ISSUES

Has Claimant overcome, by clear and convincing evidence, the opinions of the Division sponsored independent medical examination (DIME) physician, Dr. Matthew Brodie, on the issue of maximum medical improvement **(MMI)?**

At the hearing, the parties agreed to reserve all other endorsed issues for future determination, if necessary.

FINDINGS OF FACT

1. Claimant works at Employer's car rental company. Claimant's job duties include ensuring all cars have the correct keys, and are refueled and washed. Claimant's job involves a great deal of walking.

2. On December 23, 2022, Claimant was performing his normal job duties when he slipped on ice and fell to the ground. Claimant testified that when he fell he struck his left knee on the ground. Claimant needed assistance from his coworkers to stand and walk into the office. This workers' compensation claim eventuated.

Medical Treatment Prior to December 23, 2022

3. On June 1, 2021, Claimant sought medical treatment with Salud Family Health Centers. During this telehealth visit Claimant reported knee pain and constant leg cramps. Claimant specifically reported that he had experienced two episodes of cramping in his left knee, making it painful to walk. These symptoms resolved with compression and heat. At the time of the appointment he was asymptomatic. Dr. Kalina Ehrenreich-Piot assessed Claimant with acute pain of left knee and recommended an in-office visit for further evaluation.

Medical Treatment Beginning December 22, 2023

4. During this claim, Claimant's authorized treating provider has been Concentra Medical Centers (Concentra).

5. Immediately following his slip and fall on December 22, 2023, Claimant was seen at Concentra by Jeffrey Wallace, PA. At that time, PA Wallace recorded Claimant's mechanism of injury as "[h]e slipped on ice with his [left] foot that caused him to twist his [left] knee and land on a flexed [left] knee." PA Wallace noted that Claimant was limping and using a cane. X-rays performed at that time were read as normal. PA Wallace diagnosed Claimant with a sprain and contusion of the left knee, and recommended the use of ice and meloxicam. In addition, PA Wallace referred Claimant to physical therapy. With regard to work restrictions, PA Wallace assessed restrictions of

no lifting or carrying over five pounds; no pushing or pulling over ten pounds; and no walking, standing, crawling, kneeling, squatting, or climbing. These restrictions were in place from December 23, 2022 until "next visit".

6. Claimant was off of work for approximately three days. Claimant then returned to work and performed his normal job duties. Claimant testified that he returned to work at that time because his supervisor asked him to return. Claimant further testified that although he performed his job duties, he did so with pain. Returned to work?

7. On December 27, 2022, Claimant returned to Concentra and was seen by Dr. Eric Chau. Claimant reported that his pain was two or three out of ten. Dr. Chau noted that Claimant's knee had no locking or instability. Dr. Chau amended the Claimant's work restrictions to allow for one hour per day of walking and one hour per day of standing.

8. On January 3, 2023, Claimant was seen by PA Wallace. At that time, Claimant reported constant left knee pain throughout the day and occasional spasms. PA Wallace noted that Claimant was "unsure if knee feels unstable due to pain." PA Wallace ordered magnetic resonance imaging (MRI) of Claimant's left knee. PA Wallace amended Claimant's work restrictions to no walking or standing. In addition, Claimant was to use a cane for ambulation.

9. On January 12 ,2023, Claimant was seen at Concentra by Maryna Halushka, NP. At that time, Claimant reported popping and grinding in his left knee. Nurse Practitioner Halushka noted that an MRI had been ordered, but not yet performed. Claimant's work restrictions were amended to allow for lifting up to 20 pounds; carrying up to 15 pounds; pushing and pulling up to 25 pounds; walking two hours per day; and standing one hour per day.

10. On January 20, 2023, an MRI was performed on Claimant's left knee. The MRI showed severe complex displaced flap tear of the medial meniscus; severe macerated degenerative tearing of the lateral meniscus; no cruciate ligament injury; moderate acute or subacute medical collateral ligament (MCL) sprain; tricompartmental osteoarthritis (greatest in the lateral compartment); severe pes anserine bursitis; and a large joint effusion.

11. On February 2, 2023, Claimant was seen by Nurse Practitioner Halushka. At that time, Claimant reported that his pain was seven out of ten. Nurse Practitioner Halushka discussed the MRI findings of severe cartilage loss and a meniscus flap tear. Nurse Practitioner Halushka referred Claimant for an orthopedic consultation.

12. On February 14, 2023, Claimant was seen by orthopedic surgeon Dr. Cary Motz for consultation. At that time, Dr. Motz discussed the MRI results and listed Claimant's diagnoses as left knee degenerative arthritis with exacerbation and degenerative medial and lateral meniscus tears. Dr. Motz opined that an arthroscopy would not significantly improve Claimant's symptoms. Dr. Motz offered Claimant both a

steroid injection and visco supplementation. However, Claimant declined both procedures.

13. On February 17, 2023, Claimant returned to Concentra and was seen by Dr. Kristina Robinson. Claimant reported he experienced left knee pain at night, and a burning pain on the sides of his knee. Dr. Robinson noted that Claimant was not a candidate for arthroscopy and opined that Claimant would likely need a total knee replacement. Dr. Robinson further opined that Claimant had long-standing chronic degenerative changes in his left knee. She further opined that although Claimant suffered an acute injury at work, his injury did not aggravate or accelerate the already significant degenerative condition of his knee. Dr. Robinson opined that Claimant's need for a partial or total knee replacement is not causally related to the December 23, 2022 work injury. Also on February 17, 2023, Dr. Robinson placed Claimant at maximum medical improvement **(MMI).** Dr. Robinson assessed permanent impairment of ten percent for Claimant's left lower extremity.

14. On March 26, 2023, Claimant was seen at Orthopedic Centers of Colorado by Dr. Joel Gonzales for consultation. At that time, Claimant reported left knee pain, locking, and catching. Dr. Gonzales recommended Claimant undergo surgical intervention that would include left knee arthroscopic partial medial meniscectomy. Dr. Gonzales explained to Claimant that the arthritis on the lateral side was pre-existing. As a result, even if an arthroscopic surgery was pursued, Claimant would likely experience further problems with the lateral side of the knee.

15. At the request of Respondents, Dr. John Douthit performed a medical records review. Specifically, Dr. Douthit was asked to opine whether the recommended left knee medial meniscus repair was reasonable, necessary, and related to Claimant's December 23, 2022 work injury. In his March 22, 2023 report, Dr. Douthit identified Claimant's left knee diagnoses as aggravated osteoarthritis, and a degenerative tear of the medial meniscus. Dr. Douthit opined that an arthroscopy would likely be ineffective in relieving Claimant's pain. Dr. Douthit further opined that due to the presence of tricompartmental osteoarthrosis, it would be reasonable for Claimant to undergo a total joint replacement.

16. On October 17, 2023, Claimant attended an independent medical examination (IME) with Dr. Timothy O'Brien. In connection with the DIME, Dr. O'Brien reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his October 31, 2023 IME report, Dr. O'Brien opined that Claimant did not suffer a work related injury.[1] Dr. O'Brien further opined that Claimant's left knee pain is caused by chronic osteoarthritis in that knee. In support of these opinions Dr. O'Brien noted that Claimant has advanced tri-compartmental osteoarthritis in his left knee. Dr. O'Brien opined that this was present long before the slip and fall on December 23, 2022. With regard to the arthroscopy recommended by Dr. Gonzales, it is Dr. O'Brien's opinion that such a procedure would not be appropriate in treating

[1] The ALJ recognizes that this is an admitted claim.

Claimant's condition. In support of this, he explained that the American Associate of Orthopedic Surgeons recommends against performing arthroscopy in treating osteoarthritic knees. Dr. O'Brien further opined that due to the severe nature of the osteoarthritis in Claimant's left knee, he was a candidate for a total knee replacement long before the incident on December 23, 2022.

17. On May 15, 2024, Claimant attended a Division sponsored independent medical examination (DIME) with Dr. Matthew Brodie. In connection with the DIME, Dr. Brodie reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his DIME report, Dr. Brodie opined that Claimant reached MMI as of January 6, 2023. With regard to permanent impairment, Dr. Brodie assessed a six percent impairment rating for Claimant's left lower extremity. Dr. Brodie opined that on December 22, 2023, Claimant suffered a strain to his left MCL. In support of this opinion, Dr. Brodie referenced the findings on MRI. Dr. Brodie further opined that Claimant did not suffer an acute intra-articular injury to his left knee. Again, Dr. Brodie referred to the MRI results that showed degenerative changes to the articular cartilage and meniscus disease. It is Dr. Brodie's further opinion that the degenerative nature of Claimant's left knee was pre-existing as evidenced by the June 1, 2021 medical record. Finally Dr. Brodie opined that no maintenance medical treatment was necessary related to Claimant's December 23, 2022 work injury.

18. Based upon the DIME report, on June 6, 2024, Respondents filed a Final Admission of Liability (FAL) admitting for the MMI date of June 6, 2023 and a permanent impairment rating of six percent for Claimant's left lower extremity.

19. Claimant testified that he sought prior treatment for issues with his right knee, not his left. Claimant further testified that until his fall on December 23, 2022, he was able to perform all aspects of his job without issue, including walking for much of his work day. Claimant also testified that he did not remember the reason for the virtual visit with Salud Family Health Centers on June 1, 2021.

20. Dr. O'Brien's testimony was consistent with his IME report. Dr. O'Brien testified that the MRI results demonstrate that Claimant's left knee had been undergoing degeneration and desiccation for years. Dr. O'Brien explained that an arthritic knee with lateral compartment cartilage loss will "cave in" on the lateral side, which results in a "knock knee" configuration. This in turn puts pressure on the MCL every time Claimant takes a step. Dr. O'Brien also testified that this was chronic as evidenced by Dr. Motz's observation that there was no instability on exam. Dr. O'Brien testified that if Claimant did undergo an arthroscopy it would cause more harm than good. Dr. O'Brien further testified that Claimant is a candidate for a total knee replacement, but the need for that surgery is unrelated to the December 23, 2022 work injury.

21. The ALJ does not find Claimant's testimony regarding the onset of his left knee symptoms to be credible or persuasive. The ALJ specifically credits the 2021 medical record from Salud Family Health Centers and finds that Claimant did experience prior left knee issues. The ALJ also credits the medical records and the

opinions of Drs. Brodie and Robinson and finds that Claimant has reached MMI. The ALJ specifically credits the opinions of Dr. Brodie that the degenerative nature of Claimant's left knee was pre-existing as evidenced by the June 1, 2021 medical record. Therefore, the ALJ finds that Claimant has failed to overcome the opinions of the DIME physician on the issue of 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.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. Section 8-42-107(8)(b}(III} and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving* & *Storage* Co. *v. Gussert,* 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving* & *Storage, supra.* A mere difference of opinion between physicians fails to constitute error. *Gonzales v. Browning Ferris Industries* of *Colorado,* W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in their opinions including

whether the DIME appropriately utilized the Medical Treatment Guidelines (MTG) and the AMA Guides in issuing their opinions.

5. When a DIME physician issues conflicting or ambiguous opinions concerning whether or not the claimant has reached MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *Magnetic Eng'g, Inc. v. /CAO,* 5 P.3d 385 (Colo. App. 2000).

6. As found, craimant has failed to overcome, by clear and convincing evidence, the opinions of the DIME physician, Dr. Matthew Brodie, on the issue of MMI. As found, the medical records and the opinions of Drs. Brodie and Robinson are credible and persuasive on this issue.

ORDER

It is therefore ordered that Claimant has failed to overcome the opinions of the DIME physician on the issue of maximum medical improvement.

Dated December 2, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-189-848-004

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable work injury on July 15, 2021.

II. Whether Claimant proved by a preponderance of the evidence he is entitled to reasonably necessary and related medical benefits, including the medical treatment he received at North Suburban Medical Center and with Dr. Lauren MacTaggart.

III. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability ("TTD") benefits from July 16, 2021 through August 1, 2021 and from August 5, 2021 through September 29, 2021.[1]

IV. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary partial disability ("TPD") benefits from August 2, 2021 through August 4, 2021.

V. Whether the right of selection of an authorized treating physician ("ATP") passed to Claimant.

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

VII. Whether Claimant is entitled to an award for disfigurement.

FINDINGS OF FACT

Notice to Respondent-Employer

1. The hearing took place on Claimant's Application for Hearing dated May 24, 2024, in which Claimant listed the following addresses for Respondent-Employer:

[Redacted, hereinafter OC]

[Redactad, hereinafter OM]

[Redacted, hereinafter GF]

[1] At hearing Claimant reserved the issue of Claimant's entitlement to temporary indemnity benefits after September 29, 2021.

2. The Office of Administrative Courts ("OAC") did not receive any Response to Application for Hearing, other pleadings, or any communication from Respondent-Employer in this matter.

3. The OAC sent Notice of Hearing ("NOH") to the parties on June 25, 2024. NOH was mailed to OC[Redacted], to OM[Redacted], and to GF[Redacted]. Per the OAC case file, the NOH addressed to OM[Redacted] was returned to sender by the United States Post Office ("USPS"), noting "No Such Street" and "Unable to Forward."

4. The NOH addressed to OC[Redacted] was also returned to sender noting "Forward Time Exp" and specifying a forwarding address of GF[Redacted].

5. At hearing, Claimant explained that the OC[Redacted] address was the address of [Redacted, hereinafter MO], owner of Respondent-Employer. He explained he had personally visited such address on prior occasions and met MO[Redacted] there before work shifts to drive to the work location of the day. Claimant's Worker's Claim for Compensation, filed on November 7, 2022, lists the OC[Redacted] address. Claimant further explained that Respondent-Employer did not have an office nor was there a set worksite.

6. Exhibit 5 includes printouts from websites accessed by the staff of Claimant's counsel. One printout is from the Colorado Secretary of State website, accessed November 2, 2022, showing the OC[Redacted] address for Employer, with [Redacted, hereinafter MZ] as the registered agent. A printout of the Better Business Bureau website entry for Respondent-Employer, accessed on April 16, 2024, lists an address of GF[Redacted].

7. The ALJ took judicial notice of the Colorado Secretary of State public records, accessed by the ALJ on the Colorado Secretary of State's website on September 10, 2024, which listed a principal street address and mailing address for Employer of GF[Redacted]. MO[Redacted] was listed as the registered agent.

8. Claimant's counsel represented to the Court he was not aware of any email address for Respondent-Employer or MO[Redacted], and the telephone number he once had for MO[Redacted] is now disconnected.

9. Based on the foregoing, the ALJ determined NOH was sent to Respondent-Employer's last known address of GF[Redacted] and was likely to have been received by Respondent-Employer. To ensure efficient resolution of the matter, the ALJ proceeded with the hearing on the merits and took testimony from Claimant and admitted Claimant's Exhibits 1-8 into evidence. However, the ALJ determined that, prior to issuing an order on the merits of the case, she would allow Respondent-Employer the opportunity to show cause for its failure to appear at the September 10, 2024 hearing. Respondents failed to respond to the Show Cause Order that was issued on September 10, 2024.

Work Injury

10. Claimant is a 34-year-old right-hand dominant male. Claimant worked for Respondent-Employer as a flooring installer. Claimant worked full-time for Respondent-Employer six to seven days a week, earning $250.00 per day and sometimes more for certain jobs. Claimant earned an average of approximately $1,500.00 per week.

11. On July 15, 2021, Claimant sustained a work injury while performing his regular job duties during his work hours. While using a table saw to cut a board, Claimant's right hand became caught in the table saw, completely severing off Claimant's right pinky finger, and partially severing his right middle and ring fingers.

12. MO[Redacted] drove Claimant to North Suburban Medical Center for emergency care of the work injury.

13. North Suburban Medical Center medical records dated July 15, 2021 document Claimant presented with the following: a right pinky finger amputation along the distal phalanx joint line; near full amputation of the right ring finger along the PIP joint; laceration to the dorsal aspect of the middle finger along the middle phalanx; abrasion to the dorsal aspect of the index finger along the middle phalanx; and open displaced fractures of the middle phalanx of right middle and ring fingers.

14. Claimant was admitted at North Suburban Medical Center and underwent surgery for the work injury on July 16, 2021, performed by Lauren MacTaggart, M.D. Dr. MacTaggart performed a revision amputation of the right small finger and open reduction and internal fixation of the right middle and ring fingers with repair of the extensor tendons. Claimant was discharged from the hospital the same day with a hand splint and instructions to follow-up with Dr. MacTaggart postoperatively and with his primary care physician for ongoing medical management. Claimant was restricted from weight bearing with his right upper extremity.

15. Claimant attended a follow-up evaluation with Dr. MacTaggart on July 30, 2021. Claimant continued to wear a splint. He reported moderate but improving symptoms. Dr. MacTaggart removed Claimant's sutures. She noted she would like for Claimant to begin therapy to start gently working on the motion of certain fingers, but that Claimant was not yet ready to start working on the motion of his middle and ring fingers due to surgical pins.

16. Claimant returned to Dr. MacTaggart for a recheck on August 23, 2021. Claimant's ring finger fracture had fully healed. Claimant's middle finger fracture had yet to heal as of this appointment. Dr. MacTaggart removed the surgical pins in Claimant's ring finger and advised him to undergo therapy for range of motion.

17. Claimant last saw Dr. MacTaggart on September 17, 2021. X-rays revealed a healed fracture in Claimant's middle finger. Dr. MacTaggart removed the remaining pins in Claimant's right middle finger. She remarked on the importance of Claimant undergoing therapy. Claimant noted a cost barrier to undergoing such treatment.

18. Claimant testified he had no other medical treatment for his injury and that he did not seek physical or occupational therapy for his hand due to the personal cost he would incur. Claimant testified he wishes to undergo additional treatment for his right hand due to the work injury.

19. Respondent-Employer did not provide Claimant a designated providers list nor refer Claimant to a workers' compensation provider for ongoing medical care.

20. As a result of the work injury, Claimant did not earn any wages from July 16, 2021 through August 1, 2021 and August 5, 2021 through September 29, 2021. Claimant was unable to perform his regular job duties and the associated tasks due to the inability to use his right hand. Claimant testified he returned to work for Respondent-Employer for three days on August 2, 2021, at which time he attempted to perform modified duties by assisting with cleaning at a rate of pay of $150 per day. Claimant was unable to continue working in such capacity due to the work injury.

21. Claimant filed a claim for Worker's Claim for Compensation on November 7, 2022. Respondent-Employer did not respond to the claim for compensation. On November 23, 2022, the Division of Workers' Compensation ("DOWC") sent a letter to Respondent-Employer stating DOWC records did not indicate Respondent-Employer carried workers' compensation insurance on the date of the claimed injury. The letter instructed Respondent-Employer to admit or deny liability and to provide further information. Respondent-Employer failed to respond.

22. The ALJ finds Claimant's testimony credible.

23. Claimant proved it is more likely than not he sustained a compensable work injury arising out of and in the course of his employment for Respondent-Employer on July 15, 2021.

24. Claimant proved it is more likely than not the medical treatment he received at North Suburban Medical Center and with Dr. Lauren MacTaggart was reasonable, necessary and related treatment to cure and relieve the effects of the July 15, 2021 work injury. Claimant is entitled to reasonably necessary medical treatment related to the work injury.

25. Claimant's AWW is $1,500.00.

26. Claimant proved it is more likely than not the July 15, 2021 work injury caused a disability lasting more three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss from July 16, 2021 through August 1, 2021 and from August 5, 2021 through September 29, 2021. Claimant is entitled to TTD benefits for such periods.

27. Claimant proved it is more likely than not the work injury caused Claimant's disability and partial wage loss from August 2, 2021 through August 4, 2021, entitling Claimant to TPD benefits for such period.

28. The preponderant evidence demonstrates Respondent-Employer did not carry workers' compensation insurance on the date of Claimant's work injury.

29. Claimant proved it is more likely than not the right of selection of an ATP passed to Claimant. Claimant has chosen Dr. Yamamoto as his ATP.

30. The ALJ examined Claimant's right hand at hearing. As a result of the July 15, 2021 work injury and subsequent surgery, Claimant has a visible disfigurement to the body consisting of the following:

(1) Amputation of the right pinky finger at the first knuckle.

(2) A scar at the second knuckle of Claimant's right ring finger measuring approximately 1.5-2 inches in length. The scar is different in color than the surrounding skin and textured.

(3) A scar at the second knuckle of Claimant's right middle finger measuring approximately 1.5-2 inches in length. The scar is different in color than the surrounding skin and textured.

(4) Claimant's right ring and middle fingers curve to the right.

(5) Permanent swelling of the knuckles of Claimant's middle finger.

31. The ALJ finds Claimant has sustained a serious permanent and extensive disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and

draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

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

As found, Claimant proved by a preponderance of the evidence he sustained a compensable work injury on July 15, 2021. Claimant's injury occurred while he was performing his regular work-related functions during the time and place limits of his work. Claimant credibly testified regarding the occurrence of the work injury and his testimony is corroborated by the medical records. Based on the totality of the evidence, Claimant proved it is more likely than not he suffered a compensable work injury on July 15, 2021 arising out of and in the course of his employment, resulting in disability and the need for medical treatment.

Medical Treatment

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

As found, Claimant proved by a preponderance of the evidence the medical treatment he received at North Suburban Medical Center and from Dr. MacTaggart was reasonable, necessary and related medical care. Claimant presented to North Suburban Medical Center on July 15, 2021 for emergency treatment of his right hand as a result of the work injury. Claimant was admitted to the hospital and underwent surgery on his right hand the following day. Claimant subsequently attended post-operative appointments with his surgeon, Dr. MacTaggart, for follow-up and removal of sutures and hardware. The nature and severity of Claimant's work injury necessitated evaluation and treatment. The evaluation, treatment, surgery and post-operative care was the direct result of the July 15, 2021 work injury, and was reasonable and necessary to cure and relieve the effects of the work injury. Accordingly, Respondents are liable for the costs of the medical treatment Claimant received at North Suburban Medical Center and by Dr. MacTaggart, as well as other reasonably necessary and causally related medical treatment.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc.*, WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

Claimant credibly testified that he earned $250.00 per day working six to seven days per week for Respondent-Employer. As found, an AWW of $1,500.00 is a fair approximation of Claimant's wage loss and diminished earning capacity.

TTD

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

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019). Employers or insurers must pay statutory interest of 8% per annum on all benefits not paid when due. §8-43-410(2), C.R.S.

As found, Claimant proved it is more probable than not he is entitled to TTD benefits from July 16, 2021 through August 1, 2021 and August 5, 2021 through September 29, 2021. As a result of the July 15, 2021 work injury to his right hand, Claimant was unable to perform his regular job duties as a flooring installer. Claimant's regular job duties required the use of his right hand and the ability to operate tools, which was not possible due to the work injury, surgery and recovery. As a result of the July 15, 2021 work injury and resultant disability, Claimant did not earn any wages from July 16, 2021 through August 1, 2021 and August 5, 2021 through September 29, 2021, entitling him to TTD benefits for such periods.

Based on an AWW of $1,500.00, Claimant's TTD rate is $1,000.00. Respondent-Employer thus owes Claimant $2,428.57 in TTD benefits for the period July 16, 2021 through August 1, 2021, and $8,000.00 in TTD benefits for the period August 5, 2021 through September 29, 2021, totaling $10,428.57. [2]

TPD

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

Claimant attempted to return to work performing modified duties from August 2, 2021 through August 4, 2021. Claimant earned $150.00 per day during this time period, which is less than his AWW and daily rate of $250.00 per day while performing his regular job duties. Claimant proved by a preponderance of the evidence the July 15, 2021 resulted in disability and partial wage loss from August 2, 2021 through August 4, 2021, entitling him to TPD benefits for that period. Respondent-Employer owes Claimant $128.57 in TPD benefits for the period August 2, 2021 through August 4, 2021.[3]

Authorized Treating Provider and Right of Selection

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

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[2] As calculated using the DOWC's Workers' Compensation Benefits Calculator, located on the DOWC website at https://dowc.cdle.state.co.us/Benefits/tab/interest.aspx

[3] As calculated using DOWC Desk Aid #7, link located on the DOWC website at https://dowc.cdle.state.co.us/Benefits/tab/DateCalculator.aspx

If upon notice of the injury the employer timely fails to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006).

In a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, WC 4-586-030 (ICAO, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* WC 3-969-031 (ICAO, June 29, 2005). Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Office of State of Colorado*, 148 P.3d 381, 384 (Colo. App. 2006).

Claimant underwent emergency medical care for his work injury at North Suburban Medical Center and post-operative care with Dr. MacTaggart. Respondent-Employer did not provide Claimant a list of designated physicians or otherwise refer Claimant to any "non-emergency" physician. Accordingly, the right of selection has passed to Claimant. Claimant has selected Dr. Yamamoto as his ATP.

Disfigurement

Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view."

As found, Claimant sustained a serious permanent disfigurement to areas of the body normally exposed to public view. In addition to the scarring, finger curvature and permanent swelling noted, Claimant sustained the loss of one finger. As such, the ALJ concludes Claimant sustained extensive disfigurement entitling him to additional compensation pursuant to section 8-42-108 (2), C.R.S. Respondent-Employer shall pay Claimant $10,500.00 for his disfigurement.

Uninsured Employer

<u>Payment to the Colorado Uninsured Employer Fund</u>

Section 8-43-408(5), C.R.S. provides,

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an

> employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

The penalty for failure to insure only applies to indemnity benefits; it does not apply to medical benefits. *Industrial Commission v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc.*, W.C. No. 4-155- 231 (February 13, 1998). Although the ALJ is not aware of a case directly on point, statutory interest is not properly considered "compensation or benefits" within the meaning of § 8-43-408(5). Interest is a statutory right intended to secure claimants the present value of benefits to which they are entitled by creating an equitable remedy for the lost time value of money during the accrual period. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991).

Respondent-Employer has been ordered to pay Claimant $10,428.57 in TTD benefits and $128.57 in TPD benefits. Twenty- five percent (25%) of the compensation awarded is $2,639.29.

Posting Bond

Section 8-43-408(2), C.R.S. provides:

> In all cases where compensation is awarded under the terms of this section, the director or an administrative law judge of the division shall compute and require the employer to pay to a trustee designated by the director or administrative law judge an amount equal to the present value of all unpaid compensation or benefits computed at the rate of four percent per annum; or, in lieu thereof, such employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado. The bond shall be in such form and amount as prescribed and fixed by the director and shall guarantee the payment of the compensation or benefits as awarded. The filing of any appeal, including a petition for review, shall not relieve the employer of the obligation under this subsection (2) to pay the designated sum to a trustee or to file a bond with the director or administrative law judge.

As Respondent-Employer was uninsured at the time of Claimant's work injury, the provisions of Section 8-43-408(2), C.R.S. apply.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable work injury on July 15, 2021 arising out of and in the course and scope of his employment with Respondent-Employer.

2. Claimant is entitled to reasonable and necessary medical benefits related to his July 15, 2021 work injury. Claimant's treatment at North Suburban Medical Center and with Dr. MacTaggart was reasonable, necessary, and related to his July 15, 2021 work injury. Respondent-Employer shall pay for the associated costs of such treatment, as well as other reasonable, necessary and related medical treatment, subject to the Division of Workers' Compensation Fee Schedule.

3. Claimant's AWW is $1,500.00.

4. Respondent-Employer shall pay Claimant TTD benefits in the amount of $2,428.57 for the period of July 16, 2021 through August 1, 2021 and in the amount of $8,000.00 in TTD benefits for the period August 5, 2021 through September 29, 2021, totaling $10,428.57.

5. Respondent-Employer shall pay Claimant TPD benefits in the amount of $128.57 for the period August 2, 2021 through August 4, 2021.

6. Respondent-Employer shall pay $2,639.29 to the Colorado Uninsured Employer Fund.

7. Respondent-Employer shall pay Claimant $10,500.00 for his disfigurement. Respondent-Employer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

8. Claimant proved the right of selection passed to Claimant. Dr. Yamamoto is Claimant's ATP.

9. Respondent-Employer shall pay statutory interest at the rate of 8% per annum on compensation benefits not paid when due.

10. In lieu of payment of the above compensation and benefits to Claimant, the Respondent-Employer shall:

a. Deposit $23,696.43 with the Division of Workers' Compensation, as trustee, to secure payment of all unpaid compensation and benefits awarded, or

b. File a surety bond in the amount of $23,696.43 with the Division of Workers' Compensation within ten (10) days of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation, penalties, and benefits awarded.

11. Respondent-Employer shall notify the Division of Workers' Compensation and Claimant's attorney of payments made pursuant to this Order.

12. Filing any appeal, including a petition to review, shall not relieve Respondent-Employer of the obligation to pay the designated sum to the Claimant, to the trustee or to file the bond as required above.

13. 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 2, 2024

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

ISSUE

I. Whether Claimant established, by a preponderance of the evidence that the need for medical treatment recommended by Dr. Masri and Dr. Barolat is reasonable necessary and related to her admitted work injury?

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury to her face on June 27, 2008 when she had a syncopal event causing her to strike her face on the ground. She was diagnosed with condylar fractures which required wiring her jaw shut.

2. Claimant was referred to Dr. Payne who recommended traction for her jaw. Claimant was then referred to Dr. Aragon for TMJ. Dr. Aragon performed bilateral arthroscopic surgery. Claimant's pain continued to worsen in her jaw and her face.

3. Claimant was placed at MMI on September 12, 2016 with a 61% whole person impairment rating. A Final Admission of Liability was filed on May 12, 2017. The claim remains open for ongoing medical maintenance.

4. On November 10, 2015, Dr. Barolat implanted a cervical spinal cord stimulator and leads going into the left side of Claimant's face. During the invasive surgery, Claimant lost an estimated 2.4 L of blood and sustained an anoxic brain injury. Due to the complications a lead was not implanted in the left mandibular area as was previously recommended and approved.

5. Following the implantation, Claimant reported "the greatest area of pain relief has occurred in the area of the left facial peripheral lead, she has gone from a 10/10 in this area down to occasionally a 2/10. She has gone from a 9/10 in her left mandibular area with the intraspinal leads down to a 4/10. Both of these areas feel dramatically improved. Claimant has an area toward the left nasolabial fold where the stimulation does not cover, and this area is still acutely painful. Claimant continues to have debilitating pain in her face. The areas in which the leads were successfully placed were effective in greatly reducing her pain. The area in the left mandibular where the lead was not able to be placed continues to be highly symptomatic.

6. During his evidentiary deposition Dr. Barolat confirmed his current recommendations include: (1) add a lead in the left mandibular area; (2) reposition the lead in the left maxillary area; and (3) replace the internal pulse generator.

7. Dr. Barolat explained that the procedure to add the lead to the left mandibular area is a minimal procedure that entails "one little incision maybe a half an inch long, and then just running the wire under the skin. It's not a big procedure." As a result, Dr. Barolat confirmed that this is a safe procedure for Claimant.

8. Respondent requested an IME with Dr. McCranie with respect to the procedures recommended by Dr. Barolat. Dr. McCranie opined in her report that that the initial stimulator trial only provided Claimant with 10-25% relief of pain indicating that this was not a successful trial.

9. Dr. McCranie testified that meaningful pain relief would be 50% or greater relief, as well as a lasting relief, not something that is transitory.

10. Dr. Barolat disagrees with Dr. McCranie's assessment of the stimulator trial as justification for the denial of the recommended left mandibular lead. Dr. Barolat testified he disagreed with Dr. McCranie as during the trial the tip of the lead came all the way to the very tip of the chin. That was the area that was irritating her. But the more proximal part of the lead near the mandible was actually helping.

11. Dr. Baralot testified that he disagrees with Dr. McCranie's opinion that the risk of repositioning the lead outweighs the potential benefits as he testified that this is a safe procedure for Claimant and "I would not do a major procedure on this woman. We all agree on that. But that is why these would be minimal procedures that would be extremely meaningful to her."

12. Dr. Barolat also disagrees with Dr. McCranie's position that Claimant only experienced mild benefit from the stimulator when operational. Dr. Barolat testified that the stimulator was "the only thing that really made a difference in her pain" and that Claimant experienced in excess of 50% reduction of pain as "I think she did for several years and, again, we have to understand this is not your bread-and-butter case. . . I had a patient that has the same pain that she had and she was going to kill herself. So even less than 50 percent relief is meaningful, and it's worth pursuing."

13 The third recommendation from Dr. Barolat is to replace the internal pulse generator battery. Dr. Barolat testified that replacing the battery is necessary "because it's getting close to dying. It's getting close to being emptied. So if we replace the lead, but we don't replace the battery, then it doesn't make any sense."

14. Claimant was referred to Dr. Masri for ketamine infusions. Upon consultation, Dr. Masri noted "[t]his is one of the most severe cases of atypical facial pain that I have seen and all modalities should be utilized for [Redacted, hereinafter HR]

benefit including revision of the peripheral nerve stimulation as well as ketamine infusions."

15. Claimant began monthly ketamine infusions on January 1, 2023.

16. Following the second ketamine infusion, Claimant reported "improvement of pain in the cheek, tongue, and teeth, predominantly on the left side. The severity of flare of symptoms is of the same intensity but has reduced in duration. She reports improvement with an increase in the amount of sleep and less interrupted sleep. Previously she was only able to sleep for 1 hour prior to sleep interruption and had a difficult time falling back asleep. Total sleep was approximately 4 hours for the night. She currently is able to sleep for at least 2 hours continuously with inability to fall back asleep more quickly resulting in an increased total amount of sleep hours per night."

17. Claimant underwent her twelfth infusion on February 16, 2024. Claimant's Exhibit 5, pg. 132. She "endorse[d] significant reduction of flares including intensity of flares as well as frequency of flares of her facial pain. Since her last infusion she has only had 1 flare in the left side of her nose and flares on the right side of her nose. She indicates that she is able to eat more often and having an increased appetite due to a reduction in the facial pain. The pins/ needles, burning sensation present on the left-side of the face is significantly improved. Further, the "pulling apart sensation" is significantly improved. She indicates that it is also easier to talk due to the decrease in pain. She is able to tolerate her tongue touching her teeth to greater extent except for 1 portion on the right side." Claimant's Ex. 5, pg. 134.

18. Claimant and Dr. Masri wish to continue infusions due to their proven success in reducing Claimant's symptoms, and Dr. Masri stated the treatment was medically reasonable and warranted.

19. It is clear that ketamine has been an effective treatment for Claimant. The ketamine infusions have been effective in helping Claimant's ability to do basic things, including: going outside (as it reduces the hypersensitivity in her face and allodynia), chewing (as it reduces the pain in her gums and teeth), helps her sleep better, and reduces the overall intensity of her symptoms. Masri Deposition, pg. 11-12. Ketamine also reduces the length of flare ups, allowing Claimant to recover more quickly. Masri Deposition, pg 12.

20. Section 17-4 of the Medical Treatment Guidelines states that reasonable and necessary care can deviate from the Guidelines. Dr. Masri testified the current recommendation for Ketamine is a reasonable deviation from the Medical Treatment Guidelines "because she has failed everything else, you know, and this is something that is working for her. I think if she was able to get her stimulator fixed in her face, in conjunction with the ketamine infusions, she would be in a much better place with those two aspects that even she would be with just her ketamine infusions. I think taking away those aspects from her will lead to a significant increase in her symptoms."

21. Respondent had Dr. Olsen evaluate Claimant with respect to whether the ketamine injections were reasonable and necessary. Claimant reported to him "With ketamine, specific things are helped. The splits where my face was broken apart from my nose spike often harshly. These spikes feel like someone stabbing me with an icepick over and over from my upper lip to my head. With the ketamine, those spikes are almost totally gone. The ketamine makes it so it takes longer for my overall pain to spike to a level of unmanageable and needing to stop doing things and it shortens my recovery time from that. So my pain goes back to a normal level of 8 to 9 more quickly. My teeth hurt much less so it's easier to talk and eat so I can eat more at a time and more often. On the right side of my face, in addition to the stabbing and burning, it feels like somebody pulling my flesh as taut as it can be, the point of feeling like it's being torn apart. The ketamine has made that less severe."

CONCLUSIONS OF LAW

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

Generally

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

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may

resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Medical Benefits

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

E. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). I conclude that the surgery recommended by Dr. Barolat is reasonable and necessary based upon the evidence presented. The Claimant has also sustained her burden of proof that the Ketamine infusions recommended by Dr. Masri are reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant's request for the surgery recommended by Dr. Barolat is granted as reasonable and necessary.

2. Claimant's request for the ketamine injections recommended by Dr. Masri are granted as reasonable and necessary.

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

DATED: December 3, 2024

/s/ Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-254-049-002

ISSUES

- Did Claimant prove he suffered a compensable injury on September 19, 2023?
- If Claimant proved a compensable injury, is he entitled to TTD benefits on or after September 19, 2023?
- Average weekly wage.
- Penalties against Employer for failure to timely admit or deny liability.
- Penalty against Employer for failure to maintain workers' compensation insurance.

FINDINGS OF FACT

Employer is a moving company in the Denver Metro area. Claimant worked for Employer as a mover from August 16, 2023. The job is physically demanding and requires frequent lifting and carrying heavy items.

On September 19, 2023, Claimant was assigned a job that required him to move an arcade game. While attempting to move the machine, the screen fell out and landed on his left leg. Claimant suffered a severe laceration on his left thigh and multiple pieces of glass became imbedded in his tissue.

Claimant initially went to urgent care and was referred to the Denver Health emergency department. Claimant texted [Redacted, hereinafter BD], the owner of Employer from the ER and stated, "there is a big piece of glass stuck in my leg so I just got transferred to the ER to get it out. But can barely walk on my leg." BD[Redacted] replied a few minutes later, "keep me posted."

Multiple glass fragments were extracted from Claimant's left thigh immediately above the patella. A few small fragments could not be removed. Claimant was given pain medication and discharged with instructions on wound care and monitoring for possible infection.

Claimant convalesced at home for the next several weeks waiting for the wound to heal. The pain limited his ability to engage in basic activities such as standing, walking, and performing routine ADLs. During that period, Claimant was incapable of performing his pre-injury work as a mover.

Claimant returned to the emergency department approximately two weeks after the accident to have the sutures removed. Dr. Dylan Rakowski wrote a note stating:

> [Claimant] sustained a significant laceration to his left knee with retained glass fragments on September 19, 2023. Following removal of his sutures,

> [he] continues to experience mobility limitations that prevent him from walking independently. Dut to the nature of his injury and current functional limitations, he is unable to perform his duties as a mover at this time.
>
> Based on his clinical presentation and the presence of retained glass fragments, I recommend continued work restrictions for the previously advised period of one month from the date of injury.

Claimant maintained periodic contact with BD[Redacted] in the weeks after the accident to keep Employer apprised of his condition.

Claimant was off work through October 8, 2023. He returned to work for Employer on October 9, 2023. He worked two days and then left the job to look for other employment.

Employer filed no admissions, denials, or other documents with the Division of Workers' Compensation ("Division") despite knowledge that Claimant had suffered a lost-time injury.

Claimant was paid by Employer on an hourly basis. Claimant earned $3,165 in the 7 weeks immediately preceding the injury. This equates to an average weekly wage (AWW) of $663, with a corresponding TTD rate of $422 ($3,165 ÷ 7 = $633 x 2/3 = $422).

Claimant proved he suffered a compensable injury on September 19, 2023.

Claimant proved entitlement to TTD benefits in the amount of $1,145.43, from September 20, 2023 through October 8, 2023 (19 days).

Claimant proved Employer should be penalized $1,145.43 for failure to timely admit or deny liability. This penalty is based on 19 days of compensation ($422 ÷ 7 = $60.29 daily compensation rate x 19 days = $1,145.43).

Employer was not insured for workers' compensation liability on Claimant's date of injury.

Employer must pay $286.36 to the Colorado Uninsured Employer Fund (CUE Fund), as a penalty for failure to maintain worker's compensation insurance coverage on the date of Claimant's injury.

CONCLUSIONS OF LAW

A. 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). As found, Claimant proved he suffered a compensable injury on September 19, 2023.

B. Average Weekly Wage

Section 8-42-102(2) provides that 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 § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Avalanche Industries v. Clark*, 198 P.3d 589 (Colo. 2008). 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).

Claimant proved his AWW is $663 per week. Claimant's earnings fluctuated each week based on the available work, and the most appropriate computational methodology is to average his earnings over the seven weeks of employment before accident. Claimant earned $3,165 during that period, which equates to an AWW of $633.

C. Temporary total disability (TTD) 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). Claimant proved he was disabled by the compensable injury and suffered a wage loss commencing September 20, 2023.

Once commenced, TTD benefits continue until one of the terminating events enumerated in § 8-42-105(3). One statutory basis for the termination of TTD is a return to work for the same or different employer. Section 8-42-105(3)(b). Here, Claimant returned to work on October 9, 2023, which ended his eligibility for TTD benefits.

Thus, Claimant is entitled to TTD benefits from September 20, 2023 through October 8, 2023.

D. Total TTD and statutory interest owed

Employers or their insurers must pay statutory interest of 8% per annum on all benefits not paid when due. Section 8-43-410(2). Employer owes $1,145.43 in TTD benefits from September 20, 2023 through October 8, 2023, and $111.51 in statutory interest through the date of this decision. Interest will continue to accrue at the rate of $0.28 per day until the past-due TTD is paid in full. The accrued and ongoing interest were calculated using the Division of Workers' Compensation Benefits Calculator, which is available at https://dowc.cdle.state.co.us/Benefits/tab/interest.aspx

Photo of Workers' Compensation Calculator including claimant's name [Redacted, hereinafter JM]

E. Penalty for failure to admit or deny liability

Section 8-43-101(1)(a) requires every employer to report lost time injuries to the Division within ten days after notice of knowledge of the injury. Pursuant to § 8-43-203(1)(a), the employer must notify the Division and the injured worker in writing whether liability is admitted or contested within 20 days after the deadline for reporting the injury to the Division as specified in § 8-43-101. If such notice is not timely filed, the employer may be penalized up to one day's compensation for each day's failure to so notify, not to exceed the aggregate of 365 days' compensation. Section 8-43-203(2)(a). Fifty percent of any such penalty shall be paid to the Subsequent Injury Fund and fifty percent to the claimant.

Claimant proved Employer should be penalized $1,145.43 for failure to timely admit or deny liability. Claimant promptly notified Employer he suffered an injury at work that was making it difficult to walk. Considering the physical nature of Claimant's job, Employer knew or reasonably should have known Claimant was temporarily disabled and would suffer a wage loss proximately caused by the injury. Employer filed no reports, admissions, denials, or other documents with the Division of Workers' Compensation ("Division") despite knowledge that Claimant had suffered a lost-time injury.

Claimant has been awarded $1,145.43 in TTD benefits for a 19-day closed period of disability. An aggregate penalty of $1,145.43 is sufficient to encourage compliance the statue and is commensurate with the harm to Claimant and to the administrative process occasioned by Employer's failure to fulfill its legal obligations, without being unduly punitive.

F. Payment to the Colorado Uninsured Employer Fund for failure to insure

Section 8-43-408(5) provides that:

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury . . . shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund.

The penalty for failure to insure only applies to indemnity benefits; it does not apply to medical benefits. *Industrial Commission v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc.*, W.C. No. 4-155-231 (February 13, 1998). Additionally, although the ALJ is not aware of a case directly on point, statutory interest is not properly considered "compensation or benefits" within the meaning of 8-43-408(5). Interest is a statutory right intended to secure claimants the present value of benefits to which they are entitled by creating an equitable remedy for the lost time value of money during the accrual period. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991).

Employer has been ordered to pay $1,145.43 in TTD benefits. Twenty-five percent (25%) of the compensation awarded is $286.36.

ORDER

It is therefore ordered that:

1. Claimant's claim for an injury on September 19, 2023 is compensable.

2. Claimant's average weekly wage is $633.

3. Employer shall pay Claimant $1,145.43 for TTD benefits from September 20, 2023 through October 8, 2023.

4. Employer shall pay Claimant statutory interest of $111.78 on unpaid TTD.

5. Employer shall pay $1,145.43 in penalties for failure to timely admit or deny liability for Claimant's injury. Fifty percent ($572.72) shall be paid to the Subsequent Injury Fund and the remainder ($572.71) shall be paid to Claimant.

6. Employer shall pay $286.36 to the Colorado Uninsured Employer Fund for failure to maintain workers' compensation insurance coverage on the date of Claimant's injury.

7. In lieu of payment of the above compensation and benefits directly to Claimant, Employer shall:

a. Deposit $2,689.00 with the Division of Workers' Compensation, as trustee, to secure payment of all unpaid compensation and benefits awarded, or

b. File a surety bond in the amount of $2,689.00 with the Division of Workers' Compensation within ten (10) days of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation, penalties, and benefits awarded.

8. Employer shall notify the Division of Workers' Compensation and Claimant's attorney of payments made pursuant to this Order.

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or

service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 27(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: December 4, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-214-976-005

ISSUES

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

FINDINGS OF FACT

1. Claimant is 68 years old. Claimant works as a meter-reader for Employer. On August 4, 2022, during the course and scope of his employment, Claimant was assaulted. Claimant sustained injuries to his solar plexus, right shoulder, head, and neck. *See* Ex. E.

2. As a result of his injury, on February 27, 2023, Claimant underwent a right total shoulder replacement with humeral head resurfacing and inlay glenoid (arthroplasty) and open biceps tenodesis. Ex. F.

3. On April 17, 2024, Claimant's authorized treating physician, Elizabeth Bisgard, M.D., placed Claimant at maximum medical improvement, and performed an impairment rating. Dr. Bisgard assigned Claimant a 30% impairment rating for the right shoulder arthroplasty, and a 9% impairment rating for decreased shoulder range of motion. The two ratings combine for a 36% upper extremity impairment rating, which corresponds to a 22% whole person impairment.

4. Respondents filed a Final Admission of Liability on June 25, 2024, and admitted a 36% upper extremity impairment rating (as well as a 5% whole person impairment rating for mental impairment not at issue in this matter). Ex. 3.

5. Claimant filed an application for hearing requesting his 36% right upper extremity rating be converted to a 22% whole person rating based on the situs of functional impairment. Ex. 1.

6. Claimant credibly testified at hearing that due to his shoulder injury, he has pain along his shoulder blade and trapezius muscle and tightness in his neck and shoulder.

7. Claimant has had to modify how he sleeps, showers, and puts on his shirt. While driving he has difficulty looking over his right shoulder to make sure he is safe to change lanes because of pain and stiffness in his neck, and as a result he now twists his entire body to look.

8. Claimant has decreased strength, difficulty reaching across his body, and cannot reach as far overhead, requiring him to modify how he reaches lockboxes at work. When pushing using his right arm, Claimant feels tightness in his chest, particularly at the incision site for the arthroplasty.

9. Ronald Swarsen, M.D., testified on behalf of Claimant and was admitted as an expert in occupational medicine, family medicine, and as a Level II accredited physician. Dr. Swarsen did not personally examine Claimant but is familiar with the arthroplasty performed by Braden Kent Mayer, M.D. on February 27, 2023. Dr. Swarsen testified to how an arthroplasty with humeral head resurfacing and inlay glenoid would be done and that the surgery would have resulted in alteration of Claimant's anatomy at both the glenoid and the humerus.

10. Dr. Swarsen persuasively testified that the arthroplasty Claimant underwent involves manipulation of the physiological structures of the shoulder girdle and that the pain and discomfort Claimant has had after his arthroplasty include impairment of his neck and trapezius muscles on the trunk of his body, rather than below the arm at the shoulder. Dr. Swarsen further opined that Claimant's situs of functional impairment was proximal to the glenohumeral joint, which is beyond the arm at the shoulder and, therefore, not a scheduled impairment.

11. Scott Primack, M.D., testified on behalf of Respondents and was admitted as an expert in physical medicine and rehabilitation and as a Level II accredited physician. Dr. Primack performed an Independent Medical Examination (IME) of Claimant on August 28, 2024, and concluded that Claimant's arthroplasty resulted in "problems with the motion of the arm," Ex. A. Dr. Primack opined that although Claimant had a total shoulder replacement and reported pain in his neck and trapezius, the situs of functional impairment was in the arm below the shoulder joint because of Claimant's issues with movement, pushing and pulling, reaching across his body, and lifting weight. The ALJ found Dr. Primack's opinion lacked credibility.

12. Claimant's injury has affected physiological structures beyond his arm at the shoulder. The pain and discomfort Claimant feels in his neck and trapezius limit his ability to use that portion of his body and Claimant's situs of functional impairment is proximal to the glenohumeral joint in the area of his trapezius.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado, section 8-40-101, *et. seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 318 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing the weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals Off.*, 43 P.3d 637, 641 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Indus. Claim Appeals Off.*, 183 P.3d 684, 687 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186, 191 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 165 Colo. 504, 506 (1968).

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

might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385, 389 (Colo. App. 2000).

Conversion of Scheduled Impairment to Whole Person Impairment

"Where an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person." *In re Newton*, W.C. No. 5-095-589-002, 2021 Colo. Work. Comp. LEXIS 45, *13 (July 8, 2021).

> Whether a claimant has suffered the loss of an arm at the shoulder under § 8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under § 8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).
>
> The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS*, W.C. No. 4-573-459 (Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars*, W.C. No. 4-922-066-04 (Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson-Wood*, W.C. No. 4-536-198 (June 20, 2005); *Vargus v. Excel Corp.*, W.C. 4-551-161 (Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, WC 4-657-285 (Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (Dec. 28, 2006).

Id. at *13-14; *see In re Barry*, W.C. No. 5-150-172, 2023 Colo. Wrk. Comp. LEXIS 6, *4-5 (Feb. 13, 2023) ("Under the functional impairment test, neither the situs of the injury nor the anatomical distinctions found in the *American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)* controls the issue. Rather, the ALJ must consider all relevant evidence and determine what parts of the body have been functionally impaired.").

"In the case of a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder." *Id.* at *14.

Claimant has established by a preponderance of the evidence that he has sustained an impairment of anatomical structures beyond the arm at the shoulder. As found, Claimant's right total shoulder replacement with humeral head resurfacing and inlay glenoid resulted in an alteration of Claimant's anatomy at both the glenoid and the humerus. The situs of the functional impairment is proximal to the glenohumeral joint and is beyond the arm at the shoulder. Claimant's neck and shoulder pain is a manifestation of that functional impairment, and is therefore not a scheduled impairment. Therefore, Claimant's 36% right upper extremity impairment corresponds to a 22% whole person impairment. Claimant's request to convert his 36% right upper extremity permanent impairment rating to a 22% whole person impairment is granted.

ORDER

It is therefore ordered that:

1. Claimant's 36% right upper extremity impairment rating is converted to a 22% whole person impairment.

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

SIGNED: December 4, 2024.

Robin E. Hoogerhyde
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-261-671-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that his cervical condition is causally related to his January 2, 2024, work injury.

II. Whether Claimant established by a preponderance of the evidence that the multilevel cervical fusion recommended by Lindsey Henninger, PA, is reasonable, necessary and related to this work injury.

FINDINGS OF FACT

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

1. Claimant, who is currently 52-years-old, works for Employer in a meat processing plant. As part of his job, Claimant works with bison carcasses on a processing line. The carcasses are moved down the processing line by an overhead conveyer line/chain with hooks attached, and each bison carcass is attached via a hook.

