OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-080-057-007

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she sustained a worsening of condition for her March 3, 2018 injury warranting a reopening.

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 11, 2022 through ongoing.

3. What is Claimant's average weekly wage.

STIPULATION

1. The parties stipulated that Workwell is an authorized provider for Claimant's March 3, 2018 injury.

2. That Respondents are entitled to an offset for Social Security disability benefits against contemporaneous temporary total disability benefits.

FINDINGS OF FACT

1. On March 3, 2018, Claimant sustained an admitted cumulative trauma injury involving her upper back and right upper extremity from repetitive lifting and loading of fifty-pound scoops of flour.

2. On January 10, 2019, Respondents had Claimant undergo an independent medical examination (IME) with Dr. Laurence Lesnak. At that time, Claimant complained of frequent right-sided suprascapular/scapular pain and burning sensations with occasional radiation to her right proximal upper arm. Claimant reported to Dr. Lesnak that her symptoms were worse with heavy lifting activities and that she would have frequent right lateral elbow pinching sensations that would occur with any repetitive movements of her right elbow. Claimant stated that she also had constant diffuse numbness throughout the entirety of her right hand, fingers, and thumb. Claimant reported that her current pain level was a 70 out of 100.

3. Dr. Lesnak also reviewed Claimant's medical records and conducted a physical examination.

4. Ultimately, Dr. Lesnak concluded that there is no evidence that Claimant sustained any cervical spine injuries or trauma related to her work activities for Respondent. Medical records indicated no neck complaints until six months after the alleged incident, and her cervical spine MRI showed no abnormalities suggestive of injury or trauma. During his examination, Claimant exhibited diffuse pain behaviors and non-physiologic findings but no clinical evidence of symptomatic cervical spine pathology. Similarly, while her right shoulder MRI revealed pre-existing tendinosis and a small tear in the supraspinatus tendon, there was no indication of acute or work-related trauma, and prior interventions yielded non-diagnostic and non-therapeutic results. Dr. Lesnak identified significant psychosocial factors influencing Claimant's symptoms and recommended a formal pain psychological evaluation and cognitive behavioral counseling. He opined that Claimant had reached maximum medical for her injury, required no further diagnostic testing or interventional treatments, and did not require permanent or temporary work restrictions for her injury.

5. On March 4, 2019, Claimant visited Dr. Chan for examination and treatment. After considering Claimant's medical records and conducting a physical examination, Dr. Chan explained that he agreed with Dr. Lesnak's analysis. He specifically remarked that Claimant "has a significant amount of non-physiologic findings on physical examination" and confirmed that she demonstrated "symptom magnification." Dr. Chan opined that Claimant suffered a repetitive trauma injury and had been removed from work for more than one year. However, her symptoms did not improve but remained completely unchanged. Dr. Chan noted that Claimant was approaching maximum medical improvement (MMI). He commented that, because clinical examination and imaging studies did not identify a specific pathology, no permanent impairment was appropriate.

6. Claimant saw authorized treating physician Dr. Matus on March 27, 2019. Dr. Matus determined Claimant to be at MMI as of that date with no need for work restrictions. He recommended maintenance medical care consisting of a formal pain psychological consultation and continued medications. Dr. Matus explained there was only minimal objective evidence of the Claimant's ongoing pain levels and noted her MRIs and EMG, along with her injections, were all "unrevealing." Dr. Matus also stated there was no indication for a permanent impairment rating.

7. On June 26, 2019, Claimant underwent a Division independent medical examination (DIME) with Dr. Brian J. Beatty. Dr. Beatty concluded that Claimant had reached MMI on March 4, 2019. He reasoned that Claimant's neck symptoms were not related to her March 3, 2018 repetitive trauma injury and she thus did not warrant a cervical spine impairment rating. Dr. Beatty assigned a 17% right elbow rating based on range of motion deficits. He also assigned a 21% right shoulder impairment based on range of motion limitations. Dr. Beatty recommended a five-pound lifting restriction. He authorized medical maintenance benefits in the form of psychological treatment and physical therapy.

8. Claimant underwent an IME on October 14, 2019, with Dr. Gary Zuehlsdorff. Dr. Zuehlsdorff concluded that Claimant sustained right shoulder and right elbow impairments as a result of her March 3, 2018 cumulative trauma injury. He agreed that Claimant's cervical spine condition was not related to her work activities. Dr. Zuehlsdorff clarified that he did not recommend any further care through the workers' compensation system.

9. On October 22, 2019, Claimant underwent unauthorized surgery with her personal physician Dr. Benjamin Sears, M.D. Dr. Sears specifically performed a right rotator cuff repair. His postoperative diagnosis included a right shoulder rotator cuff tendon tear of the supraspinatus and right shoulder superior and posterior labral tears.

10. On October 31, 2019 the parties conducted the pre-hearing evidentiary deposition of Dr. Beatty. Prior to his deposition, Dr. Beatty reviewed surveillance video of Claimant's activities. Based on the surveillance video, Dr. Beatty modified his initial opinions. He determined that Claimant's right elbow range of motion depicted in the video justified a 0% permanent impairment rating. Moreover, Dr. Beatty agreed with Drs. Matus, Chan, and Lesnak that Claimant warranted a 0% impairment rating for her right shoulder based on her range of motion in the video. Finally, Dr. Beatty reasoned that, based on a lack of objective evidence, he did not recommend any work restrictions.

11. After reviewing additional medical records and video surveillance of Claimant, Dr. Lesnak issued an addendum report on November 15, 2019. Based on that additional information, Dr. Lesnak agreed with Drs. Beatty and Zuehlsdorff that Claimant had reached MMI by no later than March 2019.

12. The parties proceeded to hearing on December 10, 2019, on the issue of whether Claimant had overcome the opinions of Dr. Beatty with regard to MMI and permanent impairment. The ALJ in that matter ultimately found in a February 20, 2020 Findings of Fact, Conclusions of Law, and Order (FFCLO) that Claimant had failed to overcome DIME Dr. Beatty's opinions with regard to MMI and permanent impairment.

13. On January 8, 2021, Claimant underwent a right shoulder MRI. It showed a completely intact and healed rotator cuff.

14. On April 8, 2021, Claimant underwent an electrodiagnostic evaluation of her cervical spine region and bilateral upper extremities. The testing showed normal results with no evidence of median, ulnar, nor radial neuropathy, nor any evidence of cervical radiculopathy.

15. Dr. Lesnak performed an additional records review on August 12, 2021, and issued a written report on that date. He opined that Claimant remained at MMI with no permanent impairment, and that Claimant had not experienced a worsening of

condition. He reasoned that Claimant had a recent cervical MRI on April 9, 2021, which showed no changes and that Claimant underwent a recent electrodiagnostic evaluation of her bilateral upper extremities on April 8, 2021, which showed no neurologic abnormalities. Therefore, Dr. Lesnak felt that Claimant only had ongoing subjective complaints without any reproducible objective findings.

16. On December 7, 2021, Claimant became entitled to Social Security Disability benefits beginning January 2020 at a rate of $953.60 per month, plus cost-of-living adjustments and minus deductions.

17. On February 21, 2022, Claimant treated at the Bruner Family Medicine clinic and was evaluated by Dr. Nicholas Arlas. In his report, Dr. Arlas opined that Claimant may have a diagnosis of complex regional pain syndrome, type II (CRPS). He recommended that Claimant begin gabapentin 300 mg twice daily and undergo a physiatry evaluation.

18. Claimant saw Michelle Paturzo, PA-C, on March 23, 2022, at Mountain View Pain Specialists. Claimant reported right sided neck pain into the top of her shoulder, down her arm, with worsened pain concentrated around her elbow, wrist, and along her middle finger. Claimant also reported associated swelling along her right arm, worst above her clavicle, that would come and go. Claimant also reported that her right arm felt warmer and looked redder than her left arm.

19. Claimant returned to PA Paturzo on May 2, 2022, noting that Claimant had experienced pain out of proportion to imaging findings, swelling, skin and temperature changes, since her last rotator cuff repair in 2019. PA Paturzo opined that Claimant's symptoms were consistent with CRPS of the right upper extremity. Two weeks later, after Claimant did not have improvement from injections, PA Paturzo recommended a stimulator implant trial.

20. In an April 27, 2023 report by Claimant's physical therapist, the therapist noted that Claimant had worsened pain radiating into her neck and down her right upper extremity to her middle finger since undergoing rotator cuff surgery. The therapist noted that Claimant had CRPS.

21. At an August 15, 2023 appointment at Mountain View Pain Specialists, Natalia Behnken, PA-C, noted that Claimant had swelling over her right supraclavicular are and over the right anterior shoulder.

22. At Claimant's August 15, 2023, visit with her physical therapist, Claimant complained of continued pain and altered sensation in her right upper extremity. Claimant reported a burning sensation with numbness and tingling from her right shoulder to her right hand in the first three fingers.

23. On April 23, 2024, Claimant again saw Dr. Lesnak for an IME. On physical examination, Claimant reported to Dr. Lesnak that she had right upper extremity

numbness and weakness, she overall felt better than she had been the last time she saw Dr. Lesnak in January 2019. Dr. Lesnak noted there was no evidence of peripheral extremity edema involving Claimant's upper extremities, no evidence of abnormal skin temperature or skin lesions on Claimant's upper extremities, and no evidence of any type of muscle atrophy involving the right upper extremity or right shoulder girdle region when compared to the left. Dr. Lesnak observed that Claimant "exhibited diffuse pain behaviors and non-physiologic findings and frequently was uncooperative during my evaluation," yet Claimant exhibited unrestricted ranges of motion when not explicitly observed.

24. With regard to symptoms related to CRPS, Dr. Lesnak noted that Claimant had no subjective complaints of allodynia or hyperalgesia, no complaints of hair or nail changes in her right upper extremity, no color or temperature changes or swelling in the right upper extremity. Dr. Lesnak observed no asymmetry in hair or nail growth on the upper extremities and no asymmetry with regard to skin temperature on each of the upper extremities. This led Dr. Lesnak to opine that Claimant did not meet the criteria for even a suspected diagnosis of CRPS, according to the Medical Treatment Guidelines.

25. Based on this, Dr. Lesnak felt that Claimant remained at MMI with no permanent impairment and no need for post-MMI maintenance medical benefits with regard to her March 7, 2018 injury.

26. In June and July 2024, Claimant discussed with her providers at Mountain View Pain Center her desire to undergo a neurostimulator for her right upper extremity, and Claimant's providers recommended Claimant undergo a trial.

27. On August 21, 2024, Claimant filed an Application for Hearing endorsing, among other issues, the issue of reopening, alleging a change in condition consisting of CRPS.

28. Claimant returned to Mountain View Pain Center on October 17, 2024, where she was attended by Hannah Abbe, PA-C. PA Abbe noted that Claimant had tried and failed multiple interventions, including CESI, nerve blocks, and medications, and was not interested in radiofrequency ablation. PA Abbe observed that Claimant had responded well to stellate ganglion blocks, but that she discontinued those due to facial swelling. PA Abbe noted that Claimant was to undergo a psychological evaluation with Dr. Kaplan for consideration of a spinal cord stimulator.

29. Claimant underwent a psychological evaluation with Dr. Glenn Kaplan as part of her evaluation for a neurostimulator. Dr. Kaplan noted that Claimant had some mild depression but otherwise did not have any psychological contraindications for a stimulator implant.

30. At the December 19, 2024 hearing, Claimant testified on her own behalf with the assistance of an interpreter. Regarding her March 3, 2018 injury, Claimant testified that she had been carrying fifty-pound loads all day on the date of her injury and that she later underwent right shoulder surgery on October 22, 2019. Claimant testified that she underwent that surgery because she had an injury to her shoulder and two broken tendons. She paid for the surgery using a discount card, but they charged her $1,500. Claimant testified that she underwent physical therapy after the surgery. Claimant testified that in March 2022, her pain worsened. Claimant testified that, since the surgery, she underwent six injections in her shoulder to reduce the pain. Claimant testified that she also underwent three injections in the neck and two more for her back pain.

31. Claimant testified that she was recently examined by Dr. Kaplan for a spinal cord stimulator implant. She testified that she had previously turned down the implant because she hoped the injections would dispose of her pain, but that she was now willing to try the implant due to the failure of injections and therapy failed to relieve her of her pain.

32. Claimant testified that her current symptoms included swelling and inflammation in the side of her neck and shoulder and that she would experience pain in her distal shoulder and neck when she would move her right arm. She testified that when she was released from care from Mountain View Pain Center in 2019, she was experiencing a lot of pain and has been experiencing that pain since 2019. She testified that her pain was worse in 2022, but that the character of her pain was the same as in 2019. Claimant testified that she cannot carry things and sometimes cannot even carry a cup of coffee.

33. When asked whether she had provided Mountain View Pain Center copies of the February 20, 2020 FFCLO or the surveillance footage, Claimant indicated that she had not.

34. Claimant testified that when she worked for Respondent-Employer, she would work eight-to-ten-hour days at an hourly rate of $15.80. Claimant testified that she worked for Respondent-Employer for eight years prior to her date of injury. Claimant testified that she has been receiving SSDI benefits since June 2022.

35. The Court does not find Claimant's testimony credible. The medical evidence and expert testimony presented, particularly from Dr. Lesnak and other evaluating physicians, reveal multiple inconsistencies in Claimant's reports of symptoms and limitations. Claimant has exhibited significant non-physiologic pain behaviors throughout her treatment and evaluations, including exaggerated responses to examinations and inconsistent range of motion findings. Surveillance footage further undermines her testimony by demonstrating functional abilities inconsistent with her reported impairments.

36. Claimant's allegations of worsening pain and functional limitations are not supported by objective medical findings. Diagnostic tests, including MRIs and electrodiagnostic studies, have repeatedly shown no significant abnormalities or evidence of deterioration. Despite Claimant's subjective complaints of pain and disability, medical professionals—including Drs. Lesnak, Beatty, and Matus—have consistently found no objective evidence of a permanent impairment or the need for ongoing medical treatment related to her March 3, 2018, injury.

37. Furthermore, Claimant's testimony regarding the nature and severity of her condition contradicts her prior statements to medical providers. Notably, during her April 2024 IME, Claimant reported to Dr. Lesnak that she had experienced some improvement and did not believe her condition had worsened. This statement directly conflicts with her hearing testimony that her pain had significantly worsened since 2019. Additionally, Claimant's reported limitations in shoulder movement during explicit examination were inconsistent with her observed abilities when not being directly assessed, further undermining her credibility.

38. Given these inconsistencies, the lack of objective medical support for her complaints, and the persuasive expert testimony contradicting her claims, the Court does not find Claimant's testimony credible.

39. Dr. Lesnak testified by post-hearing deposition.

40. Dr. Lesnak testified that there was no documented evidence of a back injury or a neck condition relating to Claimant's work injury.

41. Dr. Lesnak testified that at the second IME he conducted with Claimant, Claimant reported that she had noticed some improvement and that she did not have any worsening. In fact, Dr. Lesnak testified, Claimant reported that she was a little bit better.

42. Dr. Lesnak testified that from his 2019 physical examination of Claimant to the one he performed in April of 2024, Claimant did not exhibit any specific worsening of her condition, though Claimant did exhibit a lot of non-physiologic pain behaviors. For example, Dr. Lesnak testified, when he was preparing to do a cervical facet joint loading test, before he put any pressure on Claimant's head, Claimant began complaining of diffuse pain in her right lateral neck and her right upper extremity, which Dr. Lesnak described as non-physiologic finding.

43. Dr. Lesnak also testified that during his April 2024 IME, while he was examining Claimant's right shoulder range of motion, Claimant was unwilling to forward flex her right arm to more than ten degrees or abduct her right arm, and Claimant would not let Dr. Lesnak perform any passive range of motion on her right shoulder at all. Yet, when Claimant was laying in supine position, Claimant was able to abduct her shoulder to at least ninety or one hundred degrees. Dr. Lesnak reasoned that Claimant's range of motion in her shoulder should not be dependent on whether

she was upright or laying down. Dr. Lesnak testified that this was one of several things Claimant exhibited that did not make sense.

44. Dr. Lesnak opined in his testimony that Claimant's non-physiologic behaviors on examination have been consistent throughout her treatment, as Claimant's behavior when being explicitly observed by healthcare providers is different than when she is surreptitiously observed on surveillance.

45. With regard to the CRPS diagnosis, Dr. Lesnak testified that to meet a presumed diagnosis of CRPS, Claimant would need three out of four subjective symptoms and two out of four objective findings, and that Claimant did not meet any of the criteria. Claimant reported pain but not hyperesthesia or allodynia, instead reporting decreased sensation which is inconsistent with CRPS. He also noted that Claimant did not complain of swelling, color changes, temperature changes, hair growth changes, or nail changes—all of which would be typical in CRPS cases. Dr. Lesnak also noted the absence of any objective findings, including no vascular changes, no edema or swelling, and no changes in hair or fingernail growth. Furthermore, Dr. Lesnak noted, Claimant had not undergone the necessary diagnostic tests to confirm the presence of CRPS, including thermography, QSART testing, or bone scans. Claimant's stellate ganglion injections, Dr. Lesnak observed, were nondiagnostic.

46. Dr. Lesnak also testified that a spinal cord stimulator was not medically appropriate for Claimant. He explained that spinal cord stimulators are typically considered a last-resort treatment for conditions such as CRPS or cervical radiculopathy. However, in this case, he found that Claimant did not meet the criteria for CRPS and had no objective evidence of cervical radiculopathy or any other symptomatic cervical spine pathology. Dr. Lesnak further noted that Claimant had been evaluated multiple times, and none of her examinations revealed any reproducible objective findings that would justify the use of a spinal cord stimulator. He emphasized that Claimant's reported pain was subjective and not supported by clinical evidence. Furthermore, he pointed out that she had undergone extensive treatments, including multiple injections and nerve blocks, none of which had produced meaningful relief or supported a diagnosis that would warrant such an invasive intervention.

47. Regarding Claimant's cervical spine, Dr. Lesnak testified that Claimant had no cervical spine pathology related to her work injury. He explained that during his evaluations, which took place on multiple occasions, there was no documented evidence to support the presence of a cervical condition stemming from her reported occupational incident.

48. He noted that when he first examined Claimant in January 2019—approximately ten months after her reported work injury—she did not even mention neck symptoms. Instead, her complaints were focused on her right shoulder girdle and upper arm. He found it significant that there was no indication of cervical spine

issues in the early stages of her treatment or during DIME conducted by Dr. Beatty. Moreover, no prior treating physicians, including Dr. Matus and Dr. Chan, had diagnosed her with a cervical condition related to the work injury.

49. Dr. Lesnak further testified that even in his later examinations, there were no objective findings of cervical pathology. Despite Claimant's subjective complaints, his physical examinations did not reveal any signs consistent with cervical radiculopathy or other cervical abnormalities that would be attributable to her work injury. He also reviewed her diagnostic imaging, including multiple MRIs, which showed mild degenerative changes but nothing that could be linked to her workplace incident.

50. When asked about whether he felt Claimant had a worsening of condition since she was placed at MMI, Dr. Lesnak responded that it was his opinion that she had not. He explained that in his evaluations of Claimant, including the most recent one in October 2024, he found no objective evidence to support the notion that her condition had deteriorated. Dr. Lesnak pointed out that during his April 2024 IME, Claimant reported that she had actually noticed some improvement and did not believe that her condition had declined. He found this to be consistent with his physical examinations of Claimant which did not reveal any evidence of worsening, aside from Claimant's significant pain behaviors and non-physiologic responses. Dr. Lesnak noted in his testimony that Claimant's subjective complaints did not correlate with clinical evidence.

51. The Court finds Dr. Lesnak's testimony credible and persuasive. Dr. Lesnak's testimony and opinions are well-supported by objective medical evidence, are consistent with the findings of multiple examining and treating physicians, and are based on thorough evaluations of Claimant over an extended period. His expert opinions align with the documented medical history, imaging studies, and diagnostic tests, all of which fail to support Claimant's allegations of a worsening condition or the presence of CRPS.

52. The Court does not find the opinions expressed by Claimant's medical providers at Mountain View Pain Specialists to be reliable. There is no credible evidence that those medical providers had reviewed the February 20, 2020 FFCLO, the surveillance footage, or any of Dr. Lesnak's reports regarding Claimant's non-physiologic pain complaints. The Court finds that the opinions of the providers at Mountain View Pain Specialists were most likely based at least in part on Claimant's unreliable subjective reports of symptoms.

53. Regarding Claimant's assertion that she developed CRPS, the medical evidence does not support this diagnosis. Dr. Lesnak credibly testified that Claimant failed to meet the necessary diagnostic criteria for CRPS, lacking both the requisite subjective symptoms and objective findings such as skin changes, temperature variations, or vascular abnormalities. Claimant's stellate ganglion blocks were non-diagnostic, and no confirmatory testing, such as thermography or QSART, was

performed. The absence of these critical indicators contradicts Claimant's claim of a worsening condition due to CRPS.

54. Ultimately, the Court finds that Claimant has not proved by a preponderance of the evidence that she sustained a worsening of condition warranting a reopening of her claim for her March 3, 2018 work injury.

CONCLUSIONS OF LAW

Generally

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

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

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

Reopening

Once a claim is closed, it may be reopened only on grounds of fraud, overpayment, error, mistake, or change in condition. § 8-43-303, C.R.S. A "change in condition" refers to a "change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury." *Cordova v. Industrial Claims Comm'n*, 55 P.3d 186, 189 (Colo.2002); *In re Caraveo*, W.C. No. 4-358-465 (October 25, 2006). Reopening is appropriate when the claimant's degree of permanent disability has changed since MMI or where the claimant is entitled to additional medical or temporary disability benefits that are causally connected to the compensable injury. *See In re Duarte*, W.C. No. 4-521-453 (June 8, 2007).

The reopening authority granted to ALJs by § 8-43-303 "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ." Cordova v. Indus. Claim Appeals Office, 55 P.3d 186, 189 (Colo.App.2002).

Claimant bears the burden, therefore, to prove that she has since sustained a worsening of her condition so as to entitle her to additional medical or temporary disability benefits.

