OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-074-200-007

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. Claimant's entitlement to disfigurement benefits.

FINDINGS OF FACT

1. Claimant sustained an admitted work-related injury on April 5, 2018 when a brake rotor fell out of a box and landed on her left foot while working for Employer.

2. After substantial treatment, Claimant was diagnosed with complex regional pain syndrome. Claimant was placed at maximum medical improvement (MMI) on January 19, 2019, and assigned a 25% permanent impairment rating by her authorized treating physician. Respondents requested a Division Independent Medical Examination (DIME), which was performed by Justin D. Green, M.D., on April 29, 2019. Dr. Green initially assigned Claimant a 25% whole person impairment, and agreed with the ATP's MMI date of January 19, 2019. (See Ex. D).

3. Respondents then filed an application for hearing challenging the DIME's impairment rating. Claimant filed a response to the application for hearing seeking permanent total disability benefits. Respondents obtained surveillance video of Claimant on multiple dates in November 2018, December 2018, January 2019, and June 2019. taken in November which showed Claimant standing and walking for hours with no apparent difficulty. The surveillance video was inconsistent with Claimant's representations to her treating providers and the DIME physician related to her ability to walk and stand, and her representations that she required the constant use of a cane. Respondents took Dr. Green's deposition on April 28, 2020, after he had the opportunity to review the surveillance videos. After reviewing the available information, Dr. Green amended his permanent impairment rating, and assigned Claimant a 10% whole person impairment rating. (See Ex. D).

4. Following a hearing on Respondents' application for hearing, ALJ Patrick Spencer issued an Summary Order dated December 20, 2020, in which Respondents' request to set aside the DIME's 10% whole person impairment rating was denied. He ordered Insurer to pay Claimant's PPD benefits based on a 10% whole person impairment rating, and permitted Insurer to take credit for any temporary disability benefits paid after Claimant reached MMI on January 9, 2019. ALJ Spencer also denied Claimant's claim for permanent total disability benefits. (Ex. E).

5. On December 23, 2020, Respondents filed a Final Admission of Liability (FAL) consistent with ALJ Spencer's Order, and asserted an overpayment in the amount of $23,189.22. (Ex. C).

6. On December 27, 2020, the ALJ issued a full Findings of Fact, Conclusions of Law, and Order (FFCL), consistent with his December 20, 2020 Summary. (Ex. D)

7. Claimant was entitled to receive temporary total disability benefits from April 6, 2018 through May 31, 2018 in the amount of $3,844.40, and temporary partial disability benefits from June 1, 2018 through January 8, 2021, in the amount of $12,086.69. Based on her 10% whole person impairment rating, Claimant was entitled to permanent partial disability benefits in the amount of $19,222.00. Respondents paid Claimant indemnity benefits in the amount of $58,342.31. Thus, Claimant received an overpayment of $23,198.22 representing benefits to which she was not entitled.

8. Claimant is 72 years-old and currently unemployed. Her sole source of income is monthly social security benefits, paid at the rate of $1,782.00 per month. Claimant lives with her adult son and his family in South Carolina. Claimant testified her monthly expenses total approximately $1,650 per month. Claimant testified that her monthly expenses include $625 and $175-$200 in utilities she pays to her son.

9. Claimant submitted Exhibits 13 and 14, which are her bank statements from October 2021 through August 2022. Claimant's bank statements are consistent with her testimony, with several notable exceptions. Specifically, Claimant's bank statements do not reflect rent and utility payments she testified she pays to her son. Claimant's bank statements show no direct payments to her son and reflect cash withdrawals from ATMs averaging $302.00 per month . Although Claimant testified she gets cash from Walmart when she makes purchases to pay her son, the amounts spent at Walmart and her ATM withdrawals are not sufficient to cover Claimant's rent and utilities, and also the $140 per month she testified she spends at Walmart. Claimant's bank statements show she spends an average of $510.00 per month at Walmart. The ALJ finds, more likely than not, that Claimant does not pay rent or utilities in the amounts she to which she testified. Claimant has approximately $660.00 in monthly expenses for credit cards, insurance, cell phone, and health expenses. In addition, based on her testimony, Claimant incurs expenses for food, fuel, and other necessities on a monthly basis of approximately $350.00. The ALJ does not find credible Claimant's assertion that she would be required to forego basic necessities such as health care, food, fuel, or transportation if she were required to make repayment of any amount.

10. As the result of her injury, Claimant has sustained disfigurement of her left foot, including a visibly lower arch, visible atrophy and visible discoloration of her left foot compared to her right. The condition of Claimant's left foot is a disfigurement sustained as a direct and proximate result of her April 5, 2018 work injury.

CONCLUSIONS OF LAW

Generally

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

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

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

Disfigurement

Section 8-42-108(1), C.R.S., provides that a claimant is entitled to additional compensation if she is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained disfigurement as a direct and proximate result of her April 2018 work injury. Claimant is awarded $850.00 for disfigurement.

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 the Matter of the Claim of Robert D. Scott, Claimant*, W.C. No. 4-777-897, (ICAO Oct. 28, 2009). Respondents have established by a preponderance of the evidence that Claimant received $23,189.22 in disability benefits to which she was not entitled. Accordingly, Respondents are entitled recover from Claimant the overpayment of $23,189.22.

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. Industrial 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).

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[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 on an Application for Hearing filed on December 13, 2021, and payments and events that occurred 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).

Respondents may offset their liability for Claimant's disfigurement award against the existing overpayment. Claimant contends, without support, that "[d]isfigurement benefits are identified as medical benefits," and as such may not be offset against an overpayment of indemnity benefits. Claimants are entitled to medical benefits to "as may reasonably needed at the time of injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury." §8-42-101(1)(a), C.R.S. In contrast, disfigurement compensation is "additional compensation" available to injured employees who are "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view, and are in addition to all other compensation benefits …." § 8-42-108 (1), C.R.S. Thus, medical benefits and disfigurement compensation are available to claimants under different circumstances and are thus separate and distinct. Consequently, "a respondent may offset their liability for [a] disfigurement award … against [an] existing overpayment." *In re Claim of Peoples*, W.C. No., 4-819-262-113 (ICAO Oct. 24, 2018).

As found, Claimant is awarded $850.00 for her disfigurement. Respondents may offset this amount against the overpayment Claimant received, leaving a balance of $22,339.22 (*i.e.*, $23,189.22 - $850.00 = $22,339.22).

As found, Claimant's monthly income is $1,782.00 per month, and derived solely from social security benefits. Claimant's argument that she would be forced to forego food, fuel, transportation, or medical care if required to make repayment is unavailing. Claimant's monthly expenses, as documented in her bank statements average $1,781 per month. Of this amount, Claimant has fixed monthly expenses for car insurance, cell phone, credit card payments and loans totaling $659.95 per month. Claimant also spends an average of $510.51.65 at Walmart, and incurs approximately $150 per month in bank "safety net" charges and ATM service charges. Claimant's testimony that she pays $625.00 per month in rent to her son, and pays $175-200 per month in utilities is not credible, given that such payments cannot be accounted for in her bank statements.

Nonetheless, the ALJ concludes requiring Claimant to make substantial payments would impose a financial hardship. The ALJ concludes that Claimant is able to make monthly payments of $50 per month without sustaining significant financial hardship.

ORDER

It is therefore ordered that:

1. Claimant is awarded disfigurement in the amount of $850. Claimant's disfigurement award is credited against Respondents' overpayment of $23,198.22.

2. Claimant received an overpayment in the amount of $23,189.22, after credit for Claimant's disfigurement award, Respondents are entitled to repayment of $22,339.22.

3. Claimant shall repay the overpayment balance of $22,339.22 at the rate of $50.00 per month.

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

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

DATED: December 1, 2022

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 5-210-972-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on Jun 24, 2022.

2. Whether Claimant established by a preponderance of the evidence an entitlement to a general award of medical benefits reasonable and necessary to cure or relieve the effects of an industrial injury.

3. Whether Claimant established by a preponderance of the evidence that medical treatment received on June 29, 2022 and June 30, 2022 at UC Health and Advanced Medical Imaging was reasonable and necessary to cure or relieve the effects of an industrial injury.

FINDINGS OF FACT

Procedural History

1. The ALJ takes judicial notice of the following procedural history based on Office of Administrative Courts records and files. See *Habteghrgis v. Denver Marriott Hotel*, W.C. No. 4-528-385 (ICAP, March 31, 2006) ("A court can take judicial notice of its own records and files."):

   a. On July 29, 2022, Claimant filed an Application for Hearing in this matter, identifying as issues for consideration compensability, medical benefits, authorized provider, reasonably necessary and temporary disability benefits. The Application for Hearing was mailed to Employer at 390 Union Blvd., Lakewood, CO 80228. The Application for Hearing was not served on insurer because Employer had not identified an insurer. Respondents did not file a Response to the Application for Hearing.

   b. On August 11, 2022, the Office of Administrative Courts mailed a Notice of Hearing to Employer at 390 Union Blvd., Lakewood, CO 80228, which advised the parties that hearing was scheduled for November 17, 2022, at 1:30 p.m.

   c. Respondents did not respond to the Notice of Hearing, and have not appeared or otherwise filed any documents with the Office of Administrative Courts.

2. On July 19, 2022, Claimant, through counsel, submitted a Worker's Claim for Compensation and counsel's entry of appearance to the Division of Workers' Compensation. (Ex. 2, p. 9-12).

3. On September 6, 2022, Insurer sent Claimant a letter listing Employer, the alleged date of injury (6/24/22), a claim number assigned to Claimant's claim, and identifying an insurance carrier. (Ex. 2, p. 5).

4. Also on September 6, 2022, the Division of Workers' Compensation sent a letter to the identified insurance carrier notifying the carrier that a position statement either admitting or denying liability was required to be filed within 20 days of the Division receiving notice of Claimant's claim. (Ex. 2, p. 6).

5. On November 3, 2022, Claimant, through counsel, sent a letter to Insurer providing a copy of Claimant's Worker's Claim for Compensation dated July 19, 2022; Claimant's July 29, 2022 Application for Hearing, Claimant's Hearing Confirmation Notice, the August 11, 2022 Notice of Hearing, and copies of medical bills. (Ex. 2, p. 8).

6. On November 11, 2022, Claimant, through counsel, filed her Case Information Sheet in this matter, and served a copy on Insurer at P.O. Box 6569, Scranton, PA 18505-6569. (Ex. 5, p. 32).

7. Respondents did not appear for hearing on November 17, 2022.

Relevant Historical Facts

8. On June 24, 2022, while working as a security guard for Employer, Claimant was involved in an accident when a deer collided with her work vehicle. The collision caused the airbags in the vehicle to deploy, striking Claimant.

9. As a result of the June 24, 2022 accident, Claimant sustained injuries to her neck, upper back, and lower back. Claimant timely reported the accident and her injuries to her supervisor at Employer. Claimant's injuries arose out of the course of Claimant's employment with Employer and are, therefore compensable.

10. When Claimant's symptoms did not improve, Claimant sought medical treatment at UC Health on June 29, 2022. Claimant's treatment included evaluations at UC Health and an MRI. As a result of the treatment, Claimant incurred medical bills of $4,752.67 for treatment at UC Health on June 29, 2022, $16,408.22 at UC Health on June 30, 2022, and $564.00 at Advanced Medical Imaging on June 30, 2022. (Ex. 1).

11. The medical treatment Claimant received was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

12. Respondents have not paid for Claimant's medical treatment.

13. Claimant credibly testified at hearing that she sustained injuries to her neck, upper back, and lower back as the result of the June 24, 2022 accident, and that she received

medical treatment at UC Health and an MRI on June 29, 2022 and June 30, 2022. Claimant further credibly testified that she has incurred the medical expenses identified above as the result of her industrial injury.

CONCLUSIONS OF LAW

Generally

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

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

<u>Compensability</u>

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). 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*, WC 4-898-391-01, (ICAO Aug. 25, 2014).

Claimant has established by a preponderance of the evidence that she sustained injuries to her neck, upper back, and lower back arising out of the course of her employment with Employer on June 24, 2022 when she her work vehicle collided with a deer causing the airbags to deploy. Claimant's testimony was credible and unrebutted.

Medical Benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Claimant has established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits designed to cure or relieve the effects of her industrial injury. Claimant credibly testified that she sustained injuries arising out of her June 24, 2022 work accident, and that she has received medical treatment directed at those injuries.

Claimant has further established by a preponderance of the evidence that the treatment she received at UC Health and Advanced Medical Imaging, on June 29, 2022 and June 30, 2022, was reasonable and necessary to cure or relieve the effects of her industrial injury. Respondents shall pay the outstanding medical expenses incurred pursuant to the workers' compensation fee schedule.

ORDER

It is therefore ordered that:

1. Claimant sustained compensable injuries to her neck and back arising out of the course of her employment with Employer on June 24, 2022.

2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's June 24, 2022 injuries.

3. Respondents shall pay the medical expenses incurred by Claimant for treatment at UC Health and Advanced Medical Imaging on June 29, 2022 and June 30, 2022, pursuant to the workers' compensation fee schedule.

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

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

DATED: December 5, 2022

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 5-161-321-003

ISSUES

1. Whether Claimant established by a preponderance of the evidence grounds for reopening her claim.

2. If Claimant established grounds for reopening, whether Claimant established by a preponderance of the evidence an entitlement to temporary disability benefits and medical benefits.

FINDINGS OF FACT

1. On December 27, 2020, Claimant sustained admitted injuries arising out of the course of her employment with Employer while assisting a nursing home resident that slipped and fell.

2. On January 4, 2021, Claimant began treatment with David Frank, M.D., for a sprain of the lumbar spine and pelvis. Dr. Frank's evaluation and treatment included a lumbar MRI, and physical therapy. The lumbar MRI, performed on February 4, 2021, showed degenerative disc disease at L5-S1, mild facet arthrosis at L4-5, and L5-S1, an no spinal canal or neuroforaminal stenosis. (Ex. A). On February 10, 2021, Dr. Frank reviewed the MRI and characterized it as showing "no major pathology." Between February 45, 2021 and March 26, 2021, Claimant attended multiple physical therapy visits to address back pain until. (Ex. B).

3. On April 21, 2021, Claimant underwent an MRI of the cervical spine which showed no disc herniation, no significant disc degeneration, spinal canal or foraminal stenosis. (Ex. A).

4. On May 24, 2021, Dr. Frank placed Claimant at maximum medical improvement (MMI), indicating Claimant had sustained no permanent impairment, did not require permanent work restrictions, and did not require maintenance medical treatment. (Ex. B).

5. After being placed a MMI, Claimant saw a Dr. Pehler on June 14, 20221. Dr. Pehler's impression was spondylosis with radiculopathy of the lumbar region and bilateral neck pain. He indicated Claimant's clinical findings were out of proportion to imaging findings and there was no evidence of significant neural compressive pathology to the cervical or lumbar spine. He noted a very mild disc herniation at the L4-S1 level, but no evidence of cervical pathology. Dr. Pehler referred claimant to physical therapy and for steroid injections. The record does not reflect whether Claimant received either additional

physical therapy or steroid injections. (Ex. A).[1] No evidence was presented to indicate that Dr. Pehler was an authorized treating physician or a referral from an authorized treating physician.

6. On July 12, 2021, Claimant underwent a lumbar MRI which showed an L5-S1 left paracentral disc protrusion with annular fissure, no central stenosis, and L5-S1 facet arthropathy producing minimal bilateral neuroforaminal narrowing. (Ex. A).[2] No credible evidence was admitted indicating any physician attributed Claimant's MRI findings to her December 27, 2020 work injury.

7. On November 4, 2021, Claimant underwent a Division Independent Medical Examination (DIME), performed by Kathy McCranie, M.D. Dr. McCranie agreed with Dr. Frank that Claimant was at MMI on May 24, 2021, and that Claimant did not qualify for an impairment rating of the cervical, thoracic, or lumbar spine. She opined that although Claimant continued to report symptoms after being placed at MMI, there was no clear objective basis for her continued symptoms, and the findings at her DIME examination were inconsistent and out of proportion to the objective findings of every provider. She noted that although a lumbar MRI showed some minor findings, there was no indication the pathology shown on the MRI was the cause of her symptoms. Dr. McCranie further noted that Claimant did not require maintenance care or work restrictions. (Ex. A).

8. On December 29, 2021, Respondents filed a Final Admission of Liability (FAL), admitting for medical treatment only and consistent with Dr. McCranie's DIME report (*i.e.*, MMI date of May 24, 2021, and no impairment rating). (Ex. F). Claimant did not seek to overcome Dr. McCranie's DIME opinion.

9. Claimant testified at hearing that she is seeking to reopen her case to obtain medical care and temporary disability benefits. She testified that she has continued pain in her back, neck and from her head to her feet. Claimant did not offer any credible evidence that her condition has changed or worsened since being placed at MMI.

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

[1] No records from Dr. Pehler were offered or admitted into evidence. The only evidence of his examination of Claimant is the summary contained in the DIME physician's report. (Ex. A).
[2] The only record of the MRI offered or admitted into evidence is the summary contained in the DIME physician's report. (Ex. A).

the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

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

REOPENING FOR CHANGE IN CONDITION

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving her condition has changed and that she is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Indus. Comm'n*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO Oct. 25, 2006). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Constr. Co.,* 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO July 19, 2004).

Claimant has failed to establish by a preponderance of the evidence that she sustained a change in condition causally connected to her original work injury of December 27, 2020. Claimant's claim was closed pursuant to the Final Admission of Liability filed on December 29, 2021. Claimant presented no credible evidence establishing her condition has changed. Claimant testified she wished to reopen her claim to obtain temporary disability benefits and additional medical care, but offered no credible evidence in support of that claim, other than stating that she continues to experience pain throughout her body. Because Claimant has failed to meet her burden of establishing a change in condition causally related to her December 27, 2020 work injury, the ALJ finds no basis for reopening Claimant's claim.

Because Claimant has failed to establish a basis for reopening her claim, her claims for temporary disability benefits and medical benefits are denied as moot.

ORDER

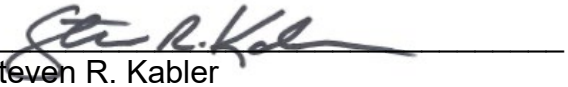
It is therefore ordered that:

1. Claimant's request to reopen her workers' compensation claim based on a change of condition is denied and dismissed.

2. Claimant's request for temporary disability benefits and medical benefits are denied and dismissed.

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

DATED: December 6, 2022



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 5-200-690-001

ISSUES

1. Whether Respondents established by a preponderance of the evidence that Claimant did not sustain an injury arising out of the course of his employment with Employer on or about February 17, 2022.

2. If Claimant's injury is compensable, whether Claimant has established by a preponderance of the evidence entitlement to temporary disability benefits.

3. If Claimant's injury is compensable, determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant worked for Employer as a courier delivering packages from Denver International Airport to end customers. As part of his job responsibilities, Claimant was required to sort packages of varying weights, with occasional packages weighing up to seventy pounds. Claimant was then required to load packages into his delivery vehicle, and deliver the packages to end customers.

2. On February 17, 2022, Claimant was performing his normal job duties for Employer. That morning, Claimant clocked in at 8:02 a.m., and clocked out at 9:02 a.m. Employer's records for that day include a notation that Claimant "went home with back pain." (Ex. 7). No evidence was offered to establish who placed the notation in Employer's records. That day, Claimant informed his supervisor, [Redacted, hereinafter KR], that he was experiencing back pain, but did not communicate to KR[Redacted] that he sustained a work-related injury, or that the back pain was the result of lifting a package at work. Claimant was not provided with a list of designated providers and Employer did not initiate the process of starting a workers' compensation claim.

3. Later that day, Claimant saw chiropractor David Estis, D.C. Dr. Estis' record (Ex. J) for February 17, 2022, states:

February 17, 2022

S: The patient states that a mild pain in the lower back region is present today with knots and tightness in the muscles around the neck, shoulders, and back area. Symptoms are consistent with the patient's chief complaint.
O: Decrease range of motion is noted in multiple areas of the spine along with edema and hyper tonicity of the surrounding soft tissue and musculature.
A: The patient had restrictions in the cervical, thoracic, and lumbar spine causing nerve pressure which results in today's reported complaints.
P: The patient received a chiropractic adjustment to the cervical, thoracic, and lumbar spine with mechanical traction as well as manual traction of the occiput. The purpose of the adjustment is to reduce subluxation and segmental dysfunction throughout the spine. The traction helps the patient to sustain their chiropractic adjustment as well as restoring range of motion while decompressing the spine. Heat therapy was recommended for 15-20 minutes at home to help increase circulation to provide protein, nutrients, and oxygen to aid in healing.

4. During the evening of February 17, 2022, Claimant sent a text message to his supervisor KR[Redacted], stating: "Yea my back is really hurt I'm gonna be off tomorrow to see my doctor if you can pls give me ur email so i can send u the proper paperwork." (Ex. 8).

5. Claimant returned to Dr. Estis on February 18, 2022, and five additional times until March 7, 2022. Dr. Estis SOAP notes for Claimant's seven visits from February 17, 2022 and March 7, 2022, are identical with two exceptions. On February 24, 2022, and March 3, 2022, in addition to repeating the identical SOAP note for February 17, 2022, Dr. Estis included a second "SOAP" note which states:

February 24, 2022

S: low back px
O: Tx i n erectors, qls, hamstrings and gastrocs, adhesions along iliac crest, gastrocs, qls, hamstrings

A: deep tissue, injury work, stretcehd legs, fbm

P: 3-4 wsk

The additional SOAP note entry for March 3, 2022 is identical to the February 24 ,2022 note, and includes the same typographical errors and misspellings. (Ex. J).

6. Although Dr. Estis' February 24, 2022 and March 3, 2022 records include the words "injury work" in the "assessment" section of his notes, no credible evidence was admitted explaining the meaning of the entry.

7. Claimant had previously seen Dr. Estis thirty-three times for vaguely defined back pain between January 4, 2019 and November 14, 2019. As with his notes in 2022, Dr. Estis' records during 2019 contain little to no specific information regarding Claimant's condition, and consist of a few different boilerplate templates for each section of the SOAP notes repeated multiple times throughout his thirty-three visits without modification.

8. With the exception of including the second "SOAP" note on February 24, 2022 and March 3, 2022 records, Dr. Estis' records for Claimant's treatment on and after February 17, 2022 are verbatim repetitions of Claimant's treatment note from September 25, 2019.

The ALJ finds Dr. Estis' records to be of little evidentiary value, other than reflecting Claimant attended chiropractic visits for ill-defined back issues.

9. On February 20,2022, Claimant texted KR[Redacted] again, stating: "I sent u the X-rays and the doctors note I won't be in until I'm cleared I'm getting another X-ray Wednesday to see the progress but I will be going in tomorrow to fill out any paperwork I need to for workers comp." (Ex. F). KR[Redacted] responded: "I got the letter sending to the head office." (Ex. F). (No credible evidence was offered or admitted identifying the "letter" referenced in KR[Redacted]'s text).

10. On February 22, 2022, Claimant texted KR[Redacted] again stating: "Hey I wanna go in today to fill out any paperwork I need to for the workers comp what time u think would be good for me to head over that u guys aren't too busy?" (Ex. F). KR[Redacted] responded: "Between 1pm and 2pm." (Ex. F).

11. On February 22, 2022, Claimant provided Employer with "Courier Statement of Accident," in which he described his injury and accident as follows:

> During the morning sort I attempted to load a package, that was labeled as 26kg, onto my van. As it was an oversized package I did my best to pick it up using a proper posture but as I lifted the item up I felt a jolt of pain run down my leg. At that point I set it back down and informed my supervisor that it was too heavy to lift." (Ex. E).

12. Also on February 22, 2022, Employer's operations manager, [Redacted, hereinafter MA] completed an Accident Report, in which it is stated: "He says it was due to picking up heavy packages[.] That statement is disputed by the supervisor who says he was told previously by [Claimant] that he hurt his back helping his mother-in-law on his time off of work." (Ex. E).

13. On March 8, 2022, Claimant saw Kristina Robinson, M.D., at Concentra. Claimant reported he was at work and lifted a heavy box into his van resulting in a back injury. Clamant reported that he felt pain and numbness into his left knee, and that his symptoms had not improved. He denied any further numbness or tingling in his extremities. Dr. Robinson documented tenderness in the left paraspinal muscles, full range of motion with painful flexion, and an equivocal straight leg raise test. She diagnosed Claimant with lumbar strain. She and prescribed a muscle relaxant. In addition, Dr. Robinson referred Claimant for physical therapy. Dr. Robinson assigned Claimant work restrictions including limiting lifting to twenty pounds. (Ex. 3).

14. On March 15, 2022, Claimant, through counsel, submitted a Workers' Claim for Compensation, indicating Claimant had sustained a low back injury on February 15, 2022, while "lifting heavy boxes off a truck and felt pain in back." (Ex. A).

15. Claimant returned to Concentra on March 16, 2022, and saw Paul Schadler, M.D. Claimant reported he had been attending physical therapy and noted a "marked reduction in pain and improved function," although he was stiff and had intermittent pain after activating. He reported pain in the left posterior buttocks shooting into his posterior leg at

times, without numbness, tingling or weakness. Dr. Schadler's only relevant objective finding was tenderness in the left paravertebral muscle and SI joint. He revised Claimant' work restrictions to include a 30-pound lifting limit, no kneeling, squatting, or climbing. (Ex. G).

16. Claimant saw Dr. Schadler again on March 23, 2022, reporting he felt he had pulled a muscle while doing stretches. Claimant reported that he had been pain free, gut after a physical therapy session he had a flare of pain with radicular symptoms. Dr. Schadler diagnosed Claimant with a lumbar strain and lumbar radiculitis. (Ex. G).

17. On April 12, 2022, Respondent filed a General Admission of Liability, admitting for medical treatment only. (Ex. 1).

18. On June 13, 2022, Claimant saw Kristin Mason, M.D., at Rehabilitation Associates of Colorado. Claimant reported he had injured his back while trying to lift a package from the ground that was heavier than he expected, and felt sharp pain in his lower back which shot into his left leg. Claimant indicated that he continued to work that day, and eventually contacted his supervisor after the pain started to radiate more significantly. Claimant reported his care to date had been through Concentra and that he had no prior history of low back injury or pain, (omitting his history of seeing Dr. Estis). Claimant reported that he was working for Employer doing alternate duty sorting packages, but indicated the conveyor belt was "a little too low for him." Dr. Mason performed a physical examination, and opined that Claimant's reported mechanism of injury and exam were most suggestive of a discogenic pain generator, most likely L5-S1. Dr. Mason recommended Claimant see a different non-Concentra physical therapist, and continue chiropractic care within Concentra with Dr. Mobus. (No records from Dr. Mobus were offered or admitted into evidence). She also referred Claimant for a lumbar MRI. She assigned work restrictions to include a 40-pound lifting/carrying limit, and repetitive lifting to twenty-five pounds. (Ex. 4).