2. On December 11, 2023, the workers could not keep up with the carcasses coming down the conveyor line. Therefore, Claimant pushed a carcass backwards against the flow of the conveyor line. While doing so, he also lifted the carcass, which weighed approximately 175-200 pounds, up and off the hook, and hurt his left shoulder. At the same time, something fell onto his right leg, causing an abrasion. Claimant continued working and did not file a workers' compensation claim.

3. On January 2, 2024, the Claimant was involved in another accident, which was captured on surveillance video. The video shows Claimant helping move a carcass back against the conveyor line flow, as workers struggled to keep up with the pace of the carcasses. To move the carcass, the Claimant used a meat hook held in his left hand. While another employee pushed a carcass backward, it fell off the overhead conveyor line and landed on the Claimant's right foot. This caused the Claimant to lose his balance and begin falling forward. As he fell, his neck flexed quickly forward and downward. His body then rotated about 150 degrees toward a nearby trashcan, which was positioned against a large table.

4. While falling towards the ground, Claimant reached out with his right hand to grab the rim of the three-foot-tall trashcan to keep from falling to the ground. At the same time, he reached out and landed on the edge of the trashcan with his left wrist, which jammed his left shoulder. Despite the impact, the Claimant maintained a closed-hand grip on the meat hook, holding it firmly in a fist-like position with his left hand, and managed to brace himself to prevent a complete fall to the ground. The video does not show any indication Claimant jammed or injured his left index finger during the incident, as his hand remained closed around the meat hook throughout the fall.

5. After the accident, Claimant reported the injury to Employer and filled out an accident report. Claimant indicated that he injured his left shoulder and left fingers by circling those body parts on the human diagram that was on the report he completed.

6. On January 6, 2024, Claimant was evaluated by Dr. Martinuzzi. At this visit, he complained of numbness, tingling, and weakness in his left shoulder. He also complained of midline soreness on the left trapezius region and overlying shoulder blade. Dr. Martinuzzi thought Claimant had a rotator cuff injury and directed Claimant to follow up with orthopedics as soon as possible.

7. On January 10, 2024, Claimant was seen at North Suburban Medical Center, in the Emergency Department, where he was seen by David Garcia, PA-C. Claimant's chief complaint was severe left shoulder pain. After an examination, he was provided pain medication – including oxycodone – and referred to Ezra Levy, D.O.

8. On January 15, 2024, Claimant was seen by another physician assistant, Mary Tribble. She noted Claimant's symptoms were getting worse. He had an increase in pain that he rated at 12/10 and said it was the worst pain of his life. He also stated that his shoulder range of motion was getting worse and that his shoulder was getting weaker. In additional to his shoulder symptoms, Ms. Tribble also documented Claimant was complaining of pain in his left 2nd MCP joint – index finger. While she stated in one section of her report that Claimant did not have any pain radiating distally from his shoulder, she did state in her final assessment that Claimant was suffering from a "Strain of unspecified muscle, fascia, and tendon at shoulder and *upper arm level*" (emphasis added). The documentation of distinct upper arm involvement, extending beyond the shoulder indicates Claimant was having symptoms radiating from his shoulder and into his upper arm. The report also states she examined Claimant's neck and it was normal. Based on Claimant's symptoms, and her assessment, Mr. Tribble ordered an MRI to be performed that day of Claimant's left shoulder. The MRI demonstrated a rotator cuff tear.

9. On January 16, 2024, Claimant was seen by Ezra Levy, D.O. At this visit, Dr. Levy focused on Claimant's shoulder. The report does not state he evaluated and examined Claimant's neck. Dr. Levy concluded Claimant had a torn rotator cuff and needed surgery. He also noted Claimant had pain in his left index finger. During the appointment, Dr. Ezra had a colleague, who is a surgeon, Dr. Cain, evaluate Claimant's shoulder. Dr. Cain concurred Claimant required surgery to repair his rotator cuff.

10. On approximately January 17, 2024, Claimant was interviewed by the adjuster over the telephone. Although the adjuster did not advise Claimant the conversation would be recorded, the conversation was recorded. The adjuster was friendly and professional. At the same time, his questions seemed to focus on finding other potential causes for Claimant's injuries and need for treatment, instead of fully understanding the extent of Claimant's injuries. Claimant sounded guarded – but appropriately so under the circumstances. During the interview, Claimant told the adjuster that the incident was captured by surveillance video. He also told the adjuster that he was advised by his medical providers that he had an acute torn rotator cuff and that his current complaints involved his left shoulder and left index finger. The adjuster did not, however, follow up and ask additional detailed questions to determine whether Claimant had any other

symptoms that might be indicative of a broader scope of injuries flowing from the work accident.

11. On January 17, 2024, Claimant was seen by Troy Manchester, M.D. During this visit, it was again noted that Claimant's symptoms were worsening. The report does not state Claimant reported any neck pain, tingling, or numbness. That said, several sections of Dr. Manchester's report-such as the mechanism of injury, reported symptoms, and neck assessment are identical—word for word—as documented in the January 15, 2024, report of PA Tribble. This strongly suggests Dr. Manchester used most of the history, symptoms, and physical exam findings from PA Tribble's prior evaluation, rather than obtain his own history from Claimant and perform his own physical examination of Claimant.

12. Moreover, Claimant credibly testified that Dr. Manchester told him that his pain was out of proportion for a rotator cuff tear. Therefore, about 2 weeks after the work accident, Claimant's symptoms revealed his injury might not be limited to his left rotator cuff. However, Dr. Manchester failed to put that information in his report and his failure to document his thoughts at that time diminishes the quality and thoroughness of his reports.

13. On January 24, 2024, Claimant returned to Dr. Manchester. As with the prior visit and report, it appears Dr. Manchester again used the information from PA Tribble's earlier examination of Claimant. As a result, the reported symptoms as well as the findings on physical examination cannot be considered reliable or useful in accurately assessing the Claimant's reported pain complaints and symptoms at that visit.

14. On January 31, 2024, Claimant returned to Dr. Manchester. During this visit, the report states Claimant did not have any distal radiation of pain from his shoulder. But in another section of the report he says Claimant reported arm pain–which would suggest distal radiation of pain from his shoulder.

15. On February 2, 2024, Claimant was seen by Dr. Hsin. According to the notes from this visit, Claimant complained of pain in the posterior part of his shoulder extending into his neck and down his bicep. Dr. Hsin, like Dr. Manchester told Claimant that his symptoms were out of proportion to the rotator cuff pathology shown on the MRI.

16. On February 6, 2024, Claimant was evaluated by Dr. Thomas Mann. In his report, Dr. Mann documented Claimant reported experiencing "significant pain down the left arm and difficulty lifting" since the injury. Upon physical examination, Dr. Mann observed the Claimant exhibiting guarded movements not only of his left shoulder but also in his neck. As part of his evaluation, Dr. Mann examined Claimant's cervical spine, noting tenderness upon palpation, particularly at the C5 level. He also observed that Claimant's head had a slight tilt at rest. Dr. Mann further noted restricted cervical mobility, with poor rotational movement to the left and a tilt to the right, accompanied by limited flexion. He also noted Claimant reported increased pain during lateral bending in both directions, as well as significant pain with rotation to the left.

17. Dr. Mann concluded Claimant's symptoms were more consistent with a cervical spine issue than with a primary rotator cuff or shoulder condition, noting significant cervical symptoms accompanied by radiating pain into the scapula, arm, and trapezius. He also concluded that the Claimant's significant pain included radicular pain originating from the cervical spine, in addition to pain from the rotator cuff tear. Dr. Mann explained that the combined effect of the cervical condition and rotator cuff tear likely accounted for the Claimant's pain being out of proportion to what would typically be expected from a rotator cuff tear alone, thereby contributing to the difficulty in managing his symptoms. Lastly, he concluded that Claimant's cervical spine be evaluated by a specialist before Claimant underwent rotator cuff surgery.

18. Dr. Mann's conclusion that Claimant's pain radiating into his trapezius was cervical radicular pain supports the connection between the Claimant's neck condition and his work injury. When the Claimant first sought treatment on January 6, 2024—his initial medical visit for the work injury—Dr. Martinuzzi documented pain in the Claimant's left trapezius region. This documentation strongly suggests that Claimant exhibited cervical radicular symptoms from the start, which supports a finding that Claimant's neck condition is causally related to his work accident.

19. On February 7, 2024, Claimant returned to Dr. Manchester. The report from this visit contains several inconsistencies. For example, in one section he states Claimant's neck is "supple" with a "functional range of motion," suggesting normal range of motion. However, in another section he states that Claimant's cervical range of motion is "still limited on extension," implying that the Claimant has had restricted neck range of motion throughout his treatment of Claimant. These conflicting findings also undermine the reliability of Dr. Manchester's reports and raises concerns about the accuracy of the information contained in his reports regarding the development of Claimant's symptoms, the extent of his symptoms, and the progression of his symptoms.

20. On February 22, 2024, Claimant was evaluated by Dr. Kawasaki, via a referral from Dr. Manchester. Dr. Kawasaki's notes state how the injury occurred and the symptoms that developed. Dr. Kawasaki noted:

> His work comp injury involved a 250lb bison carcass on a trolley system which fell off hitting his legs, causing him to fall onto trash cans. He braced his fall with his left hand as he fell onto his shoulder. He had immediate pain in his left index finger and developed shoulder pain and difficulty lifting his arm after a few days. Pain in neck, back, and down arm to thumb and finger. Experiences burning sensation in the left pectoral region, headaches, numbness, stabbing pain and burning sensation down arm.

21. The manner in which Dr. Kawasaki documented how the accident occurred and the symptoms that developed are consistent with the surveillance video and the underlying medical records. For example, a bison carcass did fall on Claimant and caused him to fall towards the ground and onto a trashcan. Plus, Claimant did use the trashcan to brace himself from falling to the ground. And while Claimant did not land on his left shoulder,

the fall onto the trashcan, and Claimant bracing his fall with his left arm and the trashcan resulted in a torn left rotator cuff. Moreover, he developed shoulder pain and left finger pain after the accident and documented such in the incident form he completed for the Employer. Plus, the medical records document that his symptoms worsened over time and by the time he saw Dr. Kawasaki, he had pain in his neck, back, down his arm and into his thumb and finger. As a result, the ALJ finds that Claimant did not misrepresent the accident and the development of his symptoms to Dr. Kawasaki.

22. During his physical examination of the Claimant, Dr. Kawasaki performed a Spurling's test. He determined that the test result was negative on the right but markedly positive on the left, with pain radiating down the left upper extremity, including the shoulder and shoulder girdle region. Based on Claimant's medical history and the findings of his physical examination, Dr. Kawasaki concluded Claimant exhibited shoulder dysfunction and weakness exceeding what would typically be expected for a rotator cuff injury as indicated by the MRI. Dr. Kawasaki further concluded that the Claimant's symptoms—including the observed pain patterns, as well as numbness and tingling—were highly consistent with a cervical left C6 radiculopathy. Thus, he recommended Claimant undergo an EMG, and a cervical MRI, to assess his cervical condition.

23. On February 23, 2024, Claimant returned to Dr. Manchester. The report from this visit also contains contradictory information and findings. For example, Claimant's reported symptoms (ROS) states Claimant is experiencing neck pain, but shortly thereafter the report contradicts this by stating "No neck pain."

24. On February 26, 2024, Claimant had a cervical MRI. It showed anterolisthesis, retrolisthesis, osteophyte complexes, neural foraminal narrowing, and facet arthropathies at multiple levels. The radiologist's impression was "moderate-severe degenerative changes including moderate-severe C5-6 central canal stenosis and multilevel severe neural foraminal narrowing."

25. On March 11, 2024, Claimant returned to Dr. Manchester. At this appointment, Dr. Manchester's records continue with contradictory statements and findings. He does, however, note Claimant' left finger problem, which was documented right after Claimant's injury, and Claimant discussed in his recorded statement, are radicular, and the ALJ does credit this portion of his report.

26. Following Claimant's cervical MRI, Dr. Kawasaki performed left upper extremity EMG and NCV testing which provided no neurological evidence of cervical radiculopathy, brachial plexopathy, or other peripheral nerve lesions. Regardless, Dr. Kawasaki believed Claimant had a left C6-C7 cervical radiculopathy, he believed this was the best explanation of Claimants symptoms, and he recommended cervical epidural steroid injections for diagnostic and therapeutic purposes.

27. On April 10, 2024, Dr. Kawasaki administered left L5-6 and left L6-7 transforaminal epidural steroid injections, and C6 and C7 nerve blocks. In follow-up Dr. Kawasaki noted Claimant had excellent short-term relief from the cervical epidural steroid injection, describing Claimant's response as diagnostic.

28. On April 25, 2024, and based on his assessment, Dr. Kawasaki recommended an

orthopedic surgery consultation with Dr. Daniel Possley for Claimant's cervical condition.

29. On May 24, 2024, the Claimant was evaluated at Lafayette Clinic's Orthopedic Spine Center by Lindsey Jean Henninger, the physician assistant for Dr. Possley. Ms. Henninger obtained the Claimant's history of symptoms, which included neck pain, left upper extremity radiating pain into the shoulder and down the left anterior forearm, as well as subscapular pain and radiating numbness in the triceps. She performed a physical examination, and also performed a Spurling's test, which was positive-and consistent with Dr. Kawasaki's findings.

30. Ms. Henninger concluded that non-operative treatments—such as pain medications, steroid injections, physical therapy, and activity modifications—had failed to alleviate Claimant's symptoms. Based on her assessment, she recommended a C4-6 cervical fusion. She also reviewed Claimant's imaging and her assessment with Dr. Possley, the surgeon. There is no indication Dr. Possley disagreed with the surgical recommendation made by Ms. Henninger.

31. On May 30, 2024, Claimant returned to see Dr. Kawasaki. At this appointment, Claimant reported continued pain down his neck and left upper extremity. He rated his pain at 9/10. Based on Claimant's continued pain complaints, and the fact that there were no more conservative options available, Dr. Kawasaki concluded cervical surgery appeared reasonable.

32. The Insurer submitted Ms. Henninger's C4-6 cervical fusion recommendation for review by Dr. Michael Janssen, an orthopedic surgeon. In a brief report dated June 11, 2024, Dr. Janssen summarized his review of the cervical imaging and noted that the focus of the claim at its initiation was on the Claimant's left shoulder, with the neck issues arising several weeks after the work injury. However, he did not address the Claimant's left index finger symptoms, which developed right after the accident, nor did he consider other potential radicular symptoms that existed right after the accident. Dr. Janssen concluded that all findings on the cervical imaging were longstanding and unrelated to the January 2, 2024, accident, and he recommended denying the cervical fusion under the workers' compensation claim, suggesting it be pursued through private insurance instead. Notably, Dr. Janssen's report does not demonstrate that he conducted a thorough review of the Claimant's complete medical records to assess causation and determine whether the work accident aggravated Claimant's preexisting asymptomatic cervical condition. Furthermore, his report lacks meaningful analysis and detailed reasoning to support his conclusions. As a result, the ALJ finds Dr. Janssen's report largely conclusory and therefore unpersuasive.

33. On June 21, 2024, Dr. Mann issued a letter saying that Claimant requires a left shoulder rotator cuff repair, but Claimant has significant cervical spine findings, likely radicular in nature, which may limit rotator cuff surgery recovery, and he also had concern for the stability of the cervical spine for intubation. Dr. Mann recommended "the cervical spine be evaluated and treated by a specialist prior to rotator cuff surgery."

34. On August 26, 2024, Robert Messenbaugh, M.D., performed an Independent Medical Examination on behalf of Respondents. Dr. Messenbaugh reviewed the video of Claimant's accident, reviewed Claimant's medical records from the date of injury through his IME date, looked at a picture Claimant brought to the IME appointment, obtained a

history from Claimant, and examined Claimant.

35. In his report, Dr. Messenbaugh first noted Claimant had a delayed post-date injury onset of cervical pain and radicular complaints. He also relied on Claimant's belief that his left index finger symptoms were caused by him jamming his finger when he fell. He also commented on the left shoulder MRI findings, and the left upper extremity EMG findings.

36. He concluded Claimant had a January 2, 2024, industrial injury which resulted in an acute injury and tearing of the left shoulder rotator cuff and bicep tendon, and a jamming injury to the left index finger metacarpophalangeal joint, but Claimant's additional diagnoses of advanced multilevel cervical spine degenerative disc disease with associated foraminal stenosis pre-dated the work injury, and were not caused by, aggravated by, nor created by Claimant's work injury. He agreed with Dr. Janssen that the cervical spine multilevel cervical pathology pre-dated the work injury, and that any cervical spine surgery Claimant might undergo would be for the advanced cervical pathology and not for any specific injury to Claimant's cervical spine sustained on January 2, 2024. Finally, with respect to whether the cervical fusion must occur prior to left shoulder surgery, Dr. Messenbaugh concluded that it did not have to be performed before the left shoulder surgery.

37. On September 6, 2024, Dr. Messenbaugh testified via evidentiary deposition, identifying himself as a Harvard educated, board certified orthopedic surgeon initially licensed to practice medicine in 1966, who has been Level II accredited by the Division of Workers' Compensation for at least 20 years. Dr. Messenbaugh no longer performs surgery, and has never performed cervical spine surgeries, but considers himself an expert in cervical spine issues. Dr. Messenbaugh explained that Claimant had no acute findings on his February 6, 2024, cervical x-ray series, nor on his February 26, 2024, cervical MRI. Dr. Messenbaugh opined that based on his evaluation, including his review of the accident, his understanding of the mechanism of injury, and his review of the imaging, the cervical fusion recommended by Ms. Henninger is not reasonable and necessary to treat Claimant from the effects of his work injury because there is no evidence Claimant sustained a cervical spine injury.

38. Dr. Messenbaugh acknowledged that there was no evidence that there was a prior incident that caused Claimant's C6 radiculopathy to become acute, but he reiterated there was also no evidence that the work injury caused an injury to the cervical spine. He explained that someone with the severe degenerative problems Claimant has based on the cervical x-ray and MRI can become symptomatic without having any inciting event or trauma.

39. Dr. Messenbaugh was also asked whether it is reasonable for Claimant to move forward with left shoulder surgery before undergoing the proposed cervical fusion, to which he answered:

> In my opinion, yes, it is. I have attended a multitude of surgical procedures performed upon shoulders and any other anatomic locations wherein the individual had advanced degenerative changes in the surgical spine known to me and known to the anesthesiologist, and I have been present when general anesthetic and intubation has been performed by the anesthesiologist quite

> reliably and safely without any contraindications or issues – bad issues resulting from intubation.

40. On cross-examination, Dr. Messenbaugh further pointed out there is no medical evidence of instability in Claimant's cervical spine, including on cervical imaging. Dr. Messenbaugh testified that in his medical opinion there is no reason the recommended cervical fusion must take place before the left shoulder surgery. Dr. Messenbaugh opined that Dr. Mann's concern that Claimant's unoperated cervical condition may somehow interfere with Claimant's left shoulder repair recovery in terms of rehab and pain relief was not a reasonable concern, and he does not agree that Claimant's cervical injury will affect Claimant's left shoulder rehabilitation.

41. The primary reason Dr. Messenbaugh does not believe Claimant injured his neck on January 2, 2024, is the lack of immediate cervical complaints following the accident. In reaching this conclusion, Dr. Messenbaugh relies on the initial medical records, including those of Dr. Manchester, which the ALJ finds are not reliable. Dr. Messenbaugh notes that in the initial evaluations after the incident, Claimant did not report any neck pain or related symptoms and that it was not until a month later, during a February 2, 2024, evaluation, that neck pain was documented, which Dr. Messenbaugh attributes to the typical referred pain associated with rotator cuff injuries rather than an acute cervical injury. He emphasized that the delay in cervical symptom onset suggests that the neck pain is likely due to the shoulder injury rather than a direct injury to the cervical spine from the accident.

42. However, Dr. Messenbaugh fails to address the fact that Claimant's left index finger symptoms are consistent with a cervical radiculopathy. Dr. Messenbaugh also fails to address why he accepted Claimant's belief that he injured his left index finger by jamming it when he fell, when the video of the accident does not show Claimant' jamming his left index finger.

43. Dr. Messenbaugh was also asked during his deposition whether there were any radicular complaints, findings or symptoms, during the first month, which he said no. However, the left index finger symptoms can demonstrate a cervical radicular component, finding, or symptom.

44. Overall, Dr. Messenbaugh's opinions and testimony are not found to be credible or persuasive. A careful review of his deposition reveals that he also repeatedly engaged in evasive responses, minimized opposing medical evidence, selectively interpreted facts, and avoided fully engaging with key findings from other treating providers. These patterns suggest that his testimony lacks the impartiality and objectivity required for a credible expert opinion.

45. One indicator of Dr. Messenbaugh's lack of credibility is his repeated dismissal of the Spurling's test, a diagnostic tool used by others to confirm cervical radiculopathy. While Dr. Kawasaki and physician assistant Henninger relied on positive Spurling's test results to diagnose cervical issues, Dr. Messenbaugh dismissed the test as subjective and unreliable without providing any specific medical basis for his opinion. He also undermined his own credibility by admitting that he did not perform the Spurling's test himself, despite its relevance to the case. This raises concerns about the thoroughness

of his examination and his willingness to engage meaningfully with available diagnostic tools.

46. Additionally, Dr. Messenbaugh's use of vague and dismissive language when asked about the opinions of other medical providers suggests an effort to distance himself from opposing viewpoints without providing a reasoned rebuttal. For instance, when asked about Dr. Mann's findings about radicular symptoms, he responded with phrases such as "That is what he said" or "That is what was written." These responses imply skepticism without directly engaging with or refuting the content, leaving the impression that he questions the validity of these findings without articulating a clear alternative view that is supportable.

47. Finally, Dr. Messenbaugh's repeated focus on the subjectivity of patient-reported symptoms, without offering an alternative and persuasive medical explanation, further undermines his credibility. While patient reports carry an element of subjectivity, dismissing them entirely without a reasonable alternative explanation reflects a biased approach. His refusal to give weight to these symptoms and diagnostic tests, even when corroborated by other medical providers, detracts from the reliability of his opinion.

48. Based on these factors, the ALJ finds that Dr. Messenbaugh's opinions and testimony lacks the impartiality and thoroughness required for a credible expert opinion. His evasive responses, selective interpretation of evidence, and failure to engage meaningfully with contrary medical findings suggest that his conclusions are not based on objective medical analysis. Therefore, his testimony is not found to be credible or persuasive in determining the cause of Claimant's cervical spine symptoms and need for cervical spine surgery.

49. Claimant testified at the hearing and credibly stated that he informed Dr. Manchester shortly after the accident that his symptoms extended beyond his shoulder and into his neck. Based on a review of Dr. Manchester's records, which the ALJ finds inconsistent and unreliable, the ALJ concludes that Claimant's testimony is credible. Therefore, the ALJ finds that Claimant had neck symptoms and reported neck symptoms, to some degree, and in some way, to Dr. Manchester shortly after the work accident.

50. At the hearing, Claimant attempted to describe his pain, gesturing with his right hand to a broad area around his left shoulder. Despite having surgeries recommended for both his shoulder and neck, and with documented complaints of pain and symptoms in his neck and down his left arm and into his index finger, Claimant struggled to clearly differentiate and demonstrate the source and location of his pain. This difficulty, which stems from the overlapping symptoms caused by injuries to both his neck and shoulder, also provides a plausible explanation for the inconsistent documentation of neck pain and radiating arm pain in the medical records, as well as for the Claimant's omission of such symptoms during his recorded statement.

51. Furthermore, the initial focus of the treating providers was on Claimant's shoulder, rather than investigating other potential causes of his pain and symptoms that were disproportionate to a rotator cuff tear. This limited focus may have contributed to the failure to identify two distinct injuries—one to the shoulder and one to the neck—at an early stage. This is another plausible explanation for why the medical records initially lacked documentation of Claimant's neck complaints. This omission, combined with the Claimant's belief that his injury was confined to his shoulder, may have also influenced

him to report only the shoulder injury and his left index finger symptoms during his recorded statement. It was only after subsequent evaluations that providers identified a cervical condition in addition to the shoulder injury.

52. Ultimately, the ALJ finds that Claimant's January 2, 2024, workplace accident resulted in a torn rotator cuff and a cervical spine injury. The ALJ further finds that the cervical spine injury has caused ongoing pain and radicular symptoms that persist despite conservative treatment. Claimant's early onset of trapezius pain and symptoms in his left index finger, combined with Claimant's credible testimony that he also developed neck pain shortly after the accident, support the finding that his work accident is the proximate cause of his neck injury and resulting pain and radicular symptoms.

53. Dr. Possley's physician assistant, Ms. Henninger, recommended cervical spine surgery to address Claimant's ongoing pain and radicular symptoms. The conservative treatment that has been provided has failed to improve Claimant's symptoms. And there is no indication that Dr. Possley disagrees with her assessment and recommendation for surgery. Based on the totality of the evidence, the ALJ finds and concludes that the recommended surgery is reasonable and necessary to treat Claimant from the effects of his cervical spine work injury.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v.*

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

I. **Whether Claimant established by a preponderance of the evidence that his cervical condition is causally related to his January 2, 2024, work injury.**

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

Yet the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005).

The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Off.,* 12 P.3d 844 (Colo. App. 2000).

In this case, the ALJ finds and concludes that Claimant suffered an injury to his cervical spine on January 2, 2024, when a bison carcass fell on Claimant's foot, causing him to fall. As found, Claimant lost his balance after the carcass fell on his foot and started to fall towards the ground. While falling towards the ground, Claimant caught himself from hitting the ground by bracing himself with his left wrist against the top edge of a trashcan and grabbing the trashcan with his right hand. The force of the accident caused the immediate onset of pain in the region of his left shoulder as well as pain in his left index finger.

An MRI performed shortly after the accident demonstrated a torn rotator cuff tear. Claimant, however, was having pain that was out of proportion to a rotator cuff tear and

his symptoms were getting worse. Claimant came under the care of Dr. Manchester. Although Dr. Manchester issued a report each time he evaluated Claimant, his medical records were found to be unreliable as it relates to documenting Claimant's pain complaints and any physical findings that existed at the time of each visit. Thus, it is not clear when clear when Claimant started to complain of neck pain and pain radiating down his arm, but the ALJ finds Claimant did complain to Dr. Manchester of his symptoms-including his neck – shortly after the accident – and before they were formally documented in the medical records in February 2024.

Claimant had ongoing symptoms involving his left index finger that were documented in the medical records and in the initial accident form he completed right after the accident when he circled his fingers being injured during the work accident. The symptoms involving his left index finger are found to be radicular symptoms that were caused by the work accident and injury to his neck. Moreover, the medical records from January 15, 2024, document pain radiating from Claimant's shoulder down into his upper arm. The ALJ also finds these symptoms to be consistent with a cervical spine injury with radiculopathy.

On February 2, 2024, Claimant was evaluated by a different physician, Dr. Hsin. Dr. Hsin noted at this visit that Claimant complained of pain in the posterior part of his shoulder extending into his neck and down his bicep. Dr. Hsin, like Dr. Manchester, told Claimant that his symptoms were out of proportion to the rotator cuff pathology shown on the MRI.

Claimant was then evaluated by Dr. Mann on February 6, 2024. At this appointment, Dr. Mann concluded Claimant's symptoms were more consistent with a cervical spine issue than with a primary rotator cuff or shoulder condition, noting significant cervical symptoms accompanied by radiating pain into the scapula, arm, and trapezius. He also concluded that the Claimant's significant pain included radicular pain originating from the cervical spine, in addition to pain from the rotator cuff tear. Dr. Mann explained that the combined effect of the cervical condition and rotator cuff tear likely accounted for the Claimant's pain being out of proportion to what would typically be expected from a rotator cuff tear alone, thereby contributing to the difficulty in managing his symptoms. Lastly, he concluded that Claimant's cervical spine be evaluated by a specialist before Claimant underwent rotator cuff surgery.

Claimant was also evaluated by Dr. Kawasaki. Dr. Kawasaki evaluated Claimant and concluded in addition to a rotator cuff tear, Claimant was suffering from cervical radiculopathy at the C6-C7 level, which he confirmed via epidural steroid injections.

There is no credible evidence that Claimant had prior neck pain and radicular symptoms before the work accident. There also no credible evidence that Claimant was involved in subsequent accident that caused his cervical spine symptoms.

Thus, based on the totality of the evidence, the ALJ finds and concludes that Claimant's January 2, 2024, work accident proximately caused his cervical spine injury, symptoms, and need for medical treatment.

II. **Whether Claimant established by a preponderance of the evidence that the multilevel cervical fusion recommended by Lindsey Henninger, PA, is reasonable, necessary and related to this claim.**

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Off.,* 53 P.3d 1192 (Colo. App. 2002).

Claimant was evaluated at Lafayette Clinic's Orthopedic Spine Center by Lindsey Jean Henninger, the physician assistant for Dr. Possley. Ms. Henninger obtained the Claimant's history of symptoms, which included neck pain, left upper extremity radiating pain into the shoulder and down the left anterior forearm, as well as subscapular pain and radiating numbness in the triceps. She performed a physical examination, and also performed a Spurling's test, which was positive-and consistent with Dr. Kawasaki's findings.

Ms. Henninger concluded that non-operative treatments—such as pain medications, steroid injections, physical therapy, and activity modifications—had failed to alleviate Claimant's symptoms. Based on her assessment, she recommended a C4-6 cervical fusion. She also reviewed Claimant's imaging and her assessment with Dr. Possley, the surgeon. There is no indication Dr. Possley disagreed with the surgical recommendation made by Ms. Henninger.

Based on the totality of the evidence, the ALJ finds and concludes that conservative treatment has failed to alleviate the effects of Claimant's neck injury, which was proximately caused by the work accident. The ALJ further finds and concludes that the surgery recommended by Dr. Possley's physician assistant is reasonable and necessary to treat Claimant from the effects of his work injury.

ORDER

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

1. Claimant's neck injury was caused by his work accident.
2. Respondents shall pay for the cervical spine surgery that has been recommended by Dr. Possley's physician assistant.
3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 5, 2024.

/s/ Glen Goldman

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-256-024-004

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she should be permitted to reopen her Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

2. Whether Claimant has proven by a preponderance of the evidence that a reverse total arthroplasty as recommended by Stephen Thon, M.D. is reasonable, necessary and causally related to her October 14, 2023 right shoulder injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Housekeeper. Her job duties involved general housekeeping tasks including cleaning rooms, making beds, sweeping, mopping, and washing laundry,

2. Claimant explained that on October 14, 2023, while working in Employer's laundry area, she slipped and fell on a dryer sheet. Claimant noted that she landed on her side with her right arm abducted.

3. After the initial fall, Claimant explained she went to check on the washing machines in a nearby room and slipped on water that was on the floor. Claimant fell forward and impacted a nearby sink with her head, the right side of her torso and both shoulders.

4. Claimant commented that she immediately informed her co-workers that she was not feeling well. She was experiencing pain in her right arm, back, and knee. A co-worker then provided pills for her pain.

5. On October 15, 2023 Claimant reported the accident to her supervisor "[Redacted, hereinafter YA]."

6. On October 20, 2023 Claimant visited Jeffrey Wallace, P.A. at Authorized Treating Physician (ATP) Concentra Medical Centers. Claimant reported that she injured her right shoulder, right arm, upper back, and right ribs when she slipped and fell on a dryer sheet at work. After reviewing Claimant's medical history and conducting a physical examination, P.A. Wallace assessed Claimant with a strain of the right shoulder, a strain of the right biceps, a right rib contusion and a thoracic myofascial strain. He determined that objective findings were consistent with a work-related mechanism of injury. P.A. Wallace assigned work restrictions, recommended physical therapy and ordered an MRI.

7. On October 21, 2023 Claimant visited Health Images for an MRI of her right elbow with Alexander Skopec, MD. Dr. Skopec found moderate tendinosis of the common extensor tendon origin with intermediate grade partial-thickness tearing, mild tendinosis of the common

flexor tendon origin, and mildly increased signal of the ulnar nerve within the cubital tunnel.

8. On October 23, 2023 Claimant returned to Concentra and was evaluated by Wendy Carle, M.D. Claimant explained that she had slipped on a dryer sheet while folding laundry at work and landed on her right side. Dr. Carle assessed Claimant with a strain of the right shoulder, a strain of the right biceps, a strain of the right elbow and a thoracic myofascial strain. She determined that objective findings were consistent with a work-related mechanism of injury.

9. On October 30, 2023 Claimant returned to PA Wallace for an examination. PA Wallace assigned work restrictions for the right upper extremity of no lifting above chest level, no lifting over one pound, no pushing/pulling over five pounds, no repetitive reaching away from the body, no squatting and no kneeling.

10. On November 13, 2023 Claimant underwent an MRI of the right shoulder at Health Images. The imaging revealed

> massive rotator cuff tear with complete tears of supraspinatus and infraspinatus tendons retracted to the level of the glenoid. There is moderate atrophy of both muscles suggesting a subacute to chronic timeframe. Severe subscapularis tendinosis with minor undersurface tearing. Long head of biceps tendon is not seen, presumably ruptured and retracted into the upper arm. Mild acromioclavicular osteoarthritis. Small glenohumeral joint effusion and small subacromial/subdeltoid bursal effusion.

11. On November 29, 2023 Respondents filed a General Admission of Liability (GAL). The document acknowledged that Claimant was entitled to receive medical benefits for her October 14, 2023 industrial injuries.

12. On November 30, 2023 Claimant visited Orthopedic Centers of Colorado for an initial orthopedic surgical consultation for her right shoulder. Stephen Thon, M.D. noted diagnoses of a massive, full thickness rotator cuff tear, atrophy of the rotator cuff musculature, and significant rotator cuff arthropathy. After considering Claimant's medical records and conducting a physical examination, he concluded that Claimant sustained a right shoulder injury while working for Employer on October 14, 2023.

13. On December 5, 2023 Claimant returned to Orthopedic Centers of Colorado. Based on Claimant's right shoulder condition, Dr. Thon scheduled reverse total shoulder arthroplasty surgery for February 29, 2024. He further ordered a CT scan of the right shoulder.

14. On December 7, 2023 Claimant again visited Orthopedic Centers of Colorado. Craig Stewart, M.D. performed a CT scan of the right shoulder. The findings revealed mild glenohumeral and acromioclavicular joint osteoarthritis, narrowing of the acromiohumeral distance, and atrophy of the supraspinatus and infraspinatus rotator cuff musculature that was consistent with known large rotator cuff tear.

15. On December 20, 2023 Respondents requested orthopedic physician advisor

Andrew Parker, M.D. to review the request for surgical authorization. After considering the medical records, he noted that Claimant had undergone a course of conservative care but had not yet had a subacromial or glenohumeral injection. Dr. Parker reasoned that Claimant had chronic rotator cuff arthropathy that may have been aggravated at work. He reasoned that, if Claimant had previous complaints or treatment for the right shoulder, her care should be addressed under her private insurance. Dr. Parker determined that Claimant should undergo a subacromial/glenohumeral injection that might return her to her pre-existing condition without the need for surgical intervention. He thus recommended denial of the request for a reverse shoulder arthroplasty.

16. During the pendency of the present claim, Employer produced a surveillance video of Claimant's slip and fall in the laundry room on October 14, 2023. The video was introduced into evidence as Respondents' Exhibit II. The surveillance reveals that Claimant did not fall on her right shoulder as she testified. Notably, Claimant used her right arm in the video without any noticeable pain, limitations, or other suggestion of injury to the right shoulder.

17. On February 2, 2024 Claimant underwent an independent Medical Examination (IME) with orthopedic surgeon Qing-Min Chen, M.D. Claimant reported that on October 14, 2023 she slipped on a dryer sheet and injured her right shoulder while working for Employer. After conducting a physical examination and reviewing Claimant's medical records, Dr. Chen assessed Claimant with the following pre-existing right shoulder conditions: (1) chronic irreparable supraspinatus and infraspinatus tendon tears; (2) rotator cuff arthropathy; (3) glenohumeral and AC joint arthritis; and (4) likely history of impingement syndrome. He concluded that Claimant's right shoulder diagnoses were not causally related to her work duties on October 14, 2023. Dr. Chen summarized that Claimant's symptoms were "100% due to pre-existing conditions." He reasoned that the December 7, 2023 CT scan of the right shoulder reflected both significant muscle atrophy on top of chronic bony remodeling of the undersurface of the acromion. The humeral head was thus touching the acromion for a long enough period of time that it was remodeling or changing the bony structure of the acromion itself. The only explanation for the condition was that the rotator cuff tendons were already significantly torn. Claimant's tears were chronic because of the significant muscle atrophy noted on both MRI and CT scan. Dr. Chen determined that there was no evidence that the October 14, 2023 work injury permanently aggravated what was already a severe, chronic, degenerative condition.

18. On March 5, 2024 Dr. Parker responded to a letter from Respondents' counsel seeking his opinion after reviewing video footage of the October 14, 2023 incident. He explained that the video revealed Claimant and others in a room folding laundry. As Claimant walks behind one of the workers, she slips on a dryer sheet, and comes down hard on her left shoulder. Her right shoulder did not strike the ground or folding table. Claimant stood up and moved her right shoulder without any significant restriction. Dr. Parker thus determined that "when combined with the chronicity definable radiographically," the October 14, 2023 incident did not cause Claimant's right shoulder symptoms and the recommended surgical procedure should be addressed under Claimant's private insurance.

19. On March 29, 2024 PA Wallace responded to a letter from Respondents' counsel inquiring about his opinion after reviewing video footage of the October 14, 2023 incident. PA Wallace explained that, after reviewing the video surveillance, Claimant fell on her left side and

did not injure her right upper extremity. He noted that he had a scheduled visit with Claimant for April 12, 2024 and planned to release her at Maximum Medical Improvement (MMI).

20. On April 4, 2024 Claimant reported that a second injury had occurred at work on October 14, 2024. She specifically reported that, after she slipped on the dryer sheet, she stood up and was still feeling dizzy. Claimant then went "over to the washroom and there was water by the washing machine." She "slipped and fell hitting [her] head on the mop sink." Claimant injured her back, head, and both shoulders.

21. In addressing the second incident on October 14, 2023, Employer witnesses testified that Claimant did not report a second fall. Director of Maintenance [Redacted, hereinafter BA] remarked that, when Claimant reported her injury, she only mentioned the skip on the dryer sheet, and did not report a second fall in a mop room or anywhere else. Supervisor [Redacted, hereinafter EZ], commented that Claimant only reported the first fall, and never explained that she had suffered a second fall as described in her April 4, 2024 report. Co-employee, [Redacted, hereinafter GZ], who Claimant noted witnessed the second fall, denied that Claimant had suffered a second fall.

22. On April 12, 2024 Claimant visited PA Wallace at Concentra. PA Wallace explained that he watched the video surveillance from October 14, 2023 and Claimant clearly did not fall on her right side. He commented that Claimant reported a second fall on October 14, 2023 and remarked there was a second video, but "no one has seen the video or is aware of its existence." PA Wallace thus determined Claimant had reached MMI and noted the alleged second incident would constitute a new case.

23. PA Wallace testified at the hearing that he initially had no reason to doubt Claimant's history of slipping on a dryer sheet and injuring her right shoulder on October 14, 2023. However, after reviewing video of the incident he determined Claimant landed on her left side and did not exhibit any right shoulder injuries. When he discussed the video with Claimant and mentioned she could not have suffered a right shoulder injury, she responded that she had suffered a second fall that was also captured on video. PA Wallace then placed Claimant at MMI on April 12, 2024. He explained that, since Claimant reached MMI, Concentra records reveal her condition has not worsened and she has not requested additional medical treatment. He recalled that throughout Claimant's visits, her pain levels were sometimes severe and she exhibited varied right shoulder range of motion limitations.

24. On April 26, 2024 Respondents' filed a Final Admission of Liability (FAL) regarding the October 14, 2023 right shoulder injury. The FAL specified that Claimant had reached MMI on April 12, 2024 with no permanent impairment.

25. On July 10, 2024 Claimant visited Health Images for an MRI of the right shoulder. Alexander Skopec, M.D. found a massive rotator cuff tear consistent with the previous study. The imaging specifically reflected full-thickness tearing and distal retraction of the biceps long head tendon, a small glenohumeral effusion with fluid decompressing into the subacromial-subdeltoid bursa, and moderate acromioclavicular joint osteoarthritis.

26. On August 13, 2024 Claimant underwent an Independent Medical Examination

(IME) with John Hughes, M.D. He reviewed Claimant's medical records and conducted a physical examination. Dr. Hughes commented that he reviewed the video and determined Claimant primarily fell on her left side. He also noted that Claimant arose promptly to the standing position without apparent distress. Nevertheless, Dr. Hughes concluded that Claimant suffered two separate and distinct injuries on October 14, 2023. He reasoned that she sustained an aggravation of pre-existing right shoulder osteoarthritis and rotator cuff tendinopathy as a result of the second fall of October 14, 2023. Dr. Hughes determined that all of her medical evaluation and treatment has been reasonable, necessary, and related to the second work-related injury. He concluded that Claimant suffered a clinical worsening of condition based on evidence of reduced active ranges of motion of the right shoulder, but without MRI evidence of progressive arthropathy. Dr. Hughes reasoned that the surgery proposed by Dr. Thon is reasonable, necessary and causally related to Claimant's second slip and fall on October 14, 2023.

27. On October 31, 2024 the parties conducted the evidentiary deposition of Dr. Chen. Dr. Chen explained that, in addition to his IME on February 2, 2024, he performed a follow-up evaluation of Claimant on October 24, 2024. Claimant's counsel objected to the admission and any testimony about Dr. Chen's report from the October 24, 2024 examination, Any report from the October 24, 2024 examination was not tendered and will not be admitted into evidence. However, Dr. Chen's deposition testimony will be admitted into evidence. Respondents had planned to take Dr. Chen's deposition as noted in their original Case Information Sheet filed in this matter. Moreover, Dr. Chen's testimony involved his medical opinion based on the original February 2, 2024 IME and the follow-up evaluation.

28. At the October 31, 2024 deposition Dr. Chen recounted that Claimant had attributed her right shoulder symptoms to her work activities on October 14, 2023. However, after reviewing video of the incident, he explained that when Claimant slipped on a dryer sheet she fell to her left side and landed on her left shoulder. There was no evidence from the video that Claimant injured her right shoulder and notably used her right shoulder immediately after the fall. Importantly, Dr. Chen detailed that a December 7, 2023 CT scan of Claimant's right shoulder reflected chronic, degenerative changes, including muscle atrophy, that had developed over many years.

29. Dr. Chen explained that during his evaluation of Claimant on October 24, 2024 she stated she had suffered a second fall on October 14, 2023. Notably, after slipping on the dryer sheet, Claimant went into another room at work and slipped in water. She struck her right shoulder against a sink. However, Claimant did not initially mention the incident to her medical providers. Assuming a second fall, Dr. Chen explained that the accident would not have caused or aggravated Claimant's chronic right shoulder condition. Dr. Chen expressed 100% confidence that Claimant had a chronic right rotator cuff tear before October 14, 2023 based in part on the remodeling demonstrated on her CT scan.

30. Dr. Chen testified that, based on his examinations before and after Claimant reached MMI, there has been no objective worsening of her right shoulder condition. Although Claimant may have exhibited subjective range of motion limitations on examination, her presentation was invalid. Dr. Chen testified that Claimant exhibited numerous Waddell's signs and an exaggeration of symptoms. He determined Claimant's subjective representations were unreliable. Dr. Chen noted that Dr. Hughes' report suggests an inconsistent and non-organic

presentation of symptoms. He thus maintained that any worsening of condition is related to the natural progression of Claimant's chronic right shoulder condition and not her work activities. There is simply no medical evidence to support a worsening of condition. Moreover, Dr. Chen reasoned that Claimant's work restrictions have not changed, and the recommendation for total shoulder replacement was issued before Claimant reached MMI and the claim closed.

31. Claimant has failed to establish it is more probably true than not that she should be permitted to reopen her Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, Claimant suffered an admitted right shoulder injury on October 14, 2023 when she slipped on a dryer sheet while folding laundry at work. After receiving conservative treatment and diagnostic testing Dr. Thon recommended reverse total shoulder arthroplasty surgery on December 5, 2023. On April 4, 2024 Claimant reported a second right shoulder injury had occurred at work on October 14, 2024. She specifically reported that, after slipping on the dryer sheet, she went into another room, slipped in water and struck her right shoulder against a sink. After reviewing video surveillance of Claimant's first October 14, 2023 work incident, PA Wallace concluded that Claimant had not suffered a right shoulder injury and placed her at MMI with no permanent impairment on April 12, 2024. He noted the alleged second incident would constitute a new case. On April 26, 2024 Respondents filed a FAL and Claimant's claim subsequently closed by operation of law.

32. Claimant seeks to reopen her claim because her right shoulder condition has worsened since she reached MMI. She requires a reverse total arthroplasty as recommended by Dr. Thon. Claimant primarily predicates her worsening on additional right shoulder range of motion deficits. Moreover, Dr. Hughes reasoned that Claimant sustained an aggravation of pre-existing right shoulder osteoarthritis and rotator cuff tendinopathy as a result of the second fall of October 14, 2023. He concluded that Claimant suffered a clinical worsening of condition based on evidence of reduced active ranges of motion of the right shoulder, but without MRI evidence of progressive arthropathy. Dr. Hughes reasoned that the surgery proposed by Dr. Thon is reasonable, necessary and causally related to Claimant's second slip and fall on October 14, 2023.

33. Despite Claimant's contention and Dr. Hughes' analysis, persuasive medical opinions and the record reveal that Claimant has not suffered a change in condition causally connected to her October 14, 2023 admitted work injury. Notably, during the pendency of the present claim, Employer produced a surveillance video of Claimant's slip and fall in the laundry room on October 14, 2023. A review of the video shows that Claimant did not injure her right shoulder during the fall, and in fact utilized her right arm without any noticeable pain, limitations, or other suggestion of injury to the right shoulder. Respondents sent the surveillance video to Dr. Parker, Dr. Chen, and PA Wallace for review. All three providers agreed that Claimant did not, and could not have suffered an injury to her right shoulder from the fall on the dryer sheet as Claimant described.

34. On April 4, 2024 Claimant reported a second work injury on October 14, 2024. She specifically reported that, after slipping on the dryer sheet, she went into another room and slipped in water. However, Claimant's account is not supported by the record. First, multiple Employer witnesses testified that Claimant did not mention a second fall. Moreover, Claimant did not report a second incident until several months after the event. She also did not initially

mention the second incident to medical providers. Furthermore, providers rejected her account of the second fall and PA Wallace determined any second incident would constitute a new case. Because Claimant's alleged second fall is inconsistent with both lay and medical evidence, it lacks credibility.

35. Nevertheless, even assuming a second fall, Dr. Chen explained that the accident would not have caused or aggravated Claimant's chronic right shoulder condition. Dr. Chen expressed 100% confidence that Claimant had a chronic right rotator cuff tear before October 14, 2023 based in part on the remodeling demonstrated on her CT scan. He detailed that the December 7, 2023 CT scan of the right shoulder reflected both significant muscle atrophy on top of chronic bony remodeling of the undersurface of the acromion. The humeral head was thus touching the acromion for a long enough period of time that it was remodeling or changing the bony structure of the acromion itself. The only explanation for the condition was that the rotator cuff tendons were already significantly torn. Dr. Chen determined that there was no evidence that the October 14, 2023 work injury permanently aggravated what was already a severe, chronic, degenerative condition.

36. PA Wallace explained that, since Claimant has reached MMI, Concentra records reveal her condition has not worsened and she has not requested additional medical treatment. He recalled that throughout Claimant's visits, her pain levels were sometimes severe and she exhibited varied right shoulder range of motion limitations. Dr. Chen persuasively testified that, based on his examinations before and after Claimant reached MMI, there has been no objective worsening of her right shoulder condition. Although Claimant may have exhibited subjective range of motion deficits on examination, her presentation was invalid and unreliable. Dr. Chen thus maintained that any worsening of Claimant's condition is related to the natural progression of her chronic right shoulder condition and not her work activities. There is simply no medical evidence to support a worsening of condition. Finally, Dr. Chen summarized that Claimant's work restrictions have not changed, and the recommendation for total shoulder replacement was issued before Claimant reached MMI and the claim closed.

37. Claimant acknowledged that her claim closed 30 days after Respondents filed their FAL on April 26, 2024. Claimant is seeking to reopen the claim based on a worsening of her medical condition. As noted above, she not only failed to establish that her condition objectively worsened after MMI, but also failed to show that her condition was causally related to a work injury. Thus, even if Claimant were successful in showing a worsening, she failed to connect any worsening to her work activities. Any worsening is not causally related to her October 14, 2023 work incident, but due to the natural progression of her pre-existing right shoulder condition. Because Claimant's claim remains closed, her request for a right reverse total arthroplasty is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

Reopening

4. At any time within six years of the date of injury, an ALJ may reopen an award on the grounds of fraud, overpayment, error or mistake, or change in condition. §8-43-303(1) C.R.S. The intent of the statute is to provide a remedy to claimants who are entitled to awards of both medical and disability benefits. *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186 (Colo. App. 2002). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004). An ALJ's decision to grant or deny a petition to reopen may therefore "be reversed only for fraud or clear abuse of discretion." *Wilson v. Jim Snyder Drilling*, 747 P.2d 647, 651 (Colo. 1987); *see also Heinicke* 197 P.3d at 222 ("In the absence of fraud or clear abuse of discretion, the ALJ's decision concerning reopening is binding on appeal.").

5. Section 8-43-303(1), C.R.S., provides that a Workers' Compensation award may be reopened based on a change in condition. In seeking to reopen a claim based on a change in condition, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Off.,* 128 P.3d 270 (Colo. App. 2005). 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 Off.,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Off.,* 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,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

6. As found, Claimant has failed to establish by a preponderance of the evidence

that she should be permitted to reopen her Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, Claimant suffered an admitted right shoulder injury on October 14, 2023 when she slipped on a dryer sheet while folding laundry at work. After receiving conservative treatment and diagnostic testing Dr. Thon recommended reverse total shoulder arthroplasty surgery on December 5, 2023. On April 4, 2024 Claimant reported a second right shoulder injury had occurred at work on October 14, 2024. She specifically reported that, after slipping on the dryer sheet, she went into another room, slipped in water and struck her right shoulder against a sink. After reviewing video surveillance of Claimant's first October 14, 2023 work incident, PA Wallace concluded that Claimant had not suffered a right shoulder injury and placed her at MMI with no permanent impairment on April 12, 2024. He noted the alleged second incident would constitute a new case. On April 26, 2024 Respondents filed a FAL and Claimant's claim subsequently closed by operation of law.

7. As found, Claimant seeks to reopen her claim because her right shoulder condition has worsened since she reached MMI. She requires a reverse total arthroplasty as recommended by Dr. Thon. Claimant primarily predicates her worsening on additional right shoulder range of motion deficits. Moreover, Dr. Hughes reasoned that Claimant sustained an aggravation of pre-existing right shoulder osteoarthritis and rotator cuff tendinopathy as a result of the second fall of October 14, 2023. He concluded that Claimant suffered a clinical worsening of condition based on evidence of reduced active ranges of motion of the right shoulder, but without MRI evidence of progressive arthropathy. Dr. Hughes reasoned that the surgery proposed by Dr. Thon is reasonable, necessary and causally related to Claimant's second slip and fall on October 14, 2023.