Claimant has argued that her condition worsened in March or November 2022. However, as found, there is no credible evidence in the record that Claimant's condition has in fact worsened. Rather, Claimant relies on her own testimony and the opinions of her treating providers at Mountain View Pain Centers, which, as found, are unreliable. The Court therefore concludes, as found, that Claimant has not proved by a preponderance of the evidence that she sustained a worsening of condition warranting a reopening of her claim for her March 3, 2018 work injury.

ORDER

It is therefore ordered that:

1. Claimant has not sustained a worsening of her condition warranting her to a reopening of her claim for her March 3, 2018 work injury.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

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

DATED: February 3, 2025.

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his left shoulder arising out of the course of his employment with Employer on August 4, 2023.

2. Whether Claimant established by a preponderance of the evidence that his January 25, 2024 left shoulder surgery was reasonable and necessary to cure or relieve the effects of an industrial injury.

3. Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability benefits for the period of January 24, 2024 to May 19, 2024.

FINDINGS OF FACT

1. Claimant has worked for Employer as a maintenance technician for approximately eight years. Claimant's job duties include performing general mechanical maintenance and housekeeping duties.

2. On August 4, 2023, Claimant was mopping a floor in the course of his employment, when his left shoulder dislocated. When the dislocation occurred, Claimant was leaning forward holding a wet mop to his side, when he lifted the mop, he felt a "pop" and significant pain. Claimant was taken to the emergency department at Lutheran Hospital where he was diagnosed with an anterior dislocation of the left shoulder. The shoulder dislocation was reduced under sedation, and Claimant was discharged. Claimant reported to the emergency department physician that he had a history of shoulder dislocations, with his most recent dislocation occurring approximately five years earlier. (Ex. F).

3. Claimant has a history of left shoulder dislocations, including a left shoulder surgery ten to fifteen years earlier. Claimant also sustained a dislocated left shoulder while working for Employer on September 26, 2017. (Ex. D). Following the 2017 injury, Claimant was released to work at full duty, and resumed his job duties without issues on October 6, 2017. (Ex. E). At the time of discharge, Claimant's physician, John Ogrodnick, M.D., indicated that Claimant was at increased risk for recurring dislocations, and that many people with his condition require surgery. Dr. Ogrodnick indicated the September 2017 dislocation was Claimant's third dislocation. No credible evidence was admitted indicating surgery was recommended for Claimant's shoulder at that time.

4. Claimant testified that between 2017 and August 4, 2024, he had not experienced shoulder issues. He testified he was able to perform his job duties, and he performed a daily exercise regimen which included weight training and exercises for his shoulders. He

testified his shoulder was functional prior to August 4, 2023, and that he did not limit his activities due to his shoulder.

5. On August 7, 2023, Claimant saw Robert McLaughlin, M.D., who served as his authorized treating physician (ATP). Claimant reported his history of dislocations to Dr. McLaughlin, indicating that he had surgery approximately 12 years earlier, and that his most recent dislocation was in 2017. On examination, Dr. McLaughlin found anterior instability of the left shoulder, and opined that Claimant's shoulder dislocation was work-related. He referred Claimant to orthopedic surgeon Daniel Hamman, M.D., for evaluation. (Ex. 5).

6. Claimant saw Dr. Hamman on August 16, 2023. Dr. Hamman noted that Claimant reported he had shoulder surgery approximately 15 years prior, and five years after that surgery, Claimant dislocated it again. He documented that Claimant reported dislocating his shoulder "every few years since" and that Claimant was concerned he had been dislocating his shoulder for "a long time." Dr. Hamman recommended an MRI. Dr. Hamman also recommended that Claimant not use his left arm until further notice. (Ex. 6).

7. The left shoulder MRI, performed on August 25, 2023, showed a possibly acute posterior-superior labral tear with diffuse anterior-inferior labral fraying and tearing that appeared chronic; a moderate chronic Hill-Sachs impaction fracture; and a moderate tear of the suprascapularis. (Ex. 6).

8. On August 31, 2023, Claimant had a phone visit Dr. McLaughlin, who opined that it was "clear" that Claimant had an acute work injury, along with chronic issues most likely related to Claimant's 2017 work injury. Dr. McLaughlin indicated he would call Dr. Hamman to see if surgery was recommended. (Ex. I). On September 1, 2023, Dr. McLaughlin documented that he spoke with an orthopedist, who indicated that Claimant's Hill-Sachs fracture did not require surgery. Dr. McLaughlin wrote "I discussed with the orthopedist [who] indicated chronic and generally healed most likely no large enough to need repair but he will speak with Dr. [Hamman[about that." In the same note, Dr. McLaughlin's "Plan" included Claimant getting left shoulder surgery with Dr. Hamman. (Ex. J).

9. On September 29, 2023, Claimant began physical therapy for his shoulder on referral from Dr. McLaughlin. Claimant reported to his physical therapist that he had a history of recurrent dislocations, and that his most recent dislocation was in 2017. Claimant completed six sessions of physical therapy through December 6, 2023. (Ex. N).

10. On October 17, 2023, Claimant saw orthopedic surgeon Timothy O'Brien, M.D., for a Respondent-requested independent medical examination (IME). Dr. O'Brien issued a report dated October 31, 2023. According to his report, the only medical record Dr. O'Brien reviewed was Claimant's August 7, 2023 visit with Dr. McLaughlin. Based on his examination, the history provided by Claimant (which included his prior shoulder dislocations and surgery), and medical record review, Dr. O'Brien concluded that Claimant's left shoulder dislocation was not work-related, and that it was "a manifestation

of his personal health and not the result of a work-related injury." He further opined that Claimant was a candidate for surgery to stabilize his left shoulder, but concluded that the surgery was not work-related.

11. On November 15, 2023, Claimant returned to Dr. Hamman for evaluation. At that time, Claimant reported that his shoulder had improved and rated his pain as 1/10. He also documented that Claimant had "dislocated his shoulder approximately 20 times." On examination, Dr. Hamman noted that Claimant had positive testing including a mildly positive Speed test, positive O'Brien test, and positive apprehension relocation testing in the abducted, externally rotated position. Dr. Hamman indicated that Claimant was at risk for recurrent dislocations and that the risk could be mitigated by arthroscopy, labral repair, and possible remplissage. However, he noted that he was winding down his practice, and recommended Claimant see Rajesh Bazaz, M.D. at Western Orthopedics. (Ex. R). Claimant testified at hearing that he did not tell Dr. Hamman that he had dislocated his shoulder twenty times, and that he had previously dislocated his shoulder three times, each time requiring an emergency room visit. Claimant's testimony in this regard and consistent with his contemporaneous reports to other medical providers.

12. December 27, 2023, Claimant saw Dr. Bazaz. Claimant reported that he had a history of shoulder including a dislocation ten years earlier, and other dislocations needing to be reduced in the emergency room. He reported that his most recent dislocation was in 2017. After examination and review of the MRI, Dr. Bazaz recommended left shoulder surgery with arthroscopic Bankart reconstruction (*i.e.*, labral repair) and remplissage. (Ex. T & U). On January 25, 2024, Dr. Bazaz performed left shoulder surgery, which included the recommended procedures. (Ex. V).

13. The parties stipulated that Claimant was off work due from the date of surgery until May 19, 2024. Claimant testified that he returned to work on May 20, 2024, and that while off work he received some received family leave benefits of approximately $1,100 per week, which ended when he returned to work. Claimant also testified that he did not consider surgery following his recovery from his 2017 shoulder dislocation because he did not feel his shoulder was unstable. Claimant's testimony was credible.

14. Dr. O'Brien testified at hearing consistent with the opinions expressed in his report. He testified that Claimant has chronic instability of the soft tissues in his left shoulder and a wedge-shaped defect in the humeral head. He also opined that Claimant was predisposed to shoulder dislocation because of this condition. He opined that Claimant's prior shoulder surgery failed, and that his left shoulder had "never been stable." He disputed Claimant's testimony that he did not dislocate his left shoulder from 2017 until his work injury, relying on the statement in Dr. Hamman's November 15, 2023 record indicating Claimant reported dislocating his shoulder twenty times. Dr. O'Brien opined that Claimant based on Dr. Hamman's note Claimant had likely dislocated his shoulder several times per year. (No credible evidence was admitted indicating Claimant received medical treatment for his left shoulder from October 2017 until the August 4, 2023 work injury, or that Claimant had dislocated his shoulder several times per year as speculated by Dr. O'Brien). Dr. O'Brien's opinion regarding causation of Claimant's left shoulder dislocation is not credible or persuasive.

15. On May 19, 2023, Claimant saw occupational medicine physician Anjmun Sharma, M.D., for a Claimant-requested IME. Dr. Sharma conducted a review of Claimant's medical records and examined Claimant. Dr. Sharma opined that Claimant's left shoulder dislocation on August 4, 2023 was work-related, based on the fact that the injury occurred while Claimant was at work and performing work-related duties. He further opined that the need for surgery was related to Claimant's work-related injury, noting that Claimant had no documented medical treatment on his left shoulder since 2017, and that Claimant had been performing his job duties during that time period without restrictions. He also opined that Claimant reached maximum medical improvement on May 17, 2024, and recommended no maintenance care. (Ex. 1).

16. Dr. Sharma testified at hearing that absent Claimant's August 2023 dislocation, he would not have recommended Claimant have shoulder surgery. He testified that Claimant's August 2023 work injury aggravated Claimant's pre-existing condition, and that absent the work injury Claimant would not have required shoulder surgery. Sharma's opinions are reasonable, logical, and credible.

17. No credible evidence was admitted demonstrating that Claimant had treatment for his left shoulder from 2017 until August 2023, or that Claimant dislocated his shoulder at any time between 2017 and August 2023.

18. The parties stipulated that Claimant's average weekly wage was $1,430.98.

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

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm'n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equip. Co.,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

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 or infirmity to produce a disability or need for medical treatment. *Duncan v. Indus. 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*, W.C. No. 4-960-513-01, (ICAO Oct. 2, 2015).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his left shoulder arising out of the course of his employment with Employer. Claimant dislocated his shoulder while using a mop to perform his job duties. Although Claimant does have a pre-existing shoulder condition, and was predisposed to shoulder dislocations, there is no credible evidence demonstrating that Claimant's shoulder spontaneously dislocated independent of his work activities.

The ALJ credits Dr. McLaughlin (Claimant's ATP) and Dr. Sharma (IME) in finding that Claimant sustained a work-related injury on August 4, 2023, as their opinions are credible, logical, and consistent. In contrast, Dr. O'Brien's claim that the shoulder dislocation was unrelated to work, despite occurring during a work activity, lacks credibility and logic. A predisposition to dislocation does not negate the work-related nature or compensability of the injury.

SPECIFIC MEDICAL BENEFITS AT ISSUE

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. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, W.C. No. 4-797-103 (ICAO Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009)

Claimant has established by a preponderance of the evidence that the surgery performed on January 25, 2025 was reasonable and necessary to cure or relieve the effects of Claimant's work injury. Respondents do not contest that surgery was reasonable and necessary, only that the need for surgery was not related to Claimant's work injury. "To prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment." *McIntyre v. KL, L.L.C.*, W.C. No. 4-805-040 (ICAO Jul. 2, 2010).

The surgery recommended by Drs. Hamman and Bazaz was to address the instability in Claimant's left shoulder that manifested as a dislocation on August 4, 2023. Although Claimant had a pre-existing shoulder condition which predisposed him to dislocations, the credible evidence demonstrates that Claimant was able to work and function without restriction prior to August 4, 2023. Moreover, Claimant had no shoulder issues (including dislocations), and no medical treatment for his left shoulder for approximately six years before the August 4, 2023 injury. The ALJ credits the opinion of Dr. Sharma that Claimant would not have required treatment in 2023 for his left shoulder in 2024 in the absence of his work injury. Claimant's request for authorization of the January 25, 2024 surgery is granted.

TEMPORARY DISABILITY BENEFITS

Claimant seeks temporary total disability benefits for the period of January 24, 2024 through May 19, 2024, while he was recovering from shoulder surgery. The parties stipulated that Claimant did not work during this period; however, the Claimant's medical records demonstrate that the surgery was performed on January 25, 2024, not January

24, 2024. The parties further stipulated that Claimant's average weekly wage was $1,430.98.

Because the ALJ finds that Claimant's injury is compensable, and that the surgery is causally-related to his work injury, Claimant has established by a preponderance of the evidence that he was unable to work for the period of January 25, 2024 through May 19, 2024 as a result of his injury, and is entitled to temporary total disability benefits during this period.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his left shoulder on August 4, 2023.

2. Respondents are liable for the January 25, 2024 surgery performed by Dr. Bazaz, and any associated treatment, subject to the Workers' Compensation Medical Fee Schedule.

3. Claimant is entitled to temporary total disability benefits for the period of January 25, 2024 through May 19, 2024, based on an average weekly wage of $1,430.98, subject to any applicable offsets.

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: February 3, 2025

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-256-432-003

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she injured her wrists during the course and scope of her employment with Employer on October 18, 2023.

2. Whether Claimant has proven by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to her through Respondent's 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 she is entitled to reasonable, necessary and causally related medical benefits for her October 18, 2023 industrial injuries.

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

5. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period November 12, 2023 until terminated by statute.

6. Whether Employer is subject to penalties pursuant to §8-43-408(1), C.R.S. for failing to carry Workers' Compensation insurance on October 18, 2023.

FINDINGS OF FACT

1. On June 5, 2023 Claimant began working for Employer as a painter. Claimant testified she worked approximately 50 hours each week and earned $20.00 per hour. She thus earned an AWW of $1,000.

2. On October 18, 2023 Claimant was working for Employer at a job site located at 18907 E. Creekside Place, Parker, CO 80134. At approximately 11:00 a.m. Claimant fell off a ladder from a height of about 8-10 feet. She fell forward, putting her arms in front to break the fall. Claimant injured both hands and suffered abrasions to her face. She reported the injury to owner of Employer Francisco Iboa about an hour later when he arrived at the work site. He applied ointment to Claimant's hands but did not offer a list of designated medical providers.

3. Mr. Iboa acknowledged that on October 18, 2023 he did not have Workers' Compensation insurance. Moreover, the record reveals that the Division of Workers' Compensation (DOWC) issued a letter dated October 20, 2023 stating that Employer did not possess Workers' Compensation insurance on the date of Claimant's injury.

4. Claimant continued to work until the end of her shift. She did not work the next day because of pain and swollen hands. Claimant returned to work the week after the accident.

5. Claimant explained that she ceased working for Employer on November 10, 2023 after the completion of her shift.

6. Claimant testified that on November 11, 2023 she could no longer tolerate the pain in her hands. She thus visited Federico Pena Family Health Center Urgent Care where Physician's Assistant Richard Milner conducted an examination. Claimant reported pain in her hands. An x-ray of the left wrist revealed a mildly compacted, non-displaced extra-articular fracture of the distal radius metaphysis and a mildly displaced fracture of the ulnar styloid. An x-ray of the right wrist revealed a comminuted mildly displaced intra-articular fracture of the distal radial metaphysis. PA Milner diagnosed Claimant with a closed fracture of the right wrist, a closed fracture of the left wrist and a facial contusion. She received a sugar tong splint for her right upper extremity and was directed to follow-up with an orthopedic specialist.

7. Claimant explained that when she presented her medical paperwork to Employer on November 12, 2023, Mr. Iboa stated there was no more work available for her. She did not return to work for Employer.

8. On November 15, 2023 Claimant visited Denver Health Hospital for an evaluation. She underwent a CT scan of her right wrist that revealed a comminuted distal radius fracture with margin extension into the radioulnar joint, radiocarpal joint, and listers tubercle as well as four mm of fracture gapping at the radiocarpal articular surface.

9. On November 21, 2023 Claimant returned to Denver Health for right wrist surgery. Stephanie Malliar, M.D. specifically performed an open reduction and internal fixation of Claimant's right upper extremity. Claimant received a short arm splint and was discharged on the same day.

10. Claimant subsequently received post-surgery follow-up care through Denver Health. On February 26, 2024 Physician's Assistant Maria S. Hermanson referred Claimant for physical and occupational therapy to improve range of motion, strength and weight-bearing of her right wrist. She limited Claimant to no lifting in excess of 20 pounds until she had near full range of motion in her right wrist.

11. Claimant has established it is more probably true than not that she injured her wrists during the course and scope of her employment with Employer on October 18, 2023. Claimant credibly testified that on October 18, 2023 at approximately 11:00 a.m. she fell off a ladder from a height of about 8-10 feet while performing her job duties for Employer. Claimant fell forward, putting her arms in front to break the fall. She injured both hands and suffered abrasions to her face. Claimant reported the injury to Employer about an hour later when he arrived at the work site.

12. On November 11, 2023 at Federico Pena Family Health Center Urgent Care an x-ray of Claimant's left wrist revealed a mildly compacted, non-displaced extra-articular

fracture of the distal radius metaphysis and a mildly displaced fracture of the ulnar styloid. An x-ray of the right wrist reflected a comminuted mildly displaced intra-articular fracture of the distal radial metaphysis. Claimant was diagnosed with a closed fracture of the right wrist, a closed fracture of the left wrist and a facial contusion. On November 15, 2023 at Denver Health a CT scan of Claimant's right wrist revealed a comminuted distal radius fracture with margin extension into the radioulnar joint, radiocarpal joint, and listers tubercle as well as four mm of fracture gapping at the radiocarpal articular surface. On November 21, 2023 Claimant underwent surgery in the form of an open reduction and internal fixation to repair her right upper extremity.

13. The record reveals that Claimant has consistently maintained she injured her wrists while performing painting services for Employer on October 18, 2023. She immediately reported the incident and was diagnosed with injuries to both wrists. Therefore, based on Claimant's credible testimony and a review of the medical records, Claimant suffered wrist injuries that were proximately caused by her work duties during the course and scope of her employment with Employer. Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered compensable wrist injuries while working for Employer on October 18, 2023.

14. Claimant has proven it is more probably true than not that the right to select an ATP passed to her through Respondent's 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. Respondent has thus not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondent failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to her.

15. Claimant has demonstrated it is more probably true than not that she is entitled to reasonable, necessary and causally related medical benefits for her October 18, 2023 industrial injury. On November 11, 2023 Claimant visited the emergency room of Denver Health where she was diagnosed with a closed fracture of her right wrist, closed fracture of her left wrist and contusion to her face. Claimant's fractures were treated by the various providers at Denver Health. On November 21, 2023 Claimant underwent right distal open reduction and internal fixation surgery. Claimant received physical therapy and had follow-up appointments with orthopedic specialists. All of her care was designed to treat her wrist injuries. She has thus proven by a preponderance of the evidence that all of her medical care was authorized, reasonable, necessary and causally related to her October 18, 2023 fall at work.

16. Claimant credibly testified she worked approximately 50 hours each week and earned $20.00 per hour. She thus earned an AWW of $1,000. An AWW of $1,000 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

17. Claimant has proven it is more probably true than not that she is entitled to receive TTD benefits for the period November 12, 2023 until terminated by statute.

Claimant credibly testified that she ceased working for Employer after her November 10, 2023 work shift and sought medical care on the following day for pain in her hands. When she presented her medical paperwork to Employer on November 12, 2023, Mr. Iboa stated there was no more work available for her. The medical records from Denver Health demonstrate that Claimant was either unable to work or under restrictions from the date of her injury. On November 21, 2023 Claimant underwent right wrist surgery. She subsequently received physical therapy and had follow-up appointments with orthopedic specialists. Claimant has not reached Maximum Medical Improvement (MMI). The preceding chronology reveals that Claimant's wrist injuries caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. Claimant is thus entitled to TTD benefits for the period November 12, 2023 until terminated by statute.

18. Claimant earned an AWW of $1,000. As of the date position statements were due in this matter on January 24, 2025, it has been 62 weeks since Claimant ceased working for Employer on November 12, 2023. Multiplying the AWW of $1,000 by 62 equals $62,000. Indemnity benefits of $62,000 at a TTD rate of 66.66% total $41,329.20.

19. Employer did not have an active Workers' Compensation insurance policy with any insurer effective on or prior to Claimant's October 18, 2023 date of injury. Based on the preceding sections of the present Order, Employer is required to pay Claimant $41,329.20 in TTD benefits. Twenty-five percent of $41,329.20 is $10,332.30. Accordingly, Employer shall pay $10,332.30 in penalties to the Colorado Uninsured Employer Fund created in §8-67-105, C.R.S.

20. This Order awards continuing TTD benefits until terminated by statute. The Order specifically awards indemnity benefits of $41,329.20, and penalties of $10,332.30 for a total amount of $51,661.50. Employer is thus required to pay the trustee of the Division a total amount of $51,661.50. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

CONCLUSIONS OF LAW

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

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

Compensability

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

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

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

7. As found, Claimant has established by a preponderance of the evidence that she injured her wrists during the course and scope of her employment with Employer on October 18, 2023. Claimant credibly testified that on October 18, 2023 at approximately 11:00 a.m. she fell off a ladder from a height of about 8-10 feet while performing her job duties for Employer. Claimant fell forward, putting her arms in front to break the fall. She injured both hands and suffered abrasions to her face. Claimant reported the injury to Employer about an hour later when he arrived at the work site.

8. As found, on November 11, 2023 at Federico Pena Family Health Center Urgent Care an x-ray of Claimant's left wrist revealed a mildly compacted, non-displaced extra-articular fracture of the distal radius metaphysis and a mildly displaced fracture of the ulnar styloid. An x-ray of the right wrist reflected a comminuted mildly displaced intra-articular fracture of the distal radial metaphysis. Claimant was diagnosed with a closed fracture of the right wrist, a closed fracture of the left wrist and a facial contusion. On November 15, 2023 at Denver Health a CT scan of Claimant's right wrist revealed a comminuted distal radius fracture with margin extension into the radioulnar joint, radiocarpal joint, and listers tubercle as well as four mm of fracture gapping at the radiocarpal articular surface. On November 21, 2023 Claimant underwent surgery in the form of an open reduction and internal fixation to repair her right upper extremity.