19. On June 17, 2022, Claimant had an MRI at SimonMed Aurora. The MRI showed a focal age-indeterminate disc protrusion at the L5-S1 level, compressing the left S1 nerve root. (Ex. I).

20. Claimant returned to Dr. Mason on August 4, 2022, reporting a pain level of 2./10, and that his back was much better with chiropractic care and physical therapy. He reported only experiencing pain in the left buttock. Dr. Mason indicated Claimant remained off work at that time, but was still subject to the same work restrictions (i.e., 40-pound lifting/carrying; 25-pound repetitive lifting; 60-pound pushing/pulling; no crawling, kneeling, squatting, or climbing). (Ex. H). No credible evidence was offered to determine whether Claimant's work restrictions have been further modified since August 2022.

21. KR[Redacted] was Claimant's supervisor and testified at hearing. KR[Redacted] testified that Claimant phoned him the week before February 14, 2022 and reported that he injured his back while out of town at his mother's house, and that he would not be able to come to work because he needed to rest his back. KR[Redacted] could not recall the date of the conversation, and indicated that Claimant later texted him an informed him

that he could not work due to a fever. He credibly testified that Claimant informed him on February 17, 2022 that his back hurt, but did not indicate that the injury was work-related. KR[Redacted] credibly testified that had Claimant notified him of a work-related injury on February 17, 2022, he would have investigated the claim by taking a picture of the package and shown it to his manager, and also would have provided Claimant with workers compensation paperwork before Claimant left that day.

22. Claimant texted KR[Redacted] on Monday February 14, 2022 indicating he had a fever and would not be coming to work. (Ex. F). On February 15, 2022, Claimant again texted KR[Redacted] and informed him that he would be returning to work on February 16, 2022. (Ex. F).

23. At hearing, Claimant testified that he injured his back attempting to load a package into a van. Claimant testified that he informed both KR[Redacted] and another supervisor, [Redacted, hereinafter DR], that he was injured on February 17, 2022. In rebuttal testimony, Claimant testified that although he hurt his back, he continued to load his truck and made two deliveries before returning to Employer's facility. Claimant's testimony was not consistent with his time records showing he worked one hour on February 17, 2022.

24. Claimant testified that following his injury, he was placed on a modified duty job, working as a dock worker. Claimant testified that he was told not to return to work for Employer after July 3, 2022. At some point, Claimant began a part-time job as a "promoter" handing out pamphlets and t-shirts at Broncos games earning $25.00 per hour, but has not returned to full-time employment. Claimant did not testify as to the date he began such work.

25. Claimant provided interrogatory responses indicating he had traveled to Florida from late February 11, 2022 until late on February 14, 2022. Claimant testified that his interrogatory responses were not accurate, that he had traveled during February 2022, but was not sure of the weekend he traveled. Claimant testified he assumed he traveled from February 11 to 14, and assumed that was why he was not at work on February 14 and 15. Claimant's testimony was not credible. Exhibit E is Claimant's time record for February 1, 2022 to February 17, 2022, and shows Claimant did not have two consecutive days off prior to February 11, 2022, during which travel to Florida would have been feasible. (See Ex. E). Notwithstanding, even if Claimant did travel to Florida, the timing of his Florida trip is inconsistent with KR[Redacted] testimony that Claimant contacted him the week before February 14, 2022 and reported he injured his back while out of town.

26. Claimant testified that he did sustain an injury to his shoulder helping his mother move a chair, but that the injury occurred in December 2021, and he missed two days of work due to that injury.

27. MA[Redacted] is employer's station operation manager who oversees Employer's operations at its Denver location. MA[Redacted] testified that his first interaction with Claimant after February 17, 2022 was between February 20 and 22, 022. He testified that Claimant informed him on February 22, 2022 that he injured is back picking up a package on the job. MA[Redacted] provided Claimant with a list of designated providers.

MA[Redacted] prepared the February 22, 2022 Accident Report based on information provided by Claimant and KR[Redacted]. MA[Redacted] testified that Claimant was provided with modified duty based on the restrictions provided by his doctors, and that Claimant performed modified duty for a couple of months. Claimant has not returned to full duty work with Employer.

28. [Redacted, hereinafter JH] is Employer's general manager, and he oversees Employer's operations at multiple locations in eleven states. JH[Redacted] testified that in on July 12, 2022, he recommended that Claimant "go home and convalesce" and that he did not see any benefit to providing Claimant with additional light duty work. He testified that Claimant's final date of employment with Employer was on July 12, 2022.

29. The parties stipulated that if Claimant's average weekly wage at the time of injury was $947.91.

30. Following his injury, Claimant continued to work for Employer in a modified capacity at reduced hours until July 12, 2022. For the twenty weeks from February 18, 2022 until July 12, 2022, Claimant earned $6,499.87 in wages. Claimant's AWW for this twenty-week period totals $18,958.20, resulting in a wage loss of $12,458.33. Claimant is entitled to temporary partial disability (TPD) benefits during this period of $8,305.55. After JH[Redacted] terminated Claimant's modified duty position, Claimant began working as a promoter earning $25.00 per hour. The evidence is insufficient to determine the date Claimant began such work, the dates Claimant worked, or the wages earned as a promoter.

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 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).

Withdrawal of Admission

When respondents attempt to modify an issue previously determined by an admission, they bear the burden of proof for the modification. § 8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School Dist.*, W.C. No. 4-702-144 (ICAO June 5, 2012); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to § 8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hosp.*, W.C. No. 4-754-838-01 (ICAO Oct. 1, 2013). Respondents must, therefore, prove by a preponderance of the evidence that the Claimant did not suffer a compensable injury as defined under Colorado law. § 8-43-201(1), 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).

A compensable injury is one that arises out of the course and scope of employment with one's 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 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 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 question of whether the requisite causal connection exists is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc.,* W.C. No. 4-588-675 (ICAO Sept. 1, 2006

Respondents have failed to establish by a preponderance of the evidence sufficient grounds to withdraw their General Admission of Liability. Claimant's contemporaneous time records from February 17, 2022 document that Claimant left work complaining of back pain. When Claimant saw an ATP at Concentra, he was diagnosed

with a lumbar strain, and consistent with the mechanism of injury Claimant reported. Claimant's reports to providers were generally consistent, in that he reported back pain with pain shooting down his left thigh while loading a package onto a truck. Although some providers documented slightly different descriptions of the mechanism of injury, the ALJ finds that such discrepancies are trivial in nature and do not establish that Claimant did not sustain an injury or aggravate a pre-existing condition.

It is undisputed Claimant reported to KR[Redacted] that he was experiencing back pain on February 17, 2022. However, more likely than not Claimant did not advise KR[Redacted] the injury was work-related until February 22, 2022, when he completed the accident report. While the failure to immediately report the injury as work-related casts some doubt on the veracity of Claimant's claim, it does not make it more likely than not that Claimant did not sustain an injury or aggravate a pre-existing condition.

KR[Redacted]'s testimony that Claimant reported injuring his back while helping his mother-in-law while off work is insufficient to establish by a preponderance of the evidence that Claimant did not sustain a work-related back injury. KR[Redacted] testified that he spoke to Claimant the week before February 14, 2022, reported injuring his back, and indicated he would be missing time from work to recover. If, as Respondents contend, Claimant injured his back while in Florida from February 11 to 14, 2022, KR[Redacted] conversation with Claimant would have occurred before that trip. Thus, the ALJ finds the issue of whether Claimant traveled during that period to be irrelevant. Even assuming *arguendo*, Claimant traveled to Florida from February 11, 2022 to February 14, 2022, no credible evidence was admitted indicating Claimant sustained a back injury during that trip.

Alternatively, Respondents speculate that Claimant sustained an injury to his back sometime earlier in February. However, Claimant's employment records are inconsistent with a back injury sufficient to prevent Claimant from working. Claimant's work records with Employer shows Claimant worked each day from Monday February 7, 2022 through Friday, February 11, 2022, averaging 9.2 hours per day during this time.

Although Claimant had vaguely-defined back issues in 2019 and saw Dr. Estis for something related to his back, no credible evidence was admitted establishing Claimant had any complaints of, or received any care for lower back issues between November 2019 and February 17, 2022. Dr. Estis' records are too vague to establish that Claimant's current back condition is the same condition as in 2019. Nor does a remote history of back pain establish that Claimant did not sustain a lumbar strain two years later.

Respondents, not Claimant, bear the burden of proof to establish that Claimant did not sustain a compensable injury on February 17, 2022. The ALJ finds that Respondents have failed to meet this burden.

TEMPORARY DISABILITY BENEFITS

To prove entitlement to temporary disability benefits, Claimant must prove his 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. *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 or TPD 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) Temporary disability benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), or § 8-42-106 (2), 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). Temporary disability 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), and § 8-42-106(2) C.R.S.

Claimant's authorized treating provider (ATP) assigned Claimant work restrictions which precluded Claimant from performing his full duties as a courier for Employer. Employer did accommodate Claimant's work restrictions until July 12, 2022. At that point, JH[Redacted] made the decision to end Claimant's light duty work based on his personal observation that he did not see any benefit to providing light duty work to Claimant. No credible evidence was presented to establish that Claimant was responsible for the termination of his light duty work. Moreover, no credible evidence was admitted establishing the work restrictions provided by Dr. Mason on August 4, 2022 have been modified since that time. Claimant has engaged in some work, but has not returned to full-time employment. Claimant has established an entitlement to temporary disability benefits continuing until terminated pursuant to statute.

As found, Claimant is entitled to TPD benefits during for the period ending July 12, 2022 in the amount of $8,305.55. Claimant is entitled to TPD benefits after July 12, 2022 considering the amounts earned as a promoter, until terminated pursuant to statute. The evidence is insufficient to determine the time period or calculation of Claimant's TPD (or TTD) benefits after July 12, 2022. The parties shall confer concerning benefits after July 12, 2022 to determine any benefits to which Claimant is entitled.

AVERAGE WEEKLY WAGE

As found, the parties have stipulated that Claimant's average weekly wage at the time of injury was $947.91.

ORDER

It is therefore ordered that:

1. Respondents request to withdraw their General Admission of Liability is denied and dismissed.

2. Claimant's average weekly wage at the time of injury was $947.91.

3. Respondents shall pay Claimant TPD benefits for the period ending July 12, 2022 in the amount of $8,305.55.

4. Claimant is entitled to temporary disability benefits beginning July 13, 2022, and continuing until terminated pursuant to statute in an amount to be determined by the parties.

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: December 28, 2022

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 5-169-078-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that the left shoulder surgery performed by Dr. Black was reasonable and necessary to cure or relieve the effects of Claimant's April 3, 2021 work injury.

FINDINGS OF FACT

1. Claimant sustained admitted injuries arising out of the course of his employment with Employer as a ski instructor. On April 3, 2021, Claimant fell while working as a ski instructor and sustained fractured ribs, and a left shoulder injury. At the time of his injury, and Claimant also worked for [Redacted, hereinafter US] as a package handler, loading delivery trucks.

2. Claimant did not seek care on April 3, 2021 because the occupational health clinic was not open. The following day, April 4, 2021, Claimant was seen at St. Anthony's in Frisco, Colorado, with complaints of pain in his left posterior ribs in the infrascapular area. (Ex. D).

3. Claimant was then seen at CCOM on April 9, 2021, where he reported rib, left flank, and left shoulder pain. On evaluation of Claimant's left shoulder, he was noted to have decreased range of motion, but additional evaluation was deferred because Claimant's rib pain made it too uncomfortable to do a proper assessment of his left shoulder. Claimant was diagnosed with contusions of the left wall of the thorax, lower back and pelvis, and a sprain of the left shoulder. (Ex. E).

4. On April 12, 2021, Claimant underwent x-rays which showed fractures of multiple ribs, and negative for left shoulder fractures or bony abnormalities. (Ex. G).

5. On April 26, 2021, Claimant reported clicking in his left shoulder and that he had not been using his left arm much due to rib pain. (Ex. I). Dr. Graham ordered an MRI of Claimant's left shoulder. (Ex. I).

6. On May 3, 2021, claimant was evaluated by Taryn Barrette, PA-C, at CCOM. Ms. Barrette noted Claimant had normal range of motion of the left shoulder, but a loud click with abduction and posterior rotation. She diagnosed Claimant with a sprain of the left shoulder and rib fractures. (Ex. J).

7. On May 7, 2021, Clamant had a MRI of the left shoulder which was interpreted as showing a tear of the posterior superior glenoid labrum decompressing into a 2.6 mm para labral cyst, tendinopathy of the supraspinatus and infraspinatus tendon, and AC joint arthropathy. (Ex. FF).

8. On May 19, 2021, Claimant saw Aaron Black, M.D., at Panorama Summit Orthopedics. Dr. Black reviewed Claimant's MRI and diagnosed Claimant with a superior glenoid lesion of the left shoulder. Dr. Black completed a Physician's Report of Worker's Compensation Injury ("WC 164") in which he indicated that the findings were consistent with Claimant's mechanism of injury, and that Claimant's work-related medical diagnoses were a left shoulder SLAP tear and multiple rib fracture. He recommended physician therapy for biceps and rotator cuff strengthening and scapular stabilization, and advised Claimant to follow up in six weeks. Dr. Black also indicated Claimant could return to work with lifting restrictions "as tolerated" noting Claimant "should never left anything that causes pain. No formal lifting restrictions but pt might limit weight temporarily." (Ex. N).

9. In June 2021, approximately two months after his injury, Claimant returned to work at US[Redacted] working full duty. He did not return to work for Employer at that time because of the seasonal nature of his employment, but he did return to work for Employer in the winter of 2021-22. Claimant testified that his left shoulder had improved, but that he was continuing to experience clicking, pain and weakness in his left shoulder.

10. Claimant returned to Dr. Black on June 25, 2021, reporting that his shoulder range of motion and stability had improved, although he continued to report joint pain, soreness, and "crunchy" movement of his shoulder. Dr. Black's examination showed tenderness over the bicipital groove, a positive O'Brien's test and a positive load and shift test. Dr. Black advised claimant to continue with physical therapy, but that if he did not continue to improve over the next 3-6 months, they would consider a biceps tenodesis surgery to address the clicking in his shoulder. (Ex. U).

11. Claimant saw Dr. Black again on August 6, 2021, reporting improving left shoulder pain, exacerbated by lifting. On examination, Dr. Black noted tenderness over the biceps tendon. He also found full range of motion, strength, and stability of Claimant's left shoulder with negative Hawkins', O'Brien's, and Speed's tests. Claimant was advised to continue with physical therapy and to follow up with Dr. Black in six weeks. (Ex. X).

12. On September 17, 2021, Claimant saw Dr. Black, noting his shoulder had been improving and that he felt he had plateaued, and was nearing 100%. Claimant continued to have tenderness over the bicipital groove, and had a normal examination, with the exception of positive Hawkins and O'Brien's tests. Dr. Black recommended six to eight weeks of additional physical therapy. (Ex. BB). Claimant testified, credibly, that Dr. Black advised that if his shoulder worsened, he would consider surgery.

13. Claimant attended additional physical therapy from September 21, 2021 through October 21, 2021. During these visits, Claimant reported continued left shoulder pain with movement, and that his work for US[Redacted], primarily repetitive lifting, aggravated his left shoulder. Claimant did not report any distinct new injury to his left shoulder during this period. (Ex. M).

14. On March 21, 2022, Claimant saw Janet Graham, NP, at CCOM. Claimant reported that he was continuing to experience left shoulder pain with certain movements,

and he was having difficulty sleeping at night due to his pain. Claimant indicated he would like to proceed with SLAP surgery. Ms. Graham referred Claimant back to Dr. Black for evaluation. (Ex. DD).

15. On April 4, 2022, Respondents filed a General Admission of Liability, admitting for medical benefits, and temporary disability benefits through June 10, 2021. The GAL noted that Claimant had returned for treatment on March 21, 2022. (Ex. 1).

16. Claimant saw Dr. Black on April 11, 2022, noting that he continued to have shoulder pain exacerbated by overhead and reaching activities. Dr. Black indicated Claimant had done five months of physical therapy and was not working his normal job delivering packages due to his shoulder pain. Dr. Black noted positive Hawkins, Neer's, O'Brien's, Speed's and Yergason's tests. He reviewed Claimant's May 7, 2021 MRI, and noted that it showed an obvious SLAP tear, and with tendinopathy of the supraspinatus and infraspinatus tendons, with AC joint arthropathy. He indicated Claimant had failed extensive conservative measures and would benefits from shoulder surgery, including biceps tenodesis with possible labral repair. (Ex. EE). On April 12, 2022, Dr. Black submitted to Insurer a request for authorization of an open repair of the left biceps tendon, and included a WC 164 form indicating that Claimant's left shoulder SLAP tear was work related, and that his need for surgery was related to his April 3, 2021 injury.. (Ex. FF).

17. On April 20, 2022, Insurer submitted Claimant's request for surgery to Timothy O'Brien, M.D., for a medical record review. Dr. O'Brien opined that the only injury Claimant sustained as the result of his April 3, 2021 work accident was left rib fractures. He further opined Claimant's left biceps tendon was a "new onset" pain that occurred after a six-month gap in treatment and was unrelated to his work injury. Thus, he opined, the surgery recommended by Dr. Black was not work related. Dr. O'Brien's opinion is not credible or persuasive. Contrary to Dr. O'Brien's report, Claimant's biceps tendon issues were not new onset symptoms in March 2022. Claimant's records show he was experiencing biceps tendon issues in May 2021, when Dr. Black referred him for physical therapy for biceps and rotator cuff strengthening. Dr. Black had also noted the possibility of a biceps tenodesis in June 2021. (Ex. B).

18. Based on Dr. O'Brien's report, Insurer denied authorization for the surgery recommended by Dr. Black. (Ex. 3).

19. On July 25, 2022, Dr. O'Brien performed an independent medical examination (IME) of Claimant at Respondent's request. Based on his examination, Dr. O'Brien indicated Claimant's shoulder exam was normal for his age. He reiterated his opinion that Claimant's April 3 2021 work incident resulted in an isolated left chest wall contusion and rib fractures. He opined "The work incident did not result in a left shoulder injury of any kind." As with his April 20, 2022 report, the opinions expressed in Dr. O'Brien's July 25, 2022 report are neither credible nor persuasive. (Ex. A).

20. Dr. O'Brien was admitted as an expert in orthopedic surgery and testified at hearing. Dr. O'Brien testified consistent with his reports, and opined that Claimant's May

7, 2021 MRI demonstrated significant degeneration in the soft tissue and bone, that the MRI did not demonstrate an acute tear of tissue, and characterized Claimant's left shoulder as functional but "diseased." Dr. O'Brien testified Claimant's left shoulder has no surgical indications, but to the extent Claimant requires surgery, the need for surgery is unrelated to his April 3, 2021 work injury. He further opined that Claimant's US[Redacted] job duties have the potential to aggravate Claimant's shoulder. Dr. O'Brien reiterated his opinion that he does not believe Claimant sustained any shoulder injury and his only work-related injury was to his rib cage. Dr. O'Brien's opinions were not persuasive.

21. On October 5, 2022, Claimant underwent an IME with Gary Zuehlsdorff, M.D. Dr. Zuehlsdorff did not testify, but his report was admitted into evidence as Exhibit 4. Dr. Zuehlsdorff opined that Claimant left shoulder injury is causally related to his April 3, 2021 ski accident, and that Claimant had no evidence of a pre-existing left shoulder condition. He agreed with Dr. Black's treatment approach of conservative care, and surgery after the failure of conservative measures. (Ex. 4).

22. On October 10, 2022, Claimant had a second MRI of the left shoulder, but with contrast. The MRI showed a 270-degree labral tear including a significantly large SLAP tear with evidence of shoulder instability. (Ex. 7).

23. On October 14, 2022, Dr. Black issued a report (Ex. 7) in which he opined:

> I do believe that [Claimant] has a significantly large SLAP tear with 270 degrees of extension. I further believe that this almost certainly happened at the time of his initial injury as the forces that are involved are reasonable for this. This would have been very difficult to assess when he had multiple broken ribs sustained from his initial injury as those are quite painful. He was initially assessed as having at least a SLAP tear if not more labral pathology and the full diagnosis was significantly limited by the fact that his initial MRI was non-contrast without intra articular gadolinium. The patient attempted extensive nonsurgical management in attempt to avoid surgery including rest, activity modification, NSAID usage, and physical therapy, but none have provided relief and his symptoms have actually worsened over time.

24. Dr. Black indicated he believed it was reasonable to proceed to an arthroscopic labral repair and biceps tenodesis. (Ex. 7). Claimant testified he had the surgery on October 25, 2022.

25. Claimant credibly testified he had begun to approach full recovery by September 2021, but was not yet at 100% when released from care by Dr. Black. He continued to experience pain, weakness, and limitations of range of motion, but not so severe that he could not function or work. He credibly testified that Dr. Black informed him if he was not fully recovered within six months after discharge, they would revisit the potential of surgery on his shoulder. Between the end of October 2021 and March 2022, Claimant

testified his shoulder did not return to baseline. He credibly testified that before the April 3, 2021 accident, he had no issues with his left shoulder, no clicking, no pain, and no weakness. Between October 2021 and March 2022, Claimant worked for both Employer and US[Redacted]. He testified he did not sustain any other injury while working as a package handler for US[Redacted], although he did have pain after working, and that he never woke up "pain free." Claimant's testimony was consistent with his medical records, and was credible.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation 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).

Specific Medical Benefits At Issue

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). 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.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Diagnostic testing which is reasonable and necessary for treatment of a work-related injury is compensable. *Beede v. Allen Mitchek Feed and Grain*, W.C. No. 4-317-785 (ICAO Apr. 20, 2000). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the left shoulder/biceps surgery performed by Dr. Black was reasonably necessary to cure or relieve the effects of Claimant's April 3, 2021 injury. The evidence established that Claimant sustained a left shoulder injury as the result of his April 3, 2021 work accident, including a left shoulder SLAP tear, as diagnosed by Dr. Black and MRI. Dr. Black initially discussed the possibility of performing a biceps tenodesis in June 2021, if conservative treatment did not resolve Claimant's complaints. Claimant then underwent significant conservative treatment to arrive at a point in September 2021 where his shoulder felt near normal, although not fully recovered. Claimant continued physical therapy through October 21, 2021, and continued to report left shoulder symptoms during this period. Although Claimant had a four-month gap between his last physical therapy appointment and returning for evaluation with Ms. Graham in in March 2022, no credible evidence was admitted indicating Claimant sustained a second injury to his shoulder. Although Claimant's work with US[Redacted] aggravated his shoulder symptoms, no credible evidence was admitted indicating Claimant's shoulder pathology, or the need for surgery was caused by his work at US[Redacted]. The ALJ finds the opinions of Dr. Black and Dr. Zuehlsdorff that Claimant sustained a left shoulder injury and that the left shoulder surgery was causally related to the April 3, 2021 accident credible and persuasive. Dr. O'Brien's opinions that Claimant's only work-injury was left rib fractures, and that shoulder surgery was not work related are not credible or persuasive.

ORDER

It is therefore ordered that:

1. The surgery performed by Dr. Black on Claimant's left shoulder and biceps was reasonably necessary to cure or relieve the effects of Claimant's April 3, 2021 work injury.

Respondents shall pay the cost of Claimant's left shoulder/biceps surgery according to the workers' compensation fee schedule.

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: December 29, 2022

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 5-201-695-003

ISSUES

- Did Claimant prove he suffered a compensable injury arising out of, and in the course and scope of, his employment on March 3, 2022?
- Did Claimant prove entitlement to reasonably necessary medical benefits?
- What is Claimant's average weekly wage (AWW)?
- Did Claimant prove entitlement to temporary total disability (TTD) benefits?
- Did Claimant prove Employer should be penalized for failure to admit or deny liability pursuant to § 8-43-203(2)(a), C.R.S.?[1]

PROCEDURAL HISTORY

On June 15, 2022, Claimant filed an Application for Hearing endorsing: compensability, medical benefits, authorized provider, reasonably necessary, average weekly wage, disfigurement, TTD, PPD, and PTD. Claimant also endorsed a claim for penalties pursuant to §8-43-203(2), C.R.S. A hearing was set for October 6, 2022. On June 30, 2022, Claimant filed an Application for Expedited Hearing based on there being an urgent need for a prior authorization of healthcare services. On August 10, 2022, Claimant filed an Amended Application for Expedited Hearing and plead, "***Respondents*** have filed a Notice of Contest within the previous 45 days on ***May 5, 2022***, and the Claimant requests an expedited hearing on compensability and medical benefits." (emphasis added). The Notice of Contest attached to Claimant's Amended Application for Expedited Hearing, however, is dated ***August 12, 2022***, and it is signed by ***Claimant's counsel***. ALJ Spencer ordered the June 15, 2022 and August 10, 2022 Applications for Expedited Hearing stricken, and "[a]ll issues endorsed on Claimant's June 30 and August 10 expedited applications shall be consolidated with the June 15 application and shall be heard of October 6, 2022."

FINDINGS OF FACT

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

1. Claimant is a 32 year-old man who worked for Employer as an installation technician. Claimant testified he was hired by [Redacted, hereinafter RS] in October 2019.

[1] In his position statement, Claimant argues for the imposition of penalties pursuant to § 8-43-409(1), C.R.S., but that specific claim for penalties was not endorsed on Claimant's Applications for Hearing.

2. RS[Redacted] is the sole owner of Employer, and was Claimant's supervisor. He and Claimant were the only employees in March 2022.

3. Claimant testified he did not have a set daily schedule. RS[Redacted] would text him each morning and direct his work for the day. Claimant's work included such things as installing speakers, installing cameras, hanging televisions, and wiring a house for electronics.

4. On March 3, 2022, Claimant was repairing a surveillance camera on the side of a house at a residential property in Franktown, Colorado. Claimant testified he fell from a ladder to the ground, landed on his heels, and shattered both heel bones. It is uncontroverted that Claimant was injured in the course and scope of his employment.

5. The homeowners drove Claimant to Castle Rock Adventist Hospital where he was evaluated and treated for his injuries. Claimant was diagnosed with bilateral calcaneal fractures, which required surgery. (Ex. 1).

6. RS[Redacted] was notified of Claimant's injury. Employer never referred Claimant to a physician for treatment. The right to select a physician passed to Claimant.

7. Claimant underwent an open reduction internal fixation of the bilateral calcaneus fractures on March 5, 2022. Jeremy Christensen, DPM, of Rock Canyon Foot & Ankle, performed the surgery. (Ex. 1).

