benefits after MMI. Claimant did not object to the FAL and the claim closed, except for *Grover* medical benefits.

31. Claimant underwent a laparoscopic gastric sleeve surgery on September 30, 2021. Thereafter, he rapidly lost weight. The gastric surgeon documented a 31-pound weight-loss within three weeks of the surgery.

32. Claimant followed up with Dr. Bee on November 3, 2021. He had already put lost 40 pounds since the gastric sleeve surgery. Dr. Bee obtained new flexion-extension x-rays, which showed grade 2 spondylolisthesis and some motion at the L5-S1 level. Dr. Bee reiterated Claimant was "a good candidate for an L4 to S1 anterior posterior [fusion] if indeed he loses weight." He further stated, "[Claimant] is still quite uncomfortable, but I cannot in good conscience recommend surgical intervention for someone who is still north of 300 pounds. I am going to see him back in 6 months. We would have him undergo clearance from Dr. Fisher before looking at an anterior approach."

33. On March 29, 2022, Dr. Fisher documented Claimant had lost 80 pounds. Dr. Fisher cleared Claimant for spine surgery from a gastric standpoint.

34. Claimant returned to Dr. Bee on May 4, 2022. Dr. Bee re-reviewed the imaging studies confirming significant pathology at L4-5 and L5-S1. He determined Claimant had lost enough weight to proceed with surgery. Dr. Bee's office requested preauthorization for and L4-S1 anterior and posterior lumbar fusion with pars repair.

35. Dr. O'Brien performed a record review for Respondents on May 12, 2022. The additional documentation "in no way" altered his previous opinions. Dr. O'Brien reiterated that Claimant suffered "a very minor injury" but returned to his preinjury level of function within six weeks. He opined an L5-S1 fusion was "doomed to fail" because it would not address the widespread degenerative changes at multiple spinal levels. He further stated Claimant had "too many comorbidities for the surgery to be undertaken safely."

36. Claimant had a follow-up IME with Dr. O'Brien on November 7, 2022. He maintained his opinions that the "L5-S1 surgery" recommended by Dr. Bee was neither reasonably needed nor causally related to Claimant's "minor, self-limited, self-healing lumbosacral spine strain sprain."

37. At hearing, Claimant described ongoing low back and leg symptoms. His pain is typically 4-5/10 but increases to 8/10 on "bad days." He described radiating pain, numbness and tingling in his legs, right greater than left. He weighed 275 pounds at the time of hearing. He was still losing weight, but more slowly than in the first several months

after surgery. Claimant described a restricted lifestyle and significant disability because of his symptoms. Claimant's testimony was generally credible.

38. Dr. O'Brien testified in a post-hearing deposition consistent with the opinions expressed in his reports. He continued to misidentify the surgery proposed by Dr. Bee as a "single-level" fusion confined to L5-S1.

39. There is no persuasive evidence of any pre-injury back problems or need for treatment despite performing physically demanding work for many years. Nor is there any persuasive evidence of any preinjury functional limitations related to Claimant's back.

40. Claimant proved his claim should be reopened based on a change of condition. Claimant was put at MMI on January 29, 2021 because he had exhausted conservative options and could not have surgery unless he lost significant weight. Claimant subsequently lost enough weight to become eligible for surgery.

41. Claimant proved the recommended L4-S1 fusion is reasonably needed and causally related to the work accident. Dr. Bee's opinions and recommendations are credible and more persuasive than the contrary opinions offered by Dr. O'Brien. Claimant has completed extensive conservative treatment without sustained improvement. The surgery proposed by Dr. Bee will address the two most damaged spinal levels, which are probably the primary pain generators. The presence of "mild" degenerative changes at higher levels does not preclude surgery to address the more severe pathology. Flexion-extension x-rays have shown some evidence of instability, which is another indication for a fusion. Regarding the "safety" of surgery, the ALJ credits the opinions of Dr. Bee, who owes Claimant a duty of care as a treating physician, over those of Dr. O'Brien. The argument that Claimant's injury was "minor" and resolved within six weeks is not persuasive. Claimant's preinjury baseline condition was an asymptomatic (or minimally symptomatic) back that required no treatment and caused no functional limitations. By contrast, Claimant has remained continuously symptomatic since the accident and has become disabled from his customary occupation. The work accident substantially aggravated the preexisting degenerative changes in Claimant's spine, requiring treatment, including surgery.