9. As found, the record reveals that Claimant has consistently maintained she injured her wrists while performing painting services for Employer on October 18, 2023. She immediately reported the incident and was diagnosed with injuries to both wrists. Therefore, based on Claimant's credible testimony and a review of the medical records, Claimant suffered wrist injuries that were proximately caused by her work duties during the course and scope of her employment with Employer. Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered compensable wrist injuries while working for Employer on October 18, 2023.

Medical Benefits/Right of Selection

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

11. 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).

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,* 996 P.2d at 229. 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. industrial Claim Appeals Office,* 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. As found, Claimant has proven by a preponderance of the evidence that the right to select an ATP passed to her through Respondent's 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. Respondent has thus not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondent failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to her.

15. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to reasonable, necessary and causally related medical benefits for her October 18, 2023 industrial injury. On November 11, 2023 Claimant visited the emergency room of Denver Health where she was diagnosed with a closed fracture of her right wrist, closed fracture of her left wrist and contusion to her face. Claimant's fractures were treated by the various providers at Denver Health. On November 21, 2023 Claimant underwent right distal open reduction and internal fixation surgery. Claimant received physical therapy and had follow-up appointments with orthopedic specialists. All of her care was designed to treat her wrist injuries. She has thus proven by a preponderance of the evidence that all of her medical care was authorized, reasonable, necessary and causally related to her October 18, 2023 fall at work.

Average Weekly Wage

16. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). The preceding method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." *Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777, 780 (Colo. 2010). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82.

17. As found, Claimant credibly testified she worked approximately 50 hours each week and earned $20.00 per hour. She thus earned an AWW of $1,000. An AWW of $1,000 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

18. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced

by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Off.*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

19. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period November 12, 2023 until terminated by statute. Claimant credibly testified that she ceased working for Employer after her November 10, 2023 work shift and sought medical care on the following day for pain in her hands. When she presented her medical paperwork to Employer on November 12, 2023, Mr. Iboa stated there was no more work available for her. The medical records from Denver Health demonstrate that Claimant was either unable to work or under restrictions from the date of her injury. On November 21, 2023 Claimant underwent right wrist surgery. She subsequently received physical therapy and had follow-up appointments with orthopedic specialists. Claimant has not reached Maximum Medical Improvement (MMI). The preceding chronology reveals that Claimant's wrist injuries caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. Claimant is thus entitled to TTD benefits for the period November 12, 2023 until terminated by statute.

20. As found, Claimant earned an AWW of $1,000. As of the date position statements were due in this matter on January 24, 2025, it has been 62 weeks since Claimant ceased working for Employer on November 12, 2023. Multiplying the AWW of $1,000 by 62 equals $62,000. Indemnity benefits of $62,000 at a TTD rate of 66.66% total $41,329.20.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

21. Prior to July 1, 2017 §8-43-408(1), C.R.S., provided that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits payable to the claimant were to be increased by fifty percent. However, effective July 1, 2017 §8-43-408, C.R.S. was amended and the language regarding a fifty percent increase in benefits was removed. The version of §8-43-408(5), C.R.S. in effect at the time of Claimant's October 18, 2023 injury 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.

22. The penalty for failure to insure only applies to indemnity benefits and does not encompass medical benefits. *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc*., W.C. No. 4-155-231 (ICAO, Feb. 13, 1998). Statutory interest is not properly considered "compensation or benefits" within the meaning of §8-43-408(5), C.R.S. 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).

23. As found, Employer did not have an active Workers' Compensation insurance policy with any insurer effective on or prior to Claimant's October 18, 2023 date of injury. Based on the preceding sections of the present Order, Employer is required to pay Claimant $41,329.20 in TTD benefits. Twenty-five percent of $41,329.20 is $10,332.30. Accordingly, Employer shall pay $10,332.30 in penalties to the Colorado Uninsured Employer Fund created in §8-67-105, C.R.S.

Payment to Trustee or Posting of Bond

24. Under §8-43-408(2), C.R.S. Employer must pay to the trustee of the Division of Workers' Compensation (Division) an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. Alternatively, "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."

25. As found, this Order awards continuing TTD benefits until terminated by statute. The Order specifically awards indemnity benefits of $41,329.20, and penalties of $10,332.30 for a total amount of $51,661.50. Employer is thus required to pay the trustee of the Division a total amount of $51,661.50. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

1. Claimant suffered compensable wrist injuries on October 18, 2023 during the course and scope of her employment with Employer.

2. Employer is financially responsible for payment of Claimant's reasonable, necessary and related medical expenses for the treatment of her wrist injuries.

3. Claimant earned an AWW of $1,000.

4. Claimant shall receive TTD benefits for the period November 12, 2023 until terminated by statute. As of the date position statements were due in this matter on January 24, 2025, it has been 62 weeks since Claimant ceased working for Employer on November 12, 2023. Multiplying the AWW of $1,000 by 62 equals $62,000. Indemnity benefits of $62,000 at a TTD rate of 66.66% total $41,329.20.

5. Employer shall pay $10,332.30 in penalties to the Colorado Uninsured Employer Fund created in §8-67-105, C.R.S.

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

a. Deposit the sum of $51,661.50, adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Trustee; or

b. File a bond in the sum of $51,661.50 with the Division of Workers' Compensation within ten (10) days of the date 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 and benefits awarded.

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

d. The filing of any appeal, including a petition for review, shall not relieve Employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

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

8. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or order authorizing distribution provides otherwise.

9. Pursuant to §8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer is solely liable and responsible for the payment of all medical costs related to Claimant's work injury.

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

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

DATED: February 4, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-236-447-002

ISSUES

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

FINDINGS OF FACT

1. Claimant is 56 years old. Claimant works as a teacher for Employer. On January 17, 2023, during the course and scope of her employment, Claimant sustained a compensable injury to her right arm and right shoulder. Claimant is right-hand dominant.

2. Claimant began treating with her authorized treating physician, John Raschbacher, M.D., on January 30, 2023. Claimant was experiencing right wrist pain, right elbow pain, and right shoulder pain. Ex. B p. 20.

3. At Claimant's next visit with Dr. Raschbacher she had decreased forward flexion of her right shoulder. Dr. Raschbacher ordered an MRI arthrogram of Claimant's right shoulder. Ex. B p. 26.

4. Claimant's MRI showed a large tear of the labrum. Ex. B p. 28; Ex. I p. 319 ("1. Near-complete circumferential labral tear. 2. Low-grade intrasubstance tearing supraspinatus tendon at the humeral footplate. No full-thickness rotator cuff injury. 3. Significant chondromalacia and osteoarthritis of posterior glenoid suggesting previous impaction type injury.").

5. Dr. Raschbacher referred Claimant for an orthopedic consultation concerning the labrum tear. Ex. B p. 30; Ex. B p. 32.

6. Claimant met with Douglas Alan Foulk, M.D., on March 27, 2023. Dr. Foulk recommended Claimant undergo a "right shoulder arthroscopy with SLAP, interior labral repair." Ex. M p. 331.

7. On April 26, 2023, Dr. Foulk repaired Claimant's torn labrum. Ex. K p. 323 ("arthroscopy of the right shoulder with repair of the anterior labrum, arthroscopy of right shoulder with repair of superior labrum anterior to posterior tear, arthroscopy of right shoulder with repair of posterior labrum; all labral repairs anterior posterior but not superior included capsulorrhaphy").

8. On May 12, 2023, 17 days after surgery, Claimant met with Dr. Raschbacher. Claimant had discomfort with muscle tightness at the base of her neck on the right side. Ex. B p. 46; Ex. B p. 47 ("Tender at the right base of the neck and supra spinatus and medial scapular areas.").

9. At visits between May 22, 2023 and June 30, 2023, Dr. Raschbacher documented that Claimant had little or no neck pain. Ex. B p 50 ("She does not have neck pain or numbness or tingling at the digits."); Ex. B p. 54 ("doesn't have much neck discomfort"); Ex. B p. 60 ("No pain behaviors").

10. On June 30, 2023, Dr. Raschbacher assessed Claimant's range of motion post-surgery. Ex. B p. 64. Claimant's right shoulder had a poor active range of motion and she was tender at the right parascapular area. *Id.*

11. Claimant began physical therapy for her injury on January 30, 2023. Ex. D p. 100. At her first visit post-surgery on May 16, 2023, Claimant was unable to move her right elbow or shoulder and she was experiencing spasms in her right bicep. Ex. D p. 131. Generally, the muscles around Claimant's right shoulder were extremely tight. *Id.*

12. Over her next 14 physical therapy visits, Claimant received manual therapy of the musculature around her right shoulder and she concluded each session with vasopneumatic compression to the shoulder. Ex. D p. 131-153.

13. Despite consistently going to physical therapy, Claimant continued to exhibit poor range of motion in her right shoulder. Ex. B p. 66. At physical therapy on July 25, 2023, Claimant underwent dry needling of her right deltoid. Ex. D p. 158.

14. Claimant met with Dr. Raschbacher on August 7, 2023. Claimant had discomfort in her right trapezius and increased muscle tension around her right shoulder. Ex. B p. 74. Dr. Raschbacher referred Claimant for chiropractic treatment. *Id.*

15. Claimant's follow up with Dr. Foulk on August 14, 2023 was unremarkable. Ex. M p. 336-337.

16. Claimant met with Alexa Sheppard, D.C., on August 15, 2023. Ex. N p. 369. Claimant had significant right shoulder pain, as well as neck and upper back tightness and stiffness. Dr. Sheppard diagnosed Claimant with "[p]ostoperative right shoulder labrum repair with associated myofascial and facet dysfunction in the cervicothoracic spine." Ex. N p. 371.

17. Claimant attended 5 appointments with Dr. Sheppard between August 23, 2023 and September 21, 2023. Claimant had hypertonicity of the musculature surrounding her right shoulder, including her trapezius, rhomboids, and deltoid. Ex. N p. 347-383. Claimant had trigger points in her trapezius, rhomboids, infraspinatus, supraspinous, teres minor, and deltoid. *Id.* Dr. Sheppard treated Claimant with trigger point dry needing, percutaneous intramuscular stimulation, and electromagnetic infrared heat therapy. Those treatments showed no objective improvements or subjective decreases in Claimant's pain. Ex. N p. 382.

18. While undergoing treatment with Dr. Sheppard for neck and upper back tightness and stiffness, Claimant met with Dr. Raschbacher. Despite Dr. Sheppard's documentation of Claimant's hypertonicity and tenderness, Dr. Raschbacher documented that Claimant's neck and trapezius were "nontender." Ex. B p. 81.

19. A preponderance of the evidence supports a finding that in mid-September 2023, Claimant's neck and upper back on her right side was tender, hypertonic, and caused Claimant pain.

20. On October 20, 2023, Dr. Raschbacher administered a trigger point injection at the base of Claimant's neck on the right side. Ex. B p. 92. Claimant's range of motion in her right shoulder remained poor. Ex. B p. 89.

21. Claimant saw Dr. Foulk on October 23, 2023, and he referred her to Michael Neil Horner, D.O., for an electromyography (EMG) nerve conduction of the right upper extremity. *Id.* When Claimant met with Dr. Horner on October 26, 2023, she had pain in her right shoulder, numbness in her right hand, and weakness in her right shoulder aggravated by lifting, pushing, and pulling. Ex. M p. 349. Claimant's EMG results were normal. Ex. M p. 352.

22. On November 10, 2023, due to Claimant's continued poor range of motion without improvement, Dr. Raschbacher placed Claimant at MMI and performed an impairment rating. Ex. C p. 106-108; *see* Ex. B p. 97. Dr. Raschbacher noted:

> She has tenderness at the anterior and posterior shoulder on the right. Cervical spine and trapezii are nontender. No spasm. Good strength in pinch grip power grip adduction and abduction at the digits. Good strength with wrist flexion and extension. Weak on the right with IR and ER. No frank muscle atrophy. No bunch of the bicep muscle. Normal vascular and sensory examination of the upper extremity. Deep tendon reflexes symmetric at the biceps triceps and brachial radialis without hyperreflexia.

Ex. C p. 106.

23. Dr. Raschbacher assigned Claimant a 19% upper extremity impairment rating, which corresponds to a 11% whole person impairment. Ex. C p. 107. Dr. Raschbacher recommended Claimant receive maintenance medical benefits for her right shoulder after his determination that she was at MMI. *Id.* ("Maintenance should be covered as follows: She should complete the scheduled physical therapy to see if it will increase her strength, and follow-up on an orthopedic basis with Dr. Foulk. Otherwise it doesn't appear maintenance is necessary.").

24. Respondents filed a Final Admission of Liability on January 10, 2024, and admitted a 19% upper extremity impairment rating. Ex. A.

25. Claimant returned to Dr. Raschbacher on January 26, 2024. Ex. B p. 101. Claimant had continued right shoulder pain, pain at the right side of her neck going into her shoulder, and numbness in her right hand. *Id.*

26. Claimant saw Dr. Foulk on March 11, 2024. Ex. M p. 361. Dr. Foulk recommended Claimant undergo an ultrasound guided cortisone injection into the bicipital groove by Dr. Horner for her "persistent pain" along the bicipital groove. *Id.* at p. 361-362.

27. On June 3, 2024, Claimant filed an application for hearing requesting, in part, that her 19% right upper extremity rating be converted to a 11% whole person rating based on the situs of functional impairment.

28. Claimant underwent a repeat MRI of her right shoulder on June 28, 2024. Ex. J p. 321 ("1. Mild rotator cuff tendinopathy. No tear. 2. Severe glenohumeral degenerative joint disease with labral degeneration. Small glenohumeral joint effusion."). Dr. Foulk diagnosed Claimant as having "post-traumatic osteoarthritis of her right glenohumeral joint." Ex. M p. 367.

29. Alicia Feldman, M.D., completed an independent medical examination (IME) of Claimant on behalf of Respondents on August 23, 2024. Ex. P. At the time, Claimant had right shoulder pain that radiated proximally and distally. Ex. P p. 401. Dr. Feldman concluded in part:

> Her injury was isolated to her arm. Eight times, Dr. Raschbacher documents that there is no neck pain. First, on January 30, 2023, "No radiation from the neck into the extremity or vice versa." Again, on February 20, 2023, "She does not have neck pain." On May 22, 2023, "She does not have neck pain or numbness or tingling in the digits. There are no psychological difficulties." On July 14, 2023, "She does not have any neck pain." Again, on September 8, 2023, Dr. Raschbacher documents again, "She does not have any neck pain." There is no evidence of any objective injury related pathology of the cervical spine or other body parts that would be rated as a whole person impairment rating. Any minimal neck pain that she has is not reflective of an additional objective work-related injury. Per desk 8-11, "In shoulder cases with accompanying neck pain, the clinician must determine whether an additional objective work-related table 53 cervical pathology qualifies for a rating or the symptoms the patient has are those expected from the shoulder pathology and do not qualify for an additional rating." There is no evidence to suggest an additional objective work-related table 53 cervical pathology related to a work-related injury, and any neck pain that she might have had would be normal for the shoulder pathology.

Ex. P p. 416.

30. Claimant credibly testified at hearing that:

a. Since being placed at MMI by Dr. Raschbacher she has "[p]ain in my shoulder . . . and up into my neck. I sometimes get headaches too." Tr. p. 12 l. 10-11. The pain in her right shoulder is "[t]hrobbing." *Id.* at l. 23.

b. She described the pain on the right side of her neck as "really tight and throbs and aches with the shoulder." Tr. p. 13 l. 20-21. The pain can radiate to the left side of her neck. *Id.* at l. 21-24.

c. The pain in her neck depends on her level of activity "but there's – most of the time it's – I'm dealing with the issues in my shoulder." Tr. p. 14 l. 19-21.

d. Along with her right shoulder, her right upper back also throbs, aches, and is stiff. Tr. p. 15 l. 13-14; *see* Tr. p. 15 l. 7-9 ("[U]susally I have some degree of low-grade pain in that shoulder and neck and – and this part, right here. The – I don't know what that's called.").

e. She has had to change a lot of her daily activities, including gardening, cooking, and bicycling. She will "divert to my left side a lot now." Tr. p. 17 l. 2.

f. She sleeps in a certain position and she has pillows she uses to "prop it level with my shoulder, and that relieves the pain." Tr. p. 17 l. 24-p. 18 l. 1.

31. Dr. Feldman testified at hearing on behalf of Respondents and was admitted as an expert in physical medicine and rehabilitation and as a Level II accredited physician. Dr. Feldman testified that Claimant's current complaints of neck and upper back pain are the type of complaints one could expect from a shoulder injury.

32. Dr. Feldman testified in conformance with her IME. Dr. Feldman did acknowledge on cross-examination that a SLAP tear occurs at the top of the glenohumeral joint. Tr. p. 39 l. 9-12. However, in her professional medical opinion, Claimant's impairment rating "is limited to her shoulder." *See* Tr. p. 35 l. 21-25.

33. The ALJ finds Dr. Feldman's testimony of little benefit since, like in her IME report, Dr. Feldman conflated whether Claimant should receive a separate impairment rating for her neck with whether Claimant's admitted upper extremity impairment should be converted to a whole person impairment. *See, e.g.*, Tr. p. 35 l. 7-13 ("[I]f the work-related injury had caused injury to the neck, we would have expected her to have neck pain immediately or very soon after. . . . So what I think she's experiencing is what we would expect for a shoulder injury, and doesn't represent a separate cervical spine injury.").

34. While Dr. Raschbacher's medical records do contain notes stating either that Claimant had no neck pain or that Claimant's neck and trapezii were nontender, there are also records documenting Claimant's neck and upper back complaints. *Compare* Ex. B p. 50 (5/22/23: "She does not have neck pain or numbness or tingling at the digits."); Ex. B p. 66 (7/14/23: "She doesn't have any neck pain."); Ex. B p. 80 (9/8/23: "She does not have any neck pain."); *with* Ex. B p. 47 (5/12/23: Claimant was "[t]ender at the right base

of the neck and super spinatus and medial scapular areas."); Ex. B p. 64 (6/30/23: "She is tender at the right parascapular area."); Ex. B p. 74 (8/7/23: "She is tender at the right trapezius."). A preponderance of the evidence supports a finding that Claimant's neck and upper back pain has waxed and waned but that she has experienced some form of neck and upper back pain since she underwent surgery to repair her torn labrum.

35. A preponderance of the evidence supports a finding that Claimant's right shoulder injury has affected physiological structures beyond the arm at the shoulder, particularly the musculature in her neck and upper back.

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. Indus. Claim Appeals Off.*, 30 P.3d 691, 693 (Colo. App. 2000); *Strauch v. PSL Swedish Healthcare Sys.*, 917 P.2d 366, 368 (Colo. App. 1996).

> 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).

Newton, 2021 Colo. Work. Comp. LEXIS 45 at *13-14; *see In re White*, W.C. No. 5-176-394, 2024 Colo. Wrk. Comp. LEXIS 18 (Feb. 5, 2024); *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." *Newton*, at *14.

As found, Claimant has established by a preponderance of the evidence that her right shoulder injury has affected physiological structures beyond the arm at the shoulder. As a result of her shoulder injury and subsequent surgery, Claimant experiences throbbing, aching, and stiffness in her upper back and neck. This is not a matter where there is only the self-serving testimony of the claimant to support a finding of neck and upper back pain. Rather, Dr. Sheppard documented Claimant's hypertonicity in her

trapezius, with trigger points in her trapezius, rhomboids, infraspinatus, supraspinous, teres minor, and deltoid, and Dr. Raschbacher administered a trigger point injection into the base of the right side of Claimant's neck. Even Respondents' expert Dr. Feldman testified that Claimant's complaints of neck and upper back pain are the type of complaints one could expect from a shoulder injury. And the ALJ found Claimant's testimony about her neck and upper back pain credible. "Pain that radiates into the trapezius muscles, located on the torso between the shoulder and the neck, has often been referenced as justification for finding that a shoulder injury should be assigned a whole person impairment rating." *White*, at *15. Because Claimant's injury has affected physiological structures beyond the arm at the shoulder, the situs of functional impairment extends to Claimant's torso, and, therefore, Claimant has established that her impairment is not a scheduled impairment. *See Newton*, *14 ("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."). Claimant's 19% right upper extremity impairment corresponds to a 11% whole person impairment. Consequently, Claimant's request to convert her 19% right upper extremity permanent impairment rating to a 11% whole person impairment is granted.

ORDER

It is therefore ordered that:

1. Claimant's 19% right upper extremity impairment rating is converted to a 11% whole person impairment.

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 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.

SIGNED: February 4, 2025.

Robin E. Hoogerhyde
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-277-915-001

ISSUES

Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer?

If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that the injury resulted in medical treatment that was reasonable and necessary to cure and relieve the Claimant from the effects of the industrial injury and provided by a physician authorized to treat Claimant for his injuries?

If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that Respondents failed to properly refer Claimant to a physician authorized to treat Claimant for his injuries pursuant to Section 8-43-404(5), C.R.S.?

If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence, whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary disability benefits based on a wage loss related to the industrial injury?

If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence, what is Claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. At the commencement of the hearing, the parties submitted exhibits including medical records, employment records and pleadings. Claimant had filed an Application for Hearing on September 24, 2024 alleging he sustained an injury on July 1, 2024 arising out of his employment with Employer. However, no sworn testimony was presented by Claimant for the hearing.

2. Respondents moved for the dismissal of the case with prejudice based on Claimant's failure to appear or provide testimony in this case. The ALJ, after Claimant rested his case in chief, converted the oral Motion to Dismiss to a Motion for a Directed Verdict and found that Claimant had failed to meet his burden of proof that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer due to the lack of sworn testimony as to the facts giving rise to the injury.

3. In order to qualify for benefits under the Colorado Workers' Compensation Act, the employee must prove by a preponderance of the evidence a number of factors, including, but not limited to:

- Claimant was an employee of Employer at the time of the injury and performing work at a time and place where Colorado would have jurisdiction over the injury.

- Claimant was acting in the course and scope of his employment and performing an act that arose out of his employment with Employer at the time of the injury.

- As a result of the incident, Claimant received medical treatment that was reasonable and necessary to cure and relieve the injured worker from the effects of the work injury.