8. Claimant spent approximately a week after surgery at a rehabilitation center participating in occupational therapy and physical therapy so he could go home. He was not weight bearing for approximately four months following surgery.

9. Claimant testified he was unable to put any weight on his feet or heels for approximately four months after surgery. Claimant further testified he had to wear casts on each leg for two and a half months following surgery, and then he used walking boots on each leg.

10. Claimant continued to receive follow-up medical treatment from Dr. Christensen, and other providers, following his surgery. Claimant continues to see Dr. Christensen and to engage in physical therapy. According to Dr. Christensen, Claimant will require ongoing medical treatment to address his work-related injury. (Ex. 4).

11. Claimant testified he received bills for medical treatment related to the March 3, 2022, injury. He further testified that Employer did not pay for any of the medical treatment. Claimant testified he has incurred medical expenses of approximately $300,000.00. Multiple invoices and bills were admitted into evidence (Ex. 1 pp 1-7-124). It is unclear from the evidence in the record, however, what amounts have been paid, and what amounts are outstanding.

12. Claimant testified Employer terminated him in April 2022. On April 5, 2022, RS[Redacted] e-mailed Claimant and said "[s]orry to say this but until we figure what claim is that you made against [Redacted, hereinafter SD] to the State of Colorado all payroll

checks have stopped. We have paid you up to date for all your payroll and you made a claim that you have not received your normal payroll. We will continue paying for the medical visits until we get the Insurance claim worked out. Once we get the State of Colorado resolved we can look at back payroll. You might want to look at short term disability until then." (Ex. 3). Claimant testified he received paychecks until the last one in April.

13. Claimant's medical records from Castle Rock Adventist Hospital indicate under "Social History" that Claimant utilizes marijuana daily. (Ex 1, page 19). RS[Redacted] testified that Claimant's marijuana use, per his medical records, would have been a basis for termination. RS[Redacted] testified, however, that he did not terminate Claimant, but stopped paying him since he was not working.

14. Claimant credibly testified he was not under the influence of marijuana at the time of his work-related injury on March 3, 2022.

15. The ALJ finds that RS[Redacted] terminated Claimant on April 5, 2022.

16. Employer does not currently maintain a workers' compensation insurance policy, nor did Employer have workers' compensation insurance on March 3, 2022. RS[Redacted] testified that the policy lapsed in November 2021. RS[Redacted] testified that Covid and supply chain issues forced Employer to restructure and reorganize, and this was why he allowed his policy to lapse.

17. RS[Redacted] testified that as of April 5, 2022, he was aware Claimant filed a Workers' Claim for Compensation, and received copies of everything that was filed.

18. The ALJ finds that RS[Redacted] was aware Claimant filed a Workers' Claim for Compensation on April 5, 2022. RS[Redacted] had until April 25, 2022 to file a notice admitting or denying liability. The ALJ finds that RS[Redacted] did not file any notice with the Division admitting or denying liability.

19. Claimant filed a Notice on Contest on August 12, 2022, but plead on the Amended Application for Expedited Hearing that Respondent filed the Notice of Contest on May 5, 2022.

20. At the time of Claimant's injury, Employer paid Claimant $2,020.60 every two weeks, after taxes. (Ex. 2). There is no evidence in the record of Claimant's pre-tax wages. The ALJ finds that Claimant's Average Weekly Wage (AWW) at the time of his injury was $1,101.30 ($2,020.60 / 2). This equates to a weekly TTD rate of $734.20 and a daily rate of $104.88.

21. Employer paid Claimant through April 15, 2022. (Ex. 2).

22. Claimant proved he is entitled to TTD benefits commencing April 16, 2022 and ongoing. Claimant has not returned to work, has not been released to full duties, and has not been put at MMI.

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 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).

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

Compensability

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), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001).

An individual who performs services for another in exchange for compensation shall be deemed an employee unless such individual is free from direction and control in the performance of the service and is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. § 8-41-202(2)(a), C.R.S. If the claimant establishes he performed services for pay, the burden shifts to the

employer to prove the claimant was an independent contractor. *Stampados v. Colorado D & S Enterprises*, 833 P.2d 815 (Colo. App. 1992); *Almanza v. W.Y.B. d/b/a What's Your Beef*, W.C. No. 4-489-774 (April 16, 2002).

As found, Claimant proved he suffered a compensable injury out of and in the course of his employment on March 3, 2022. The injury resulted from Claimant falling from a ladder and fracturing both heals. The onset of disability occurred on March 3. 2022 when he could no longer continue working. There is no persuasive evidence Claimant was free from direction and control in the performance of service to Employer or was customarily engaged in an independent trade or business.

Medical Benefits

The employer is liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101, C.R.S. The employer has the right to choose the claimant's treating physician "in the first instance." § 8-43-404(5)(a)(I)(A), C.R.S. If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Indus. Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

As found, the right to select a treating physician passed to Claimant, and after receiving emergency treatment at Castle Rock Adventist Hospital, he selected Dr. Christensen. Employer is liable for the emergency treatment Claimant received, and reasonably necessary treatment from Dr. Christensen and his referrals to cure and relieve the effects of Claimant's industrial injury.

Average Weekly Wage

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 section 8-42-102(3), C.R.S. 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).

At the time of his injury, Claimant was earning $2,020.60 every two weeks after taxes. There was no objective evidence of Claimant's wages before taxes. As found, Claimant's AWW at the time of his injury was $ 1,010.30.

Temporary Disability Benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity

evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Elec.*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Once commenced, TTD benefits continue until the occurrence of one of the factors enumerated in § 8-42-105(3), C.R.S.

The persuasive evidence shows Claimant was disabled by his injury and could no longer work following his injury on March 3, 2022. Claimant has not returned to work since then. There is no persuasive evidence Claimant has been released to regular duty or been put at MMI by an authorized treating physician. Accordingly, Claimant is entitled to TTD benefits commencing April 16, 2022 and continuing until terminated by law. The TTD rate is $734.40 per week ($1,101.30 x 2/3 = $734.20). Employer must pay statutory interest of 8% per annum on all benefits not paid when due. § 8-43-410(2), C.R.S.

Penalties for Failure to Admit or Deny

Claimant seeks a penalty under § 8-43-203, C.R.S. The employer must admit or deny liability within 20 days after it learns of an injury that results in "lost time from work for the injured employee in excess of three shifts or calendar days." § 8-43-203(1)(a). An employer "may become liable" to the claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division. The maximum penalty for failure to admit or deny liability cannot exceed "the aggregate amount of three hundred sixty-five days' compensation." Fifty percent of any penalty shall be paid to the claimant and fifty percent to the Subsequent Injury Fund. § 8-43-203(2)(a), C.R.S.

The phrase "may become liable" means the imposition of a penalty under § 8-42-203(2)(a), C.R.S. is discretionary. *Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of the requirement to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise administrative oversight over the claim process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colo. Civil Rights Comm'n*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Assoc. Bus. Prod. v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Indus. Claim Appeals Office*, 442 P.3d 94 (Colo. 2019). The claimant must prove circumstances justifying the imposition of a penalty under § 8-43-203(2)(a), C.R.S. *Pioneer Hosp. v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

As found, Employer knew Claimant filed a Workers' Compensation Claim on April 5, 2022, so the deadline to admit or deny liability was April 25, 2022. Employer has never filed an admission or denial of liability regarding Claimant's injury. But Claimant's August 10, 2022, Amended Application for Expedited Hearing asserted that Respondents filed a

Notice of Contest on May 5, 2022. The Notice of Contest attached to the application was filed by Claimant on ***August 12, 2022***, and references and attaches RS[Redacted]'s ***April 5, 2022*** email.

Claimant's hearing took place on October 6, 2022. Claimant's case has not been delayed, nor prejudiced, by Employer's failure to admit or deny liability. Claimant's multiple filings, including the Notice of Contest, have created procedural challenges in this case with respect to Claimant's penalty claim.

The ALJ finds Employer should be penalized $ 1,048.80, for failure to admit or deny liability from April 25, 2022 to May 5, 2022. The allowable penalty is mitigated by the procedural irregularities in this case and Claimant's assertion that a Notice of Contest was filed on May 5, 2022. This penalty is based upon 10 days at the daily compensation rate of $104.88. The penalty of $ 1,048.80 is sufficient to penalize Employer's violation of the law and encourage future compliance without being excessively punitive. Fifty percent (50%) of this penalty shall be paid to Claimant and fifty percent (50%) to the Subsequent Injury Fund.

ORDER

It is therefore ordered that:

1. Claimant's injury on March 3, 2022 is compensable.

2. Dr. Christensen in an authorized provider.

3. Employer shall cover reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's injury, including the emergency treatment Claimant received at Castle Rock Adventist Hospital.

4. Employer shall reimburse Claimant for any medical expenses related to his March 3, 2022 injury. Since the ALJ was unable to determine Claimant's medical expenses, Counsel for Claimant and Respondent shall confer regarding the medical expenses. If the parties are unable to reach an agreement, either Claimant or Respondent may file an Application for Hearing on this issue

5. Claimant's average weekly wage is $ 1,101.30.

6. Employer shall pay Claimant TTD benefits from April 16, 2022 and continuing until terminated by law.

7. Employer shall pay statutory interest of 8% per annum on all TTD owed on or after April 16, 2022, not paid when due.

8. Employer shall pay $ 1,048.80 in penalties for failure to admit or deny liability. Fifty percent of the penalty shall be paid to the Claimant, and

fifty percent of the penalty shall be paid to the Subsequent Injury Fund. The check for the Subsequent Injury Fund shall be payable to and sent to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention: Gina Johannesman, Trustee Special Funds Unit.

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

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

DATED: December 6, 2022

Victoria E. Lovato
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 5-180-852-001

ISSUE

- Did Claimant prove by a preponderance of the evidence that he suffered compensable injuries to his back and right arm on August 10, 2021?

- Did Claimant prove by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits?

- What is Claimant's average weekly wage (AWW)?

- Did Claimant prove by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits for the period of August 10, 2021 through August 20, 2021 and ongoing?

STIPULATIONS

At the beginning of the hearing, Respondents acknowledged that Claimant suffered a compensable injury to his right arm, and Claimant missed ten days of work because of the injury.

FINDINGS OF FACT

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

1. Claimant is a 49 year-old male who worked for Employer as a siding installer. On August 10, 2021, around 10:30 a.m., Claimant was installing siding and fell from the scaffolding. Claimant testified that he felt pain in his lower back after falling. Claimant testified he grabbed a pole as he was falling to try to catch himself, and he lacerated his right arm as he fell. Claimant estimated the scaffolding was 10 to 12 feet high. When Claimant fell, he landed in a standing position. (Tr. 15:18-16:24).

2. [Redacted, hereinafter RC], Claimant's co-worker, witnessed Claimant's fall. RC[Redacted] credibly testified Claimant landed on his feet, and did not seem to land hard. Claimant's right arm, however, was bleedings profusely. RC[Redacted] wrapped Claimant's arm with a shopping bag and he made a tourniquet. RC[Redacted] took Claimant to the Emergency Department at Banner Health McKee Medical Center (Banner). (Tr. 29:6-30:14).

3. The emergency triage note from Banner indicated Claimant had a right arm laceration from sheet metal. The medical record noted that Claimant was working at a construction site and throwing away trash when a piece of sheet metal inadvertently tore into his right forearm, lacerating him. (Ex. A, p. 30).

4. Claimant speaks Spanish and communicated with the English-speaking staff at Banner through a screen monitor that served as a translation device. (Tr. 16:14-18). Claimant credibly testified he did not tell anyone at Banner that he lacerated his arm when throwing away trash, but that he lacerated his arm when he fell from the scaffolding. (Tr. 17:23:18-4).

5. The ALJ finds that Claimant fell from scaffolding while working, and injured his right arm.

6. In the emergency room, Claimant rated his pain as 2 out of 10. The medical record noted Claimant's injury was not head or spine related. (Ex. A, p. 36). Claimant testified that while he was in the emergency room, he did not report any injuries to, or problems with, his back. (Tr. 16:19-22).

7. Claimant's laceration was cleaned, irrigated, and sutured. Claimant was provided discharge instructions solely for a laceration, and these were provided in English and Spanish. (Ex. A, pp. 1-15).

8. Claimant was restricted to modified duty from August 10 to August 20, 2021. Claimant was to not use his right arm, and keep the laceration clean and covered. The work-related diagnosis listed on the August 10, 2020, WC 164 form was a right arm laceration. There is no mention of any back injury. (Ex. A, p. 58).

9. On August 18, 2021, Claimant filed a Worker's Claim for Compensation. On the form, Claimant asserted he fell seven feet from scaffolding, and injured his right arm and back. The nature of the injury is listed as laceration and sprain. (Ex. 1).

10. Claimant returned to Banner on August 20, 2021, to have his sutures removed. Claimant reported no pain and none was suspected. (Ex. A, p. 78). Claimant's clinical assessment was a laceration of the anterior right arm. (Ex. A, p. 84).

11. Claimant testified he reported his back issues at the time he had his sutures removed. (Tr. 16:19-25). But there is no objective evidence in the medical records that Claimant reported any injury to his back or any back pain.

12. Claimant testified Employer terminated him because he went to the emergency room for treatment. (Tr. 19:11-16). This testimony was uncontroverted.

13. Claimant testified he continues to have pain in his lower back, which he did not have prior to the fall, and has not worked since August 10, 2021. (Tr. 19:23-20:6). He further testified the physicians released him from care on August 20, 2021, and no physician has kept him off of work. (Tr. 22:5-23:12).

14. When questioned on direct examination, Claimant testified it was possible that the translation system at the hospital did not record correctly his mechanism of injury or the body parts involved. (Tr. 18:15-19: 3). While some details may be lost in translation, it is not credible that Claimant's alleged complaints regarding his low back would have been misinterpreted or not recorded.

15. Claimant testified he has not seen a doctor for his low back pain because he does not have insurance. (Tr. 22:1-3). The ALJ finds Claimant's testimony to be credible, but there is no objective medical evidence to support Claimant's complaints of back pain, and his alleged inability to work.

16. Claimant was restricted to modified duty from August 10, 2021 until August 20, 2021. It is uncontroverted that Employer terminated Claimant on August 10, 2021. Further, Claimant testified he was released to return to work on August 20, 2021.

17. The ALJ finds that Claimant is entitled to TTD from August 10, 2021 through August 20, 2021.

18. Claimant testified he earned $30.00 per hour and worked 35 to 45 hours per week, which equates to an average of 40 hours per week. Claimant submitted a copy of "check history" from [Redacted, hereinafter MT] (Ex. 13). The most recent check from Employer dated August 6, 2021, was in the amount of $1,400.00. This would equate to 46 plus hours of work. As Claimant's work hours were variable, it is reasonable to calculate Claimant's AWW based on a 40 hour workweek.

19. The ALJ finds that Claimant's AWW at the time of his injury on August 10, 2021 was $1,200.00. This is based on a 40 hour workweek at $30.00 per hour.

20. Based on the totality of the evidence, the ALJ finds that Claimant failed to prove by a preponderance of the evidence that he suffered an injury to his back on August 10, 2021 when he fell from the scaffolding.

21. The ALJ finds that the medical care Claimant received for the laceration on his right arm was reasonable, necessary and related to his work injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in 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).

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

Compensability

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), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001).

An individual who performs services for another in exchange for compensation shall be deemed an employee unless such individual is free from direction and control in the performance of the service and is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. § 8-41-202(2)(a), C.R.S. If the claimant establishes he performed services for pay, the burden shifts to the employer to prove the claimant was an independent contractor. *Stampados v. Colorado D & S Enterprises*, 833 P.2d 815 (Colo. App. 1992); *Almanza v. W.Y.B. d/b/a What's Your Beef*, W.C. No. 4-489-774 (April 16, 2002).

As found, Claimant proved he suffered a compensable injury to his right arm in the course of his employment on August 10, 2021. The injury resulted from Claimant falling from scaffolding and lacerating his right arm. As found, there is no persuasive evidence that Claimant injured his back in the fall. Based on the totality of the evidence, Claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back.

Medical Benefits

The employer is liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101, C.R.S. Claimant received emergency treatment at Banner. This treatment was reasonable, necessary and related to Claimant's injury to his right arm. Employer is liable for the emergency treatment Claimant received.

Average Weekly Wage

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 section 8-42-102(3), C.R.S. 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).

At the time of his injury, Claimant was earning $30.00 an hour, and he worked 35-45 hours a week. As found, Claimant's AWW at the time of his injury was $ 1,200.00.

Temporary Disability Benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Elec.*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Once commenced, TTD benefits continue until the occurrence of one of the factors enumerated in § 8-42-105(3), C.R.S.

The persuasive evidence shows Claimant was disabled by his injury and was restricted to modified duty. Claimant could not return to work because Employer terminated him. The doctors released Claimant to full duty work on August 20, 2021. Accordingly, Claimant is entitled to TTD benefits from August 10, 2021 through August 20, 2021.

ORDER

It is therefore ordered that:

1. Claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury to his back on August 10, 2021.

2. Claimant sustained a compensable injury to his right arm on August 10, 2021.

3. Employer shall cover reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's

injury, including the emergency treatment Claimant received at Banner.

4. Employer shall reimburse Claimant for any medical expenses related to his compensable injury on August 10, 2021. Counsel for Claimant and counsel for Respondents shall confer regarding the medical expenses. If the parties are unable to reach an agreement, either Claimant or Respondent may file an Application for Hearing on this issue

5. Claimant's average weekly wage is $ 1,200.00.

6. Employer shall pay Claimant TTD benefits from August 10, 2021 through August 20, 2021.

7. 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: December 16, 2022

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-162-468-004

ISSUES

I. Whether Claimant has shown by a preponderance of the evidence he sustained a work related injury in the course and scope of his employment with Employer on April 30, 2020.

IF COMPENSABAILITY IS PROVEN, THEN:

II. Whether Claimant has shown by a preponderance of the evidence that Claimant is entitled to medical benefits that are reasonably necessary and related to the injury.

III. Whether Claimant has shown by a preponderance of the evidence who is the authorized treating physician.

IV. Whether Claimant has shown by a preponderance of the evidence he is entitled to a change of physician.

V. Whether Claimant has shown what is his average weekly wage.

VI. Whether Claimant has shown by a preponderance of the evidence that he is entitled to temporary disability benefits from May 27, 2020.

STIPULATION

The parties stipulated that Claimant's average weekly wage was $1,041.40. The stipulation of the parties is approved and incorporated in the Order.

FINDINGS OF FACT

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

1. Claimant was 68 years old at the time of the hearing. Claimant was the head of public works for Employer and started working there in 2019. He would care for the grounds, performing maintenance of machinery and park maintenance. He had multiple different duties including maintenance of equipment and machinery, including a tractor, street sweeper (which was the biggest piece of equipment), dump truck, motor grader, and pickup with a plow. He was the only public works employee for Employer.

2. On or about April 30, 2020, it was springtime in the area and he had to sweep the streets, to get rid of the stones and debris that had accumulated on the streets during the winter months. He was not certain of the exact day but within a day or so on either side of April 30, 2020 is when the accident happened.

3. He was very familiar with the sweeper, which picked up the sand and dirt left over from the winter snow treatment of the roads. He had to do maintenance checks and adjust each machine before use and had to make sure the sweeper was ready to do the street sweeping. He had to perform preventative maintenance on the sweeper, including on the chains that held up the attachment, or hopper. Several parts needed lubrication because it had dried up over the winter, caused by the sand and dirt in the hopper (stores the sand and dirt). He also had to spray water on it to clear the filter of the clogged hoses. The sweeper would barely fit through the shop 12 foot doors. He would have to get on the ground to get under it, had to sit on the ground because it was too big to use a mechanical lift to get to the underside.

4. On or about April 30, 2020, he likely right before lunch, when he was getting up from servicing the chain, he struck his head. He was on his side under the machine, had just fastened the chain, and he tried to get up, from underneath. He struck his head on the metal bar of the car lift just proximal to the sweeper, about 1 foot away from the sweeper. It was a very solid strike, as he immediately had a headache, felt goofy, and dizzy. When he stood up, he was wobbly and could not walk in a straight line, feeling the pain. He was not paying attention to how he was walking. He sat for one or two minutes. But he had a lot of work on his schedule to do, so he pushed forward to get everything done despite the headache. At the time he said some curse words, but no one was in the shop to hear him. He worked alone.

5. He struck his head on the temple, right above his right ear. He thought he was wearing regular glasses, not his protective goggles, because they were bifocal, and he could not see without them. The glasses did not fall off of him. The area on his head felt bruised for one to two (1-2) days following the incident. He continued working the complete day because he had a long list of machinery maintenance to complete but had problems completing the work.

6. Following this accident, he started to have cognitive issues, difficulty with memory, word search problems. He did not notice right away, as he was by himself most of the time, but at the end of day he would go into the office around quitting time. He did not recall reporting the injury to anyone but did mention it to his wife who worked for Employer. After this accident, he would get dizzy and feel fuzzy, and had memory problems. The medical records mentioned cognitive issues, problems with cognition and memory. He first noticed the cognition problems because he was told by family members. Then he started seeing small things that he would normally do but he did not recall doing them.[1]

7. In the days following the accident Claimant would notice himself that he had continual problems remembering things at work and at home. For example, he had to perform a sprinkler system job and could not work out how to get it done, though it was something he was very familiar with completing. He knew the controller wiring was off. He was also very frustrated that he could not get to the wires he needed to work on because his hands would tremble excessively. This was also after the accident but he could not remember exactly when after the work incident when he hit his head.

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[1] The ALJ infers from tis that he would complete everyday tasks and have no recollection of actually performing the tasks.

8. Claimant ended up going to the hospital on May 26, 2020. The office manager and Town Administrator[2] had sent him home because of the memory problems and the shaking. He remembered he had only wanted to go to his primary care provider at Franktown Family Health, but his wife took him to the emergency room (ER) at Parker Adventist instead.

9. Claimant knows he had a craniotomy. Now he cannot drive safely anymore, anywhere. He lives in a community of approximately 600 people, and few residents drive the roads. He had been driving to the store, but he had the shakes, sometimes severely, though some days were better than others. A lot of the time he simply went with his wife everywhere. His symptoms were multiple, such as his limbs shaking, right hand worse than the left; balance issues, would drag his left foot; serious attention issues, it is hard to focus and to stay focused; memory issues, he would forget what he would be doing on a regular basis and fail to complete tasks. Claimant emphasized that there was no way that he could return to work. He continued working after April 30, 2020, but from May 26, 2020 he stayed at home after his surgery. He did not recall what happened for some months following the surgery. He was frequently fatigued and would sleep a lot. He has not returned to work.

10. Claimant and his wife reported to the emergency room personnel that there were three potential incidents that they specifically recalled involving his head. The first incident was at work, when he was getting up from the ground and hit his head on the metal bar of the car lift. (Work incident) the month prior. The second one was approximately one week before going to the hospital, when he scraped his head on the door frame of his shed, which was approximately one inch shorter than he was. It scrapped his forehead at about the hair line. He had had the shed for 20 years and never hit or scraped his head before that time. The scrape on his head was not very serious, just surprising. He did not recall exclaiming in pain, cursing or bleeding from the scrape but he did mention it to his wife. (Shed incident). The third incident occurred the day before he was hospitalized. He was in the boat, in the process of getting out. He had one foot over the rail, or side of the boat, and felt very weak, he could barely get the other foot over. He recalled he was holding onto the side of the boat, could not push himself up, so he got kind of stuck. He had a grip on the edge of the boat and as he had a foot on the ground and could not stay up though he thought he had a firm grip on the side of the boat. He did not recall hitting his head but thought he might have hit his head on the ground. (Boat incident). Of the three incidents, the injury at work was a lot more serious. He had never had shaky hands before the April work incident. He had not suffered from any cognitive issues before, and no prior problems with memory issues, loss of focus or attention.

11. There were no other significant incidents that he could recall. He stated that he had hit his head a work before, but it was a long time ago, long before he started working for Employer. There was certainly nothing in the last 5 years before this work incident. He had never been diagnosed with a hematoma before May 26, 2020.

12. He did not recall immediately reporting the incident to Employer and did not think it had been immediately after the accident. If he did, he certainly did not complete

[2] The title of Town Administrator is noted on the unsigned designated provider list, Exhibit K.

any formal report himself. He did mention the incident to the Town Administrator but never received a list of doctors to see. His wife also worked for Employer and may have also mention the incident to the Town Administrator.

13. Claimant stated that he was foggy when he was admitted to the hospital, and he noted that his wife likely answered a good portion of the questions he was asked. He was having problems with thought process. He went to look for a bathroom in the hallway and was disoriented and urinated on himself. He was dragging his left foot too.

14. Claimant's wife (Wife) testified at the hearing. She noted that she and Claimant had been married for 33 years. She was employed by Employer as a Utility Clerk at the Town Hall, working part time, and part time as a realtor. Outside of work she would spend a significant amount of time with Claimant, and occasionally had lunch with Claimant, while at work. She stated that she did not recall that Claimant reported the incident to Employer. Around the beginning of May, 2020, she noted that Claimant was having shaking in his left arm. She noted that other strange things were happening to Claimant, such as he could not open a bag of chips. This ALJ infers that he did not have any problems doing that activity before. He could not find the light switch in the bedroom, and he was doing everyday things in a slow-motion kind of way.

15. Claimant's wife stated that Claimant, prior to the injury at work, was very strong, and had a very high work ethic. They had to remove their windmill, as Claimant was unable to pound the stakes into the ground, implying that it was an activity that he would perform frequently before. She journaled everything and put a timeline together of things that Claimant would not remember. She became very alarmed by what was happening to her husband as he had problems remembering things he had done or said. He had weakness of his limbs. On one occasion, they were out to breakfast with one of their daughters and his arm kept shaking so hard that it caused him to slam a glass full of juice on the table and it splashed everywhere. On the day that Claimant went to the emergency room, she had spoken with the Town Administrator and was advised that Claimant had been sent home because she had noticed Claimant not doing well, was dragging his left foot, and was alarmed by the symptoms he was displaying. Wife thought that Claimant was having a stroke or something because his speech was impaired. She personally witnessed the boat incident and denied that Claimant hit his head that day.

16. The day Claimant was admitted to the hospital, Wife spoke with several people about the claim, including the Town Manager and the Town Attorney, who mentioned she should consider filing a claim on behalf of Claimant. She did not see any designated provider list and she did all the paperwork for Claimant as he was dealing with memory loss problems. Claimant continued to see his personal providers and the providers referred by the emergency room providers. She stated that Claimant attempted to return to work, but it was not successful. He was prohibited from driving, and she had to spend all her time with Claimant as he needed supervision. She had to quit her job because of Claimant's impairments and need for help.