8. As found, despite Claimant's contention and Dr. Hughes' analysis, persuasive medical opinions and the record reveal that Claimant has not suffered a change in condition causally connected to her October 14, 2023 admitted work injury. Notably, during the pendency of the present claim, Employer produced a surveillance video of Claimant's slip and fall in the laundry room on October 14, 2023. A review of the video shows that Claimant did not injure her right shoulder during the fall, and in fact utilized her right arm without any noticeable pain, limitations, or other suggestion of injury to the right shoulder. Respondents sent the surveillance video to Dr. Parker, Dr. Chen, and PA Wallace for review. All three providers agreed that Claimant did not, and could not have suffered an injury to her right shoulder from the fall on the dryer sheet as Claimant described.

9. As found, on April 4, 2024 Claimant reported a second work injury on October 14, 2024. She specifically reported that, after slipping on the dryer sheet, she went into another room and slipped in water. However, Claimant's account is not supported by the record. First, multiple Employer witnesses testified that Claimant did not mention a second fall. Moreover, Claimant did not report a second incident until several months after the event. She also did not initially mention the second incident to medical providers. Furthermore, providers rejected her account of the second fall and PA Wallace determined any second incident would constitute a new case. Because Claimant's alleged second fall is inconsistent with both lay and medical evidence, it lacks credibility.

10. As found, nevertheless, even assuming a second fall, Dr. Chen explained that the accident would not have caused or aggravated Claimant's chronic right shoulder condition. Dr.

Chen expressed 100% confidence that Claimant had a chronic right rotator cuff tear before October 14, 2023 based in part on the remodeling demonstrated on her CT scan. He detailed that the December 7, 2023 CT scan of the right shoulder reflected both significant muscle atrophy on top of chronic bony remodeling of the undersurface of the acromion. The humeral head was thus touching the acromion for a long enough period of time that it was remodeling or changing the bony structure of the acromion itself. The only explanation for the condition was that the rotator cuff tendons were already significantly torn. Dr. Chen determined that there was no evidence that the October 14, 2023 work injury permanently aggravated what was already a severe, chronic, degenerative condition.

11. As found, PA Wallace explained that, since Claimant has reached MMI, Concentra records reveal her condition has not worsened and she has not requested additional medical treatment. He recalled that throughout Claimant's visits, her pain levels were sometimes severe and she exhibited varied right shoulder range of motion limitations. Dr. Chen persuasively testified that, based on his examinations before and after Claimant reached MMI, there has been no objective worsening of her right shoulder condition. Although Claimant may have exhibited subjective range of motion deficits on examination, her presentation was invalid and unreliable. Dr. Chen thus maintained that any worsening of Claimant's condition is related to the natural progression of her chronic right shoulder condition and not her work activities. There is simply no medical evidence to support a worsening of condition. Finally, Dr. Chen summarized that Claimant's work restrictions have not changed, and the recommendation for total shoulder replacement was issued before Claimant reached MMI and the claim closed.

12. As found, Claimant acknowledged that her claim closed 30 days after Respondents filed their FAL on April 26, 2024. Claimant is seeking to reopen the claim based on a worsening of her medical condition. As noted above, she not only failed to establish that her condition objectively worsened after MMI, but also failed to show that her condition was causally related to a work injury. Thus, even if Claimant were successful in showing a worsening, she failed to connect any worsening to her work activities. Any worsening is not causally related to her October 14, 2023 work incident, but due to the natural progression of her pre-existing right shoulder condition. Because Claimant's claim remains closed, her request for a right reverse total arthroplasty is denied and dismissed.

ORDER

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

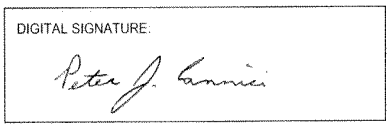
1. Claimant's request to reopen her October 14, 2023 claim based on a worsening of condition is denied and dismissed. Because her claim remains closed, her request for a right reverse total arthroplasty is denied and dismissed.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or

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

DATED: December 5, 2024.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-246-639-002

ISSUES

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

2. Whether Claimant established that the DIME physician's impairment rating is incorrect.

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

FINDINGS OF FACT

1. On May 4, 2023, Claimant sustained an admitted injury to his right leg arising out of the course of his employment with Employer during a confrontation with another employee. During the altercation, Claimant fell backward, landing on his right buttock, injuring his right leg. Claimant was initially seen at St. Anthony's Central hospital, and diagnosed with a hamstring strain. (Ex. 6).

2. Claimant later began treatment with Kristin Mason, M.D., at Rehabilitation Associates of Colorado. Claimant first saw Dr. Mason on September 28, 2023, reporting pain in his right leg, low back, and buttock, and pain into the lateral and posterior right thigh, occasionally radiating into the shin and top of foot. Dr. Mason diagnosed Claimant with an injury to the right hip, buttock, and thigh, and ordered imaging of the hip, buttock, and posterior thigh. On examination, Dr. Mason noted Claimant's report of tenderness over the right SI joint, but no other findings with respect to the lower back. (Ex. 6).

3. MRIs of Claimant's right hip and thigh were performed on October 15, 2023. The MRIs showed likely chronic full-thickness tearing of the conjoined component of the hamstring tendon, low-grade partial tearing of the proximal hamstring tendon, tendinosis, and partial tearing of the right gluteus minimus and medius tendons, and the abductor longus tendons. The radiologist also noted likely degenerative changes in the right hip labrum. (Ex. 3).

4. Claimant returned to Dr. Mason on December 7, 2023. Dr. Mason noted that Claimant had seen a mid-level orthopedic provider at the Steadman Hawkins Clinic, who felt that Claimant's hamstring tear had likely healed, and was not clinically significant. In her examination, Dr. Mason noted that Claimant had negative straight leg raise tests, but his pain conformed to an L5 pattern when it occurred. She noted no fixed neurologic deficits and tenderness in the sacroiliac area. She did not document evidence of rigidity, increased muscle tone, or loss of range of motion of the lower back or lumbar spine. Dr Mason indicated that Claimant was not a surgical candidate, and ordered physical therapy, and recommended lumbar x-rays to further evaluate Claimant's complaints of

right hip, buttock, and thigh pain. In the WC 164 form corresponding to this visit, Dr. Mason indicated that Claimant had a possible right L5 radiculopathy, and a hamstring tear. (Ex. 6). The lumbar x-rays, performed on December 8, 2023, showed only mild degenerative changes. (Ex. 3).

5. On February 5, 2024, Claimant saw Dr. Mason again, after completing a course of physical therapy. Dr. Mason noted that Claimant's right hamstring tear was clinically healed, although Claimant continued to report ongoing leg pain and tightness. She further noted that Claimant walked without a limp, and recommended additional physical therapy. In the WC 164 form, Dr. Mason indicated Claimant's diagnosis as right hamstring tear, and lumbar strain. Although Dr. Mason apparently diagnosed Claimant with a lumbar strain, her report does not include an examination of Claimant's lumbar spine or lower back. (Ex. 6).

6. On March 4, 2024, Dr. Mason placed Claimant at maximum medical improvement (MMI), and performed an impairment rating assessment. She noted that Claimant had mild limitations in his hip, but felt significantly better overall. Dr. Mason assigned Claimant an 18% right lower extremity impairment rating, based on deficits in range of motion of Claimant's right hip. Dr. Mason's lower extremity impairment rating corresponds to a 7% whole person impairment. Dr. Mason did not assign Claimant an impairment rating for his lumbar spine, and did not note any examination of the lumbar spine. In the WC 164 form, Dr. Mason listed Claimant's work-related diagnosis as a right hamstring tear. Although Dr. Mason apparently diagnosed Claimant with a lumbar . (Ex. 6).

7. Respondents then requested a Division Independent Medical Examination (DIME). On June 11, 2024, Stephen Lindenbaum, M.D., performed the DIME. Dr. Lindenbaum opined that Claimant had a definite hamstring injury on the right side. He performed right hip range of motion testing yielding a 13% right lower extremity rating, which corresponds to a 5% whole person impairment. Dr. Lindenbaum also found range of motion deficits in Claimant's left hip, which he determined justified normalization of Claimant's right hip rating. Specifically, he found Claimant to have deficits in the left hip equating to an 8% lower extremity rating. Consequently, after normalization, Dr. Lindenbaum assigned Claimant a 5% right lower extremity impairment rating, which corresponds to a 2% whole person impairment. He noted that there was no evidence of any SI joint impairment based on negative testing, and no lumbar spasms. He further noted no evidence of dermatomal numbness in the right leg, and negative straight leg testing (Ex. 8).

8. In discussing his decision to apply normalization to Claimant's impairment rating, Dr. Lindenbaum noted that Claimant had no history of abnormality or previous injury to the left hip, and definitively had decreased motion in the left hip based on the AMA Guides.

9. Claimant testified at hearing that he continues to experience issues with his right leg. He indicated that he has difficulty entering and exiting a vehicle; his leg falls asleep after driving for more than a couple of hours; it is difficult to climb a ladder, and his sleep is impacted. Claimant also indicated that after getting out of bed in the morning, the first few steps can be challenging. Claimant testified that he has not had a prior hip injury, and

that before his May 4, 2023 injury, he did not have any issues with either leg, and that both legs functioned equally before his injury.

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

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

Conversion of Scheduled Impairment to Whole Person Impairment

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in § 8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. § 8-42-107(l)(a), C.R.S. The schedule includes the "loss of a leg at the hip joint or so near thereto as to preclude the use of an artificial limb," but does not define "hip" or specifically include an injury limited to the "hip." § 8-42-107(2)(w), C.R.S., When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* § 8-42-107(8)(c), C.R.S.

The term "injury" contained in § 8-42-107(l)(a), C.R.S. "refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390, 1391 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo.App.1996). Depending upon the facts of a particular claim, therefore, damage to the lower extremity may or may not reflect functional impairment enumerated on the schedule of benefits. *See Strauch, supra; see also Abeyta v. Wackenhut Services*, W.C. No. 4-519-399 (ICAO Sep. 16, 2004).

The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, Jun 20, 2005); *Vargas v. Excel Corp.,* W.C. No. 4-551-161 (ICAO Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the leg at the hip and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood, supra; In re Claim of Barnes*, W.C. No. 5-063-493 (ICAO Apr. 24, 2020).

Claimant has established by a preponderance of the evidence that his right lower leg injury should be converted to a non-scheduled, whole person impairment. Although Claimant's injury is to his right hamstring, this injury has resulted in decreased function of his right hip, as reflected in the impairment ratings assigned by Dr. Mason and Dr. Lindenbaum. Thus, the situs of Claimant's functional impairment is his right hip, which is not a scheduled impairment rating. Claimant's 5% lower extremity impairment rating is converted to a 2% non-scheduled, whole person impairment.

Overcoming DIME On Impairment Rating

Because Claimant's impairment rating is converted to a non-scheduled impairment, Claimant must establish by clear and convincing evidence that the DIME physician erred in assigning Claimant a 2% whole person impairment. Similarly, Claimant must establish by clear and convincing evidence that the DIME physician erred in failing to assign Claimant an impairment rating for his lower back.

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician's opinions concerning whole person impairment carries presumptive weight and may be overcome by clear and convincing evidence. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME's whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

Normalization

With respect to Claimant's assigned impairment rating (i.e., right lower extremity converted to a whole person impairment), Claimant asserts that the DIME physician improperly applied normalization to reduce his impairment rating. The Division of Workers' Compensation's Desk Aid #11 which provides non-binding guidance for practitioners explains normalization as follows: "In some cases, the contralateral joint is a better representation of the patient's pre-injury state than the AMA Guides population norms. The 3rd Revised Edition has little commentary on this procedure, however the 5th Edition and the Division consider it reasonable to compare both extremities when there are specific conditions which would make the opposite, non-injured extremity serve as a better individual baseline. … Therefore, when deemed appropriate, the physician may subtract the contralateral joint ROM impairment from the injured joint's ROM impairment. … However, this subtraction should not be done if the contralateral joint as a known previous injury because that joint may not reflect the 'normal' ROM for that individual." (Ex. 7). The determination of whether normalization is necessary is left to the DIME physician, who may utilize normalization when deemed appropriate. *Fisher v. Indus. Claim Appeals Off.*, 484 P.3d 816 (Colo. App. 2021).

Claimant has not proven by clear and convincing evidence that Dr. Lindenbaum erred in applying of normalization was error. Dr. Lindenbaum explained that his decision to apply normalization was based on the Claimant's "less than normal" range of motion of his uninjured left hip, supported by objective measurements. Claimant has presented no credible disputing the accuracy of these measurements or demonstrating that normalization applied improperly.

Claimant argues that normalization is improper because it is not required under the AMA Guides, is discriminatory, and unfairly reduced his permanent partial disability benefits Claimant. While normalization is not mandated by the AMA Guides 3rd Edition, the Colorado Court of Appeals has upheld its discretionary use by rating physicians. See *Fisher,* 484 P.3d 816 (Colo. App. 2021). Claimant's assertion that the Desk Aid's extremity ratings section excludes the hip from normalization is unpersuasive, as the Desk Aid does not limit normalization to specific joint.

Claimant's discrimination claim rests on the selection of Dr. Lindenbaum as the DIME physician, which he interprets as a "bad draw" due to the normalization of his impairment rating. Claimant's contention normalization favors the insurer, is a misinterpretation of Claimant's reliance on 8-43-201 (1) is misplaced. Section 8-43-201(1) sets forth principles applicable to the director and ALJs in deciding workers' compensation disputes, and pertains to the interpretation of facts or evidence in hearings. *Federal Express v. Indus. Claim Appeals Off.*, 51 P.3d 1107 (Colo. App. 2002). Nothing in this section requires a DIME physician to render opinions favoring claimants over insurers, as Claimant implies.

Notwithstanding, Claimant's argument is unsupported by evidence. Claimant has offered no evidence indicating that normalization improperly applied or based on anything other than objective range of motion measurements. Moreover, Claimant's testimony that both legs functioned equally before the injury further supports appropriateness of normalization. Claimant has failed to demonstrate that normalization is generally improper or misapplied in this case.

Claimant's Lower Back

Claimant next contends that Dr. Lindenbaum erred by not assigning a 5% impairment rating for his lower back, but has not proven by clear and convincing evidence that this omission was erroneous.

Claimant's argument that Table 53 of the AMA Guides requires a 5% impairment rating for six months of medically documented pain, is incorrect. Table 53 II B. assigns a 5% whole person rating where a claimant sustains an unoperated "intervertebral disc or other soft-tissue lesions" in the lumbar spine with a medically documented injury and "a minimum of six months of medically documented pain and rigidity with or without muscle spasm." (Emphasis added). The criteria of Table 53 cannot be met without a finding of rigidity. *See Medina-Weber, v. Denver Public Schools*, W.C. No. 4-694-444 (ICAO Aug. 27, 2008)

The evidence does not demonstrate that Claimant meets the Table 53 criteria for a lumbar spine impairment rating. Although Dr. Mason documented occasional lower back pain complaints but no findings of rigidity, increased lumbar muscle tone, lumbar stiffness, or decreased range of motion. Dr. Lindenbaum also did not document objective findings of lumbar rigidity. Because Claimant has not established these criteria, he has

failed to prove by clear and convincing evidence that the DIME physician erred in in not assigning a lumbar spine rating.

Disfigurement

Claimant has sustained a permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. § 8-42-108(1), C.R.S. Specifically, Claimant walks with a slightly altered gait as the result of his right leg injury. Respondents shall pay Claimant $750 additional compensation for his disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's right lower extremity permanent impairment rating is converted from a 5% scheduled impairment to a 2% whole person impairment rating.

2. Claimant's request to increase his impairment rating due to DIME physician's normalization of range of motion measurements is denied and dismissed.

3. Claimant's request for a lumbar spine permanent impairment rating is denied and dismissed.

4. Respondent shall pay Claimant $750 for disfigurement. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

DATED: December 5, 2024

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

ISSUES

1. Have Respondents demonstrated, by a preponderance of the evidence, that the that the February 7, 2024 General Admission of Liability (GAL) should be withdrawn?

2. If Respondents' GAL is not withdrawn, was the surgery performed by Dr. Evan Smith on December 11, 2023, and post-operative physical therapy, reasonable medical treatment necessary to cure and relieve Claimant from the effects of the August 1, 2023 work injury?

FINDINGS OF FACT

1. Claimant works for Employer as a window dispatcher. On Wednesday, August 2, 2023, Claimant sought medical treatment at American Family Care for pain in her left ankle. At that time, Claimant was seen by Dr. Michelle Eason-Delhougne. In the August 2, 2023 medical record, Dr. Eason-Delhougne recorded that Claimant injured her left ankle when "she was out late Monday[1] night and didn't realize the sidewalk she was walking on was uneven, she tripped and as she was trying to catch her balance and keep from falling, she stepped off a curb wrong and rolled her [left] ankle". Claimant also reported that the following morning she had pain and swelling in her left ankle and foot. Claimant did not state that this incident occurred at work.

2. Dr. Eason-Delhougne ordered x-rays of Claimant's left ankle. Those x-rays were performed on August 2, 2023 and showed old avulsion fractures on the medial and lateral side of the ankle joint, but no acute fracture or articular abnormalities. Dr. Eason-Delhougne diagnosed Claimant with a sprain injury. Claimant was provided a walking boot and instructed to alternate the use of heat and ice; use a pain patch; and take acetaminophen. In addition, Dr. Eason-Delhougne referred Claimant for an orthopedic consultation.

3. On August 29, 2023, Claimant was seen by a podiatrist, Dr. Evan Smith. Claimant described her mechanism of injury as "she was walking down the sidewalk, stepped off the side and rolled her ankle". Claimant did not indicate that she was injured at work. However, Claimant did tell Dr. Smith that she has a history of numerous sprains to both ankles. Claimant further reported that she believed that she fractured her left ankle "about 10 years ago" and prior to August 1, 2023, she had experienced a feeling of instability in both ankles.

[1] Monday of that week was July 31, 2023.

4. Dr. Smith ordered additional x-rays, which were performed on that same date. Dr. Smith noted that the x-rays showed evidence of a previous and chronic avulsion fracture of the distal fibula. The x-rays also showed an area of raised periosteum at the medial malleolus, with a small chronic ossicle. Dr. Smith recommended that once Claimant's acute injury resolved, she could undergo lateral ankle stabilization. Dr. Smith ordered magnetic resonance imaging (MRI} of Claimant's left ankle.

5. On September 11, 2023, Claimant underwent the recommended left ankle MRI. The MRI showed significant remote and recurrent lateral ankle spraining; a small, ununited transverse fracture of the plantar aspect of the distal fibular epiphysis; and probable ATFL[2] laxity. The MRI also showed "remote trauma" to the tibiocalcaneal and tibiotalar ligaments.

6. On September 15, 2023, Claimant returned to Dr. Smith. At that time, Claimant reported that she continued to experience pain with weight bearing, but that the pain was no longer "sharp", but now "more achy". Dr. Smith discussed the MRI results and noted "that from an acute perspective, [Claimant's] injury does not show any severe findings". Dr. Smith also noted that the MRI findings were consistent with severe chronic instability of the ankle. Dr. Smith again referenced possible surgical intervention for Claimant, including a possible ankle arthroscopy with lateral ankle stabilization. With regard to immediate treatment, Dr. Smith advised Claimant to transition out of the walking boot and into a Tri-Lock ankle brace. In addition, Dr. Smith recommended Claimant undergo physical therapy. Claimant declined formal physical therapy and opted to do range of motion exercises on her own.

7. On October 17, 2023, Claimant was again seen by Dr. Smith. At that time, Claimant reported that her pain symptoms had improved significantly, but she continued to experience feelings of instability. As a result, she wished to pursue surgery. Dr. Smith noted that Claimant had recovered from her acute sprain. Dr. Smith recommended Claimant undergo ankle arthroscopy with debridement and a Brostrom lateral ankle stabilization. The recommended surgery was scheduled for December 11,2023.

8. On November 20, 2023, Claimant submitted a time off request to Employer for the time period of December 11, 2023 through December 26, 2023. The reason Claimant stated for the request was that she was undergoing foot surgery. In that time off request, Claimant did not indicate that the surgery was related to a work injury.

9. On December 6, 2023, Claimant completed an Operator Incident Report and submitted it to Employer. In that report, Claimant described an August 1, 2023 incident. Specifically, Claimant stated that on that date she "was on the southside of the building on my break walking West down the sidewalk and couldn't see that the sidewalk had a break in it, step[ped] off the curb and my left ankle rolled back and forth."

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[2] Anterior tatofibular ligament.

Claimant further stated that she initially believed she was fine, but when she was home later that day her ankle was swollen, and she sought medical treatment on August 2, **2023.**

10. Following Claimant's submission of the incident report, on December 6, 2023, a First Report of Injury was prepared by [Redacted, hereinafter CE], Safety Manager.

11. Claimant testified that at the time of the August 2023 incident she informed CE[Redacted] and her manager, "[Redacted, hereinafter LZ]". Claimant further testified that she completed an incident report at that time, but later learned that CE[Redacted] had lost it. Claimant testified that this was why she completed the December 6, 2023 incident report.

12. [Redacted, hereinafter JG], Human Resources Manager, and SM[Redacted], General Manager, both testified at the hearing. SM[Redacted] testified that at some time in the Fall of 2023, she saw that Claimant was wearing a walking boot at work. SM[Redacted] asked Claimant why she had the boot. At that time, Claimant informed SM[Redacted] that she had "bad ankles". Claimant did not inform SM[Redacted] of any work related injury.

13. Both JG[Redacted] and SM[Redacted] testified that they were unaware of the alleged work related injury until December 6, 2023. JG[Redacted] testified that company policy requires the safety manager, CE[Redacted], to complete incident reports and call the nurse line at the time that any injury is reported.

14. On December 6, 2023, Claimant met with JG[Redacted] and SM[Redacted]. During that meeting. JG[Redacted] asked Claimant why she waited so long to report the injury. Claimant explained that she was reporting the injury late because her insurance was not going to pay for her surgery.

15. JG[Redacted] also testified that Claimant showed her the area of the sidewalk that caused Claimant's injury. In her testimony, JG[Redacted] described the sidewalk on the southside of the building. Specifically, this is a long flat sidewalk between two buildings that is bordered by a building and grass. There is no parking lot nearby and no curbs. The sidewalk area that Claimant showed to JG[Redacted] had a raised piece of cement approximately one-half inch high.

16. After the First Report of Injury was completed, Claimant received treatment at Concentra Medical Centers (Concentra). Claimant first treated at Concentra on December 7, 2023 and was seen by Dr. Jay Reinsma. Claimant reported to Dr. Reinsma that she injured her left ankle at work by stepping on the side of the sidewalk. Claimant also reported that she underwent x-rays that showed a "greenstick" fibular fracture. Claimant also reported that an MRI revealed a deltoid ligament tear and the same fracture. Claimant reported that she was scheduled for surgery on December 11, 2023. Dr. Reinsma instructed Claimant to continue care with her podiatrist, Dr. Smith.

17. On December 11, 2023, Dr. Smith performed surgery on Claimant's left ankle. The procedure included arthroscopy with extensive debridement and Brostrom Gould lateral ankle stabilization.

18. On February 7, 2024, Respondents filed a General Admission of Liability (GAL).

19. On July 9, 2024, Claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak. In connection with the IME, Dr. Lesnak reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In the IME report, Dr. Lesnak opined that a possible left ankle sprain sustained on July 31, 2023 appeared to be unrelated to any work activities. Dr. Lesnak also opined that the surgery performed by Dr. Smith on December 11, 2023, was not causally related to the July 31, 2023 acute injury. In support of this opinion, Dr. Lesnak noted that the purpose of the surgery was to treat chronic ankle instability, which was symptomatic prior to July 31, 2023.

20. Dr. Lesnak's testimony was consistent with his written report. Dr. Lesnak reiterated that Claimant did not sustain a work related injury. Dr. Lesnak also testified that the surgery performed by Dr. Smith on December 11, 2023 was intended to prevent further ankle sprains. Dr. Lesnak testified that the MRI findings document the chronic condition of Claimant's left ankle, but no evidence of any acute injuries to the structures of the ankle.

21. The respondents wish to withdraw the February 7, 2024 GAL. As a result, Respondents are essentially contesting the issue of the compensability of Claimant's work injury.

22. The ALJ does not find Claimant's testimony regarding the onset of her left ankle symptoms to be credible or persuasive. The ALJ finds Claimant's reports to medical providers immediately following her ankle sprain to be more credible than her hearing testimony. Therefore, the ALJ finds as fact that Claimant sprained her left ankle late at night on Monday, July 31, 2023. The ALJ also finds as fact that Claimant was not at work when this ankle sprain occurred.

23. The ALJ also credits the medical records, the opinions of Dr. Lesnak, and the testimony of JG[Redacted] and SM[Redacted]. The ALJ finds that Claimant did not begin to allege that her left ankle injury was work related until December 2023. The ALJ finds that Respondents have successfully demonstrated that it is more likely than not that Claimant did not injure her left ankle while at work on August 1, 2023. Therefore, the Respondents have successfully demonstrated that the February 7, 2024 GAL was based upon erroneous information, and shall be withdrawn.

24. As the ALJ has found that the respondent's GAL shall be withdrawn, the reasonableness and necessity of the surgery performed by Dr. Smith and related post-surgical physical therapy is moot.

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. 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 Section 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 Hospital,* W.C. No. 4-754-838-01 (ICAO, Oct. 1, 2013).

5. Withdrawal of an admission is granted prospectively, except in limited situations where the claimant is shown to have fraudulently supplied materially false information upon which the insurer relied in filing the admission. *Rocky Mountain Cardiology v. Indus. Claim Appeals Office,* 94 P.3d 1182 (Colo. App. 2004); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997).

6. As noted above, the Respondents' request to withdraw their admission of liability becomes an analysis of the compensability of the previously admitted August 1, 2023 injury. Therefore, the ALJ considers whether Claimant suffered an injury arising out of and in the course and scope of her employment with Employer.

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

8. As found, Respondents have successfully demonstrated, by a preponderance of the evidence, that Claimant did not suffer an injury arising out of and in the course and scope of her employment with Employer. Therefore, Respondents admitted liability based upon erroneous information. The ALJ concludes that it is appropriate for Respondents' to withdraw the February 7, 2024 GAL. As found, the medical records, the opinions of Dr. Lesnak, and the testimony of JG[Redacted] and SM[Redacted] are credible and persuasive.

ORDER

It is therefore ordered that Respondents' request to withdraw the February 7, 2024 General Admission of Liability is granted.

Dated December 6, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above

address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **It is recommended that you send a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

The issues to be determined are:

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury within the course and scope of his employment on August 6, 2022.

2. If compensable whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his November 3, 2022 termination from employment under sections 8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving temporary total disability (TTD) benefits.

3. Whether Respondents have established by a preponderance of the evidence that Claimant failed to provide notice of his alleged injury to Respondents until he filed his Workers Claim for Compensation on April 25, 2023, and is thus not entitled to temporary disability benefits from the date of his injury on August 6, 2022, through April 24, 2023, under § 8-43-102(1)(a).

4. Whether Respondents have established by a preponderance of the evidence that Claimant failed to provide notice of his alleged injury to Respondents until he filed his Workers Claim for Compensation on April 25, 2023, and is thus not entitled to medical benefits from the date of his injury on August 6, 2022, through April 24, 2023.

STIPULATIONS

5. At hearing, the parties stipulated to an Average Weekly Wage (AWW) of $979.33 with a corresponding TTD rate of $652.89.

6. Respondents stipulated that if Claimant established a compensable injury, he would be entitled to a general award of reasonable, necessary, and related medical benefits.

7. The parties agreed to hold the issue of Claimant's specific entitlement to temporary disability benefits in abeyance pending the resolution of the issue of compensability.

FINDINGS OF FACTS

1. Employer operates retail stores that sell appliances ranging in size from microwaves to refrigerators. (Hrg. Tr. 16:6-11). In November 2016, Claimant began working for Employer as a product specialist and his primary job duty was to sell appliances to customers. (Hrg. Tr. 15:20-17:9). As a part of his job duties, Claimant would check out customers at the register and schedule deliveries. (Hrg. Tr. 17:13-18:7). However, if the customer did not choose to have their appliance delivered, Claimant would assist the customer by performing a "loadout," which involved loading the appliance into their vehicle.

2. Claimant testified that on August 6, 2022, in the late morning or early afternoon, he sustained an injury to both of his shoulders when performing a loadout of a refrigerator. (Hrg. Tr. 20:3-22:4). Specifically, Claimant testified that he was using a dolly to load out a refrigerator onto the back of smaller pickup truck at the back dock when it dropped "a little" into the back of the truck. (Hrg. Tr. 23:14-25:2). Claimant explained that once the refrigerator "dropped into the back of the pickup truck, it recoiled from the shocks of the pickup truck, and that's when it forced [his] arms and shoulders back in an unnatural position." (Hrg. Tr. 25:3-6). Claimant explained that this mostly affected his right shoulder because he was holding onto the top of the refrigerator with his right arm and his left was acting as a hinge. (Hrg. Tr. 26:2-10). Claimant emphasized that he originally thought he only hurt his right shoulder but then later both started hurting. (Hrg. Tr. 29:12-17). The incident was unwitnessed.

3. Following his alleged injury, Claimant testified that he went to report this incident to a supervisor, focusing on the fact that a fellow co-worker did not assist him with the loadout. (Hrg. Tr. 27:20-28:1). Claimant explained that the store manager, [Redacted, hereinafter HN], and, the assistant manager, [Redacted, hereinafter JQ]" were at the store the day of his alleged injury. (Hrg. Tr. 29:21-24). Claimant testified that he initially told HN[Redacted], who was leaving on vacation, that "[he] was mad that [Redacted, hereinafter DN] wasn't there to help, . . . and two, that [he] was hurt." (Hrg. Tr. 30:5-16). Claimant then testified that HN[Redacted] advised him to report the incident to JQ[Redacted]". (Hrg. Tr. 30:17-20).

4. Claimant testified that he proceeded to tell JQ[Redacted] that he was again upset about his co-worker who was not there to help and that he hurt himself loading out a refrigerator. (Hrg. Tr. 31:2-12). Claimant did not offer any testimony that he reported any sort of shoulder injury or how the injury specifically occurred. Following this, Claimant completed his shift and returned to work on a regular basis.

5. Following this alleged injury, Claimant did not seek any medical attention for his shoulders. Of particular note, on August 10, 2022, just days after his alleged injury, Claimant attended an evaluation with his primary care physician, Karen Campbell, D.O. (Ex. F, at 105-109). However, there was no mention whatsoever of any shoulder pain or issues in this medical report and Dr. Campbell expressly noted under her physical examination that Claimant's musculoskeletal and extremity examination were normal. (*Id.* at 109).

6. Claimant called [Redacted, hereinafter JG] to testify in support of his claim that he sustained an injury. JG[Redacted] could not remember the dates of her employment with Employer and initially testified that she was no longer working for Employer at the time of Claimant's alleged injury. (Hrg. Tr. 86:3-87:14). Additionally, she testified that she was working August 2022 initially but later revised her answer to indicate that she did not return to work until November 2022 or possibly September 23, 2022. (Hrg. Tr. 98:17-99:20). Otherwise, JG[Redacted] offer testimony that did not support any particular first-hand observations or discussion of Claimant's specific shoulder issues following the alleged incident.

7. Claimant was eventually terminated from his employment with Employer on November 3, 2022. (Ex. N, at 260). Prior to his termination from his employment with employer on September 16, 2022, about a month after his injury, Claimant was placed on a 60-day performance improvement plan (PIP). (Ex. N, at 258-259). The ALJ found that Claimant's placement on this performance improvement plan and later termination were more likely than not unrelated to any performance issues his injury could have caused. Of note, Claimant offered no explanation in his testimony as to how his injury would have even caused his declining sales and ultimate termination.

8. Respondents called two witnesses, [Redacted, hereinafter JK], and [Redacted, hereinafter LH], who both testified credibly and reliably regarding the events

following Claimant's alleged injury and his failure to report any injury on August 6, 2022. First, Respondents called JK[Redacted], who testified for Respondents in his capacity as District Manager. JK[Redacted] had worked for Employer for 13 years and managed eight stores in the Southern District Colorado, which included Claimant's store in Colorado Springs. (Hrg. Tr. 105:2-12). JK[Redacted] primary responsibility was to supervise the performance and overall performance of the retail stores, which included supervising employees' performance and attendance. (Hrg. Tr. 105:13-23). If an injury occurred to an employee, JK[Redacted] would be made aware of the injury by the injured employee, the store's general manager, and human resources. (Hrg. Tr. 105:24-106:22). Additionally, JK[Redacted] would follow-up with the injured employee and the store's general manager to confirm that all relevant procedures and documentation were completed following an employee's injury. (Hrg. Tr. 106:23-107:7).

9. JK[Redacted] confirmed that Employer had a strict policy for work injuries, which required employees to go through the process regardless of the severity of the alleged injury. (Hrg. Tr. 130:5-131:10). He explained that injured employees are required to fill out forms, undergo a drug test, and encouraged to seek treatment at a designated facility. However, if the injured employee does not wish to seek medical treatment, they completed a written waiver.

10. JK[Redacted] knew Claimant for approximately three years and had met him on several occasions including coaching conversations, performance conversations, telephone conversations, and conversations via text message. (Hrg. Tr. 107:11-24). JK[Redacted] credibly testified that Claimant never reported any alleged injury on August 6, 2022 to him. (Hrg. Tr. 108:11-23). Indeed, JK[Redacted] credibly testified that Claimant never complained about any sort of work injury after August 6, 2022, or any sort of shoulder pain. (Hrg. Tr. 108:24-109:4).

11. It is particularly compelling that Claimant did not report any shoulder issues or that his performance was suffering as a result of a work injury when JK[Redacted] administered the PIP to Claimant on September 16, 2022. (Hrg. Tr. 109:10-111:3). Indeed, JK[Redacted] confirmed that Claimant's performance issues started seriously in April 2022, due to attendance problems, including showing up late and calling out of work. (Hrg. Tr. 109:24-110:5). JK[Redacted] observed that he had spoken with LH[Redacted] about

Claimant's ongoing performance issues up through the date the PIP was administered which included attitude, attendance, and overall sales volume. (Hrg. Tr:110:6-16). Notably, Claimant was only averaging about $45,000 in sales during this time, which was well below the minimum requirement of $60,000, and even further below the expectations for an experienced product specialist such as Claimant of $70,000 to $80,000 a month in sales. JK[Redacted] further testified that Claimant's performance issues preceded his alleged injury on August 6, 2022. (Hrg. Tr. 110:20-111:12).

12. To successfully complete his PIP, Claimant would have needed to meet the specific sales goals, expectations, and standards by November 15, 2024, which were based on the store's performance and employee's average sales, otherwise Employer advised him that they may terminate his employment (Ex. N, at 259; Hrg. Tr. 120:17-19).

13. Ultimately, Claimant failed to meet the requirements of his PIP and he was terminated on November 3, 2022. (Hrg. Tr. 111:13-17). While this was approximately two weeks before the expiration of his complete 60-days, JK[Redacted] explained that Claimant was not on track to meet the goals and the decision was made to terminate Claimant in accordance with a normal practice of Employer's policy. (Hrg. Tr. 111:18-112:22). JK[Redacted] also credibly testified that Claimant never asked for any sort of accommodation as a result of his injury and he confirmed that Claimant's injury had nothing to do with his termination from his employment with Employer. (Hrg. Tr. 112:23-113:17). Indeed, JK[Redacted] explained that he did not even have knowledge or indication of an alleged work injury at the time of Claimant's termination of on November 3, 2022. (Hrg. Tr. 113:18-23).

14. In any event, JK[Redacted] explained that Claimant's alleged inability to perform loadouts would not affect his ability to make a sale of an item that required a loadout, and Claimant would still get paid for making a sale of an item that required a loadout even if he did not complete the loadout. (Hrg. Tr. 124:16-125:10). Even more critically, JK[Redacted] explained that shoulder issues would not have an affect on an individual's ability to make a sale because to successfully complete a sale, an employee would really only need to type. (Hrg. Tr. 140:3-15).

15. Next, LH[Redacted] testified in his capacity as general manager of the location where Claimant worked who had been employed with Employer in this role for

approximately 11 years. (Hrg. Tr. 144:23-145:8). As a general manager, LH[Redacted] primary duties and responsibilities included overseeing standard operating duties at the location such as scheduling, overall sales, coaching, training, leading, and developing. (Hrg. Tr. 145:9-14). LH[Redacted] confirmed that when an injury occurs in the store, he is the individual to whom the employee reports the injury. (Hrg. Tr. 145:15-146:2). After an injury is reported, LH[Redacted] confirmed the procedure that JK[Redacted] testified to above. (Hrg. Tr. 146:7-20). LH[Redacted] also explained that he was directly involved in the completing of the written reports completed by the injured employee as there was a report specifically for management.

16. LH[Redacted] testified that he knew Claimant for approximately six years as he worked with him during that time and that they spent a significant amount of time together as Claimant was on the same scheduled as LH[Redacted] for the better part of his career. (Hrg. Tr. 146:21-147:8). Despite this close working relationship, LH[Redacted] confirmed that Claimant never reported an incident or work injury to him on August 6, 2022. (Hrg. Tr. 147:9-12). Indeed, he credibly denied the allegation that he would have left Claimant reporting an injury and he would have reported it immediately if Claimant reported the injury. (Hrg. Tr. 162:1-12). Additionally, LH[Redacted] confirmed that if an injured employee declines medical treatment, they must sign a form. (Hrg. Tr. 168:14-23). LH[Redacted] emphasized that even if there was an inclination of an injury it must be reported. (Hrg. Tr. 163:10-17). LH[Redacted] also confirmed that his assistant manager, JQ[Redacted], never reported anything to him even though he has previously submitted the work injury forms correctly and followed protocol on them. (Hrg. Tr. 148:4-23). LH[Redacted] even saved his text messages or calls from this time and there was no mention of any work injury sustained by Claimant during this time. (Hrg. Tr. 148:15-149:1; Ex. O, at 287-291).

17. LH[Redacted] testified credibly that Claimant never reported a work injury to him after August 6, 2022, and did not even mention any shoulder pain to him at all even though he had complained about other aches and pains in life at times. (Hrg. Tr. 150:2-17). Claimant did not miss work because of shoulder pain and again indicated that he maintained his text messages for this time with no mention of shoulder pain from Claimant. (Hrg. Tr. 150:18-151:1).

18. LH[Redacted] also confirmed that Claimant never requested to be excluded from doing loadouts and Claimant was never an employee who was restricted from this after his alleged work injury. (Hrg. Tr. 151:12-22). LH[Redacted] contradicted Claimant's allegation that a shoulder injury or inability to do load outs would have hurt his performance. (Hrg. Tr. 152:2-13). Instead, he explained that this would likely improve sales because he would not be taken off the floor to perform a loadout and he could make more sales while on the floor during that time. (Hrg. Tr. 152:2-13).

19. By contrast, LH[Redacted] maintained credibly that Claimant's performance issues that led to his PIP had nothing to do with his physical abilities to perform loadouts or make sales. (Hrg. Tr. 154:3-155:12). Instead, he explained that Claimant had been struggling with his sales performance, calling out, and not appearing at work on time. (Hrg. Tr. 154:12-155:12). LH[Redacted] explained that Claimant wanted to switch departments and was expressing unhappiness because he wanted to transfer to multifamily deals with apartments which would have allowed him to work from home, an office, or even visit sites in the field. (Hrg. Tr. 155:1-21).

20. LH[Redacted] explained that Claimant's performance had always been hit or miss and inconsistent but towards the end of his employment he just went lower and was not hitting the required sales numbers for a few months. (Hrg. Tr. 156:16-157:7). He explained that after missing his goals for a couple of months, the decision was made to put Claimant on the PIP. (Hrg. Tr. 157:3-7). Again, LH[Redacted] explained that his alleged injury had nothing to do with the decision to place Claimant on the PIP because he did not know anything about the alleged injury. (Hrg. Tr. 157:8-12). Even more, he explained that the timeline did not match because the decision to put an employee on a PIP takes several months and Claimant was injured only about a month before he was placed on a PIP. (Hrg. Tr. 157:21-158:9).

21. Ultimately, LH[Redacted] confirmed the testimony of JK[Redacted] that Claimant did not successfully improve his performance in compliance with the PIP and he was terminated from his employment. (Hrg. Tr. 158:23-159:4). Again, as with JK[Redacted], LH[Redacted] testified that Claimant did not report any shoulder issues when Claimant was on the PIP and he did not request any additional assistance or accommodations for a shoulder injury. (Hrg. Tr. 159:5-21). In fact, at the time of Claimant's

termination on November 3, 2024, LH[Redacted] had no knowledge of a shoulder injury. (Hrg. Tr. 160:12-16). Finally, he also confirmed, as did JK[Redacted], that the only way a shoulder injury would impact sales would be if it prevents the employee from typing and that an employee recent returned to work in a sling after shoulder surgery and had no issues with her sales. (Hrg. Tr. 179:6-17). Once again, the ALJ found that Claimant's failure to request assistance while on the PIP for his alleged work injury from LH[Redacted] greatly undermined Claimant's credibility. With LH[Redacted], this issue is particularly more glaring because Claimant and LH[Redacted] had a close working relations and LH[Redacted] even considered Claimant a long-time friend with open lines of communication about issues like this. (Hrg. Tr. 179:18-180:16).

22. Instead, the ALJ found the testimony of LH[Redacted] and JK[Redacted] more credible and reliable that Claimant did not report any injury occurring on or around August 6, 2022. The ALJ finds this lack of reporting until after he was terminated from his employment presented particularly strong evidence to undermine the reliability of Claimant's testimony that he sustained an injury on August 6, 2022.

23. Approximately a week after his termination, on November 9, 2022, the first written mention of any alleged injury at work appeared when he attended an evaluation with his primary care physician Karen Campbell, D.O., who noted that Claimant reported to her that he was experiencing pain in both of his shoulders after he was moving a refrigerator at work two months prior. (Ex. F, at 111). Later in her note, Dr. Campbell noted that Claimant's bilateral shoulder pain could be due a work injury but also opined that it could be related to Claimant's diabetes. (*Id.* at 112). Dr. Campbell ordered x-rays for both of Claimant's shoulders, which were taken on December 12, 2022, and revealed normal left and right shoulders. (Ex. J, at 218).

24. On January 11, 2023, Claimant returned to Dr. Campbell and reported ongoing issues with his shoulder pain and Dr. Campbell referred Claimant for an MRI. (*Id.* at 124-125). On January 23, 2023, Claimant underwent MRIs of both shoulders. (Ex. K, at 223-226). Claimant's right shoulder MRI revealed superior labral tear, some tendinosis across the long head of the biceps tendon, small joint effusion, tendinosis of the supraspinatus tendon, moderate acromioclavicular (AC) joint arthritis, and edema across the inferior glenohumeral ligament (IGHL). Claimant's left shoulder MRI revealed a small

interstitial tear of the biceps anchor as well as some tendinosis, a small amount of subdeltoid bursal fluid, mild AC joint arthritis. The left shoulder labrum was noted as intact.

25. After his MRIs, Claimant was referred to Kinetic Orthopedics and appeared at his initial evaluation on March 6, 2023, where he was evaluated by Leann Murphy, PA-C, who recommended Claimant complete physical therapy with possible later surgery. (Ex. L, at 228-230).

26. Claimant then proceeded through a course physical therapy before following up for an orthopedic consultation on May 9, 2023, where he reported increased range of motion following physical therapy with continued pain. (Ex. L, at 231-234). Claimant opted to pursue an intra-articular corticosteroid injection, which he underwent without complication on May 23, 2023. (Ex. L, at 235-239).

27. While Claimant was seeking treatment for his alleged work injury, on April 25, 2023, Claimant filed a Workers' Claim for Compensation with the Division of Workers' Compensation. (Ex. A, at 3-5). The ALJ found that this was the first written or actual notice Claimant provided to Employer regarding his alleged bilateral shoulder injury on August 6, 2022. After receiving this notice for the first time, Respondents promptly filed a Notice of Contest on May 5, 2023, denying the claim as the injury was not work related. (Ex. B, at 7).

28. On January 5, 2024, Claimant attended an Independent Medical Examination (IME) at Respondents request with Qing-Min Chen, M.D., who authored a report following the IME and later testified as an expert in general orthopedic surgery at a deposition on August 7, 2024 (Ex. M, at 242; Chen Depo. 4:16-5:25). At the evaluation, Claimant reported a consistent mechanism of injury however in his narrative to Dr. Chen, both of his arms were on top of the refrigerator as it lowered, which differed from his testimony at hearing in which his right was on top and the left was acting more as a hinge. (*Id.*). Claimant demonstrated to Dr. Chen that he was in an externally rotated and abduction position of both shoulders, and claimed that the refrigerator caused some hyper external rotation of both shoulders. (*Id.*). He had pain in both shoulders with his right worse than the left after the incident. (*Id.*). However, at his examination with Dr. Chen, Claimant claimed his pain in the right shoulder was a 3/10 at rest on the anterior side, with worse pain in his left shoulder at a 4/10. (*Id.*). Notably, Claimant denied a history of any shoulder problems. (*Id.*).

29. At his deposition, Dr. Chen highlighted this discrepancy in the mechanism of injury because Claimant reported that both of his shoulder were hyper abducted and hyper externally rotated causing bilateral shoulder pain and this altered mechanism of injury would not explain both or be consistent with Claimant's representations at this examination. (Chen Depo. Tr. 29:23-30:10).

30. After reviewing Claimant's medical records and performing an examination of Claimant, Dr. Chen opined in his written report that Claimant had a right sided SLAP tear and his left shoulder MRI was essentially negative. (Ex. M, at 246). He could not find any objective findings to support Claimant's pain in his left shoulder. (*Id.*). Dr. Chen found that Claimant had essentially symmetric range of motion in both shoulders and the remaining provocative testing was essentially normal. (Chen Depo. Tr. 8:18-3). This was noteworthy to him because he was expecting significant MRI findings but he did not find this. (Chen Depo. Tr. 9:4-10:10). Additionally, Claimant's unremarkable provocative testing in the form of the O'Brien's and Neer's test revealed that the MRI findings, in particular the asymmetric labral tear, were not likely causes of Claimant's pain. (Chen Depo. Tr. 10:11-12:18).

31. However, Dr. Chen opined that the right shoulder SLAP tear was not related to this alleged accident. (Ex. M, at 247). He noted that the mechanism of injury more likely than not did not result in enough force to cause such a tear.

32. Of particular note to Dr. Chen as well, he had issues with Claimant's narrative and credibility as Claimant indicated he had not had any prior shoulder issues or treatment, which directly contradicted the medical records. (Ex. M, at 249). Namely, after Claimant was in a severe car accident in 2019, he reported bilateral shoulder and neck pain. Specifically, on August 14, 2019, Claimant reported to Dr. Campbell for a follow-up and reported having neck pain, muscle spasm in the right shoulder for which Dr. Campbell referred Claimant to physical therapy. (Ex. F, at 58-62; Ex. M, at 244). Indeed, even on September 30, 2019, he was continuing to report a 4/10 pain for his neck and shoulder pain. (Ex. F, at 63; Ex. M, at 244).

33. Additionally, Dr. Chen observed that Claimant simply failed to report any such injury to a physician for over three months. (Ex. M, at 247) The first time the claimant ever mentioned bilateral shoulder pain was around November 9, 2022. Dr. Chen explained that

this was not consistent with an acute shoulder injury because if there was truly an acute traumatic SLAP tear in both shoulders, he would have expected Claimant to be in much more pain and seek treatment much sooner.

34. He further explained that the Claimant's right shoulder SLAP tear was not even the cause of his problems. (Ex. M, at 247). Of note, Dr. Chen observed that Claimant primarily had decreased range of motion and was diabetic, which both suggested he had an idiopathic condition known as adhesive capsulitis. (*Id.* at 247, 249). Dr. Chen believed that Claimant's mechanism of injury was not consistent with a SLAP tear and is likely a "red herring." Instead, he explained Claimant presented with symptoms related to adhesive capsulitis secondary to his diabetes, which occur from an idiopathic type of etiology, and Claimant did not sustain a true trauma for that to have caused that particular condition. Dr. Chen explained at his deposition that Claimant's symmetrical findings strongly suggested a diagnosis of adhesive capsulitis in this case because it was the only thing that explained Claimant loss of range motion loss in light of the MRI findings and provocative testing. (Chen Depo Tr. 12:19-20:20). Of note, Dr. Chen highlighted that the Colorado Medical Treatment Guidelines provide as follows: "Idiopathic adhesive capsulitis usually occurs spontaneously without any inciting injury. This is not normally a work-related condition." (Chen Depo. Tr. 14:1-8). Dr. Chen also clarified at hearing that adhesive capsulitis will not always be evident on MRI as you cannot always see the inflammation of the capsule and ligaments. (Chen Depo. Tr. 19:23-20:6).

35. Ultimately, Dr. Chen also found that there was no evidence to support the conclusion that this alleged work injury caused Claimant's adhesive capsulitis or his current condition. (Chen Depo. Tr. 16:18-17:10). Further, he explained that the remaining findings of the MRI were likely degenerative in nature or incidental. (Chen Depo. Tr. 21:4-22:23). Finally, he noted that there is a chance that if Claimant undergoes surgery for his shoulders, it may not help him and may possibly hurt him as surgery on adhesive capsulitis can trigger and cause further inflammation leading to further problems. (*Id.* at 249). He recommended that to treat for this condition, Claimant should just engage in physical therapy and a home exercise program.

36. Of particular note to Dr. Chen, despite Claimant alleging symmetric bilateral injuries that led initially to worse right pain, Claimant was now Claimant a worse left

shoulder pain and his MRI findings were not symmetric. (*Id.* at 249). He believed this was completely inconsistent with Claimant's alleged mechanism of injury. Dr. Chen explained that Claimant's symmetric complaints at the examination and worse left shoulder pain had no explanation in the MRIs and this strongly suggested to him that Claimant did not undergo a work injury on August 6, 2022.

CONCLUSIONS OF LAW

A. Generally

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

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The 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).

B. COMPENSABILITY

To receive workers' compensation benefits, an injured worker must establish, by a preponderance of the evidence, that he has sustained a compensable injury "proximately caused by an injury . . . arising out of and in the course of the employee's employment . . ." § 8-41-301(1)(c), C.R.S.; *see Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201(1), C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). In *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), the Panel offered clarification that 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. In short, "correlation is not causation." *Id.* At base, Claimant carries the burden to show that an event even occurred to cause as alleged work injury. *Mesich v. The Riverhouse Children's Center, Inc.*, W.C. No. 4-735-693 (Feb. 25, 2010) (affirming ALJ's finding that Claimant did not sustain a work injury after finding Claimant's testimony lacked credibility for failure to report and inconsistencies in mechanism of injury). Additionally, the fact that the claimant merely sought medical treatment and was given work restrictions from a medical provider does not automatically dictate the conclusion that an injury is work-related. *Fay v. East Penn Manufacturing Company, Inc.*, W.C. No. 5-108-430-001 (Jan. 17, 2020).