4. Because Claimant did not offer any testimony that would establish that it is more likely true than not that the legal elements necessary for establishing a compensable injury were present in this case, the court must grant the Motion for Directed Verdict in this case.

5. A motion for directed verdict should not be granted unless the evidence compels the conclusion that a reasonable trier of fact could not disagree and that no evidence or inference has been received at trial upon which a verdict against the moving party could be sustained. The trial judge must view the evidence in the light most favorable to the nonmoving party. *City of Westminster v. Centric-Jones Constructors,* 100 P.3d 472, Colo App. 2003.

6. Even viewing the evidence in a light most favorable to Claimant, without testimony from Claimant in a case involving compensability, Claimant is unable to meet his burden of proof that would establish the elements of a compensable workers compensation claim. As such, Claimant's claim for benefits under the Colorado Workers' Compensation Act is denied.

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. To qualify for recovery under the Workers' Compensation Act of Colorado, a claimant must be performing services arising out of and in the course of his employment at the time of the injury. *See* Section 8-41-301(1)(b), C.R.S. For an injury to occur "in the course of' employment, the claimant must demonstrate that the injury occurred within the time and place limits of the employment and during an activity that had some connection with the work-related function. *See Triad Painting Co. v. Blair,* 812 P.2d 638 641 (Colo. 1991). The "arising out of' requirement is narrower than the "in the course of' requirement. *See Id.* For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. See *Id.* at 641-642.

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

5. In this case, Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer as no testimony was presented that would establish that Claimant was acting within the course and scope of his employment when the injury occurred. Moreover, Claimant has failed to establish that Claimant was performing an action that arose out of his employment at the time the injury occurred.

ORDER

It is therefore ordered that:

1. Claimant's claim for Colorado Workers' Compensation benefits for an injury arising out of and in the course and scope of his employment with Employer on July 1, 2024 is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 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: February 6, 2025

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-240-903-001

ISSUES

- Did Claimant prove by a preponderance of the evidence that she suffered a functional impairment not listed on the schedule?
- If the Claimant's impairment is not on the schedule is the authorized treating physician's impairment rating binding?
- Is Claimant entitled to post-MMI medical benefits?
- Disfigurement.

FINDINGS OF FACT

1. Claimant worked for the Colorado Department of Corrections. At the time of her injury, December 10, 2022, she was employed as a case manager. In addition to the job duties of a case manager, she would occasionally perform the duties of a correctional officer when the facility was short staffed. While she was counting the inmates, as a correctional officer, she tripped and fell on a 4 inch pipe that protruded above the floor one or two inches from the floor. She landed on her right side and shoulder. The claim was admitted.

2. Claimant initially was provided with physical therapy. That treatment made her shoulder pain worse.

3. Physical therapy was discontinued and Claimant was referred to Dr. Seiter at Vail Associates. Dr. Seiter initially tried a cortisone shot in the Claimant's shoulder. The shot was ineffective. Dr. Seiter then recommended a total shoulder replacement.

4. The shoulder replacement surgery occurred on May 26, 2023. After some physical therapy following the surgery, Claimant was placed at MMI on April 30, 2024. Claimant was referred to Dr. Thomas White for an impairment rating. He provided an impairment rating of 19% of the upper extremity. The scheduled impairment was admitted in the final admission dated September 20, 2024. The 19% extremity rating converts to 11% whole person. No DIME was requested by Claimant to dispute the impairment rating.

5. Claimant credibly testified that she continues to experience symptoms and functional limitations related to the upper extremity injury and shoulder replacement. These issues increase and worsen in different areas proximal to the shoulder joint and in response to different movements/activities. Claimant provided many examples of movement/activities that worsen her symptoms. Such examples include, but were not limited to, dressing herself, personal hygiene and grooming, posturing herself while seated, being unable to sleep throughout the night or on her right side, driving, and

lifting/manipulating heavy objection. Depending on the movement/activity, Claimant's symptoms worsen in her scapular area, neck, pectoral muscles, and ribs.

6. Claimant was referred to Dr. Orent for an independent medical examination (IME). Dr. Orent is level II accredited. As part of the IME, Dr. Orent took a history from claimant, reviewed medical records and performed a physical examination that included range of motion measurements. Dr. Orent testified that when one has had a shoulder replacement, the scheduled impairment rating begins at 30% of the extremity according to Table 19 (page 50) of the *AMA Guides, 3rd Edition Revised*.

7. Claimant proved she suffered functional impairment not listed on the schedule of disabilities.

8. The ATP, Dr. White did not indicate that Claimant required medical benefits after MMI. In his rating report, he states "No maintenance care is required".

9. Claimant demonstrated disfigurement consisting of a surgical scar that is 4 inches long and an eighth of an inch wide. It is discolored as compared to the rest of the shoulder and skin. There is a slight depression around the scar area.

CONCLUSIONS OF LAW

A. Burdens of Proof regarding impairment

Claimant is requesting whole person benefits for her shoulder. Whether Claimant's shoulder impairment represents a scheduled or whole person impairment is a threshold question. Section 8-42-107 sets forth two methods of compensating permanent medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings from the ATP. If either party disputes the impairment rating, a DIME process is available. Whether a claimant sustained a scheduled or non-scheduled impairment is a question of fact for determination by the ALJ.

B. Claimant proved she suffered functional impairment not listed on the schedule

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of her body other than the "arm", she has sustained a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008).

Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc.*, W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the trapezius and scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved she suffered functional impairment not listed on the schedule. Claimant's testimony regarding the impact the injury has had on her ability to perform various activities was credible. The preponderance of persuasive evidence shows Claimant has functional impairment to parts of her body beyond her "arm". Since no DIME was requested, the impairment rating of Dr. White is binding, despite Dr. Orent's testimony that Dr. White erred in failing to include 30% upper extremity rating for the total shoulder arthroplasty. Furthermore, Dr. White who is level II accredited noted in his impairment rating report that Claimant had a right shoulder replacement. So he was aware of the surgery. Despite that, he did not provide the 30% impairment rating that Dr. Orent said was mandatory. In reviewing section 3.1j of the guides, which includes table 19, the initial paragraphs indicate that rating in this section are discretionary and not mandatory. Specifically, it states *"Note: It must be stressed that impairments secondary to these disorders are usually rated by other parameters. The following disorders are to be rated only when other factors have not adequately rated the extent of impairment".* AMA Guides 3rd Ed. Rev., p.48. I conclude that Dr. White did not err in excluding the 30% upper extremity rating for the shoulder arthroplasty and instead exercised his discretion in relying on the range of motion testing to assign the Claimant's impairment rating.

C. Medical benefits

Dr. White's determination that the Claimant does not require medical benefits after MMI is credible and persuasive based on Claimant's condition at MMI.

D. Disfigurement

Section 8-42-108(1) provides for additional compensation if a claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant suffered visible disfigurement to her right shoulder area. The ALJ concludes Claimant should be awarded $1,000 for disfigurement.

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant PPD benefits based on Dr. White's whole person rating. Respondent may take credit for any PPD benefits previously paid to Claimant on this claim.

2. Claimant's request for medical benefits after MMI is denied and dismissed.

3. Respondent shall pay Claimant $1,000 for disfigurement.

4. Insurer shall pay statutory interest of 8% per annum on all benefits not paid when due.

5. Any issues not decided herein are reserved for future determination.

DATED: February 6, 2025

/s/ Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-160-044-002

ISSUE

Whether Claimant has established by a preponderance of the evidence that she is entitled to a disfigurement award pursuant to §8-42-108(1), C.R.S. based on a limp.

FINDINGS OF FACT

1. On November 17, 2020 Claimant sustained work injuries to her right ankle and left hip when an elevator in which she was riding fell from the fourth floor to the basement, quickly stopped, and then rose back up to the first floor. The elevator did not crash. Claimant did not undergo surgery as a result of the work accident. She is seeking a disfigurement award for an alleged limp.

2. Medical records from Kaiser Permanente document that Claimant had a prior right ankle condition in 2017 and had been diagnosed with flexor hallucis longus tenosynovitis. She received a brace and anti-inflammatories. Claimant reported pain and popping in her ankle related to the 2017 condition that affected her activities. When asked about the prior medical records from Kaiser, Claimant stated that her ankle became sore after she gained significant weight during pregnancy. The issues resolved, and Claimant did not require treatment for any ankle issues until her 2020 work accident.

3. On April 18, 2023 Claimant was evaluated by Division Independent Medical Examination (DIME) physician David W. Yamamoto, M.D. Dr. Yamamoto noted full active range of motion of Claimant's left hip and full active range of motion of her right ankle. He observed Claimant "walk across the room with a normal gait." However, Dr. Yamamoto diagnosed Claimant with right ankle peroneal tendinitis and subluxation of the right peroneal tendon. He assigned a 5% lower extremity impairment rating for the conditions. Dr. Yamamoto determined Claimant had not reached Maximum Medical Improvement (MMI).

4. On December 28, 2023 Claimant visited Authorized Treating Physician (ATP) Joan Mankowski, M.D. for an examination. She reported remaining symptoms of popping in her right ankle, often with cold weather or after a few hours of sitting. Claimant noted no difficulties working her regular job but some ankle pain and weakness while snowboarding and trying to ride a motorcycle. Dr. Mankowski remarked that Claimant's "gait [was] normal in corridor: one loud audible pop while walking." She concluded Claimant had reached MMI.

5. On April 26, 2024 Claimant returned to Dr. Yamamoto for a follow-up DIME. Dr. Yamamoto again found full range of motion in her left hip and right ankle. He also observed that she exhibited a normal gait while walking across the room. Nevertheless, he noted that Claimant continues to experience some lower back pain that she attributed "to her sometimes altered gait." Dr. Yamamoto also commented that Claimant exhibited

"strikingly loud popping" that was "just as startling" as when he first saw her. He agreed that Claimant had reached MMI on December 28, 2023. However, Dr. Yamamoto again diagnosed Claimant with right ankle peroneal tendinitis and subluxation of the right peroneal tendon. He assigned a 5% lower extremity impairment rating for the conditions.

6. Employer's Human Resources Director Susan Jiron-Garcia testified at hearing. Ms. Jiron-Garcia remarked that she has had the opportunity to see Claimant walking at work both before and after the work accident. She also observed Claimant walk in the courtroom during the hearing. Ms. Jiron-Garcia commented that Claimant did not walk any differently in the courtroom than she walked prior to the November 17, 2020 work accident. Specifically, between Claimant's date of MMI and the date of hearing, Claimant did not exhibit a limp.

7. Claimant testified at the hearing. She remarked that she generally walks with a limp. However, she tries to practice compensating with her other leg to correct her limp. Claimant also addressed Dr. Yamamoto's DIME reports that noted she was able to walk across the room with a normal gait, She explained that she was instructed by her physician to attempt to straighten her gait to compensate for her limp. Moreover, although Claimant has completed treatment for her right ankle, it frequently makes an audible popping sound.

8. At the hearing in this matter, the ALJ asked Claimant to walk across the courtroom so he could observe her gait. The ALJ determined that Claimant demonstrated a slight limp.

9. Claimant has established it is more probably true than not that she is entitled to a disfigurement award pursuant to §8-42-108(1), C.R.S. based on a limp. Initially, on November 17, 2020 Claimant sustained work injuries to her right ankle and left hip when an elevator in which she was riding abruptly malfunctioned. She was diagnosed with right ankle peroneal tendinitis and subluxation of the right peroneal tendon. Claimant received conservative treatment for her injuries. On April 26, 2024 Claimant visited Dr. Yamamoto for a follow-up DIME. He observed Claimant to have a normal gait while walking across the room. Nevertheless, Dr. Yamamoto noted that Claimant continues to experience some lower back pain that she attributed "to her sometimes altered gait." He also commented that Claimant exhibited "strikingly loud popping" that was "just as startling" as when he first saw her. Dr. Yamamoto determined Claimant reached MMI on December 28, 2023 and assigned a 5% lower extremity impairment rating for her injuries.

10. Despite the comments of Drs. Mankowski and Yamamoto that Claimant had a normal gait, Claimant explained that she was instructed to attempt to straighten her gait to compensate for her limp. Moreover, although Claimant has completed treatment for her right ankle, it frequently makes an audible popping sound. Furthermore, Claimant credibly testified that she generally walks with a limp. However, she tries to practice compensating with her other leg to correct her limp and walk straight. Finally, at the hearing in this matter, the ALJ asked Claimant to walk across the courtroom so he could observe her gait. The ALJ determined that Claimant had a slight limp.

11. Claimant has sustained a serious 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. Claimant credibly explained that she generally walks with a limp and the ALJ observed a slight limp while Claimant was demonstrating her gait in the courtroom. Respondents shall pay Claimant $750.00 for that disfigurement. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.

CONCLUSIONS OF LAW

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

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

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

4. Under the Workers' Compensation Act, an injured worker may be entitled to additional compensation if found to have bodily disfigurement as a result of an accepted work injury. C.R.S. §8-42-108(1). Disfigurement is an observable impairment of the natural appearance of a person. *Arkin v. Indus. Com. of Colorado*, 358 P.2d 879, 884 (Colo. 1961). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores*, 865 P.2d 915, 918 (Colo. App. 1993).

5. An ALJ is afforded great discretion when determining the amount of compensation to be awarded for disfigurement. *See* §8-42-108, C.R.S. The ALJ views the disfigurement and is in the best position to assess the amount to be awarded. *Nagle v. City and County of Denver*, WC 5-105-891 (ICAO, July 24, 2020).

6. As found, Claimant has established by a preponderance of the evidence that she is entitled to a disfigurement award pursuant to §8-42-108(1), C.R.S. based on a limp. Initially, on November 17, 2020 Claimant sustained work injuries to her right ankle and left hip when an elevator in which she was riding abruptly malfunctioned. She was diagnosed with right ankle peroneal tendinitis and subluxation of the right peroneal tendon. Claimant received conservative treatment for her injuries. On April 26, 2024 Claimant visited Dr. Yamamoto for a follow-up DIME. He observed Claimant to have a normal gait while walking across the room. Nevertheless, Dr. Yamamoto noted that Claimant continues to experience some lower back pain that she attributed "to her sometimes altered gait." He also commented that Claimant exhibited "strikingly loud popping" that was "just as startling" as when he first saw her. Dr. Yamamoto determined Claimant reached MMI on December 28, 2023 and assigned a 5% lower extremity impairment rating for her injuries.

7. As found, despite the comments of Drs. Mankowski and Yamamoto that Claimant had a normal gait, Claimant explained that she was instructed to attempt to straighten her gait to compensate for her limp. Moreover, although Claimant has completed treatment for her right ankle, it frequently makes an audible popping sound. Furthermore, Claimant credibly testified that she generally walks with a limp. However, she tries to practice compensating with her other leg to correct her limp and walk straight. Finally, at the hearing in this matter, the ALJ asked Claimant to walk across the courtroom so he could observe her gait. The ALJ determined that Claimant had a slight limp.

8. As found, Claimant has sustained a serious 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. Claimant credibly explained that she generally walks with a limp and the ALJ observed a slight limp while Claimant was demonstrating her gait in the courtroom. Respondents shall pay Claimant $750.00 for that disfigurement. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

Based upon the preceding findings of fact and conclusions of law, the following order is entered:

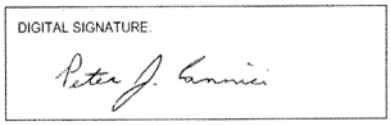
1. Respondents shall pay Claimant $750.00 for disfigurement based on the limp she sustained as a result of her November 17, 2020 work injuries. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.

2. Any issues not resolved in this Order 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 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 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 6, 2025.



Peter Canicci
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80202

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-218-380-001

ISSUES

I. Whether Claimant has established, by a preponderance of the evidence, that she suffered compensable injuries to her head and face as a consequence of an assault occurring August 28, 2022. The question regarding compensability is whether the assault arose from an inherently private dispute between Claimant and a customer and thus, was unrelated to Claimant's employment as a food server or whether the assault was sufficiently connected to Claimant's work-related functions so as to "arise out of" her employment.

II. If Claimant established that she suffered compensable injuries, whether she also proved, by a preponderance of the evidence, that he is entitled to all reasonable, necessary, and related medical treatment to cure and relieve her from the effects of said injuries.

III. If. Claimant established that she suffered compensable injuries, whether she also established, by a preponderance of the evidence, that the right to select her authorized treating provider passed to her.

IV. Whether Respondents established, by a preponderance of the evidence, that Claimant's injuries resulted from the willful violation of a reasonable safety rule in contravention of C.R.S. §8-42-112(1) (b).

FINDINGS OF FACT

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

Claimant's August 28, 2022 Assault

1. Employer operates a large national chain of restaurants located around the Country. Claimant works as a server in one of Employer's Colorado Springs diner locations. Her duties include greeting customers, taking food orders and serving meals.

2. Claimant testified that the environment in the restaurant where she works can be quite chaotic and at times violent. She testified to fights and at least one

shooting occurring in the restaurant. Accordingly, Claimant noted that Employer hired a security guard around January 2022 to de-escalate confrontations between customers and remove unruly patrons when necessary.

3. Claimant testified she was scheduled to work the third shift on Saturday, August 27, 2022. This shift runs through the night from 9:00 p.m. to 7:00 a.m. the next morning. At around 2:30 in the morning on August 28, 2022, Claimant was involved in an altercation with a couple of disruptive patrons during her shift. The argument turned physical and Claimant sustained a concussion and a broken nose. Claimant testified that at the time of the dispute, the restaurant was full of rowdy customers she described as the "bar crowd".

4. Claimant testified that a customer whom she had waited on in the past was standing near the counter waiting for a to-go order. According to Claimant, this customer, whose identity she later learned was Derek Bernard instigated a confrontation with another customer who was also standing near the counter attempting to pay for his meal. Per Claimant, Mr. Bernard had a history of provoking fights in the restaurant. Claimant testified that altercations slow the delivery of orders from the kitchen and places customers at risk for harm. Accordingly, she testified that she was eager to prevent a fight between the two.

5. As the argument began to escalate, Claimant, who was standing behind the service counter yelled for Mr. Bernard to leave the restaurant and wait for his order outside. Claimant testified that she yelled multiple times for Mr. Bernard to leave but he refused, yelling back at her. As the two men stood their ground, Claimant testified she moved around to the front of the counter advancing towards Mr. Bernard in an effort to separate them. Claimant initiated contact with Mr. Bernard and pushed him towards the exit. Following this exchange, Mr. Bernard's girlfriend, Ashley Zubiate, a/k/a Ashley Hernandez began fighting with Claimant, wrestling her to the ground and punching her in the face. According to Claimant, the security guard retained by Employer was not on duty during her August 27 – 28, 2022 shift.

6. The incident was caught on the diner's security camera. (CHE 6). Video of the confrontation was admitted into evidence and viewed at hearing. Careful post-hearing review of the video reveals Mr. Bernard, who is dressed in all black and wearing a black hat, standing near the counter at approximately 2:33 a.m. Mr. Bernard waits behind a chair towards the middle portion of the counter until approximately 2:38:53 of the video. At this point, Mr. Bernard moves to the end of bar to confront another patron waiting to pay his bill. Mr. Bernard remains uncomfortably close to this patron's face clearly attempting to intimidate and goad this customer into a fight. At approximately

2:39:17 of the video, Mr. Bernard's attention is momentarily directed to the area behind the counter and he is seen saying something to someone, most probably Claimant, who testified that she told Mr. Bernard to leave the restaurant and wait for his food outside prompting him to snap back at her. Following this brief exchange, Mr. Bernard immediately returns to harassing the aforementioned patron. At approximately 2:39:28, or about 10 seconds after Mr. Bernard exchanged words with someone behind the counter, Claimant, who is wearing a blue and orange sports jersey with the number 18 emblazoned on the back is seen approaching Mr. Bernard from the bottom of the video frame. Claimant rushes up to Mr. Bernard and with two hands pushes him away from the other patron while pointing towards the restaurant door. After making contact with Mr. Bernard, Claimant is immediately attacked from behind by Mr. Bernard's girlfriend, Ashley Zubiate, who is seen wearing a white t-shirt and carrying a large purse over her left shoulder. A melee ensues with both Mr. Bernard and Ms. Zubiate physically pushing, shoving, striking and wrestling with Claimant and others, including several of Claimant's co-workers who were attempting to break up the fracas. As the fight progresses, video captures Ms. Zubiate crouched over Claimant as they continue to wrestle and fight to the ground, while a co-worker, with black and blond hair, attempts to pull Ms. Zubiate off of Claimant. (CHE 6, 2:40:35). Claimant testified she was punched in the face while on the floor, sustaining a broken nose. Claimant's remaining co-workers were able to physically remove Mr. Bernard from the restaurant. However, video captures Mr. Bernard returning back inside the diner at 2:43:23 where, unprovoked, he sucker punches Claimant in the head, knocking her to the ground.

7. Multiple officers from the Colorado Springs Police Department (CSPD) responded to the scene. (RHE I). Witness statements were obtained and Claimant was interviewed. *Id*. at 254-269. During a September 2, 2022 follow-up to discuss the extent of her injuries, Claimant informed Officer Ezekiel Martin that she had gone to the hospital where she was diagnosed with a concussion and a fractured nose which would required surgery. *Id.* at 258. (See also, RHE I, p. 273, 281). Claimant testified that her store manager, Jennifer Wouters, who had come into the restaurant after the altercation, drove her to the UCHealth emergency room. As Claimant told Officer Martin on September 2, 2022, she testified at hearing that she was assessed in the ER with a fractured nose, bruises, scratches, and a concussion. She added that she shared her ER paperwork with Ms. Wouters. Claimant testified neither Ms. Wouters, nor any other member of Employer's management team had her complete any post-injury workers' compensation paperwork. Outside of Ms. Wouters driving her to the ER, Claimant testified that she was never directed where to seek medical treatment. Based upon the content of the police reports, the ALJ finds that Ms. Wouters had actual knowledge of Claimant's assault and the extent of her Claimant's injuries.