17. Wife noted that she now had to go behind Claimant and finish his tasks because he was unable to focus and complete tasks. Even simple things like, flushing the toilet after going to the bathroom. She stated that Claimant was very good with math and now could not do math without help. She testified that Claimant, after the surgeries,

would sleep a lot and was advised that it was because his brain was trying to heal. She also stated she took Claimant to all his medical appointments and none of the providers had suggested that alcohol had anything to do with the SDH.

18. Claimant assumed that there would be a time of recovery, that would allow an occasional drink, but he had not had any alcohol since the hospitalization and brain surgery. Claimant stated he did not continue having his evening drinks after the initial admission to the hospital.

19. The parties submitted over 2,200 pages of records in this matter, which are summarized below only in pertinent part, addressing only those records that might be relevant to the issues to be addressed in this matter.

20. Employer issued a First Report of Injury (FROI) completed by an administrative assistant for Employer on January 28, 2021. The FROI specifically noted that Claimant had reported the incident on April 30, 2020. It also noted that Claimant was inspecting the brushes of the street sweeper and that he was wearing a helmet. He was getting up off the floor when he stood up, striking the right temple against the "A frame" steel dual post car lift.

21. Claimant stated that he was working for Employer as a salaried employee. He thought he was earning around $50,000.00 per year. The FROI indicated that Claimant was earning an average weekly wage of $1,014.40.

22. Claimant filed a Workers' Claim for Compensation on February 4, 2021. It noted that, as he was standing up after leaning over to repair a chain, he hit his head on a car lift and reported it to the Town Administrator. It noted that Claimant was being treated at Franktown Family Medicine.

23. Employer issued a February 9, 2021 document entitled Employer's First Report of Injury.[3] This document also stated that Employer was notified on April 30, 2020 and that Claimant's disability began on May 26, 2020. This form also lists Insurer's information and notes that Insurer received notice of the claim from Employer on January 28, 2021.

24. Employer submitted Exhibit K, with a designated provider list (DPL), and a cover letter dated February 11, 2021 from Respondents' counsel to Claimant's counsel. The DPL was undated and unsigned.

25. Insurer filed a Notice of Contest on February 11, 2021, denying that Claimant's injuries were work related.

26. Claimant was attended by Reiner Kremer, PA-C of Franktown Family Medicine, LLC, (supervised by Paula Castro, M.D.) beginning October 14, 2015 for multiple conditions including cardiology issues, cervical spine issues, dizziness, myalgias and cervicalgia. On April 2, 2020 Claimant was seen for a regular follow-up. PA Kremer assessed hypercholesterolemia, hypertension, lumbalgia, hip pain, coronary arteriosclerosis, and aortic arteriosclerosis. Other prior records indicate maintenance and

[3] Not a Division of Workers' Compensation standard form.

cardiology concerns as well as lifestyle concerns such as weight, regular exercise, diet and proper sleep.[4]

27. Claimant was admitted to Parker Adventist emergency room on May 26, 2020 with a history of headaches for the last week in the right parietal and base of his neck. The medical records highlighted that Claimant's wife noted that Claimant had bilateral arm weakness that was fairly equivalent and left leg weakness which was most prominent. She noted that over the last 3 days he would be dragging his left foot toward the end of the day though seems to be better in the morning. He had had some difficulty walking because of this. She noted that his speech was slow, and he seemed to be moving in "slow motion." Claimant denied vertigo or imbalance, but his wife reported his complaints of a sensation of lightheadedness and his tendency to fall towards the left. Claimant reported that he would drink two beers and one shot of whiskey daily but denied any withdrawal symptoms or seizures, and upon discharge, there was no evidence of alcohol withdrawal. Claimant and his wife were cautioned with the risk of alcohol withdrawal which could dramatically complicate the course of his SDH. The records noted that "In hindsight," Claimant and wife noted that Claimant had an injury at work "3 months ago" but did not make anything of it. Then a week ago "he had (sic.)[5] his forehead on the door of the shed." Symptoms may have started shortly thereafter. Then the day prior to admission, he rolled out of their boat, falling, one foot to the ground and hit the left side of his head but denied associated loss of consciousness (LOC).

28. Dr. Michael Rauzzino performed a right craniotomy for evacuation of a subdural hematoma with microscopic technique on May 26, 2020. He stated that indications for the surgery were Claimant's right sided headaches and altered mental status. He noted that diagnostics showed a large right sided holohemispheric subdural hematoma with significant mass effect and midline shift without any unresolved problems. Claimant also had a speech and language evaluation as Claimant reported confusion when he awoke from a brief nap, not knowing where he was. He was able to reorient himself after a couple minutes. His wife noted slower processing than normal. Upon assessment of the Montreal Cognitive Assessment (MoCA) screening, Claimant had mild cognitive deficiencies overall with most significant deficits noted with immediate and delayed recall, verbal fluency, and calculations. During his stay, therapists noted that Claimant demonstrated decreased insight into deficits and mild impulsivity.

29. Claimant was discharged from Parker Adventist on May 29, 2020. The primary diagnosis was acute on chronic intracranial subdural hematoma, daily consumption of alcohol, coronary artery disease, tobacco use disorder, Class 1 obesity with a body mass index (BMI) over 32, benign prostatic hyperplasia and prediabetes. The discharge addressed in-hospital care, including physical therapy and occupational therapy evaluations with gait training and lower extremity strengthening, range of motion exercises and neuromuscular reeducation. Upon discharge and the records from admission through discharge, there was no persuasive evidence of alcohol withdrawal.

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[4] There was no mention of dizziness issues by April 2, 2020.

[5] There are several possibilities regarding this mistake, it could mean that a word was missing like "he had scrapped/hit/struck his forehead" or that that there was a typo as in "he scrapped/hit/struck his forehead." This ALJ declines to make any assumptions in this regard like Dr. Morgenstern in his report.

30. The discharge note described the findings of the at least five CT scans performed while in the care of Parker Adventist. The comparison from the CT performed on May 26, 2020, which showed a large mixed attenuation nearly holohemispheric right convexity SDH with areas that may reflect acute on chronic hemorrhage. Near the cranial vertex it measured 3.2 cm. Substantial mass-effect and right hemisphere with sulci that were effaced, right lateral ventricle was effaced, approximately 1.2 cm right greater than left midline shift (MLS). While the CT post craniotomy and evacuation of the SDH on May 26, 2020 showed smaller than on prior diagnostics, measuring 15 mm, there was increased acute hemorrhage within the collection anteriorly. The May 29, 2020 CT showed a decreased mass-effect with left MLS down to 7 mm with residual mixed density right hemispheric subdural collection measuring 1.3 cm in thickness with 7 mm subfalcine midline shift, which was an improvement from the prior day's head CT, with no new intracranial hemorrhage, cortical infarct, mass or other new or acute intracranial pathology. He was discharged with multiple recommendations for outpatient PT/OT/SLP, and medications.

31. Claimant returned to the emergency room and was readmitted on May 30, 2020 with left arm movement suspicious for secondary focal seizure. The CT on readmission showed a recurrent SDH with new loculation of acute SD blood along the anterior and superior margins of the prior craniotomy, with a 13 mm defect. Overall, the size of the residual mixed right SDH was unchanged, measuring 14 mm. Not change in the 9 mm MLS. They assessed that Claimant had a "recurrent subdural hematoma for which he had craniotomy 4 days ago by Dr. Rauzzino." Dr. Rauzzino was consulted, and he wanted Claimant to be admitted to the hospital. After he reviewed the CT scam, Dr. Rauzzino would see him in the morning to decide if any other interventions were needed.

32. On June 2, 2020 Claimant was prepped for surgery as following the prior procedure he had done well but after a week, he had worsening symptoms. Diagnostics indicated that Claimant had a recurrent subdural and epidural[6] hematoma. Dr. Rauzzino proceeded with a revision right craniotomy with evacuation of epidural hematoma and recurrent subdural hematoma. The head CT postoperatively on June 3, 2020 showed a right mixed density smaller SDH with maximum thickness 0.7 cm (compared to 1.4 cm), showed less mass-effect, decreased leftward MLS, now only 0.5 cm (compared to 0.9 cm) and a decreased overall size of right posterior falx SDH with maximum thickness 0.4 cm. By discharge Claimant was showing cognitive linguistic skills within functional limits.

33. Claimant was evaluated by Derrick Winckler, PA-C from Dr. Rauzzino's office, on June 8, 2020 at Front Range Spine and Neurosurgery. PA Winckler took a history and noted that Claimant continued to have tingling in the fingertips of his left hand, but otherwise improved since the craniotomy. He had some drainage at the site of a staple. It was replaced and the drainage stopped. He was advised to return the following week for a wound check.

34. On June 11, 2020 PA Kremer noted Claimant's recent release from the hospital with subdural bleed that was repaired twice by Dr. Rauzzino. PA Kremer noted

[6] Epidural hematoma is a blood accumulation between the dura and the skull, while subdural hematoma means a bleed between the dura and brain matter.

Claimant's use of a cane and that he was on short term disability (STD). It noted a referral to neurology for further evaluation. Claimant's physical exam was unremarkable.

35. Claimant started physical therapy with Fyzical Therapy & Balance Centers on June 16, 2020. They noted complaints of balance and residual left sided strength deficits, with limited ambulation outside the home and with an assistive device. He was discharged on November 24, 2020 due to Claimant's inability to get to his appointments as he was having increased cognitive therapy visits.

36. He returned to Dr. Rauzzino's office on June 17, 2020. Claimant no longer had issues with tingling extremity sensations but continued to ambulate with a cane and continued with his seizure medications. On July 16, 2020 Claimant reported to PA Winckler that he had taken a turn for the worse with worsening headaches and problems with confusion and lethargy. PA Winkler noted that the July 2, 2020 CT scan showed no recurrent hemorrhage and only a small residual subdural hygroma.[7]

37. Pamela Kinder, M.D., a neurologist, first saw Claimant on August 4, 2020 for evaluation and continued seizure medications management, which were increased after his June 2, 2020 admission. The headaches had abated but he continued having fatigue and increased symptoms with stress. Dr. Kinder noted that Claimant would frequently drink nightly except that since his first hospitalization, he had stopped that altogether. Neurological exam was essentially within normal limits except for gait, as Claimant had a tendency to sway to the left. Dr. Kinder noted that Claimant would not be able to drive for approximately one year, recommended a change in medication and gradual exposure to aggravating factors. On August 24, 2020 Claimant indicated to Dr. Kinder that he had almost immediate change in mood with the new medication. She diagnosed localization-related (focal) (partial) idiopathic epilepsy and epileptic syndromes with seizures of localized onset without status epilepticus and traumatic subdural hemorrhage without loss of consciousness.

38. At a follow-up on September 21, 2020 PA Stephen Ladd of Dr. Rauzzino's office, noted that Claimant was recovering fairly well still with complaints of fatigue and shakiness towards the end of the day, but improving strength. Claimant also reported that towards the end of the day he had increasing speech difficulties. PA Ladd recommended continued follow up with the neurologist for control of seizure medications and continued physical therapy. He also reviewed the last CT scan.

39. On October 29, 2020 Dr. Kathryn Polovitz, M.D. conducted an EEG with a finding of persistence of amplitude asymmetry with overlying frequencies appreciated throughout the right frontoparietal region consistent with a breath rhythm, seen in the setting of skull manipulation or underlying skull defect, as well as mild intermittent focal slowing appreciated in the right frontoparietal region suggestive of a mild focal dysfunction in the region. Claimant followed up with Dr. Kinder who noted that Claimant suffered a significant injury to his brain, his studies were still reflecting ongoing impairment at his right frontal/parietal area that could cause confusion, risk of accident and could impair his judgement.

[7] A hygroma is a collection of spinal fluid without blood.

40. The CT of the head and brain from December 31, 2020, as read by David Solsberg, M.D., showed a nearly isodense subdural fluid collection deep to the craniotomy site, that measured 4 mm. There were no mass effects or acute hemorrhage or progression of the hemorrhage since the prior study. Dr. Solsberg noted, at this time, some cerebral atrophy.[8]

41. On January 25, 2021 Claimant was readmitted to Parker Adventist after suspicion of a seizure. EEG and EKG were normal without indication of continued seizures. CT showed an acute 4 mm right frontoparietal subdural hemorrhage with no midline shift. Dr. Rauzzino, from neurosurgery, was notified, he reviewed the films then called back and stated that he felt this was likely old. However, after discussion with the patient's family and wife, they were more comfortable with Claimant staying overnight for evaluation, therefore he was admitted to the medicine service unit. He was discharged and was recommended further neurologist evaluation with Dr. Kinder as well as continued with antiseizure medications.

42. Dr. Kinder reevaluated Claimant on February 1, 2021 noting he was alert but could not recall recent events, had a slightly ataxic gait and immediately lost his balance with eye closure. Dr. Kinder again explained to both Claimant and his wife the extent of the brain injury, that blood had "clotted", but remained an irritant to his brain, noting that both Claimant and his wife only now comprehended the extent of the Claimant's disability, finally realizing Claimant would not be fit to drive or work for some time. Dr. Kinder also stated that Claimant should be on long-term disability as he was not able to meet the demands of his job.

43. On February 24, 2021 Claimant followed up with PA Kremer who noted that Claimant continued to follow up with neurology and was disabled as a result of the brain hemorrhage. He was enrolled in a cognitive rehabilitation program in Parker, Colorado. He complained of left sided shoulder problems as well as right sided headaches. PA Kremer ordered a new CT to evaluate whether there were any new brain bleeds. In addition to his prior diagnosis, he was diagnosed with shoulder pain and right sided headaches. Prior exams were also similar and provided no other insightful notations other than Claimant had frequent lab workups.

44. Dr. Bruce L. Morgenstern performed a medical records review independent medical evaluation (IME) at Respondents' request on April 28, 2021. He did not examine Claimant. The records provided to Dr Morgenstern included Dr. Rauzzino's at Front Range Spine, Franktown Family Medicine, FROI, Neurology of the Rockies and Parker Adventist. Dr. Morgenstern specifically associated use of alcohol as a possible cause of the subdural hematoma in Claimant as alcohol consumption or abuse leads to both atrophy of the brain, which stretches the bridging cerebral vein tissue and may lead to increased risk of SDHs, and risks of falls due to intoxication. Dr. Morgenstern heavily relied on discrepancies regarding whether the work incident occurred one month or three months prior to the May 26, 2020 admission. He, erroneously, assumed that Claimant filled out the FROI instead of Employer's representative. Dr. Morgenstern stated that "[I]n summary, significant discrepancies exist both in the documented time course as well as

[8] This was the first CT report to document any atrophy.

the severity of any associated work-related injury," questioning Claimant's credibility as a historian in his final analysis and opinion.

45. Dr. Rauzzino wrote a letter dated January 31, 2022. He stated as follows:

> I treated Mr. [Claimant] directly including having performed surgery and having assessed the hematoma. I have also looked at the images at length. This was a large hematoma, mostly chronic and likely present for at least one month. It is not something that would have occurred from an injury five days earlier. The vast majority of the hematoma, or perhaps all of it, was relatable to the event that occurred one month earlier. There were chronic membranes found at the time of surgery; these membranes take time to develop over the course of weeks, not a few days. It is therefore my opinion as a level II accredited physician that the etiology of his hematoma and the need for surgery had to have been caused by an event that had occurred at least one month prior to his presentation. If he struck his head at work and if this can be documented, it would be my opinion that this was an occupational injury and not related to the minor trauma that may have occurred one week prior to his presentation.

46. Dr. Michael Rauzzino testified as an expert in neurosurgery and as a Level II accredited physician by deposition on October 17, 2022 on behalf of Claimant, as a treating provider. Dr. Rauzzino was Claimant treating neurosurgeon since his first admission in May 2020, when he treated Claimant at Parker Adventist Hospital. Dr. Rauzzino first evaluated Claimant in the emergency room at Parker Adventist, where Claimant was complaining of headaches, left sided weakness, trouble with thinking, and diagnosed Claimant with an "acute on chronic subdural hematoma." This was based on the CT study of Claimant's head. The CT showed a large fluid collection on the right side of his head compromising or compressing the right side of the brain down. Dr. Rauzzino explained that a subdural hematoma is a blood clot or an area of bleeding between the skull and the dura, and the brain. He could tell that it was acute on chronic because of the size of the hematoma. The brain would not have been able to tolerate an acute hematoma the size Claimant had, because it was several centimeters, comprised of the whole side of the brain. The radiologist measured it at 3 centimeters and noted that the brain had shifted approximately one centimeter pushing the brain to the middle. All of which lead Claimant to have a neurologic deficit.

47. Dr. Rauzzino testified that Claimant's symptoms were consistent with a subdural hematoma, he recommended surgery and performed the surgery. Claimant then had recurrence of blood clotting, so Dr. Rauzzino performed a second surgery to clean out the recurrent clot. Dr. Rauzzino noted that most (greater than 90%, nearly 100%) subdural hematomas are caused by trauma to the head. To assess the causality of the hematoma, he would normally take a history, generally traumatic, viewed the imaging, looking for color and size of the hematoma, and reviewed past records.

48. In this case, Dr. Rauzzino took a history from Claimant that he struck his head at work, which was consistent with the history Claimant provided at hearing, of an incident where he was getting up after working on the sweeper and had a solid hit on his head on a car lift bar. Dr. Rauzzino stated that this type of hit was more than sufficient to have caused the subdural hematoma, even if Claimant had been wearing a helmet. He stated of the three incidents Claimant had, the one the day before had no probability

of causing the hematoma of the size Claimant had because not enough time had transpired. The one where Claimant scrapped his head on the frame of the shed, could not have caused it either, because the type of hematoma noted was older than a week prior. Dr. Rauzzino stated that "the only of those three incidents, the only one that had the potential to have caused this was the one that occurred about a month prior." He went on to state:

> Having an injury about a month prior would have been enough time for the bleeding to occur, the hematoma to expand, and the blood to have lysed. So while I try -- you know, very rare in life you can say absolutely, a hundred percent, I can actually say a hundred percent that the injury didn't occur a week prior, and it didn't occur a day prior.
>
> The analogy that I would give you is if you took an oyster and you dropped it to the ground and the pearl rolled out, we know that that pearl didn't develop just from hitting the ground, and it didn't develop a week prior. It takes time for a pearl to develop. It starts with a grain of sand, it grows, and you know, that sort of thing. The hematoma he had was like that. That is something that took weeks to develop, you know, to occur. So I can say with surety that of those three incidents, the one that is most plausible is -- or the only one that is plausible would be the injury he described at work.

49. Dr. Rauzzino noted that it takes time for a subdural hematoma to grow and individuals don't always present with symptoms right away because it takes time for the blood clot to form, to a point where the brain can no longer tolerate the change. At the beginning, right after the head trauma, Claimant could not have expected to have any symptoms other than the fact that he hit his head.

50. Dr. Rauzzino opined that individuals, generally, that abuse alcohol, have a tendency to fall and suffer trauma to the head, but Claimant did not provide a history of alcohol abuse to Dr. Rauzzino or any other history separate from the three instances, the shed, the boat and the work incident. Dr. Rauzzino noted that alcohol can cause the brain to shrink and atrophy but not to create a subdural hematoma. Further, in this case, Claimant's brain showed no signs of shrinkage. Also, when performing the brain surgery to remove the clot, Dr. Rauzzino noted a chronic membrane which had encased the blood and stated that chronic membranes take several weeks to form, not just a week or days.

51. Dr. Rauzzino also noted that the color of the blood on CT showed that most of the blood was isodense, meaning that it had already broken down after clotting and showed as a gray color. He noted that there was only very little blood that showed any acute findings, as a very white color. He noted that:

> …someone with a chronic subdural hematoma, they can have bleeds into it and, you know, sometimes it happens spontaneously. That is how a subdural hematoma develops. You have a little bit of bleeding.
>
> I don't know if Dr. Morgenstern went through this. But there are veins on the surface of the brain that connect to the dura. And if you have an injury and you shear one of those veins, blood will start to ooze out. And as the blood oozes out, it presses against the brain, and since it can't push the skull out, it pushes the brain down, and as the brain gets pressed down, other veins can stretch and they can tear and they can bleed.

> So sometimes you can catch it right after one of the other veins has gone, started the bleed, you will see acute blood on top of the other blood, which is more chronic in nature.

52. Dr. Rauzzino stated that within a week after the head trauma, an individual could show signs of weakness, confusion. But as time passes, the symptoms become more pronounced as the subdural hematoma continues to grow over the next weeks. "People hit their head, they don't realize how hard they hit it, they shake it off, they just go about things, and they didn't realize they started a process which is going to lead, you know, to potential death, which is what happens if these things aren't treated."

53. Dr. Rauzzino testified that while the patient was suffering from symptoms of the SDH that his mind could be cloudy but once he had been treated, his mind would have cleared from the effects of the SDH and may have been able to provide a more detailed or accurate history of the trauma. He stated that "it is hard to get an accurate history when your brain is under so much pressure."

54. Dr. Rauzzino stated that Claimant "almost died. His brain was so compressed that he was having neurologic symptoms, and to ask him to give an accurate history is difficult in that situation." Dr. Rauzzino noted that following the surgery, when Claimant was recovering, he obtained a history of the three incidents and that of the three, his opinion was that Claimant's injury at work more likely than not, caused the initial bleed, which started the hematoma and that it continued to bleed up until he was seen in the hospital emergency room. At that time, the hospital called him in as they had detected a large, acute on chronic intracranial subdural hematoma.

55. On November 7, 2022 Respondents deposed Dr. Bruce L. Morgenstern, a Board-Certified expert in neurology who conducted a record review. Dr. Morgenstern noted that most SH are caused by trauma and that it was rare for a SH to be spontaneous or not have a history of trauma. He explained as follows:

> The -- the blood forms, as we said, between the · inter table of the skull below a membrane called the dura and the brain. So it basically squeezes the brain between the skull and the brain.· When one leads (sic.) acutely certainly into the brain, or around the brain, blood has iron in it. And on a CAT scan, iron is white.· So acute blood looks hyperdense or white.
>
> After about three days, the blood begins to deteriorate.· So it goes from bright to kind of gray, which we call isodense.· It's about the same color -- same shade of the brain itself.· And then beginning about a week or so after that, the blood further deteriorates and becomes hypodense or dark.· So we have acute blood, which is white; subacute blood, which is isodense, so sort of gray; and chronic blood, which is dark.
>
> Mr. -- on his CAT scan, Mr. [Claimant] had a combination of -- of hypodense, that is, dark blood, which was chronic, but also areas of acute blood, which were bright white. So it was interpreted as acute superimposed upon chronic.

56. Dr. Morgenstern testified that there were multiple possible causes for Claimant's SH, including excessive alcohol consumption which could have caused a fall,

such as the “shed incident:” and the “boat incident” or shrinking of the brain which could have sheered the blood vessels leading to the skull. He also noted that three months as noted in the ER visit report was the outside limit for symptoms to occur from a SH. He also criticized Claimant’s change in reports from the ER visit of three months to the FROI report of approximately one month. Lastly, he noted that because Claimant was wearing a helmet, it was less likely the cause of the SDH, that “it would blunt the injury.” The ALJ infers from this statement that it was also his opinion that it could occur.

57. Dr. Morgenstern questioned Claimant’s credibility because of the three-month notation taken during the May 26, 2020 emergency room visit. He stated that individuals with SHs can suffer or develop cognitive difficulties as a result of the SDHs and that Claimant was reporting cognitive issues, and that he had presented to the ER with a history of headaches for the last week in the right parietal side.

58. As found, Dr. Rauzzino’s opinions are more credible and persuasive than the opinions of Dr. Morgenstern. Dr. Rauzzino was the one to perform the craniotomies in this case and found that there was no brain atrophy present at the time of the craniotomies. He studied the CT imaging, not just the reports from the radiologists, both prior to surgery and after surgery. Dr. Rauzzino credibly explained that Claimant was under the influence of the SDH, that showed a midline brain shift, which caused brain damage, affecting cognitive awareness, memory, and speech. He noted specifically that the SDH could not have been caused by the boat incident because the imaging showed isodense, hypodense and hyperdense. This combination of blood deterioration indicated to Dr. Rauzzino that the shed incident, which occurred approximately one week before the May 26, 2020 admission was not the cause of the SDH. Lastly, he opined that whether the work accident was one month or three, that the CT scan indicated that it was greater than two weeks old but certainly could have been up to three months old due to the isodense blood (degradation of the blood). Dr. Rauzzino’s opinion established that the head trauma was probably caused by the work injury. Dr. Rauzzino’s opinions are more persuasive over the contrary opinion of Dr. Morgenstern. As found, the fact that Dr. Rauzzino viewed the actual CT scans, not just the reports, as well as performed the surgeries on Claimant’s brain and viewed firsthand the condition of the SDH and the surrounding brain tissue showed that it was more likely than not that the SDH was caused by an incident greater than one week before the admission, any time around three weeks to three months. Lastly, Dr. Rauzzino spoke with Claimant in person and obtained a history from Claimant after the surgeries took place, consistent with Claimant’s testimony at hearing, noting that any history of present illness taken on the date of admission, would have likely not been fully reliable, not because Claimant was not credible, but because Claimant had a large SDH deforming his brain matter, which was causing brain injury, causing both physical and cognitive deficits.

59. Further, as found, Claimant’s testimony was credible and persuasive. Claimant described the incident which occurred on or about April 30, 2020, where he was getting up after working on the sweeper’s chains and hitting his head on the car lift that was immediately adjacent to the sweeper and described it as a “very solid hit.” The incident was so traumatic that he immediately had a headache, felt goofy, and dizzy. When he stood up, he was wobbly and could not walk in a straight line, feeling the pain. He sat there for one or two minutes. But he had a full schedule so pushed forward to get

everything done. At the time he said some curse words, but no one was in the shop to hear him. While the medical records documented that Claimant "did not think anything of it," as found, Claimant did not have the experience or expertise to recognize that the significant hit to the head would or could cause trauma or injury to his blood vessels sufficient enough to cause bleeding in his brain and causing the midline shifting of the brain. As found, Claimant's detailed description of the work incident was not casual or transient or fleeting but was very memorable, which in and of itself is very persuasive. Claimant has proven by a preponderance of the evidence that it was more likely than not that the traumatic event at work caused the SDH and brain injury. This is in conjunction with Dr. Rauzzino's opinion that the SDH, which was isodense upon admission to the ER, was probably caused by the trauma at work.

60. The fact that Claimant did not specifically take notice of or write down the particular date of the injury was not unexpected, as, while he had a solid hit to his head, he was able to continue working, though with some difficulty. As stated previously in this analysis, Claimant did not have the expertise to know that there was a cerebral brain vein that was bleeding in his head. Claimant was persuasive in explaining that the accident at work would have been on or about April 30, 2020 because it was springtime and he needed to do maintenance on the sweeper in order to be able to use it to pick up all the debris on the roads from the winter road maintenance.