As found, Claimant has failed to meet his burden of proof to establish that injury caused in the course and scope of his employment. The ALJ found that Claimant's testimony that he suffered an acute injury to his bilateral shoulders on August 6, 2022, lacked credibility and was not consistent with medical evidence. In reaching this finding,

the ALJ found the testimony of Respondents' witnesses, JK[Redacted], LH[Redacted] and Dr. Chen more credible and persuasive than Claimant's. Initially, the ALJ found that Claimant failed to timely report his alleged injury to Employer as testified by JK[Redacted] and LH[Redacted], who both testified that Claimant never reported a work injury or even shoulder issues to them prior to his termination on November 3, 2024. The ALJ found this particularly noteworthy as Claimant was facing termination for performance issues after being placed on a 60-day PIP and yet he never requested accommodations or raised issues with his shoulders to his Employer even when threatened with termination. The ALJ found that this seriously undermined Claimant's credibility regarding his alleged mechanism of injury as he made no effort to document or report any injury until after his termination from employment. This suggests to the ALJ that Claimant did not sustain an injury within the course and scope of employment on August 6, 2022, especially because his motivation for doing so after losing his employment calls into question the reliability and credibility of his statements.

Even more, the ALJ found it particularly noteworthy that Claimant did not provide details about his alleged injury to his employer after it occurred. When discussing this in his testimony, Claimant only reported that he got hurt in someway with apparently no follow-up until April 25, 2023, when he filed his claim for workers' compensation. Not to mention, even the position of Claimant's arms in relation to how exactly he was lowering the refrigerator into the bed of the pickup truck were not clear or consistent as Claimant seemed to indicate both were on top of the refrigerator while in other statements suggesting that his right hand was on top while his left hand was on the side acting as a hinge with the dolly. These inconsistencies further undermined Claimant's credibility.

The ALJ further concludes that the medical evidence did not support a finding that Claimant sustained a work injury on August 6, 2022, as credibly and persuasively explained by Dr. Chen. Of note, the ALJ found that Claimant's medical records do not mention any sort of alleged work injury until November 9, 2023, after he was terminated from employment and three months after the alleged injury. The ALJ found Dr. Chen's opinion that the type of injury Claimant alleged he sustained would have likely required more immediate medical attention. Instead, the ALJ found Dr. Chen's opinions that Claimant's bilateral symmetrical complaints and range of motion findings when compared with his MRI

support a finding that Claimant's condition of adhesive capsulitis is purely idiopathic with no relationship to the alleged work injury. The ALJ concludes that the remaining findings on the MRI, due to their inconsistencies with Claimant's physical examination and subjective complaints, more likely than not represented incidental and degenerative findings as testified by Dr. Chen.

Dr. Chen's opinion is particularly persuasive as it was supported by the objective medical evidence as well as the medical treatment guidelines regarding adhesive capsulitis as a non-work-related condition. Additionally, Dr. Campbell also agreed that Claimant's diabetes may have been the cause of Claimant's injury. (Ex. F, at 112). The ALJ further concludes that Dr. Chen's opinion and testimony regarding the alleged mechanism of injury also credible and persuasive that dropping a refrigerator into the bed of a truck would more likely than not result in sufficient force to cause Claimant's alleged work injury as he testified.

ORDER

It is therefore ordered:

1. Claimant failed to establish by a preponderance of the evidence that he sustained a compensable injury within the course and scope of his employment on August 6, 2022. Claimant's workers' compensation claim is denied and dismissed with prejudice.

DATED: December 10, 2024

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she sustained a right shoulder injury on November 6, 2023.

2. Whether Claimant proved by a preponderance of the evidence that the April 3, 2024 surgery with Dr. Thon was reasonably necessary to cure and relieve her of the effects of her November 6, 2023 injury.

FINDINGS OF FACT

1. Claimant was a line-worker at a meat processing facility who injured her right shoulder while lifting chicken into a grinder on November 6, 2023. Claimant was forty-seven years old at the time of the injury.

Medical History

2. The day after her injury, Claimant reported her injury and sought treatment at Concentra where she was attended by Dr. Jay Reinsma. Claimant reported experiencing an increase in pain in her shoulder during her shift as she lifted heavy boxes. Claimant was given temporary work restrictions that included no use of the right upper extremity, and Claimant began physical therapy.

3. Claimant underwent a right shoulder MRI on December 15, 2023, which showed a full-thickness rotator cuff tear of the supraspinatus tendon with mild retraction and moderate atrophy.

4. On December 18, 2023, Dr. Reinsma reviewed the MRI and opined that the MRI showed what appeared to be an old tear and that, "This would take longer to occur than the injury reported date of 11/7/23. Also MOI would be most consistent with aggravation of a pre-existing injury [and] not an acute injury."

5. At Claimant's January 3, 2024 visit with Dr. Reinsma, she reported that she had been performing a great deal of scanning and writing at work and felt that it was aggravating her right upper extremity symptoms. Claimant was still on temporary work restrictions that restricted her from using her right upper extremity.

6. Claimant was referred to orthopedist Dr. Stephen Thon, whom she saw on January 11, 2024. Dr. Thon reviewed Claimant's medical history, noting Claimant's lack of

progress with physical therapy. Dr. Thon also independently reviewed Claimant's right shoulder MRI, which he noted to show a full-thickness rotator cuff tear with medial retraction and moderate chronic atrophy of the supraspinatus muscle, as well as bicipital and subacromial bursitis. Dr. Thon opined that "[i]n reviewing the patient's history and medical records and examination today, it appears that the patient did sustain an injury to the right shoulder arising from and caused by the industrial exposure of 11/06/2023." Dr. Thon recommended Claimant undergo surgical rotator cuff repair.

7. On January 29, 2024, Dr. Thon submitted a written request for prior authorization to Respondents for a right shoulder rotator cuff repair, biceps tenodesis, extensive debridement, and subacromial decompression. Respondents did not authorize the surgery. Nevertheless, Claimant proceeded with the surgery with Dr. Thon on April 3, 2024.

8. Following that surgery, Dr. Thon took Claimant completely off work. It was not until May 16, 2024, that Claimant's restrictions were relaxed to sedentary duty only by Dr. Nancy Strain. Claimant continued with physical therapy after surgery for the next several months.

Cebrian IME

9. Claimant underwent an independent medical examination (IME) with Dr. Carlos Cebrian on August 2, 2024, at Respondents' request. The IME was conducted with the assistance of an interpreter.

10. At the IME, Dr. Cebrian took Claimant's subjective history. Dr. Cebrian documented that Claimant reported that she had been injured on November 6, 2023, while repetitively lifting trays of chicken overhead into a grinder with a coworker, each holding one side of the tray, and that Claimant experienced a pop and pain in the top of her shoulder around 2:00 P.M. while lifting trays. The report also documented Claimant stating that she reported her injury to her supervisor and was sent to her regular job of cutting after her afternoon break.

11. Dr. Cebrian reviewed Claimant's medical records and performed a physical examination.

12. Ultimately, Dr. Cebrian concluded that Claimant's right shoulder complaints and need for treatment were "independent, incidental and unrelated to her work" for Respondent-Employer. Dr. Cebrian reasoned that the mechanism of injury, as described, was "extremely minor" and was not a mechanism that would cause a tear to the rotator cuff or aggravate a pre-existing condition. Specifically, he felt that Claimant's work activities did not involve sufficient force or repetition for a prolonged duration to support a causal relationship. Dr. Cebrian pointed to the Colorado Division of Labor Level II Accreditation Course and Curriculum and its guidance on assessing causation, which requires an explanation of the scientific

evidence supporting the cause-and-effect relationship between the diagnosis and the exposure or injury. Dr. Cebrian also relied on the Colorado Medical Treatment Guidelines for guidance on causation assessment for supraspinatus tendon tears, noting that Claimant's work conditions did not rise to the standards set forth in those Guidelines for causing a supraspinatus tendon tear.

13. Dr. Cebrian felt that the evidence supported natural degeneration rather than a work injury or workplace cumulative trauma. He relied in part on the presence of evidence of the degenerative nature of Claimant's shoulder condition, including Claimant's type-II acromion, Claimant's age, and the presence of chronic fatty atrophy consistent with a tear that is at least two-and-a-half years old. If anything, in Dr. Cebrian's opinion, Claimant's work merely elicited symptoms from a pre-existing degenerative condition but did not in fact aggravate the condition so as to require medical treatment.

14. Dr. Cebrian felt that the surgery recommended by Dr. Thon was reasonable and necessary, but he felt that it was not causally related to Claimant's November 6, 2023 injury.

Hearing Testimony

15. Claimant testified at hearing on her own behalf. Claimant testified that she had been working for Respondent-Employer for three years in the packing department. Claimant reported that her job as of the date of injury was chicken grinding. However, Claimant testified that she would use the chicken grinder twice a week, not every shift. As part of that job of grinding, Claimant testified that she would take chickens from a tray and put them into the machine for grinding. She explained that each tray would have about fifty pounds of chicken consisting of two packages that were twenty-five pounds each, that she would have to lift the chicken "quite high" due to her height and would have to perform that task several times during those shifts when she would be grinding chicken.

16. Claimant testified that on the date of injury, she arrived at work around 8:30 A.M., did thirty minutes of exercise, and then went to her post. Sometime around 1:30 or 2:00 P.M., Claimant felt her shoulder hurt while lifting the chickens. Claimant described the pain as though she felt like her shoulder was coming apart. Claimant took her lunch break, returned to cutting chicken, and finished her shift that day around 8:00 P.M. Claimant testified that she did not do any more grinding during that shift.

17. Claimant testified that after her shift on the date of injury, she went home and laid down in bed to sleep. When she woke up the next morning at 6:00 A.M., Claimant testified that she went to work early, around 8:00 A.M., with her husband, and contacted her supervisor to report her pain complaints.

18. In her testimony, Claimant denied that she had ever injured her right shoulder nor that she had any of those problems prior to the date of injury.

19. Regarding her treatment, Claimant testified that she began with therapy when she went to Concentra, but it did not alleviate her pain. Claimant underwent imaging of her shoulder, which she reviewed with Dr. Thon, and Dr. Thon recommended surgery. Claimant testified that she underwent the surgery, which made her shoulder feel better, and followed up with physical therapy, which she testified also helped.

20. Claimant testified that following the injury, Respondent-Employer offered her modified duty, which included checking expiration dates on boxes, but that she stopped working for Respondent-Employer on February 22, 2024. Claimant testified that her boss told her to go home and that they would call her when they had an appropriate position for her. Claimant denied working for any other employer since leaving Respondent-Employer and denied applying for unemployment benefits.

21. The Court finds Claimant's testimony credible.

22. Respondents called Claimant's coworker, [Redacted, hereinafter MA], to testify at hearing as well. MA[Redacted] testified that she had been working for Respondent-Employer for seven years and was working as a cutter. MA[Redacted] testified that the job included cutting chicken breast and thighs.

23. MA[Redacted] testified that she worked with Claimant in November 2023, and, that at the time of the injury, Claimant did not complain to her about hurting her shoulder, nor did she hear Claimant complain to the supervisor, despite MA[Redacted] and Claimant working together during the entire shift. MA[Redacted] testified that Claimant never appeared to have injured her shoulder.

24. Additionally, MA[Redacted] testified that she and Claimant did not lift trays of boxes, but rather that there was another person who worked with Claimant to lift the boxes.

25. The Court finds MA[Redacted] testimony less credible than that of Claimant.

26. Respondents also called another employee of Respondent-Employer to testify, [Redacted, hereinafter RO]. RO[Redacted] testified that she had worked for Respondent-Employer for a year and a half and worked as a chicken cutter.

27. RO[Redacted] testified that she did not have to lift entire trays of chicken to grind the chicken, but rather that she would put chicken into a bucket and then deposit it into the grinder. She testified that she is five feet three inches tall.

28. The Court finds RO[Redacted] testimony credible.

29. Respondents called Dr. Cebrian to testify by deposition after the hearing.

30. Dr. Cebrian testified that the mechanism of injury as Claimant described it to him at the IME was that Claimant attributed her injury to repetitive overhead lifting over a period of time, something which Claimant did only a few hours a week. Dr. Cebrian reiterated his analysis based on the Medical Treatment Guidelines that he had provided in his IME report.

31. Dr. Cebrian testified that the finding of fatty atrophy on Claimant's MRI demonstrated that the supraspinatus tendon tear was old. Specifically, he noted that the appearance of that fatty infiltration of the torn area typically first appears two and a half years after the tear.

32. Dr. Cebrian also testified that the presence of acromioclavicular joint osteoarthritis on the MRI demonstrated a degenerative process that could have resulted in the degeneration of the supraspinatus tendon due to pressure being placed on that tendon. Dr. Cebrian also cited Claimant's type-II acromion, which he testified would narrow the space for the tendon even further.

33. Dr. Cebrian also pointed out that Claimant had long-term prediabetic range for blood glucose, which would likely cause additional degeneration of her rotator cuff tendons, contributing to her pathology.

34. The Court finds Dr. Cebrian's testimony credible, though it does not find it persuasive.

Medical Treatment Guidelines

35. Section E.10.b of the Medical Treatment Guidelines for Shoulder Injury[1] provide a framework for analyzing the occupational relationship of a torn rotator cuff. It provides that such an injury may be caused either by sudden trauma to the shoulder or as a result of chronic use, referring the reader to Section C.2 of the same Medical Treatment Guidelines. Section C.2 clarifies that shoulder injuries can occur from a specific incident or injury, aggravation of a previously symptomatic condition, or a work-related exposure that "renders a previously asymptomatic condition symptomatic and subsequently requires treatment." The Guidelines note that cumulative work-related causation for shoulder disorders is difficult to quantify. Nevertheless, the Guidelines summarize several studies that demonstrated higher incidences of shoulder pathologies in workers who performed overhead work.

[1] Rule 17, WCRP, Exhibit 4.

Ultimate Findings

36. The Court finds that Claimant has proved that it is more likely than not that she did sustain a right shoulder injury on November 6, 2023, and that the surgery she underwent with Dr. Thon was reasonably necessary to cure and relieve her of the effects of her injury.

37. Claimant credibly testified that she had never injured her right shoulder nor had any right shoulder problems prior to the date of injury. Indeed, there is no credible evidence in the record that Claimant did in fact have any prior right shoulder symptoms prior to the date of injury.

38. Although Dr. Cebrian credibly testified that Claimant's fatty atrophy in the supraspinatus tendon showed evidence of an old tear, the presence of a prior tear does not preclude the possibility that Claimant's work activities on November 6, 2023, caused further tearing or otherwise aggravated the pre-existing condition. The Court finds that the mechanism of injury described by Claimant, combined with the onset of novel symptoms immediately following the work activity, supports the finding that Claimant's work caused an aggravation of her pre-existing supraspinatus tear. Specifically, the evidence weighs in favor of finding that the November 6, 2023 injury transformed what was an asymptomatic condition into a symptomatic one, thereby necessitating medical treatment, including the surgical intervention ultimately performed by Dr. Thon. Accordingly, the Court finds that it is more likely than not that Claimant's work activities on November 6, 2023, aggravated her pre-existing supraspinatus tendon tear and were the proximate cause of her need for medical care, including the surgery performed by Dr. Thon.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App.

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

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

Compensability

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

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

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

As found, the Court concludes that Claimant has proved that it is more likely than not that she did sustain a right shoulder injury on November 6, 2023, and that the surgery she underwent with Dr. Thon was reasonably necessary to cure and relieve her of the effects of her injury.

Right Shoulder Surgery

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

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. Indus. Claim Appeals Off.*, 942 P.2d 1337 (Colo.App.1997).

As found, the evidence weighs in favor of finding that the November 6, 2023 injury transformed what was an asymptomatic condition into a symptomatic one, thereby necessitating medical treatment, including the surgical intervention ultimately performed by Dr. Thon. Therefore, the Court concludes that Claimant established by a preponderance of the evidence that the surgery performed by Dr. Thon on April 3, 2024, was reasonably necessary to cure and relieve Claimant from the effects of her November 6, 2023, work injury.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable work injury on November 6, 2023, arising out of and in the course of her employment with Respondent-Employer.

2. The surgery Claimant underwent with Dr. Thon on April 3, 2024, was reasonably necessary to cure and relieve her of the effects of the November 6, 2023 injury.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 10, 2024.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-224-883-001

ISSUES

- Whether Respondents are liable for the Moto Leg and Versa Foot prosthetic device recommended by PA Herrera pursuant to Section 8-42-101(1)(b), C.R.S?

FINDINGS OF FACT

1. Claimant was employed with Employer as a welder. Claimant testified that prior to being employed with Employer she worked in construction, as a mason, in mining and performing welding. Claimant sustained an admitted injury on December 13, 2022 that resulted in Claimant having her right leg amputated below the knee. In addition to the lower leg injury, Claimant also sustained injuries to her left hand.

2. Claimant testified at hearing that after the accident, Claimant initially had her leg amputated below the knee and Claimant was provided with a prosthetic leg that attached below the knee. Claimant testified that this led to a serious infection in her leg which necessitated a wound debridement procedure on December 16, 2022. Claimant was eventually re-hospitalized and had a second amputation that was above her knee. This surgery occurred on December 29, 2023.

3. Following Claimant's second leg operation, Claimant was provided with a new prosthetic leg. Claimant testified that the current prosthetic leg is weight activated, meaning that if Claimant has her weight on her heel, the leg is supposed to stay stiff, and if the weight is on Claimant's toe, the prosthetic leg is intended to bend.

4. Claimant testified that she received her current prosthetic leg in April 2024 and has had to send the leg in for repairs once. Claimant testified this is the only prosthetic device she currently uses. Claimant testified that the current prosthetic device will buckle causing Claimant to fall.

5. Claimant testified that prior to her injury, she participated in racing dirt bikes (motorcycles) and was a body builder. Claimant testified that the with the current prosthetic leg she can not ride her dirt bike and while she does lift weights, can not perform deadlifts any other exercises due to fear of damaging her prosthetic leg.

6. Claimant testified that she would like to have a new prosthetic leg identified as a Moto Leg and Versa Foot that would allow Claimant to lift heavier weights and ride her dirt bikes. Claimant testified that with the new Moto Leg and Versa Foot, she would be able to go to physical therapy twice per week to strengthen her other leg instead of the twice per month she currently attends. Claimant testified that the Moto Leg and Versa Foot prosthetic could be used for biking, lifting, welding

and hiking, but she would keep her current prosthetic leg for walking as the current leg is better for walking. Claimant testified that the new prosthetic leg would allow Claimant to return to work quicker and be able to work at a higher capacity, as she would be able to lift more. The ALJ finds the testimony of Claimant to be credible and persuasive.

7. Brian Karsten, a certified prosthetist, provided Claimant with care involving her prosthetic leg. Mr. Karsten initially examined Claimant on January 26, 2023 and fitted Claimant with her original prosthetic device. Mr. Karsten continued to follow up with Claimant until November 2, 2023, but then followed up again after Claimant's second amputation surgery in December 2024.

8. Mr. Karsten noted on February 16, 2024 that Claimant wants to walk as far as she can every day. Mr. Karsten noted that Claimant owns her own home that she is renovating and ants/needs to perform all the household maintenance inside and outside, including mowing, raking, pulling weeds, etc. Mr. Karsten followed up with Claimant on March 18, 2024 and noted that Claimant was not readty to be scheduled for delivery of the prosthesis due to "authorization".

9. Claimant was examined by physicians' assistant ("PA") Herrera with Work Partners on April 22, 2024. PA Herrera noted Claimant was trying to incorporate gym training for her core and general conditioning. PA Herrera discussed with Claimant the need for additional prosthesis to help Claimant get to where she was pre-amputation. PA Herrera noted Claimant expressed her desire to return to weightlifting and to get back on her bike to enjoy time with her fiancé riding together. PA Herrera noted that Claimant would need a more recreational specific prostheses for these particular activities. Claimant received the initial prosthetic device through Mr. Karsten on April 23, 2024. Claimant continued to follow up with Mr. Karsten for fittings and socket replacement throughout the summer of 2024.

10. Claimant returned to PA Herrera on September 3, 2024. PA Herrera noted that Claimant was 5 days post-surgery on her left hand and continued with physical therapy for her hand injury. With regard to Claimant's right leg injury, PA Herrera noted Claimant was unable to go to the gym and do much of her home exercise program (with weights) to aid in her recovery with the current prosthetic as it is not designed for weights. PA Herrera noted Claimant was seeing the physical therapist twice per months and Claimant does as much as she can at home.

11. Claimant was examined at the request of Respondents by Dr. Scott for an independent medical evaluation ("IME") on June 25, 2024. Following the evaluation, Dr. Scott issued a report on July 7, 2024. Dr. Scott noted in his July 7, 2024 report that his IME was specifically related to the type of prosthetics prescribed as to their "medical necessity" for the treatment of claimant's injury or incidental to obtaining such treatment. Dr. Scott noted in his examination that Claimant was able to walk with the right leg prosthesis with her hips even, but with a somewhat clunky gait, due to the prosthesis weighing 10 pounds.

12. Dr. Scott opined in his report that the recommended Moto Leg and Versa Foot prosthesis was not necessary to treat her right leg through the knee amputation and was incidental to her required treatment. Dr. Scott opined that the prosthesis was recommended to support Claimant's recreational activities.

13. Dr. Scott testified at hearing in this matter consistent with his IME report. Dr. Scott opined in his testimony that Claimant does require a prosthetic device, but opined that the Moto Foot prosthesis was not medically necessary to treat the effects of the injury. Dr. Scott testified that Claimant's current prosthetic device allow Claimant to ambulate and sit and stand safely. Dr. Scoot testified that is was his opinion that the Moto Leg and Versa Foot prosthesis was only intended to aid in Claimant's recreational activities. However, Dr. Scott also testified that if Claimant were in a job that required heavy lifting, lifting heavy objects off the floor and deep bending, Claimant would need a prosthetic that could support that weight.

14. The ALJ credits Claimant's testimony with regard to her work history and her intentions of pursuing work in the same types of industries when she is capable of returning to work. The ALJ finds that Claimant has demonstrated good cause for the need for the Moto Leg and Versa Foot prosthesis in order to be capable of returning to work in the same type of work she had previously performed.

15. Additionally, the ALJ credits the medical records from PA Herrera along with Claimant's testimony at hearing and finds that the Moto Leg and Versa Foot prosthesis would allow Claimant to expand on her physical therapy and home exercise program and assist in her recovery from the December 13, 2022 work injury. The ALJ credits Claimant's testimony that her physical therapy and ability to lift weights are limited by the current prosthetic device based on the inability of the current prosthetic device to sustain significant weight. The ALJ credits Claimant's testimony with regard to her intentions to more thoroughly complete her physical therapy and home exercise program by being able to lift more and complete more exercises (including dead lifts) as being credible and persuasive.

16. The ALJ notes that the Moto Leg and Versa Foot prosthesis would also allow Claimant to return to other types of activities including riding dirt bikes and lifting heavier weights at the gym, but the ALJ finds that this is incidental to the basis for awarding the Moto Leg and Versa Foot prosthetic device under Section 8-42-101(1)(b). Specifically, the ALJ finds that there is also an industrial purpose for the Moto Leg and Versa Foot prosthesis in that it would allow Claimant the opportunity to return to work in the same field she was working in prior to the injury. With regard to this finding by the ALJ, the ALJ specifically credits the testimony of Claimant along with the testimony of Dr. Scott at hearing that if Claimant were to return to a job that required lifting heavy objects from the floor, Claimant would need a prosthetic device that would not buckle when performing those activities.

17. Because Claimant has established good cause for the need of the additional prosthetic device, the ALJ finds that Respondents are liable for the cost of

the additional prosthetic device pursuant to Section 8-42-101(1)(b) once Claimant has established good cause for the need for the prosthetic device.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016.

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

3. 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).

4. Section 8-42-101(1)(b), (2022)[1] states in pertinent part:

> In all cases where the injury results in the loss of a member or part of the employee's body, loss of teeth, loss of vision or hearing, or damage to an existing prosthetic device, the employer shall furnish within the limits of the medical benefits provided in paragraph (a) of this subsection (1) artificial members, glasses, hearing aids, braces, and other external prosthetic devices, including dentures, which are reasonably required to replace or improve the function of each member or part of the body or prosthetic device so affected or to improve the employee's vision or hearing. The employee may petition the division for a replacement of any artificial

[1] Section 8-42-101(1)(b) was amended by HB 23-1076, however these amendments to the statute became effective 90 days from the end of the 2023 legislative session. Therefore, based on Claimant's date of injury, the statute that was in effect at the time of Claimant's injury is the statute to applies to Claimant's injury.

> member, glasses, hearing aid, brace, or other external prosthetic device, including dentures, upon grounds that the employee has undergone an anatomical change since the previous device was furnished or for other good cause shown, that the anatomical change or good cause is directly related to and caused by the injury, and that the replacement is necessary to improve the function of each member or part of the body so affected or to relieve pain and discomfort. Implants or devices necessary to regulate the operation of, or to replace, with implantable devices, internal organs or structures of the body may be replaced when the authorized treating physician deems it necessary. Every employer subject to the terms and provisions of articles 40 to 47 of this title must insure against liability for the medical, surgical, and hospital expenses provided for in this article, unless permission is given by the director to such employer to operate under a medical plan, as set forth in subsection (2) of this section.

5. As found, Claimant has proven by a preponderance of the evidence that good cause exists for the Moto Leg and Versa Foot prosthetic device to be provided by Respondents. As found, the testimony of the Claimant and Dr. Scott along with the medical records entered into evidence establish that Claimant would benefit from the Moto leg and Versa foot and allow Claimant to return to work in the field in which she was previously employed and perform work with less restrictions. As found, good cause also exists for the Moto Leg and Versa Foot prosthetic device as it would allow Claimant to more thoroughly complete her physical therapy and home exercises.

ORDER

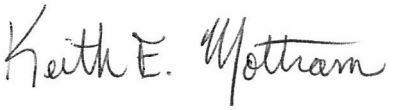
It is therefore ordered that:

1. Respondents shall pay for the cost of the Moto Leg prosthetic device recommended by PA Herrera and Mr. Karsten pursuant to Section 8-42-101(1)(b).

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, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 11, 2024



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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that the ketamine infusion therapy recommended by Dr. Matthew Stottle, is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted September 1, 2020 work injury?

FINDINGS OF FACT

1. On September 1, 2020, Claimant suffered an injury to her right ankle while working for Employer in Colorado. Respondents have admitted liability for Claimant's September 1, 2020 work injury.

2. Subsequently, Claimant moved from Colorado to Nebraska. Due to this move, Dr. Matthew Stottle became Claimant's authorized treating provider (ATP).

3. On October 24, 2022, Claimant was seen by neurologist Dr. Scott Goodman. At that time, Claimant Goodman diagnosed Claimant with complex regional pain syndrome (CRPS). Dr. Goodman recommended treatment with a pain management specialist.

4. Claimant was first seen in Dr. Stottle's practice on December 14, 2022. At that initial appointment, Claimant was seen by Kristina Mccutchen, PA. At that time, Claimant reported pain in her right ankle, right shin, and right knee. Claimant described her pain as stinging, pulling, and tingling. PA Mccutchen discussed various interventional treatments including sympathetic blocks, ketamine infusions, and neurostimulation. PA Mccutchen recommended starting with a lumbar sympathetic block. In addition, Claimant was to continue the following medications: gabapentin, Cymbalta, diclofenac, and lidocaine patches.

5. On January 6, 2023, Dr. Stottle administered the recommended lumbar sympathetic block. At that time, Claimant reported that her pain was nine out of ten. Dr. Stottle recorded swelling and discoloration in Claimant's right leg.

6. On January 11, 2023, Claimant returned to PA Mccutchen. At that time, Claimant reported two days of pain relief following the lumbar sympathetic block. However, after that time, Claimant's pain returned and at times was worse than her baseline pain. PA Mccutchen recommended a second right lumbar sympathetic block.

PA Mccutchen also recommended moving forward with a spinal cord stimulator[1]. In addition, PA Mccutchen began Claimant on percocet.

7. On February 1, 2023, Dr. Stottle administered the repeat lumbar sympathetic block. Dr. Stottle ordered physical therapy to begin following the block.

8. On February 15, 2023, Claimant was seen by PA Mccutchen and reported approximately four days of relief following the most recent sympathetic block. PA Mccutchen continued to recommend a spinal cord stimulator, which necessitated a psychological evaluation. Between February and May 2023, Claimant continued to see PA Mccutchen primarily for medication management.

9. On May 10, 2023, Claimant attended a Division sponsored independent medical examination (DIME) with Dr. Richard Gordon. In connection with the DIME, Dr. Gordon reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In the DIME report, Dr. Gordon agreed with the diagnosis of CRPS. Dr. Gordon opined that Claimant had not yet reached maximum medical improvement (MMI), as she had not yet received the recommended spinal cord stimulator.

10. On June 7, 2023, Claimant returned to PA Mccutchen. At that time, Claimant reported that she was scheduled for a spinal cord stimulator trial. On June 22, 2023, Dr. Stottle placed percutaneous leads for the spinal cord stimulator trial. Specifically, the trial was at the right L4 and LS levels.

11. On June 28, 2023, Claimant reported to PA Mccutchen that she had approximately 60 percent relief during the spinal cord stimulator trial. Claimant also reported that during the trial she was more active and slept better. Permanent placement of a spinal cord stimulator was to be scheduled as soon as possible.

12. On August 8, 2023, Claimant was seen by PA Mccutchen. At that time, Claimant reported pain of 10 out of 10 in her right foot and ankle. Claimant also reported pain in the area around the the leads for the spinal cord stimulator. Claimant further stated that she felt as if her CRPS "was spreading". Claimant asked to discuss ketamine infusions. On that date, Dr. Stottle recommended Claimant undergo left sacroiliac (SI) joint injections, permanent implantation of a spinal cord stimulator, and ketamine infusion.

[1] At times, both PA Mccutchen and Dr. Stottle refer to a spinal cord stimulator as "DRG". The ALJ infers that this is an abbreviation for dorsal root ganglion stimulation treatment. For clarity, the ALJ uses the term spinal cord stimulator throughout this order.

13. September 13, 2023, Claimant returned to Dr. Stottle. At that time, Claimant reported that the requested ketamine injections had been denied by Insurer.

14. On November 28, 2023, Claimant reported to PA Mccutchen that she had improvement in her SI joint pain. Claimant further reported that she was experiencing new pain on the "outer part of her skin."

15. On December 8, 2023, Claimant underwent placement of a permanent spinal cord stimulator.

16. On December 20, 2023, Claimant was seen by PA Mccutchen. At that time, Claimant reported experiencing an "increased nerve flare".

17. On February 14, 2024, Claimant was seen by Dr. Stottle. At that time, Claimant reported burning pain at the surgical site and that her worst pain was in her right lower back. Claimant also reported that since the permanent spinal cord stimulator implantation, she was able to be more active, resulting in weight loss.

18. On March 13, 2024, Claimant returned to Dr. Stottle and reported pain at the location of the "IPG"[2] . On that same date, Claimant raised the possibility of undergoing ketamine therapy.

19. On April 10, 2024, Claimant was seen by PA Mccutchen and reported weakness in her right leg, which resulted in her "bumping" her left leg while walking. PA Mccutchen recommended reprogramming the spinal cord stimulator to address this issue.

20. On June 4, 2024, Dr. Cyrus Kao reviewed the request for ketamine infusion therapy. In a report of that same date, Dr. Kao opined that the requested ketamine treatment should be denied. In support of this opinion, Dr. Kao noted that ketamine treatment does not comply with the Colorado Medical Treatment Guidelines (MTG). Specifically, Dr. Kao referenced the following from Rule 17, Exhibit 7 of the MTG:

> As of the time of this guideline writing, formulations of ketamine hydrochloride have been FDA approved for injection as the sole anesthetic agent for diagnostic and surgical procedures that do not require skeletal muscle relation. There is some evidence that in CRPS I patients, low dose daily infusions of ketamine can provide pain relief compared to placebo. The relief, however, faded within a few **weeks.** Studies have not shown any functional improvements in patients with CRPS treated with ketamine infusions. Because their potential harm, as described below, outweighs evidence of limited short-term benefit in patients with CRPS, NMDA receptor antagonists are not recommended.

[2] The ALJ infers that this stands for "implantable pulse generator", which is the battery pack for the spinal cord stimulator.

21. Based upon Dr. Kao's opinions, Respondents denied authorization for the requested ketamine infusion therapy.

22. On June 26, 2024, Claimant again returned to PA Mccutchen. Claimant reported that the recent spinal cord stimulator reprogramming helped for a period of time, but then she began to experience various issues with the device. Claimant also reported increased pain in her right foot. PA Mccutchen recommended further reprogramming of the spinal cord stimulator.

23. On August 2, 2024, Claimant was seen by PA Mccutchen and reported pain of 8 out of 10. The area of the pain was in the location of the spinal cord stimulator battery pack (or IPG). PA Mccutchen opined that the pain was due to the battery pack sitting on Claimant's piriformis muscle, resulting in piriformis syndrome. PA Mccutchen recommended moving the battery pack to resolve this issue.

24. Claimant testified that since her work injury her medical treatment has included various pain medications, physical therapy, water therapy, cortisone injections, lower lumbar epidural injections, and eventually placement of a spinal cord stimulator. Claimant also testified that her current symptoms include extreme pain and constant burning in her right ankle, right calf, the back of her right thigh, her right buttock, and her lower lumbar spine. In addition, Claimant experiences changes in skin color and skin temperature in her right lower extremity. Claimant further testified that her skin is extremely sensitive. Claimant testified that the repositioning of the battery pack was scheduled for October 24, 2024.

25. Dr. Stottle testified via deposition. Dr. Stottle testified that he has pioneered ketamine infusion therapy for CRPS in the state of Nebraska. Dr. Stottle explalned that the treatment involves a ten day trial. If after the trial the ketamlne is found to be beneficial, Claimant would then undergo "booster" treatments. The frequency of these boosters would vary based upon Claimant's individual symptoms. Dr. Stottle further testified that in his experience boosters are necessary every 12 weeks, on average. Dr. Stottle testified that he would prefer that Claimant undergo quarterly ketamine infusions, rather than continued daily opiate use.

26. With regard to the repositioning of the battery pack for the spinal cord stimulator, Dr. Stottle testified that the procedure did not have any bearing on his recommendation for ketamine treatment. Dr. Stottle testified that he disagrees with Dr. Kao's report regarding the effectiveness of ketamine treatment for CRPS. Dr. Stottle also testified that he is not familiar with the Colorado MTG.

27. The ALJ credits the medical records and the opinions of Dr. Kao over the contrary opinions of Dr. Stottle. The ALJ also credits the MTG and finds that the recommended ketamine infusions are not recommended by the MTG. The ALJ specifically credits Rule 17, Exhibit 7 of the MTG that notes that the potential harm of ketamine treatment outweighs the limited short-term benefit in treating CRPS. Based upon the foregoing, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the ketamine infusion therapy recommended by Dr. Stottle, is

reasonable medical treatment necessary to cure and relieve Claimant from the effects of the September 1, 2020 work injury.

CONCLUSIONS OF LAW

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

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

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

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

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

However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

6. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. 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}; *Burchard v. Preferred Machining,* W.C. No. 4-652-824 (July 23, 2008) (declining to require application of the MTG for carpal tunnel syndrome in determining issue of PTO); *Stamey v. C2 Utility Contractors et al,* W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the MTG were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

7. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that the ketamine infusion therapy recommended by Dr. Stottle, is reasonable medical treatment necessary to cure and relieve her from the effects of the September 1, 2020 work injury. As found, the medical records, the MTG, and the opinions of Dr. Kao are credible and persuasive.

ORDER

It is therefore ordered that Claimant's request for ketamine infusion therapy is denied and dismissed.

Dated December 12, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address:

oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **It is recommended that you send a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-240-716-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the lumbar microdiscectomy is reasonable and necessary.

FINDINGS OF FACT

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

1. This case involves an admitted claim.
2. Claimant is a 37-year-old female, who works for Respondent as a non-certified Deputy Sherriff in the [Redacted, hereinafter AD].
3. On March 13, 2023, her job duties included maintaining the safety of the facility, responding to critical incidents within the facility, and escorting inmates throughout the facility.
4. On March 13, 2023, Claimant was responding to an incident and running at full speed when she slipped, and twisted her back, and then slipped one more time, but did not fall to the ground due to either incident. After she slipped, she felt pain in the lower left side of her back, but she continued working.
5. On March 14, 2023, Claimant went to the emergency department of Aurora Medical Center.
6. On March 15, 2023, Claimant began treating with Barry Nelson, DO. At this appointment, Claimant said that while running, a mat underneath her feet slipped, causing her to twist her back and almost fall.
7. On April 17, 2023, Rick D. Zimmerman, DO began treating Claimant. Dr. Zimmerman diagnosed Claimant with a lumbosacral strain, left SI joint dysfunction, sciatica, lumbar spondylosis with disc degeneration primarily at L5-S1.
8. On April 25, 2023, Claimant went to the emergency room for worsening back pain. Later that day, she told Dr. Nelson she fell the prior night, causing worse pain on her right side.
9. On May 3, 2023, Dr. Zimmerman performed a left sacroiliac joint steroid injection and left piriformis steroid injection using fluoroscopic guidance on Claimant. Claimant had a partially diagnostic response to the injections.
10. On May 16, 2023, Claimant underwent another MRI. This MRI revealed a 4 mm paracentral disc protrusion at L5-S1, which contacted the left S1 nerve root and it also revealed bilateral facet arthropathy.
11. On May 22, 2023, Dr. Zimmerman noted that based on the new MRI, Claimant's edema in her L4-5 facets was improving, but there was progression of the L5-S1 disc

protrusion with contact of the left S1 nerve root and crowding of the L5 neural foramen. He recommended an L5 plus S1 transforaminal epidural steroid injection for therapeutic and diagnostic purposes.

12. On July 12, 2023, Dr. Zimmerman performed a L5 and S1 transforaminal epidural steroid injection for therapeutic and diagnostic purposes. Claimant had a nondiagnostic response.

13. On August 23, 2023, Dr. Zimmerman administered an L4-5 and L5-S1 medial branch block and left S1 lateral branch block for diagnostic purposes, to determine whether Claimant might benefit from radiofrequency neurotomy treatment. Dr. Zimmerman reported that Claimant had a diagnostic response. On September 6, 2023, Dr. Zimmerman repeated the procedure and noted Claimant had another diagnostic response.

14. On September 20, 2023, Claimant underwent radiofrequency neurotomy with Dr. Zimmerman, who noted a diagnostic response that day.

15. On October 5, 2023, Claimant reported to Dr. Zimmerman a new set of symptoms that developed while walking. The new symptoms included muscle spasms in her left lower extremity, calf pain, pressure in her lumbosacral spine, and paresthesia in both feet.

16. On October 10, 2023, Claimant underwent another MRI. That MRI revealed little to no change.

17. On October 19, 2023, Claimant returned to Dr. Zimmerman and was still symptomatic. Based on her ongoing pain and symptoms, she asked for a second opinion through Denver Spine.

18. On October 31, 2023, Claimant was evaluated by David Wong, MD, for a second opinion. Dr. Wong noted nine months of failed conservative treatment, and several degenerative changes at Claimant's lower two lumbar levels. Dr. Wong considered a micro decompression discectomy of L5-S1 surgery, pending an EMG indicating acute left S1 or L5 radicular changes. Otherwise, he recommended more comprehensive rehabilitation, including weight loss, which he believed to be a contributing factor.

19. John Aschberger, MD, performed the EMG study on December 7, 2023. He noted that lumbar disc issues were identified, despite the MRI not showing neural impingement per the MRI report. Dr. Aschberger also noted that the testing was positive, with significant findings in the abductor hallucis and S1 paraspinal musculature with associated positive findings identified. He also stated that the findings implicate an acute/subacute S1/S2 radiculopathy.

20. Dr. Wong reviewed the EMG study on December 28, 2023, which did show acute/subacute radicular changes to S1 or S2. Ultimately, due to the medium size disc herniation at the L5-S1 level, combined with the EMG nerve conduction study that demonstrated left S1 and S2 radicular changes, he concluded that Claimant is a candidate for a microdecompression and discectomy at the L5-S1 level on the left. He did, however, note that it would not fully cure Claimant due to degenerative issues, but believed it could reduce her symptoms.

21. Dr. Chen performed a Rule 16 records review on January 22, 2024. Dr. Chen diagnosed Claimant with preexisting obesity, L4-S1 preexisting degenerative disc disease, preexisting L5-S2 epidural lipomatosis, and a work-related lumbar strain. Despite Claimant's ongoing symptomology that was caused by her work accident, Dr. Chen found Claimant had a simple soft tissue strain of her lumbar spine that resolved within three months of the incident, by June 13, 2023. Dr. Chen did not find evidence that any subsequent treatment, including injections, related to Claimant's injury, or targeted the areas involved in the accident.

22. Dr. Chen saw no evidence of acute disc disorder and believes Claimant's disc protrusion preceded the work injury. He noted MRIs were always negative for S1 nerve root compression or impingement, and that the positive EMG included an acute to subacute left-sided S1 radiculopathy, but no lesion to target surgically. He noted no evidence of neural impingement at L5-S1. Although he did not think the need for surgery was related to the work injury, he was uncertain as to whether the surgery was reasonable and necessary.

23. Dr. Chen's opinion raises concerns about its reliability and persuasiveness due to several factors. While he acknowledges a nerve conduction study showing acute to subacute left-sided S1 radiculopathy, he dismisses its significance based on the absence of corresponding MRI findings. This selective reliance on imaging over functional diagnostic results, without a cogent analysis as to why, diminishes the thoroughness and persuasiveness of his analysis.

24. Moreover, Dr. Chen uses qualifiers to downplay the severity and long term nature of Claimant's injury, stating that she "likely" only suffered a lumbar strain and asserting that such injuries "usually" resolve within 6 weeks to 3 months, without providing specific evidence to support this conclusion in her case. Additionally, he claims that he is "uncertain" whether surgery is reasonably necessary, underscoring the speculative nature of his assessment.

25. He also states that "there is no great evidence" the sacroiliac joint or facets were involved or that the accident made those areas pathologically or permanently worse. However, he fails to recognize that such injections might have been performed diagnostically to isolate the pain generator(s). This omission suggests a lack of consideration for the full clinical picture. Plus, his apparent requirement for "great evidence, is also another qualified answer.

26. Finally, his assertion that Claimant was medically stationary as of June 13, 2023, and that subsequent treatments were unrelated to the accident, lacks detailed justification. He provides no specific explanation of Claimant's symptoms around that date or a persuasive rationale for why treatments beyond that point were deemed unnecessary. These factors collectively render Dr. Chen's opinion less credible and persuasive, as it does not present a balanced or well-supported evaluation of Claimant's ongoing symptoms that arose after her accident.

27. On April 4, 2024, Dr. Barry Nelson, issued a short report and concluded that microdiscectomy surgery recommended by Dr. Wong is medically necessary for Claimant to recover from her March 13, 2023, work-related injury, which caused a lumbar strain, vertebral bruising, herniated disc, and radiculopathy. He stated that

despite extensive conservative treatments, including epidural injections and radiofrequency ablation, she continues to suffer from low back pain and left S1 nerve root radicular symptoms. He also disputed the contention that Claimant's condition is preexisting, emphasizing her lack of prior back complaints and her medical history. He concludes the surgery is essential and directly related to her workplace injury.

28. Dr. Nelson's opinion is persuasive, as it is supported by evidence that Claimant had no prior history of back pain or radicular symptoms before her March 2023 workplace injury, yet now suffers from ongoing low back pain and left S1 radicular symptoms, which have not abated despite undergoing extensive conservative treatment. While his report does not provide very much analysis, his conclusions align with the documented treatment history and diagnostic findings, which substantiate the failure of conservative treatment and the need for surgical intervention. This connection between the injury and her current condition underpins the persuasiveness of his opinion.

29. On May 4, 2024, Andrew Castro, MD, performed an IME, in which he interviewed and physically evaluated Claimant. Dr. Castro reviewed both the MRI reports and films. Dr. Castro updated his IME on July 12, 2024, and August 22, 2024, based on updated MRIs of Claimant's lumbar spine.

30. During the initial IME, Claimant reported she had two incidents on March 13, 2023, in which she slipped on a mat and then water, twisting her back, but never falling. In reviewing the March 13, 2023, MRI, Dr. Castro noted no severe central canal impingement, and that the small disc protrusion did not appear to contact or displace the traversing S1 nerve root. Dr. Castro agreed with Dr. Chen, that Claimant suffered a simple soft tissue strain that resolved on June 13, 2023. Dr. Castro did not believe that the requested surgery related to Claimant's soft tissue strain, nor did he believe it was reasonably necessary based on the MRI he reviewed. Further, Dr. Castro agreed with Dr. Chen that Claimant reached MMI three months after the initial injury, and did not need further treatment related to the work incident.

31. On July 12, 2024, Dr. Castro updated his IME based on receipt of a further view of the March 15, 2023, MRI, he had not previously seen. Still, Dr. Castro did not observe any nerve contact, displacement, or impingement. Dr. Castro noted that Claimant's pain symptoms appeared somewhat migratory, and she maintained full strength and neurologic function initially. Finally, Dr. Castro noted that while the EMG on December 7, 2023, highlighted some S1/S2 changes, the nerve conduction studies were within normal limits. Dr. Castro found that Claimant's only diagnostic response resulted in failed treatment of the medial branch blocks and rhizotomy. Further, Dr. Castro opined that the discectomy surgery sought by Claimant likely will result in advanced degenerative changes at L5-S1. Based on Claimant's presentation of symptoms, Dr. Castro thought the surgery unlikely to provide relief, and thus, found it unreasonable.

32. Claimant underwent a repeat lumbar MRI on July 16, 2024. The only changes noted were an apparent subtle partial interim resolution in the postcentral annulus fibrosis bulging at the L4-5 level. The MRI also showed that the L5-S1 parasagittal disc protrusion remained stable, and still failed to contact the S1 nerve root.

33. In reviewing the new reports and films, Dr. Castro found the MRI indicated that the L5-S1 small disc bulge did not contact or displace the S1 root. Ultimately, Dr. Castro believed the new MRI supported the opinions he previously relayed, and strengthened his opinion that the discectomy, rather than decreasing Claimant's symptoms, would cause further disc degeneration of the L5-S1. Further, Dr. Castro opined that the scar tissue from surgery could cause impingement of the nerve root.

34. At hearing, Dr. Castro testified as an expert in orthopedic surgery. He reaffirmed his IME opinion, that the surgery was not reasonable or necessary, and explained that he did not believe the surgery would help Claimant. In reaching this conclusion, he considered objective data, medical records, MRI studies, and the physical examination.

35. Dr. Castro testified to other factors exacerbating the risk of surgery, including the risk of infection, medical comorbidities, the increased risk of disc herniation, high risk of increased degeneration causing chronic back pain, and scar tissue impinging upon the nerve root and actually causing impingement.

36. Further, Dr. Castro stated that the discectomy, recommended by Dr. Wong, is a leg pain procedure, not a back pain procedure. Thus, the procedure would not improve Claimant's back pain symptoms. Additionally, he testified that the MRIs did not reveal nerve impingement by the herniated disc, so there was no nerve compression, rendering the anticipated benefit questionable. Also, Claimant's physical examination did not show neurological deficits, such as diminished reflexes, strength changes, and had negative straight leg raise. Ultimately, based on the totality of the objective findings, Dr. Castro stated that the surgery is unlikely to benefit Claimant's symptoms.

37. He added that the only objective suggestion of possible impingement, the EMG, contained a positive result for S1 or S2, but without neurologic dysfunction or impingement. The positive result relates to a muscle in Claimant's foot, rather than the myriad of diverse locations of pain. Dr. Castro believed that the EMG failed to provide enough data to indicate a successful surgery. Even with more dispositive results, Dr. Castro did not believe an EMG, by itself, was enough to support surgery, or even that it would lessen Claimant's symptoms.

38. When considering the treatment Claimant underwent, Dr. Castro testified that the epidural steroid injection was most related to the nerve roots targeted by the suggested surgery. However, Claimant did not have a diagnostic response to those injections.

39. Dr. Castro also testified that Claimant had not met any of the core requirements of Rule 17, Exhibit 1 of the Colorado Medical treatment Guidelines (Guidelines). Specifically, she had not undergone a psychological screen, there was not sufficient documentation of severe radicular pain, she did not display the objective indications laid out by the guidelines, and there were no objective findings on imaging studies that correlated with the reported symptoms. Based on Claimant's failure to meet the requirements, Dr. Castro was concerned the surgery would result in a bad outcome for Claimant's symptoms. Thus, Dr. Castro concluded that the surgery was not reasonably necessary.

40. The ALJ finds that while Dr. Castro's testimony that Claimant did not meet the requirements of the Guidelines is credible, but its persuasiveness is diminished by other factors. For example, while his opinion appropriately highlights the lack of psychological screening and inadequate correlation between imaging findings and Claimant's condition, his heavy reliance on imaging studies over clinical and diagnostic findings undermines the persuasiveness of his conclusions and application of the Guidelines.

41. Dr. Castro's evaluation is further weakened by his failure to fully incorporate critical diagnostic and clinical factors. Specifically, he seems to dismiss the EMG findings indicating S1 radiculopathy, gives insufficient consideration to the temporary relief and diagnostic response Claimant experienced from some of the injections and ablation, and disregards patient-reported symptoms without adequate explanation.

42. Dr. Castro's emphasis on the absence of visible nerve impingement on the MRI, without integrating other substantial evidence, reflects a narrow and incomplete approach under the circumstances in this case. While his analysis of the MRI findings is detailed, it lacks the balance and thoroughness required to justify rejecting the proposed surgical intervention recommended by Dr. Wong-which does look at the entire picture of Claimant's symptoms, MRI findings, EMG results, and expected reduction in symptoms.

43. The ALJ finds that Dr. Wong's opinion that surgery is reasonable and necessary is persuasive, as it reflects a comprehensive consideration of multiple diagnostic and clinical factors. His evaluation integrates findings from imaging studies that show a disc herniation, Claimant's diagnostic response to certain injections and the ablation, Claimant's reported symptoms that are ongoing, and the EMG results. Moreover, his evaluation considers, and he advised Claimant of such, that the reasonable expectation would be a 50-75% reduction in symptoms. Like Dr. Castro, he also advised Claimant that the surgery could leave some scar tissue. But he inquired into the severity of Claimant's pain to assist in determining whether surgery was appropriate under the circumstances of this case and Claimant indicated that she felt her symptoms were sufficiently severe to consider the surgery-even with an expected 50-75% reduction in symptoms.

44. Dr. Wong's review of the MRI findings revealed a medium-sized central and left-sided disc herniation at L5-S1, contributing to mild stenosis, and identified degenerative changes at L4-5 and L5-S1, which were consistent with the Claimant's reported symptoms of left buttock and low back pain, as well as distal left lower extremity discomfort. Importantly, Dr. Wong contextualized the imaging findings alongside clinical observations.

45. Dr. Wong further emphasized the significance of the EMG findings, which demonstrated evidence of S1 radiculopathy, aligning with the Claimant's reported symptoms. Unlike Dr. Castro, Dr. Wong afforded proper weight to the EMG results, recognizing their diagnostic value in confirming nerve involvement even in the absence of overt nerve impingement on imaging studies.

46. Dr. Wong also accounted for the temporary relief provided by prior conservative treatments, such as epidural injection and ablation procedures. He noted that while

these interventions offered short-term improvement, they failed to yield sustained benefits, supporting the conclusion that surgery might provide a more effective and lasting solution.