8. At the request of Employer, specifically Tausha Threatt, Claimant and several of her co-workers were interviewed regarding the incident. The interviews were recorded by Lance West of Winston Services, Inc., an investigative agency headquartered in Norman Oklahoma. (CHE 5). The ALJ finds the content of Claimant's recorded statement consistent with her testimony and what is depicted in the security camera video.

9. Claimant testified that the bill for the August 28, 2022, UCHealth emergency room visit remains unpaid and is in collections. She added that she proceeded through a consultation with a plastic surgeon regarding her nose. Claimant testified that during this consultation she was advised that she had a deviated septum which would require corrective surgery. Claimant testified that she has not moved forward with the recommended surgery because she cannot afford it. Consequently, Claimant testified that she has a hard time breathing and that when she develops a cold it frequently progresses into a sinus infection.

10. Claimant testified that since her assault, she suffers from anxiety and migraines, which are accompanied by vertigo, none of which she had previously. As with the surgery recommended to repair her deviated septum, Claimant testified she has not obtained any treatment for these injury related symptoms because she cannot afford it.

Claimant's Testimony Regarding her Employment Training

11. Claimant testified that her initial Waffle House employment training lasted two or three days and did not cover any de-escalation protocols for dealing with unruly customers. Indeed, Claimant testified that she never received any training or guidance on how to de-escalate or handle disorderly patrons such as Mr. Bernard and Ms. Zubiate prior to the August 28, 2022 incident.

12. Employer's "Salesperson" training manual was admitted into evidence. (RHE E). Techniques on how to work with "rowdy" customers is contained in the Appendix of the manual at p. 162. (RHE E, p. 182). As noted in the training manual, when patrons become rowdy, sales associates are instructed to remain "calm and polite". They are instructed further to "not raise [their] voice, threaten or argue with the Customer, especially if they are intoxicated or under the influence of drugs". If the customer becomes "aggressive or argumentative", sales associates are instructed to "maintain a safe distance so that [they] are out of range of a physical attack" and if the situation escalates, to bring in a co-worker or a manager to assist. If a fight breaks out, sales associates are trained to call 911 and are specifically instructed not to attempt to

"physically remove the person from the unit". *Id*. This section of the appendix refers sales associates to the "Back of the House" rules which specifically addresses de-escalation of customer related issues. (RHE E, p. 45). These rules specifically instruct sales associates to "Call the Police" when a customer related issues such as fights, threats of violence, and refusals to leave after being asked occur. Regarding fights, the sales associates training manual ("Back of House Rules") explicitly instructs associates not to intervene. *Id.*

13. Claimant testified that she received a handbook to use during her new employee orientation/training but, was instructed to return the handbook following training. Claimant testified that she has not seen the safety poster included in the training manual.

The Testimony of John Fervier

14. John Fervier testified he has been employed with Waffle House for 36 years and is currently the vice president of risk management and security. Mr. Fervier testified he currently oversees 2,000 Waffle House restaurants with 45,000 active employees and 100,000 new hires annually.

15. Mr. Fervier has never met Claimant and was not personally involved with her training nor has Mr. Fervier been to the restaurant where Claimant works for at least 5 years. Indeed, Mr. Fervier testified that he has not been to Colorado in the last 4 years.

16. Mr. Fervier testified that all new employees are required to undergo standardized security training as outlined in the employee handbook, which manual includes a section on safety training. According to Mr. Fervier, new hires and their trainers are "required" to sign off on the manual acknowledging this training. Per Mr. Fervier, new hires are not permitted to start work before signing off on their training. Mr. Fervier testified that Employer did not have the written acknowledgment of Claimant's safety training because it was not retained.

17. According to Mr. Fervier, the "Back of the House" rules are posted in a back room of every Waffle House.

18. Mr. Fervier testified that it was possible that the presence of a security guard employed at the location where Claimant worked had been discontinued but he was not certain. Nonetheless, Mr. Fervier testified that security guards were retained to address crowd control and disruptive customers.

19. Mr. Fervier testified the decision to reprimand a worker for violating safety policies was a “local” decision for the local operations team, depending on that individual associate. Mr. Fervier added that he was unaware if Claimant was ever reprimanded for her role in the August 28, 2022 altercation. Claimant credibly testified that following the incident she was directed to return to work.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers’ Compensation Act of Colorado (Act), Sections 8-40-01, C.R.S., *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In general, the claimant 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 must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. *Section 8-43-201, C.R.S.*

B. In accordance with Section 8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5. P3.d 385 (Colo. App. 2000).

Compensability

C. Under the Workers' Compensation Act, an employee is entitled to compensation where the claimed injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. *Section 8-41-301(1), C.R.S.; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of” and "in the course of" are not synonymous and a claimant must meet both requirements. *Younger v. City and* County of Denver, 810 P.2d 647, 649

(Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976).

D. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando, supra.* Colorado courts have repeatedly emphasized that the determination of whether alleged injuries arose out of and in the course of an employment relationship is largely dependent upon the facts surrounding the injury in question. *Bennet v. Furr's Cafeterias, Inc.*, 549 F. Supp 887 (D. Colo. 1982).

E. An assault is considered to "arise out of" the employment if the underlying dispute giving rise to the assault has an inherent connection to the employment, or is the result of a "neutral force". *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *In Re Questions Submitted by U.S. Court of Appeals*, *supra*. Accordingly, injuries suffered during an assault are compensable if the assault grew out of an argument over performance of work, possession of work tools or equipment, delivery of a paycheck, quitting or being terminated. Further, even if the subject of the dispute is unrelated to the work, injuries in an assault are compensable if work-related tensions exacerbate the underlying dispute. However, where the assault arises from an inherently private dispute imported into the employment and the dispute is not exacerbated by the employment, the resulting injuries are not compensable. *In Re Questions Submitted by U.S. Court of Appeals, supra*. In this case, Respondents concede that the assault committed by Mr. Bernard would "likely qualify" as compensable as a "neutral force" assault or as an assault having an inherent connection to Claimant's employment. Nonetheless, Respondents contend that the assault perpetrated by Ms. Zubiate, which gave rise to Claimant's broken nose is not compensable because Claimant was the initial aggressor against Mr. Bernard. Indeed, Respondents note that Ms. Zubiate told Claimant not to touch her man, before she began brawling with Claimant, leading Respondents to conclude that the reason for the fight was Claimant's assault of Mr. Bernard. Accordingly, Respondents contend that the injuries arising from the assault committed by Ms. Zubiate are not connected to

Claimant's employment, but rather an inherently private dispute imported into the employment by Claimant. The ALJ is not persuaded.

F. For assaults with an inherent connection to the employment, it is immaterial whether Claimant was the initial aggressor or purely a victim. *Banks v. Industrial Claim Appeals Office*, 794 P.2d 1062 (Colo. App. 1990). Here, the convincing evidence establishes that an argument arose between Claimant and Mr. Bernard over his harassment of another patron. In order to fulfill her work duties in providing a safe and valued dining experience to other patrons, Claimant demanded that Mr. Bernard wait for his food order outside. Instead of leaving the diner, Mr. Bernard escalated the dispute by yelling at Claimant before turning, once again, to confront and harass another patron who was simply trying to pay his bill, prompting Claimant to intervene by pushing Mr. Bernard towards the door. Ms. Zubiate then, without warning, immediately attacked Claimant as she gestured for Mr. Bernard to leave the diner. Based upon the evidence presented, the ALJ is not convinced that Claimant had deviated from the course and scope of her work before she was viciously attacked by Ms. Zubiate and later by Mr. Bernard who elected to persist in assaulting Claimant and other employees trying to break up the brawl. In short, the ALJ is not persuaded that Claimant's assault stemmed from an inherently private dispute imported into the workplace from Claimant's private life. Rather, the evidence presented persuades the ALJ that the assault and Claimant's associated injuries are rooted in and arise out of her work-related functions and are sufficiently connected to those functions to be considered part of her employment contract. *Popovich v. Irlando, supra.* Accordingly, Claimant has established that her injuries are compensable.

Claimant's Entitlement to Medical Benefits and the Right of Selection

G. As noted above, Claimant bears the burden of proving entitlement to benefits by a preponderance of the evidence. This includes medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary 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*, supra. Regardless, Respondents are only liable for authorized treatment. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office*, 944 p.2d 677 (Colo. App. 1997).

H. Under C.R.S. § 8-43-404(5) (a) (I) (A), the employer has the right in the

first instance to designate the authorized provider to treat the claimant's compensable condition. The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Consequently, if the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. Section 8-43-404(7), C.R.S. 2005; *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Pickett v. Colorado State Hospital*, 32 Colo. App. 282, 513 P.2d 228 (1973).

I. As noted, C.R.S. § 8-43-404(5) (a), affords an employer or its insurer the right in the first instance to select a physician to treat the injury. The statute requires the employer or insurer to "provide a list of at least four physicians . . . in the first instance, from which list an injured employee may select the physician who attends said injured employee." Similarly, Workers' Compensation Rules of Procedure, Rule 8-2(A), 7 Code Colo. Reg. 1101-3, states that "[w]hen an employer has notice of an on the job injury, the employer or insurer shall provide the injured worker with a written list . . .” In order to maintain the right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 545 (Colo. App. 1987). The failure to tender the "services of a physician . . . at the time of injury" gives the employee "the right to select a physician or chiropractor." The employer's duty to designate is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.,* 689 P.2d 681 (Colo. App. 1984); *Gutierrez v. Premium Pet Foods, LLC*, W.C. No. 4-834-947 (ICAO, September 6, 2011).

J. In this case, the record contains substantial evidence to support a conclusion that the emergent medical care Claimant received through UC Health was reasonable, necessary and related to Claimant’s August 28, 2022 assault. Accordingly, the ALJ finds Respondent’s liable for the costs of this care. Moreover, the record supports a conclusion that Claimant probably requires additional treatment, to cure and relieve her of the ongoing effects of her compensable injuries. Indeed, the ALJ credits Claimant’s testimony to find that she suffers from a deviated septum, which affects her ability to breathe and which is probably causing her headaches and anxiety leading to a recommendation for surgical repair. Nonetheless, it is necessary to determine who is authorized to provide such care.

K. As noted above, an employer's duty to designate a medical provider in the first instance is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. The questions of whether Employer failed to timely tender the services of a physician and the right of selection passed to Claimant are questions of fact for resolution by the ALJ. *See Ruybal v. University Health Sciences Center,* 768 P.2d 1259 (Colo. App. 1988); *Buhrmann v. University of Colorado Health Sciences Center,* W.C. No. 4-253-689 (November 4, 1996). In this case, the ALJ is convinced that Ms. Wouters, as Claimant's manager, was aware that Claimant was assaulted during working hours and further that she suffered a broken nose and concussion as a consequence of that assault. Based upon the evidence presented, the ALJ finds/concludes that Employers duty to select a provider to treat Claimant's injury was triggered August 28, 2022 and that Employer failed to timely tender the services of a physician as required by statute. Accordingly, the right of selection passed to Claimant and she is now free to select an appropriate physician to attend to her work-related injuries.

Respondents' Asserted Safety Rule Violations

L. Section 8-42-112(1)(b), C.R.S. 2023, provides for a 50% reduction in compensation benefits if an employee is injured due to his/her willful failure to obey any reasonable safety rule adopted by the employer for the safety of the employee. The term "willful" connotes deliberate intent. See *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App 1990). Mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968). Respondents' bear the burden to prove a safety rule violation. *Lori's Fam. Dining, Inc. v. Indus. Claim Appeals Off.,* 907 P.2d 715, 719 (Colo. App. 1995).

M. The elements of proving a violation under C.R.S. § 8-42-112(1) (b) include the following: 1). There must be a safety rule adopted by the employer. 2). The safety rule must be reasonable. 3). The safety rule must be known by the employee, i.e. "brought home" to the employee, and diligently enforced. *Pacific Employers Insurance Co. v Kirkpatrick*, 111 Colo. 470, 143 P.2d 267 (Colo. 1943). 4.) The meaning and content of the safety rule must be specific, unambiguous and definite, clear and non-conflicting. *Butland v. Industrial Claim Appeal Office*, 754 P.2d 422 (Colo. App 1988). 5). The violation of the safety rule must be willful, that is, with deliberate intent, *City of Las Animas v. Maupin*, 804 P.2d 285, 286 (Colo. App. 1990). It is Respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule." *Horton v. JBS Swift and Company*, W.C. No. 4-779-078

(2010); *Strait v. Russell Stover Candies*, W.C. No. 4-843-592 (2011). The question of whether the respondents carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

N. After careful consideration of the evidence presented, the ALJ concludes that Respondents have failed to establish that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1) (b) C.R.S. during her interaction with Mr. Bernard. The willful violation of a safety rule may be established without direct evidence of the claimant's state of mind at the time of the injury because "it is a rare case where the claimant admits that the conduct was the product of a willful violation of the employer's rule." *Gargano v. Metro Wastewater Reclamation District*, W.C. No. 4-335-104 (ICAO, Feb. 19, 1999). Instead, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548, 550 (1968); *Miller v. City and County of Denver*. W.C. No. 4-658-496 (ICAO, Aug. 31, 2006). Here, the balance of the persuasive evidence reflects the obvious danger in engaging with a purposefully belligerent patron. Indeed, Claimant admitted in her testimony that she was aware that she should not escalate a conflict if one arose, and evidence demonstrates, that it was Claimant's actions which ultimately led to the physical fight. Moreover, the ALJ is persuaded that Claimant consciously considered her options and after deliberating, she independently and purposefully acted by leaving the relative safety of the counter to aggressively confront Mr. Bernard.

O. As presented, the evidence persuades the ALJ that Claimant's actions were not simply impulsive, thoughtless (careless) or instinctive in nature. To the contrary, the evidence presented supports a conclusion that Claimant's actions were deliberately calculated to confront and remove Mr. Bernard from the diner. The ALJ is convinced that had Claimant simply involved her on-site manager and not deliberately and aggressively accost Mr. Bernard, she probably would not have been injured, as it is clear that Ms. Zubiate was determined to assist Mr. Bernard in fending Claimant off. Claimant's actions and subsequent injury demonstrate the basis for Employer's adoption of the above referenced policies surrounding interactions with "rowdy" patrons. Indeed, the ALJ is convinced that the safety policies surrounding interactions with unruly patrons is both reasonable and designed to prevent the type of violent injury that Claimant sustained by inserting herself in a conflict between customers and physically attempting to push an unruly patron towards the door. In short, the policy is specifically tailored for the safety of the employees working in Employer's diners. Nonetheless, the evidence presented fails to convince the ALJ that Employer sufficiently "brought home" the safety rules contained in the Employee handbook to Claimant or anyone else

working in the diner on August 28, 2022. Indeed, at least three other employees became actively engaged in the altercation. Had the rules been sufficiently communicated to these employees, the ALJ finds it doubtful that they would have responded to the situation as they did. Finally, the ALJ finds insufficient evidence to establish that the policies Claimant violated were strictly (diligently) enforced. Instead, the ALJ agrees with Claimant that the very nature of the rule and the basis for their adoption would logically dictate some discipline in the event of violations. Here, the evidence supports a conclusion that Claimant was not reprimanded or terminated following the events of August 28, 2022. Accordingly, the ALJ is unpersuaded by the testimony of Mr. Fervier that Employer strictly trains and enforces their drafted safety policies. Mr. Fervier has no personal knowledge of any training Claimant received at any time regarding safety policies at Waffle House. Mr. Fervier testified he was not personally involved in any aspect of Claimant's training, has never met Claimant, and has not been to the Waffle House where Claimant was employed at any time in the past 4 years. Again, given the number of Waffle House employees observed on video who were also engaged in the altercation, there is no clear indication any employees outside of Mr. Fervier are aware of the safety policy on de-escalation as no less than three other Waffle House employees were actively engaged in the altercation on August 28, 2022. In short, the ALJ finds the evidence in the record does not support the training, enforcement, or clarity of Employer's safety rules based on the behavior of the Waffle House employees observed on video. Accordingly, Respondents have failed to meet their burden of proof to establish that Claimant's injuries resulted from the willful violation of a reasonable safety rule in contravention of C.R.S. §8-42-112(1) (b).

ORDER

It is therefore ordered that:

1. Claimant has proven, by a preponderance of the evidence, that she sustained compensable work-related injuries on August 28, 2022.

2. Insurer shall authorize and pay for all reasonable, necessary and related treatment expenses to cure and relieve Claimant from the effects of her work-related injuries. All treatment and payment for the same shall be in accordance with the Colorado workers' compensation medical benefits fee schedule.

3. Claimant has proven that she is entitled to exercise her right of physician selection and designate the Authorized Treating Physician to cure and relieve her from the ongoing effects of her work-related injuries.

4. Respondents' have failed to demonstrate, by a preponderance of the evidence, that Claimant's injury resulted from her willful failure to obey a reasonable safety rule adopted by Employer for her safety. Accordingly, Insurer's request to reduce Claimant's non-medical compensation benefits by 50% as provided for by § 8-42-112(1)(b), is denied and dismissed.

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

DATED: February 6, 2025

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

NOTE: 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 ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-229-285-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she injured her lower back on January 12, 2023 during the course and scope of her employment with Fountain Barbecue, LLC.

2. Whether Claimant has proven by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to her through Fountain Barbecue's 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 she is entitled to reasonable, necessary and causally related medical benefits for her January 12, 2023 industrial injuries.

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

5. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period January 24, 2023 until April 30, 2023.

6. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Partial Disability (TPD) benefits for the period May 1, 2023 until terminated by statute.

7. Whether Employer is subject to penalties pursuant to §8-43-408(1), C.R.S. for failing to carry Workers' Compensation insurance on January 12, 2023.

STIPULATION

Owner of Fountain Barbecue, LLC Glen Fountain is not personally liable in his individual capacity.

FINDINGS OF FACT

1. On January 12, 2023 Claimant was employed by Fountain Barbecue, LLC working in a food truck. Her job duties involved preparing food, shopping for supplies, washing dishes and cleaning.

2. Glen Fountain was the owner of Fountain Barbecue, LLC on January 12, 2023. He acknowledged that he did not possess Workers' Compensation insurance for the company on the preceding date. Mr. Fountain was also the owner of Evergreen Deli. Despite December 2022 and January 2023 paystubs from Evergreen Deli, Claimant was

not working for that entity on January 12, 2023. Mr. Fountain acknowledged the paystubs were a mistake. Finally, Mr. Fountain was the owner of Fountain Restaurant Group. However, that company did not have any employees and therefore, Claimant was not an employee of that entity.

3. Claimant was responsible for cleaning and maintaining the food truck. The truck did not have any inside running water. Claimant was required to load all dirty dishes and transport them to another location where she could wash them. On January 12, 2023 Claimant loaded the dirty dishes into a tub and was exiting the trailer that was approximately two feet off the ground. When she stepped down with her left foot, she lost her balance on ice and attempted to catch herself so she would not fall. In the process, she injured her lower back. Claimant felt immediate sharp pain that radiated into her right leg.

4. Claimant contacted Mr. Fountain and reported her injury on January 12, 2023. He did not send her anywhere to obtain medical care. Mr. Fountain never provided Claimant with a list of designated medical providers from which to choose a treating physician.

5. On January 13, 2023 Claimant sought medical care at personal provider Boulder Valley Family Practice. She received muscle relaxers and home exercise recommendations. Claimant was not taken off work but was directed to do what she could tolerate.

6. Claimant returned to work following her back injury. However, when she returned to Boulder Valley Family Practice on January 24, 2023 she was taken completely off work. Claimant never returned to work for Fountain Barbecue, LLC after January 24, 2023.

7. Boulder Valley Family Practice referred Claimant to Evergreen Spine & Sports Medicine. She was subsequently referred to Vertical Motion Physical Therapy, Barry Ogin, M.D., Denver Pain & Spine, Health & Harmony Chiropractic Center, and Denver Int. Spine Center. She received conservative medical care consisting of medications, physical therapy, chiropractic care, and ablations. Claimant continues to receive treatment from Daniel S. Bennett, M.D. at Denver Pain & Spine.

8. Claimant was completely off work for the period January 24, 2023 through January 31, 2023. She subsequently received work restrictions. Claimant's work restrictions continue through the present.

9. Claimant testified that she earned 20.00 per hour and worked an average of 28 hours per week for Fountain Barbecue, LLC. However, Exhibit K lists all payments made to Claimant while working for Fountain Barbecue, LLC. The exhibit reflects that Claimant earned a total of $5,630.00 from her start date on October 24, 2022 through her date of injury on January 12, 2023 for a total of 81 days. Earnings of $5,630.00 divided by 81 days equals $69.51 per day. Multiplying $69.51 times 7 days per week equals total

earnings of $486.57 each week. Therefore, Claimant's Average Weekly Wage (AWW) is $486.57.

10. Claimant did not work at all beginning January 24, 2023. Therefore, she is entitled to Temporary Total Disability (TTD) benefits beginning January 24, 2023 until terminated pursuant to statute.

11. Claimant testified that she started working for Evergreen Parks and Recreation sometime in the middle of May 2023. Because Claimant did not recall a precise start date, May 15, 2023 is reasonable. Therefore, Claimant's TTD benefits terminated on May 14, 2023. Multiplying 15 6/7 or 15.86 weeks by an AWW of $486.57 yields $7,717 in TTD benefits for the period January 24, 2023 through May 14, 2023. Multiplying $7,717 at a TTD rate of 66.66% totals $5,170.39.

12. Claimant testified that she earned $17.00 per hour working for Evergreen Parks and Recreation. At one point, Claimant testified that she worked approximately 28 hours per week, but later stated she worked roughly 35 hours each week. The average of the two figures is a reasonable inference regarding Claimant's work hours. Therefore, Claimant worked 31.5 hours per week at $17.00 per hour for Evergreen Parks and Recreation. She thus earned a total of $535.50 per week.

13. Claimant testified that her job for Evergreen Parks and Recreation was a "summer job" and she worked through August 2023, but did not give a termination date. The last Friday of the month was August 29, 2023. Because Claimant earned in excess of her AWW while working for Evergreen Parks and Recreation she is not entitled to temporary disability benefits for the period May 15, 2023 through August 29, 2023.