61. As found, Respondents had notice of the work injury, as the FROI established that Claimant advised his employer of the work incident on April 30, 2020. Respondents failed to designate a medical provider in this matter and Claimant selected his provider, Franktown Family Medicine, and PA Kremer as his authorized treating physician. Further, any provider within the chain of referral were also authorized. PA Kremer referred Claimant to the neurologist, Dr. Kinder, as well as to the neurosurgeon that performed the craniotomy for follow up. PA Kremer also made referrals to multiple other providers, including physical therapy and speech therapy. These providers are authorized.

62. Claimant received appropriate care in this matter. Claimant sought treatment, after the initial emergency care, with Franktown Family Medicine. They referred Claimant to multiple other providers, back to his neurosurgeon, Dr. Rauzzino, for neurologic consultation with Dr. Kinder, for physical therapy with Fyzical Therapy, and to a speech therapist. All these are reasonably needed care to address the work-related subdural hematoma and the sequelae of the SDH, including possible seizure disorder and care. Claimant has shown that the medical treatment was authorized, reasonably necessary and related to the injury. Claimant has failed to show that a change of provider is proper in this matter as no persuasive testimony was tendered on this issue, a new physician identified or a plausible reason for requesting a change of physician.

63. Lastly, Claimant has shown by a preponderance of the evidence that he was disabled due to the work-related injury, SDH and the diagnosed seizure disorder and was unable to return to work from May 26, 2020 to the present. Claimant is entitled to temporary disability benefits. This is supported by Dr. Rauzzino, Dr. Kinder and PA Kremer's opinions as set forth above.

64. Any evidence or possible inferences contrary to the above findings, were specifically found not persuasive or not relevant.

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

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d 6 (Colo. App. 199f5). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." Sec. 8-41-301, C.R.S.

As found, based on the totality of the evidence, the medical records, Claimant's testimony, and the opinions of Dr. Rauzzino, Dr. Kinder, and PA Kremer are more persuasive than the contrary opinions of Dr. Morgenstern. The record shows that Claimant clearly was at work, within the course and scope of his employment, when he hit his head on the metal bar of the car lift, which was immediately adjacent to the large industrial sweeper. Regardless of whether Claimant had a helmet on or not, the hit was sufficient to cause the trauma and damage to a vein in his brain, which in turn caused bleeding and the subdural hematoma. Claimant and his wife started to notice the effects and symptoms of the SDH shortly after this incident, including changes in speech, slowness of reactions or actions, memory loss and loss of function in his upper extremities. Clearly, even the Town Administrator noticed that something was not right as she was the one to send Claimant home the day he was admitted to the emergency room at Parker Adventist. It was not until a CT of his head was performed at the ER that they realized that Claimant had a SDH causing midline shift of the brain, which was significant and life threatening. Dr. Rauzzino was also persuasive and credible in stating that the two incidents one week before being admitted to the ER and one day before (shed incident and boat incident respectively) were probably not the cause of the SDH

and the incident at work, whether he was using a helmet or not was the probable cause of the trauma to Claimant's head and the proximate cause of the subdural hematoma and subsequent seizure disorder. Claimant credibly testified that he was immediately dizzy and had an immediate headache. The fact that he continued working was only a sign that he had a great work ethic, as his wife testified. Dr. Rauzzino's testimony that because most of the blood was not bright white (hyperdense), it was actually isodense and some that was hypodense was extraordinarily persuasive. Dr. Rauzzino's opinions were credible and persuasive. Claimant has shown that the proximate cause of Claimant's injuries to his head and brain was the work-related accident of April 30, 2020. Claimant's injuries arose from the accident at work in the course and scope of his employment on April 30, 2020.

C. Authorized 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).

Pursuant to Section 8-43-404(5) (a) (I) (A) the employer or insurer must provide "a list of at least four physicians or four corporate medical providers …in the first instance, from which list an injured employee may select the physician who attends the injured employee." Pursuant to W.C.R.P. Rule 8-2 (A) "[w]hen an employer has notice of an on-the-job injury, the employer or insurer shall provide the injured worker with a written list of designated providers from which the injured worker may select a physician or corporate medical provider." Further, pursuant to Rule 8-2(A)(1) "[a] copy of the written designated provider list must be *given to the injured* worker in a verifiable manner within seven (7) business days following the date the employer had notice of the injury." (*Emphasis added*.) Pursuant to Rule 8-2(E) "[I]f the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing."

Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical care related to the injuries. As found, Respondents had notice of the accident on April 30, 2020 as established by the completed Division

form, the Employer's First Report of Injury. Also, the Town Administrator and Town Attorney had notice at least by May 26, 2020 when Claimant's wife contacted them to advise Claimant was I the hospital and likely injured in the accident when he hit his head on the car lift. The Town Attorney actually mentioned to Claimant's wife that Claimant could file a claim to that effect. Further, Employer failed to designate the medical providers in a verifiable manner in order for Claimant to choose a provider. Both Claimant and his wife credibly testified that they had never received a designated provider list. Lastly, the DPL that was in evidence failed to show that it was sent to Claimant within seven day following notice to Employer of the work injury or potential work injury.

D. Change of Physician

A claimant can obtain a change of physician "upon the proper showing to the division." Section 8-43-404(5)(a)(VI)(A); *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). Section 8-43-404(5)(a)(VI)(A) does not define a "proper showing," and the ALJ has broad discretion to decide if the circumstances justify a change of physician. *Jones v. T.T.C. Illinois, Inc*., W.C. No. 4-503-150 (May 5, 2006). The ALJ should exercise this discretion with an eye toward ensuring the claimant receives reasonably necessary treatment while protecting the respondents' legitimate interest in being apprised of treatment for which they may ultimately be held liable. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Landeros v. CF & I Steel*, W.C. No. 4-395-315 (October 26, 2000). The ALJ may consider many factors including whether the claimant has received adequate treatment, whether the claimant trusts the ATP, the level of communication between the claimant and the ATP, the ATP's expertise and skill at managing a condition, and the ATP's willingness to provide additional treatment. *E.g*., *Carson v. Wal-Mart*, W.C. No. 3-964-07 (April 12, 1993); *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 1995); *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995). An ALJ need not approve a change of physician because of a claimant's personal reasons, including mere dissatisfaction with the ATP. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (November 27, 2007). On the other hand, the ALJ is not precluded from considering the claimant's subjective perception of his relationship with the physician. *Gutierrez v. Denver Public Schools*, W.C. No. 4-688-075 (December 18, 2008).

As found, Claimant failed to establish a basis for a change of physician. Franktown Family Medicine and PA Kremer were authorized treating providers when Claimant initially selected the providers and by choosing to continue to receive treatment through them. Now Claimant is requesting a change in medical provider but provided no persuasive testimony to support a change in provider nor provided an alternative medical provider. Claimant's request for a change of provider is denied.

E. 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, he

left work as a result of the disability, and 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. Sec. 8-42-105(3)(a)-(d), C.R.S.

Claimant alleges impaired earning capacity from May 26, 2020 through the present. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive temporary disability benefits. Claimant credibly testified that he would be unable to drive to and from work or drive the equipment needed to perform his work. Further, PA Kremer and Dr. Kinder have both addressed that Claimant continues to be disable from work as he would not be capable of engaging in work activities. Dr. Kinder specifically stated that Claimant should be on long-term disability as he was not able to meet the demands of his job. Claimant was first disabled when he was admitted at Parker Adventist and was not able to return to work beginning May 27, 2020 to the present.

There is some mention in the medical records that Claimant volunteered to assist training the new head of public works for Employer and Claimant's wife also mentioned that Claimant attempted to return to work without success. Therefore, Respondents may take credit for any money paid by Employer to Claimant from May 27, 2020 to the present. Further, there is mention of short-term and long-term disability benefits. If Claimant received either type of benefit or Respondents paid for any portion of the disability benefits policies, they are entitled to an offset in the appropriate proportion.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a work-related injury to his head on April 30, 2020 in the course and scope of his employment.

2. Respondents shall pay for all authorized, reasonably necessary, and related medical benefits including but not limited to treatment at Parker Adventist, Dr. Rauzzino, Front Range Spine and Neurosurgery, Franktown Family Medicine, Fyzical Therapy & Balance Centers, Neurology of the Rockies and Dr. Kinder as well as any other provider within the chain of referral to treat the SDH and seizure disorder.

3. Claimant has failed to show he is entitled to a change of physician.

4. The stipulation of the parties is approved and granted. Claimant's average weekly wage is $1014.40.

5. Respondents shall pay temporary total disability benefits beginning May 27, 2020 until terminated by law. Respondents are entitled, in accordance with the law, to offset any benefits paid.

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 7th day of December, 2022

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. 5-191-066-002

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a work-related injury on November 8, 2021.

II. Whether Claimant proved by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits related to a November 8, 2021 work accident, specifically Concentra and Physical Medicine of the Rockies.

PROCEDURAL HISTORY

Claimant filed an Application for hearing on June 28, 2022 on issues that included compensability, medical benefits that were authorized, reasonably necessary and related to the injury, average weekly wage, temporary total and partial disability benefits beginning November 8, 2021 until terminated by law.

Respondents filed a Response to the June 28, 2022 Application for Hearing on July 28, 2022 on issues that included temporary total disability benefits, pre-existing condition; apportionment, if applicable; natural progression of unrelated condition; causation; termination of temporary disability benefits pursuant to 8-42-105(3)(a-d), and 8-42-106(2)(a-b); C.R.S. 8-43-404(7), termination for cause and/or voluntary resignation; insurer not liable for unauthorized medical care; idiopathic injury; unexplained injury; intervening injury; SSDI, unemployment, income from other employment, and/or any other offsets or credits; medical benefits sought not reasonable, necessary, or causally related.

STIPULATIONS OF THE PARTIES

The parties stipulated that Claimant's average weekly wage would be $760.00, if the claim was found compensable. The parties also stipulated that the only issues that needed to be heard were compensability and medical benefits. They stipulated that the parties would negotiate, at a later time, the remaining issues, if the claim was found compensable.

FINDINGS OF FACT

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

1. Claimant was 42 years old at the time of the hearing. He was working as a foreman for a landscape maintenance crew for Employer, and performed general ground maintenance alongside his crew.

2. On November 8, 2021 Claimant was working, trimming bushes when he started to have low back pain. He reported the incident to Employer on the same day.

Respondents filed an Employer's First Report of Injury on November 9, 2022 which stated Claimant was trimming the bushes all day and it was a heavy week. He thought it started hurting when he bent down or from bending down all day from trimming the bushes.

3. Claimant had a well-documented history of chronic low back pain stemming from the work-related injury which occurred on November 10, 2016.

4. A lumbar MRI was completed on December 16, 2016. It showed a small left subarticular protrusion and annular fissure at the level of L5-S1 with contact and mild displacement of the left descending S1 nerve and no evidence of spinal or foraminal stenosis at any level.

5. On February 23, 2017, Claimant was seen by Dr. Roberta Anderson-Oeser from Ascent Medical Consultants, who was authorized treating provider (ATP) in the 2016 claim. The record documents "stabbing/aching pain in his low back and right lower extremity, which is worsened with lifting and bending and improved by massage and physical therapy." Dr. Anderson-Oeser reviewed Claimant's lumbar MRI and noted "no evidence of nerve root compression on the right. He does have a disc protrusion at L5-S1 – off to the left. It is unclear as to what is causing his right lower extremity symptoms."

6. Nerve conduction studies were performed on August 22, 2017. The EMG/NCS testing was normal. Dr. Anderson-Oeser noted that there was no electrophysiological evidence of a right or left lumbar radiculopathy, lumbosacral plexopathy or peripheral nerve entrapment neuropathy. On October 312, 2017 Dr. Anderson-Oeser noted that Claimant had two surgical evaluations and both surgeons advised he was not a surgical candidate but recommended facet injections, which she performed on November 27, 2017. The bilateral L4-5 and L5-S1 facet joint steroid injections, which Dr. Anderson-Oeser documented were not diagnostic as they provided minimal change in his pain levels and was very temporary. She stated that a psychological evaluation was necessary.

7. Claimant was seen by Dr. William Boyd of Ascent Medical Consultants, who diagnosed Claimant with depression, anxiety, and adjustment disorder due to the chronic pain. He recommended psychological testing.as well as cognitive therapy.

8. On April 23, 2018, Dr. Otten, an ATP, from US HealthWorks placed Claimant at MMI. Dr. Otten documented that the FCE was "self-terminated" by the patient. Dr. Otten noted that Claimant continued to take medications including Lyrica and stated that "[h]e has undergone injections without much relief. He has been deemed not a surgical candidate by two spine surgeons…. He is frustrated that the case is being closed, but he does understand that we have exhausted all the options." Dr. Otten assigned a 17% whole person permanent impairment for the lumbar spine and assigned permanent work restrictions of maximum lifting of 40 pounds, and repetitive lifting of 30 pounds.

9. Claimant returned to see Dr. Anderson-Oeser for maintenance though he was weaned off of all his medications due to poor liver functions. However, by September 26, 2018, he was back on multiple medication including cyclobenzaprine, Lyrica and Lexapro. Dr. Anderson-Oeser noted that he continued to have a 5/10 on the pain scale with 7/10 at its worst and 4/10 at its best.

10. On July 19, 2018, Dr. John Hughes preformed an IME on Claimant's behalf. Dr. Hughes stated Claimant "presents with a perplexing medical history. What is perplexing is his lack of improvement over a course of multiple therapies and spinal injections." He agreed with the ATP that claimant was at MMI. Dr. Hughes went on to note that "I agree as well that he has been left with permanent impairment involving both his cervical and lumbar spine regions." Dr. Hughes assigned a 20% whole person permanent impairment for the lumbar spine.

11. On August 6, 2018, a DIME physician, Dr. Frederick Scherr he did not to assign an impairment rating with respect to Claimant's lumbar spine condition. In support of his decision, Dr. Scherr stated that Claimant's "imaging and bone scan did not indicate any acute process of lumbar spine injury per review by both Dr. Gerlach and Dr. Castro spine surgeons. An EMG performed on his LE's was found to be normal." He noted that Claimant continued with pain in his low back coupled with the paresthesia of the right lower extremity with no objective findings. His examination indicated mostly subjective complaints with minimal objective findings and since he did not believe that there was a Table 53IIB diagnosis (AMA Guides, 3rd Edition Rev.), Claimant did not qualify for an impairment of the lumbar spine. He also relied on the Division's Impairment Rating Tips, which stated there must be objective pathology for a spinal rating.

12. On December 31, 2018, Dr. Anderson-Oeser documented that Claimant "has stabbing, aching, numbing pains in the low back, burning and aching in the right buttocks, aching in the left buttocks and pins and needles sensation in his feet." And that "despite all of his treatment to date, his symptoms have not resolved." At that time, Dr. Anderson-Oeser prescribed methocarbamol to address his muscle spasms, lidocaine 5% topical pain cream for his chronic pain, escitalopram (Lexapro) for his depression, and Lyrica to address neuropathic pain.

13. On January 31, 2019, claimant returned to Dr. Anderson-Oeser. The record documents "low back pain, bilateral lower extremity pain and paresthesias." Pain severity documented at 6/10, worst was 7/10. Dr. Anderson-Oeser recommended that Claimant increase his Lyrica for better control of his neuropathic pain. She encouraged Claimant "to remain diligent with his independent range of motion, stretching and exercise program." Dr. Anderson-Oeser also recommended massage therapy, which took place at Ascent Medical Consultants form February 8, 2019 through March 15, 2019 in part to address his lumbar spine flare up.

14. Claimant testified at hearing that he settled his 2016 workers compensation claim in April of 2019 on a full and final basis, so he did not return to see Dr. Anderson-Oeser under this claim.

15. On September 18, 2019, Claimant was seen at the Salud Family Health Centers by Daniel Norton PA-C. The record documents: "Chronic low back pain since work related injury 3 years ago." PA Norton goes on to note "case with workmen's compensation has closed. The patient was now requesting Salud to provide his care. Most bothersome was ongoing right sided sciatica symptoms." Claimant advised that Lyrica had been the most helpful of everything he had been previously taking for his lumbar spine complaints. He also continued to report depression and PA Norton prescribed Lexapro again. Claimant continued to complain of right sided sciatica symptoms and low back problems on October 16, 2019 and January 18, 2022, and they

continued both his Lyrica and Lexapro medication. On December 11, 2019 Claimant continued to report he was taking both medications as well. This continued on April 6, 10, and 13, 2020.

16. On January 21, 2021 PA Norton again documented Claimant's current medications included Lyrica and Lexapro but he recommended Claimant taper off the Lexapro and replace it with Wellbutrin (bupropion). On May 4, 2020, February 22, 2021, March 10, 2021, March 24, 2021, August 2, 2021 both of those medication continued to be listed and noted that the "[m]edication [l]ist reviewed and reconciled with the patient." Also, on May 4, 2020, the record documented "chronic sciatica" and on February 22,2021 both depression and right sided sciatica were diagnosed.

17. Claimant made a claim for date of injury of July 29, 2021 for a bilateral inguinal hernia against Employer, for which he received medical care from Concentra Medical Centers and Dr. Lori Long Miller. He was placed on light duty restrictions. Dr. John Weaver evaluated Claimant on August 5, 2021 and ordered ultrasounds. On September 16, 2021 Dr. Weaver stated that the ultrasound did not reveal any evidence of bilateral inguinal hernias. Claimant also participated in physical therapy from September 22, 2021 through at least October 7, 2021. By October 11, 2021, Claimant continued to complain of improving groin pain but also complained of hip pain. On November 1, 2021 Claimant was still under modified duty restrictions and was to return to Concentra within a month.

18. Claimant was evaluated by Dr. Long Miller on November 11, 2021 with complaints of low back pain and radiation to the left gluteal area. The record noted that Claimant was engaged in heavy labor using a trimmer. She noted that Claimant had been with Employer for approximately two years and that he had recently changed from residential work to commercial jobs. Dr. Long Miller documented that Claimant had a prior low back claim in 2016, not treated at Concentra, for which Claimant had an MRI, injections, an impairment (though not from the DIME physician and from which he had only recovered approximately 50%. Dr. Long Miller noted that Claimant's symptoms were a result of repetitive activity as the pain was caused "without trauma or incident."

19. On November 18, 2021, Claimant returned to Concentra for recheck with Jennifer Thomas, NP. The record noted bilateral low back pain and no radiation. The record documents that "he stated that he feels about 80% improved." He had lifting restrictions of 20 pounds, and he requested they be increase to 30 pounds. He was in physical therapy and stated that it was helping tremendously.

20. On December 6, 2020, Claimant returned to Concentra complaining of low back pain with bilateral radicular symptoms down to his toes. Symptoms also included back stiffness and decreased spine range of motion, but no lower extremity numbness, no lower extremity tingling and no lower extremity weakness. Exacerbating factors included bending, lifting, sitting, standing, twisting and walking. Relieving factors included physical therapy. On exam, Dr. Long Miller noted that the spinal alignment exhibited a loss of normal lordosis, so she ordered an MRI. Dr. Long Miller reviewed his MRI from 2016 which showed a small disc protrusion but was unable to obtain the US HealthWorks records.

21. On December 22, 2021, a lumbar MRI was completed at Health Images Boulder. Dr. Virginia Scoggins Young reviewed the 2021 lumbar MRI, compared it to the prior 2016 lumbar MRI and stated Claimant had "mild lumbar spondylosis, not significantly changed when compared to 12/16/16."

22. On December 28, 2021, Claimant was evaluated at Concentra. Dr. Lori Miller documented "constant bilateral low back pain and intermittent radiation of pain to bilateral upper thighs." Exam showed tenderness present in the left paraspinal, but not lumbar spine and not right paraspinals. Palpation revealed no bilateral muscle spasms, though he had limited range of motion but normal motor strength. The neurologic exam showed that sensation was intact to light touch in all dermatomes tested, muscles tested displayed no weakness nor muscle atrophy.

23. Claimant disclosed to Dr. Long Miller, for the first time, he had continued being prescribed Lyrica since the 2016 injury as maintenance together with a home exercise program. Dr. Long Miller reviewed the MRI and noted that there was no change from the December 2016 lumbar MRI. Dr. Long Miller referred claimant to Dr. Shoemaker for further evaluation.

24. Respondents filed a Notice of Contest on January 10, 2022 denying that the Claimant was injured and or that any injury was work related.

25. On January 11, 2022, Claimant was seen by Dr. Eric Shoemaker, D.O., at Physical Medicine of the Rockies. The record documents that Claimant's symptoms began on November 8, 2021 noting that "[T]here was no trauma or incident." The record goes on to state that "[i]n November of 2016 at work in which he had multiple injuries including lumbar spine and had multiple injections. After this case was closed his low back continued to bother him. His pain is similar to his chronic baseline, but it is just worse. He has been taking Lyrica since 2016."

26. Dr. Shoemaker reviewed the two lumbar MRI's (from 2016 and 2021) and stated "[t]his was compared to prior MRI dates 12/16/16 and there is no significant change. Indeed 2016 MRI does describe left subarticular protrusion at L5-S1. In comparison to these imaging I agree similar findings." With respect to pain levels, Claimant reported to Dr. Shoemaker "worse pain in the last few weeks was a 6 out of a 10." Dr. Shoemaker noted "chronic axial extension based right greater than left low back pain since work-related polytrauma in 2016 which became worse without particular trauma or incident while just trimming bushes on 11/8/21." Dr. Shoemaker noted Claimant had a "[p]ain disability questionnaire score is 94 consistent with moderate to severe disability which seems somewhat out of proportion to objective findings."

27. On January 18, 2022 Claimant was seen at the Salud Clinic. The record documents "on Lyrica since work accident several years ago." The record goes on to note "he plans to see a physiatrist in near future for ongoing pain."

28. On March 4, 2022, Dr. Albert Hattem, M.D., performed a Physician Advisor review for the claim regarding the low back complaints. Dr. Hattem reviewed medical records and issued a report. Dr. Hattem stated that Claimant did not sustain a work injury on November 8, 2021. In support of his conclusion, Dr. Hattem noted that Claimant denied a specific injury or any trauma to the spine to both Dr. Shoemaker and Dr. Long Miller. Ne opined that in the absence of a specific work injury, it would have to be a

repetitive type condition which would be guided by the Medical Treatment Guidelines (MTG) pertaining to low back conditions and Claimant did not meet the threshold under the MTGs for a cumulative type low back condition. Dr. Hattem stated that Claimant clearly had a pre-existing history of chronic low back pain since 2016 where he received years of various treatments. He noted that on January 11, 2022, Claimant informed Dr. Shoemaker his current pain was similar to his chronic baseline pain, just worse and that he had continued to take Lyrica since 2016. Dr. Hattem highlighted that on January 31, 2019, Claimant had returned to Dr. Anderson Oeser complaining of low back pain and rated his pain at 6/7 out of 10, then eight months later, on September 18, 2019, he returned to the Salud Clinic complaining of chronic low back pain since 2016. Dr. Hattem opined that there was no objective evidence to support that an injury occurred on November 8, 2021. In fact, Dr. Hattem noted that the two MRI's that were done (one in 2016 and one on December 22, 2021) showed findings that were essentially unchanged. Dr. Hattem further noted that Claimant's subjective report that his pain was worse compared to his chronic baseline pain is not supported by the contemporaneous records, that on January 31, 2019, Claimant rated his pain to Dr. Anderson Oeser at 7/10, and then gave the same pain rating to Dr. Shoemaker two and a half years later. Dr. Hattem opined that Claimant's current pain complaints were due to his pre-existing chronic pain disorder and that there were behavioral factors contributing to his subjective pain complaints.

29. Dr. D'Angelo, M.D., testified at the hearing on November 17, 2022. Dr. D'Angelo was admitted as an expert in occupational medicine and had previously prepared an IME report on behalf of Respondents on October 18, 2022. Dr. D'Angelo testified consistent with her report. Dr. D'Angelo opined that there was no traumatic incident or physical trauma to the spine on November 8, 2021, that Claimant had a long-standing history of low back pain with radicular symptoms dating back to his 2016 workers compensation injury and that Claimant's reported symptoms from the November 8, 2021 incident at work were virtually identical to his symptoms that are well documented from his 2016 workers compensation claim. Dr. D'Angelo stated that the location of Claimant's symptoms from the November 8, 2021 incident at work are virtually identical to the location of his symptoms from his 2016 workers' compensation claim. She opined that his lumbar MRIs from December 16, 2016 and December 21, 2021 were read as unremarkable and virtually identical. She stated that there was no objective evidence that an acute injury occurred on November 8, 2021 based on the recent lumbar MRI. She noted that Claimant's subjective pain levels after the November 8, 2021 incident at work were virtually identical to the pain levels, he was reporting following the 2016 workers compensation injury. She observed that Claimant had ongoing, well documented low back pain and radicular symptoms in 2016, 2017, 2018, 2019, 2020, and 2021, and that she has no indication in the records or from her examination that Claimant's pain suddenly dissipated just prior to the November 8, 2021 incident. Rather, the evidence demonstrated the opposite, that Claimant continued to have low back pain and radicular complaints since 2016 and any reduction in his medical visits after he settled his 2016 claim in April of 2019 were most likely due financial considerations, a deterrent to obtaining treatment.

30. Dr. D'Angelo opined that trimming trees on or about November 8, 2021 did not permanently aggravate and/or accelerate, or cause the need for medical treatment,

rather, Claimant's symptoms were the direct result of his long standing 2016 industrial injury. She also reviewed Dr. Hattem's report and agreed that Claimant would not meet the criteria for a cumulative trauma condition according to the Medical Treatment Guidelines. Dr. D'Angelo was not surprised that Claimant had symptoms after doing physical labor at work on November 8, 2021 given his pre-existing history and the fact that he reported to her that physical activity in general hurts his back. However, she opined that having symptoms following physical activity at work does not medically equate to being injured and that Claimant acknowledged to her that his level of back pain is directly tied to his level of physical activity. Dr. D'Angelo agreed with other providers that Claimant had a somatoform disorder and pain out of proportion to objective findings. She explained that somatoform disorder is not in any way suggesting that Claimant is lying about his symptoms. Yet, she opined that it is not sound medical judgment to rely solely on Claimant's subjective report of pain and symptoms.