47. The ALJ finds Dr. Wong's recommendation for surgery particularly persuasive due to its all-inclusive approach. He carefully integrated imaging findings, clinical observations, and diagnostic testing to form a balanced and thorough assessment and recommendation. His acknowledgment of the limitations of conservative management and the potential benefits of surgery under the circumstances underscores the reasonableness and necessity of the proposed intervention.

48. Accordingly, the ALJ finds that Dr. Wong's recommendation for surgical intervention is well supported by the evidence and therefore highly persuasive.

49. The surgery recommended by Dr. Wong is found to be reasonably necessary to treat Claimant from the effects of her work injury.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the

consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant proved by a preponderance of the evidence that the lumbar microdiscectomy is reasonable and necessary.

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

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the Guidelines is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008). See also: Section 8-43-201(3), C.R.S.

The ALJ finds and concludes that Dr. Wong's recommendation for surgery is supported by Claimant's subjective complaints of pain and radicular symptoms, the diagnostic response to specific injection and ablation procedures, and the EMG results. Although the MRI does not show the disc herniation compressing a nerve, the ALJ does not consider this finding to be outcome determinative in light of the other clinical and diagnostic evidence.

The ALJ has also considered the testimony of Dr. Castro. While Dr. Castro is a credible witness, the ALJ finds his opinions not as persuasive as Dr. Wong's ultimate conclusion that surgery is reasonable under the circumstances because Dr. Castro overly relies on the MRI findings and gives insufficient weight to other clinical and diagnostic indicators.

The ALJ has also considered the Guidelines in determining whether surgery is reasonably necessary to treat Claimant from the effects of her work injury. The Guidelines acknowledge that some research indicates MRIs can significantly underestimate nerve involvement, which may be more accurately identified through a combination of physical examination and simplified pain drawings. And although certain elements of the

Guidelines that assess the reasonableness and necessity of surgery have not been met, the ALJ finds and concludes that the Guidelines are not dispositive in this case.

Ultimately, the ALJ finds and concludes that Claimant has established, by a preponderance of the evidence, that the surgery recommended by Dr. Wong is reasonable and necessary to treat Claimant from the effects of her work injury.

ORDER

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

1. Respondent shall pay for the microdecompression discectomy recommended by Dr. Wong.
2. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: December 12, 2024

/s/ Glen Goldman

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

ISSUES

Have Respondents demonstrated, by a preponderance of the evidence, that the claim should be reopened and Claimant's permanent total disability (PTD} benefits terminated due to a change in condition pursuant to Section 8-43-303(3)(a}, C.R.S.?

FINDINGS OF FACT

1. On July 9, 1998, Claimant suffered a work-related injury. On August 2, 1999, Dr. Lawrence Lesnak placed Claimant at maximum medical improvement (MMI) and assessed whole person permanent impairment of 12 percent. At that time, Claimant reported to Dr. Lesnak that he was no longer able to perform his job duties with Employer.

2. On September 15, 1999, Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Lesnak's report. Claimant timely objected and requested a Division sponsored independent medical examination (DIME).

3. On May 4, 2000, Respondents filed a General Admission of Liability admitting stating that the date of MMI was undetermined.

4. Subsequently, Claimant was found to be at MMI as of November 18, 2004, with a permanent impairment rating of 66 percent, whole person. In a November 18, 2004 report, Claimant's authorized treating physician (ATP) Dr. Christopher Ryan addressed Claimant's ability to work. Specifically, Dr. Ryan stated that he had "serious reservations about [Claimant's] employability." At that time, Dr. Ryan explained that Claimant was unable to maintain positions, would need to lie down periodically, and could not maintain concentration to focus on mental tasks.

5. On October 5, 2005, Respondents filed an amended FAL admitting to permanent total disability (PTO) benefits and maintenance care. Prior to the determination that Claimant was permanently and totally disabled, records demonstrate that Claimant used a cane to ambulate and did not operate a vehicle.

6. Although Respondents admitted to medical maintenance care, there is no evidence in the record that Claimant sought any medical care after being placed at MMI.

7. On December 2, 2021, Claimant pied guilty to the following criminal charges: second degree burglary; identity theft; and three counts of aggravated motor vehicle theft in the first degree. On January 19, 2022, Claimant was sentenced to 48 months in [Redacted, hereinafter IS], and a fine of $1,125.50.

8. On January 25, 2022, Respondents terminated Claimant's PTD benefits effective January 19, 2022, due to Claimant's criminal plea and related incarceration.

9. On April 7, 2022, Claimant entered the IS[Redacted] program. However, after serving only five days, Claimant escaped from the program on April 12, 2022. Thereafter, on July 27, 2022, Claimant's prior sentence involving IS[Redacted] was revoked, and Claimant was resentenced to the [Redacted, hereinafter DC] for 42 months.

10. The records related to the various crimes Claimant admitted to committing include specific information regarding Claimant's activities. On July 10, 2021, [Redacted, hereinafter JK] contacted the [Redacted, hereinafter PD] and reported that her vehicle was stolen. Surveillance video of the scene demonstrated that a person, who was later identified as Claimant, burglarized JK[Redacted] apartment, and subsequently stole her wallet and vehide. Thereafter, Claimant used JK[Redacted] credit card to check into a hotel in Cheyenne, Wyoming, as well as for several purchases at gas stations.

11. The police report also notes that on July 10, 2021, Claimant was observed on foot, carrying a black backpack, wearing a blue facemask, navy blue jacket, blue shirt, grey or blue pants, and possibly black shoes. This description does not indicate that Claimant was using a cane.

12. Prior to the July 10, 2021 incident involving JK[Redacted], between 2019 and 2020 Claimant was charged with several crimes involving driving as well as false reporting, disorderly conduct, assault and false imprisonment. Additionally, on March 5, 2020, Claimant was charged with driving with a revoked license, careless driving, driving with a fictitious plate and speeding. No further information was available for the first 3 charges but on July 21, 2021, he was found guilty on the last charge and assessed a fine.

13. The ALJ summarizes this matter as follows. Claimant sustained a work-related injury and was found permanently and totally disabled. Claimant's PTO benefits were terminated due to Claimant's incarceration. Respondents now argue that based upon the various crimes committed by Claimant, and the physical activity necessary to engage in those crimes, Claimant's condition has improved and he is no longer permanently and totally disabled.

14. In support of this argument, Respondents note that at the time of the July 10, 2021 incident, Claimant was not using a cane to ambulate. In addition, in their position statement, Respondents listed the elements of the various crimes Claimant has committed. Specifically, the elements of the crime of burglary in the State of Colorado include the defendant knowingly breaking or entering and remaining unlawfully into a dwelling with Intent to commit theft. The elements of a crime of identity theft include knowingly using the personal identifying information, financial identifying information, or financial device of another with the intent to obtain cash, credit, property, service, or any other thing of value or to make a financial payment. Finally, the elements of the crime of aggravated vehicle theft in the first degree indude obtaining or exercising control over a

motor vehicle belonging to another person, causing damages of five hundred dollars or more, and causing bodily injury to another person.

15. The ALJ credits the documents admitted into evidence and is persuaded by Respondents' arguments. The ALJ notes that although there is no evidence that Claimant returned to gainful employment, the evidence is overwhelming that Claimant has participated in activities which indicate that Claimant's physical condition has improved. For example, Claimant was able to steal a vehicle (indicating an ability to drive); escape from IS[Redacted]; and commit various crimes. The ALJ finds that this also demonstrates that Claimant is capable of performing basic work tasks. Based upon the foregoing, the ALJ finds that Claimant is physically capable of finding a job in the local job market. Therefore, the ALJ finds that Respondents have demonstrated that it is more likely than not that Claimant's condition has improved such that he is no longer permanently and totally disabled.

CONCLUSIONS OF LAW

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

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

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

4. With regard to reopening a workers' compensation claim, Section 8-43-303(1), C.R.S. provides that any time within six years after the date of injury, a claim may be reopened on the basis of "fraud, an overpayment involving the

circumstances described in section 8-42-113.5, an error, a mistake, or a change in condition".

5. When a claimant has been awarded PTO benefits, Section 8-43-303(3)(a), C.R.S. provides that an award may be reopened at any time "if the claimant has returned to employment. If the claimant has returned to employment and has earned in excess of seven thousand five hundred dollars per year or has participated in activities that indicate that the claimant has the ability to return to employment and earn in excess of seven thousand five hundred dollars in a year, the claimant's permanent total disability award shall cease and the claimant is not entitled to further permanent total disability benefits as a result of the injury or occupational disease that led to the original permanent total disability award."

6. 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.

7. Section 8-43-303(4), C.R.S. provides that "[t]he party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened."

8. In order to prove permanent total disability, claimant must show by a preponderance of the evidence that he is incapable of earning any wages in the same or other employment. Section 8-40-201(16.5)(a), C.R.S. (2016). A claimant therefore cannot receive PTO benefits if he is capable of earning wages in any amount. *Weld County School Dist. RE-12 v. Bymer,* 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. *Lobb v. /CAO,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. /CAO,* 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. R.E. 12 v. Bymer,* 955 P.2d at 550, 556, 557 (Colo. 1998). The critical test is whether employment exists that is reasonably available to a claimant under their particular circumstances.

9. A claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages. Rather the claimant must demonstrate that the industrial injury is a "significant causative factor" in his permanent total disability. *Seifried v. Industrial Commission,* 736 P.2d 1262 (Colo. App. 1986). Under this standard, it is not sufficient that an industrial injury create some disability which ultimately contributes to permanent total disability. Rather, *Seifried* requires the claimant to prove a direct causal relationship between the precipitating event and the disability

for which the claimant seeks benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office,* 914 P.2d 496 (Colo. App. 1995), *rev'd on other grounds, Askew v. Industrial Claim* Appeals Office, 927 P.2d 1333 (Colo. 1996).

10. A respondent is not required to prove the existence of a job offer to refute a claim for permanent total disability benefits. *Black v. City of La Junta Housing Authority,* W.C. No. 4-210-925 (ICAO, December 1998) (claimant is not permanently totally disabled even though respondents' vocational expert was unable to identify a single job opening available to claimant); Beavers *v. Liberty Mutual Fire Ins.* Co., (Colo. App. No. 96 CA0275, September 5, 1996) (not selected for publication); *Gomez v. Mei Regis,* W.C. No. 4-199-007 (September 21, 1998). Rather, the claimant fails to prove
permanent total disability if the evidence establishes that it is more probable than not that the claimant is capable of earning wages. *Duran v. MG Concrete Inc.,* W.C. No. 4-222-069 (September 17, 1998).

11. As found, Respondents have demonstrated, by a preponderance of the evidence, that this claim shall be reopened because of a change in Claimant's condition; specifically an improvement in his condition. The ALJ further concludes that Respondents have successfully demonstrated, by a preponderance of the evidence, that Claimant is no longer permanently and totally disabled.

ORDER

It is therefore ordered that Respondents' request to reopen the claim and terminate Claimant's PTD benefits is granted.

Dated December 16, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to

Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **It is recommended that you send a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-226-769-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a lumbar spine injury during the course and scope of her employment with Employer on December 31, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the L4/L5 surgical fusion recommended by Troy D. Gust, M.D. constitutes a reasonable and necessary medical benefit causally related to her industrial injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Flight Attendant. On December 31, 2022 she slipped on a wet jet bridge at an airport in San Francisco, California. Claimant reported to Employer that she landed on her left side and sustained injuries to her left shoulder, left knee, neck and back.

2. On January 4, 2023 Claimant visited the Black Hills Orthopedics and Spine Center for an evaluation. She explained that she had slipped in water on a jet bridge and fallen on her back while working as a flight attendant for Employer. Claimant reported worsening symptoms in the left side of the neck, pain radiating down the left upper extremity, centralized mid back pain radiating down her left thoracic region, and centralized lower back pain. After conducting a physical examination, Physician's Assistant Jacob L. Hemenway assessed Claimant with cervicalgia, thoracic spine pain and left arm pain. He recommended a Medrol Dosepak for inflammation as well as MRIs of the cervical and thoracic spines.

3. On January 17, 2023 Respondents filed a General Admission of Liability (GAL). Respondents subsequently provided Claimant with medical benefits and paid Temporary Total Disability (TTD) benefits. Claimant received conservative treatment in the form of physical therapy, injections, and ablations. She also underwent diagnostic testing.

4. On January 31, 2023 Claimant presented to Tyler Ptacek, M.D. at Rapid City Medical Center for pain management. She had been referred by PA-C Hemenway specifically for an evaluation of cervical disc disorder at C6-C7 with radiculopathy on the left. However, Claimant also reported 6/10 lower back pain that radiated into her hips and thighs. The record reveals that Claimant suffered "severe low back pain and associated radiculitis." Claimant was diagnosed with cervical radiculopathy at C7, cervical degenerative disc disease, left shoulder pain, sacroiliitis, lumbar radiculitis, and left knee pain. Dr. Ptacek referred Claimant to physical therapy for her cervical spine, left shoulder, hips, lumbar spine, and left knee. He also ordered an MRI of the lumbar spine.

5. On August 17, 2023 Claimant underwent x-rays of her lumbar spine. The imaging revealed "lumbar degenerative changes without acute abnormality."

6. On November 6, 2023 an MRI of Claimant's lumbar spine revealed "mild degenerative changes from L2-L5 with no significant spinal canal or neuroforaminal narrowing and scattered bilateral facet arthropathy."

7. On February 14, 2024 Claimant visited spine surgeon Troy D. Gust, M.D. for an evaluation. Claimant presented with lower back pain and bilateral lower extremity symptoms "that have been present since December 2022." Claimant stated that while at work she was walking on a jet bridge when water caused her to slip and fall on her left side. Since the accident "she has had low back pain, bilateral lower extremity symptoms." She specified "medial low back pain that radiates outward bilaterally." After a physical examination, Dr. Gust diagnosed Claimant with chronic lower back pain, bilateral intermittent thigh pain, and degenerative facet arthritis with mobile spondylolisthesis. Dr. Gust referred Claimant back to Dr. Ptacek for bilateral diagnostic L4-L5 facet joint injections.

8. On March 25, 2024 Claimant returned to Dr. Gust for an examination. She reported seven days of pain relief following medial branch blocks from Dr. Ptacek. Dr. Gust referred Claimant to Tyler Bergstrom, M.D. for evaluation of a L4-L5 ALIF with integral anterior screw fixation. The goal of this procedure was to fuse and stabilize the L4-L5 level at the splaying of the facets.

9. On April 17, 2024 Dr. Gust requested surgery in the form of a lumbar 4-5 ALIF, right L4-5 central and recess decompression, and posterior pedicle screw fixation. On April 18, 2024 Respondents issued a Rule 16 letter to Dr. Gust advising that they were denying the surgical request pending receipt of an Independent Medical Examination (IME) opinion.

10. Although Respondents denied the surgical request, Claimant underwent the procedure through her personal medical insurance on August 20, 2024. Claimant testified that the surgery completely alleviated her lower back symptoms and she has no radiating pain down her leg into her foot.

11. On May 21, 2024 Claimant underwent an IME with Timothy S. O'Brien, M.D. After reviewing Claimant's medical records and conducting a physical examination, Dr. O'Brien assessed Claimant with a minor cervical spine strain/sprain that had resolved and a minor thoracic spine sprain/strain that had resolved. In specifically addressing Claimant's back symptoms, Dr. O'Brien explained that she did not have complaints of lower back pain until January 31, 2023. He reasoned that, if Claimant had sustained a lower back injury, she would have noted pain immediately following the Dedember 31, 2022 fall on the jet bridge. Dr. O'Brien summarized that "[a] one-month delay in seeking medical attention and complaining of low back pain is too long a period of time to create any type of temporal link between the two."

12. On September 18, 2024 Sander H. Orent, M.D. conducted a records review of Claimant's claim. Initially, Dr. Orent reasoned that Dr. O'Brien misunderstood the nature of Claimant's injuries as a result of the December 31, 2022 accident. Specifically, regarding Claimant's lumbar spine, Dr. Orent recounted that Dr. O'Brien claimed Claimant did not have any lower back complaints for about one month. However, Dr. Orent noted that Dr. O'Brien's statement was not true because on January 4, 2023 Claimant reported to PA-C Hemenway at the Black Hills Orthopedics and Spine Center "lower back pain centralizing and going into the

lower extremities." He explained that Claimant clearly injured her lumbar spine on December 31, 2022 and mentioned her symptoms within a few days of the event. Despite Dr. O'Brien's comments that Claimant would have sought acute emergency care if she had injured her lower back, Dr. Orent reasoned that Claimant's injuries took several days to develop and manifest themselves. Dr. Obrien's 3-4 day timeframe to deny that Claimant injured her lower back was unreasonable.

13. Dr. O'Brien also testified at the hearing in this matter. He maintained that Claimant's only work-related diagnoses were a thoracic strain and cervical strain. She did not suffer a lower back injury on December 31, 2022 because the medical records from January 4, 2023 and January 16, 2023 only supported diagnoses of thoracic and cervical injuries. It was not until January 31, 2023 that Claimant's lower back complaints were significant enough for a diagnosis. Dr. O'Brien reviewed all of the imaging studies of the lumbar spine and found no acute trauma. He detailed that the imaging showed pre-existing degenerative arthritis, as well as a small pars fracture that occurred at birth and caused slippage of the spine. All of the preceding findings were old and pre-existing. Dr. O'Brien testified that Claimant's lumbar injury was not casually related to the December 31, 2022 incident. Instead, Claimant's lumbar injury constituted the natural progression of her arthritis. Accordingly, the need for lumbar fusion surgery was not medically reasonable, necessary, or causally related to Claimant's work injury.

14. Claimant testified at the hearing in this matter. She reported her injuries to Employer about 20 minutes after the accident occurred. Claimant specified that she injured her neck, left shoulder, back and left knee. She detailed that she had intense pain in her lower back that would wrap around her hips and travel down the front of her legs to her feet.

15. On cross-examination, Respondents counsel asked Claimant why she did not report lower back pain when she first obtained medical treatment. She disagreed and replied that she reported her symptoms. Claimant's response is confirmed in the January 4, 2023 report from Black Hills Orthopedic and Spine Center. It describes Claimant's symptoms as pain in the left side of the neck, pain radiating down the left upper extremity, centralized mid back pain radiating down her left thoracic region, and centralized lower back pain.

16. Claimant has established it is more probably true than not that she suffered a compensable lower back injury on December 31, 2022 during the course and scope of her employment with Employer. Initially, Claimant explained that on December 31, 2022 she slipped on a wet jet bridge while performing her job duties as a Flight Attendant. Claimant reported to Employer that she landed on her left side and sustained injuries to her left shoulder, left knee, neck and back. Respondents have admitted liability and provided medical as well as TTD benefits while Claimant has been off work with her injuries. Claimant received conservative treatment in the form of physical therapy, injections, and ablations. She also underwent diagnostic testing. By February 14, 2024 Dr. Gust diagnosed Claimant with chronic lower back pain, bilateral intermittent thigh pain, and degenerative facet arthritis with mobile spondylolisthesis. Dr. Gust subsequently requested surgery in the form of a lumbar 4-5 ALIF, right L4-5 central and recess decompression, and posterior pedicle screw fixation.

17. Respondents denied the surgical request based on an IME with Dr. O'Brien. Dr. O'Brien maintained that Claimant's only work-related diagnoses were a thoracic strain and

cervical strain. She did not suffer a lower back injury on December 31, 2022 because the medical records from January 4, 2023 and January 16, 2023 only supported diagnoses of thoracic and cervical injuries. He reasoned that, if Claimant had sustained a lower back injury, she would have reported pain immediately following the fall on the jet bridge. However, it was not until January 31, 2023 that Claimant's lower back complaints were significant enough for a diagnosis. Dr. O'Brien detailed that imaging revealed pre-existing degenerative arthritis as well as a small pars fracture that occurred at birth. Claimant's lumbar injury was thus not casually related to the December 31, 2022 incident. Instead, Claimant's back symptoms constituted the natural progression of her arthritis.

18. In contrast, Dr. Orent persuasively reasoned that Dr. O'Brien misunderstood the nature of Claimant's injuries as a result of the December 31, 2022 accident. Specifically, regarding Claimant's lumbar spine, Dr. Orent recounted that Dr. O'Brien claimed Claimant did not have any lower back complaints for about one month after the fall. However, Dr. Orent noted that Dr. O'Brien's statement was not true because on January 4, 2023 Claimant reported to PA-C Hemenway at the Black Hills Orthopedics and Spine Center "lower back pain centralizing and going into the lower extremities." He explained that Claimant clearly injured her lumbar spine on December 31, 2022 and mentioned her symptoms within a few days of the event. Importantly, Claimant credibly testified that she reported lower back pain when she first obtained medical treatment on January 4, 2023. Claimant's testimony is confirmed in the January 4, 2023 report from Black Hills Orthopedic and Spine Center. It describes her symptoms as pain in the left side of the neck, pain radiating down the left upper extremity, centralized mid back pain radiating down her left thoracic region, and centralized lower back pain.

19. Despite Claimant's pre-existing lower back condition, the record demonstrates that the December 31, 2022 incident constituted the proximate cause of her need for medical treatment. Claimant sought medical treatment on January 4, 2023 for her symptoms as a result of the slip and fall on the jet bridge. The medical records do not reflect that Claimant had any prior back symptoms, complaints or treatment. The December 31, 2022 event was thus a significant, direct, and consequential factor in her disability. The persuasive evidence thus supports a conclusion that Claimant suffered an injury to her lower back that necessitated evaluation and medical care. Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable lower back injury during the course and scope of her employment with Employer on December 31, 2022.

20. Claimant has demonstrated it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical benefits for her December 31, 2022 lower back injury. After Claimant underwent conservative treatment for her condition, Dr. Gust requested surgery in the form of a L4-5 ALIF, right L4-5 central and recess decompression, and posterior pedicle screw fixation. Respondents denied the request based on an IME from Dr. O'Brien. Dr. O'Brien primarily reasoned that, because Claimant did not injure her lower back on December 31, 2022, the requested surgery was not causally related to the event. Instead, Claimant's lumbar injury constituted the natural progression of her arthritis. Accordingly, the need for lumbar fusion surgery was not medically reasonable, necessary, or causally related to Claimant's work injury.

21. Claimant underwent the requested surgical procedure through her personal medical insurance on August 20, 2024. Claimant testified that the surgery completely alleviated her lower back symptoms and she has no radiating pain down her leg into her foot. Although Claimant suffered from a pre-existing lower back condition, the record demonstrates that the December 31, 2022 incident constituted the proximate cause of her need for medical treatment. Claimant's conservative medical care and the back surgery recommended by Dr. Gust constituted reasonable, necessary and causally related medical treatment. Respondents shall provide continuing reasonable, necessary and causally related medical care to relieve the effects of Claimant's lower back injury.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a

need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

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

8. As found, Claimant has established by a preponderance of the evidence that she suffered a compensable lower back injury on December 31, 2022 during the course and scope of her employment with Employer. Initially, Claimant explained that on December 31, 2022 she slipped on a wet jet bridge while performing her job duties as a Flight Attendant. Claimant reported to Employer that she landed on her left side and sustained injuries to her left shoulder, left knee, neck and back. Respondents have admitted liability and provided medical as well as TTD benefits while Claimant has been off work with her injuries. Claimant received conservative treatment in the form of physical therapy, injections, and ablations. She also underwent diagnostic testing. By February 14, 2024 Dr. Gust diagnosed Claimant with chronic lower back pain, bilateral intermittent thigh pain, and degenerative facet arthritis with mobile spondylolisthesis. Dr. Gust subsequently requested surgery in the form of a lumbar 4-5 ALIF, right L4-5 central and recess decompression, and posterior pedicle screw fixation.

9. As found, Respondents denied the surgical request based on an IME with Dr. O'Brien. Dr. O'Brien maintained that Claimant's only work-related diagnoses were a thoracic strain and cervical strain. She did not suffer a lower back injury on December 31, 2022 because the medical records from January 4, 2023 and January 16, 2023 only supported diagnoses of thoracic and cervical injuries. He reasoned that, if Claimant had sustained a lower back injury, she would have reported pain immediately following the fall on the jet bridge. However, it was not until January 31, 2023 that Claimant's lower back complaints were significant enough for a diagnosis. Dr. O'Brien detailed that imaging revealed pre-existing degenerative arthritis as well as a small pars fracture that occurred at birth. Claimant's lumbar injury was thus not casually related to the December 31, 2022 incident. Instead, Claimant's back symptoms constituted the natural progression of her arthritis.

10. As found, in contrast, Dr. Orent persuasively reasoned that Dr. O'Brien misunderstood the nature of Claimant's injuries as a result of the December 31, 2022 accident. Specifically, regarding Claimant's lumbar spine, Dr. Orent recounted that Dr. O'Brien claimed Claimant did not have any lower back complaints for about one month after the fall. However, Dr. Orent noted that Dr. O'Brien's statement was not true because on January 4, 2023 Claimant reported to PA-C Hemenway at the Black Hills Orthopedics and Spine Center "lower back pain centralizing and going into the lower extremities." He explained that Claimant clearly injured her lumbar spine on December 31, 2022 and mentioned her symptoms within a few days of the event. Importantly, Claimant credibly testified that she reported lower back pain when she first obtained medical treatment on January 4, 2023. Claimant's testimony is confirmed in the January 4, 2023 report from Black Hills Orthopedic and Spine Center. It describes her symptoms as pain in the left side of the neck, pain radiating down the left upper extremity, centralized mid back pain radiating down her left thoracic region, and centralized lower back pain.

11. As found, despite Claimant's pre-existing lower back condition, the record demonstrates that the December 31, 2022 incident constituted the proximate cause of her need for medical treatment. Claimant sought medical treatment on January 4, 2023 for her symptoms as a result of the slip and fall on the jet bridge. The medical records do not reflect that Claimant had any prior back symptoms, complaints or treatment. The December 31, 2022 event was thus a significant, direct, and consequential factor in her disability. The persuasive evidence thus supports a conclusion that Claimant suffered an injury to her lower back that necessitated evaluation and medical care. Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable lower back injury during the course and scope of her employment with Employer on December 31, 2022.

Medical Benefits

12. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan*

v. Indus. Claim Appeals Off., 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

13. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

14. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her December 31, 2022 lower back injury. After Claimant underwent conservative treatment for her condition, Dr. Gust requested surgery in the form of a L4-5 ALIF, right L4-5 central and recess decompression, and posterior pedicle screw fixation. Respondents denied the request based on an IME from Dr. O'Brien. Dr. O'Brien primarily reasoned that, because Claimant did not injure her lower back on December 31, 2022, the requested surgery was not causally related to the event. Instead, Claimant's lumbar injury constituted the natural progression of her arthritis. Accordingly, the need for lumbar fusion surgery was not medically reasonable, necessary, or causally related to Claimant's work injury.

15. As found, Claimant underwent the requested surgical procedure through her personal medical insurance on August 20, 2024. Claimant testified that the surgery completely alleviated her lower back symptoms and she has no radiating pain down her leg into her foot. Although Claimant suffered from a pre-existing lower back condition, the record demonstrates that the December 31, 2022 incident constituted the proximate cause of her need for medical treatment. Claimant's conservative medical care and the back surgery recommended by Dr. Gust constituted reasonable, necessary and causally related medical treatment. Respondents shall provide continuing reasonable, necessary and causally related medical care to relieve the effects of Claimant's lower back injury.

ORDER

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

1. Claimant suffered a compensable lower back injury during the course and scope of her employment on December 31, 2022.

2. Claimant's conservative medical care and the back surgery recommended by Dr. Gust constituted reasonable, necessary and causally related medical treatment. Respondents

shall provide continuing reasonable, necessary and causally related medical care to relieve the effects of Claimant's lower back injury.

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

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

DATED: December 16, 2024.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-189-966-003

ISSUE

Whether Claimant has established by a preponderance of the evidence that she has suffered a compensable injury to her cervical spine?

FINDINGS OF FACT

1. Claimant was working as a counselor at the [Redacted, hereinafter AV] facility in September of 2021.

2. In order to maintain her employment, she had to complete a four-day Defensive Tactics Training Class (hereinafter "training").

3. [Redacted, hereinafter JT] testified at hearing. He is a corrections officer (CO III) at the AV[Redacted] in Crowley and was one of the officers who taught the training. He outlined the multiple days of training. On day one of the training is a power point presentation and study guides and maybe some pressure points, day two is practicing strikes, day three is take downs and cuffing. On day four, the staff reviews everything with staff, a written exam is given, and the assessment is conduction to be sure the employees can perform each technique.

4. There is one technique called the straight arm take down. The technique requires a participant as the "bad guy" and the officer doing the take down is the "good guy". Employees do not have to play the bad guy. The technique being tested are the actions of the "good guy" or the one applying the straight arm technique from behind. [Redacted,

hereinafter GS] could have opted out of being the “bad guy” if she were not feeling up to performing that roll according to JT[Redacted].

5. The instructors verbally advised the staff they don’t have to be the bad guy.

6. According to JT[Redacted], the technique involves keeping one of the “bad guys” arms straight and behind them. This leverage maintains control over the person, not forces on their back or stomach. The right arm is used as leverage, such as in a wrestling move.

7. JT[Redacted] testified the technique being demonstrated was not violent or forceful.

8. The straight arm takes down technique is practiced and demonstrated in slow motion. The person being taken down to would typically go to their knees first or crouch down and then lower themselves to the ground.

9. The techniques would not involve putting pressure on the bad guy’s head with once they are down on the mat. There would not be any pressure applied directly to the neck according to JT[Redacted].

10. JT[Redacted] disagrees that Claimant would have been “thrown to the mat several times”. This would not be an accurate description of how this technique was practiced or tested.

11. The straight arm take down does not involve “tumbling’ according to JT[Redacted].

12. The arrest technique is not performed in real time and real-life forces are not applied to the “bad guy”.

13. None of the medical records submitted document a specific injury or trauma. Claimant testified at hearing and has told her physicians that there was no specific traumatic event that caused injury. Ex. 86.Claimant testified that she expected to be sore from the training as she had in the past.

14. On September 21, 2021, Claimant expressly stated that she had not incurred any injuries as a result of her participation in the training. Ex. K, p. 256. At no time after the training did Claimant verbally report any injury, trauma or soreness to her instructor JT[Redacted].

15. Claimant has told multiple providers she does not recall a specific incident or injury causing her an injury or trauma. (Dr. Goldman, Ex. A, p.7, Ex. B, p. 45-50).

16. Claimant underwent an independent medical examination Dr. Bart Goldman on January 3rd and 5th of 2023. Dr. Goldman performed an extensive records review of records dating back to 2007 from Claimants primary care physician, Dr. Lacy, and her rheumatologist, Dr. Timms and others. He also took a detailed history from the Claimant and conducted a physical examination. Dr. Goldman's IME report Ex. A, is the only comprehensive medical report by an examiner who had full knowledge of Claimant's complaints going back to 2007 and the progression of her pre-existing symptoms.

17. Claimant had been actively treated for headache and neck pain on a number of occasions dating back to 2007. Ex. A, p. 12. She complained to Dr. Lacy, her PCP, of a chronic 6-year history of neck, shoulder and upper back pain with an intensity of 8/10 in 2012. Exh. A, p. 14.

18. In 2016 Claimant complained to Dr. Timms, her rheumatologist, of a history of one year of pain in her cervical spine as well as shoulders. She was prescribed Gabapentin

300 mg twice a day. Ex. A, p. 15. X-rays were taken of the neck at that time which noted bony osteophytes and degenerative changes. Ex. p. 15.

19. In June of 2017 Claimant complained of pain in her cervical spine and shoulders and was taking 600 mg of Gabapentin a day. Ex. A, p.17. Claimant was diagnosed with inflammatory arthritis. Ex. A, p. 17. In 2019 she complained of shoulder pain. Ex. A, p. 17. In 2020 Claimant was still treating for inflammatory arthritis involving her bilateral shoulders. She was still taking 600 mg of Gabapentin a day. Ex. A, p. 18.

20. On November 28, 2020 an MRI of the right shoulder ordered by her rheumatologist Dr. Timms showed a small partial-thickness undersurface tear of the supraspinatus tendon with adjacent tendinopathy as well as osteoarthritic change of the acromioclavicular joint and glenohumeral joint. Ex. A, p. 19.

21. Dr. Goldman concluded that Claimant's subjective history, physical examination, administrative statements and documentation and medical records do not support a discrete injury occurring on September 21, 2021. In his opinion, the only consistent potential musculoskeletal injury documented within the first 2 months of the incident would be considered a temporary exacerbation of a pre-existing chronic right shoulder strain. Ex. A, p. 39. He opined Claimant did not suffer a neck or upper back injury.

22. Dr. Goldman noted that aside from the medical note 2 days after September 21, 2021 training, there is no further discussion by the patient's private physician of neck or mid back pain in the subsequent two months. It was Dr. Goldman's impression after interviewing GS[Redacted] that she would certainly bring to the attention of her physicians whatever symptoms were distressing her more than usual, as well as seek out more frequent medical consultation under such distances, whether they be her private

physicians or occupational health physicians. The records also support his impression that her private physicians would certainly document such concerns if they were brought to their attention. Ex. A, p. 24.

23. Dr. Goldman opined that for purposes of a causation determination, the prospective notes documenting the patient's medical condition in the first 2 months after her Defense Tactics Training must be weighed heavily from a medical forensic perspective. Ex .A, p. 24.

24. Claimant underwent an MRI of the cervical spine on December 30, 2021 which showed multiple herniations, stenosis and multilevel spondolyltic changes. Ex. A, p. 25. Dr. Goldman notes that the MRI shows diffuse and multilevel spondylosis and degrative spine conditions that would be anticipated with a pre-existing evolving issue for a patient with chronic inflammatory conditions and documented and recurrent neck pain dating back to 2012. Dr. Goldman stated, "it is unlikely that this MRI scan represents any specific trauma from 3 months earlier and it is unclear whether it correlates with the patient's symptoms". N.P. Madrid's exam (on December 21, 2021) showed Claimant was neurologically normal and does not support a diagnosis of cervical radiculopathy or myelopathy." Ex. A, p. 26. If Claimant had suffered a spinal injury during the training symptoms of radiculopathy or myelopathy would have presented within the first 72 hours. Ex. A, p. 26.

25. The MRI report dated December 30, 2021 does not identify any acute injury. Ex. p. 247-248. A follow up MRI performed April 6, 2023 states there is "no evidence of acute injury". Ex. p. 245.

26. Dr. Goldman noted injuries are generally associated with a very specific move or technique and it is readily apparent to the employee that an injury has occurred. These are not the facts of this case and Claimant's history is atypical in this case. Ex. A, p. 22. Claimant testified that she expected to be sore after completing the course just as she been in previous years. The existence of expected soreness doesn't support a finding of a new injury.

27. Dr. Goldman noted that that Claimant's symptom complex was probably related to her pre-existing diffuse inflammatory polyarthralgia and poly-myalgia symptoms which likely became more focal by September 23, 2021 in the shoulder, neck, mid-back and low back when Claimant had a flare up of her chronic sinusitis condition. Ex. A, 23. While it is Claimant's personal belief that the cause of the conditions reported in her description of the incident , Ex. O, p. 256, was the training, according to Dr. Barton, her statement "is consistent with a history in which her pre-existing diffuse inflammatory polyarthralgia and poly-myalgia symptoms …are likely in conjunction with a flare up underlying chronic sinus condition.". Ex. A, p. 23.

28. Claimant had a lengthy history of attendance issues which pre-dated the alleged work injuries. Exh. S, p. 287 shows that dating back to July of 2021, Claimant had a history of showing up late and calling off at the last minute. Claimant had been counseled by her supervisor, in July of 2021, two months before the purported work injury that her attendance need improvement.

29. Claimant alleges she called off work on September 22, 20221 and September 23rd due to her work injury. However, according to the written records, Claimant called off due to an illness. Ex. S, p. 287.

30. On September 23, 2021, Claimant was advised that she should consider taking FML due to her personal health conditions and inability to meet her work schedule. Exh. S, p. 287.

31. Claimant continued failing to give timely notice of absences and missing scheduled work hours without properly advising her supervisor. Ex. S, p. 287-288. Claimant was issued a corrective action on October 22, 2021 for violating policy. It was after this action that Claimant gave notice of this alleged injury.

32. While the First Report of Injury and the report of injury are both dated September 27, 2021, Claimant did not testify she submitted the documents to her supervisor on that day. In fact, the supervisor's signature wasn't added until November 10, 2021. They were submitted after the corrective action was issued.

33. In the written statement that Claimant testified she authored on September 27, 2021,but did not submit until later, he indicates she had was expectedly sore from training but also fell ill and had increased arthralgias. Ex. O, p. 256. She had these same arthralgias during a sinus illness in 2007 as well. Ex. I, p. 233.

34. Dr. Lacey signed an FML form dated November 18, 2021 indicating between June 1, 2021 and June 1, 2022 it would be expected that Claimant would miss 2 days per week from work due joint pain, diarrhea, headache, and fatigue. The dates of treatment supporting this time off from work included 7-12-2021, 9-23-2021, and 11-3-2021. Ex. P. 269-270.

35. This report supports Dr. Goldman's opinions that Claimant suffered no aggravation of underlying conditions because Dr. Lacey's recommendations for care and sick days did not increase after September 23, 2021. Ex. P, 269-270.

36. When Dr. Goldman stated that Claimant did not have any vocational limitations or disabilities due to the pre-existing condition prior to September 21, 2021 he hadn't considered the FMLA records wherein Dr. Lacy did excuse Claimant from work for up to two days per week commencing 6-1-2021. Ex. P, p. 270.

37. Claimant testified at hearing that while she had not received any formal treatment for her neck since 2019, her pain levels were a steady 2-3 while on substantial medication. Claimant testified her neck pain increased to the 6-7 range after the training. However, these statements are not supported by the medical records. Claimant complained of neck pain once, to Dr. Lacy on September 23, 2021. There are no documented ongoing elevations of lower back pain in the two months after the training ended.

38. Claimant makes no mention of any neck complaints to Drs. Lacy and Timms in the months after the course ended. Ex. A, p. 21-22. Claimant repeatedly saw her primary care physician Dr. Lacy and her rheumatologist Dr. Timms over the next few months and did not report neck pain to them Ex. A. p. 26.

39. Claimant's next reported neck pain at her first examination at the designated providers Concentra on December 21, 2021. Ex. C, p. 90.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he/she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." Section 8-40-201(1). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The fact that the employer provides treatment after an employee reports symptoms does not automatically establish a compensable injury. The claimant must prove the symptoms and need for treatment were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment. *E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

Claimant has failed to establish by a preponderance of the evidence that she suffered an injury or exacerbation to her cervical and thoracic spine. She testified she expected to be sore from the training and she was so in September of 2021. Claimant was already taking multiple medications for pain and inflammation at that time. There was a solid two-month gap between the training and the onset of symptoms in the neck that required treatment. The MRI taken in December of 2021 shows a severely degenerated spine but no evidence of an acute injury. Claimant has presented no credible medical evidence that the findings on the cervical MRI were caused by her work activities. She has also failed to present credible medical evidence that treatment to the cervical and thoracic spine is the result of an injury or aggravation from her work activities, even though the training is mentioned by Claimant during her appointments.

I am also persuaded by Dr. Goldman's opinions with respect to his causation analysis.

ORDER

It is therefore ordered that:

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

DATED: December 18, 2024

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 27(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-194-926-004

ISSUES

1. Whether Claimant established by clear and convincing evidence that the impairment rating assigned by the Division Independent Medical Examination (DIME) physician, David Orgel, M.D, was incorrect.

STIPULATIONS

At hearing, the parties stipulated to the following:

1. The DIME opinion regarding the date of maximum medical improvement (MMI) is not being challenged by Claimant.

2. Respondent is entitled to an overpayment in an amount equal to the temporary total disability (TTD) benefits which were paid after the date of MMI as determined by the DIME physician.

3. Claimant waives the right to pursue permanent total disability (PTD) benefits.

4. The only issue which will be litigated for the purposes of this hearing is permanent partial disability (PPD) benefits.

5. The parties agree Claimant can challenge the DIME physician's opinion regarding permanent impairment even though the date of MMI is not subject to challenge.

6. Respondent will offset any PPD rating which may awarded against the overpayment. If there is an unrecouped overpayment after offsetting and PPD liability, then Respondent waives its right to collect the overpayment from Claimant.

7. If the claim is reopened in the future and there is an unrecouped overpayment, then Respondent preserves its right to apply it against any future indemnity benefits which may become due, but in any event Respondent will not directly collect any unrecouped overpayment from Claimant even in the event of a reopening.

FINDINGS OF FACT

1. Claimant worked for Employer for approximately five years as a pharmacy technician and customer service representative. As a condition of her employment, Claimant was required to receive COVID vaccines.

2. On December 25, 2020, Claimant received a Moderna COVID vaccine injection.

3. Following this injection Claimant reported symptoms such as a racing heartbeat, chest tightness, facial swelling (including tongue and lips), and difficulty breathing.

Approximately two weeks after receiving the vaccination, Claimant began reporting having a hoarse voice. Claimant received treatment, including Benadryl, steroids (prednisone) , and after approximately two months, her symptoms resolved. (Ex. 6). On January 8, 2021, one of Claimant's physicians, Peter Cvietusa, M.D., at Kaiser Permanente, indicated that his general impression was that Claimant did not experience an allergic reaction, that much of her reported symptoms were subjective, and there was "really never any objective evidence for a reaction." Dr. Cvietusa indicated that he suspected Claimant's symptoms were due to anxiety, and may have been enhanced by prednisone. (Ex. 6).

September 23, 2021 Vaccination

4. On September 23, 2021, Claimant received a second COVID vaccination. Between September 14, 2021 and September 21, 2021, Claimant contacted Kaiser at least five times expressing concerns and anxiety about receiving the COVID vaccination again. Ultimately, it was determined that Claimant should receive the Pfizer version of the vaccine. Approximately one hour after receiving the Pfizer vaccination, Claimant began reporting symptoms, including heart palpitations, increased heart rate, laryngitis, shortness of breath. Claimant was seen at the St. Joseph Hospital emergency department on September 23, 2021, for an allergic reaction, and provided Benadryl, Pepcid, and prednisone. Although no substantive records from that visit were admitted into evidence, other providers noted that Claimant's vocal cord examination was normal at St. Joseph. (Ex. 7[1]).

5. After being discharged from St. Joseph Hospital, Claimant was seen by physicians at both Concentra and Kaiser. The majority of Claimant's evaluations and treatment were performed at Kaiser, although she continued to follow up with physicians at Concentra. At Kaiser, Claimant had evaluations by providers in neurology, allergy and immunology, otolaryngology, behavioral health, neurology, and cardiology. During this time, Claimant continued to report symptoms including loss of her voice, breathing issues, and increased heart rate, anxiety, muscle aches, and headaches, among other symptoms. Claimant received multiple treatments and interventions, including steroids, inhalers, various other medications, including antidepressants, speech therapy, and Botox injections, which provided only transient relief of her reported symptoms. (Ex. 6).

6. On September 24, 2021, Claimant was examined by Douglas Altschuler, D.O., at Kaiser. Dr. Altschuler noted that Claimant had evident laryngitis, but a normal heart rate without palpitations, a clear chest, no breathing issues, no muscle pain, no headache, no chest pain, and no dysphagia. Dr. Altschuler recommended 50 mg prednisone, five times per day. He opined that although Claimant did not have an anaphylactic reaction, it was "certainly an allergic reaction" to the COVID vaccine. (Ex. 6). Claimant was on prednisone for several months, and reported that her symptoms were better with 60 mg prednisone, but quickly returned whenever the dosage was decreased.

[1] The September 23, 2021 St. Joseph record (Ex. 7) consists of an "After Visit Summary" but does not include other records of her visit.

7. On November 4, 2021, Kelly Pettijohn, M.D., performed a laryngoscopy, noting it was normal except Claimant's vocal cords had "inappropriate closure of during phonation and significant muscle tension dysphonia significant evidence of laryngopharyngeal reflux (LPR)." She was diagnosed with vocal cord dysfunction and LPR in the setting of long-term prednisone. On November 30, 2021, Charles Armstrong, M.D, performed a second laryngoscopy, which was unremarkable, with the exception of moderate erythema of the arytenoid. Based on his examination, Dr. Armstrong opined that Claimant had a severe case of muscle tension dysphonia (MTD). (Ex. 6).

8. Claimant had multiple visits with allergist Jatinder Aulakh, M.D, at Kaiser. In November 2021, Dr. Aulakh opined that Claimant likely had mild asthma, and suggested performing spirometry tests. An attempt to perform a spirometry test was unsuccessful because Claimant indicated it was difficult for her to breathe in. Claimant also indicated that she felt her throat closing while speaking. He prescribed Claimant an inhaler for asthma symptoms. Claimant's primary treating physician at Kaiser, Elma Kreso, M.D., also diagnosed Claimant with intermittent asthma. On November 23, 2021, Dr. Aulakh indicated that opined that it was possible that Claimant had developed a post-vaccine-related laryngeal neuropathy, but offered no definitive opinion on the issue of causation. (Ex. 6).

9. Claimant saw Kevin Bach, M.D., a voice specialist at Kaiser, on December 10, 2021. Dr. Bach recommended laryngeal Botox injections for recalcitrant MTD. The initial Botox procedure was delayed after Claimant contracted COVID at the end of January 2022. On April 5, 2022, the Botox procedure was performed, resulting in a return of Claimant's voice for approximately one month. On May 25, 2022, Dr. Bach indicated that he "strongly suspected" a "significant psychological component" to Claimant's MTD, and believed Claimant presented with conversion disorder following the COVID vaccine, resulting in severe MTD, which had not been responsive to voice therapy. He recommended a neurologic consult to evaluate his concerns. (Ex. 6)

10. On June 7, 2022, Claimant saw Erin Lonnquist, M.D., a neurologist at Kaiser. Dr. Lonnquist indicated that she did not believe conversion disorder was the primary cause of Claimant's symptoms, noting that one medical study on vocal cord paralysis found 1444 cases of dysphonia after COVID vaccination, while another study "comments on the presence of muscle tension dysphonia from COVID infection." She also felt that Claimant's good response to steroids was further evidence against conversion disorder. (Ex. 6).

11. On July 27, 2022, Claimant received a second laryngeal Botox injection which resulted in no improvement of her voice. (See Ex. 10). Claimant continued to see providers at Kaiser after July 27, 2022, with no reported improvement in her condition. (Ex. 6).

12. From October 26, 2022 through January 23, 2023, Claimant saw Karin Pacheco, M.D. at National Jewish for an occupational/environmental consultation. Claimant reported occasional shortness of breath and occasional chest tightness, sharp chest pains, heart palpitations, and constant heartburn, muscle pain, among other symptoms.

Dr. Pacheco's examination of Claimant's respiratory function was normal, with the exception of "somewhat diminished breath sounds" on auscultation. She assessed Claimant as having a severe COVID vaccine reaction, fibromyalgia due to prednisone taper, MTD aggravated by chronic gastroesophageal reflux disease (GERD), side effects from Botox, and deconditioning. She indicated that Claimant's was demonstrating side effects of the Botox injections, which included chronic reflux and aspiration, and that some of Claimant's hoarseness was likely due to chronic reflux. She further opined that Claimant's symptoms were not directly due to the vaccine, but due to effects of treatments from the vaccine reactions. Dr. Pacheco again referred Claimant for speech pathology, and for a GI consultation for chronic GERD. (Ex. 10).

13. Claimant's treatment at Concentra was primarily directed by Carol Dombro, M.D., beginning in October 2021.[2] She continued to see providers at Concentra through February 2023, and reported the same symptoms she reported to Kaiser, including hoarseness, breathing difficulties, heart palpitations, tachycardia, difficulty swallowing, fatigue, and depression. The admitted records include documented examinations by Dr. Dombro from April 29, 2022 through November 29, 2022. In these examinations, Dr. Dombro noted Claimant's voice was hoarse, and diffuse swelling in the lateral and anterior neck. Although Claimant reported shortness of breath, Dr. Dombro's did not document objective pulmonary findings, noting at each visit that Claimant had "no increased work of breathing or signs of respiratory distress." Claimant's cardiovascular examinations were also noted as normal. (Ex. 9).

14. On December 14, 2022, John Sacha, M.D. at Concentra saw Claimant for an impairment rating on referral from Dr. Dombro. He placed Claimant at maximum medical improvement (MMI), and assigned a 10% whole person impairment for psychiatric impairment and a 25% impairment for speech impairment, which corresponds to a 9% whole person impairment. Dr. Sacha indicated that Claimant's psychiatric impairment included diffuse body aches and symptomatology, and issues with focus and cognition. These impairment ratings combine for an 18% whole person impairment. Although referenced in his reports, the impairment worksheets upon which Dr. Sacha's impairment ratings were based were not offered or admitted into evidence. Dr. Sacha indicated he would see the Claimant again for pulmonary function tests to evaluate her lung function and then determine whether a further impairment rating was appropriate. (Ex. 9).

15. On December 28, 2022, Dr. Sacha's office performed pulmonary testing (which the Claimant testified was a spirometry test). Dr. Sacha recorded the results of the pulmonary testing as ""the patient had an FEV1 and FVC of 73% predicted, and FVC of 61% predicted the max. FEV1 was ranged from 45% to 80% predicted," but otherwise provided no documentation regarding the testing. Based on the results, he determined an impairment rating of the lungs of between 10% and 25% was appropriate. Noting that Claimant was not on supplemental oxygen, and did not have significant shortness of breath, he elected to assign Claimant a 10% whole person impairment for lung function.

[2] The first Concentra record in evidence is from April 29, 2022, but references prior visits to Concentra beginning October 27, 2021.

When combined with the vocal and psychiatric impairment ratings, the additional 10% lung rating resulted in a 26% whole person impairment. (Ex. 9).

16. After Dr. Sacha assigned Claimant's impairment rating, Respondents requested a Division Independent Medical Examination (DIME), and also an independent medical examination with pulmonologist Jeffrey Schwartz, M.D.

17. Dr. Schwartz performed an IME on February 21, 2023, and issued a report dated March 7, 2023. Dr. Schwartz also testified at hearing. (Ex. B). Based on his review of records and examination, Dr. Schwartz opined there was no evidence that Claimant "has asthma of any etiology, vaccine-related or otherwise." During his IME, he attempted to perform spirometry testing, but found the results to be unreliable based on variable efforts by Claimant. (Ex. B).

18. Dr. Schwartz indicated that MTD can mimic the symptoms of asthma. He noted there are many known causes of MTD, including psychological/personality disorders, laryngopharyngeal reflux, gastroesophageal reflux disease (GERD), and organic lesions. Dr. Schwartz opined that although the cause of Claimant's MTD is unclear, it is not likely related to the COVID vaccine, because there is no pathobiological mechanism that would link the vaccine to MTD, and that MTD has never been causally-linked to COVID vaccines. He surmised that Claimant's MTD could be the result of chronic GERD, which is reflected in her pre-vaccine medical records[3]. He also indicated that Claimant's MTD could have a psychogenic origin, arising from the significant anxiety she has experienced surrounding the vaccine and her reaction to the vaccine. (Ex. B).