14. Claimant did not work from August 30, 2023 through September 30, 2023. Multiplying Claimant's AWW of $486.57 by 4 4/7 or 4.57 weeks yields 2,223.62. Multiplying $2,223.62 at a TTD rate of 66.66% totals $1,489.83. Therefore, Claimant is entitled to $1,489.83 in TTD benefits for this period.

15. Claimant testified that she began working for Bergen Bark Inn sometime at the end of October 2023. However, pay records establish that Claimant received a pay check for the period beginning October 1, 2023. Therefore, Claimant's entitlement to TTD benefits ended on September 30, 2023.

16. Claimant explained that at Bergen Bark Inn she earned about $15.00 per hour for approximately 20 hours per week. However, wage records from Bergen Bark Inn establish that Claimant earned total wages of $5242.61 for the 16-week period from October 1, 2023 through January 20, 2024 for an AWW of $327.66. Claimant's AWW of $486.57 while working for Fountain Barbecue, LLC minus $327.66 equals $158.91. Multiplying $158.91 at a TPD rate of 66.66% equals $106.47. Multiplying $106.47 times 16 weeks equals TPD benefits totaling $1,703 through January 20, 2024:

17. Claimant testified that she continued to work for Bergen Bark Inn through September 2024. However, Claimant did not provide any wage records after the pay period ending January 20, 2024. Over the 16 weeks for which Claimant provided pay records, she was entitled to a total of $1,703 in TPD benefits, or an average of $106.47 per week. Because Claimant has not provided any credible evidence that she would not have continued to earn wages as shown in the first 16 weeks of her employment, it is a reasonable inference that Claimant would have continued to earn the same wages through September 2024. She would thus be entitled to $106.47 per week in TPD benefits. The period from January 21, 2024 through September 30, 2024 is 36 1/7 or 36.14 weeks. Multiplying $106.47 times 36.14 yields $3,847.83 in TPD benefits for the period January 21, 2024 through September 30, 2024.

18. However, Claimant's testimony that she left work at Bergen Bark Inn in late-September 2024 in part due to trouble attending therapy appointments is not credible. Claimant's wage records from October 15, 2023 through January 20, 2024 show that she averaged 22.39 hours of work per week. She explained that she stopped working there because it was hard to get treatment for her back while working and for other reasons unrelated to her injury. However, Claimant's testimony that she left work at Bergen Bark Inn in late-September 2024 in part due to trouble attending therapy appointments is not credible.

19. Claimant provided no credible evidence that her hours increased after January 2024. Working 22.4 hours per week gave Claimant ample time to schedule therapy appointments in September 2024. Furthermore, Claimant's therapy records do not establish that her therapy appointments in 2024 increased in September 2024. In fact, Claimant went to therapy six times in April 2024, six times in May 2024, four times in June 2024, seven times in July 2024, five times in August 2024, only twice in September 2024 and only once in October 2024. If Claimant left work in September 2024 so that she could have more time to attend therapy, then it makes no sense that her appointments in September and October 2024 would significantly decrease. Therefore, it is more likely that Claimant's other personal health issues were the reason she ceased working for Bergen Park Inn in late September, 2024.

20. Because Claimant has failed to prove that she suffered a wage loss in September 2024 as a result of her work injury, rather than as a result of her own personal health issues, she is not entitled to TTD benefits after leaving work in September 2024. Claimant would thus continue to be entitled to TPD benefits of $106.47 per week through the date position statements were due in this case on January 13, 2025. The period October 1, 2024 through January 13, 2025 totals 14 6/7 or 14.86 weeks. Multiplying 14.86 times $106.47 yields $1,582.14 in TPD benefits due for the period October 1, 2024 through January 13, 2025.

21. Private health insurance covered Claimant's medical care. She thus incurred out-of-pocket medical expenses.

22. Claimant has established it is more probably true than not that she injured her lower back during the course and scope of her employment with Fountain Barbecue,

LLC on January 12, 2023. On January 12, 2023 Claimant loaded dirty dishes into a tub and was exiting the food truck that was approximately two feet off the ground. When she stepped down with her left foot, she lost her balance on ice and attempted to catch herself so she would not fall. In the process, she injured her lower back. Claimant felt immediate sharp pain that radiated into her right leg. Claimant immediately reported her injury to Mr. Fountain and sought medical care at personal provider Boulder Valley Family Practice on the following day. Claimant has continued to receive a variety of conservative treatment for her injury.

23. The record reveals that Claimant has consistently maintained she injured her back while working for Fountain Barbecue, LLC on January 12, 2023. Therefore, based on Claimant's credible testimony and a review of the medical records, Claimant suffered back injuries that were proximately caused by her work duties during the course and scope of her employment with Employer. Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered a compensable back injury while working for Employer on January 12, 2023.

24. Claimant has proven it is more probably true than not that the right to select an ATP passed to her through Respondent's 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. Claimant contacted Mr. Fountain when she was injured on January 12, 2023. He did not provide her with a designated physician list. The record thus reflects that Claimant did not receive a list of at least four designated medical providers. Respondent has not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondent failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to her. Therefore, the right to choose the ATP passed to Claimant. She chose to receive care at Boulder Valley Family Practice.

25. Claimant has demonstrated it is more probably true than not that she is entitled to reasonable, necessary and causally related medical benefits for her January 12, 2023 industrial injury. The record demonstrates that Claimant initially sought reasonable, necessary and causally related medical care from Boulder Valley Family Practice. She was subsequently referred to Evergreen Spine & Sports Medicine, Vertical Motion Physical Therapy, Dr. Ogin, Denver Pain & Spine, Health & Harmony Chiropractic Center, and Denver Int. Spine Center. Any referrals from the designated authorized treating provider are thus authorized. Claimant received reasonable, necessary and related medical care consisting of work restrictions, medications, physical therapy, chiropractic care and ablations. She has thus proven that all of her medical care was authorized, reasonable, necessary and causally related to her January 12, 2023 fall at work. Employer Fountain Barbecue, LLC is therefore liable for all medical bills from Boulder Valley Family Practice, Evergreen Spine & Sports Medicine, Vertical Motion Physical Therapy, Dr. Ogin, Denver Pain & Spine, Health & Harmony Chiropractic Center, and Denver Int. Spine Center.

26. Claimant testified that she earned 20.00 per hour and worked an average of 28 hours per week for Fountain Barbecue, LLC. However, Exhibit K lists all payments

made to Claimant while working for Fountain Barbecue, LLC. The exhibit reflects that Claimant earned a total of $5,630.00 from her start date on October 24, 2022 through her date of injury on January 12, 2023 for a total of 81 days. Earnings of $5,630.00 divided by 81 days equals $69.51 per day. Multiplying $69.51 times 7 days per week equals total earnings of $486.57 each week. An AWW of $486.57 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

27. Claimant has proven it is more probably true than not that she is entitled to receive TTD benefits for the period January 24, 2023 through May 14, 2023. Following Claimant's January 12, 2023 back injury she returned to work until January 24, 2023. However, she was then taken completely off work and later given work restrictions that rendered her unable to return to work at the food truck for Fountain Barbecue LLC. Claimant's work restrictions have continued through the present.

28. Claimant testified that she started working for Evergreen Parks and Recreation sometime in the middle of May 2023. Because Claimant did not recall a precise start date, May 15, 2023 is reasonable. Therefore, Claimant's TTD benefits terminated on May 14, 2023. Multiplying 15 6/7 or 15.86 weeks by an AWW of $486.57 yields $7,717 in TTD benefits for the period January 24, 2023 through May 14, 2023. Multiplying $7,717 at a TTD rate of 66.66% totals $5,170.39.

29. Claimant testified that she earned $17.00 per hour working for Evergreen Parks and Recreation. At one point, Claimant testified that she worked approximately 28 hours per week, but later stated she worked roughly 35 hours each week. The average of the two figures is a reasonable inference regarding Claimant's work hours. Therefore, Claimant worked 31.5 hours per week at $17.00 per hour while employed by Evergreen Parks and Recreation. She thus earned a total of $535.50 per week. Because Claimant earned in excess of her AWW while working for Evergreen Parks and Recreation she is not entitled to TTD benefits for the period May 15, 2023 through August 29, 2023.

30. Claimant did not work from August 30, 2023 through September 30, 2023. Multiplying Claimant's AWW of $486.57 by 4 4/7 or 4.57 weeks yields 2,223.62. Multiplying $2,223.62 at a TTD rate of 66.66% totals $1,489.83. Therefore, Claimant is entitled to $1,489.83 in TTD benefits for this period.

31. Wage records from Bergen Bark Inn establish that Claimant earned total wages of $5242.61 for the 16-week period from October 1, 2023 through January 20, 2024 for an AWW of $327.66. Claimant's AWW of $486.57 while working for Fountain Barbecue, LLC minus $327.66 equals $158.91. Multiplying $158.91 at a TPD rate of 66.66% equals $106.47. Multiplying $106.47 times 16 weeks equals TPD benefits totaling $1,703.00 through January 20, 2024.

32. Claimant testified that she continued to work for Bergen Bark Inn through September 2024. However, Claimant did not provide any wage records after the pay period ending January 20, 2024. Over the 16 weeks for which Claimant provided pay records, she earned an average of $106.47 per week. Because Claimant has not provided any credible evidence that she would not have continued to earn wages as shown in the

first 16 weeks of her employment, it is a reasonable inference that Claimant would have continued to earn the same wages through September 2024. She would thus be entitled to $106.47 per week in TPD benefits. The period from January 21, 2024 through September 30, 2024 is 36 1/7 or 36.14 weeks. Multiplying $106.47 times 36.14 yields $3847.83 in TPD benefits for the period January 21, 2024 through September 30, 2024.

33. Because Claimant has failed to prove that she suffered a wage loss in September 2024 as a result of her work injury, rather than as a result of her own personal health issues, she is not entitled to TTD benefits after leaving work in September 2024. Claimant would thus continue to be entitled to TPD benefits of $106.47 per week through the date position statements were due in this case on January 13, 2025. The period October 1, 2024 through January 13, 2025 totals 14 6/7 or 14.86 weeks. Multiplying 14.86 times $106.47 yields $1,582.14 in TPD benefits due for the period October 1, 2024 through January 13, 2025.

34. Employer did not have an active Workers' Compensation insurance policy with any insurer effective on or prior to Claimant's January 12, 2023 date of injury. Based on the preceding sections of the present Order, Employer is required to pay Claimant TTD benefits of $5,170.39 for the period January 24, 2023 through May 14, 2023 and $1,489.83 in TTD benefits for the period August 30, 2023 through September 30, 2023. Combining the two preceding figures yields total TTD benefits of $6,660.22.

35. Based on the preceding sections of this Order Employer is required to pay Claimant $1,703.00 in TPD benefits for the period October 1, 2023 through January 20, 2024, TPD benefits of $3847.83 for the period January 21, 2024 through September 30, 2024 and TPD benefits of $1,582.14 for the period October 1, 2024 through January 13, 2025. Combining the three preceding figures yields total TPD benefits of $7,132.97.

36. Claimant is entitled to total indemnity benefits of $6,660.22 plus $7,132.97 or $13,793.19. Twenty-five percent of $13,793.19 is $3,448.30. Accordingly, Employer shall pay $3,448.30 in penalties to the Colorado Uninsured Employer Fund created in §8-67-105, C.R.S.

37. This Order awards continuing TTD benefits until terminated by statute. The Order specifically awards indemnity benefits of $13,793.19 and penalties of $3,448.30 for a total amount of $17,241.49. Employer is thus required to pay the trustee of the Division a total amount of $17,241.49. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

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

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

7. As found, Claimant has established by a preponderance of the evidence that she injured her lower back during the course and scope of her employment with Fountain Barbecue, LLC on January 12, 2023. On January 12, 2023 Claimant loaded dirty dishes into a tub and was exiting the food truck that was approximately two feet off the ground. When she stepped down with her left foot, she lost her balance on ice and attempted to catch herself so she would not fall. In the process, she injured her lower back. Claimant felt immediate sharp pain that radiated into her right leg. Claimant immediately reported her injury to Mr. Fountain and sought medical care at personal provider Boulder Valley Family Practice on the following day. Claimant has continued to receive a variety of conservative treatment for her injury.

8. As found, the record reveals that Claimant has consistently maintained she injured her back while working for Fountain Barbecue, LLC on January 12, 2023. Therefore, based on Claimant's credible testimony and a review of the medical records, Claimant suffered back injuries that were proximately caused by her work duties during the course and scope of her employment with Employer. Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered a compensable back injury while working for Employer on January 12, 2023.

Medical Benefits/Right of Selection

9. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a

factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

10. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

11. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck,* 996 P.2d at 229. 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. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

12. 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).

13. As found, Claimant has proven by a preponderance of the evidence that the right to select an ATP passed to her through Respondent's 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. Claimant contacted Mr. Fountain when she was injured on January 12, 2023. He did not provide her with a designated physician list. The record thus reflects that Claimant did not receive a list of at least four designated medical providers. Respondent

has not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondent failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to her. Therefore, the right to choose the ATP passed to Claimant. She chose to receive care at Boulder Valley Family Practice.

14. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to reasonable, necessary and causally related medical benefits for her January 12, 2023 industrial injury. The record demonstrates that Claimant initially sought reasonable, necessary and causally related medical care from Boulder Valley Family Practice. She was subsequently referred to Evergreen Spine & Sports Medicine, Vertical Motion Physical Therapy, Dr. Ogin, Denver Pain & Spine, Health & Harmony Chiropractic Center, and Denver Int. Spine Center. Any referrals from the designated authorized treating provider are thus authorized. Claimant received reasonable, necessary and related medical care consisting of work restrictions, medications, physical therapy, chiropractic care and ablations. She has thus proven that all of her medical care was authorized, reasonable, necessary and causally related to her January 12, 2023 fall at work. Employer Fountain Barbecue, LLC is therefore liable for all medical bills from Boulder Valley Family Practice, Evergreen Spine & Sports Medicine, Vertical Motion Physical Therapy, Dr. Ogin, Denver Pain & Spine, Health & Harmony Chiropractic Center, and Denver Int. Spine Center.

Average Weekly Wage

15. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). The preceding method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." *Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777, 780 (Colo. 2010). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82.

16. As found, Claimant testified that she earned 20.00 per hour and worked an average of 28 hours per week for Fountain Barbecue, LLC. However, Exhibit K lists all payments made to Claimant while working for Fountain Barbecue, LLC. The exhibit reflects that Claimant earned a total of $5,630.00 from her start date on October 24, 2022 through her date of injury on January 12, 2023 for a total of 81 days. Earnings of $5,630.00

divided by 81 days equals $69.51 per day. Multiplying $69.51 times 7 days per week equals total earnings of $486.57 each week. An AWW of $486.57 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

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

18. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period January 24, 2023 through May 14, 2023. Following Claimant's January 12, 2023 back injury she returned to work until January 24, 2023. However, she was then taken completely off work and later given work restrictions that rendered her unable to return to work at the food truck for Fountain Barbecue LLC. Claimant's work restrictions have continued through the present.

19. As found, Claimant testified that she started working for Evergreen Parks and Recreation sometime in the middle of May 2023. Because Claimant did not recall a precise start date, May 15, 2023 is reasonable. Therefore, Claimant's TTD benefits terminated on May 14, 2023. Multiplying 15 6/7 or 15.86 weeks by an AWW of $486.57 yields $7,717 in TTD benefits for the period January 24, 2023 through May 14, 2023. Multiplying $7,717 at a TTD rate of 66.66% totals $5,170.39.

20. As found, Claimant testified that she earned $17.00 per hour working for Evergreen Parks and Recreation. At one point, Claimant testified that she worked approximately 28 hours per week, but later stated she worked roughly 35 hours each

week. The average of the two figures is a reasonable inference regarding Claimant's work hours. Therefore, Claimant worked 31.5 hours per week at $17.00 per hour while employed by Evergreen Parks and Recreation. She thus earned a total of $535.50 per week. Because Claimant earned in excess of her AWW while working for Evergreen Parks and Recreation she is not entitled to TTD benefits for the period May 15, 2023 through August 29, 2023.

21. As found, Claimant did not work from August 30, 2023 through September 30, 2023. Multiplying Claimant's AWW of $486.57 by 4 4/7 or 4.57 weeks yields 2,223.62. Multiplying $2,223.62 at a TTD rate of 66.66% totals $1,489.83. Therefore, Claimant is entitled to $1,489.83 in TTD benefits for this period.

TPD Benefits

22. Section 8-42-106(1), C.R.S., provides for an award of TPD benefits to be 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). When an employee is only partially disabled, TPD benefits are calculated by determining 66 2/3 of the difference between the employee's AWW at the time of the injury and the employee's AWW during the continuance of the temporary partial disability. *See* §8-42-106(1), C.R.S.

23. As found, wage records from Bergen Bark Inn establish that Claimant earned total wages of $5242.61 for the 16-week period from October 1, 2023 through January 20, 2024 for an AWW of $327.66. Claimant's AWW of $486.57 while working for Fountain Barbecue, LLC minus $327.66 equals $158.91. Multiplying $158.91 at a TPD rate of 66.66% equals $106.47. Multiplying $106.47 times 16 weeks equals TPD benefits totaling $1,703.00 through January 20, 2024.

24. As found, Claimant testified that she continued to work for Bergen Bark Inn through September 2024. However, Claimant did not provide any wage records after the pay period ending January 20, 2024. Over the 16 weeks for which Claimant provided pay records, she earned an average of $106.47 per week. Because Claimant has not provided any credible evidence that she would not have continued to earn wages as shown in the first 16 weeks of her employment, it is a reasonable inference that Claimant would have continued to earn the same wages through September 2024. She would thus be entitled to $106.47 per week in TPD benefits. The period from January 21, 2024 through September 30, 2024 is 36 1/7 or 36.14 weeks. Multiplying $106.47 times 36.14 yields $3847.83 in TPD benefits for the period January 21, 2024 through September 30, 2024.

25. As found, because Claimant has failed to prove that she suffered a wage loss in September 2024 as a result of her work injury, rather than as a result of her own personal health issues, she is not entitled to TTD benefits after leaving work in September

2024. Claimant would thus continue to be entitled to TPD benefits of $106.47 per week through the date position statements were due in this case on January 13, 2025. The period October 1, 2024 through January 13, 2025 totals 14 6/7 or 14.86 weeks. Multiplying 14.86 times $106.47 yields $1,582.14 in TPD benefits due for the period October 1, 2024 through January 13, 2025.

Penalties for Employer's Failure to Carry Worker's Compensation Insurance

26. Prior to July 1, 2017 §8-43-408(1), C.R.S., provided that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits payable to the claimant were to be increased by fifty percent. However, effective July 1, 2017 §8-43-408, C.R.S. was amended and the language regarding a fifty percent increase in benefits was removed. The version of §8-43-408(5), C.R.S. in effect at the time of Claimant's October 18, 2023 injury 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.

27. The penalty for failure to insure only applies to indemnity benefits and does not encompass medical benefits. *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc*., W.C. No. 4-155-231 (ICAO, Feb. 13, 1998). Statutory interest is not properly considered "compensation or benefits" within the meaning of §8-43-408(5), C.R.S. 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).

28. As found, Employer did not have an active Workers' Compensation insurance policy with any insurer effective on or prior to Claimant's January 12, 2023 date of injury. Based on the preceding sections of the present Order, Employer is required to pay Claimant TTD benefits of $5,170.39 for the period January 24, 2023 through May 14, 2023 and $1,489.83 in TTD benefits for the period August 30, 2023 through September 30, 2023. Combining the two preceding figures yields total TTD benefits of $6,660.22.

29. As found, based on the preceding sections of this Order Employer is required to pay Claimant $1,703.00 in TPD benefits for the period October 1, 2023 through January 20, 2024, TPD benefits of $3847.83 for the period January 21, 2024 through September 30, 2024 and TPD benefits of $1,582.14 for the period October 1, 2024 through January 13, 2025. Combining the three preceding figures yields total TPD benefits of $7,132.97.

30. As found, Claimant is entitled to total indemnity benefits of $6,660.22 plus $7,132.97 or $13,793.19. Twenty-five percent of $13,793.19 is $3,448.30. Accordingly, Employer shall pay $3,448.30 in penalties to the Colorado Uninsured Employer Fund created in §8-67-105, C.R.S.

Payment to Trustee or Posting of Bond

31. Under §8-43-408(2), C.R.S. Employer must pay to the trustee of the Division of Workers' Compensation (Division) an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. Alternatively, "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."

32. As found, this Order awards continuing TTD benefits until terminated by statute. The Order specifically awards indemnity benefits of $13,793.19 and penalties of $3,448.30 for a total amount of $17,241.49. Employer is thus required to pay the trustee of the Division a total amount of $17,241.49. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

1. Claimant suffered a compensable back injury on January 12, 2023 during the course and scope of her employment with Fountain Barbecue LLC.

2. Employer is financially responsible for payment of Claimant's reasonable, necessary and related medical expenses for the treatment of her back injury from Boulder Valley Family Practice, Evergreen Spine & Sports Medicine, Vertical Motion Physical Therapy, Dr. Ogin, Denver Pain & Spine, Health & Harmony Chiropractic Center, and Denver Int. Spine Center.

3. Claimant earned an AWW of $486.57.

4. Claimant shall receive TTD benefits in the amount of $6,660.22.

5. Claimant shall receive TPD benefits in the amount of $7,132.97.

6. Employer shall pay $3,448.30 in penalties to the Colorado Uninsured Employer Fund created in §8-67-105, C.R.S.

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

a. Deposit the sum of $17,241.49 adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Trustee; or

b. File a bond in the sum of $17,241.49 with the Division of Workers' Compensation within ten (10) days of the date 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 and benefits awarded.

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

d. The filing of any appeal, including a petition for review, shall not relieve Employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

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

9. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or order authorizing distribution provides otherwise.

10. Pursuant to §8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer is solely liable and responsible for the payment of all medical costs related to Claimant's work injury.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts.

For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.

DATED: February 10, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer on September 22, 2022?

If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve the Claimant from the effects of the work injury and provided by a physician authorized to treat Claimant for his industrial injury?