31. As found, Claimant has failed to show that it was more likely than not that he was injured in the course and scope of his employment with Employer. The history, medical records and documentation is rife with Claimant's continued care for his lumbar spine injury of 2016. What was particularly persuasive was that Claimant was on multiple medications including methocarbamol to address his muscle spasms, lidocaine 5% topical pain cream for his chronic pain, escitalopram (Lexapro) for his depression, and Lyrica to address neuropathic pain from Dr. Anderson-Oeser as of one of the lasts visits Claimant had prior to settling his 2016 claim. He followed up with his personal provider to request ongoing medication. However, he only requested prescriptions to address the neuropathic pain and depression, not for any muscle spasms or the topical chronic pain medication. This ALJ is persuaded by both Dr. Hattem and Dr. D'Angelo that Claimant did not suffer a new injury, an aggravation of his preexisting condition nor sustained an occupational repetitive injury. Claimant clearly required all of his maintenance care for his ongoing lumbar spine problems from his prior 2016 work related injury. He continued to have similar symptoms and complaints as when he was treating for the 2016 work related injury and this ALJ perceives no difference in the symptoms or complaints as documented by his providers in the 2021 claim.

32. 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

A compensable injury is one that arises out of and occurs within the course and scope of employment. Sec. 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Industrial Claim Apps. Office*, 905 P.2d

6 (Colo. App. 199f5). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." Sec. 8-41-301, C.R.S.

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, cause 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); *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, based on the totality of the evidence, the medical records, Claimant's testimony, and the opinions of Drs. Hattem and D'Angelo, Claimant has failed to show that it was more likely than not that he suffered work related injuries to his lumbar spine and right lower extremity due to either a specific incident or an occupational injury. Here, it is clear from the records that Claimant had a work related back injury in 2016 to the same or similar body parts that Claimant claimed in this matter. Claimant was prescribed a maintenance program for his 2016 claim that Claimant failed to continue after he settled his claim despite ongoing lumbar spine pain as documented by the Salud clinic. Here, there is little persuasive evidence that Claimant showed it was more likely than not that any mechanism of injury, specifically using the trimmer and performing repetitive bending caused an injury or an aggravation of the prior injury. The above facts show a pattern that Claimant required ongoing maintenance care from his 2016 claim not that he needed treatment for any 2021 claim. The proximate cause of Claimant's need for treatment were his ongoing symptoms from the 2016 work related injury and the direct and natural consequence of the pre-existing condition.

This ALJ declines to address the issue of medical benefits as Claimant failed to show that he had a November 8, 2021 work related injury.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim of November 8, 2021 is denied and dismissed.

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

DATED this 8th day of December, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that Claimant sustained an occupational disease with an onset date of December 19, 2020 and/or January 5, 2021.

IF CLAIMANT PROVED COMPENSABILITY 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 occupational disease and that the surgery proposed by Dr. Pehler is reasonably necessary and related to the injury.

FINDINGS OF FACT

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

1. Claimant was a 71-year-old ramp agent for Employer at the time of the hearing. He was rehired by Employer on June 4, 2007 and continues working for Employer. Between 1984 and 2007 he worked for other employers as an account manager. From 1976 through 1984 he had been previously employed by Employer as a ramp agent.

2. As a ramp agent Claimant would load and unload bags from airplanes, lift and carry bags from one area to another within the airport, loading and unloading belt loaders, carts and containers to put the baggage in and out of the airplanes, drove a tractor or tug and, and between flights he occasionally had down time when he will sit down to rest. He would be required to lift up to 70 lbs. and sometimes up to 100 lbs. if the bags were tagged as heavy. The job required the agents to lift while bending and twisting to perform the job.

3. The Employer's Functional Job Description of a Hub Station Ramp worker included resource, receiving inbound aircraft, dispatching outbound aircraft, unloading inbound aircraft, loading outbound aircraft, product sort equipment runner, product sort pier worker, product sort matrix, cargo, ramp operation control and station operation center. The resource tasks included receiving assignments from the board lead, secure tractor and rolling stock, attaching rolling stock to tractor if needed, which required up to 65 lbs. push/pull, drive tow motor to gate. It included a notation that the tow motors have little to no suspension and whole-body vibration was common. Agents received bags and small package deliveries from five to ninety-nine lbs. with an average of 45 lbs. They loaded and sorted baggage as needed according to delivery location, drive to delivery locations and unload bags onto a cart, belt loader or baggage system conveyor at each location, then stored the rolling stock in designated areas by disconnecting the hitch and

lifting the tongue to apply break, which required up to 85 lbs. of push. They were required to open the baggage compartments of the aircraft, position loaders at the aircraft doors, enter the aircraft and unload the cargo onto the loader, then receive the cargo at the bottom of the loader and load the baggage onto the carts or carriers. The positional requirements were sitting in tow motors or standing and walking frequently on concrete. The job included frequent bending, stooping, squatting, crouching, kneeling, and forward reaching.

4. Claimant stated that he would perform these activities on a daily basis and was required to perform them for up to eight hours a day, since he returned to the job in 2007, but at least for six hours a day. He performed the lifting, bending and twisting for the most part greater than seven hours per week and greater than 9.5 years since he went back to work with Employer.

5. Claimant has had previous injuries to his low back. Once was in 2013 when he had an onset of low back pain with lower extremity radiculopathy which was not job related. He had an MRI performed on August 6, 2013, according to Dr. Khan, which included a notation of a developmentally small central canal. Claimant underwent conservative treatment at that time with therapy, and epidural steroid injections at the Spine One Surgery Center on September 9 and 23, 2013 by Dr. Hahim Khan, which alleviated his back pain as documented by Shaun Gabriel, M.D. on October 21, 2013.

6. On June 2, 2015 Claimant had a recurrence of the low back pain, specifically back pain that radiated to his right buttocks. Dr. Fredric Sonstein noted on exam that extension of the thoracolumbar spine induced severe low back pain and ordered a repeat MRI. Dr. Sonstein diagnosed severe lumbar stenosis at L4-L5 in a patient who presented with back pain and neurogenic claudication.[1]

7. Claimant underwent a bilateral L3-S1 laminal foraminotomies for decompression of the lumbar spine with Bradley Duhon, M.D. due to severe "lateral recess stenosis." The surgical report dated October 28, 2015 noted that Claimant had severe bilateral buttock and leg symptoms, worse with being upright and walking. It went on to state:

> When he sits and rests, symptoms abate. MRI reveals severe stenosis at L3-4, L4-5, and, to a lesser extent, L5-S1 with severe foraminal stenosis on the left side L5-S1. He tried an epidural injection which gave him some relief for a period a time. Other therapies and anti-inflammatories were helpful, but he was not able to go to work and carry on his job successfully without significant pain due to this intractable claudication.

Dr. Duhon specifically noted that the L4-5 disc appeared quite solid. His post-operative diagnosis was lumbar stenosis with neurogenic claudication.

8. Claimant testified that the surgery was successful in relieving his symptoms and he was released to return to full duty as a ramp baggage handler in 2016. Claimant testified that after surgery, he felt great relief and did well. He had no further problems

[1] This ALJ understands neurogenic claudication as the symptoms that occur from pressure on the spinal nerves as a result of stenosis and disc herniations, causing pins and needles, tingling or weakness into the lower extremities.

with his low back except a temporary aggravation of low back pain on March 25, 2020, while at work.

9. The March 25, 2020 Concentra record by NP Allison Haldien documented that Claimant had an onset of low back pain that radiated to his left hip, groin and testicle after bending over repeatedly picking up pieces of paper. He was diagnosed with a lumbar strain and strain of the left iliopsoas muscle.

10. The therapist, Jessica McAlee, P.T., of Concentra, documented on March 30, 2020 that since being slower at the airport (related to COVID), supervisors would have the ramp agents pick up debris off the ground. Claimant reported that ramp agents were given dippers but they ran out, so Claimant was not provided one and resulted in him having to do a lot of repetitive bending to pick debris up, after which he noticed some gradual onset of low back pain especially when he stood up after the break, experiencing some sharp pins and needles sensation on the left side of low back.

11. Claimant underwent a course of physical therapy and was released full duty with no restrictions on April 20, 2020 by Dr. Amanda Cava. Claimant advised Dr. Cava he had no significant ongoing low back problems, radiculopathy, numbness or tingling at that time and requested to be returned to full duty.

12. On December 19, 2020, while waiting to punch out at the time clock, Claimant felt sudden numbness going into his legs, he fell backwards and was caught by one of his fellow coworkers. This was the first time he had ever had this kind of situation happen to him. He stated that he had never experienced numbness or weakness in his legs like he did on that occasion. The experiences he had previously were more like pain in his left hip that radiated down his leg and up through his scrotum area. He did not know if this was or not work related because he did not have an instantaneous onset of pain.

13. Claimant contacted his personal provider the following day but was not able to obtain an appointment until January 5, 2021. Claimant was seen by Jeffrey Amundson, M.D. of Colorado Physician Partners, Garrison Family Physicians on January 5, 2021. He noted Claimant had complaints of leg numbness with worsening symptoms of pain radiating down his posterior buttocks and thighs to the knees. Claimant did not identify a particular trigger other than standing and walking when he had the onset of the leg numbness. On exam he found the low back nontender, with normal leg strength and a mildly positive Phalen's sign. He assessed bilateral low back pain with sciatica and spinal stenosis.

14. Dr. Amundson documented that Claimant could not stand continuously for greater than 15 minutes at a time, so he had to alternate sitting and standing. The standing caused his legs to go numb, and have pain going down his leg with weakness, and it caused him to have to bend over to alleviate the numbness. The pain concentrated in his buttocks, his thighs and the back of his legs. He did not have back pain. He noted that Claimant had not performed any strenuous activities at home or away from work. He differentiated the type of symptoms he had with his prior 2015 complaints because they had affected his hip, and leg that radiated down to his toes and up through his scrotum. Those were not the symptoms he had at the time of the exam.

15. Claimant stated that Dr. Amundson ordered an MRI of the lumbar spine. Once he had the results, Claimant was referred to Dr. Pehler, who advised him that he had problems with the discs and spine and recommended surgical repair. At the time of the hearing Claimant had not yet had the surgery performed and had not missed any work related to his low back condition. However, following his consultation with the surgeon, Dr. Pehler, Claimant undoubtedly believed that his heavy work with Employer had caused the problems with his discs and the need for surgery.

16. The MRI of January 13, 2021 was read by Eric Lyders, M.D., from Diversified Radiology, a fellowship trained neuroradiologist with Certificate of Added Qualifications. His impressions were as follows:

> 1. Disc bulging with right paracentral extrusion and facet arthropathy at L4-L5 contributing to severe central spinal stenosis, right greater than left lateral recess stenosis, and moderate bilateral foraminal narrowing.
>
> 2. Disc bulging with left extraforaminal protrusion and facet arthropathy at L3-L4 contributing to severe central spinal stenosis, left greater than right lateral recess stenosis, as well as moderate bilateral foraminal narrowing.
>
> 3. Other multilevel lumbar spondylosis, detailed above. There is moderate central spinal stenosis at L2-L3 with mild central spinal stenosis at L5-S1. There is scattered lateral recess stenosis with severe foraminal narrowing bilaterally at L5-S1.

17. Maria Kaplan, PA at Orthopedic Centers of Colorado noted on February 2, 2021 that the MRI demonstrated multilevel lumbar spondylosis, L2-3 through L5-S1 spinal stenosis, with severe spinal stenosis at L3-4 and L4-5 due to disc herniation. She noted that it greatly reduced his quality of life due to not being able to stand or walk for more than 10 minutes at a time and recommended surgery from L2 to pelvis for lumbar decompression and fusion.

18. Stephen Pehler, M.D. also of Orthopedic Centers of Colorado, wrote a letter to Dr. Amundson on February 2, 2021 emphasized that Claimant had a severe spinal stenosis at L3-4 and L4-5 due to disc herniation.

19. Dr. Pehler examined Claimant on February 15, 2021, who documented that Claimant continued to have significant buttock and leg pain, with progressive difficulties with any standing and extension, noting that this was following a work-related event. Claimant reported that his symptoms were affecting his quality of life as well as his ability to work. On exam he documented back pain with numbness, unsteadiness and weakness. Dr. Pehler opined that, considering Claimant's severe and almost critical levels with spinal stenosis most significantly at the L4-5 level, a dynamic spondylolisthesis as well as a slight underlying spinal deformity that proceeding with L2 to pelvis lumbar decompression and fusion surgery was recommended in this matter, as isolated decompression would lead to instability.

20. Dr. Pehler submitted a request for prior authorization on March 3, 2021 to Insurer for the spine laminectomy, decompression and fusion from L2-S1 with interbody titanium cage. The record is devoid of any exchange of designated provider list or response to the request for prior authorization.

21. Despite the issues that Claimant was having with the leg numbness and pain with standing and walking Claimant has continued to work while waiting for the approval for the low back surgery.

22. Claimant was evaluated by Dr. Brian Reiss, an orthopedic spine surgeon, on March 16, 2022. He noted that he had received 127 pages of medical records to review. Following review of the January 5, 2021 records he specifically opined that

- More likely than not there was no actual work injury.
- More likely than not his symptoms are not related to his work activity.
- Having pain while being active at work is not equivalent to a work injury.
- More likely than not this symptomatology represents a recurrence of his chronic pre-existing condition combined with the natural history of progression of that condition.
- This is not a work-related condition.
- His symptoms and treatment thereof should be considered non-work related

23. Dr. Reiss reviewed the MRI films directly stating that the images were extremely grainy and opined that "[a]ll the findings probably represent degeneration and postoperative changes with no acute pathology." With regard to the March 2020 lumbar spine claim, Dr. Reiss commented that the flare up was not likely work related and that Claimant should "find another job that does not create low back soreness." Lastly, he opined that "the proposed surgical intervention is for treatment of a chronic preexistent multilevel degenerative condition unrelated to any effects of the work situation. The proposed treatment is not work-related," and that the multilevel decompression and fusion was not indicated pursuant to the Medical Treatment Guidelines because the pain generator had not been clearly identified.

24. Claimant testified that he wished to proceed with the L2-S1 decompression and fusion recommended by Dr. Pehler. He understood from Dr. Pehler that he has herniated discs for which he required the surgery. He continued to have the numbing sensation going into his bilateral legs, which was somewhat relieved by sitting.

25. Dr. Reiss testified at hearing as a Level II accredited, board certified orthopedic spine surgeon and consistent with his report. Dr. Reiss explained that stenosis is a narrowing of the spinal canal and that claudication is simply a descriptor for the symptoms one gets from that kind of problem, including causing lower extremity symptoms, numbness, tingling, and pain. Dr. Reiss noted that Dr. Pehler described in his report that Claimant had moderate to severe narrowing of the canal or the foramina, and which was possible but not clear from the available studies. Dr. Reiss stated that Claimant's diagnosis were "pretty much the same" as Clamant had in 2015 before his surgery. He stated that Claimant had a developmentally small central canal and that, as he aged, the structures around the canal thickened and took ups space to narrow it further and caused compressed nerves.

26. The W.C.R.P. Rule 17, Medical Treatment Guidelines, Exhibit 1, Table 5 state that there is "Good Evidence: Trunk flexion, rotation, and lifting in the workplace cumulatively is associated with low back pain." It further stated that there is "Good Evidence: Work related factors, such as lifting and bending of the trunk or bending and twisting of the trunk, increase a workers' risk of developing lumbosacral radiculopathy." Lastly, the MTGs state that there is some evidence that

> Cumulative exposure to lifting in the workplace is associated with the development of low back pain. Exposures of 7 hours per week or greater, over more than 9.5 years, is associated with low back pain in an apparent dose-response relationship. The effects of lifting may only become apparent when considered in combination with other work exposures.

27. As found Claimant's testimony was credible and persuasive with regard to the nature and onset of his symptoms. The ALJ credits the medical records, the opinions of Ms. Kaplan and Dr. Pehler and finds that Claimant has demonstrate that it is more likely than not that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with Employer. A fact that was particularly persuasive was that Dr. Duhon noted in 2015 that the L4-5 disc appeared quite solid. The 2021 MRI, as noted by both PA Kaplan and Dr. Pehler, showed severe spinal stenosis at L3-4 and L4-5 "due to disc herniation." After review of the MRI reports of August 6, 2013, and June 11, 2015, the stenosis as described in those reports appears to be less significant, and less affected by disc herniations as described in those reports when compared to the MRI study of January 13, 2021.

28. Dr. Reiss' opinion that Claimant had a history of similar complaints and symptoms related to the congenitally small spinal canal and stenosis as the cause of his current symptoms is not persuasive. Claimant had the stenosis addressed by surgery in 2015. Claimant returned to work in 2016 and continues to work to this date in a heavy job, moving luggage that weighs an average of 45 lbs. from one area to another, including from inside the airplanes onto the belt loaders and then from the belt loaders to carts. He would lift, push and pull heavy weight in excess of 70 lbs. as noted by the job description, and pushed in excess of that to hook and unhook the carts from the tractors. While Claimant may have had a predisposition of a small spinal canal, Claimant had an aggravation of his preexisting condition, including disc herniations, which resulted directly form the work he performed for Employer. The aggravation was proximately caused by the type of work he performed and as a result of the heavy nature of the employment, that required Claimant to continuously lift, push, pull, twist, bend and reach. Further, the aggravation caused him to require medical attention. Claimant was not exposed to the same type of conditions outside of his work environment, including at home or non-work activities. Claimant credibly testified that he did not perform the same kind of activities outside of work. Claimant has shown that the onset of Claimant's occupational disease was December 19, 2021, when his symptoms caused by the aggravation, resulted in the need for medical care. Claimant scheduled an appointment for the first available time he was able to obtain.

29. The ALJ is persuaded by Ms. Kaplan's opinion and Dr. Pehler's opinion Claimant requires surgery to address the occupational injuries to his lumbar spine which cause the claudication symptoms including numbness, tingling and pain into his lower extremities.

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's testimony was credible and persuasive with regard to the nature and onset of his symptoms as well as the nature of his job. The ALJ credits the medical records, the opinions of Ms. Kaplan and Dr. Pehler and finds that Claimant has demonstrated that it is more likely than not that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with Employer.

As found, Claimant returned to work in 2016 and continues to work to this date in a heavy job, moving luggage from one area to another, including from inside the airplanes onto the belt loaders and then from the belt loaders to carts. He would lift, push and pull heavy weight in excess of 70 lbs. as noted by the job description of having to hook and unhook the carts from the tractors. It is also of note that the tugs have little suspension and likely caused further aggravation to Claimant's condition. He clearly met the criteria

as laid out in the Medical Treatment Guidelines under W.C.R.P. Rule 17, Exhibit 1, Table 5 as Claimant performed heavy lifting on a daily basis for greater than ten years. While Claimant had a preexisting small spinal canal, the work he perform for Employer more likely than not caused significant disc damage, including herniated discs and proximately cause further aggravation of the stenosis and accelerated his preexisting condition causing him to require medical attention. In other words, but for the work performed by Claimant for Employer as a ramp agent, Claimant would likely not have needed the medical care he now requires. Claimant was not exposed to the same type of conditions outside of his work environment, including at home or non-work activities. Claimant was a credible witness and was persuasive in his descriptions of the type of work he performed. Claimant was also credible that he did not perform the same kind of activities outside of work. As found, Dr. Duhon noted in 2015 that the L4-5 disc appeared quite solid but both PA Kaplan and Dr. Pehler noted that the 2021 MRI showed severe spinal stenosis at L3-4 and L4-5 "due to disc herniations." PA Kaplan and Pehler's opinions were credible and persuasive over the contrary opinions of Dr. Reiss. As found, Claimant had the stenosis address by surgery in 2015 and the continued heavy lifting, twisting, reaching of heavy bags that weighed an average of 45 lbs. caused disc herniations and aggravation of Claimant's underlying stenosis. Claimant has shown that he sustained an occupational disease to his lumbar spine with an onset of Claimant's occupational disease on December 19, 2021, when his symptoms caused by the aggravation, resulted in the need for medical care.

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).

30. Claimant has proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical treatment for the occupational diseased with a date of onset of December 19, 2021 which caused work related injury and need for medical care. As found, Claimant was attended by Dr. Amundson, who in turn referred Claimant to Dr. Pehler. As found, after examining Claimant and reviewing diagnostic results, Dr. Pehler and PA Kaplan recommended the five level decompression and fusion

of the lumbar spine from L2 through S1 due to the significant damage cause by the combination of the herniated discs and stenosis at L2-3 and L4-5, which significantly aggravated the severe spinal stenosis. The stenosis is causing claudication, which is causing Claimant to have symptoms into the lower extremities, including weakness, pins and needles, and tingling sensations. Claimant has proven by a preponderance of the evidence that the need for spine surgery proposed by Dr. Pehler was causally related to the December 19, 2021 work related occupational disease and injury. As further found, Dr. Pehler's opinion that the five level surgery is necessary as "isolated decompression would lead to instability," so anything less than the five level fusion would place Claimant at risk for further complications. Therefore, as found, Claimant has shown that the proposed surgery to address the occupational injuries to his lumbar spine which cause the claudication symptoms including numbness, tingling and pain into his lower extremities is authorized, reasonably necessary and related to the occupational disease.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained occupational injuries to his lumbar spine with a date of onset of December 19, 2021.

2. Respondents shall pay for the reasonably necessary and related medical care including the surgery as recommended by Dr. Pehler.

3. 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 22nd day of December, 2022.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has shown by a preponderance of the evidence that the surgery recommended by Dr. Arthur was reasonably necessary and related to the admitted June 19, 2021 work-related trauma.

STIPULATIONS

The parties stipulated that the New West Physician records were exchanged late but that they waived the 20-day deadline in this matter.

FINDINGS OF FACT

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

1. Claimant was 68 years old at the time of the hearing. At the time of the admitted work-related injury, on June 19, 2021, Claimant was working for two separate employers. Claimant's first job was working for Employer for the prior seven years as a ramp agent, primarily in the "makeup" area transporting transfer travelers' luggage to carts that would then be transported to the appropriate plane. The second job was as a shuttle driver for a hotel chain, where he was picking up and dropping off passengers from the airport to the hotel. He had been performing this job for approximately one and a half years.

2. Claimant was seen by Aedine Prummer, PA-C at New West Physician on March 4, 2020, with a primary complaint of low back pain, which had persisted for the prior three months. Claimant described symptoms as an ache with aggravating factors of sitting and alleviating factors as running. PA Prummer ordered x-rays of the lumbar spine. She provided a diagnosis of low back pain, which was a diagnosis previously provided by Dr. Kevin Scott on November 16, 2018, when he ordered an MRI of the lumbar spine.

3. Claimant was seen at New West for an annual physical exam by Dr. Scott on June 1, 2020, who noted Claimant was an athletic healthy age-appropriate male. He indicated that Claimant was maintaining an exercise regime of 30 minutes a day. Claimant had complaints of pain in his hips and hands as well as his low back. Dr. Scott noted that an MRI was denied by Insurance. He assessed that the low back pain was chronic but stable and that physical therapy provided him no relief. He also assessed arthralgia that was chronic and progressive, and suspected osteoarthritis from an athletic life and increasing age. Dr. Scott ordered a rheumatoid factor, labs, and pelvic x-rays, but the record reflected that Claimant had had diffuse arthralgia, worse in hands and hips.

4. On May 5, 2021, PA Prummer examined Claimant for a primary complaint of right hip pain. She took a history that:

> Patient is a 66 y/o M here with a complaint of R hip pain. He cannot remember when pain first started. but it has at least been 1 year. The pain comes and goes. Sometimes the pain is felt in his R groin. He feels like his hips are weaker than before. The pain is worse with leaning on the R side when he is sitting. The pain is better with Aleve. He works at the airport and lifts a lot of bags. He wants to make sure his hips are okay before retiring. He has a past medical history of degenerative disc and joint disease in lumbar spine seen on x-ray in 3/2020.

On physical exam Ms. Prummer noted that Claimant's left hip strength was 5/5 but the right hip strength was only 4/5. Claimant specifically requested x-rays of both hips and she assessed his condition as chronic and was considering a diagnosis of osteoarthritis. She stated Claimant should continue with ibuprofen and would consider ordering physical therapy once the x-ray results were known.

5. Claimant stated that the pain in the hip would come, stay a few days and then resolve. He noted that it just happened to be bothering him on the day he was in to see the doctor on another health issue.

6. On June 19, 2021 Claimant was moving a military bag, which Claimant testifies weighed between 60 to 80 pounds, twisted, and felt a pop in his right hip. Following this incident, his hip problem never subsided or went away. Claimant stated that he was seen at Concentra four days later and was provided with work restrictions, which continued through the day of the hearing.

7. On June 23, 2021 Claimant was seen at Concentra by Lea Johansen, M.D. who took a history as follows:

> Patient reports he was lifting heavy bags and injured his low back, shoulders and R groin on Saturday. Called off work the next day and then had Mon and Tues off work. Today he called off and came in for evaluation. Tried tylenol [Sic.] w/o relief. Rest is helping. Shoulder and lumbar pain worse on R and worse with lifting. No radiculopathy. Denied R groin bulge or lump. No scrotal swelling or hernaturia. No h/o hernias in past. *Does have a h/o[1] lower back pain and shoulder injury a few years ago* but has been working as a ramp agent since then w/o problems. PE does not suggest a R hernia; appears to be a groin strain. Will hold off imaging with US[2] for now but discussed at length signs to watch for hernia. Patient endorsed understanding. Will start PT, diclofenac, and methocarbinal [Sic.]. f/u Monday. (*Emphasis added.)*

On physical exam, Dr. Johansen found tenderness in the anterior shoulder and in the lateral shoulder including with palpation and limited range of motion. Claimant was tender to palpation over the deep anterior hip flexor, inferior to ASIS,[3] and had abnormal range

[1] This ALJ infers that h/o means "history of."
[2] This AlJ infers that US is an ultrasound of the abdomen, a diagnostic tool frequently used to identify hernias.
[3] This ALJ infers ASIS is the anterior superior iliac spine.

of motion with pain.[4] She assessed that Claimant had a lumbar strain, repetitive strain injury of the bilateral shoulders and a groin strain on the right.

8. Claimant immediately started physical therapy at Concentra on June 23, 2021. Zachary Fox, P.T. took a history that Claimant had right sided low back pain felt achy, sore, and stiff. He did not have any proximal or distal pain, but pain did wrap around the right side to the front of his hip. Mr. Fox noted abnormal range of motion, positive FADIR, positive FADER, positive piriformis test, was significantly tender to palpation along the right hip gluteus medius, minimus, piriformis, and TFL.[5] P.T. included therapeutic exercises, therapeutic activities, manual therapy, neuromuscular reeducation, and dry needling.[6] Therapy with Mr. Fox continued through October 12, 2021, with some interruptions.

9. Also on June 23, 2021, Claimant attended an appointment at New West Physicians for an annual exam. The list of conditions being assessed, primarily consisted of an annual exam, and there was no mention of a work-related injury on June 19, 2021. However, the list of current, active problems lists the lumbar spine pain, lumbar degenerative disc disease, radicular pain, pelvic pain and hip pain.