19. Dr. Schwartz opined that the articles referenced by Dr. Lonnquist did not support the opinion that vocal cord paralysis is causally-related to the COVID vaccine. (Ex. B). (Because the referenced articles were not offered or admitted into evidence, the ALJ is unable to determine whether either Dr. Schwartz or Dr. Lonnquist accurately characterized the findings in the medical literature, and thus finds the opinions and testimony related to medical literature of limited evidentiary value.)

20. On April 12, 203, Claimant underwent a Division Independent Medical Examination (DIME) with David Orgel, M.D. Based on his review of Claimant's medical records and examination, he diagnosed Claimant with somatic symptom disorder, which he characterized as causing multiple complaints, likely including MTD. He indicated that the recognized side effects of the COVID vaccine included immediate hypersensitivity reactions which include cutaneous symptoms, respiratory symptoms, cardiovascular symptoms, and gastrointestinal symptoms, including anaphylaxis and mimics of anaphylaxis. He noted that none of the examinations findings consistent with these reactions were present in the record following Claimant's COVID vaccinations. Instead, Dr. Orgel attributed Claimant's vocal cord issues, globus sensation, hypertension, tachycardia, dyspnea, and other symptoms to her anxiety, rather than COVID vaccines.

[3] Although Claimant contends she only experienced GERD during a pregnancy in 2017-18, her records indicate that she was diagnosed and treated for GERD through at least 2020. (See Ex. 6)

He concluded that there is no literature to suggest that Claimant's symptoms were related to the COVID vaccination, and were more likely psychogenic. (Ex. A).

21. Dr. Orgel found no respiratory issues when he examined Claimant. He noted that because Dr. Sacha's impairment rating documentation did not include the actual pulmonary function testing, no validity measures were available to assess the results upon which Dr. Sacha's lung impairment rating was based. Dr. Orgel concluded that Claimant has no documented pulmonary impairment, and that her pulmonary symptoms were voice related, and unrelated to her respiratory system. (Ex. A).

22. Dr. Orgel considered Claimant's MTD to be either psychological or neurological in etiology, and determined that Claimant's neurological workup did not suggest a neurological cause. He thus concluded that Claimant's MTD is psychological, and consistent with somatic symptom disorder, and not related to the COVID vaccine. Because he found Claimant's psychological issues related to her physical issues, and those issues to be unrelated to her employment, Dr. Orgel assigned no psychological impairment. Ultimately, Dr. Orgel determined that Claimant reached MMI on the date of her injection (*i.e.*, September 23, 2021), and has no work-related permanent impairment. (Ex. A).

23. In October 2023, Claimant began treatment with Jill Schofield, M.D., at the Center for Multisystem Disease. Claimant was not referred to Dr. Schofield by any provider, and located her through an internet search.

24. Dr. Schofield evaluated Claimant first on October 5, 2023, and opined that Claimant has long-haul COVID due to adverse reaction to COVID vaccine, positional orthostatic tachycardia syndrome (POTS), and a strong clinical suspicion for Mast cell activation syndrome (MCAS) "dramatically escalated post COVID vaccination." (Ex. 4).

25. Dr. Schofield's MCAS diagnosis appears based on the subjective symptoms described by Claimant, and not on objective testing. Many of the symptoms Claimant described to Dr. Schofield were not previously documented by her providers at Kaiser, , Concentra, or National Jewish. For example, no health care provider documented Claimant experiencing heat in her ears, episodic pruritus, exaggerated responses to insect bites, gum hypersensitivity, night sweats, alcohol intolerance, sensitivities to lotions, perfumes, and new construction off-gassing, food reactions, reactivity to medications such as Tums and non-Costco brand ibuprofen, or sensitivity to altitude, or soda. (Ex. 4)

26. Dr. Schofield testified that, in her opinion, Claimant had contracted POTS and MCAS as a result of her receipt of the COVID vaccine. However, she offered no coherent medical explanation for her opinion, other than conclusory statements. For example, she testified that the COVID vaccine is "recognized to cause POTS" indicating that there are "multiple publications" supporting the causal connection. However, Dr. Schofield offered no credible medical explanation as to how the COVID vaccine causes POTS. Moreover, she offered no persuasive explanation as to how, if Claimant contracted POTS as a result

of the vaccine, it caused impairment of Claimant's lung function, voice, or psychology, as determined by Dr. Sacha.

27. Similarly, she testified that MCAS is related to the COVID-19 vaccine, stating: "Yes, that was recognized very early actually initially by the very first patient forum, which was called Body Politic, where the patients figured out that COVID seemed to be causing POTS and mast cell activation, and that was later confirmed by many publications, by physicians, and it's I think even published in the CDC and the NIH definitions." (9/8/24 Hrg. Trans., p 74, l. 15-24). She offered no further medical explanation for this opinion. Dr. Schofield further testified that no objective testing had been done to support Claimant's purported MCAS diagnosis, but that Claimant "definitely has multisystem issues that meet the criteria" for MCAS. She also testified that there are no objective tests for MCAS, and the quality of the tests that do exist are recognized to be poor. In her records, Dr. Schofield opined that Claimant likely had underlying MCAS before receiving the vaccine, but offered no persuasive evidence or opinion explaining how that condition was caused or exacerbated by the COVID vaccine. Moreover, she offered no persuasive explanation as to how MCAS caused the impairments assigned by Dr. Sacha.

28. Claimant testified that she began experiencing symptoms, including heart palpitations, and losing her voice, approximately 30 minutes after receiving the COVID vaccine on September 23, 2021. Claimant testified that she has received other vaccines, including the flu vaccine, and had not previously experienced the health issues such as cardiac issues, breathing issues, laryngitis, or psychological issues, before receiving the COVID vaccines. She testified regarding the treatment she received through Kaiser and noted that it did not lead to improvement.

29. Claimant testified that she has developed sensitivities to certain foods such as watermelon, peanut butter, and is now allergic to alcohols and dyes, and becomes irritated by smells. She testified that she is no longer as active as she was before receiving the COVID vaccine, and that her activities are now extremely limited.

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming DIME on Impairment

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician's opinions concerning whole person impairment carries presumptive weight and may be overcome by clear and convincing evidence. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME's whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

Claimant has failed to meet her burden of proving by clear and convincing evidence that the DIME physician's assigned impairment rating is incorrect. Dr. Sacha assigned Claimant impairment ratings for three areas: voice impairment, lung impairment, and psychological impairment. The DIME physician, Dr. Orgel, found Claimant to have no permanent impairment as a result of her receipt of the COVID vaccine on September 23, 2021.

Dr. Orgel found that Claimant's MTD (the cause of her dysphonia or voice impairment) was more likely than not related to anxiety than to the COVID vaccination.

Although several of Claimant's treating providers indicated that Claimant's dysphonia was possibly due to the COVID vaccine, there was no consensus among those providers on the issue. Dr. Aulakh indicated there was a possibility that her vocal issues were related to the vaccination, but offered no persuasive explanation for this opinion. Dr. Pacheco indicated Claimant's MTD and voice symptoms were not directly caused by the vaccination but were likely related to side effects from the treatment for the vaccination reactions. However, Dr. Pacheco's opinion did not consider that Claimant's vocal issues began within an hours of receiving the vaccination on September 23, 2021, before she had received any treatment. Dr. Bach opined that Claimant's symptoms were likely the result of a conversion disorder. Although Dr. Lonnquist indicated conversion disorder was not likely the primary reason for Claimant's MTD, her rationale was based on one study describing vocal issues in patients who received the vaccination. She offered no persuasive medical explanation for the connection. Similarly, Dr. Schofield testified that dysphonia was related to COVID and COVID vaccines, but she offered no persuasive medical explanation for this opinion, merely indicating that medical literature supports her opinion. Ultimately, there are multiple differences of opinions among Claimant's providers and the DIME physician, which does not constitute clear and convincing evidence that the DIME physician was incorrect.

Similarly, the evidence does not demonstrate that Dr. Orgel's opinion that Claimant does not have a permanent lung impairment is highly probably incorrect. The only provider who has opined that Claimant has a permanent lung impairment is Dr. Sacha, and the opinion is based on a single pulmonary lung function test, for which the actual data from the tests was not included in the record. None of Claimant's treating providers or Dr. Schofield offered a persuasive, credible opinion indicating that Claimant has a permanent lung impairment as a result of receiving the COVID vaccine, or otherwise demonstrating that Dr. Orgel's opinion is highly probably incorrect.

Finally, Claimant has failed to establish that Dr. Orgel's opinion that Claimant does not have a psychological impairment is incorrect. Dr. Orgel concluded that because Claimant's physical symptoms were not causally related to the COVID vaccine, any psychological impairment that derived from those physical symptoms was not related. Claimant offered no credible evidence to establish that Dr. Orgel's opinion is highly probably incorrect.

The ALJ finds that there is no evidence that is unmistakable and free from serious and substantial doubt demonstrating that it is highly probable that Dr. Orgel's opinion that Claimant has no permanent impairment is incorrect.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by clear and convincing evidence that the DIME physician erred in assigning Claimant no permanent impairment rating.

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

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

DATED: December 19, 2024

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. 5-236-474-001

ISSUE

Whether Claimant has established by a preponderance of the evidence that she is entitled to reasonable, necessary, and related treatment for her neck stemming from the admitted April 6, 2023, work incident?

FINDINGS OF FACT

1. Claimant has been employed by the Employer since November 12, 2015 in her capacity as working in "Member Service Security." (Claimant Ex. 3, p. 11). She testified at hearing this position is more commonly known as a "greeter." Claimant testified that she was able to work in her full capacity and without any physical restrictions prior to April 6, 2023. Claimant sustained multiple compensable injuries on April 6, 2023. She has not returned to work since April 6, 2023 due to the compensable injuries. (Respondent Ex. A, p. 5; Claimant Ex. 3, p. 19). There is no dispute regarding the compensable nature of certain body parts and injuries, such as Claimant's need for the surgeries to her shoulder, elbow, and wrist. The dispute lays with Claimant's neck symptoms that are alleged to be caused by the April 6, 2023 incident.

2. Claimant testified that on April 6, 2023 while working for Employer, when she was accidently tripped and fell onto a cement floor, landing primarily on her left side. She immediately experienced pain primarily in her left shoulder. Emergency medical services transported her to Memorial Hospital where she complained of left shoulder pain and tenderness across the midline of the cervical spine that is worse on the left lateral side. A CT scan of the cervical spine showed early degenerative changes. The immediate

documentation of the injury reflected that Claimant had “broken [her] shoulder” when she fell and was taken to Memorial Hospital for emergency treatment. *Id.* The paramedics placed Claimant in a cervical collar and on a stretcher for transport. *Id.* at 21. Claimant attempted to break her fall with her outstretched left arm, “but fell onto her shoulder face (left side), and abdomen. She describes pain in all of these areas.” *Id.* at 22. Claimant described neck pain to the paramedics only minutes after the incident. As she testified at hearing, she felt pain essentially on her entire left side.

3. The Memorial Hospital record reflects that Claimant’s “main complaint” at her time of arrival was her left shoulder. (Claimant Ex. 5, p. 28). The differential diagnosis included “closed head injury, C-spine injury, [and] shoulder dislocation.” *Id*. Accordingly, a CT scan of her neck was ordered. *Id.* Physical examination documented “tenderness across the midline of the cervical spine that is worse on the left lateral side.” *Id* at 36.

4. Claimant’s first medical appointment at an occupational medicine clinic was four days after the injury on April 10, 2023 at Concentra. (Claimant Ex. 7, p. 99). Claimant provided a history that included prior shoulder surgery. As for the neck, the note specifically reads, “Patient denies any prior injury to area of concern” aside from the shoulder.” *Id.* at 100. Claimant’s neck was listed among her many left-sided pain complaints consistent with a traumatic fall onto her left side four days prior. *Id.* Claimant was diagnosed with a neck sprain at her initial visit. *Id.* at 101. It was known at this time Claimant had broken the proximal end of her left humerus and attention was focused on this primary complaint. *Id.* at 102.

5. Dr. Michael Simpson examined Claimant the next day on April 11, 2023. (Claimant Ex. 7, p. 106). She reported a consistent mechanism of injury, i.e., she fell on

her left side, striking her shoulder and her face on the ground. *Id.* Claimant reported neck pain as a symptom to Dr. Simpson. *Id.* at 107. She asked her ATP at Concentra on April 12, 2024 about additional imaging of the neck, only to be reassured that her other conditions would be addressed after her broken arm healed. *Id.* at 112.

6. Claimant was referred to Dr. Christopher Jones with the Colorado Springs Orthopedic Group. She was seen at this clinic on May 4, 2023. (Claimant Ex. 8, p. 255). Her complaints of pain again included her neck, her left shoulder and other affected body parts. *Id.*

7. Dr. Marcie Wilde with Concentra began primarily overseeing Claimant's care on May 25, 2023. (Claimant Ex. 7, p. 138). She noted that the chief complaint was, as Claimant testified at hearing, essentially the entire left side of her body. *Id.* More specifically, under review of symptoms, neck pain remained noted. *Id.* at 140. Claimant continued to report neck pain on June 22, 2023; July 20, 2023; and August 17, 2023; to Dr. Wilde. (Claimant Ex. 7, pp. 146, 153, 161). Dr. Wilde noted on September 12, 2023 that both Dr. David Weinstein and Dr. Gregg Martyak were recommending surgery for her multiple left upper extremity injuries. *Id.* at 164. Physical therapy was on hold. *Id.* The focus became Claimant's upcoming multiple surgeries.

8. Dr. Weinstein's examination on September 12, 2023 documented tenderness over Claimant's left pericervical area, anterior chest, and scapular rotators. (Claimant Ex. 10, p. 344). Dr. Weinstein opined Claimant likely had pericervical myofascial inflammation and that the surgery he was going to perform would not correct her myofascial inflammation of the neck. *Id.* Dr. Weinstein performed multiple procedures to Claimant's left shoulder on October 13, 2023. *Id.* at 347. Dr. Martyak also performed

surgery on Claimant's wrist and elbow at the same time of Dr. Weinstein's surgery on October 13, 2023. *Id.* at 350. She required surgery for left cubital tunnel syndrome and left wrist pain secondary to a partial tear of her scapholunate ligament. *Id.*

9. Claimant followed up with Dr. Wilde on November 21, 2023. Now that Claimant had undergone her surgeries, she was "Revisiting [Claimant] hitting her head." (Claimant Ex. 7, p. 189). Dr. Wilde documented that, as of November 21, more than seven months after the injury, Claimant "Continue[d] to have neck pain." *Id.* Dr. Wilde ordered an MRI of Claimant's cervical spine given the seven plus months of ongoing neck pain. *Id.* at 192; *See* Claimant Ex. 13, p. 476 (Cervical spine MRI performed because of pain in neck).

10. Dr. Wilde made it a point to document Claimant's history and mechanism of injury were obtained directly from her, and that unless otherwise noted, the mechanism of injury was consistent with her presenting symptoms and physical examination. (Claimant Ex. 7, p. 193). She did not question the legitimacy of Claimant's complaints, noting that she had several injuries and this was a "complicated case." *Id.* at 192.

11. Claimant was recovering well from her left wrist surgery. Unfortunately, her left elbow was not healing as hoped. (Claimant Ex. 10, p. 357). She reported to Dr. Martyak on November 29, 2023 that she continued to have burning pain down her forearm, which he could recreate with a positive Tinel's. *Id.* He anticipated another elbow surgery to address the ulnar nerve if she failed to get better with therapy. *Id.* She failed to get better with therapy. She underwent left ulnar nerve neuroplasty with intramuscular transposition on January 16, 2024. *Id.* at 362.

12. Shortly prior to her second surgery, Claimant's neck pain was addressed by her physical therapist in detail. (Claimant Ex. 12, p. 450). The record reflects that "Coming out of the sling did not do so much for the neck…." Her physical therapist—the individual actually manipulating Claimant's musculature with their hands—stated clearly that Claimant had a significant amount of paracervical myofascial inflammation. Her physical therapist further recommended Claimant have a physiatry evaluation specifically to address any "cervical contribution" to her overall symptoms. *Id.*

13. Respondents retained Dr. F. Mark Paz to perform an examination of Claimant. The examination occurred on January 25, 2024, nine days after Claimant's second surgery. (Respondent Ex. 3, p. 22). Dr. Paz testified at hearing that he was not asked to perform a causation analysis of Claimant's neck symptoms at the time of the January 2024 examination. His focus was on her upper extremity. Claimant told Dr. Paz she recalled feeling breaking and tearing when she fell. *Id.* at 23. Claimant reported to Dr. Paz that she felt she was having neck pain that would radiate into her left shoulder blade region. *Id.* at 24. He asked Claimant about the pain levels of her left elbow, left shoulder, and left knee, but not her neck. *Id.* His physical examination of her neck elicited diffuse pain and revealed restricted range of motion with left and right rotation with reports of discomfort into the trapezius. *Id.* at 27. Dr. Paz wrote "Myofascial neck pain" under his list of assessments regarding Claimant. *Id.* at 29.

14. Dr. Paz was asked to address "electric shock-like symptoms" involving Claimant's left upper extremity. (Respondent Ex. 3, p. 31). He opined these symptoms were not causally related to the work incident. *Id.* Dr. Paz's entire discussion of the relatedness of the neck was made in passing and without any supporting rationale:

> [Redacted, hereinafter WF] is also reporting "some" left-sided neck pain, left knee pain, left foot swelling, left jaw catching, heartburn, nausea, color changes in the left hand, constant left chest tightness, and difficulty walking. Based on reasonable medical probability, it is not medically probable that the subjective symptoms are causally related to the April 6, 2023, incident

Id. at 31. Dr. Paz states Claimant was reporting left-sided neck pain, along with other symptoms. He summarily dismissed her neck complaints as unrelated without explanation. Dr. Paz's report contains a section on his second to last page titled, "Causation Analysis." *Id.* at 32. This section and the remainder of the report make no comment regarding Claimant's reported neck symptoms. *Id.* at 32-33.

15. Dr. Paz was asked to write a supplemental report on August 6, 2024 to address Claimant's neck, almost seven months after his examination of her wherein he was not asked to address her neck. *Id.* (Respondent Ex. 3, p. 50). Dr. Paz's report featured a total of four medical records from three years before Claimant's work injury that make mention of "neck pain." *Id.* These are reports from January 7, January 21, April 27, and May 7, 2020. *Id.* (*See also* Respondent Ex. 3, pp. 111-166).

16. The January 7, 2020, record reflects the primary reason for the visit was ptosis of Claimant's left eyelid. (Respondent Ex. 3, p. 125). She was sent for neurological consultation by an ocular specialist, note she had pain behind her left eye. *Id.* at 127. The HPI included reports of neck pain radiating down her left arm and neck pain while laying down. It also documented she had nodules in her neck. *Id.* Along with an MRI, her provider also ordered a CT Angiogram of her brain and neck to rule out vascular disease. *Id.* at 133. The cervical MRI was performed on January 21, 2020 and showed only mild degenerative joint disease. *Id.* at 121. The impression provided by the radiologist was mild multilevel facet joint hypertrophy. *Id.* at 122.

17. Claimant followed up with her provider on April 27, 2020. (Respondent Ex. 3, p. 136). The "Visit Diagnoses" included left arm pain and ptosis of the left eyelid (primary). *Id.* Her provider did not believe she had cervical radiculopathy, as she listed "Left arm pain, will rule out radiculopathy." *Id.* at 138. The primary reason for the visit was the ptosis and discussion of injections or surgery for her eyelid, not her neck. *Id.* at 139. Further, it was noted she only had "occasional" pain in her left arm. *Id.* Claimant underwent EMG testing on May 7, 2020. *Id.* at 161. The EMG showed mild median neuropathy. *Id.* There is no further record of any neck pain, neither before nor after the aforementioned medical records. Additionally, Claimant credibly testified she only vaguely remembered remote complaints of neck pain and that she did not have any significant ongoing complaints aside from your typical aches and pains.

18. Dr. Paz summarizes the 2020 records in his addendum report and then provides a discussion of these new records. (Respondent Ex. 3, pp. 50-51). The first of four paragraphs reaffirms his opinion that Claimant sustained shoulder, elbow, and wrist injuries. *Id.* at 51. The second provides his opinion that Claimant's left-sided facial paralysis, left lower extremity paresthesia, color changes of the hand, and left knee symptoms are not causally related to the injury. The third reflects his opinion that Claimant had a history of bilateral carpal tunnel syndrome and that the diagnosis of carpal tunnel syndrome is not causally related.[1] The final paragraph comments on the progression of Claimant's left upper extremity conditions, opining these conditions were approaching or may have been at MMI. *Id.* Notably absent from Dr. Paz's report is any discussion regarding causation of Claimant's reported neck symptoms.

[1] Dr. Kenneth Finn confirmed via EMG on August 24, 2023 that Claimant had no evidence of carpal tunnel syndrome. (CHE 11, p. 396).

19. Dr. Paz's summary of medical records includes an MRI of the left shoulder from only five months after her consult regarding neck pain, left arm pain, and paresthesia. (Respondent Ex. 3, p. 53). The MRI revealed rotator cuff pathology along with a superior labral tear. *Id.*

20. Claimant was able to return to Dr. Kenneth Finn based on referral from Dr. Wilde on May 10, 2023. (Claimant Ex. 11, p. 403). Dr. Finn explained that the cervical MRI from November 30, 2023, showed some facet arthropathy from C4 through C7. He noted that despite time and physical therapy, her neck symptoms persisted. *Id.* She reported ongoing, constant left-sided neck pain. Examination revealed an increase in symptoms with cervical extension and rotation to the left. *Id.* Dr. Finn's examination revealed notable tenderness of the cervical spine on the left with mild spasm and increased tone noted. *Id.* at 406.

21. Dr. Finn opined Claimant's neck symptoms were a direct result of the April 6, 2023 work injury. (Claimant Ex. 11, p. 406). He suspected her ongoing cervical pain was the result of a facet injury, citing the mechanism of injury and the significant injury sustained to the left upper extremity. *Id.* Dr. Finn felt it would be reasonable to undergo facet blocks to see if they provided Claimant with relief. If so, Claimant would be a candidate for a radiofrequency ablation. *Id.* Dr. Finn referred Claimant for surgical evaluation of her neck for further consideration before performing any injections. *Id.* at 409.

22. Claimant was seen again by Dr. Wilde on September 6, 2024. (Claimant Ex. 7, p. 237). Her diagnoses now included cervical facet arthropathy. *Id.* at 247. Dr. Wilde

referred Claimant for treatment for her neck pain, including acupuncture, chiropractic care, and an evaluation with an orthopedic spine specialist. *Id.* at 248.

23. Dr. Michael Rauzzino, a neurosurgeon, examined Claimant on October 1, 2024 at the request of Dr. Wilde. (Claimant Ex. 14, pp. 479-482). Dr. Rauzzino begins the report noting Claimant was being evaluated with respect to an "alleged" work related-injury. *Id.* at 479. After review of Claimant's history, medical records, and his examination of her, Dr. Rauzzino opined Claimant did sustain an injury to her neck "arising out of and caused by the industrial exposure of 04/06/2023." *Id.* at 481. Dr. Rauzzino explained that although the MRI did not show any acute lesions, he would not exclude the possibility of having pain from the structural aspect of her neck, i.e., her facet joints.

24. Dr. Rauzzino recommended Claimant return to Dr. Finn for pain management to include, but not necessarily be limited to, consideration of cervical facet injections versus cervical epidural steroid injections. (Claimant Ex. 14, p. 481). Dr. Finn recommended facet injections, consistent with Rule 17, Exhibit 8, of the Medical Treatment Guidelines ("MTGs"), to manage Claimant's pain and improve mobility. (Claimant Ex. 15, p. 71). Both doctors explicitly opined that Claimant's injury and subsequent treatment were causally related to her workplace fall.

25. Dr. Castrejon performed an independent medical examination of Claimant at the request of her counsel on October 11, 2024. (Claimant Ex. 15). He was unequivocal in his opinion that Claimant's mechanism of injury would be expected to affect the posterior facet joints in Claimant's cervical spine. *Id.* at 507. Claimant's mechanism of injury—falling onto her left side—was sufficient to cause posterior facet joint injuries in the cervical spine. He emphasized that Claimant's symptoms, diagnostic imaging

findings, and clinical history align with such an injury. *Id*. He, in addition to Drs. Finn and Rauzzino, agreed Claimant should undergo the facet injections to determine candidacy for a rhizotomy. *Id.*

26. The medical evidence from Claimant's treating and evaluating physicians, including Drs. Finn, Rauzzino, and Castrejon, supports the conclusion that Claimant's neck symptoms, including cervical facet arthropathy, arose out of the compensable work-related injury on April 6, 2023.

27. Dr. Mark Paz conducted an independent medical evaluation ("IME") on February 25, 2024 that focused on Claimant's left upper extremity. Dr. Paz was asked on direct examination about the physical examination he performed of Claimant's neck during the IME and what he looks for when examining the neck. He indicated that you are looking for objective findings on physical examination, such as non-localizing axial compression and diffuse pain complaints. (Tr. 37:19 – 38:10).

28. In his IME report, Dr. Paz noted restricted range of motion and diffuse tenderness in Claimant's neck, diagnosing "myofascial neck pain" without performing a detailed causation analysis of the neck. Nevertheless, he provided Claimant with a specific diagnosis: myofascial neck pain. (Respondent Ex. C, pp. 29-33). Dr. Paz's diagnosis of myofascial neck pain is fundamentally at odds with his testimony and the MTGs. Dr. Paz stated, "There's only myofascial neck pain. So there's no diagnosis. So there was no incorporation of cervical degenerative disease, cervical pain in the causation analysis at that time." (Tr. 64:21 – 65:14). Dr. Paz's testimony that a myofascial strain is not a diagnosis is not consistent with his authored report.

29. Dr. Paz concluded that Claimant's neck pain was not causally related to the April 6, 2023, workplace injury, providing no substantial rationale to support this conclusion whatsoever in his initial report. (Respondent Ex. C, pp. 22–49). On August 6, 2024, Dr. Paz issued a supplemental report in which he reviewed four prior medical records from 2020 documenting intermittent complaints of neck pain and mild degenerative changes. He relied heavily on these older records to argue that Claimant's cervical symptoms were preexisting and not related to her workplace fall. However, his analysis failed to reconcile this conclusion with the acute onset of symptoms following the April 2023 incident, as documented by Claimant's treating physicians. (Respondent Ex. C, pp. 50–55). His reliance on remote, pre-injury medical records, coupled with his limited examination and lack of a detailed analysis, significantly undermines the credibility of his opinion.

30. Dr. Paz testified that Claimant's "diagnosis" was "chronic neck pain at this time without a diagnosis." (Tr. 73:4-7). Dr. Paz was asked on cross-examination how one would go about forming a diagnosis for Claimant. Dr. Paz testified. First, he stated, "I think we have all the diagnoses that there are." (Tr. 74:3-4). On cross-examination, Dr. Paz agreed the injections recommended by Dr. Rauzzino and Dr. Finn would be reasonably necessary in helping to form a diagnosis. (Tr. 74:2-16) (emphasis added). Dr. Paz states that such injections would not be related to the claim though. (Tr. 74:15-16).

31. Notably, Dr. Paz relies on isolated records from 2020 in support of his opinion. There are no medical records after 2020 to suggest Claimant had any ongoing functional issues with her neck or need for treatment. Dr. Paz hypocritically relies on these

prior medical records that provide no diagnosis for the neck to determine the present neck condition is unrelated. (Tr. 74:24 – 75:2).

32. Dr. Paz simply dismisses records that do not support his argument while latching on to a select few records from years ago that do support his argument. His reliance on remote and isolated records from 2020 lacks probative value when weighed against the comprehensive and recent assessments of Drs. Wilde, Finn, Rauzzino, and Castrejon. There is also a lack of evidence suggesting Claimant had any significant or limiting neck condition after isolated visits in 2020, years before this incident occurred.

33. Claimant testified at hearing on her behalf consistently with the record. She recalled her mechanism of injury at hearing, stating she fell forward and landed on her left side. “So I think the reason the left side was hit, not the right, is because that little turn I did to see what was coming. And at that point, I could feel the breaks in the neck. I could hear – you know, I could hear them. I could feel the tears. And a nurse who was in the line to leave the building just said, don’t whatever you do, don’t move your neck. (Tr. 11:21 – 12:4). She was taken to the emergency room that day given the severity of her symptoms. (Tr. 12:17-25).

34. Claimant testified at hearing that Drs. Rauzzino, Wilde, and Finn wanted to perform the recommended treatment. (Tr. 19:4 – 21:4).

35. Claimant testified at hearing that she has been employed with Employer since November of 2015 in member services. This job is colloquially known as a “greeter,” though her job responsibilities extend far beyond “greeting.” She explained her job also involved her going to check for shopping carts, doing security walks, going up and down

the stairs, and if you have to close the store at night, you have to climb to the top of the building to make sure that the hatch leading to the roof is locked. (Tr. 21:9 – 22:9).

36. Claimant testified that she was working full duty for Employer with no limitations or restrictions on her neck for many years. She clarified, "I mean, you ache if you work [for Employer]. But with the neck, in and of itself, I honestly don't really remember anything in particular, to be honest. I mean, I really don't." (Tr. 22:10-20).

37. Based on the mechanism of injury, consistent reports of symptoms, diagnostic imaging, and physician recommendations, the evidence establishes that Claimant's neck condition is causally related to the April 6, 2023, work-related incident and requires medical treatment, including diagnostic injections and potential further interventions as deemed appropriate by her treating providers.

CONCLUSIONS OF LAW

Medical Benefits

Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder*, 942 P .2d 1337. Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo. App. 1997).

Claimant has established by a preponderance of the evidence that her neck symptoms are causally connected to her April 6, 2023, work injury. Claimant injured her neck at work and more likely than not aggravated underlying degenerative cervical facet arthropathy. Claimant has presented overwhelming evidence of a causal link between her work-related injury and her neck condition, countered only by remote mentions of neck pain and ignorance of Claimant's physical abilities between the date of the remote records and her work injury.

The medical opinions of Drs. Wilde, Finn, Rauzzino, and Castrejon are persuasive, and they align with the MTGs, specifically Rule 17 Exhibit 8: Cervical Spine Injury Guidelines, and demonstrate adherence to evidence-based protocols. (Colorado Division of Workers' Compensation. (2021). *Cervical Spine Injury Medical Treatment Guidelines*. Colorado Department of Labor and Employment.

The MTGs emphasizes the importance of integrating diagnostic imaging, clinical findings, and patient history when evaluating cervical injuries. Dr. Finn correlated Claimant's MRI findings of facet arthropathy from C4 to C7 with her persistent neck pain and the mechanism of injury documented in this case. His recommendations for diagnostic cervical facet injections and possible radiofrequency ablation adhere to the MTGs, which identify facet injections as an appropriate diagnostic tool for confirming facet-mediated pain and guiding subsequent treatment. Moreover, Dr. Finn's plan to consider radiofrequency ablation follows the MTGs which endorses this procedure for confirmed facet joint pain.

Dr. Wilde's, Dr. Rauzzino's, Dr. Finn's, and Dr. Castrejon's evaluations further reinforce the necessity and relatedness of the proposed treatment. Rule 17 Exhibit 8

advises a stepwise approach to care, beginning with conservative measures such as physical therapy and activity modifications. Claimant's providers documented the failure of these initial treatments to alleviate Claimant's persistent symptoms, justifying the escalation to interventional procedures. Diagnostic injections, as proposed by Claimant's treating providers, are explicitly recommended under Exhibit 8, Section 8.a.iv, when conservative care has failed. These physicians also adhered to Exhibit 8's directive to prioritize clinical correlation over imaging alone, acknowledging that imaging studies are only one component of a comprehensive diagnosis. Dr. Paz places undue reliance on imaging alone, coupled with speculation regarding Claimant's neck symptoms, or lack thereof, between 2020 and the date of injury of April 6, 2023. There are simply no recent records to support Respondents' assertion that Claimant's complaints of neck pain on and after April 6, 2023 do not have a diagnosis themselves, and are solely a result of her 2020 condition for which their expert could not provide a diagnosis either.

The opinions of Drs. Wilde, Finn, Rauzzino, and Castrejon are more persuasive than those of Dr. Paz.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her neck on April 6, 2023. Claimant's neck condition is compensable and causally related to the April 6, 2023 work injury.

2. Claimant is entitled to all reasonably necessary and related treatment for her neck, including, but not limited to, the medial branch blocks recommended by Dr. Kenneth Finn and all other related treatment for Claimant's neck to bring her to MMI.

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

DATED: December 23, 2024

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-124-689-007

ISSUES

- Did Claimant prove a left knee arthroscopic surgery proposed by Dr. Jennifer FitzPatrick is reasonably needed?

FINDINGS OF FACT

1. Claimant works for Employer as a Corrections Officer. On October 8, 2019, Claimant sustained admitted injuries, including an injury to her left knee, while participating in Emergency Response Team (ERT) training. Claimant credibly described the training as "pretty rough, boot camp-style" activity. Claimant was crawling on her hands and knees across rocky ground and stuck her left knee on a rock. She experienced severe pain in her left knee, which caused her to terminate the activity.

2. Knee swelling and bruising were documented by Claimant's PCP and the ATP, Dr. Bradley, on October 9, 2019.

3. Claimant had a left knee MRI on November 4, 2019.

4. Claimant saw Dr. Jennifer FitzPatrick, an orthopedic surgeon, on November 20, 2019. Dr. FitzPatrick reviewed the MRI images and noted edema consistent with a patellar bone bruise or retinacular sprain, possible patellar maltracking or instability, and moderate patellar chondromalacia. Dr. FitzPatrick diagnosed left patellofemoral chondromalacia and a bone contusion. She saw nothing that required immediate surgery, and recommended conservative treatment.

5. On December 19, 2019, Dr. FitzPatrick noted that the swelling, pain, and catching in Claimant's left knee were improving with therapy and dry needling. She released Claimant to work "as tolerated" without restrictions and follow-up as needed.

6. Dr. Bradley put Claimant at MMI on December 19, 2019 with no impairment.

7. Claimant had a DIME with Dr. Wallace Larson on May 5, 2020. Dr. Larson agreed that Claimant was at MMI with no impairment.

8. Claimant challenged the DIME at a hearing before Administrative Law Judge Lamphere on November 12, 2020. Judge Lamphere found that Claimant overcame the DIME's determination of MMI because she needed additional treatment for an injury to her left breast. Judge Lamphere did not address treatment for Claimant's left knee.

9. Claimant followed up with Dr. FitzPatrick on March 15, 2021. She initially did well with therapy, but her knee pain had returned and was "worsened since the time of her initial injury." She was working regular duty but having difficulty with prolonged standing. Examination showed a trace effusion, mild patellofemoral crepitus and mild

patellar maltracking. Dr. FitzPatrick referred Claimant back to PT and ordered an updated MRI to evaluate potential progression of the patellofemoral changes seen on the initial MRI.

10. The MRI was completed on March 18, 2021. Dr. FitzPatrick saw no significant progression of the underlying condition and recommended additional PT.

11. Claimant returned to Dr. FitzPatrick on May 3, 2021. Her left knee had increased pain and swelling and was "not doing well." Claimant had no new injury but had been doing activities at work such as climbing and ascending stairs more than usual, pushing heavy carts, and tasks that required frequent changing from sitting to standing.

12. On July 12, 2021, Dr. FitzPatrick documented improvement of Claimant's symptoms. She recommended that Claimant complete the authorized PT sessions and transition to a home exercise program. They discussed that Claimant would need additional PT in the future as maintenance care for periodic exacerbations of knee pain.

13. Claimant received treatment for other injury-related conditions until December 10, 2021, when she was put at MMI and released to full duty.

14. Claimant next saw Dr. FitzPatrick on June 27, 2022. Her knee had been doing well until she returned to work in December 2021. There was no new injury or trauma, but simply regular work activities. Claimant described anterior and medial knee pain and clicking. She felt "similar pain as [it] was before PT." She was also having increased left SI joint pain, which Dr. FitzPatrick opined was related to altered gait mechanics caused by the knee symptoms. Claimant wanted to restart PT in hopes of avoiding surgery. Dr. FitzPatrick stated, "[I] anticipate ongoing deficit from this injury that will likely cause intermittent exacerbations requiring additional intervention with PT or other modalities. Referral made for PT today."

15. Respondent filed a Final Admission of Liability (FAL) on June 30, 2022, which admitted for medical benefits after MMI. Despite admitting for post-MMI treatment, the PT requested by Dr. FitzPatrick was denied.

16. Dr. Fitzpatrick requested authorization for a left knee arthroscopy and patellofemoral joint debridement in July 2022. The surgery was denied pending an IME.

17. Dr. John Erickson performed an IME for Respondent on August 22, 2022. Claimant's knee was still painful and she was eager to start PT, which had been denied. Examination of the knee showed positive patellar compression test with crepitus during range of motion. Dr. Erickson remarked that Claimant was "very pleasant, knowledgeable, honest and forthright" during the evaluation. She gave maximum effort and her clinical presentation was consistent with her reported symptoms. Dr. Erickson opined the MRI showed mild to moderate posttraumatic chondrolysis and chondromalacia patella. She had no history of pre-injury left knee problems, and therefore her ongoing knee symptoms were "clearly related to her fall on 10/9/2019." Dr. Erickson agreed with the recommendation for additional PT and dry needling, which had "very positive" results previously. Dr. Erickson opined the surgery proposed by Dr. FitzPatrick should remain

denied and “should only be considered after vigorous nonoperative treatment, including the rehabilitation program . . . [and] injections.”

18. Claimant commenced PT on October 4, 2022. The therapist documented that Claimant’s knee had been painful since resuming full duty work in December 2021. She described difficulty with stairs, transfers, and prolonged walking. Claimant attended PT for approximately three months but stopped in January 2023. The discharge note indicates that Dr. FitzPatrick and the therapist thought she should continue with PT, but Claimant was in the middle of a pregnancy and was struggling to obtain authorization for additional treatment from Respondent.

19. On July 17, 2023, Dr. FitzPatrick noted that Claimant had given birth several weeks earlier and recommended that she resume PT. There are no corresponding PT records, and the ALJ infers that the PT was not authorized.

20. Claimant saw Dr. FitzPatrick on February 21, 2024 for an exacerbation of knee pain. Dr. FitzPatrick noted Claimant had returned to work from maternity leave in September 2023, and her knee had buckled while ascending stairs, causing her to fall. She was having difficulty arising from a seated position. The knee was continuing to buckle and “makes a crunching sound.” The pain increased to 8/10 at times. Dr. FitzPatrick ordered an updated MRI and referred Claimant to PT.

21. Claimant started PT at UCHealth in March 2024. The therapist noted decreased left knee ROM and strength which impaired Claimant’s ability to complete ADLs and work-related activities. On April 30, 2024, the therapist noted Claimant was having increased knee pain and felt she was getting worse despite PT.

22. Claimant had an updated left knee MRI on May 5, 2024. It showed patellar chondromalacia with a full-thickness fissure involving the superior medial articular surface and mild underlying bone edema and a small joint effusion.

23. Claimant followed up with Dr. FitzPatrick on June 3, 2024. She reported throbbing, burning pain, and “pins and needles” in her knee. She was having occasional mechanical symptoms, including “popping [and] crunching.” Claimant was frustrated with the lack of progress. Examination showed a trace effusion, crepitus with ROM, pain to palpation, painful extension, and mild patellar maltracking. Dr. FitzPatrick reviewed the MRI images. She concluded, “unfortunately despite extensive nonoperative management patient has persistent left knee anterior pain. Evolving edema in the patella noted on the repeat MRI [ ]. . . . At this point I would recommend left knee arthroplasty with chondroplasty and synovial debridement.” Surgery was scheduled for July 9, 2024.

24. Dr. Erickson performed a Rule 16 records review for Respondent on June 25, 2024. Dr. Erickson was “unclear” how aggressive Claimant’s recent round of therapy had been. He opined the recent MRI showed no substantial worsening compared to previous imaging. He concluded, “there is no evidence [Claimant] had a pre-existing condition involving the left knee. I believe her minimal difficulties arose from her work-related injury on 10/9/2019. That injury, however, was mild, responsive to non-operative

treatment, and has not worsened over time. I would therefore recommend the denial of the request for surgery."

25. Dr. Erickson testified at hearing consistent with his report. Dr. Erickson opined that the recommended surgery by Dr. Fitzpatrick is not indicated. He testified that the MRIs showed stable pathology. Dr. Erickson stated that the proposed procedure "does not have a good track record" and commonly makes patients worse. He opined that the MTGs only allow surgery to address patella malalignment, which he believes Claimant does not have. Dr. Erickson opined that conservative measures should be exhausted before surgery is considered. He testified that viscosupplementation injections and/or stem cell injections or PRP would be an excellent idea. On cross-examination, he testified he has "no doubts" about Claimant's credibility and has no question that her ongoing symptoms are causally related to the 2019 work accident. He agreed Claimant appears highly motivated and has "expended a great deal of effort over a lengthy period of time" trying to rehabilitate her knee. He described Dr. FitzPatrick as "well credentialed" and "an excellent orthopedic surgeon." He conceded that orthopedic surgeons frequently have differing opinions regarding the appropriate treatment for individual patients.

26. Claimant testified that her knee symptoms have worsened over time despite multiple rounds of therapy and consistent home exercises. At the time of the hearing, she was attending PT twice weekly, but was still having significant problems with her knee. She described her current symptoms as "terrible," including crunching, "popping," and constant pain. The symptoms make it difficult to squat and crouch and perform routine tasks at home. Her job is physically demanding and she is concerned about the knee's impact on her ability to maintain and progress in her career. Claimant hoped to avoid surgery but now feels it is the only reasonable option given the longstanding and progressive nature of her symptoms. Claimant has lost over 30 pounds, but her knee pain has not improved.

27. Claimant's testimony is credible.

28. Dr. FitzPatrick's opinions that Claimant has exhausted conservative treatment and that surgery is appropriate are credible and more persuasive than the contrary opinions of Dr. Erickson.

29. Claimant proved the surgery proposed by Dr. FitzPatrick is reasonably needed.

CONCLUSIONS OF LAW

Respondent is liable for medical treatment after MMI reasonably needed to relieve the effects of the injury or prevent deterioration of Claimant's condition. Section 8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). However, Respondent retains the right to question the reasonable necessity and causal relationship of any specific treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Respondent has made no argument that surgery cannot be provided as post-MMI treatment; the sole question relates to reasonable necessity. As found, Claimant proved the surgery proposed by Dr. FitzPatrick is reasonably needed. Claimant's testimony regarding her ongoing symptoms is credible. Claimant's left knee remains significantly symptomatic more than five years after her accident despite extensive conservative treatment. These symptoms interfere with her ability to perform work and recreational activities. She had diligently participated in multiple rounds of PT and maintained a home exercise regimen for several years. Although she responded to PT in the past, the most recent efforts have not relieved her symptoms. The argument that Claimant will achieve satisfactory relief from additional PT is not persuasive. Under the circumstances, Dr. FitzPatrick appropriately concluded that Claimant has failed conservative treatment and arthroscopic surgery is a reasonable option.

ORDER

It is therefore ordered that:

1. Respondents shall cover the left knee arthroplasty with chondroplasty and synovial debridement recommended by Dr. FitzPatrick.

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 27(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: December 24, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-273-178-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable injury at work on May 4, 2024.

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical benefits reasonably necessary to cure and relieve him of the effects of his May 4, 2024 injury.

3. Whether Claimant proved by a preponderance of the evidence that the crutches and knee brace he purchased after his May 4, 2024 injury were causally related, reasonable, and necessary to cure and relieve the effects of that injury.

4. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits beginning May 4, 2024 until terminated by statute.

STIPULATIONS

1. Claimant's average weekly wage is $1188.05.

2. If compensable, Claimant's authorized treating provider is Advanced Urgent Care and Occupational Medicine located in Broomfield, Colorado.

3. If compensable, Respondents are responsible for Claimant's outstanding medical expenses to Denver Health for an emergency room visit on May 8-9, 2024.

4. If compensable, Respondents are entitled to a credit for unemployment compensation benefits received by Claimant.

FINDINGS OF FACT

1. Claimant is thirty-six years old. Claimant worked for Employer as a server. As a server, Claimant is on his feet for his entire shift, must carry food, must complete side work, and walks anywhere from 4 to 6 miles during his shifts.

2. On Saturday, May 4, 2024, at the beginning of his shift, Claimant was doing side work, including stocking wine in the bar. Stocking the bar required Claimant to bring wine from Employer's wine storage to the bar. Using a dishwasher glass rack, Claimant squatted and lifted the rack holding between 15-20 bottles of wine, then pivoted to bring the wine to the bar. During the action of lifting and carrying the wine, Claimant felt a pain in his left knee.

3. Claimant had no left knee injury prior to May 4, 2024.

4. Claimant worked his complete shift on May 4, 2024. Claimant's pain progressed throughout the evening and by the end of his shift, Claimant was unable to put weight on his left knee.

5. [Redacted, hereinafter LK], Claimant's supervisor, was not at the restaurant on May 4, 2024. [Redacted, hereinafter RT], owner of Employer, was working in the kitchen on May 4, 2024. RT[Redacted] did not observe Claimant throughout his shift on May 4, 2024.

6. Claimant did not report his injury to Employer on May 4, 2024. Rather, Claimant went home to rest his knee knowing he had the following three days off before his next shift.

7. The pain in Claimant's left knee did not improve despite resting his knee from May 5 – May 7, 2024.

8. Prior to the start of his scheduled shift on May 8, 2024, Claimant went to Employer's location to speak with LK[Redacted] to tell her he could not work because of his injury. Claimant was concerned about finding coverage for his shift as the restaurant was short-staffed and busy because of graduation at the [Redacted, hereinafter UC].

9. LK[Redacted] was not at the restaurant when Claimant arrived, so he texted LK[Redacted] to let her know he was injured and could not work. Ex. 13.

10. Based on the testimony of Claimant and LK[Redacted] in which both agreed they texted on May 8, 2024, and the fact that the texts that follow the below exchange are dated May 9, 2024, the ALJ infers the following texts between Claimant and LK[Redacted] occurred on May 8, 2024. Claimant wrote to LK[Redacted]:

a. "I think it got aggravated when I worked Saturday"

b. "Not totally sure when I injured it"

c. "Sometime last week"

d. "Thought on my off days it would have gotten better"

Ex. 13.

11. LK[Redacted] testified that she did not read Claimant's texts as informing her that he was injured at work on Saturday, May 4, 2024.

12. The ALJ finds that Claimant's texts on May 8, 2024, informed LK[Redacted] that he was injured at work. Claimant tells LK[Redacted] that he injured himself "sometime last week" and "when I worked Saturday"; even though Claimant also states he is "not totally sure" when he injured his knee, when taken together Claimant is telling LK[Redacted] he was injured at work.

13. On May 8, 2024, Claimant sought treatment in the emergency department (ED) of Denver Health. Ex. 6. Claimant's treatment notes from that visit are silent on how Claimant was injured. *Id.* Claimant was diagnosed with acute knee pain and a medial collateral ligament sprain of his left knee. *Id.* Based on the diagnosis of a ligament sprain, Claimant declined to have a radiograph of his left knee. Claimant was discharged from the ED on May 9, 2024.

14. Claimant purchased crutches on May 8, 2024 for approximately $40.00. Claimant used the crutches to walk until July 2024.

15. Claimant texted with LK[Redacted] on May 9, 2024. Ex. 13. Claimant informed LK[Redacted] that he went to the hospital and "[t]he doctor did an exam and thinks maybe stage 1-2 ligament sprain with a possible tear." *Id.* Claimant told LK[Redacted] the doctor gave him an estimated recovery time of 2-6 weeks. *Id.* Claimant provided LK[Redacted] with a picture of the notes he received from his ED visit. *Id.*

16. Claimant submitted a Claim for Compensation to the State of Colorado on May 15, 2024. Ex. 1.

17. Claimant continued to text with LK[Redacted] letting her know that he was on crutches and using a brace and that he would be unable to work. Ex. 13.

18. On May 23, 2024, Respondents provided Claimant with a list of authorized treatment providers he could see based on his Claim for Compensation. Ex. E. Included on that list was Advanced Urgent Care and Occupational Medicine (Advanced Urgent Care) in Broomfield, Colorado. *Id.*

19. On May 24, 2024, Claimant sought treatment for his left knee at Advanced Urgent Care. Ex. 7. Claimant completed paperwork in which he described his injury as: "My knee became increasingly inflamed and painful through the shift. The following days resulted in an inability to walk and an emergency visit on May 9th to confirm the ligament tear/sprain at work." Ex. D.

20. Claimant saw Alyssa Stockman, P.A., who diagnosed Claimant with an injury to his medial collateral ligament of his left knee. Ex. 7. P.A. Stockman noted "exam suspicious for MCL sprain vs tear" and recommended "following up with occupational and/or ortho for further evaluation and potential MRI imaging." *Id.*

21. Claimant has not returned to work with Employer. Claimant filed for, and has been receiving, unemployment compensation benefits.

22. Respondents contested Claimant's Claim for Compensation, Ex. A, and Claimant has not attained a MRI of his left knee.

23. Claimant does not have health insurance.

24. Claimant purchased a knee brace costing approximately $15.00. Claimant used the knee brace from May to September 2024.

25. Claimant's knee has improved to the point where he can walk without crutches and the knee brace. However, Claimant is unable to walk carrying heavy objects. Claimant also is unable to walk 4 to 6 miles per shift.

26. Claimant proved it is more likely than not he sustained an injury arising out of and in the course and scope of his employment on May 4, 2024.

27. Claimant proved it is more likely than not his purchase of crutches and a knee brace were causally related, reasonable, and necessary to cure and relieve Claimant of the effects of his May 4, 2024 injury.

28. Claimant proved it is more likely than not that the May 4, 2024 work injury caused a disability lasting more than three work shifts, that he left work as a result of that disability, and that the disability resulted in an actual wage loss beginning May 8, 2024 and ongoing.

CONCLUSIONS OF LAW

The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 318 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing the weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals Off.*, 43 P.3d 637, 641 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Indus. Claim Appeals Off.*, 183 P.3d 684, 687 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385, 389 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. § 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

As found, Claimant proved by a preponderance of the evidence that he sustained a compensable work injury on May 4, 2024. Claimant had no preexisting left knee injury. On May 4, 2024, while completing his side work, Claimant lifted a dishwasher glass rack that contained multiple bottles of wine and felt a pain in his left knee. This pain was caused by his action of lifting and carrying the wine to the bar. The pain worsened throughout his shift and eventually resulted in Claimant being unable to place weight on his left leg. Claimant then rested his left knee from May 5 – 7, 2024 in an attempt to heal whatever was causing the pain. Claimant then received a diagnosis of a medial collateral ligament strain on May 8, 2024.

The ALJ is unpersuaded by Respondents' arguments that Claimant must not have been injured in the manner he described because Claimant did not immediately report hurting his knee, he finished his shift, and he texted LK[Redacted] that he "aggravated" his knee on Saturday, meaning he must have previously injured the knee. First, finishing a shift and not immediately reporting an injury are not uncommon, especially when the severity of an injury may not be immediately apparent as with a strain or tear. Second, the ALJ reads Claimant's text that "it got aggravated" to state that Claimant's knee became "angry or displeased" while working on Saturday, May 4, 2024. *Merriam Webster Online Dictionary*, Aggravated ("angry or displeased especially because of small problems or annoyances; feeling or showing aggravation") *available at* https://www.merriam-webster.com/dictionary/aggravated (last visited December 19, 2024). This reading makes the most sense considering the uncontroverted evidence that Claimant had no left knee injury prior to May 4, 2024.