If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits and/or temporary partial disability ("TPD") benefits as a result of the work injury?

If Claimant has proven a compensable injury, what is Claimant's average weekly wage ("AV..JW")?

If Claimant has proven a compensable injury, whether Respondents have proven by a preponderance of the evidence that Claimant is subject to a penalty for late reporting of the injury pursuant to Section 8-43-102, C.R.S.?

If Claimant has proven a compensable injury, whether Respondents have proven by a preponderance of the evidence that Claimant committed a volitional act that led to Claimant's termination of employment thereby barring Claimant from an award of temporary disability benefits pursuant to Sections 8-43-105(4) and 8-42-103(1)(9), C.R.S.?

FINDINGS OF FACT

1. Claimant was employed with Employer as a driver. Claimant was hired by Employer in August 2022. As part of the hiring process, Claimant passed a pre-employment physical on August 18, 2022. Claimant testified he was working at Peak Ready Mix and was inspecting his truck on September 22, 2022 when he climbed down the tanker ladder and as he reached the bottom rung of the ladder, the ladder pushed under a bit and his left foot got stuck on the bottom rung of the ladder causing Claimant to twist his left knee.

2. Claimant testified that after the injury, he had an immediate onset of pain in his left knee. Claimant testified he got his leg out, stood by the truck for a minute, then got back in his truck, drove about 100 yards to the trailer where he needed to

stop to get paperwork from the office. Claimant testified he limped into the office and saw Mr. Alcott, a supervisor for Employer, who asked Claimant why he was limping. Claimant testified he told Mr. Alcott he twisted his knee on the ladder and Mr. Alcott responded by inquiring if Claimant wanted to see a doctor. Claimant testified he responded to Mr. Alcott by say, "let's see how it goes", then got back into his truck and went about his work. Claimant testified he has had pain in his knee since this date.

3. Claimant testified he was going to try to get through the pain without making a big deal about it and was concerned that if he made too many waves, he might get terminated. Claimant testified he already had issues with Employer regarding the condition of his truck that included the issue with the ladder, issues with the windshield and bald tires.

4. Mr. Alcott testified at hearing that he and Claimant were working together in Craig, Colorado at the concrete plant in late October or early November 2022 and noted Claimant appeared to in discomfort. Mr. Alcott testified Claimant told him he had tweaked his knee, but it would be better in a few days. Mr. Alcott testified he asked Claimant if he had injured himself at work, but Claimant avoided the question and said he would be "OK". Mr. Alcott testified that later in December 2022, Claimant said he was having issues with his knee and that his knee injury came from when he was coming down the ladder on his truck. Mr. Alcott testified he then told Claimant he needed to report the injury to "Mac" the supervisor.

5. On cross-examination, Mr. Alcott testified he explicitly asked Claimant if his injury was work related and Claimant said it wasn't going to be a workers' compensation claim. Mr. Alcott testified in December 2022 when Employer had gone to "Swap Time" Claimant had a couple of times that he couldn't get his full 32 hours or work during a week. Mr. Alcott testified that it was at this point that Claimant reported his knee injury as work related.

6. Claimant testified at hearing that he reported the injury to his supervisor, "Mac". This testimony was supported by text messages between Claimant and Mac in February 2023 regarding the injury and Claimant's intention of treating the injury through his health insurance. The text messages also establish that Claimant was requesting modified employment from Employer as a result of his knee condition.

7. Claimant had a history of pre-existing problems involving his left knee, including a prior workers' compensation claim for an injury to his left knee, for which he received medical treatment. Specifically, Claimant sought medical treatment on April 13, 2021 by Dr. Sisk for an injury to his left knee that occurred on April 7th or 8th. Claimant reported he was kneeling at work and upon standing, he was unable to bear weight on his left knee. Claimant reported to Dr. Sisk that his knee pain was at a 7/10 and the knee had been catching and locking. Dr. Sisk diagnosed Claimant with a left knee medical meniscus tear and referred Claimant for a magnetic resonance image ("MRI") .

8. Claimant underwent the MRI of his left knee on April 20, 2021 that showed areas of grade II chondral fibrillation in the medial tibial plateau, but not in the femoral condyle. An intrameniscal degenerative signal in the poster horn was also noted, but it did not extend into the joint. The lateral compartment of the left knee showed similar findings of grade II chondromalacia, and the patellofemoral compartment showed grade III in a small area and grade IV fibrillation in the trochlear groove with a TT-TG distance of 15 mm. A small knee joint effusion and a cluster of small loose bodies deep to the popliteal hiatus were also noted.

9. Claimant returned to Dr. Sisk's office on April 22, 2021 and was evaluated by physicians' assistant ("PA"} Minor. PA Minor noted that Claimant was in significant pain that made it difficult for Claimant to perform his job and made it so Claimant was unable to sleep. PA Minor reviewed the findings of the MRI and noted that there seemed to be tearing at the edge of the medial meniscus, and noted that this was a disagreement they had with the MRI report.

10. Dr. Sisk interpreted the MRI scan to show a tear of the medical meniscus and recommended surgery to repair the tear. Authorization for the proposed left knee scope medical and lateral meniscectomy and chondroplasty was requested from the insurance carrier on April 26, 2021.

11. The insurance carrier for that claim obtained a review of the records by Dr. Erickson and, after reviewing the MRI, Dr. Erickson opined that the MRI did not demonstrate a tear of the medial meniscus and recommended against authorizing the surgery.

12. Claimant sought treatment at the emergency room ("ER"} on April 25, 2022 after he tripped over his dog and fell down 4-5 steps resulting in back pain and left knee pain. Claimant advised the ER physician that the knee pain was likely related to his meniscus, but he did not want treatment for the left knee because he was going through workers' compensation for that issue. Claimant did report that he was experiencing knee pain with a clicking/ giving out feeling at that time.

13. Claimant testified at hearing that he did not undergo the surgery recommended by Dr. Sisk and his symptoms from the work injury ultimately resolved.

14. After September 22, 2022, Claimant sought treatment for his left knee on January 18, 2023 with PA Harr at Memorial Regional Hospital. PA Harr noted Claimant's complaint of chronic pain in the left knee with a twisting injury while stepping off a ladder in September 2022. PA Harr reported Claimant had diffuse pain on his knee that was worse with standing/bending and at night when lying on it. Claimant reported the pain radiated up and down the leg that Claimant was treating with ibuprofen and Tylenol. PA Harr diagnosed Claimant with suspected osteoarthritis exacerbation versus a meniscus injury. PA Harr referred Claimant for x-rays of the left knee. Claimant was provided with a prescription for oxycodone for pain at night.

15. PA Harr phoned Claimant following the x-ray to let Claimant know that the x-ray showed mild arthritis with swelling above the kneecap which may indicate small bone fragments were present. Based on the results of the x-ray, PA Harr referred Claimant for an MRI of the left knee. Claimant contacted Memorial Regional Hospital to inquire as to whether he had any work restrictions for the knee pain.

16. The medical records document that between January 23, 2023 and January 26, 2023, Claimant was in contact with representatives at Memorial Regional Hospital regarding obtaining additional oxycodone medications. According to the records, Claimant was instructed by the pharmacy to take one oxycodone every 6 hours (despite the fact that PA Harr had prescribed the oxycodone to be taken for pain at night) and Claimant had exhausted his supply of oxycodone. By January 26, 2023 Claimant was reporting that his pain was getting worse and a seven day supply of oxycodone was arranged by PA Harr along with a referral to an orthopedic surgeon.

17. Claimant underwent an MRI of the left knee on January 30, 2023. The MRI showed degenerative joint disease most pronounced in the patellofemoral and medial compartment with probable complex degenerative medical meniscal tear primarily intrasubstance. Along with small effusion and popliteal cyst.

18. Claimant was examined by PA Reed on February 8, 2023. Claimant reported that about 5 months ago he was at work and climbing down a ladder when his bottom leg slipped, and the leg that was still on the ladder, the foot remained in place, and his body turned, twisting his knee, causing instant pain. Claimant reported that he had tried Tylenol, ice and heat, but his knee continued to get worse. Claimant reported he drives a concrete truck, which requires him to get up and down a ladder often. Claimant reported his knee was very weak and hurts with bending. Claimant reported the paid radiates down to his ankle and up to his hip. Claimant also reported weakness of the knee. Claimant reported his knee was worse at night.

19. PA Reed noted good range of motion of the knee on examination, with some pain elicited with extreme flexion at the end point of flexion. PA Reed noted pain with palpation over the greater trochanter of the hip and pain with abduction of the hip. Claimant expressed an interest in conservative treatment and was referred for physical therapy. PA Reed also performed a steroid injection of the left knee.

20. Claimant started his physical therapy on February 23, 2023.

21. Claimant testified he took a seasonal layoff effective March 1, 2023.

22. Claimant returned to Memorial Regional Hospital on May 30, 2023 and was examined by Dr. Miranda. Dr. Miranda noted Claimant reported he continued to have daily swelling within the knee with weakness and subjective giving way. Claimant also reported popping over the anterior aspect of the knee. Dr. Miranda diagnosed Claimant with intermittent knee pain and swelling with symptomatic popping, likely consistent with medial meniscus tearing and possibly attributed to components of chondromalacia or migrating loose bodies. Dr. Miranda opined that

with regard to treatment, it would be reasonable to see whether dedicated physical therapy, anti-inflammatory use and consideration of injections would provide pain relief and improvement in function. Dr. Miranda noted that if this treatment failed, they could consider surgical treatment in the form of a diagnostic knee arthroscopy with partial medial meniscectomy, chondroplasty and possible loose body removal.

23. Claimant started a new course of physical therapy on June 12, 2023. Claimant subsequently contacted Dr. Miranda and requested to undergo the proposed surgery discussed by Dr. Miranda at the May 30, 2023 appointment.

24. Respondents obtained an independent Medical Examination ("IME") of Claimant on September 30, 2023 under the auspices of Dr. O'Brien. Dr. O'Brien reviewed Claimant's medical records, obtained a medical history and performed a physical examination as part of the IME. Dr. O'Brien noted on examination that Claimant reported tenderness of the medial joint line of the left knee with tenderness to palpation. Dr. O'Brien also noted that ligamentous testing demonstrated a negative anterior drawer and posterior drawer. Dr. O'Brien found no medial or lateral laxity to varus or valgus stress testing at either 0 degrees or 30 degrees of flexion bilaterally. Lachman test was reported to be negative. The anterior and posterior drawer were negative. Claimant had a negative SAG test.

25. Dr. O'Brien opined in his report that Claimant's onset of left knee pain was a manifestation of Claimant's long standing and pre-existing left knee osteoarthritis. Dr. O'Brien opined that Claimant did not sustained a work-related injury. In support of this opinion, Dr. O'Brien noted that Claimant did not report his injury on a timely basis and delayed seeking medical treatment after his alleged injury. Dr. O'Brien further opined that Claimant had a long history of osteoarthritis in the left knee. Dr. O'Brien noted that osteoarthritis is an incurable and relentlessly progressive condition that is expected to result in waxing and waning symptoms which are not the result of any identifiable trauma. Dr. O'Brien noted in his report that the imaging studies demonstrate the presence of preexisting degenerative osteoarthritis of the left knee with no evidence of a new injury. Dr. O'Brien also noted that the MRI scan demonstrated on degenerative changes in the left knee.

26. Dr. O'Brien testified at hearing in this matter consistent with his IME report. Dr. O'Brien testified that the most recent MRI did not show an acute injury to the left knee. Dr. O'Brien testified that the MRI showed that the meniscus was abnormal, but opined that the abnormality was not the result of a work injury.

27. The ALJ finds the testimony of Claimant regarding the onset of symptoms after the September 22, 2024 incident in which his foot was stuck on the bottom rung of the ladder on his truck resulting in a twisting injury to his left knee to be not credible. The ALJ notes that Claimant testified to an immediate onset of pain, and when asked by Mr. Alcott if he wanted to see a doctor that he would, he replied "let's see how it goes."

28. The ALJ notes that Claimant's testimony that he reported the injury to Mr. Alcott on the date it occurred was contradicted by Mr. Alcott in Mr. Alcott's testimony at hearing. While Mr. Alcott acknowledged that Claimant did report a work injury to him, Mr. Alcott testified he noticed Claimant limping sometime in late October or early November. Moreover, while Claimant testified he expressly told Mr. Alcott that his foot got stuck on the ladder resulting in a twisting injury on the day it occurred, Mr. Alcott testified Claimant was evasive about whether he sustained an injury at work when he noticed Claimant was limping and Claimant only told him about the knee injury occurring from use of the ladder when he spoke to Claimant in December.

29. Insofar as the testimony between Claimant and Mr. Alcott is inconsistent or contradictory, the ALJ credits the testimony of Mr. Alcott over the testimony of Claimant regarding the nature of their conversations and the timing of the conversations. The testimony regarding the timing of the conversations of Mr. Alcott is further found to be more credible as he had a specific reference related to the time when he became aware Claimant was alleging a work injury, as Mr. Alcott indicated Claimant reported his knee condition as being work related after "swap time" was started in December and Claimant had a couple of times where he couldn't get his full 32 hours.

30. The ALJ credits the medical opinion of Dr. O'Brien presented at hearing regarding the cause of Claimant's reports of pain and finds Claimant has failed to establish that he sustained an injury arising out of and in the course and scope of his opinion with Employer. The ALJ specifically notes that Claimant alleges an injury on September 22, 2022, but did not seek medical attention for this injury until January 18, 2023. After Claimant starting seeking medical treatment, he reported a worsening of his knee pain, despite the fact that his knee injury was at that point four months post injury and Claimant was provided with a prescription of oxycodone. Claimant's report of worsening knee pain four months after the injury is not consistent with a compensable injury occurring on September 22, 2024 which did not necessitate medical treatment for over four months.

31. The ALJ further notes that Claimant's subjective complaints of pain are markedly similar to Claimant's complaints that were present in his medical treatment from 2021 and early 2022. The similar complaints include the complaints of clicking/giving out in April 2022 and complaints of the knee catching and locking that he made in April 2021 which are similar to the complaints Claimant provided to Dr. Mrianda in May 2023 with regard to popping and weakness in the left knee. Additionally, Claimant's complaints that the knee pain was disrupting his sleep on April 22, 2021 to PA Minor are similar to the complaints he provided to PA Harr on January 18, 2023. Furthermore, because Claimant's testimony that these symptoms resolved prior to his work with Employer is found to be not credible, the ALJ finds that Claimant has failed to establish that Claimant sustained a work injury on September 22, 2022 resulting in the need for medical treatment. This is further supported by the fact that despite Claimant's testimony that the September 22, 2022 injury caused an immediate onset of pain that never resolved, Claimant did not seek medical treatment for this condition until January 18, 2023.

32. Significant additional testimony was presented at hearing by Claimant and Ms. Lowe, the transportation manager for Employer, regarding Claimant reporting the injury to "Mac" and Claimant's termination of employment form Employer. The ALJ acknowledges that Claimant did inform his supervisor Mac of his knee injury and the medical treatment he was receiving on his own without claiming the injury to be work related and the circumstances surrounding Claimant's termination of employment. However, because the ALJ finds Claimant has failed to establish that the injury is compensable under the Colorado Workers' Compensation Act, this testimony and evidence is not relevant to the ultimate finding in this case.

33. Moreover, the evidence regarding Claimant reporting the injury to Mac establishes that Claimant reported the injury after the time period in which Mr. Alcott instructed Claimant to report the injury to Mac. According to Mr. Alcott's testimony, this conversation occurred in December 2022. Therefore, the ALJ finds that the testimony regarding Claimant's text message between himself and Mac in February 2023 further supports the testimony presented at hearing by Mr. Alcott regarding the timing of their conversations regarding Claimant's 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 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. To qualify for recovery under the Workers' Compensation Act of Colorado, a claimant must be performing services arising out of and in the course of his employment at the time of the injury. See Section 8-41-301 (1)(b), C.R.S. For an injury to occur "in the course of' employment, the claimant must demonstrate that the injury occurred within the time and place limits of the employment and during an activity that

had some connection with the work-related function. *See Triad Painting* Co. *v. Blair,* 812 P.2d 638 641 (Colo. 1991). The "arising out of' requirement is narrower than the "in the course of" requirement. *See Id.* For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Id.* at 641-642.

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

5. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer on September 22, 2022. As found, the opinions expressed by Dr. O'Brien in his testimony and report in this case are found to be credible with regard to the cause of Claimant's pain in his right knee. As found, the opinions expressed by Dr. O'Brien in his testimony and report in this case are found to be credible and persuasive regarding the issue of compensability.

6. As found, Claimant's testimony regarding the onset of symptoms resulting from any incident occurring on September 22, 2022 is found to be not credible. As found, the testimony of Mr. Alcott regarding the nature of the conversations regarding Claimant's knee condition and the cause of his pain along with the dates of the conversations is found to be more credible and persuasive than the testimony of Claimant.

7. Because Claimant has failed to meet his burden of proof to establish he sustained a compensable injury arising out of and in the course and scope of his employment, Claimant's claim for benefits is denied and dismissed. Based on this finding regarding the compensable nature of the injury, the ALJ does not need to make findings regarding the remaining issues raised by Claimant and Respondents at hearing.

ORDER

It is therefore ordered that:

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 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: February 11, 2025

Keith E. Mottram

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

ISSUES

I. Whether Claimant produced clear and convincing evidence to overcome the cervical spine impairment rating of Dr. David Frank.

II. Whether Claimant established, by a preponderance of the evidence, that he is entitled to maintenance medical benefits.

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

Overcoming the DIME

A. Claimant's request to set aside the cervical impairment rating opinion of Division IME Dr. Frank is denied and dismissed. Pursuant to § 8-42-107(8), C.R.S., a DIME physician's opinions concerning MMI and permanent medical impairment are binding unless overcome by clear and convincing evidence. Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. See *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges the DIME physician's determination of MMI or the DIME physician's impairment rating, the Colorado Court of Appeals has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Id.*; *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); see also, *Denham v. L & L Disposal*, W.C. No. 4-891-278-04 (ICAO, June 18, 2015).

B. Clear and convincing" evidence has been defined as evidence which demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). In other words, to overcome a DIME physician's opinion regarding permanent medical impairment, the party challenging the DIME must demonstrate that the physicians determinations in this regard is highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

C. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp.*

v. Indus. Claim Appeals Office, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The question whether the DIME properly applied the Guides or other rating protocols is an issue of fact for the ALJ. *See McLane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999). Proof that a division independent medical examiner deviated from the AMA Guides does not compel the ALJ to find that the rating has been overcome by clear and convincing evidence. Rather, proof of such a deviation constitutes some evidence which the ALJ may consider in determining whether the challenge to the rating should be sustained. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Almanza v. Majestic Industries,* W.C. No. 4-490-054 (Nov. 13, 2003); *Smith v. Public Service Company of Colorado,* W.C. No. 4-313-575 (May 20, 2002). Moreover, § 8-42-101(3.7) provides that all physical impairment ratings must be calculated by reference to the AMA Guides. Section 8-42-101(3.5)(a)(II) requires the Director of the Division of Workers' Compensation ("Director") to establish impairment rating guidelines based on the AMA Guides. Pursuant to that directive, the Director promulgated numerous guidelines, many of which are contained in Desk Aid #11 – Impairment Rating Tips (Tips). The Tips contain the Director's recommendations when assigning impairment ratings. The Tips may be relevant to the impairment rating so a physician's application of those tips goes to the weight the ALJ gives to an impairment rating. *Serena v. SSC Pueblo Belmont Op Co. LLC,* W. C. No. 4-922-344 (ICAO, December 1, 2015); *Kurtz v. JBS Carriers*, W.C. No. 4-797-234 (ICAO, December 7, 2011); *Oritz v. Service Experts, Inc.*, W.C. No. 4-657-974 (ICAO, January 22, 2009). The Industrial Claim Appeals Office gives deference to the Workers' Compensation Division's interpretation of the AMA Guides as set forth in the Tips. *Serena, supra; Kurtz, supra; Lenox v. United Airlines*, W.C. No. 4-616-469 (ICAO, June 2, 2006).

D. In *Rojahn v. Monaco Rehab. and ACE Am. Ins. Co.*, W.C. No. 4-955-695-02 (ICAO, Oct. 5, 2017), a Panel from the Industrial Claims Appeals Office relied on the principles set forth in the AMA Guides and the Rating tips to conclude that "[i]t is not appropriate to calculate a spinal impairment relying solely on a range of motion deficit *without also involving a spinal injury diagnosis*" *(emphasis added)*. *Id.* at 11. Further, the Panel cited several cases holding that "the AMA Guides require the finding of a diagnostic rating pursuant to Table 53 as a *necessary prerequisite* to assigning an impairment rating due to spinal range of motion deficits" *(emphasis added)*. *Id*. at 11-12, [*citing: Silva v. Corp. Servs. Group Holdings, Inc.*, W.C. No. 4-944-337-03 (Feb. 23, 2016); *Wilson v. Qwest*, W.C. No. 4-886-202-1 (May 23, 2012); *Villeral v. K-Mart*, W.C. No. 4-506-526 (Mar. 13, 2003); *Lopez v. Oasis Outsourcing, Inc.*, W.C. No. 4-416-822 (Jan. 8, 2001)]. In this case, Dr. Frank clearly opined that Claimant is not entitled to a cervical spine rating because the industrial injury did not cause a Table 53 disorder and because Claimant did not have a work-related specific disorder from Table 53, he is similarly not entitled to impairment for cervical range of motion loss.[1] Indeed, Dr. Frank concluded that any pathology in the cervical spine as demonstrated on MRI was degenerative in nature and not related to Claimant's slip and fall. Thus, while Claimant

[1] In *Rojahn*, the Panel concluded that the DIME physician erred in rating cervical range of motion deficits in the absence of a work-related specific disorder.

may have had a compensable injury to his neck, Dr. Frank opined that the degenerative changes, which normally could form the basis for a Table 53 rating, were not causally related to Claimant's injury and thus no impairment could be assigned for the cervical spine. (RHE A, p. 13). Based upon the evidence presented, the ALJ concludes that Claimant failed to present any probative, or persuasive evidence that would support a finding/conclusion that Dr. Frank improperly deviated from or misapplied the AMA Guides in opining that that the assignment of a Table 53 specific disorders cervical rating was inappropriate in this case. Indeed, Claimant presented no convincing evidence to indicate that Dr. Frank erred in applying the AMA Guides in support of his request to set his impairment rating aside. To the contrary, Dr. Frank's DIME report clearly indicates that he properly applied the AMA Guides in concluding that Claimant's degenerative cervical spine condition was not causally related to his industrial injury and therefore, did not qualify him to a specific disorder rating under Table 53. While the Claimant disagrees and the record reflects a variety of opinions regarding Claimant's impairment rating, differences in opinion among physicians are not unusual, nor do such differences in medical opinion reach the required level of "clear and convincing" evidence to prove that Dr. Frank's opinion was erroneous. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (ICAO, March 22, 2000); *Metro Moving & Storage*, 914 P.2d at 415 ("conflicts in the medical evidence are for the ALJ's resolution"); *Lopez*, W.C. No. 4-416-822 at 8-9 (the ALJ did not err in crediting the DIME and treating physicians over the claimant's expert, when the record did not compel crediting the expert over the others, and it supported concluding that the claimant did not overcome the DIME's impairment rating by clear and convincing evidence). After considering the totality of the evidence presented, the ALJ concludes that Claimant has failed to establish that Dr. Frank's opinions regarding causation and cervical spine impairment are highly probably incorrect. Accordingly, the request to set Dr. Frank's cervical spine impairment determination aside must be denied and dismissed.