10. Claimant was evaluated and treated by multiple Concentra providers, including PA Valerie Skvarca on June 28, 2021, on July 6, 2021, and July 20, 2021. The history is clearly a cut and paste job as it is repeated verbatim on each of the medical records. On the last date Claimant was reported having right hip pain and groin pain, in addition to the shoulder pain and low back pain. It noted that the reason for the visit was lower back pain, bilateral shoulder problems as well as groin pain and minor aches in the groin and 'left' hip (not the right one). Ms. Skvarca ordered x-rays and had Claimant on modified duty restrictions. On exam both hips had normal appearance, with no deformity or tenderness and had normal strength. Claimant returned to Concentra on August 11, 2021 and was then evaluated by PA Kathryn Miller, for continued hip complaints but an essentially normal exam, with only tenderness in the gluteus maximus and gluteus minimums.

11. Deana Halap, NP attended Claimant on August 31, 2021 and recommended MRIs of the lumbar spine and hip in order to identify the cause of the right hip and groin pain. Claimant returned with PA Miller on September 15, 2021 for reevaluation, and she referred Claimant to an orthopedic specialist for the right hip strain as he had a focal tear of the right hip labrum.

12. The September 14, 2021 MRI, as read by Adam Williams, M.D. of Invision Sally Jobe and provided an impression that Claimant had a focal chondrolabral separation located anteriorly, mild thickening of the gluteal tendons bilaterally without evidence of a tear; and mild advanced L5-S1 degenerative disc disease. He did note that there was no

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[4] Unfortunately, Dr. Johansen failed to document specific tests to assess right hip labral integrity, such as FABER/Patrick's test.

[5] This ALJ infers that TFL is the tensor fasciae latae, a muscle that is proximal to the anterolateral thigh, between the superficial and deep fibers of the iliotibial (IT) band, and works in conjunction with the gluteus maximus, gluteus medius, and gluteus minimus to perform hip movements, including flexion, abduction, and internal rotation.

[6] There are multiple comments by physicians that state Claimant had acupuncture treatment but this ALJ only found evidence in the record of dry needling.

evidence of any substantial joint effusion. Of note, the left hip was also visualized in the imaging and showed marginal osteophyte formation at the superior acetabular rim undermining the left acetabular labrum.

13. On September 15, 2021 PA Miller made referrals to both Dr. Nathan Faulkner for the hip complaints and to Dr. Brian Castro for lumbar spine issues.

14. Claimant was first evaluated by Nathan Faulkner on October 1, 2021 at the Concentra facility. Dr. Faulkner took a history as follows:

> …he was lifting some heavy bags onto a cart when he felt pain initially in his back. He subsequently noticed pain in his hip when leaning to the right and has had persistent pain over the lateral aspect of the hip and groin since that time. The pain is sharp in nature. He has noticed painful popping over the lateral aspect of his hip since the injury and *denies any antecedent right hip pain or dysfunction*. He has tried 3 months of physical therapy, which has helped with his strength, but not his pain. He has not had any previous injections and has tried ibuprofen without relief. He has also tried ice, heat, lidocaine patches, and acupuncture. He denies any numbness/tingling in the right leg. He has been off work for the past 2 weeks as he completed 3 months of light duty. (*Emphasis added).*

Dr. Faulkner noted on exam that Claimant had a mildly positive Trendelenburg sign (indicative of hip abductor weakness in the gluteus medius and minimus) but otherwise a slightly abnormal hip exam, including range of motion, mildly positive McCarthy and extension/adduction/internal rotation test, positive Patrick test with negative FABER test, normal strength, flexors and abductors with some pain and normal neurovascular exam. He reviewed the hip x-rays and the MRI, which showed moderate hip DJD with circumferential femoral head osteophytes and degenerative labral tear. Dr. Faulkner provided two proposed treatments, the first was a steroid injection into the right hip under ultrasound, the second a total hip replacement. Dr. Faulkner stated that Claimant was not eligible for any other kind of surgery in light of the significant degenerative condition of the hip, and that he should be seen by Dr. Arthur for the arthroplasty of the hip.

15. Respondents filed a General Admission of Liability on October 6, 2021, admitting for temporary total disability benefits beginning on September 13, 2021. Respondents did not specify what conditions they were admitting to in filing the GAL.

16. Claimant was seen by Dr. Bryan Castro, an orthopedic specialist. After reviewing records, Dr. Castro noted that Claimant appeared to have sustained a work related right hip injury on June 19, 2021. However, the history taken was not specific nor focused on preexisting conditions. Dr. Castro specifically opined that

> Dr. Faulkner has already recommended a right hip joint injection under ultrasound. Dr. Castro discussed with the patient that would be reasonable to go ahead with the hip injection. We discussed that this may help significantly with his pain symptoms, but it would also be a diagnostic injection. If he gets temporary resolution of his symptoms, then his hip *is* likely the main source of his pains. If he gets no benefit from a hip joint injection, then we could consider a right-sided transforaminal epidural steroid injection at L5 for diagnostic and therapeutic purposes.

17. PA Miller noted on October 7, 2021 that Claimant was concerned with the recommended steroid injections into the hip and lumbar spine as he was under the care of an eye specialist for retinal changes caused by his uncontrolled diabetes and was aware that there are higher risks for patients with diabetes. PA Miller stated that:

> After a lengthy discussion about plan of care and timeline of PCP today and eye dr in 1 month, then FU w/ us in 4-6 weeks, pt was at checkout and began asking back office staff for referral to Dr. Arthur to discuss THA . I interveined (Sic.) and stated that we had discussed he would talk w/ PCP and eye doc about steroid injections but he states he has changed his mind and would like to persue (Sic.) surgical consultation at this time. I will place ortho referral to DR. Arthur for R THA consult as recommended by DR. Faulkner should pt NOT want steroid injection

18. Also, on October 7, 2021 Claimant was evaluated again by PA Prummer. She took a history that Claimant was complaining of chronic hip pain. She specifically noted that:

> He cannot remember when pain first started. but it has at least been 1 year. He was last seen for this in 5/2021. *The pain comes and goes.* Sometimes the pain is felt in his R groin. He feels like his hips are weaker than before. The pain is worse with leaning on the R side when he is sitting. The pain is better with Aleve. He works at the airport and lifts a lot of bags. He has a past medical history of degenerative disc and joint disease in lumbar spine seen on x-ray in 3/2020. Last x-ray was done in 5/2021, which revealed *symmetric bilateral hip osteoarthritis*. He is was [Sic.] seeing an orthopedist through workman's comp who suggested he receive steroid hip injections. He requests a referral to a different orthopedist today.
>
> He is also here to follow up on diabetes. His home glucose levels have been around 200s, fasting. He requests a referral to an endocrinologist as he would like to make sure his sugars are well-controlled prior to initiating steroid injections for his hip.

19. Claimant continued seeing the providers at Concentra. He saw Dr. Cava on November 5, 2021 who stated that Claimant was not working as he ran out of light duty time. He continued with complaints of unchanged hip pain in the right lateral hip, and groin with associated symptoms of gait disturbance, decreased range of motion, hip stiffness and a click inside of hip when bending over. The exacerbating factors included crossing legs, stair climbing and exercise like elliptical. Relieving factors included nonsteroidal OTC anti-inflammatories. Claimant discussed with Dr. Cava during this visit his hesitancy to proceed with steroid injections due to side effects that might be caused by his uncontrolled diabetes, which he also discussed with PA Miller on December 1, 2021. He also discussed with Dr. Cava on January 21, 2022 that he definitely wished to proceed with surgery instead of steroid injections which could cause serious side effects due to his uncontrolled diabetes. Dr. Cava noted that Claimant was not at maximum medical improvement as he was awaiting surgery.

20. On November 17, 2021 Claimant was evaluated by Jeffrey Arthur, D.O. of Orthopedic Centers of Colorado. He noted the following assessment:

> Patient is a pleasant 67-year-old male who presents today for second opinion regarding his right hip evaluation and options. We had a lengthy discussion regarding the options based on his current situation. *He had no issues with this hip prior to this injury.* He felt a pop and now has evidence of a labral tear. He had

> seen a hip arthroscopy specialist who per the patient's report said that he would not do a hip arthroscopy. But would refer him for hip replacement. … *Do not feel that going straight to hip replacement is the next reasonable option.* Do feel that if there was more evidence of arthritis and/or chronicity to this issue then would be more open to going straight to hip replacement. *I was very honest with the patient and that I do perform injections and hip replacements routinely and that based on his overall clinical evaluation and imaging would still want to start with injection.* This would also be for diagnostic and therapeutic purposes. Explained the reasoning for this. He was somewhat more interested in hip replacement and just getting everything done. (*Emphasis added.)*

21. Claimant returned to Dr. Arthur's office and was seen by PA Rachel Sauvageau on December 17, 2021. Claimant advised he really did not want to proceed with a steroid injection "as he feels this is more of a Band-Aid than anything." Claimant stated he wanted to have the total hip replacement/arthroplasty (THA) surgery and requested that a request for authorization be completed and sent to Insurer. Dr. Arthur's office submitted the request for authorization for the on January 11, 2022.

22. Claimant complained to Dr. Cava on February 11, 2022 that his right hip continued to get worse. Dr. Cava also noted that the delay in proceeding with the hip surgery was due to a pending independent medical examination (IME). Claimant continued to follow-up with the providers at Concentra while awaiting the IME.

23. Claimant was evaluated by Stephen Pehler, M.D., an orthopedic surgeon, at Respondents' request on March 18, 2022. He issued a report on April 4, 2022. From the fax trace, the report was not actually sent to the Insurer adjuster until May 11, 2022. He noted that he reviewed the medical records provided, took a history from Claimant and completed an examination. Claimant reported prior low back and shoulder injuries several years prior to the admitted work injury of June 19, 2021, but did not disclose any complaints of prior hip pain or injuries and Dr. Pehler denied the receipt of any records documenting symptoms or pain related to the hip condition immediately prior to the work injury. Dr. Pehler noted it was possible that Claimant suffered a permanent exacerbation of his degenerative hip arthritis and degenerative lumbar spondylosis at L5-S1. However, Claimant needed to have a diagnostic injection before making that determination. He noted that there were concerns for diabetes management in the setting of a steroid injection. As a result, he stated that it would be reasonable to perform a local-only based injection of his right hip and assess his clinical response to determine if Claimant's pain and symptoms were coming from the hip or a referred pain from his severely compressed L5 nerve root. A local-only injection of the lumbar spine could then be performed on the right at L5-S1 to assess Claimant's clinical response. Dr. Pehler noted that Claimant may ultimately be a candidate for a THA. However, there would first need to be some, even limited, clinical response to a local-only injection. He noted that Claimant would not be at MMI until the injection was done and the pain generator was clarified.

24. On April 29, 2022 he had no change in symptoms of the right hip and groin but reported that symptoms increased with walking and performing twisting activities like sweeping or cleaning floors. PA Skvarca noted that it was unknown if Claimant had reached MMI as they were awaiting Dr. Pehler's IME results.

25. He still had not been provided the IME by June 6, 2022, as noted by Eric Chau, M.D, who finally discussed the results of the IME with Claimant on July 7, 2022, noting that Claimant would schedule a follow up appointment with Dr. Faulkner for a diagnostic local injection. The records noted that Claimant had provided histories of diabetes, hypertension, repetitive bilateral shoulder problems, right trapezius muscle strain and thoracic myofascial strain. It is not clear from the record whether this information was derived from Claimant because in one section of the report it showed that Claimant was not working and in the same report, it showed that he was currently working. He did, however, inform Dr. Chau that he was willing to proceed with the injection without steroid in order to proceed with the surgery.

26. On July 22, 2022 Claimant was evaluated by Dr. Faulkner, who documented a history of groin and lateral hip pain with a 7/10 on a pain rating scale, on average. He was working as a baggage handler when he injured his right hip on June 19, 20221, while lifting some bags into a cart. He continued to have intermittent popping over the lateral aspect of his hip. His pain was refractory to several months of physical therapy as well as ice, heat, lidocaine patches, acupuncture, and NSAIDs. He has not worked for several months. Dr. Faulkner reviewed x-rays which showed mild hip degenerative joint disease, with a lateral acetabular osteophyte and medium cam deformity. He also had advanced L5-S1 degenerative disk disease with grade l L4-L5 spondylolisthesis. He noted that the MRI images of the right hip dated September 24, 2021 were reviewed, which show moderate chondromalacia of the hip joint with small circumferential femoral head. Dr. Faulkner discussed the pros and cons of steroids versus platelet rich plasma (PRP) injections, and considering that Claimant did not have his diabetes under control, PRP was the better recommendation. He noted that if Claimant failed to respond to the PRP injection, that he would continue to recommend a total hip replacement, given Claimant's arthritis and age.

27. On September 23, 2022 Dr. Faulkner prescribed PRP and proceeded to perform a PRP injection of the right hip on September 25, 2022, in light of both Dr. Arthur and the IME recommending injections before proceeding with a THA.

28. Claimant testified at hearing that he had had right hip pain off and on for approximately one year before the June 19, 2021 work related injury. He also agreed that he had groin pain before and after the admitted injury. The difference was that before it was off and on and now it was constant groin pain.

29. Claimant stated that he was never asked if he had had prior problems with his hip by the ATPs in this case. Had he been asked, he would have advised that he had intermittent times when he would have pain in his right hip but it would only last for a few days and then go away. He stated that after the June 19, 2021 incident when he was lifting a heavy military bag and heard the popping in his right hip and his low back, he has had continuous pain and problems. He also stated that he had never had problems with crossing his leg, for example, and now just trying to do that, caused him more pain. He stated that immediately before the incident of June 19, 2021 he was not having any pain in his hips at all until he heard the popping.

30. Claimant stated that he never advised his workers' compensation providers about his prior problems with his hip. He did comment about his diabetes, hypertension,

prior back and shoulder problems, but never commented about his prior hip problems because those would come and go and did not think that his prior hip problems were relevant, despite providers including Dr. Arthur, Dr. Faulkner and Concentra providers stating in their records that Claimant had no prior problems with his hip.

31. In fact, when Claimant answered interrogatory No. 8, which stated “Please indicate whether you have ever had any symptoms or injuries to your back or any other body part you allege is work-related prior to June 19th, 2021." Claimant failed to state he had prior back or hip problems, even though it is clear from the June 1, 2020 and May 5, 2021 New West Physician records that Claimant had both. He only disclosed that he had had a prior shoulder injury in 2018 and thought the question only related to work-related injuries.

32. Claimant stated that he had the injection that Dr. Faulkner recommended and it provided no relief of his right hip pain. Claimant requested leave to proceed with the THA, as recommended by Dr. Arthur now that the PRP injection was not successful.

33. Dr. Stephen Pehler, a Board Certified orthopedic surgeon with a fellowship in spine surgery, testified at hearing on behalf of Respondents. He explained that Claimant had wear and tear of the component of cartilage in the hip joint that allows the joint to move, causing the degenerative labral tear. Dr. Pehler also explained that Claimant has a cam deformity that caused additional wear and tear of the hip joint. Claimant also has a chondrolabral separation where the cartilage and the labrum itself can, during the degenerative or wearing process, become separated from the attachment to the bone. He explained that the radiological MRI report specifically identifies that Claimant has a pattern of joint degeneration and there was no evidence of the hip having a traumatic event such as a flipped cartilage into the joint. He specifically noted that the findings on the MRI were consistent with pathology as identified on May 5, 2021 by PA Prummer. Dr. Pehler stated:

> … sometimes people that have labrum degeneration or even if it's a labral tear, it can present with groin pain as opposed to isolated buttock. You can have just literally primary osteoarthritis of the hip, which can present with groin pain. So you can have groin or buttock, some people can have leg, there are several presentations you can have clinically when it comes to a symptomatic right hip, and this is certainly one of them.

Dr. Pehler went on to state that groin pain is consistent with a degenerative labral tear as well as consistent with the symptoms he was having when he saw PA Prummer at New West Physicians. Considering Claimant’s ongoing diabetes, Dr. Pehler recommended a lidocaine injection to anesthetize the hip or the low back to better identify the situs of the symptoms, identify what is driving Claimant’s clinical symptoms coming from the back or the hip. He stated that since the PRP did not provide any results he opined that Claimant continued to need the anesthetic injection to pinpoint the condition that needs to be treated given Claimant’s ongoing symptoms and the mild to moderate labral pathology and the very real lumbar spine pathology. Dr. Pehler’s expert opinion was that Claimant had a preexisting degenerative pathology in the hip that likely sustained an acute exacerbation and that the total hip arthroplasty was not related to the work-related event though may be, eventually reasonably necessary, after the anesthetic injection. It was more patent to Dr. Pehler that Claimant has a legitimate and severe pathology in the spine

that might be causing the hip symptoms and that is why he heartily recommended the anesthetic injection before embarking on any surgery.

34. Dr. Pehler also stated that:

> [Claimant] did not have any other presentations for his hip other than the couple of months before this event and before his work related injury, and there is a distinct and now sustained and permanent change in his symptoms and quality of life since that event, then we have to go with it was a permanent injury.
>
> In my opinion, there's still more diagnostic work that should be done before he has a surgery, but at least based on [Claimant]'s presentation to now multiple providers that he's continued to have symptoms, that was a different pattern and a different cadence before this event.
>
> In my clinical opinion, doing a PRP injection, for his right hip, if that did not work, it points more towards a degenerative condition. Whereas if a PRP injection works, it points more towards a traumatic condition. That's not absolute, that's not crystal clean, there's a heck of a lot of gray there. But it's at least a piece of data that helps kind of push you one way or another.
>
> Right, so you're not going to scope [Claimant]'s right hip for a degenerative labral tear, because that'd be the wrong procedure, in your 60s. You would get a total hip replacement, it's 100 percent the right call. It's just my opinion that you should just at least try to figure out what's -- what's driving what. I don't think that a total hip replacement is the wrong answer, it very well could help him a lot, but there's still more pathology and at least one more step that should be done before he has surgery.
>
> …
>
> *I think he likely sustained an acute injury that exacerbated a preexisting condition. (Emphasis added.)*

35. As found, the fact that Claimant reported a prior history of low back and shoulder problems but failed to disclose that he had seen Dr. Scott and PA Prummer on June 1, 2020 and May 5, 2021, respectively, complaining about a history of problems with his hips and/or groin for approximately one year, prior to the May 5, 2021 visit, including that his provider had ordered x-rays of the hips, were significant and relevant facts. These were not provided to his Concentra ATPs, Dr. Faulkner, Dr. Castro, or Dr. Arthur for their consideration. Neither were they provided to the IME, Dr. Pehler until after he wrote his report. As found, Dr. Pehler noted that they were important facts to the causation analysis of the claim. Here, it is clear that Claimant has a preexisting condition and that it was not disclosed. However, it is also clear that Claimant had an aggravation of the preexisting condition. The ATPs in this case had access to diagnostic testing, including x-rays and MRIs that showed Claimant had a clear underlying condition, yet they continued to state that Claimant was not at MMI because he continued to await surgery for the hip.

36. The question here is what was the extent of the aggravation that Claimant sustained, and this is answered by Dr. Pehler who explained that it was an acute injury that exacerbated the preexisting condition. As found, it is more likely than not that Claimant sustained an aggravation of a preexisting condition. As further found, Dr.

Pehler's testimony was more credible and persuasive than Claimant's testimony. Claimant, in fact denied that he was ever asked by anyone, including medical providers, Insurer or Respondents' attorney, about prior history of his hip condition and this ALJ doubts the accuracy of Claimant's explanations.

37. As found, Claimant sustained an exacerbation of his preexisting hip degenerative condition on June 19, 2021 when he lifted the heavy military bag and twisted, feeling a pop in his lumbar spine and right hip. This is supported by Claimant's ATPs medical records, his PCP and the IME physician, Dr. Pehler.

38. As further found, Claimant has failed to show that the surgery proposed by Dr. Arthur, a total hip arthroplasty, is reasonably necessary at this point in time, as anesthetic injections to both the right hip and the lumbar spine are required to properly assess Claimant's pain generator. This is supported by Dr. Pehler's credible testimony that it was more likely than not that Claimant required this diagnostic tool to assess the true pathology that needs to be treated in this matter. This is also supported by Dr. Arthur's opinion that he did not feel that going straight to hip replacement was the next reasonable option.

39. Testimony and evidence inconsistent with the above findings are 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 oairf 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. Reasonably Necessary and Related Medical Benefits

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

The 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. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Therefore, in a dispute over medical benefits that arises after the filing of a general

admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the work injury and the need for medical treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A panel of the ICAO also addressed these issues in *Maestas v. O'Reilly Auto Parts*, ICAO, W.C. No. 4-856-563-01 (August. 31, 2012). The panel stated:

> [The *Snyder*] principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury.

Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *In re Claim of Foust*, I.C.A.O, WC, 5-113-596 (COWC October 21, 2020).

Claimant alleged that surgery recommended by Dr. Arthur for the right total hip arthroplasty was reasonably necessary and related to the admitted work injury of June 19, 2021. Respondents argued that while it may be reasonably necessary it is not related to the June 19, 2021 injury as they alleged the hip condition was a preexisting or degenerative chronic condition.

However, a preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004).

As found here, Claimant sustained an aggravation or exacerbation of his underlying degenerative hip condition as explained by Dr. Pehler, Respondents' expert witness.

However, as further found, Claimant failed to show that the proposed surgery, the THA, is reasonably necessary at this point in time. Claimant has two specific conditions. The first is a mild to moderate aggravation of a right hip labral tear. The second is a more significant pathology of the lumbar spine that is serious, as explained by Dr. Pehler. While Claimant is understandably unable to undergo steroid injections to assess and appropriately diagnose Claimant's true clinical pathology causing symptoms due to his uncontrolled diabetes, he is able to undergo anesthetic injections into the hip and the spine, without the steroid component, to identify the pain generator in this matter, also explained by Dr. Pehler. Claimant's request for authorization to proceed with the THA is denied at this time.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained an aggravation of his underlying right hip labral tear.

2. Claimant's request for a determination that the total hip arthroplasty prescribed by Dr. Arthur on January 22, 2022 is reasonably necessary is denied at this time, subject to further diagnostic work-up with anesthetic injections into the lumbar spine and right hip.

3. 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 30th day of December, 2022.

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. 5-204-072-001

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on April 12, 2022 he suffered an injury arising out of and in the course and scope of his employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that the left knee surgery performed by Dr. Christopher George on July 11, 2022 was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that the left knee surgery performed by Dr. Christopher George on July 11, 2022 was authorized medical treatment.

4. The parties stipulated that the claimant's average weekly wage (AWW) for this claim is $704.82.

5. At hearing, the parties agreed to reserve the remaining endorsed issues (temporary total disability (TTD) benefits; temporary partial disability (TPD) benefits, and whether the claimant was responsible for the termination of his employment) pending a ruling on the issue of compensability.

FINDINGS OF FACT

The ALJ has considered all evidence and testimony presented at hearing and finds the following to be true:

1. The employer operates a hospital. The claimant worked for the employer as a dishwasher in the hospital cafeteria. On April 12, 2022, the claimant clocked in at 6:12 a.m. and clocked out at 7:51 a.m.

2. Executive Chef [Redacted, hereinafter SM] was the claimant's direct supervisor on April 12, 2022. [Redacted, hereinafter RD] is the employer's Director of Food and Nutrition Services. RD[Redacted] oversees the department in which both SM[Redacted] and the claimant worked.

3. On April 12, 2022, RD[Redacted] met with the claimant regarding his continued failure to park in employee designated parking. RD[Redacted] typically arrives at work by 8:00 a.m. The April 12, 2022 meeting with the claimant occurred close to 8:00 a.m.

4. Shortly after meeting with RD[Redacted], the claimant informed SM[Redacted] that his knee hurt and he needed to go home. The claimant did not indicate to SM[Redacted] that he hurt his knee while at work.

5. Prior to going to the ED, the claimant met with [Redacted, hereinafter CG], Workers' Compensation and Employee Health Case Manager. The claimant informed CG[Redacted] that he was walking in the kitchen and felt pain in his knee. The claimant specifically denied carrying any items at the time he felt pain. CG[Redacted] sent the claimant to the employer's emergency department (ED) for treatment. CG[Redacted] also scheduled the claimant to see Dr. Julie Cohen as his authorized treating provider (ATP).

6. The claimant was seen in the ED at 8:06 a.m. on April 12, 2022. The ED triage assessment portion of that medical record includes the following: "patient states he was walking and felt [pain to] inside left knee" and that "patient took ibuprofen 600 mg at 0700". Dr. Benjamin Peery noted in that same medical record that the claimant "was walking in hospital cafeteria when he felt pain inside the left knee". Dr. Peery also noted that the claimant "did take ibuprofen this morning prior to coming to work".

7. Dr. Peery ordered x-rays of the claimant's left knee. The x-rays showed no acute abnormalities. Dr. Peery diagnosed the claimant with a mild sprain of his medial collateral ligament (MCL). He recommended use of a knee brace, anti-inflammatory medication, ice, and elevation. The claimant was excused from work for one week.

8. On April 14, 2022, the claimant spoke with [Redacted, hereinafter BC] Senior Claims Specialist with the insurer. During a recorded statement, the claimant told BC[Redacted] that the Monday prior he was "walking around" and "twisted wrong" and felt pain in his knee. The claimant also reported that the following day it was sore and he went to the ED. After completing the recorded statement, BC[Redacted] informed the claimant that it sounded as if he had suffered an idiopathic injury, which would not be work related. At that point, the claimant changed his story to state that he was carrying dishes when he felt pain.

9. On April 14, 2022, the claimant was first seen by his ATP, Dr. Cohen. The claimant told Dr. Cohen that he was walking around the kitchen at work and felt a pop in his left knee. Dr. Cohen opined that the claimant suffered an MCL tear or strain. Dr. Cohen released the claimant to return to work as of April 19, 2022 with restrictions of no crawling, crouching, or kneeling.

10. The claimant returned to work on April 19, 2022 and continued to work his normal job duties until he resigned from his position on June 2, 2022.

11. On May 19, 2022, the claimant was seen by Daniel Greene, PA-C at Valley View Ortho. At that time, the claimant reported to PA Greene that he injured his knee at work. Specifically, the claimant stated that he "was lifting something and pivoted, felt a pop/pain". PA Greene diagnosed internal derangement of the left knee and ordered magnetic resonance imaging (MRI) of the claimant's left knee.

12. The claimant was not referred to Valley View Ortho by Dr. Cohen or CG[Redacted]. BC[Redacted] testified that the insurer did not receive a request for authorization regarding treatment with PA Greene or Valley View Ortho. Nor did the insurer receive a request for authorization of a left knee MRI.

13. The recommended left knee MRI was performed on May 19, 2022. The MRI showed a high grade radial tear of the medial meniscus at the junction of the posterior horn and body; a grade 2 sprain of the MCL; advanced chondromalacia of the patellofemoral compartment; and a nondisplaced subarticular insufficiency fracture of the weight bearing medial femoral condyle.