CONCLUSIONS OF LAW

A. Reopening

Section 8-43-303 authorizes an ALJ to reopen any award based on a change in condition. A "change in condition" refers either to a change in the condition of the original compensable injury, or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. The claimant must prove a basis to reopen by a preponderance of the evidence. Section 8-43-304(4).

As found, Claimant proved his claim should be reopened based on a change of condition. Claimant was put at MMI on January 29, 2021 because he had exhausted conservative options and could not have surgery unless he lost weight. Dr. Stanulonis explicitly contemplated future surgery at the time of MMI if Claimant could get his weight down. Claimant subsequently lost enough weight that he became eligible for back surgery. Although Claimant's longstanding obesity was not directly caused by the work accident, it is enmeshed with his claim because it was the reason he could not pursue the otherwise reasonably necessary surgery before being placed at MMI.[1] Now that the impediment to surgery has been removed, it is appropriate to reopen the claim and allow Claimant to proceed with Dr. Bee's recommendation.

B. Reasonable necessity and causal relationship of surgery

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if it the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019).

Claimant proved the recommended surgery is reasonably needed. Dr. Bee's opinions and recommendations are credible and more persuasive than the contrary opinions of Dr. O'Brien. Claimant has completed extensive conservative treatment including PT, massage, medications, trigger point injections, steroid injections, and rhizotomy. He also underwent bariatric surgery and lost considerable weight. None of these modalities have resolved or substantially improved his symptoms or functional capacity. It is therefore reasonable to conclude that nothing short of surgery has a reasonable prospect of success. Although there is no guarantee surgery will improve his condition, it is an appropriate option at this point given the failure of lesser interventions and the persistence of his disabling symptoms. Dr. O'Brien is correct that a single-level fusion at L5-S1 would not adequately address all significant pain generators in Claimant's

[1] The gastric sleeve treatment could potentially have been covered under the claim as necessary to allow Claimant to pursue treatment for the work injury. *E.g., Public Service Co. v. Industrial Claim Appeals Office*, 979 P.2d 584 (Colo. App. 1999). But the fact that Claimant pursued the weight loss treatment outside the claim does not alter the inherent causal connection.

spine. That is why Dr. Bee is recommending a *two-level fusion* at L4-S1. Even though Claimant has “mild” degenerative changes at the lower thoracic and upper lumbar levels, it makes sense to target the two worst levels, which are probably responsible for Claimant's leg symptoms. Additionally, Dr. Bee noted some evidence of instability on flexion-extension x-rays, which is another indication for a fusion. Regarding the “safety” of surgery, the ALJ credits the opinions of Dr. Bee, who owes Claimant a duty of care as a treating physician, over those of Dr. O’Brien.

Claimant also proved the surgery is causally related to the work injury. Dr. O’Brien’s argument that Claimant’s injury was “minor” and resolved within six weeks is not credible. Claimant’s preinjury baseline condition was an asymptomatic (or minimally symptomatic) back that required no treatment and caused no functional limitations. By contrast, Claimant has remained continuously symptomatic since the accident and has become disabled from his customary occupation. The notion that his back pain became suddenly disconnected from the work injury within six weeks, based on generic assumptions about when an injury of this “should” heal, is not persuasive. Nor is such a scenario consistent with the other persuasive medical and lay evidence in the record. The work accident substantially aggravated and accelerated the preexisting degenerative changes in Claimant’s spine, requiring treatment and ultimately surgery.

ORDER

It is therefore ordered that:

1. Claimant's Petition to Reopen is granted.

2. Insurer shall cover the L4-S1 fusion surgery recommended by Dr. Bee.

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(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 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: February 27, 2023

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