Based on the totality of the evidence, Claimant proved it is more likely than not he suffered a compensable work injury on May 4, 2024 arising out of and in the course of his employment, resulting in disability and the need for medical treatment.

Medical Treatment

Respondents are liable for medical treatment that is causally related, reasonable, and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a),

C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Hobirk v. Colo. Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

Having found the May 4, 2024 injury compensable, Respondents are liable for Claimant's purchase of crutches and a knee brace because those medical devices are causally related, reasonable, and necessary to cure and relieve the effects of Claimant's left knee injury. Respondents are liable for Claimant's reasonable, necessary, and causally related treatment from authorized treatment providers.

Temporary Total Disability (TTD) Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* § 8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323, 327 (Colo. 2004); *City of Colo. Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637, 639 (Colo. App. 1997).

Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. § 8-42-105(3)(a)-(d), C.R.S.

As found, Claimant proved it is more probable than not he is entitled to TTD benefits as his injury has caused a disability lasting more than three work shifts, he left work as a result of his disability, and his disability has resulted in actual wage loss. As a result of his May 4, 2024 injury, Claimant could not resume work on May 8, 2024, because it would be impossible for him to complete the essential functions of his job using crutches, resulting in a total loss of wages.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable industrial injury on May 4, 2024 arising out of and in the course and scope of his employment with Employer.

2. Respondents shall pay for Claimant's reasonable and necessary medical treatment causally related to the May 4, 2024 injury, including the cost of Claimant's May 8-9, 2024 visit to Denver Health, Claimant's May 24, 2024 visit to Advanced Urgent Care, and the cost of the crutches and knee brace purchased by Claimant.

3. Claimant's average week wage is $1188.05. Respondents shall pay Claimant TTD from May 8, 2024 until terminated by statute based on an average weekly wage of $1188.05. Respondents are entitled to an offset for Claimant's receipt of unemployment benefits.

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

SIGNED: December 23, 2024.

Robin E. Hoogerhyde
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-278-336-001

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $2010.87.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable right elbow injury during the course and scope of employment with Employer on July 1, 2024.

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

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable and necessary medical benefits that are causally related to his July 1, 2024 right elbow injury.

4. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 4, 2024 until terminated by statute.

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

FINDINGS OF FACT

1. On July 1, 2024 Claimant worked for Employer performing duties at the [Redacted, hereinafter GR] project in Colorado. Claimant was hired as a driver, but was being trained to operate the conveyor belt used to transport concrete up to the dam site project. Claimant was schedule for the overnight shift and began his work in the evening. He finished on the morning of the following day.

2. On July 1, 2024 Claimant arrived at the project and transported multiple employees in a shuttle from the parking area up to the job site. Upon arriving at the location, Claimant followed his supervisor down an enclosed ladder. While descending, Claimant struck his right elbow on the metal safety cage surrounding the ladder. He specifically felt like he hit his funny bone. Claimant experienced the immediate onset of pain in his right elbow, with radiating symptoms down to his hand.

3. Once Claimant descended the ladder, he was instructed to break up concrete with a handheld sledgehammer. While using the sledgehammer with his right arm for approximately 15-20 minutes, Claimant continued to suffer pain in his elbow. The pain in Claimant's elbow did not abate over the course of his shift.

4. At the end of his shift on July 2. 2024 Claimant reported his right elbow injury to Employer's Safety Specialist [Redacted, hereinafter CM]. Claimant received a written disciplinary warning for reporting the injury at the conclusion of his shift.

5. CM[Redacted] put the Claimant in touch with Registered Nurse Rachael Nesselrodt for a video/telehealth appointment. RN Nesselrodt noted that Claimant's injury occurred "earlier today" when he "was coming down a ladder and hit his right elbow on the metal cage." She did not note any open wounds, bruising or swelling. RN Nesselrodt directed Claimant to use over-the-counter nonsteroidal anti-inflammatories and heat therapy after 24 hours.

6. After the initial evaluation with RN Nesselrodt, Claimant was examined by [Redacted, hereinafter CL], who CM[Redacted] believed to be an EMT. CL[Redacted] noted the same full range of motion RN Nesselrodt had observed. He also mentioned mild right elbow swelling. CL[Redacted] assessed normal range of motion with pain and made similar recommendations to RN Nesselrodt for Claimant's treatment. Claimant testified that CL[Redacted] directed him to limit the use of his right upper extremity including lifting.

7. On the afternoon of July 2, 2024 CM[Redacted] followed up with Claimant about his right elbow condition. Claimant reported feeling "a little better." He noted the "[s]welling went down" but that he still had pain. On July 3, 2024 Claimant reported that his elbow was feeling "[m]uch better."

8. On July 3, 2024 Claimant returned to work at the GR[Redacted] project. Claimant drove the shuttle to transport employees to the work site. After he fueled the shuttle vehicle, Construction Manager [Redacted, hereinafter BD] directed Claimant to follow him to the office. BD[Redacted] asked Claimant to clean the office, including emptying the large and small trash cans. Claimant responded with "Roger that" as he was putting on his work gloves. BD[Redacted] did not like Claimant's attitude during the exchange and asserted that he was being insubordinate. He then terminated Claimant from employment.

9. BD[Redacted] testified at the hearing in this matter and discussed the circumstances of Claimant's termination. He noted Claimant was working as a shuttle driver at the time of his termination. BD[Redacted] detailed that he asked Claimant to come up to the office to empty some trash. When BD[Redacted] asked Claimant to perform this task, Claimant replied "roger that" in a way that reportedly made BD[Redacted] feel like Claimant had an attitude. He noted that Claimant's response was very long and drawn out, like he was being sarcastic. The Employee Termination Notice specifies that, after BD[Redacted] gave Claimant instructions to perform a task, Claimant responded "with a very poor attitude that was disrespectful and insubordinate." BD[Redacted] then told Claimant to "quit it" with his attitude, and Claimant effectively replied that he would just go home. He stated Claimant could go home for good, and Claimant responded "ok." The confrontation led BD[Redacted] to believe that,

although Claimant was being terminated, he also appeared to be resigning his position. Claimant did not attempt to apologize or do anything else that would allow him to retain his position.

10. BD[Redacted] also mentioned that the incident was the third "write-up" Claimant had received during the week. As noted, Claimant was written-up because he waited to report his right elbow injury until the end of his shift. He also received a write-up because he was seen on his cellphone when operating a drop chute. The preceding factored into the decision to terminate Claimant. Although Claimant asserted at hearing that the task of emptying trash cans exceeded his work restrictions, the record is devoid of any work restrictions for Claimant on July 3, 2024. Claimant was ultimately terminated for insubordination and unsatisfactory job performance.

11. On July 4, 2024 Claimant requested information from CM[Redacted] about how to file a Workers' Compensation claim. He also reported "shooting pain" in his right elbow and planned to visit urgent care.

12. On July 4, 2024 Claimant visited AdventHealth Southmoor Emergency and Urgency Center. Claimant reported striking his elbow against metal and experiencing gradually worsening pain throughout the day. By the end of the day he had ongoing medial aspect right elbow pain with trace radiation down the forearm. An examination revealed mild tenderness of the medial aspect of the right elbow. Providers noted he could have had a mild elbow sprain or ligamentous injury, but there did not appear to be a "complete tear or disruption." An x-ray was "negative for acute bony abnormality." Claimant was released without any work restrictions. He was directed to follow-up with his personal care physician.

13. The record reflects that Claimant did not receive a list of at least four designated medical providers. Respondents have not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Claimant did not subsequently seek medical treatment for his right elbow symptoms until August 20, 2024 when he visited David W. Yamamoto, M.D.

14. On August 14, 2024 Claimant underwent a [Redacted, hereinafter CT] examination and physical. Claimant noted in a health history that he had no "bone, muscle, joint or nerve problems" and no "limited use of arm, hand, finger, leg, foot, toe." Additionally, under the section that elicited information about other health conditions, Claimant only listed an allergy to penicillin. Under his health history review, Claimant did not mention the July 1, 2024 accident. His physical examination was normal. Claimant ultimately satisfied CT[Redacted] standards for a 2-year certificate. He signed an attestation on August 14, 2024 stating that "the above information is accurate and complete." At hearing, Claimant acknowledged that he did not disclose his right elbow injury because he needed to pass the examination to earn an income.

15. On August 16, 2024 Claimant was offered employment with [Redacted, hereinafter HR]. When hired by HR[Redacted], no physician had imposed any written work-restrictions on Claimant's elbow. Claimant began work on August 19, 2024.

16. Claimant finally sought additional medical treatment on August 20, 2024 when he

visited David W. Yamamoto, M.D. with Peak to Peak Family Medicine. Claimant reported that he struck his right elbow on a steel brace while descending a ladder at work on July 1, 2024. Claimant continued to work, but by the end of his shift he had shooting pain down his right arm. Dr. Yamamoto diagnosed Claimant with "a classic case of lateral epicondylitis." He determined that objective findings were consistent with a work related mechanism of injury. Dr. Yamamoto assigned work restrictions of no lifting, repetitive lifting, carrying, or pushing/pulling with the right arm greater than two pounds.

17. Claimant reported the restrictions to HR[Redacted] and his employment was suspended. HR[Redacted] specified that Claimant could not perform "the duties for which he was hired." Claimant was ultimately terminated from HR[Redacted] on August 22, 2024.

18. Claimant received wages in the amount of $885.76 during the week of August 17-23, 2024 from HR[Redacted]. Respondents may offset the preceding amount if Claimant is entitled to receive wage loss benefits.

19. On August 23, 2024 Claimant underwent an MRI of his right elbow. The MRI revealed "tendonitis of the common extensor tendon origin with adjacent reactive edema consistent with bony stress reaction." The imaging also reflected "fluid within the substance of the common extensor tendon consistent with a partial thickness tear."

20. On October 17, 2024 Claimant underwent an Independent Medical Examination (IME) with Marc Steinmetz, M.D. Dr. Steinmetz reviewed Claimant's medical records and performed a physical examination. He concluded that the July 4, 2024 emergency room visit did not reveal any objective evidence that Claimant suffered a rateable or treatable injury to his right upper extremity while working on July 1, 2024. Claimant only reported medial right elbow tenderness and had full elbow function with no bruising, swelling or bleeding. Dr. Steinmetz summarized that Claimant did not sustain a work-related right elbow injury on July 1, 2024. Notably, Claimant presented to Dr. Steinmetz with lateral right elbow pain when he originally had medial elbow symptoms. Dr. Steinmetz commented that the MRI findings were not even on the same side of Claimant's right elbow as his original complaints and tenderness.

21. On October 23, 2024 Dr. Yamamoto issued a rebuttal report to Dr. Steinmetz' IME. He explained that, when Claimant reported injuring his funny bone and pointed to his olecranon, there was apparently a mistake since the olecranon is not the funny bone. Dr. Yamamoto remarked it would be difficult to strike "the medial or inner aspect of the elbow" when coming down a ladder inside a metal cage. He commented that he asked Claimant about sledgehammering after striking his right elbow on the enclosed elevator on July 1, 2024, and Claimant replied the activity was painful but he was able to do it. Dr. Yamamoto reasoned that the activity of sledgehammering was not incompatible with lateral epicondylar pain. In addressing the emergency room note from July 4, 2024 that Claimant's original complaints involved medial elbow tenderness, Dr. Yamamoto commented that the record could have been inaccurate. Dr. Yamamnoto concluded that, although Dr. Steinmetz discussed significant inconsistencies in Claimant's medical history, he did not find any inconsistencies other than the mention of abrasions on the forearm.

22. On October 24, 2024 Claimant visited Rudy Kovachevich, M.D. based on a

referral from Dr. Yamamoto. Dr. Kovachevich recounted that Claimant suffered a traumatic right elbow injury when he hit his posterior elbow region on a metal ladder. After performing a physical examination and reviewing Claimant's medical records, Dr. Kovachevich determined that Claimant exhibited evidence of traumatic lateral epicondylitis. He administered a right lateral epicondyle injection.

23. Claimant has established it is more probably true than not that he suffered a compensable right elbow injury during the course and scope of employment with Employer on July 1, 2024. Initially, Claimant testified that he injured his right elbow while descending a ladder. He specifically struck his right elbow on the metal safety cage surrounding the ladder. Claimant immediately experienced pain in his right elbow, with radiating symptoms down to his hand. Once Claimant descended the ladder, he was instructed to break up concrete with a handheld sledgehammer. While using the sledgehammer with his right arm for approximately 15-20 minutes, Claimant continued to suffer pain in his right elbow. At the end of his shift Claimant reported his right elbow injury to Employer's Safety Specialist CM[Redacted]. CM[Redacted] put Claimant in touch with RN Nesselrodt for a video/telehealth appointment. RN Nesselrodt noted that Claimant's injury occurred "earlier today" when he "was coming down a ladder and hit his right elbow on the metal cage." After the initial evaluation with RN Nesselrodt, Claimant was examined by CL[Redacted], who CM[Redacted] believed to be an EMT. Claimant testified that CL[Redacted] directed him to limit the use of his right upper extremity including lifting.

24. The medical records also reveal that Claimant sustained a right elbow injury while descending a ladder at work on July 1, 2024. On July 4, 2024 Claimant visited AdventHealth Southmoor Emergency and Urgency Center. Claimant reported striking his elbow against metal and experiencing gradually worsening pain throughout the day. By the end of his shift he had ongoing medial aspect right elbow pain with trace radiation down the forearm. Providers noted a possible mild elbow sprain or ligamentous injury. Claimant's next medical visit occurred on August 20, 2024 with Dr. Yamamoto. Claimant reported that he struck his right elbow on a steel brace while descending a ladder at work on July 1, 2024. Dr. Yamamoto diagnosed Claimant with "a classic case of lateral epicondylitis." He determined that objective findings were consistent with work related mechanism of injury. Dr. Yamamoto assigned work restrictions of no lifting, repetitive lifting, carrying, or pushing/pulling with the right arm greater than two pounds. Finally, Dr. Kovachevich recounted that Claimant suffered a traumatic right elbow injury when he hit his posterior elbow region on a metal ladder. After performing a physical examination and reviewing Claimant's medical records, Dr. Kovachevich also determined that Claimant exhibited evidence of traumatic lateral epicondylitis.

25. Despite the preceding medical records, Respondents assert Claimant did not suffer a compensable injury on July 1, 2024 because he provided inconsistent statements about the cause of his injury. Furthermore, after conducting an IME, Dr. Steinmetz concluded that the July 4, 2024 emergency room visit did not reveal any objective evidence that Claimant suffered a rateable or treatable injury to his right upper extremity while working on July 1, 2024. Claimant only reported medial right elbow tenderness and had full elbow function with no bruising, swelling or bleeding. Dr. Steinmetz summarized that Claimant did not sustain a work-related right elbow injury on July 1, 2024. Notably, Claimant presented to Dr. Steinmetz with lateral right elbow pain when he originally had medial elbow symptoms. Dr. Steinmetz commented

that the MRI findings were not even on the same side of Claimant's right elbow as his original complaints.

26. Although the record reflects minor inconsistencies in Claimant's account, he consistently maintained that he injured his right elbow area when he struck it on metal while descending an enclosed ladder at work on July 1, 2024. The bulk of the medical evidence also demonstrates that Claimant injured his right elbow area on July 1, 2024. Claimant reported his injury to CM[Redacted] at the end of his shift and was evaluated by RN Nesselrodt and CL[Redacted]. Moreover, the emergency room record from July 4, 2024 reflects that Claimant injured his right elbow at work and Dr. Yamamoto also reasoned that objective findings were consistent with a work-related mechanism of injury. The persuasive evidence thus supports a conclusion that Claimant suffered an injury that necessitated evaluation and medical care when he injured his right elbow area in the course and scope of employment. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable right elbow injury while working for Employer on July 1, 2024.

27. Claimant has proven it is more probably true than not that the right to select an ATP passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. The record reflects that Claimant did not receive a list of at least four designated medical providers. Respondents have not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him.

28. Claimant did not seek additional medical treatment after his July 4, 2024 emergency room visit until he saw Dr. Yamamoto at Peak to Peak Family Medicine on August 20, 2024. Claimant's actions reveal that he selected Dr. Yamamoto as his ATP. Dr. Yamamoto subsequently referred Claimant to Dr. Kovachevich for an evaluation. Claimant's medical treatment with ATP Dr. Yamamoto and any referrals, including Dr. Kovachevich, are thus authorized.

29. Claimant has demonstrated it is more probably true than not that he is entitled to receive reasonable, necessary and causally related medical benefits for his July 11, 2024 industrial injury. ATP Dr. Yamamoto diagnosed Claimant with "a classic case of lateral epicondylitis" as a result of his July 1, 2024 work injury. He determined that objective findings were consistent with a work related mechanism of injury. Dr. Yamamoto assigned work restrictions of no lifting, repetitive lifting, carrying, or pushing/pulling with the right arm greater than two pounds. An August 23, 2024 right elbow MRI revealed "tendonitis of the common extensor tendon origin with adjacent reactive edema consistent with bony stress reaction." The imaging also reflected "fluid within the substance of the common extensor tendon consistent with a partial thickness tear." Claimant's subsequent evaluation with Dr. Kovachevich revealed evidence of traumatic lateral epicondylitis. He administered a right lateral epicondyle injection. Claimant's medical treatment including medications, injections and diagnostic testing was reasonable, necessary and causally related to his July 1, 2024 work-related right elbow injury. Because he has not yet reached MMI, Claimant is entitled to receive additional reasonable, necessary and causally related medical care for his industrial injury.

30. Claimant has demonstrated it is more probably true than not that he is entitled to TTD benefits beginning July 1, 2024. Claimant's testimony and the medical records demonstrate that he was either unable to work or under restrictions that rendered him unable to perform his job duties and impaired his earning capacity. Notably, the record reveals that Claimant experienced worsening right elbow pain after the July 1, 2024 incident. On July 4, 2024 emergency room providers noted he possibly had a mild elbow sprain or ligamentous injury, but there did not appear to be a "complete tear or disruption." By August 20, 2024 ATP Dr. Yamamoto diagnosed Claimant with "a classic case of lateral epicondylitis" as a result of his July 1, 2024 work injury. He assigned work restrictions of no lifting, repetitive lifting, carrying, or pushing/pulling with the right arm greater than two pounds.

31. Claimant continues to be under medical care and has not reached Maximum Medical Improvement (MMI). He attempted to work for HR[Redacted], but was unable to perform his job duties because of his industrial injuries. Specifically, Claimant began working for HR[Redacted], on August 19, 2024. However, when he reported the restrictions assigned by Dr. Yamamoto on August 20, 2024 his employment was suspended. HR[Redacted],specified that Claimant could not perform "the duties for which he was hired." Claimant was ultimately terminated from HR[Redacted], on August 22, 2024. The record thus reflects that Claimant's 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. Accordingly, Claimant has proven that that he is entitled to receive TTD benefits from July 4, 2024 until terminated by statute. However, Claimant is not entitled to receive TTD benefits, but only Temporary Partial Disability (TPD) benefits, during the week of August 17, 2024 to August 23, 2024 because he earned wages in the amount of $885.76 from HR[Redacted],.

32. The record reveals that Employer terminated Claimant effective July 3, 2024. Notably, on July 3, 2024 BD[Redacted] asked Claimant to clean an office, including emptying the large and small trash cans. Claimant responded with "Roger that" as he was putting on his work gloves. BD[Redacted] did not like Claimant's attitude during the exchange and asserted that he was being insubordinate. He testified that Claimant's response was very long and drawn out, like he was being sarcastic. He then terminated Claimant from employment. The Employee Termination Notice specifies that, after BD[Redacted] gave Claimant instructions to perform a task, Claimant responded "with a very poor attitude that was disrespectful and insubordinate." BD[Redacted] also mentioned that the incident was the third "write-up" Claimant had received during the week. As noted, Claimant was written-up because he waited to report his right elbow injury until the end of his shift. He also received a write-up because he was seen on his cellphone when operating a drop chute. The preceding infractions factored into the decision to terminate Claimant.

33. Respondents have failed to prove it is more probably true than not that Claimant was responsible for his termination from employment under the termination statutes and is not precluded from receiving TTD benefits. Respondents have not established that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. Importantly, an employee is "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. Here, Claimant's termination was based on his "attitude" and insubordination when he failed to

clean an office area as directed by BD[Redacted]. However, in response to the request, Claimant merely responded with "Roger that" as he was putting on his work gloves. The allegations of an "attitude" and insubordination are vague and do not demonstrate that Claimant acted with deliberate intent to precipitate his termination. Moreover, Claimant's actions do not demonstrate that he exercised some control over his termination under the totality of the circumstances. The record reveals that Claimant did not precipitate his employment termination by volitional acts that he would reasonably expect to cause the loss of employment. He is thus not precluded from receiving TTD benefits subsequent to his July 3, 2024 termination from employment.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo.

App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

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

8. As found, Claimant has established by a preponderance of the evidence that he suffered a compensable right elbow injury during the course and scope of employment with Employer on July 1, 2024. Initially, Claimant testified that he injured his right elbow while descending a ladder. He specifically struck his right elbow on the metal safety cage surrounding the ladder. Claimant immediately experienced pain in his right elbow, with radiating symptoms down to his hand. Once Claimant descended the ladder, he was instructed to break up concrete with a handheld sledgehammer. While using the sledgehammer with his right arm for approximately 15-20 minutes, Claimant continued to suffer pain in his right elbow. At the end of his shift Claimant reported his right elbow injury to Employer's Safety Specialist CM[Redacted]. CM[Redacted] put Claimant in touch with RN Nesselrodt for a video/telehealth appointment. RN Nesselrodt noted that Claimant's injury occurred "earlier today" when he "was coming down a ladder and hit his right elbow on the metal cage." After the initial evaluation with RN Nesselrodt, Claimant was examined by CL[Redacted], who CM[Redacted] believed to be

an EMT. Claimant testified that CL[Redacted] directed him to limit the use of his right upper extremity including lifting.

9. As found, the medical records also reveal that Claimant sustained a right elbow injury while descending a ladder at work on July 1, 2024. On July 4, 2024 Claimant visited AdventHealth Southmoor Emergency and Urgency Center. Claimant reported striking his elbow against metal and experiencing gradually worsening pain throughout the day. By the end of his shift he had ongoing medial aspect right elbow pain with trace radiation down the forearm. Providers noted a possible mild elbow sprain or ligamentous injury. Claimant's next medical visit occurred on August 20, 2024 with Dr. Yamamoto. Claimant reported that he struck his right elbow on a steel brace while descending a ladder at work on July 1, 2024. Dr. Yamamoto diagnosed Claimant with "a classic case of lateral epicondylitis." He determined that objective findings were consistent with work related mechanism of injury. Dr. Yamamoto assigned work restrictions of no lifting, repetitive lifting, carrying, or pushing/pulling with the right arm greater than two pounds. Finally, Dr. Kovachevich recounted that Claimant suffered a traumatic right elbow injury when he hit his posterior elbow region on a metal ladder. After performing a physical examination and reviewing Claimant's medical records, Dr. Kovachevich also determined that Claimant exhibited evidence of traumatic lateral epicondylitis.

10. As found, despite the preceding medical records, Respondents assert Claimant did not suffer a compensable injury on July 1, 2024 because he provided inconsistent statements about the cause of his injury. Furthermore, after conducting an IME, Dr. Steinmetz concluded that the July 4, 2024 emergency room visit did not reveal any objective evidence that Claimant suffered a rateable or treatable injury to his right upper extremity while working on July 1, 2024. Claimant only reported medial right elbow tenderness and had full elbow function with no bruising, swelling or bleeding. Dr. Steinmetz summarized that Claimant did not sustain a work-related right elbow injury on July 1, 2024. Notably, Claimant presented to Dr. Steinmetz with lateral right elbow pain when he originally had medial elbow symptoms. Dr. Steinmetz commented that the MRI findings were not even on the same side of Claimant's right elbow as his original complaints.

11. As found, although the record reflects minor inconsistencies in Claimant's account, he consistently maintained that he injured his right elbow area when he struck it on metal while descending an enclosed ladder at work on July 1, 2024. The bulk of the medical evidence also demonstrates that Claimant injured his right elbow area on July 1, 2024. Claimant reported his injury to CM[Redacted] at the end of his shift and was evaluated by RN Nesselrodt and CL[Redacted]. Moreover, the emergency room record from July 4, 2024 reflects that Claimant injured his right elbow at work and Dr. Yamamoto also reasoned that objective findings were consistent with a work-related mechanism of injury. The persuasive evidence thus supports a conclusion that Claimant suffered an injury that necessitated evaluation and medical care when he injured his right elbow area in the course and scope of employment. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable right elbow injury while working for Employer on July 1, 2024.

Right of Selection/Authorized Treating Physician

12. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Off.,* 996 P.2d 228, 229 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires respondents to provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381, 383 (Colo. App. 2006).

13. The term "select," is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives." *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." *Williams v. Halliburton Energy Services,* WC 4-995-888-01 (ICAO, Oct. 28, 2016); *Loy v. Dillon Companies*, W.C. No. 4-972-625 (Feb. 19, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000).

14. Although §8-43-404(5)(a), C.R.S. grants employers the initial authority to select the ATP, in a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Indus. Claim Appeals Off,,* 797 P.2d 777, 781 (Colo. App. 1990). The purpose of the medical emergency exception is to allow an injured worker the ability to obtain immediate treatment without undergoing the delay inherent in notifying the employer and obtaining a referral or approval. *Delfosse v. Home Services Heroes, Inc.*, W.C. No. 5-075-625-001 (ICAO, Apr. 26, 2021). Once the emergency has ended the employer retains the right to designate the first "non-emergency" physician. *Bunch,* 148 P.3d at 384; *see* W.C.R.P. 8-3. Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* WC 3-969-031 (ICAO, June 29, 2005).

15. As found, Claimant has proven by a preponderance of the evidence that the right to select an ATP passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. The record reflects that Claimant did not receive a list of at least four designated medical providers. Respondents have not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him.

16. As found, Claimant did not seek additional medical treatment after his July 4,

2024 emergency room visit until he saw Dr. Yamamoto at Peak to Peak Family Medicine on August 20, 2024. Claimant's actions reveal that he selected Dr. Yamamoto as his ATP. Dr. Yamamoto subsequently referred Claimant to Dr. Kovachevich for an evaluation. Claimant's medical treatment with ATP Dr. Yamamoto and any referrals, including Dr. Kovachevich, are thus authorized.

Medical Benefits

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

18. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

19. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his July 11, 2024 industrial injury. ATP Dr. Yamamoto diagnosed Claimant with "a classic case of lateral epicondylitis" as a result of his July 1, 2024 work injury. He determined that objective findings were consistent with a work related mechanism of injury. Dr. Yamamoto assigned work restrictions of no lifting, repetitive lifting, carrying, or pushing/pulling with the right arm greater than two pounds. An August 23, 2024 right elbow MRI revealed "tendonitis of the common extensor tendon origin with adjacent reactive edema consistent with bony stress reaction." The imaging also reflected "fluid within the substance of the common extensor tendon consistent with a partial thickness tear." Claimant's subsequent evaluation with Dr. Kovachevich revealed evidence of traumatic lateral epicondylitis. He administered a right lateral epicondyle injection. Claimant's medical treatment including medications, injections and diagnostic testing was reasonable, necessary and causally related to his July 1, 2024 work-related right elbow injury. Because he has not yet reached MMI, Claimant is entitled to receive additional reasonable, necessary and causally related medical care for his industrial injury.

Temporary Total Disability Benefits/Responsible for Termination

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

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

22. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to TTD benefits beginning July 1, 2024. Claimant's testimony and the medical records demonstrate that he was either unable to work or under restrictions that rendered him

unable to perform his job duties and impaired his earning capacity. Notably, the record reveals that Claimant experienced worsening right elbow pain after the July 1, 2024 incident. On July 4, 2024 emergency room providers noted he possibly had a mild elbow sprain or ligamentous injury, but there did not appear to be a "complete tear or disruption." By August 20, 2024 ATP Dr. Yamamoto diagnosed Claimant with "a classic case of lateral epicondylitis" as a result of his July 1, 2024 work injury. He assigned work restrictions of no lifting, repetitive lifting, carrying, or pushing/pulling with the right arm greater than two pounds.

23. As found, Claimant continues to be under medical care and has not reached MMI. He attempted to work for HR[Redacted], but was unable to perform his job duties because of his industrial injuries. Specifically, Claimant began working for HR[Redacted] on August 19, 2024. However, when he reported the restrictions assigned by Dr. Yamamoto on August 20, 2024 his employment was suspended. HR[Redacted] specified that Claimant could not perform "the duties for which he was hired." Claimant was ultimately terminated from HR[Redacted] on August 22, 2024. The record thus reflects that Claimant's 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. Accordingly, Claimant has proven that that he is entitled to receive TTD benefits from July 4, 2024 until terminated by statute. However, Claimant is not entitled to receive TTD benefits, but TPD benefits, during the week of August 17, 2024 to August 23, 2024 because he earned wages in the amount of $885.76 from HR[Redacted].

24. As found, the record reveals that Employer terminated Claimant effective July 3, 2024. Notably, on July 3, 2024 BD[Redacted] asked Claimant to clean an office, including emptying the large and small trash cans. Claimant responded with "Roger that" as he was putting on his work gloves. BD[Redacted] did not like Claimant's attitude during the exchange and asserted that he was being insubordinate. He testified that Claimant's response was very long and drawn out, like he was being sarcastic. He then terminated Claimant from employment. The Employee Termination Notice specifies that, after BD[Redacted] gave Claimant instructions to perform a task, Claimant responded "with a very poor attitude that was disrespectful and insubordinate." BD[Redacted] also mentioned that the incident was the third "write-up" Claimant had received during the week. As noted, Claimant was written-up because he waited to report his right elbow injury until the end of his shift. He also received a write-up because he was seen on his cellphone when operating a drop chute. The preceding infractions factored into the decision to terminate Claimant.

25. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant was responsible for his termination from employment under the termination statutes and is not precluded from receiving TTD benefits. Respondents have not established that Claimant committed a volitional act, or exercised some control over his termination under the totality of the circumstances. Importantly, an employee is "responsible" if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. Here, Claimant's termination was based on his "attitude" and insubordination when he failed to clean an office area as directed by BD[Redacted]. However, in response to the request, Claimant merely responded with "Roger that" as he was putting on his work gloves. The allegations of an "attitude" and insubordination are vague and do not demonstrate that Claimant acted with deliberate intent to precipitate his termination. Moreover, Claimant's actions do not demonstrate that he exercised some control over his termination

under the totality of the circumstances. The record reveals that Claimant did not precipitate his employment termination by volitional acts that he would reasonably expect to cause the loss of employment. He is thus not precluded from receiving TTD benefits subsequent to his July 3, 2024 termination from employment.

ORDER

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

1. Claimant suffered a compensable right elbow injury while working for Employer on July 1, 2024.

2. The right of selection passed to Claimant. He selected Dr. Yamamoto as his ATP. Claimant's medical treatment with Dr. Yamamoto and any referrals, including Dr. Kovachevich, are thus authorized.

3. Claimant's medical treatment including medications, injections and diagnostic testing was reasonable, necessary and causally related to his July 1, 2024 work-related right elbow injury. Because he has not yet reached MMI, Claimant is entitled to receive additional reasonable, necessary and causally related medical care for his industrial injury.

4. Claimant earned an AWW of $2010.87.

5. Claimant shall receive TTD benefits from July 4, 2024 until terminated by statute. However, Claimant is not entitled to receive TTD benefits, but only TPD benefits, during the week of August 17, 2024 to August 23, 2024 because he earned wages in the amount of $885.76 from HR[Redacted].

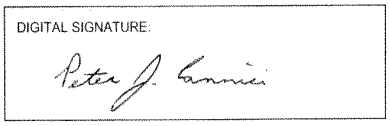
5. Claimant was not responsible for his July 3, 2024 termination from employment with Employer.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver

Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 26, 2024.



Peter J. Cannici
Administrative Law Judge
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1525 Sherman Street, 4th Floor
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-977-676-005

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the C5-6 anterior cervical discectomy and fusion ("ACDF") recommended by Sanjay Jatana, M.D., is reasonable, necessary, and related treatment for Claimant's work injury.

FINDINGS OF FACT

1. Claimant is a 68-year-old male who sustained an admitted industrial injury to his neck and back on November 25, 2014.

2. Claimant has undergone extensive care and treatment for the industrial injury, including a C6-7 anterior cervical discectomy and fusion with Doug Wong, M.D. in March 2015, an arthroscopic rotator cuff repair, subacromial decompression, and distal clavicle excision with Dr. Foulk in June 2015, and a pectoralis minor tenotomy and neurolysis to the brachial plexus including the upper, middle, and lower trunk of his supraclavicular nerve root with a partial first rib resection and amniotic membrane wrap in September 2018.

3. On February 26, 2019, the parties went to hearing before ALJ Felter on whether Claimant's claim should be reopened based on a change/worsening of his condition. ALJ Felter issued an order dated April 1, 2019 finding that Claimant's claim be reopened and that the September 2018 thoracic outlet syndrome surgery was reasonable, necessary, and related to Claimant's industrial injury.

4. Upon the reopening of his claim, Claimant treated with authorized treating physician ("ATP") Kristin D. Mason, M.D. Claimant first presented to Dr. Mason on October 17, 2019. Claimant reported pain between the neck and the shoulder, as well as into the scapulae and chest, along with numbness down the back of his left arm into his left thumb, index and middle fingers. Dr. Mason referred Claimant for physical therapy.

5. Claimant began physical therapy on November 6, 2019. Dr. Mason noted improvements in Claimant's reported pain levels, hypertonicity and strength.

6. On February 27, 2020, Dr. Mason noted Claimant was advancing in his activities with physical therapy, but continued to experience some paresthesias down the left arm into the thumb and first two fingers and increased pain when reaching over shoulder level or away from the body.

7. On May 7, 2020, Dr. Mason noted Claimant reported having less pain and improved functional status.

8. On July 6, 2020, Dr. Mason placed Claimant at maximum medical improvement ("MMI") and performed an impairment rating evaluation. Dr. Mason noted Claimant had responded well to combination of Norflex and physical therapy, which had gradually advanced his physical capabilities. Claimant reported some ongoing shoulder pain and ongoing numbness and pain in the left upper extremity. Dr. Mason recommended permanent work restrictions and maintenance care in the form of medication, follow-up visits for symptom monitoring, and physical therapy for exacerbations.

9. On August 28, 2020, Respondents filed a Final Admission of Liability ("FAL") admitting for a 17% whole person impairment rating and a 34% scheduled impairment rating and medical maintenance benefits, pursuant to Dr. Mason's July 6, 2020 medical report.

10. Claimant continued to see Dr. Mason. Claimant continued to complain of pain in the neck and left trapezius area, as well as left upper extremity symptoms. On March 11, 2021, Dr. Mason noted that, although Claimant had completed another round of physical therapy, there were still some large trigger points that were tender in the trapezius on the left side.

11. On June 14, 2021, Dr. Mason noted Claimant "always has left-sided neck pain and left scapular area pain. He does do his home exercise program diligently but feels that his myofascial pain is somewhat worse." Cl. Ex. 7, p. 97. She ordered additional physical therapy sessions.

12. On September 13, 2021, Dr. Mason noted Claimant was having pain on left side of his neck radiating into the left arm to his wrist. She noted Claimant was at risk for adjacent segment issues as he had an ACDF at C6-7 six years prior. Dr. Mason ordered a repeat MRI of the cervical spine and updated x-rays with possible follow up with Dr. Wong.

13. On October 7, 2021, Dr. Mason noted x-rays showed no instability with a solid fusion at C6-7. The cervical MRI demonstrated small central disc protrusions at C3-4 and C4-5 with mild impingement on the thecal sac but not the spinal cord. At C5-6 there was some mild left foraminal stenosis which Dr. Mason noted may account for Claimant's symptoms. She also noted moderate bilateral C3-4 and mild bilateral C4-5 stenosis. Dr. Mason referred Claimant to Dr. Wong to follow-up on the new imaging.

14. Claimant saw Dr. Wong on October 26, 2021, who reviewed the imaging and felt surgery was not warranted at that time.

15. On November 19, 2021, Dr. Mason noted Claimant underwent an EMG of the left upper extremity. Her assessment at this evaluation was status post C6-7 ACDF with C6 radiculopathy with some mild foraminal narrowing on the left at C5-6. Dr. Mason referred Claimant to Nicholas K. Olsen, D.O. for left C5-6 and C6-7 transforaminal epidural steroid injections ("ESI").

16. On January 24, 2022, Dr. Mason noted the recommended ESIs were put on hold for Claimant to focus on treating a recently diagnosed unrelated hernia and bladder stone. Her assessment was status post ACDF at C6-7 with some adjacent segment disease at C5-6.

17. On April 4, 2022, Dr. Olsen performed a left C5-6 transforaminal ESI. Claimant reported 80% relief of targeted pain, but continued pain down his medial forearm, shoulder pain, and neck pain.

18. Claimant underwent a repeat left C5-6 transforaminal ESI on October 12, 2022, performed by Dr. Robert Kawasaki. Claimant reported 70% overall benefit from the injection.

19. On May 22, 2023, Dr. Mason noted Claimant experienced the gradual return of his left upper extremity symptoms.

20. Dr. Olsen performed a repeat left C5-6 transforaminal ESI on October 24, 2023. On November 18, 2023, Dr. Mason noted Claimant had no enduring benefit from this injection. She ordered repeat imaging.

21. Claimant underwent a repeat cervical MRI on November 28, 2023, which was compared to an April 13, 2018 cervical MRI. The radiologist's impression was: unchanged anterior C6-7 fusion and increase moderate degenerative changes including moderate C3-4 and moderate C4-5 central canal stenosis and multilevel severe neural foraminal narrowing.

22. On December 11, 2023, Dr. Mason reviewed the November 28, 2023 MRI, noting it showed some increased left-sided stenosis at a moderate level at both C5-6 and C6-7. Claimant was reporting fairly constant left-sided neck pain. Dr. Mason discussed the option of a repeat injection or surgery. Claimant elected to proceed with another ESI.

23. On January 9, 2024 Claimant underwent left C5-6 and C6-7 transforaminal ESIs performed by Dr. Olsen.

24. On January 22, 2024, Claimant reported to Dr. Mason experiencing very brief initial relief from the most recent ESIs. Dr. Mason noted the injections had become ineffective in managing Claimant's radicular symptoms and referred Claimant to Sanjay Jatana, M.D. for a surgical consultation.

25. Claimant presented to Dr. Jatana on March 11, 2024. Dr. Jatana noted Claimant presented with recurrent symptoms of upper extremity radiculopathy on the left side, involving the neck left trapezial region and left upper extremity radiculitis described to be in the C6 or possible C7 distribution, mostly involving thumb index and middle finger. Claimant reported 4-7/10 pain on a daily basis with flexion-extension rotation causing

left-sided neck, trapezius and interscapular pain. Dr. Jatana performed a physical examination and noted he reviewed Claimant's diagnostic studies.

26. Dr. Jatana recommended Claimant undergo a C5-6 ACDF, stating:

> Based on the consultation today, with the translator present, it appears that he has tried nonsurgical treatment with respect to injections. Treatment options could include an anterior cervical diskectomy and fusion at C5-6. This will likely address his left upper extremity radiculopathy based on the injections that he has had done recently.
>
> The biggest problem with addressing just C5-6 is that he has spondylolisthesis present at C4-5 degenerative changes at C3-4 and these levels certainly could be exacerbated by extending the fusion to the C5-6 level. **The other option, however, of doing an anterior cervical diskectomy and fusion from C3-C6 appears too extensive in my opinion.**
>
> He does not meet the criteria for arthroplasty. In my opinion based on his axial and mechanical symptoms foraminotomy would be of limited benefit. **He understands all this and overall would favor just addressing the C5-6 level** and if he does develop problems in the future to deal with C3-C5.

Cl. Ex. 9, p. 203.

27. On March 18, 2024, Dr. Mason noted Claimant has C5-6 degenerative disk disease with radiculopathy, C4-5 listhesis, and a central disk at C3-4. She agreed with Dr. Jatana's recommendation for surgery and opined the surgery would help Claimant.

28. Dr. Jatana requested authorization for a C5-6 ACDF on May 22, 2024.

29. On May 30, 2024, Dr. Mason noted Claimant had received cardiac clearance for the recommended surgery. Dr. Mason noted Claimant continued to do his home exercises daily and that he continued to have C6-pattern radiculopathy symptoms. Her assessment was status post C6-7 ACDF with junctional syndrome at C5-6 with left-sided foraminal stenosis.

30. On August 1, 2024, Neil Brown, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. As part of the IME, Dr. Brown reviewed Claimant's medical records dated March 11, 2021 through May 30, 2024. Dr. Brown opined that Claimant's worsening symptomatology is most likely degenerative in nature and unrelated to his November 25, 2014 work injury. He noted there was a small risk of symptomatic adjacent level degeneration related to Claimant's prior C6-7 ACDF, but that he could not relate this to Claimant's prior surgery, but rather to the aging and degenerative process. Dr. Brown explained:

> He underwent an anterior cervical discectomy and fusion at the C6-7 level on February 23, 2015, with Dr. David Wong. There is unknown risk of radiological adjacent level degeneration estimated to be between 2 and 4%/year. Approximately half of these patients become symptomatic. Consequently, the annual risk of symptomatic adjacent level disease is estimated at 1.5%/year. On this basis, his risk of developing adjacent level disease at the C5-6 level in the last 9 years would be estimated at 13.4% which is not even close to being medically probable (greater than 50%). Although the risk in any individual cannot be accurately ascertained, in terms of a population undergoing cervical fusions and developing adjacent level disease, these are the best estimates that we have. As consequence, would (*sic*) consider a C5-6 anterior cervical discectomy and fusion procedure to be unrelated to the original injury, but rather secondary to the normal aging and degenerative process.

R. Ex. A, p. 8.

31. On August 22, 2024, Claimant reported to Dr. Mason 8/10 pain. Dr. Mason noted Claimant's condition was worsening. She had yet to review Dr. Mason's IME report. Her assessment was status post C6-7 ACDF with development of degenerative disk disease at C5-6 with left-sided foraminal stenosis causing left C6 radiculopathy.

32. On September 23, 2024, Dr. Mason issued a letter in response to Dr. Brown's IME report, stating:

> Dr. Brown expressed the opinion that the risk of developing adjacent level disease at C5-6 over a nine-year period of time would be estimated at 13.4%. He stated that was not even close to being medically probable. Please note, in assessing risk, that means that 13.4% of patients will develop junctional syndrome, and for the ones who develop it, such as [Claimant], their chances of developing it become 100%, While the risk is small, it is real. Looking at various published studies in the medical literature, Schuermans, et al. in 2022 found the risk to be 9.7% at five years. Other studies have also estimated rates over various time periods. The average time to the development of junctional disease is 92.4 months, which is between seven and eight years. This is from a study by Bydon, et al, published in 2014. There are multiple studies in the literature that discuss adjacent segment disease. [Claimant] doesn't have any other reason to develop accelerated degeneration at the adjacent level, and I am puzzled as to how Dr. Brown came to his conclusions. Dr. Jatana, whom I had consulted in [Claimant's] case, has a very good reputation in the local area and I trust his judgment implicitly, and I think his analysis of causation is correct. The patient needs the surgery based on his current symptomatology of advancing C6 radiculopathy, I do feel it is related to his

> prior fusion from his original work comp date of injury of 11/25/2014. Please reconsider the decision regarding the surgery.

Cl. Ex. 7, p. 175.

33. On September 30, 2024, Dr. Mason noted Claimant's continued C6 motor and sensory findings on the left, as well as tightness in the trapezius bilaterally. Regarding Dr. Brown's IME report she stated, "I have reviewed the RIME. The literature is quite clear on adjacent-segment disease, and Dr. Brown appeared to have ignored that. Since all of [Claimant's] treaters agree, it is particularly striking that Dr. Brown, having seen the patient once, came to that conclusion." Cl. Ex. 7, p. 176.

34. On October 13, 2024, Dr. Brown issued an addendum IME report after reviewing Dr. Mason's letter dated September 23, 2024. Dr. Brown noted there is extensive medical literature regarding adjacent level disease and provided his opinion regarding the study (Schuermans, et. al.) Dr. Mason relied upon. He wrote, "Dr. Mason alleges that the only reason that the claimant developed adjacent level degeneration was that he underwent a fusion procedure which is simply not consistent with the known history of degenerative disc disease, which is fairly diffuse and multi segmental, typically occurring at levels with the most motion." Dr. Brown stated that his original opinions remained the same. R. Ex. A, pp. 10 - 11.

35. On October 21, 2024, Dr. Mason noted Claimant's condition and reiterated that she strongly disagrees with Dr. Brown's findings.

36. Claimant credibly testified at hearing. Claimant testified about the extensive treatment he has undergone since 2014. He testified that his neck and left upper extremity symptoms have worsened over the last five years. Claimant testified that, on a daily basis, he wears a brace around his mid-section and left arm to help support his upper extremity, as recommended by Dr. Mason. Claimant testified that his left arm strength has weakened over the last five years, with his left arm feeling tired and heavy. Claimant testified he experiences weakness and numbness down his left upper extremity and into his upper back and neck. Claimant testified that these symptoms have been present since 2014, but they have increasingly worsened over time. Claimant testified that prior to his work injury, he worked a heavy-duty job and never had any neck or left upper extremity symptoms. Claimant testified he was never limited in his capacity to perform his heavy-duty job prior to this work injury. Claimant testified that he wants this recommended surgery because he wants to get better and is tired of dealing with the pain and symptoms.

37. The ALJ finds the opinion of treating physicians Drs. Mason and Jatana, as supported by the medical records and Claimant's credible testimony, more credible and persuasive than the opinion of Dr. Brown.

38. Claimant proved it is more likely than not the surgery recommended by Dr. Jatana is causally related to Claimant's November 25, 2014 industrial injury and reasonably necessary to cure and relieve its effects.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical Treatment

Respondents are liable for medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-

101(1)(a), C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office*, 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.*, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

Respondents do not dispute the reasonableness or necessity of the recommended surgery. Respondents instead contend the need for surgery is related to age-related degeneration and thus not causally related to the work injury. The ALJ is not persuaded.

Claimant credibly testified that he has experienced ongoing symptoms in his neck and left upper extremity since the work injury, which have progressively worsened over the last five years. The records demonstrate that, while Claimant has experienced periods of improvement, Claimant's symptoms and condition have progressively worsened. Claimant has undergone extensive treatment, including physical therapy and multiple injections in the last five years, which have ceased to effectively relieve Claimant's symptoms. Both Dr. Brown and Dr. Mason addressed medical literature regarding the likelihood of developing symptomatic adjacent level disease. While Dr. Brown notes that, based on such literature, the risk is less than 50 percent, he acknowledges that determining the particular risk in any individual cannot be accurately ascertained.

As Claimant's ATP, Dr. Mason is familiar with the course of Claimant's treatment and condition over the last several years and has credibly opined, based on objective findings and recommendation of orthopedic surgeon Dr. Jatana, the recommended surgery is reasonable, necessary and causally related to the work injury. While some age-related degeneration would be expected, the ALJ is persuaded Claimant's work injury and prior C6-7 ACDF has caused some accelerated degeneration and Claimant's current need for surgery. Based on the totality of the evidence, Claimant has established it is more probable than not the recommended surgery is causally related to his November 25, 2014 industrial injury and is reasonably necessary to cure and relieve its effects.

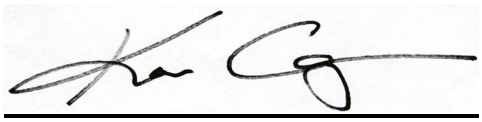
ORDER

1. Claimant proved by a preponderance of the evidence that the C5-6 anterior cervical discectomy and fusion recommended by Dr. Jatana is reasonable, necessary, and related to his admitted industrial injury. Respondents shall pay for the treatment subject to the Division of Workers' Compensation Medical 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 27, 2024



Kara R. Cayce
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-247-819-002

ISSUE

- Whether Claimant has proven by a preponderance of the evidence that the C5-C6-7 Anterior Cervical Discectomy and Fusion ("ACDF") proposed by Dr. Ghiselli is reasonable, necessary, and related to the admitted work injury from August 6, 2023?

FINDINGS OF FACT

1. Claimant was injured on August 6, 2023, while working for the Respondents. She tripped over a mop bucket and fell. She had an outstretched arm, left, and hit a table with her elbow. She then continued to fall to the floor, hitting her chest. As a result, Claimant had problems using her left arm and issues with pain in her cervical spine. See Claimant's Exhibit packet 8, page 52 (August 7, 2023, report from Dr. Shell).

2. Immediately, the injury was reported and the Claimant sought emergent medical care for the symptoms she began to experience directly after the fall. [Redacted, hereinafter CD] was reporting neck pain, left shoulder pain and left arm pain, all on the left side into her shoulder, down the arm and into her hand. These symptoms persisted and the next day was seen by San Luis Valley Occupational medicine.

3. Claimant began treatment with an Authorized Treatment Provider, Tasha Alexis, on August 7, 2023. At the initial visit, Claimant was noted to have pain in her left shoulder and cervical spine. Claimant's exhibit 8, page 52. She was noted as having difficulty with using her shoulder and some issues with movement in her cervical spine. See Claimant's exhibit 8, page 52.

4. The initial diagnosis was a sprain of her ligaments in her cervical spine. In addition, he noted a "Strain of the musc/tend the rotator cuff of the left shoulder". Claimant's exhibit 8, Page 53. Claimant was then referred to Dr. Shell for further treatment.

5. During her visits with Dr. Shell, she complained of shoulder and arm symptoms, and cervical spine pain. Dr. Shell also documented CD[Redacted] headache that starts at the base of the skill at about the C7 region and radiates to the top of the head and occasionally to behind the eyes and the forehead. Turning the head to the left increases neck and headache pain.

6. Physical therapy was attempted, but stopped due to pain, and after that an MRI of the cervical spine was performed on August 21, 2023, showing a left paracentral disc protrusion at C5-6, mild deformity of the anterior cord, mild bilateral neural foraminal narrowing. Claimant's Exhibit 8, Bates 58.

7. CD[Redacted] was then referred to Dr. Gary Ghiselli, for evaluation of the cervical spine. Dr. Ghiselli noted the degenerative changes on MRI at both C5-6 and C6-7 where he diagnosed her with cervical myelopathy and cervical stenosis of the spinal canal. At that exam, the neck pain was greater on the left than the right that radiates into headaches as well as down into the interscapular, parascapular and midback region. Pain also radiates down the left arm. According to Dr. Ghiselli, "This all stems from a work injury she sustained on 8/6/2023." Claimant's Exhibit 5, Bates 21.

8. On June 4, 2024, CD[Redacted] followed up with Dr. Ghiselli and CD[Redacted] was still reporting significant symptoms into her neck and left greater than right upper extremity that was significantly disabling. Dr. Ghiselli opined at that time that an anterior cervical diskectomy and fusion at C5-6 and C6-7 should address CD[Redacted] left upper extremity complaints as well as a portion of the neck pain. A request for surgery was submitted. Claimant's Exhibit 5, Bates 33.