14. On May 20, 2022, the claimant returned to PA Greene to discuss the MRI results. At that time, PA Greene noted that the claimant had a medial meniscus tear and a subchondral medial condyle fracture. PA Greene recommended surgical intervention that would include a left knee arthroscopy with partial medial meniscectomy.

15. On May 24, 2022, the claimant returned to Dr. Cohen and reported that he had undergone an MRI and left knee surgery was recommended by orthopedics. Dr. Cohen recommended physical therapy, but the claimant declined that treatment. Dr. Cohen noted that the claimant was working without restrictions and that the claimant "does not want restrictions at this time".

16. On June 1, and June 2, 2022, the claimant contacted the Department of Veterans Affairs (VA) and requested an orthopedic referral to address a torn meniscus.

17. On June 7, 2022, the claimant was seen at the VA by Dr. Carla Tillery. The claimant reported that he "was at work when he developed knee pain" and "felt a pop". On that date, Dr. Tillery reviewed the MRI results and made a referral for an orthopedic evaluation.

18. On July 11, 2022, Dr. Christopher George performed a left knee arthroscopy with partial medial meniscectomy.

19. On August 5, 2022, the claimant attended an independent medical examination (IME) with Dr. Tashof Bernton. In connection with the IME, Dr. Bernton obtained a history from the claimant and performed a physical examination. With regard to the mechanism of injury, the claimant told Dr. Bernton that while "lifting 'big pots for the soup' " at work, he turned and felt a pop in his left knee. In his IME report, Dr. Bernton noted that the only medical record he was provided was the May 24, 2022 record of the claimant's visit with Dr. Cohen in which Dr. Cohen referenced the claimant's meniscal tear and MCL tear. Dr. Bernton opined that the claimant's

description of the incident was consistent with a medial meniscus tear and/or an injury to the MCL. Based upon the information he had at that time, Dr. Bernton opined that the claimant suffered a work related injury to his left knee.

20. On September 23, 2022, Dr. Bernton authored an addendum to his IME report after receiving additional medical records for his review. Specifically, Dr. Bernton was provided with records from the VA as well as the May 19, 2022 MRI report. Dr. Bernton noted that the records from the VA were not related to a left knee condition. With regard to the MRI, Dr. Bernton noted that the report indicated a high grade radial tear of the medial meniscus; a grade 2 sprain of the MCL; and a "nondisplaced subarticular insufficiency fracture". Based on this additional information, Dr. Bernton opined that the medial meniscus tear and MCL tear are work related. He further opined that the insufficiency fracture is not work related.

21. After reviewing additional medical records, on October 3, 2022, Dr. Bernton authored a third report. At this time, Dr. Bernton was provided with the April 12, 2022 ED report. Based upon his review of these additional records, Dr. Bernton changed his opinion regarding the work relatedness of the claimant's left knee condition. Specifically, Dr. Bernton noted that the mechanism of injury recited in the ED record is that the claimant was "walking into work" when he felt pain in the inside of his knee. Dr. Bernton opined that this mechanism of injury is not consistent with a work injury. Dr. Bemton opined that the claimant appears to have suffered an injury to his left knee while simply walking.

22. Dr. Bemton testified consistent with his October 3, 2022 report. Dr. Bemton explained why his opinion changed regarding whether the claimant suffered a work injury.

23. The claimant testified that he did not report feeling left knee pain while walking into work. Rather, he felt pain in his left knee while he was walking at work.

24. The ALJ does not find the claimant's testimony regarding the nature and onset of his left knee symptoms to be credible or persuasive. The ALJ credits the medical records and the testimony of RD[Redacted], SM[Redacted], and BC[Redacted], regarding the sequence of events on April 12, 2022 and thereafter. The ALJ credits Dr. Bernton's opinion as expressed in his October 3, 2022 report and his testimony at hearing. The ALJ finds that it was reasonable for Dr. Bernton's opinion to change once he had access to the ED records. Additionally, the statement the claimant gave to BC[Redacted] is indicative of the claimant feeling pain while engaging in the ubiquitous act of walking. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that on April 12, 2022 he suffered an injury arising out of and in the course and scope of his employment with the employer. The ALJ finds that the claimant felt pain in his left knee while simply walking.

CONCLUSIONS OF LAW

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

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

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

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse V. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on April 12, 2022 he suffered an injury arising out of an in the course and scope of his employment with the employer. As found, the testimony of RD[Redacted], SM[Redacted], and BC[Redacted] is credible and persuasive. As found, Dr. Bernton's testimony and the opinions expressed in his October 3, 2022 report are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim regarding an April 12, 2022 date of injury is denied and dismissed.

Dated December 12, 2022.

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.

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that on January 27, 2020 she suffered an injury arising out of and in the course and scope of her employment with the employer.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment she has received from Lake Chiropractic beginning on January 28, 2020 was reasonable, necessary, and related to her work injury.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that the bilateral total hip arthroplasties performed by Dr. Brinceton Phipps were reasonable, necessary, and related to her work injury.

FINDINGS OF FACT

1. The claimant works for the employer as a front counter employee. The claimant testified that when she reported to work on January 27, 2020, she slipped on a patch of ice in the employer's parking lot. She further testified that both of her feet went out from under her, causing her to fall to the ground. It is the claimant's testimony that her left elbow struck the ground first, followed by her buttocks/low back area. The claimant testified that she immediately felt pain in her left elbow and low back.

2. On January 27, 2020, the claimant notified her direct supervisor, [Redacted, hereinafter JL], of her fall. JL[Redacted] instructed the claimant to notify human resources. The claimant notified [Redacted, hereinafter AB] with the employer's human resources office that same day.

Medical Treatment Prior to January 27, 2020

3. On January 23, 2018, the claimant began treatment with chiropractor, Dr. Andrew Lake at Lake Chiropractic. At that time, Dr. Lake identified the claimant's issues as: chronic posterior cervical and upper thoracic complaints; chronic lumbar, left and right SI joint complaints; and chronic bilateral thumb complaint. The claimant continued regular treatment with Dr. Lake throughout 2018 and 2019. The claimant was seen three times by Dr. Lake in December 2019. The claimant testified that she considers this to be "maintenance treatment".

Medical Treatment After January 27, 2020

4. On January 28, 2020, the claimant was continuing to have pain. As a result, AB[Redacted] instructed the claimant to seek treatment with Dr. Lake. The claimant was seen by Dr. Lake on January 28, 2020. The medical record of that date lists the claimant's complaints as pain in her lumbar area, left and right sacroiliac (SI) joints. In that same record, the claimant described her January 27, 2020 fall as "slipping on the ice and landing on her buttock and left elbow".

5. The claimant was seen by Dr. Lake ten times between January 28, 2020 and March 2020. In March 2020, Dr. Lake's office was closed due to COVID-19 restrictions. Dr. Lake's office reopened to patients in approximately July 2020. The claimant returned to Dr. Lake on July 23, 2020 and continued to seek treatment from him weekly throughout the remainder of 2020 and into 2021.

6. In 2021, the claimant continued to have pain in her low back and hips. On April 29, 2021, Dr. Lake referred the claimant to Animas Orthopedic Associates for consultation.

7. On June 3, 2021, the claimant was seen at Animas Orthopedic Associates by Dr. Brinceton Phipps. At that time, the claimant reported bilateral hip pain with weakness, stiffness, and instability. The claimant reported that she fell onto her right hip when she fell in early 2020. The claimant also reported that the pain was greater in her left hip. Following x-rays, Dr. Phipps diagnosed the claimant with bilateral osteoarthritis of the hip. Specifically, the June 3, 2021 x-rays showed: "moderate to advanced hip arthritis on the right side with near bone-on-bone contact and associated osteophyte formation. On the left side, [h]er joint space narrowing is more mild to moderate with some minor osteophyte formation."

8. As the claimant reported a fall onto her right hip, but greater pain in her left hip, Dr. Phipps ordered magnetic resonance imaging (MRI) of the claimant's left hip.

9. On June 16, 2021, an MRI of the claimant's pelvis "with attention to left hip" was performed. Dr. Brett Englund reviewed the MRI and issued a report. In that report, Dr. Englund identified extensive marrow edema involving the left femoral head and neck, with edema involving the acetabulum with subarticular cysts. In addition, there was focal flattening of the superior medial aspect of the femoral head "consistent with sequela of previous avascular necrosis or advanced cartilage loss and osteoarthritis". Dr. Englund also noted degenerated acetabular labrum and left hip joint effusion and synovitis. With regard to the claimant's right hip, Dr. Englund noted mild reactive marrow edema involving both sides of the right hip joint with moderate effusion, synovitis, and labral tear.

10. On June 23, 2021, the claimant returned to Dr. Phipps to discuss the MRI results. Dr. Phipps noted that the claimant's right hip is more arthritic, but her left is more painful. Dr. Phipps recommended bilateral hip arthroplasty. The claimant requested the left hip surgery first.

11. In July 2021, the claimant reported to the employer that she would need to undergo surgery. At the direction of the company owner, on July 19, 2021 AB[Redacted] prepared a First Report of Injury regarding the January 27, 2020 incident. The injured body part was identified as "hip". In addition, the nature of the injury was described as "[d]islocation - [p]inched nerve, slipped/ruptured herniated disc, sciatica, HNP subluxtion (sic), MD dislocation".

12. On July 27, 2021, the respondents filed a Notice of Contest regarding the January 27, 2020 incident.

13. On July 30, 2021, Dr. Phipps performed a left total hip arthroplasty.

14. On November 23, 2021, Dr. Phipps performed a right right total hip arthroplasty. Following her surgeries, the claimant attended physical therapy for approximately one year.

15. The claimant testified that prior to the January 27, 2020 incident, she was very active. The claimant engaged in activities such as hiking, hunting, skydiving, scuba diving, and horseback riding. The claimant further testified that since January 27, 2020, she has not been able to engage in any of these activities.

16. At the request of the respondents, on July 19, 2022, the claimant attended an independent medical examination (IME) with Dr. John Burris. In connection with the IME, Dr. Burris reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. At the IME, the claimant described her January 27, 2020 fall. Specifically, she reported to Dr. Burris that she slipped on ice, both of her feet slipped from beneath her and she struck the ground with her left elbow and low back/buttocks. Dr. Burris opined that as a result of the January 27, 2020 fall, the claimant suffered a left elbow contusion and a lumbar/buttock contusion. In addition, Dr. Burris identified the claimant's date of maximum medical improvement **(MMI)** for those contusions as March 16, 2020. It is Dr. Burris's opinion that the claimant's bilateral end stage hip osteoarthritis was not caused by the January 27, 2020 fall on ice. In addition, Dr. Burris opined that the January 27, 2020 fall did not accelerate or aggravate the claimant's pre-existing bilateral hip osteoarthritis.

17. On August 12, 2022, the claimant attended a virtual IME with Dr. Sander Orent. Dr. Orent also reviewed the claimant's medical records and obtained a history from the claimant. Due to the virtual nature of the IME, he did not perform a physical examination. The claimant described her January 27, 2020 fall as both feet going out from under her, and falling on to her left elbow, low back, sacrum, and pelvis. It is Dr. Orent's opinion that the claimant's January 27, 2020 fall aggravated the preexisting and asymptomatic osteoarthritis in her bilateral hips. In support of this opinion, Dr. Orent

noted that the claimant engaged in a number of physically demanding activities prior to her fall, and she is now unable to engage in those same activities. Dr. Orent also opined that the avascular necrosis present in the claimant's hips occurred between the time of her 2020 fall and her 2021 diagnosis. Therefore, it is Dr. Orent's opinion that the need for bilateral hip arthroplasties is directly related to the claimant's January 27, 2020 slip and fall.

18. Dr. Burris's testimony was consistent with his IME report. Dr. Burris reiterated his opinion that the claimant's January 27, 2020 fall resulted in soft tissue contusions to her left elbow and low back. He further testified that these contusions have resolved. Dr. Burris also testified that the claimant's fall in January 2020 was not the cause of her hip condition. Nor did the fall aggravate or accelerate the pre-existing condition of the claimant's hips. It is Dr. Burris's opinion that pre-existing end stage osteoarthritis is what led to the need for bilateral hip replacements. Dr. Burris explained that avascular necrosis is a condition where the bone begins to die because of a lack of blood flow.

19. Dr. Orent's deposition testimony was consistent with his IME report. Dr Orent testified that it continues to be his opinion that the claimant's need for bilateral hip replacements is related to her fall on January 27, 2020. Dr. Orent reiterated his reasoning with regard to the claimant's previously asymptomatic hip condition became symptomatic with the January 2020 fall. Dr. Orent also testified that since the onset of the COVID-19 pandemic, he meets with patients virtually because his spouse is immunocompromised. That is why the claimant's IME was conducted virtually. It is Dr. Orent's opinion that lack of a physical examination of the claimant does not impact his opinions.

20. The ALJ credits the medical records and the opinions of Dr. Burris over the conflicting opinions of Dr. Orent. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that she suffered an injury while at work when she slipped and fell on January 27, 2020. The ALJ credits the opinions of Dr. Burris and finds that on January 27, 2020, the claimant slipped and fell while at work, resulting in a left elbow contusion and lumbar/buttock contusion. The ALJ further finds that this injury resolved by March 2020, as opined by Dr. Burris. The ALJ also finds that the claimant has successfully demonstrated that it is more likely than not that her first ten visits with Dr. Lake for chiropractic care beginning January 28, 2020 and into March 2020 was reasonable, necessary, and related to the claimant's work injury.

21. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that treatment in 2021 of her hips is reasonable, necessary, and related to the work injury. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that her need for bilateral hip replacements was related to the work injury. While it is clear to the ALJ that bilateral hip replacements were reasonable and necessary in treating the claimant's condition, those surgeries were not related to the work injury. The ALJ finds that the claimant's fall on January 27, 2020 did not cause the end stage osteoarthritis or avascular necrosis in the claimant's hips. Nor did the

January 27, 2020 work injury aggravate or accelerate the claimant's pre-existing hip conditions to necessitate total hip replacements.

CONCLUSIONS OF LAW

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

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

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

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H* & *H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson,* 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H* & *H Warehouse v. Vicory, supra.*

5. As found, the claimant has successfully demonstrated, by a preponderance of the evidence, that on January 27, 2020 she suffered an injury arising out of and in the course and scope of her employment with the employer. As found, the medical records and the opinions of Dr. Burris are credible and persuasive on this issue.

6. 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).

7. As found, that the claimant has successfully demonstrated, by a preponderance of the evidence, that as a result of her January 27, 2020 fall at work, the first ten treatments with Dr. Lake beginning January 28, 2020 and into March 2020 were reasonable, necessary, and related to the work injury. As found, the medical records and the opinions of Dr. Burris are credible and persuasive on this issue.

8. As found, that the claimant has failed to demonstrate, by a preponderance of the evidence, that treatment of her bilateral hips, including bilateral hip replacement is related to the work injury. The claimant has failed to demonstrate by a preponderance of the evidence, that the fall at work caused the end stage osteoarthritis or avascular necrosis in her hips. In addition, the claimant has failed to demonstrate, by a preponderance of the evidence, that the January 27, 2020 work injury aggravated or accelerated the end stage osteoarthritis or avascular necrosis in her hips. As found, the medical records and the opinions of Dr. Burris are credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. The claimant suffered a compensable work injury on January 27, 2020.

2. The respondents shall pay for the first ten visits with Dr. Lake (beginning with January 28, 2020), pursuant to the Colorado Medical Fee Schedule.

3. The claimant's request for payment of her medical treatment of her bilateral hips, including bilateral hip replacements, is denied and dismissed.

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

Dated December 16, 2022.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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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. 5-124-750-003

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that his claim should be reopened pursuant to Section 8-43-303, C.R.$., due to a change in condition.

2. If the claim is reopened, whether the claimant has demonstrated, by a preponderance of the evidence, that the denied medical treatment (consisting of lumbar spine **MRI;** physical therapy; consultation with Dr. Lewis for injections; consultation with Dr. Ceola; and a neurosurgery evaluation with Dr. Agrawal); is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 29, 2019 work injury.

3. If the claim is not reopened, whether the claimant has demonstrated, by a preponderance of the evidence, that the denied medical treatment (consisting of lumbar spine **MRI;** physical therapy; consultation with Dr. Lewis for injections; consultation with Dr. Ceola; and a neurosurgery evaluation with Dr. Agrawal}; is reasonable medical treatment necessary to maintain the claimant at maximum medical improvement (MMI).

FINDINGS OF FACT

1. On November 29, 2019, the claimant suffered an admitted work injury when he slipped on ice and fell, resulting in pain in his right knee. During this claim the claimant treated with Dr. Craig Stagg as his authorized treating physician (ATP).

2. On June 12, 2020, the claimant attended an independent medical examination (IME) with Dr. John Raschbacher. In connection with the IME, Dr. Raschbacher reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. Dr. Raschbacher opined that the claimant had reached maximum medical improvement **(MMI)** for his right lower extremity as of the date of the IME. Dr. Raschbacher also assessed a permanent impairment rating of three percent for the claimant's right lower extremity, (which converts to one percent whole person). Dr. Raschbacher recommended that the claimant continue with a home exercise program and avoid crawling, kneeling, and squatting. With regard to the claimant's reports of hip and back symptoms, Dr. Raschbacher opined that those symptoms are not work related. In support of this opinion, Dr. Raschbacher pointed to the claimant's prior history of chronic back pain. In addition, he noted that if the claimant had injured his left hip and low back at the time of the fall, he would have experienced immediate symptoms.

3. On August 27, 2020, the parties proceeded to hearing before ALJ Sidanycz on the issue of whether treatment of the claimant's left hip and low back complaints constitutes reasonable, necessary, and related medical treatment. On October 13, 2020, ALJ Sidanycz issued Findings of Fact, Conclusions of Law, and Order (FFCLO). In that order, treatment of the claimant's low back and left hip was found to be reasonable, necessary, and related to the work injury.

4. On February 26, 2021, the Industrial Claim Appeals Office affirmed the October 13, 2020 FFCLO.

5. On October 22, 2021, the claimant was seen by Dr. Stagg and reported that his knee was "basically the same". With regard to his back, the claimant reported that he received some relief from prior injections, but was continuing to have low back pain. On that date, Dr. Stagg placed the claimant at maximum medical improvement (MMI) and assessed whole person permanent impairment of 13 percent. This was based on a nine percent impairment for the claimant's right lower extremity (which converts to four percent whole person), and a nine percent whole person impairment for the lumbar spine. With regard to maintenance medical treatment, Dr. Stagg recommended three to four follow•up visits.

6. On October 27, 2021, the respondents filed a Final Admission of Liability relying upon Dr. Stagg's October 22, 2021 report.

7. The claimant contested the FAL, and a Division sponsored independent medical examination (DIME) was scheduled with Dr. Caroline Gellrick. The claimant attended the DIME with Dr. Gellrick on February 3, 2022. In connection with the DIME, Dr. Gellrick reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In her February 23, 2022 DIME report, Dr. Gellrick agreed with the MMI date of October 22, 2021. In her report, Dr. Gellrick listed the claimant's work related diagnoses as right knee contusion; lumbosacral pain; left hip pain; and right ankle pain. Dr. Gellrick assessed a scheduled impairment rating of 22 percent for the claimant's right lower extremity[1], specifically the right knee.

8. Dr. Gellrick opined that the November 26, 2019 work injury did not result in permanent impairment to the claimant's left shoulder. In support of this opinion, Dr. Gellrick noted that the claimant had prior bilateral shoulder injuries, but no current shoulder injuries. Dr. Gellrick further opined that the November 26, 2019 work injury did not result in permanent impairment to the claimant's lumbar spine. Specifically, Dr. Gellrick stated "[i]mpairment [r]ating of the [lumbar]-spine is questionable in the mind of this examiner and determined not to be ratable with further VA Hospital/Clinic records review." Dr. Gellrick went on to note that it was reasonable for Dr. Stagg to find a causal connection between the need for physical therapy and lumbar spine evaluation as a result of gait issues arising from the claimant's knee surgery.

[1] This converts to a whole person impairment rating of nine percent.

9. In the DIME report, Dr. Gellrick listed a number of maintenance medical treatment modalities for the claimant. Those recommendations included four follow up maintenance appointments with Dr. Stagg; access to Dr. Pevny; knee brace replacement; a lumbar spine TFESI with Dr. Campion (as recommended by Dr. Ceola); and access to a gym program once COVID-19 restrictions were lifted.

10. On March 9, 2022, the respondents filed an FAL which relied upon Dr. Gellrick's DIME report. Specifically, the DIME identified the claimant's date of MMI of October 22, 2021 and a scheduled impairment rating of 22 percent for the claimant's right lower extremity.

11. Initially, the claimant objected to the FAL and filed an Application for Hearing (AFH) on the issues of overcoming the DIME and permanent partial disability (PPD) benefits. The parties did not proceed to hearing on those issues.

12. On March 24, 2022, the claimant left a message with Dr. Stagg's practice indicating that his back was "completely out" and he was unable to lift his right leg. The claimant was instructed to seek treatment in the emergency department.

13. On March 29, 2022, the claimant was seen by Dr Stagg. On that date, the claimant reported significant pain and requested "his third injection". The claimant also reported that over the last several months he had experienced more pain in his back with radiation into both lower extremities. Dr. Stagg opined that the claimant's condition had worsened and recommended magnetic resonance imaging (MRI) of the claimant's lumbar spine. Dr. Stagg also referred the claimant to Dr. Lewis for injections, to Dr. Ceola for consultation, and physical therapy. The respondents denied authorization for these recommended treatment modalities.

14. On April 15, 2022, the claimant filed an Application for Hearing (AFH) on the issues of reopening; authorized provider, reasonably necessary; average weekly wage **(AWW),** temporary total disability (TTD) benefits; and temporary total disability (TPD) benefits. In addition, under "other issues" on the AFH, the claimant included change of physician and "not at MMI". The April 15, 2022 AFH is at issue in the present case.

15. The claimant testified that his condition has worsened since he was placed at MMI. He further testified that his current symptoms include burning pain in the center of his back, his left hip "goes out", and his right ankle swells.

16. On May 4, 2022, Dr. Rashbacher issued a report following his review of the claimant's medical records. In his report, Dr. Raschbacher stated that his opinions have not changed. In addition, Dr. Raschbacher stated that he agrees with the opinions of the DIME physician, Dr. Gellrick.

17. Dr. Raschbacher's deposition testimony was consistent with his written reports. Dr. Raschbacher testified that he agrees with the impairment rating issued by Dr. Gellrick and reiterated his opinion that the claimant's only work related impairment is to his right knee. Dr. Raschbacher further testified that the claimant is not entitled to an impairment rating for any other body part. Dr. Raschbacher testified that there is no evidence of anatomic disruption or any objective finding that would attribute the claimant's hip or low back issues to his knee injury. Dr. Raschbacher noted that Dr. Stagg has not rescinded MMI or stated that the claimant is no longer at **MMI.** It is Dr. Raschbacher's opinion that the claimant could be seen at the VA for his low back.

18. The ALJ credits the medical records and the opinions of Dr. Gellrick and finds that the claimant has failed to demonstrate that it is more likely than not that he has suffered a worsening of his condition. Therefore, the claimant has failed to demonstrate that his claim should be reopened.

19. Although the claim shall not be reopened at this time, the ALJ must now determine if the medical treatment denied by the respondents constitutes reasonable maintenance medical treatment necessary to maintain the claimant at MMI.

20. In Colorado workers' compensation cases, the opinions of a DIME physician are given great deference. As a result, as a general matter, a party attempting to overcome the opinions of a DIME physician bears the greater burden of proof of clear and convincing evidence. The claimant has not sought to overcome the opinions of the DIME physician in the present case. However, the ALJ finds that the opinions of Dr. Gellrick, in her role as the DIME physician in this case must be given consideration in the present matter.

21. Therefore, the ALJ credits the opinions and recommendations of Dr. Gellrick. Specifically, Dr. Gellrick recommended that the claimant receive maintenance medical treatment as follows: four follow up maintenance appointments with Dr. Stagg; access to Dr. Pevny; knee brace replacement; a lumbar spine TFESI with Dr. Campion (as recommended by Dr. Ceola); and access to a gym program once COVID-19 restrictions were lifted.

22. The ALJ credits Dr. Gellrick's recommendations for maintenance medical treatment. However, the modalities identified by Dr. Gellrick are not the same as the denied modalities at issue in the present case. The denied medical treatment before the ALJ are: a lumbar spine MRI; additional physical therapy; a consultation with Dr. Lewis for injections; a consultation with Dr. Ceola; and a neurosurgery evaluation with Dr. Agrawal. With regard to these medical treatments, the ALJ credits the opinions of Dr. Gellrick and the testimony of Dr. Raschbacher and finds that the claimant has failed to demonstrate that a lumbar spine MRI; additional physical therapy; a consultation with Dr. Lewis for injections; a consultation with Dr. Ceola; and a neurosurgery evaluation with Dr. Agrawal; constitute reasonable medical treatment necessary to maintain the claimant at MMI.

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.$. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.$. 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. Section 8-43-303(1) provides that "any award" may be reopened within six years after the date of injury "on the ground of fraud, an overpayment, an error, mistake, or a change in condition." Reopening for "mistake" can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1,* 924 P.2d 1177 (Colo. App. 1996). A claimant may request reopening on the grounds of error or mistake even if the claim was previously denied and dismissed. *E.g., Standard Metals Corporation v. Gallegos,* 781 P.2d 142 (Colo. App. 1989); *see also Amin v. Schneider National Carriers,* W.C. No. 4-81-225-06 (November 9, 2017). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Travelers Ins.* Co. *v. Industrial Commission,* 646 P.2d 399 (Colo. 1981).

5. A change in condition refers to "a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen

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

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he has experienced a worsening of his condition. Therefore, the claimant has failed to demonstrate, by a preponderance of the evidence that his claim should be reopened pursuant to Section 8-43-303(1), C.R.S. As found, the medical records and the opinions of Dr. Gellrick are credible and persuasive on this issue.

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

8. 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.*

9. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that recommended maintenance medical treatment (specifically a lumbar spine MRI; additional physical therapy; a consultation with Dr. Lewis for injections; a consultation with Dr. Ceola; and a neurosurgery evaluation with Dr. Agrawal) is reasonable and necessary to maintain the claimant at MMI. As found, the opinions of Dr. Gellrick and Dr. Raschbacher's testimony are credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. The claimant's claim shall not be reopened at this time.

2. The claimant's request for denied maintenance medical treatment (specifically a lumbar spine MRI; additional physical therapy; a consultation with Dr. Lewis for injections; a consultation with Dr. Ceola; and a neurosurgery evaluation with Dr. Agrawal) is denied and dismissed.

Dated December 27, 2022.

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.