9. On October 2, 2023, CD[Redacted] was seen by Dr. Chen at Respondent's request for an Independent Medical Examination. In that report, Dr. Chen reviews less than a handful of medical records and responds to various interrogatories propounded upon him by Respondents' counsel. He opines that the current complaints do not appear to be related to her fall, that the need for treatment to the cervical spine is related to pre-existing conditions, and that there is no evidence they were either made temporarily or permanently worse. Respondents' Exhibit E.

10. Dr. Shell testified that CD[Redacted] showed findings objectively on exam and on MRI that were consistent with a disc herniation at C5-6 and that while there were pre-existing changes at C5-6 and C6- 7, CD[Redacted] hadn't had any prior injuries, treatment, or symptoms in those body parts at any time prior to her fall and that they were more likely exacerbated by the fall necessitating the surgery recommended by Dr. Ghiselli. Shell Deposition Pgs. 16-17.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must

prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997), *cert. denied* September 15, 1997. The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." Section 8-40-201(1). Workers' compensation benefits are only payable if an accident results in a compensable "injury." *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016). The fact that the employer provides treatment after an employee reports symptoms does not automatically establish a compensable injury. The claimant must prove the symptoms and need for treatment were proximately caused by their work. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Madonna v. Walmart*, W.C. No. 4-997-641-02 (March 21, 2017).

Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment. *E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

The ALJ concludes that Claimant proved she suffered a compensable injury to her neck resulting in the need for the surgery proposed by Dr. Ghiselli. I am more persuaded by the opinions of Dr. Shell and Dr. Ghiselli that the need for surgery to the cervical spine is due to the compensable work injury than the competing opinion from Dr. Chen that the need for surgery is not due to the admitted work injury.

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ORDER

It is therefore ordered that:

1. The request for the surgery made by Dr. Ghiselli is granted as reasonable, necessary and related to the admitted work related injury.

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

DATED: December 17, 2024

/s/ Michael A. Perales

Administrative Law Judge

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 27(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-267-002-002

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that she suffered an injury to her arms (specifically scratches and wounds) arising out of and in the course and scope of her employment with Employer?

On August 29, 2024 PALJ Marcus Zarlengo issued a Prehearing Order that included the following: "Claimant clarified that the only body parts and conditions for which she is seeking benefits under the claim are for scratches and wounds to both arms. Claimant agreed and stipulated that she is not seeking benefits for any psychological injury or mental health condition in connection with this claim."

In addition, PALJ Zarlengo specifically ordered the following: "The court accepts and hereby approves as an order of the court the stipulation of the parties that Claimant is not seeking benefits under the claim for psychological or other mental health related conditions."

FINDINGS OF FACT

The ALJ has considered all evidence and testimony presented at hearing and makes the following findings of fact.

1. On October 5, 2023, Employer assigned Claimant to a position with Employer's client [Redacted, hereinafter AD]. At that time, Claimant was assigned to the position of extract worker. On October 9, 2023, Claimant was moved to a different position with Employer's client, specifically assembling boxes. Claimant's work schedule was four, ten hour shifts.

2. On October 17, 20231, [Redacted, hereinafter VG], a recruiter with Employer sent an email to Claimant asking how the position was going. Claimant responded via email on that same date and indicated that she was not pleased with the assignment. Specifically, Claimant referenced a general lack of training and supervision in her position. She requested the opportunity to switch to a position on the evening shift. Claimant's October 17, 2023 email did not address any injury to Claimant's arms.

3. Due to an attendance related issue, on October 19, 2023, Claimant was released from her assignment with Employer's client. Claimant was informed by Employer of her release on that same date.

[1] October 17, 2023 **was a** Tuesday.

4. On October 20, 2023, Claimant sent an email to [Redacted, hereinafter BP], Talent Agent with Employer. Claimant again noted her displeasure with her time with the client. Claimant requested reimbursement for shoes. However, Claimant did not indicate that her arms were injured while working for the client.

5. [Redacted, hereinafter KN], Fort Collins Branch Market Manager with Employer testified at the hearing. KN[Redacted] testified that Employer first learned of Claimant's alleged work injury in February 2024. Employer learned of Claimant's allegations when they received notice of a small claims court proceeding.

6. Upon learning of Claimant's alleged work injury, Employer prepared an Employer's First Report of Injury. That document was prepared by BP[Redacted] on February 12, 2024. The date of injury was identified as October 17, 2023, and the body parts identified were Claimant's upper extremities.

7. Thereafter, on March 14, 2024, Claimant was seen by her authorized treating provider (ATP) Dr. Kevin O'Toole. At that time, Claimant reported that due to the work activity of assembling boxes, she suffered scrapes on her bilateral forearms. Claimant also reported that these scratches "healed after just a few days." Dr. O'Toole opined that Claimant did not suffer a work related injury[2].

8. At the request of Respondents, Dr. Lawrence Lesnak performed a medical records review in this matter. In a report dated October 28, 2024, Dr. Lesnak opined that Claimant did not suffer an injury that necessitated medical treatment Specifically, Dr. Lesnak noted that Claimant herself reported to Dr. O'Toole that the scratches on her arms resolved within days. Dr. Lesnak further opined "although there may have been some type of "incident" that involved [Redacted, hereinafter HR] during her work activities ... , there is no medical evidence to support that she sustained any type of injuries or developed any type of medical diagnoses that would have [In] any way required any type of medical care".

9. The ALJ credits the medical records, the testimony of KN[Redacted], and the opinions of Dr. Lesnak, and finds that Claimant has failed to demonstrate that it is more likely than not that she suffered an injury arising out of or in the course and scope of her employment with employer. The ALJ specifically credits Dr. Lesnak's opinion that even if Claimant did suffer an "incident" in the form of scrapes on her arms, those scrapes did not require or necessitate medical treatment.

[2] Dr. O'Toole specifically made reference to the issue of "mental impairments". Pursuant to PALJ Zarlengo's prehearing order and the stipulation contained therein, the ALJ reiterates here that "psychological or other mental heatth related conditions" are not at issue in this matter.

CONCLUSIONS OF LAW

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

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

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

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate **cause of the disability** or **need for treatment.** *H* & *H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. **1990)(emphasis added);** *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." *H* & *H Warehouse v. Vicory, supra.*

5. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that she suffered an injury arising out of an and the course and scope of her employment with Employer. As found, the Claimant's arm scrapes (that arose during her employment with Employer's client), resolved without medical treatment. Therefore, there is no compensable work injury that caused a disability or resulted in any need for medical treatment. As found, the medical records, the testimony of KN[Redacted], and the opinions of Dr. Lesnak are credible and persuasive.

ORDER

It is therefore ordered that Claimant's workers' compensation claim is denied and dismissed.

Dated December 30, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that the settlement in this matter should be reopened pursuant to Section 8-43-204, C.R.S., due to fraud or mutual mistake of a material fact?

FINDINGS OF FACT

The ALJ has considered all evidence and testimony admitted at the hearing and makes the following findings of fact:

1. Claimant reported an alleged work injury to Employer in 2023.

2. On July 26, 2023, Employer prepared and filed a First Report of Injury. The date of injury was identified as July 18, 2023.

3. On August 29, 2023, attorney [Redacted, hereinafter EN] entered his appearance on behalf of Claimant.

4. On August 30, 2023, Claimant filed a Worker's Claim for Compensation. In that document, the date of injury was identified July 18, 2023.

5. On August 31, 2023, Respondents filed a Notice of Contest for further investigation. Although they had denied the claim pending further investigation, Respondents authorized conservative medical treatment for Claimant.

6. On September 12, 202, Employer terminated Claimant's employment. Claimant testified that following the termination of his employment, he received unemployment insurance benefits.

7. On September 26, 2023, Claimant was seen by Dr. Scott Primack at Physical Medicine of the Rockies. In a pre-appointment questionnaire, Claimant was asked to identify any symptoms he had experienced in the last six months. Claimant checked boxes on the questionnaire to indicate he had been experiencing "joint pain, stiffness, joint swelling, muscle weakness, back pain, and loss of motion." Claimant also indicated he was experiencing symptoms of "depression, anxiety/excessive stress, memory loss/confusion/cloudiness, sleep disorder/insomnia, headaches."

8. On that same date, Dr. Primack administered a psychosocial questionnaire. Dr. Primack noted that the results placed Claimant in the "distressed depressed" category. Dr. Primack diagnosed Claimant with depression with

somatization. In the medical record of that date Dr. Primack stated that he "believe(d] strongly that counseling will be necessary".

9. Between September 13, 2023, and November 22, 2023, Respondents exchanged records with Claimant that included the claim and employment files and medical records. Specifically, the medical record for Claimant's September 26, 2023 appointment with Dr. Primack was exchanged on October 19, 2023.

10. Also in 2023, the parties entered into settlement negotiations, and on November 17, 2023, Claimant and his attorney signed the Workers' Compensation Claim Settlement Agreement.

11. Paragraph 4 of the settlement agreement states "The parties stipulate and agree that this claim will never be reopened except on the grounds of fraud or mutual mistake of material fact."

12. In addition, paragraph 6 of the settlement agreement states:

> Claimant realizes that there may be unknown injuries, conditions, diseases or disabilities as a consequence of those alleged injuries or occupational diseases, including the possibility of worsening of the conditions. In return for the money paid or other consideration provided in this settlement, Claimant rejects, waives and FOREVER gives up the right to make any kind of claim for workers' compensation benefits against Respondents for any such unknown injuries, conditions, diseases or disabilities resulting from the injuries or occupational diseases, whether or not admitted, that are the subject of this settlement. The Claimant and Respondents agree that this settlement, when approved by the Division of Workers' Compensation or by an administrative law judge from the Office of Administrative Courts, ends FOREVER the Claimant's right to receive any further workers' compensation money and benefits even if the Claimant later feels that Claimant made a mistake in settling this matter or later regrets having settled. (emphasis in the original).

13. Paragraph 7 of the settlement agreement states, in pertinent part, "Claimant is agreeing to this settlement of Claimant's own free will, without force, pressure or coercion from anyone."

14. At the time that he signed the settlement agreement, Claimant also signed a Choice of Settlement Advisement. On that document, Claimant checked the box for the statement: "I have been advised of my rights by my attorney regarding settlement and am requesting immediate approval of the settlement agreement."

15. On November 27, 2023, Paul Tauriello, Director of the Division of Workers' Compensation, issued a Settlement Order approving the parties' settlement agreement.

16. On December 8, 2023, Respondents issued the settlement payment to Claimant via check. That check was mailed to Claimant at his attorney's address.

17. On December 22, 2023, the settlement check was cashed by Claimant's attorney.

18. On February 8, 2024, Claimant was seen by Dr. Andrew Lampley for psychiatric treatment. At that time, Claimant reported that he believed that he was bipolar. Dr. Lampley noted that Claimant "endorse[d] acute on chronic worsening depression and anxiety" related to arguing with family, a recent break-up, and unemployment. Claimant also reported that since a young age he had experienced anxiety, depression, and manic episodes. Claimant further reported that he had previously been diagnosed with generalized anxiety disorder.

19. Due to the current matter, the parties engaged in discovery. In Claimant's responses to interrogatories, he stated that he believes that the settlement agreement should be reopened on the basis of fraud because:

> Respondent created a situation in which claimant was harassed, injured, discriminated against as well as terminated. Respondent specifically did not respond to accepting liability within 20 days and is considered outside of good faith. Respondent did not allow insurance company to investigate for months. Respondent made fraudulent statements to unemployment with the sole purpose of cutting off any sort of income. Without any end in sight claimant was forced to sign a settlement agreement and was not given the proper 21 days to evaluate this situation. This is fraud by inducement.

20. Also in Claimant's responses to interrogatories, he supported hls argument regarding reopening due to mutual mistake of a material fact as "[tlhis situation triggered claimants first recorded manic episode. (Claimant was later diagnosed as bipolar.) Claimant is not blaming respondent for his condition, but since the event he has had several months long panic attacks and manic episodes. Claimant was diagnosed with [post traumatic stress disorder]."

21. During his testimony, Claimant sought to argue the merits of his alleged work related injury and subsequent events. However, and as noted above, the sole issue before the ALJ is whether the settelment should be reopened.

22. As the ALJ understands Claimant's assertion of fraud in the inducement, Claimant believes that Respondents manipulated him into signing the settlement agreement. In support of this assertion, Claimant argues that Respondents put him in a position where he was "forced" to sign the settlement agreement without having twenty-one days to review the settlement agreement b ecause Respondents made false

representations to unemployment for the purpose of limiting Claimant's income. The ALJ does not find Claimant's assertions to be persuasive. The ALJ finds that Claimant has not presented any persuasive evidence to support his contention that Respondents made false statements to an unemployment office.

23. With regard to Claimant's assertion of mutual mistake, the ALJ understands Claimant's argument to be that at the time the parties entered into the settlement agreement, Claimant was suffering from unknown mental health diagnoses. The ALJ does not find this assertion to be persuasive.

24. Claimant was seen by Dr. Scott Primack on September 26, 2023. Claimant signed the settlement agreement on November 17, 2023, which was almost two months after Dr. Primack diagnosed Claimant with depression with somatization.

25. When Claimant was seen by Dr. Lampley in early 2024, Claimant did not attribute his mental health diagnoses to an alleged July 18, 2023, work injury. Rather, Claimant attributed his depression and anxiety to familial stressors, a recent break up, and unemployment. The ALJ finds that none of these factors are related to Claimant's work-injury. and are therefore not material to the settlement agreement.

26. Claimant has failed to show that there was a mutual mistake of material fact relating to a mental health diagnosis as both parties were aware of the prior diagnosis and treatment recommendations from Dr. Primack before Claimant voluntarily chose to settle the claim.

27. Claimant also asserts that Respondents "maliciously" delayed issuing the settlement proceeds. The ALJ notes that Respondents issued the settlement on December 8, 2023. The ALJ finds that this was timely. Any delay that may have occurred appears to be in the time in which Claimant's counsel cashed the check and ultimately forwarded monies to Claimant. Furthermore, even if Respondents were late in Issuing the payment (which they were not) the payment was made after the parties signed the settlement agreement at issue. Thus, the date the payment was issued could not constitute a false representation intended to "induce" Claimant into signing the agreement.

28. Based upon the foregoing, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the settlement in this matter should be reopened on the basis of fraud or mutual mistake of a material fact.

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. Section 8-43-204(1), C.R.S, provides that a settlement "shall not be subject to being reopened under any provisions of articles 40 to 47 of this title other than on the ground of fraud or mutual mistake of material fact." The party seeking to reopen a settlement agreement that was made in accordance with Section 8-43-204(1), C.R.S. bears the burden of proving the existence of either fraud or mutual mistake of material fact. *Matus v. /CAO,* 18CAO675 1, 8-9 (Colo. App. 2019).

Fraud

5. To reopen a settled claim on the basis of "fraud," a claimant must prove that the respondents made false representations which the claimant relied upon to settle the claim. Section 8-43-303(1), C.R.S., *Trimble v. City and County* of *Denver,* 697 P.2d 716 (Colo. 1985). In particular, a claimant must prove: (1) a false representation of material fact or a concealment of a material fact which should in good conscience be disclosed; (2) knowledge on the part of the party making the representation that it is false, or indifference to that issue; (3) ignorance of the true facts by the person to whom the representations are made; (4) that the party making the representation or concealing a fact does so with the intent to induce action on the part of the other party; and (5) the party to whom the representation or concealment is directed is damaged. *Morrison v. Goodspeed,* 100 Colo. 470, 60 P.2d 458 (1937); *Beeson v. Albertson's Inc.,* W.C. No. 3-968-056 (April 30, 1996); *Hickman v. Lebouf, Lamb, Leiby, & Macrea & Royal Indemnity Company,* W.C. No. 4-441-053 (ICAO, Jan. 15, 2004).

6. While a claimant is not required to plead an allegation of fraud with the specificity required under C.R.C.P Rule 9(b) *(See Stough v. State* of *Colorado Department of Revenue,* W.C. Nos. 4-880-583 and 5-231-380 (ICAO, 2024)), a claimant still bears the burden of providing evidence to establish all of the elements of fraud, and

mere "supposition and unfounded assumptions" of fraud are insufficient. *Forbes v. Barbee's Freeway Ford,* W.C. No. 4-797-103 (ICAO, Apr. 26, 2021).

7. In *Howe v. Colorado Interstate* Gas, W. C. No. 3-979-492, (ICAO, Dec. 23, 1996), the claimant alleged that his settlement agreement should be reopened because the respondents committed wrongful acts as it related to claimant's termination from employment and because they delayed the production of documents during the course of the claim. The ALJ dismissed claimant's petition to reopen because claimant's allegations, even if accepted as true, failed "to state a claim of 'fraud' for purposes of reopening." *Id.* On appeal, the ICAO upheld the ALJ's decision and explained that the ALJ did not even have the authority to grant relief relating to the claimant's termination from his employer or to "investigat[e] ... the circumstances surrounding his separation from employment" pursuant to Section 8-43-207(1), C.R.S., *Id.* at 2. Rather, the ALJ has jurisdiction to adjudicate controversies arising under the Worker's Compensation Act. *Id.;* Section 8-43-207(1), C.R.S.

8. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that the settlement agreement should be reopened on the basis of fraud. The ALJ finds no persuasive evidence that Respondents manipulated Claimant into signing the settlement agreement.

Mutual Mistake

9. To reopen a settlement agreement on the basis of mutual mistake, a claimant must demonstrate the existence of three primary criteria. "First, the mistake must be mutual, meaning both parties must share the same factual misconception. Second, the mistaken fact must be material, meaning that it is a fact which goes to the very basis of the contract. Third, the mistaken fact must be a past or present existing one, as opposed to a fact to come into being in the future." *England v. Amerigas Propane,* 395 P.3d 766, 769 (Colo. 2017).

10. A "mutual mistake is one which is reciprocal and common to both parties to an agreement, and both parties must share the same misconception as to the terms and conditions of the agreement." *Cary v. Chevron U.S.A., Inc.,* 867 P.2d 117, 119 (Colo. App. 1993). In other words, "it is necessary that both parties labor under the same erroneous conception in respect to the terms and conditions of the instrument." *Bussell v. Candy's Tort/Ila Factory, Inc.,* W.C. 3-864-860 (ICAO, Nov. 10, 1992).

11. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that the settlement agreement should be reopened on the basis of mutual mistake. As found, both parties were aware of the prior diagnosis and treatment recommendations from Dr. Primack before Claimant voluntarily chose to settle the claim.

ORDER

It is therefore ordered that Claimant's request to reopen the settlement in this matter is denied and dismissed.

Dated December 30, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-270-703-004

ISSUES

- Average weekly wage (AWW).
- Mileage reimbursement.

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on January 12, 2024.

2. Insurer's Third Party Administrator (TPA) filed a General Admission of Liability (GAL) on June 20, 2024, admitting for medical benefits and TTD benefits.

3. The GAL admitted for TTD benefits based on an AWW of $588.16. The wage records attached to the GAL relate to an individual other than Claimant, with a different carrier claim number, and a different date of injury.

4. Claimant earned $11,021.64 in the 14 weeks before the injury. This equates to an AWW of $787.26, with a corresponding TTD rate of $524.84.

5. Claimant traveled 737.4 miles to authorized treatment between January 15, 2024 and July 29, 2024. Claimant submitted mileage reimbursement request forms to Respondents, but has not been reimbursed.

6. Claimant proved he is entitled to mileage reimbursement in the amount of $435.07 (737.4 miles x $0.59 = $435.07).

CONCLUSIONS OF LAW

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The admitted AWW is indisputably incorrect because it is based on earnings from a different employee. As found, Claimant's AWW is $787.26, based on the 14 weeks before the injury.

WCRP 18-7(E) requires the respondents to reimburse the injured worker for reasonable and necessary mileage expenses for travel to and from authorized medical appointments. The mileage rate for 2024 is $0.59 per mile. As found, Claimant proved he traveled 737.4 miles for medical appointment between January 15, 2024 and July 29, 2024. Claimant is entitled to mileage reimbursement of $435.07.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $787.26, with a corresponding TTD rate of $524.84.

2. Insurer shall reimburse Claimant $435.07 for travel to and from authorized treatment.

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 27(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: December 30, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

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

2. Whether Respondents established by a preponderance of the evidence that Claimant received an overpayment of indemnity benefits.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to disfigurement benefits.

FINDINGS OF FACT

1. Claimant sustained an admitted right knee injury arising out of the course of his employment with Employer on February 3, 2023. Specifically, Claimant sustained a torn lateral collateral ligament in his right knee, and required surgery for that condition, including an LCL reconstruction, and tibiofibular reconstruction. Surgery was performed on July 26, 2023.

2. At the time of his injury, Claimant was employed full time as a seasonal snowboard instructor. For the ski season from 2022 to 2023, Claimant's term of employment was from November 19, 2022 through April 9, 2023. Claimant testified that typically after his seasonal employment ended, he would work as a lifeguard during the summers. Due to his injury, Claimant was unable to perform his job responsibilities as a snowboard instructor after February 3, 2023. Moreover, Claimant was unable to perform the duties of a lifeguard as a result of his work-related injury. (Ex. 9).

3. From February 3, 2023 through April 12, 2024, Claimant was under work restrictions imposed by his treating physicians. Claimant was limited to seated work until October 2023, when he was permitted to walk short distances. Over time, his work restrictions were relaxed, but he was not released to full duty. (Ex. 1, 2, 4-7, 9, 12-21). Ultimately, on April 12, 2024, Claimant's authorized treating physician (ATP) Elizabeth Bisgard, M.D., placed Claimant at maximum medical improvement (MMI) with a 30% lower extremity permanent impairment rating. (Ex. M). Claimant continued to be subject to work restrictions after reaching MMI.

4. At the time of his injury, Claimant's average weekly wage (AWW) was $775.31, which corresponds to a TTD rate of $516.87 per week.

5. Claimant's wage records from Employer demonstrate that Claimant did not work in any capacity for the periods of February 4, 2023 to March 24, 2023 (a period of 7 weeks); April 8, 2023 to June 2, 2023 (8 weeks), and from July 29, 2023 through September 8, 2023 (6 weeks). During these times, Claimant was under work restrictions which limited Claimant to seated-only work. No credible evidence was admitted

demonstrating that Employer offered Claimant a modified position that he refused to perform during these time period. Assuming entitlement, Claimant's wage loss for these 21 weeks corresponds to TTD benefits of $11,075.84, as shown in the chart below.

Start Date	End Date	Time Period	TTD Benefit
2/4/23	3/24/23	7 weeks	$3,618.09
4/8/23	6/2/23	8 weeks	$4,134.99
7/26/23	9/8/23	6 3/7 weeks	$3,322.76
			$11,075.84

6. The remainder of the weeks between Claimant's injury and MMI (April 12, 2024), Claimant worked in some capacity for Employer and earned wages in varying amounts. (Ex. L).

7. From March 25, 2023 through April 7, 2023 (a period of 2 weeks), Claimant worked for Employer and earned gross wages of $327.26. (Ex. L). Claimant's normal earnings based on an AWW of $775.31 during this period would have been $1,550.62. The difference between Claimant's earned gross wages and normal wages during this period corresponds to TPD benefits of $815.57. (See Appendix p. 1).

8. From June 3, 2023 through July 25, 2023 (a period of 7 4/7 weeks), Claimant also worked for Employer and earned gross wages of $1,635.60. (Ex. L). Claimant's normal earnings based on an AWW of $775.31 during this period would have been $5,870.20. The difference between Claimant's earned gross wages and normal wages during this period corresponds to TPD benefits of $2,823.07. (See Appendix p. 2).

9. From September 9, 2023 through April 11, 2024 (a period of 30 6/7 weeks), Claimant earned $17,562.39 in gross wages working for Employer. (Ex. L). Claimant's normal earnings based on an AWW of $775.31 during this period would have been $23,923.85. The difference between Claimant's earned gross wages and normal wages during this period corresponds to TPD benefits of $4,240.97. (See Appendix p. 3).

10. In total, the difference between Claimant's earned gross wages and normal gross wages based on his AWW for the periods identified in paragraphs 7-9 above corresponds to total TPD benefits of $7,879.61, as set forth below.

Start Date	End Date	Time Period	TPD Benefit
3/25/23	4/7/23	2 weeks	$815.57
6/3/23	7/25/23	7 4/7 weeks	$2,823.07
9/9/23	4/11/24	30 6/7 weeks	$4,240.97
TOTAL			**$7,879.61**

11. On May 1, 2024, Respondents filed a Final Admission of Liability (FAL) admitting to the 30% impairment rating assigned by Dr. Bisgard, and asserting an overpayment of

$6,225.98. (Ex. B). According to the FAL, Respondents admitted that Claimant was entitled to TTD and TPD benefits totaling $11,792.46, as set forth in the chart below:

Type	**Start Date**	**End Date**	**Time Period**	**Benefits**
TTD	2/4/23	3/25/23	7 1/7 weeks	$3,691.93
TTD	7/26/23	9/10/23	6 5/7 weeks	$3,470.41
TPD	9/11/23	4/11/24	30 3/7 weeks	$4,630.12
Total				**$11,792.46**

12. At hearing, [Redacted, hereinafter MN], a senior claim specialist for Insurer, and the adjuster for Claimant's claim testified that the Indemnity Log, Exhibit Q, accurately reflected the indemnity payments made to Claimant. MN[Redacted] testified that she calculated the overpayment of $6,225.89 asserted in the FAL by subtracting the benefits Respondents admitted were due (*i.e.*, $11,792.46) from the TTD and TPD benefits Respondents paid, as set forth in the Indemnity Log.

13. Respondents' Indemnity Log (Ex. Q) shows that Respondents paid Claimant TTD and TPD benefits for the following periods as set forth in the chart below.

Type	**Start Date**	**End Date**	**Time Period**	**Benefits Paid**
TTD	2/4/23	3/25/23	7 1/7 weeks	$3,691.93
TTD	7/26/23	1/9/24	24 weeks	$12,404.88
TPD	1/10/23	4/30/24	16 weeks	$1,840.66
Total				**$17,937.47**

14. Based on MN[Redacted] testimony, the Indemnity Log (Ex. Q), and the FAL (Ex. B), the $6,225.89 overpayment set forth in the FAL is inaccurate. The difference between the admitted combined TTD/TPD benefits and the benefits paid is $6,145.01. However, based on the evidence presented, the ALJ finds that Respondents have failed to establish that Claimant received an overpayment of indemnity benefits, and instead was underpaid temporary disability benefits in the amount of $1,017.98.

15. On May 29, 2024, Claimant filed an application for hearing endorsing the issues of disfigurement, temporary total and partial disability benefits, and overpayment.

16. Claimant did not request a Division Independent Medical Examination (DIME) to challenge the impairment rating assigned by Dr. Bisgard.

Disfigurement

17. As a result of his June 26, 2023 work-related knee surgery, Claimant has a scar on the outside of his right knee measuring 4 inches in length and ½ wide. The scar is visibly distinct from the surrounding skin, and constitutes a permanent disfigurement.

CONCLUSIONS OF LAW

Generally

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

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

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

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§ 8-42-105(1) & 8-42-106 (1), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain temporary

disability benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Once a claimant has established entitlement to temporary disability benefits, the benefits continue until one of the events listed in §8-42-105 (3) (a)–(c) , or 8-42-106 (2)(a)-(c) occur, and there is a causal connection between the injury and the claimant’s wage loss. Where a claimant is responsible for termination of the employment relationship, the Act prohibits the receipt of temporary benefits. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). “Under the termination statutes, sections 8-42-103(1)(g) and 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment.” *Gilmore*, 187 P.3d at 1132. “Generally, the question of whether the claimant acted volitionally, and therefore is ‘responsible’ for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances.” *Gonzales v. Indus. Comm’n*, 740 P.2d 999 (Colo. 1987); *Windom v. Lawrence Constr. Co.*, W.C. No. 4-487-966 (November 1, 2002). *In re Olaes*, WC. No. 4-782-977 (ICAP, April 12, 2011).

That Claimant’s position as a snowboard instructor with Employer was a seasonal position does not preclude temporary disability benefits for wage loss after the expiration of the seasonal position. See *City of Aurora v. Dortch*, 799 P.2d 461, 463 (Colo. App. 1990). The conclusion of seasonal employment is neither a permanent end to the employment relationship, nor does it establish that a claimant is responsible for the termination. *Judd v. Antarctic Support Servs.*, W.C. No. 4-457-362 (ICAO Sep. 30, 2003). Claimant testified that during the off-season he worked as a lifeguard, and was unable to do so due to his work-related injury. As a result of his work restrictions, which limited Claimant to a seated/desk job, his earning capacity after the conclusion of his seasonal employment was diminished as a result of his work injury. Accordingly, Claimant was entitled to temporary disability benefits due to his diminished earning capacity resulting from his work-related injury.

Claimant has established by a preponderance of the evidence an entitlement to temporary total and partial disability benefits. As found, Claimant was under work restrictions from February 4, 2023 until April 11, 2024. During this time, Claimant was entitled to temporary disability benefits due to his inability to work for certain periods, and

his diminished earning capacity during others. For the relevant periods, Claimant was entitled to TTD or TPD, totaling $18,955.45 as follows:

Start Date	End Date	Benefit Type	Time Period	Benefits Due
2/4/23	3/24/23	TTD	7 weeks	$3,618.09
3/25/23	4/7/23	TPD	2 weeks	$815.57
4/8/23	6/2/23	TTD	8 weeks	$4,134.99
6/3/23	7/25/23	TPD	7 4/7 weeks	$2,823.07
7/29/23	9/8/23	TTD	6 3/7 weeks	$3,322.76
9/9/23	4/11/24	TPD	30 6/7 weeks	$4,240.97
TOTAL				**$18,955.45**

As found, Respondents paid Claimant combined TTD and TPD benefits from the date of injury through April 30, 2024, totaling $17,937.47. Resulting in an underpayment to Claimant in the amount of $1,017.93 (i.e., $18,955.45 - $17,937.47 = $1,017.98).

Overpayment

Respondents contend Claimant received an overpayment of $6,225.98, arguing that Claimant received an overpayment during the period of July 25, 2023 through January 9, 2023, because Claimant was receiving full TTD benefits, although he was working and should have been receiving a lesser amount as TPD benefits.

C.R.S. § 8-40-201(15.5)(a) states:

(15.5)(a) “Overpayment” means money received by a claimant that:

> (IV) Results in duplicate benefits because of offsets that reduce disability or death benefits payable under articles 40 to 47 of this title 8. Duplicate benefits include any wages earned by a claimant in the same or other employment while a claimant is also receiving temporary disability benefits

While Claimant did receive some duplicate benefits, in that he received TTD benefits while working and earning wages in a modified capacity, Respondents did not pay Claimant temporary disability benefits during other times Claimant was entitled to receive such benefits. Specifically, Respondents paid Claimant no temporary disability benefits for the period of March 26, 2023 to July 25, 2023. As discussed above, the difference between the temporary disability benefits to which Claimant was entitled and the benefits Respondent paid resulted in an underpayment to Claimant of $1,017.98. Consequently, Respondents have failed to establish that Claimant received and overpayment, or that Respondents are entitled to recover or offset any amount from Claimant.

Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained disfigurement as a direct and proximate result of the February 3, 2023 injury in the form of surgical scarring. Claimant is awarded $1,200.00 for disfigurement.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant $1,017.98 in unpaid temporary disability benefits.

2. Respondents have failed to establish that Claimant received an overpayment for which Respondents are entitled to either offset or recovery.

3. Respondent shall pay Claimant $1,200 for permanent disfigurement. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

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

DATED: December 30, 2024

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability ("TTD") benefits from May 1, 2024 through August 1, 2024.

II. Whether Respondents proved by a preponderance of the evidence Claimant is responsible for the termination of his employment.

STIPULATIONS

The parties stipulated at hearing Claimant's average weekly wage ("AWW") is $1,480.00.

FINDINGS OF FACT

1. Claimant is 44-years-old. Claimant began working for Employer, a fire safety company, on March 6, 2023. Claimant worked for Employer as an alarm division manager. Claimant's job duties involved, among other things, programming and installing alarms, conducting inspections and performing site surveys. Claimant has approximately 17 years of experience working in the fire safety industry.

2. In October 2023, Claimant and Employer entered into an agreement pursuant to which Employer loaned Claimant $7,000 to repair his truck. Pursuant to the terms of the agreement, Claimant was to repay the loan at a rate of $1,000 per month commencing on January 15, 2024. The parties agreed $1,000 would be deducted from Claimant's paycheck on the 15th of each month until the total loan amount was fully repaid on July 15, 2024.

3. In early 2024 Employer instituted a new payroll system. The change in payroll systems resulted in various clerical issues and disruption in payments to multiple employees, including Claimant. $1,000 was incorrectly deducted from Claimant's April 1, 2024 paycheck. Claimant testified that, upon becoming aware of this error, he notified [Redacted, hereinafter LD], co-owner of Employer. LD[Redacted] immediately informed his wife and co-owner, [Redacted, hereinafter CD], of the issue. CD[Redacted] then transferred $1,000 to Claimant that same day via Zelle, a money transfer application.

4. $1,000 was properly deducted from Claimant's April 15, 2024 paycheck pursuant to the loan agreement.

5. On April 29, 2024, Claimant sustained an admitted industrial injury when he was rear ended by another vehicle at a stoplight. CD[Redacted] drove Claimant to authorized provider Concentra for evaluation and treatment soon after the motor vehicle

accident. Claimant was diagnosed with a neck strain, dizziness, and a left rib contusion. The provider released Claimant to modified duty with the following temporary restrictions: no driving the work vehicle, no climbing ladders, no lifting over 15 pounds, and no pushing or pulling over 30 pounds.

6. Claimant attended a follow-up appointment at Concentra on April 30, 2024. The provider referred Claimant for physical therapy and continued the same work restrictions. Claimant sent CD[Redacted] a copy of his medical report with his ongoing restrictions. Claimant was told to keep Employer updated regarding his condition and status. At the time there was no discussion with Employer regarding his work restrictions or any offer of modified duty.

7. Claimant attended a physical therapy appointment on the morning of May 1, 2024. Claimant testified that, after leaving the appointment, he checked his bank account in preparation to pay rent and realized an additional $1,000 had erroneously been deducted from his May 1, 2024 paycheck. Claimant testified he immediately thereafter called LD[Redacted]. Claimant testified he told LD[Redacted] this was the second time $1,000 had erroneously been deducted from his paycheck, he had bills to pay, it was getting frustrating and, "if you guys are going to continue to do this I will have to find work somewhere else at this time." Hearing Audio 19:29-19:41. Claimant testified that LD[Redacted] then told him "Let me get with [Redacted, hereinafter CL] there might have been a mix up or something happened. I'll call you back," and then he never heard from LD[Redacted] again. Hearing Audio 19:50-19:59. Claimant testified that nothing was determined during the telephone call with LD[Redacted]. Claimant testified that he was frustrated during the telephone call, but did not yell or curse.

8. Claimant testified he then received an email from CD[Redacted] at 11:41 a.m. the same morning. The email stated, "[Claimant], this email is to confirm your conversation with LD[Redacted] at 8:30am 5.01.2024 terminating your employment effective immediately." Cl. Ex. 7, p. 68.

9. Claimant testified he did not quit his job during his conversation with LD[Redacted]. Claimant testified that he interpreted CD[Redacted] email as notice that Employer was terminating his employment. Claimant did not respond to the email or make any attempts to clarify what occurred. He testified he did not do so because at the time he was agitated, he never heard back from LD[Redacted], and then received that email and saw no need to contact Employer when they had already made their decision.

10. Claimant later spoke with CD[Redacted] to make arrangements to return Employer's equipment and pick up his personal items. There was no discussion between Claimant and Employer regarding the circumstances of his employment ending.

11. LD[Redacted] testified at hearing on behalf of Employer. LD[Redacted] testified Claimant was a good and knowledgeable employee, but at times was aggressive and combative. LD[Redacted] testified that, prior to the October 2023 loan, Employer previously loaned Claimant money shortly after he began working for Employer.

12. LD[Redacted] testified that, at approximately 8:30 a.m. on May 1, 2024, he received a telephone call from a seemingly frustrated and irritated Claimant notifying him that $1,000 had again been erroneously deducted from Claimant's paycheck. LD[Redacted] testified that Claimant stated, "I can no longer work for your company, I'm done." Hearing Audio 42:32-42:39. LD[Redacted] testified he told Claimant he would let CD[Redacted] know and that was the end of the conversation, which was approximately 60 seconds. LD[Redacted] testified he did not tell Claimant he would get back to him. LD[Redacted] then called CD[Redacted] to notify her of Claimant's resignation and the error with Claimant's paycheck.

13. LD[Redacted] testified he had no plans to fire Claimant. LD[Redacted] testified Claimant had brought up quitting on two or three prior occasions over the course of Claimant's employment, at which time LD[Redacted] talked to Claimant and calmed him down. He testified that on this occasion he accepted Claimant's statement for what it was worth.

14. LD[Redacted] further testified that there was plenty of light duty work available within Claimant's work restrictions, which Employer would have offered to Claimant had he not resigned.

15. CD[Redacted] testified at hearing on behalf of Employer. CD[Redacted] testified that, on the morning of May 1, 2024, LD[Redacted] called to notify her that there was an issue with Claimant's paycheck and that Claimant had resigned. CD[Redacted] testified that she then contacted claims adjuster [Redacted, hereinafter CS] and was instructed to get Claimant's resignation in writing or get something in writing regarding Claimant's employment termination. CD[Redacted] then sent the email to Claimant at 11:41 a.m. CD[Redacted] testified that Claimant was not fired and she had no intention of firing Claimant from his employment, particularly when he still owed Employer money on a loan. When asked about the wording she used in the email, CD[Redacted] testified that it was just her choice of words. She explained that she used the word "terminating" because Claimant had terminated his own employment. CD[Redacted] confirmed that light duty work was available for Claimant.

16. Insurer filed a General Admission of Liability ("GAL") on May 13, 2024 admitting for medical benefits. Insurer did not admit to TTD benefits, stating Claimant "has not missed any time from work due to his injuries." R. Ex. B, p. 006.

17. Claimant subsequently relocated to Arizona. Claimant has continued to treat with Concentra and remains under work restrictions. Claimant did not work or earn any income from May 1, 2024 until August 1, 2024. On August 2, 2024 he began employment as a service manager performing mostly sedentary work.

18. Claimant testified he is aware that individuals who lose their job through no fault of their own are entitled to unemployment benefits. Claimant testified that he applied for unemployment benefits in Colorado but was denied because the unemployment office was informed he quit his job. Claimant did not provide any documentation to Respondents or at hearing confirming he applied for unemployment benefits.

CD[Redacted] testified that she handles unemployment insurance claims for Employer and that she has never received any notice regarding an unemployment insurance claim filed by Claimant, nor did she inform the unemployment office that Claimant quit.

19. The ALJ finds the testimony of LD[Redacted] and CD[Redacted] more credible and persuasive than Claimant's testimony.

20. The ALJ finds Claimant quit his employment with Employer due to his frustration with a payroll error that, based on the totality of the circumstances, was not an objectively unsatisfactory working condition.

21. The preponderant evidence demonstrates Claimant was responsible for the termination of his employment and thus not entitled to TTD benefits from May 1, 2024 through August 1, 2024.

CONCLUSIONS OF LAW

Generally

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

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

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

TTD & Responsibility for Termination of Employment

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

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Here, the evidence demonstrates Claimant suffered a disability as a result of his work injury. Claimant was placed on medical restrictions that impaired his ability to perform his regular employment. Claimant also sustained wage loss after the work injury. Nonetheless, the requisite causal connection between the work injury and Claimant’s wage loss has not been established, as Claimant was responsible for the termination of his employment.

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her

termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001). The question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

Based on the totality of the circumstances, it is more probable than not Claimant exercised some control over, and thus was responsible for, the termination of his employment. It is undisputed Claimant and LD[Redacted] had a very brief telephone conversation on the morning of May 1, 2024 during which Claimant was frustrated and notified LD[Redacted] of an error with his paycheck. Claimant contends he did not resign, but instead stated to LD[Redacted] that "if" the paycheck errors continued he would have to find work somewhere else. Respondents argue Claimant resigned, stating unequivocally to LD[Redacted] that he was "done." The totality of the evidence supports LD[Redacted] testimony and Respondents' position.

Per Claimant's own testimony, nothing was determined during the call with LD[Redacted], meaning there was no indication from LD[Redacted] during the call Employer was intending on firing Claimant. Claimant also offered no evidence indicating he had any prior indication from Employer he would be fired, and LD[Redacted] and CD[Redacted] credibly testified Employer had no intention of firing Claimant. To the contrary, Claimant had previously threatened to leave his employment on two or three prior occasions, during which LD[Redacted] talked to Claimant to calm him down.

Despite all of this, Claimant made no attempt to respond to or clarify CD[Redacted] email "confirming" Claimant's conversation with LD[Redacted] "terminating" Claimant's employment, which Claimant says he interpreted as Employer firing him. Even based on Claimant's version of events, it would be illogical for an individual who had not resigned nor received any indication from an employer he would be fired to not make any attempts to clarify. A reasonable person in the same or similar circumstances would clarify the situation with the employer. Claimant's contention that he believed he was fired after simply notifying Employer of a payroll issue is not credible and does not comport with the history or working relationship between Claimant and Employer. Employer has loaned Claimant money more than once. LD[Redacted] credibly testified he talked to and calmed down Claimant when Claimant expressed frustrations on other occasions. Additionally, when previously made aware of a payroll issue, Employer recognized and promptly addressed the error.

The ALJ acknowledges that the use of the word "terminating" in CD[Redacted] email could reasonably be subject to different interpretations. Nonetheless, the ALJ is persuaded by CD[Redacted] testimony, in light of the totality of the circumstances and the context of the email, that she was referring to Claimant ending his own employment by resigning during his conversation with LD[Redacted]. The email specifically refers to confirming Claimant's conversation with LD[Redacted] which, per Claimant's own testimony, involved no discussion or indication of being fired. The ALJ is persuaded Claimant stated he was done with Employer during the telephone conversation, which was reasonably interpreted by Employer as a resignation. Even assuming, arguendo, Claimant did not intend to resign at that time, his statements during the telephone call and his subsequent inaction in failing to clarify with Employer were within his control and what ultimately resulted in his employment termination.

While Claimant's frustration regarding the payroll error is understandable, based on the totality of the circumstances, the ALJ is not persuaded it rose to the level of an objectively unsatisfactory working condition as contemplated in section 8-73-108(4)(c), C.R.S. Although section 8-73-108(4)(c), C.R.S. relates to unemployment insurance benefits, it can be instructive when analyzing responsibility for termination in workers' compensation cases. *See In re Claim of Coleman*, 4-969-560-02 (ICAO, Jan. 13, 2017) (noting that the concept of "fault" as used in the unemployment insurance context is instruction for purposes of the termination statutes under the Act); see also *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002) (holding that the term "responsible" reintroduced the concept of "fault" into the Act).

Claimant acknowledged that, upon notification of a prior error with his paycheck, Employer promptly rectified the error by transferring the money to him on the same day. Claimant had received correct paychecks on other occasions. Claimant did not argue, nor was any evidence offered, that Claimant had any reasonable basis to believe Employer would not promptly rectify the issue as done previously. Thus, while frustrating, based on the totality of the circumstances, the payroll error did not rise to the level of an objectively unsatisfactory working condition that would reasonably render Claimant not at fault or responsible for his employment termination. Accordingly, Claimant is not entitled to TTD benefits from May 1, 2024 through August 1, 2024.

ORDER

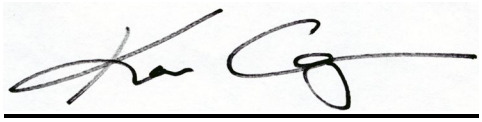
It is therefore ordered that:

1. Claimant’s request for TTD benefits from May 1, 2024 through August 1, 2024 is denied and dismissed.

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

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

DATED: December 31, 2024



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-122-401-007

STIPULATION

The parties stipulated that AWW would include the cost of the COBRA benefit of $83.97 per week.

ISSUE

- What is Claimant's Average Weekly Wage?

FINDINGS OF FACT

1. Claimant's total gross wages for the 15 weeks of his available wages total $10,070.55. This is equal to an average weekly wage (AWW) rate of $671.37.

2. Claimant testified that his hours worked fluctuated. He also testified that he took an unpaid vacation in July and August which reduced his gross earnings for two weeks. On those two weeks, Claimant earned $320.60 and $380.60.

CONCLUSIONS OF LAW

C.R.S. §8-42-102(d), provides "Where the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage shall be determined from said daily wage in the manner set forth in paragraph (c) of this subsection (2)".

The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. See *Campbell v. IBM Corp., 867* P.2d 77 (Colo.App. 1993), *National Fruit Prod. v. Crespin*, 952 P.2d 1207 (Colo.App. 1997).

Sections 8-42-102(3) and (5) (b), C.R.S. (2013), give the ALJ discretion to calculate an AWW that will fairly reflect a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra; Avalanche Industries, Inc. v. Clark,* 198 P.3d 589 (Colo. 2008). It is well settled that if the specified method of computing a claimant's AWW will not render a fair computation of wages for "any reason," the ALJ has discretionary authority under, § 8-42-102(3) C.R.S. 2020, to use an alternative method to determine AWW. *Campbell v. IBM Corp*., supra.

A fair computation of Claimant's wages based on the facts of the case should include the total wages for the 15 weeks that Respondents' utilized in their AWW calculation, inclusive of the reduced wages for the two weeks that Claimant took vacation.

ORDER

IT IS HEREBY ORDERED that Claimant's AWW is $755.34, which includes the stipulated COBRA amount. This results in a TTD rate of $503.56.

Dated this 31st day of December, 2024.

OFFICE OF ADMINISTRTIVE COURTS

Michael A. Perales
Michael A. Perales
Administrative Law Judge

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury on March 29, 2024, during the course and scope of his employment with Employer.

2. Whether Claimant established by a preponderance of the evidence that he is entitled to receive reasonable, necessary, and causally related medical benefits for his industrial injuries.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to Temporary Total Disability (TTD) benefits for the period May 18, 2024, until terminated by statute.

4. Whether Claimant is entitled to select his authorized treating physician

FINDINGS OF FACT

1. Claimant was hired by Employer on July 1, 2023, to provide labor construction for new houses. Claimant was paid $32.00 per hour and worked approximately 50 hours per day. Claimant earned approximately $1,600.00 per week. Claimant testified he was paid by check or through electronic transfer. (Ex. 1) Claimant's received paychecks from either [Redacted, hereinafter MF] or [Redacted, hereinafter BS] for his work for Employer. (Ex. 6).

2. Employer did not carry worker's compensation on March 29, 2024.

3. On March 29, 2024, Claimant was working construction for Employer when he slipped while on a ladder and fell ten feet to the ground, injuring his right hand. Claimant credibly testified that he notified MF[Redacted], Employer's owner, of the injury the following day. MF[Redacted] asked Claimant if he wanted to get a massage or take some pills but did not offer a list of providers. Claimant continued working for Employer despite his injury.

4. On April 8, 2024, Claimant went to the Saint Joseph Emergency Department with complaints to his right hand. Physical exam revealed swelling over the fourth and fifth metacarpals. An x ray showed an acute mildly comminuted and displaced fracture of the right metacarpal neck with slight radial and for displacement of the distal fracture fragment. He was placed on a splint, advised to follow up with an orthopedic doctor, and discharged the same day (Ex. 3, p. 10-15).

5. On April 10, 2024, Claimant presented to Concentra Medical Centers, where he was evaluated by Thomas Corson, D.O. He was diagnosed with a displaced fracture of the fifth metacarpal of the right hand (Ex. 5, p. 38). Dr. Corson discussed the case with

an orthopedic surgeon who opined a surgery was not indicated. Claimant was assigned work restrictions including no lifting more than 5 pounds and wearing a splint, and referred to physical therapy.

6. Claimant credibly testified that he continued to work for Employer until May 17, 2024. Claimant was unable to continue working for Employer due to his injuries, and physician-assigned restrictions. Claimant is right-hand dominant, and required the full use of his right hand to perform the duties requested by Employer. Claimant testified, credibly, that he informed Employer of his work restrictions, and Employer did not offer Claimant modified duty work.

7. Claimant credibly testified that was not able to obtain further treatment, including the recommended physical therapy, because he did not have the financial resources for treatment, and needed to get another job. Claimant ultimately obtained new employment in early June 2024.

8. Claimant continues to experience discomfort and pain to his right hand, which limits his ability to perform construction work, including the using hand tools, nail guns, and hammers.

9. Claimant's testimony was credible.

10. The opinions of the medical providers at Saint Joseph Hospital and Concentra Medical Centers as expressed in Claimant's medical records are credible.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). 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 he sustained a compensable injury to his right hand arising out of the course of his employment with Employer on March 29, 2024, when he fell from a ladder while working for Employer. Claimant's testimony regarding how the incident occurred and the injury he sustained was credible, and supported by the contemporaneous medical record. Claimant's right-hand injury is compensable.

Medical benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192

(Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has establish that he sustained a compensable injury, Claimant is entitled to an award of general medical benefits for all authorized treatment that is reasonable, necessary and related to the injuries sustained on March 29, 2024. Moreover, Claimant has proven by a preponderance of the evidence that Claimant's medical care through Saint Joseph Hospital and Concentra Medical Centers was authorized, reasonably necessary medical treatment causally related to the March 29, 2024, accident.

Temporary Total Disability Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant 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).

Claimant's testimony and the admitted medical records demonstrate that Claimant was unable to work at full capacity following his March 29, 2024 injury, but continued to work for Employer until May 18, 2024. Claimant continues to experience some level of restriction to the present. No credible evidence was admitted indicating that Claimant has been placed at maximum medical improvement. Although Claimant obtained new employment in early June 2024, insufficient evidence was presented to determine the exact date on which Claimant began his new employment, and the wages earned from such employment. Thus, the ALJ is unable to determine whether Claimant sustained any additional wage loss and entitlement to temporary partial disability (TPD) benefits after beginning his new employment. Claimant has established by a preponderance of the evidence an entitlement to temporary disability benefits from May 18, 2024, until terminated by statute.

Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Rule 8-2 (A)(2) clarifies that, "[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 has notice of the injury." The term "business days" refers to any day other than a Saturday, Sunday, or legal holiday. W.C.R.P. 1-2 (C).

An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006). If upon notice of the injury the employer does not timely designate an ATP, the right of selection passes to the claimant. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987), *see also* W.C.R.P. 8-2 (E) ("If 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 established that employer did not provide Claimant with a designated provider list as required by the Act. As a result, the right of selection of an authorized treating physician passed to Claimant.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his right hand on March 29, 2024 arising out of the course of his employment with Employer.

2. Claimant entitled to receive reasonable, necessary medical benefits to cure or relieve the effects of the March 29, 2024 injury. Respondent is liable for Claimant's medical expenses incurred from Saint Joseph Hospital and Concentra Medical Center as a result of his March 29, 2024 injury.

3. Claimant is entitled to TTD benefits for the period of March 30, 2024 until Claimant began his new employment in early June 2024. The issue of whether Claimant is entitled to temporary partial disability benefits after starting employment with his new employer is reserved future determination.

4. Claimant is entitled to select an authorized treating physician to treat his work-related injuries.

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

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

DATED: December 31, 2024

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