Claimant's Headaches and his Entitlement to Additional Occipital Injections

E. Claimant bears the burden of establishing his entitlement to medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary 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).

F. Regardless, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment 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 was caused by the industrial injury. To the contrary, the range of compensable consequences of an

industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

G. Based on the totality of the evidence presented, the ALJ credits the opinions of Dr. Bisgard and Dr. Fall to find and conclude that Claimant's persistent headaches and need for additional occipital injections is not related to Claimant's admitted February 9, 2020 work-related injury. Here, the conclusions of Drs. Bisgard and Fall are more persuasive than the contrary opinions of Dr. Sharma. As presented, the evidence persuades the ALJ that Claimant has failed to establish a causal connection between his admitted February 9, 2020 work injury and his headaches and need for additional injection therapy to treat the aforementioned headaches. Indeed, Claimant related his need for headache treatment to his cervical spine condition, which the ALJ is convinced is probably related to the natural progression of the degenerative changes present at multiple levels in the cervical spine rather than the effects of his February 9, 2020 slip and fall. Consequently, the ALJ concludes that Respondents are not liable to provide payment for additional headache treatment, including additional occipital injections. Accordingly, Claimant's request for payment of the same by Respondent is denied and dismissed.

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

DATED: February 11, 2025

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

This decision is final and not subject to appeal unless a full order is requested. The request shall be made at the Office of Administrative Courts, 2864 S. Circle Drive, Suite 810, Colorado Springs, CO 80906 within ten working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

If a party makes a request for a full order both parties shall submit a proposed full order containing specific findings of fact and conclusions of law within five working days from the date of the request. The proposed full order must be submitted by e-mail in Word or Rich Text format to OAC-CSP@state.co.us. The proposed order shall also be submitted to opposing counsel and unrepresented parties by e-mail, facsimile, or same day or next day delivery.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above **SUMMARY ORDER** were served by placing same in the U.S. Mail, or by e-mail to:

Roger Fraley, Jr., Esq.
rfraley201@comcast.net

Paul D. Feld, Esq.
paul.feld@ritsemalaw.com

Division of Workers' Compensation
Via email

Division of Worker's Compensation
By e-mail to the "DIME UNIT" group
lori.olmsted@state.co.us

Date: February 11, 2025

/s/ Matthew Chavez
Court Clerk

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-270-596-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on November 15, 2023.

2. Whether Employer was uninsured as of November 15, 2023.

FINDINGS OF FACT

1. Claimant worked for Employer off and on for approximately four years performing various construction duties, including painting, remodeling and roofing. Employer is a construction company owned and run by Oscar Fuentes.

2. On November 15, 2023, Claimant was working for Employer at a job site located in Fairplay, Colorado along with Mr. Fuentes, and two other employees – Javier and Christian. After completing the job, Mr. Fuentes testified that he received a call from a friend "Nelson," to assist with a different project located in Evergreen, Colorado. Specifically, to assist with placing plastic sheeting on a roof that was partially shingled. Thereafter, Mr. Fuentes, Claimant, Javier and Christian drove to the Evergreen location in two different vehicles – Mr. Fuentes in one; Claimant, Javier, and Christian in another.

3. After arriving at the Evergreen location, Claimant ascended a ladder to access the roof, slipped and fell off the roof, landing on the ground. Claimant was not wearing a safety harness when this occurred. Claimant lost consciousness. Mr. Fuentes assisted Claimant and called an ambulance that transported Claimant to the emergency room. Claimant testified the he had no recollection of events after he fell until he woke up in the hospital the following day. Claimant testified at hearing that he sustained injuries to his ribs, shoulder, neck and head. No medical records were admitted into evidence, although Respondent does not dispute that Claimant did sustain injuries from falling off the roof.

4. Mr. Fuentes testified that the Evergreen project was not a project for which Employer was paid, or contracted to perform services, and that he asked his crew to go to the project as a favor for his friend Nelson. Mr. Fuentes also testified that he had asked Javier and Christian to place the material on the roof in Evergreen, had not asked Claimant to assist, and instructed Claimant to stay in the vehicle while Javier and Christian attended to the roof. He testified that Claimant took it upon himself to climb onto the roof, and that Claimant was not wearing a safety harness at the time.

5. Claimant testified that Mr. Fuentes did not instruct him to stay in the vehicle, and he understood that he was to assist Javier and Christian with the work at the Evergreen property.

6. At the time of Claimant's injury, Employer was not covered by a workers' compensation insurance policy.

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

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641

(Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). “Arising out of” and “in the course of” employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the 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. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury “has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee’s service to the employer in connection with the contract of employment.” *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Indus. Comm’n,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer. The credible evidence demonstrates that Claimant was taken to the Evergreen project at the direction of Employer, and was injured performing work at Employer’s direction. The ALJ does not find credible Mr. Fuentes’ testimony that he specifically instructed Claimant to remain in the van and not perform work at the Evergreen project. Claimant’s failure to use a safety harness does not render the claim non-compensable. Claimant sustained a compensable injury arising out of the course of his employment with Employer on November 15, 2023.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury on November 15, 2023.

2. At the time of Claimant’s injury, Employer was not covered by workers’ compensation insurance.

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: February 11, 2025

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment on October 16, 2024.

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

FINDINGS OF FACT

1. Claimant is a 59-year-old man who worked for Employer as a temporary construction laborer from September 2024 until October 2024. As a temporary laborer, Claimant would typically go to Employer's office around 5:00 a.m., to obtain job assignments for the day. When Claimant was given a job assignment, he typically worked at that job from 8:00 a.m. until 4:30 p.m. Claimant earned $17.00 per hour for his work for Employer.

2. Claimant testified that on October 16, 2024, he went to Employer's office to see if a job was available for him on that day. He was given an assignment to clean a construction site, and arrived at the job site at 8:00 a.m. At the jobsite parking lot, Claimant testified that he encountered another temporary worker named Juan Jiminez. Claimant testified that Mr. Jiminez asked Claimant why Claimant was paid for a full day for the previous day, when Claimant had arrived an hour late. Claimant testified that Mr. Jiminez became very angry and pushed Claimant causing him to fall backward to the ground injuring Claimant's right wrist, elbow, back, neck, and shoulder.

3. Following the altercation, Claimant drove to Employer's offices, reported his injuries, and was given a list of treating providers, which included Concentra.

4. Claimant went to Concentra on October 16, 2024, where he was examined by Elva Saint, N.P., where he reported being pushed down by an angry co-worker, and reported injuries to his right wrist, right elbow, right shoulder, and the right side of his neck. X-rays demonstrated acute fractures of the distal radius and ulnar styloid. Examination of Claimant's right elbow and shoulder was negative, with the exception of a reports of subjective tenderness, and pain with movement. No examination of Claimant's neck was documented. Nonetheless, Claimant was diagnosed with contusions of the right elbow and shoulder, and a cervical strain, in addition to the closed fracture of the right wrist. Claimant was placed in a right wrist splint, and referred for an orthopedic evaluation and physical therapy. (Ex. 6, 8 and 10). Claimant was assigned temporary work restrictions, including no use of the right arm and to use a splint at all times. (Ex. 7).

5. On October 30, 2024, Respondents filed a Notice of Contest with the Division, indicating further investigation was required. (Ex. 1).

6. On November 5, 2024, Claimant saw Bret Peterson, M.D., at Orthopedic & Spine Center of the Rockies for evaluation of his right wrist. After examination and review of x-rays, Dr. Peterson recommended surgery to restore the alignment of Claimant's wrist. (Ex. 13). Claimant testified that he has also received physical therapy, but offered no records of such treatment.

7. On November 15, 2024, Respondents denied authorization for surgery for "non-medical reasons pursuant to WCRP 16-7-1 because compensability has not been established." (Ex. 15).

8. On November 20, 2024, Claimant filed an Application for Expedited Hearing, seeking a determination of compensability and medical benefits.

9. At the time of the injury, Claimant resided at the "Mission Center." On cross examination, Claimant was asked whether he injured his wrist the night before October 16, 2024 by punching a wall at the Mission Center. Claimant was aware Mr. Jiminez had written a statement indicating he had done so, but denied he had injured his wrist before the altercation with Mr. Jiminez.

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). 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). 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. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has established that he was injured in an altercation with a co-worker. Respondents contend that Claimant's wrist fracture occurred when he punched a wall the day before at his residence and now improperly seeks workers' compensation benefits for a non-work-related injury. Respondents' contention would require the ALJ to find that Claimant broke his wrist in a non-work-related incident, and then formulated a plan to obtain workers' compensation benefits by falsely claiming to be the victim of a work-place assault the following morning. Given that this theory would require the Claimant to have a working knowledge of esoteric workers' compensation case law, the ALJ finds this scenario unlikely.

Moreover, the medical evidence does not appear consistent with a wrist injury sustained as the result of punching something. Logically, Claimant's October 16, 2024 medical record would have documented findings consistent with that mechanism of injury, such as swelling, contusions or abrasions of Claimant's right hand. None of these were noted in the examination report. Thus, the ALJ finds that it is more likely than not that

Claimant's wrist injury was the result of an altercation with a co-worker on October 16, 2024.

The primary question with respect to Claimant's claim is whether his injuries arose out of his employment. For the purposes of the Act, assaults on employees fall within three categories: (1) those that are inherently employment-related; (2) those involving an "inherently private" dispute; and (3) those considered "neutral." *Banks v. Indus. Claim Appeals Off.*, 794 P.2d 1062 (Colo. App. 1990). Only assaults that are inherently private are not compensable under the Act. *Padilla v, Pub. P'ships Colo. Inc.*, W.C. No. 5-124-671-002 (ICAO Apr. 5, 2021) "Determining the motivation for a work-place assault is largely a factual issue and must be ascertained by examining the circumstances in each individual case." *Dominguez v. Fed. Bldg. Servs., Inc.*, W.C. No. 4-820-253 (ICAO Jan. 14, 2011).

"Inherently employment-related assaults are those that 'have an inherent connection with employment' and emanate from 'the duties of the job.'" *Dominguez, supra*, *citing In re Question Submitted by U.S. Cort of Appeals*, 759 P.2d 17 (Colo. 1988). This category includes assaults growing out of arguments over performance of work, possession of work tools or equipment, delivery of a paycheck, quitting or being terminated. *Id*.

"Inherently private" disputes, are those that "have their origin in the private affairs of the claimant or the tortfeasor and are unrelated to their respective work-related functions." *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). These are disputes in which "the animosity or dispute that culminates in an assault is imported into the employment" from claimant's or assailant's domestic or private life, and "is not exacerbated by employment." *Id*. These disputes generally involve parties who know one another in private life, or circumstances where the victim is specifically chosen or targeted. *Id*.

"The third category of assaults comprises those with a neutral source. This category refers to injuries that are attributable to neutral and unexplained forces and are neither personal to either party nor distinctly associated with the employment." *Horodyskyj*, *supra*, *citing Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). "Thus, an injury is compensable under the Act as long as it is triggered by a neutral source that is not specifically targeted at a particular employee and would have occurred to any person who happened to be in the position of the injured employee at the time and place in question." *Horodyskyj, supra.*

Because the Claimant bears the burden of proof to establish by a preponderance of the evidence an entitlement to benefits, including that the injury arose out of the course of his employment, Claimant must establish that his injury was either the result of an inherently employment-related assault or a neutral force. §8-41-201(1), C.R.S., and *Zanotelli v. Evraz, Inc.*, W.C. No. 4-860-562-04 (ICAO Jun. 19, 2013).

Claimant attributes the altercation with Mr. Jiminez to a dispute regarding Claimant's receipt of a full-day's pay for the previous day, despite working one hour less than Mr. Jiminez. The evidence establishes that the altercation between Claimant and

Mr. Jiminez was not a “neutral source” assault. That is, no credible evidence was offered to establish that the altercation would have happened to any person who happened to be where Claimant was at the time and place of injury. Thus, the issue is whether the assault was personal or work-related. No evidence was offered which established that Claimant had any relationship with Mr. Jiminez other than being co-workers, or that the dispute was purely private in nature. Claimant’s testimony established by a preponderance of the evidence that he was injured in an altercation with a co-worker related to an employment-related issue; specifically the work Claimant performed the day before, and the pay he received for that work. Because the Claimant’s injury arose out of an altercation related to Claimant’s employment, Claimant’s claim 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 established a compensable injury, Claimant is entitled to reasonable and necessary medical benefits designed to cure or relieve the effects of his injury.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury on October 16, 2024.

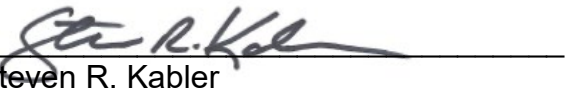
2. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury

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: February 11, 2025



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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that on August 22, 2024, she suffered an injury arising out of and in the course and scope of her employment with Employer?

If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that medical treatment she has received, including surgery performed on August 23, 2024, constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

FINDINGS OF FACT

1. Claimant began working for Employer on July 22, 2024 as a Parts Coordinator. Claimant was initially hired to work at the Centennial, Colorado location. In August 2024, Claimant began working at the Castle Rock, Colorado location. Claimant's job duties included the receipt and inventory of automotive parts. This process included unboxing, inspecting, and moving various automotive parts. Prior to working for Employer in this role, Claimant had 20 years of similar work experience.

2. Claimant testified that on August 22, 2025, she was performing her normal job duties when she lifted a hood. Claimant testified that this hood weighed between 15 and twenty pounds. Claimant further testified that as she moved the hood she felt a sharp pain in her low back and a warm sensation down her right leg. Claimant also testified that she notified her supervisor, Tanner Lay, of her symptoms and stated that she needed medical attention. Claimant then sought medical treatment at Advent Health Parker Hospital. Claimant further testified that after imaging was performed, she was admitted to the hospital on August 22, 2024 and underwent back surgery on August 23, 2024.

3. Medical records admitted into evidence indicate that Claimant arrived in the emergency department (ED) at Advent Health Parker Hospital at 1:54 p.m. on August 22, 2024. At that time, Claimant reported that she was experiencing low back pain with radiation into both legs. The attending physician, Dr. Jesse Troutman, noted Claimant's report that she

> has been having this pain for the past six months or so. She describes pain as burning sensation which typically starts at the lower back and then goes down the leg. She endorses numbness in her right foot and decreased sensation in legs. She reports these symptoms come and go and often happen multiple times a day. She denies any specific

trauma to the back, but does endorse a fall at work, injuring her right knee[1].

4. While Claimant was in the ED on August 22, 2024, magnetic resonance imaging (MRI) was performed of her lumbar spine. The MRI showed anterolisthesis with a circumferential disc bulge and facet arthropathy at the L4-L5 spinal level causing severe central canal and lateral recess stenosis. The radiologist, Dr. Peter Ricci, also noted a disc bulge and superimposed small central protrusion at the L5-S1 level, with narrowing of the central canal. Finally, Dr. Ricci noted degenerative neural foraminal narrowing at the L4-L5 level with deformity of the exiting L4 nerve roots.

5. On August 23, 2024, Dr. Kevin Boyer performed surgery on Claimant's lumbar spine. Specifically, the procedure included posterior lumbar interbody fusion and laminectomy at the L4-L5 level.

6. On September 18, 2024, Claimant was seen by Dr. Boyer for follow-up. At that time, Claimant reported that following the surgery she suffered a deep vein thrombosis (DVT) and was readmitted to the hospital.

7. Mason Pelham is a Service Advisor with Employer. Mr. Pelham testified that Claimant did not report a work injury to him.

8. Savannah Royer is currently a Training and Support Manager with Employer. On August 22, 2024, Ms. Royer was the Office Administrator at the Castle Rock location. Ms. Royer testified that Claimant did not report a work injury to her.

9. Tanner Lay is the General Manager at Employer's Castle Rock, Colorado location. Mr. Lay testified that on August 21, 2024, Claimant left work to attend a doctor's appointment. Claimant informed Mr. Lay that the purpose of that appointment was related to her her knee. When she returned to work, Claimant also informed Mr. Lay that her doctor wanted to undergo physical therapy, before pursuing a knee replacement.

10. Mr. Lay also testified that on August 22, 2024 he interacted with Claimant. During that interaction, Claimant informed him that her knee was hurting. Claimant further indicated to Mr. Lay that she would be seeking immediate medical treatment for her knee. Mr. Lay testified that at that time, Claimant did not report a back injury to him. Nor did Claimant report that she believed that she was injured at work.

11. Travis Kennedy is a Regional Manager of Operations with Employer. In that role, Mr. Kennedy oversees the Castle Rock, Colorado location. Mr. Kennedy testified that Employer first learned that Claimant was alleging an injury at work when they were contacted by the company's workers' compensation provider.

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[1] The ALJ notes that the knee injury referenced here did not occur on August 22, 2024. Rather, the medical records indicate that this fall resulting in a right knee injury occurred on or about July 7, 2024, which was prior to Claimant's employment with Employer.

12. On August 22, 2024, Claimant sent text messages to Mr. Lay and Mr. Kennedy regarding her time at the hospital. During that exchange Claimant indicated that she had been experiencing leg symptoms, and explained that she would be undergoing back surgery. Specifically, Claimant texted Employer as follows:

> Thank you. I'm sorry this is happening. My whole leg went to sleep I can't feel it now. I checked myself into urgent care.
>
> They are setting up [an] MRI to scan for clots and nerve damage. Find out why my leg went to sleep and swelling. Honestly it scares me[.]
>
> Copy text sent to father. They are going to do an MRI looking to see if I have a disk in back that could of slipped (sic). Doc said it's definitely a nerve issue. Something is blocking blood flow on legs. Even with my compression socks on legs a swollen. (sic)
>
> I'm being admitted to hospital. My L4 and L5 are compressing against my main nerve. The nerve can't work correctly it is squeezed off. Kinda like a hose with a kink in it the blood cant flow. I have talked to the spinal surgeon [h]e said it's SEVER[E]. Very high possibility of back surgery. I would be out of work for a while. The surgeon will open my back and remove the disk that is pressing on my main nerve. The nerve that controls my blood flow to my legs. The nerves control all the pain in my knees too.

13. In her texts to Employer, Claimant did not state that she believed she was injured at work.

14. On December 10, 2024, Claimant attended an independent medical examination (IME) with Dr. John Raschbacher. In connection with the IME, Dr. Raschbacher reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In the IME report, Dr. Raschbacher identified Claimant's diagnoses as longstanding lumbar spine degenerative disease, knee pain, and DVT. Dr. Raschbacher opined that these diagnoses are not work related. In support of this opinion, Dr. Raschbacher noted that the mechanism of injury reported to him at the IME does not appear in the August 22, 2024 ED records. Rather, Claimant reported to ED staff that she had a history of chronic pain with lower extremity radiculopathy. Claimant also reported on August 22, 2024 that she had experienced approximately six months of low back pain. Dr. Raschbacher further opined that while the surgery performed by Dr. Boyer was reasonable and necessary to treat Claimant's condition, the need for surgery was not work related.

15. Dr. Raschbacher's deposition testimony was consistent with his written report.

16. The ALJ does not find Claimant's testimony regarding the nature and onset of her symptoms to be credible or persuasive. The ALJ credits the medical records. The ALJ specifically credits the August 22, 2024 ED medical record in which Claimant reported that she had experienced low back and leg symptoms for approximately six months. That same medical record indicates that Claimant did not report any acute injury, nor did she report injuring her back at work. The ALJ specifically credits the opinions of Dr. Raschbacher. The ALJ also credits the testimony of Mr. Pelham, Ms. Royer, Mr. Lay and Mr. Kennedy. Based upon all of the foregoing, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that on August 22, 2024, she suffered an injury arising out of and in the course and scope of her employment with Employer.

CONCLUSIONS OF LAW

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

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

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

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *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 on August 22, 2024, she suffered an injury arising out of and in the course and scope of her employment with Employer. As found, the medical records, the opinions of Dr. Raschbacher, and the testimony of Mr. Pelham, Ms. Royer, Mr. Lay and Mr. Kennedy, are credible and persuasive on this issue.

ORDER

It is therefore ordered that Claimant's claim regarding an alleged on August 22, 2024 work injury is denied and dismissed.

Dated February 13, 2025.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. You may file your Petition to Review electronically by emailing the Petition to Review 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 5-125-346-005

ISSUES

- Did Respondents overcome the DIME's MMI determination by clear and convincing evidence?
- If Respondents overcame the DIME, what is the proper impairment rating?
- If Respondents failed to overcome the DIME, did Claimant prove a TFCC debridement and CMC arthroplasty recommended by Dr. Delarosa are reasonably needed and causally related to the July 22, 2019 work injury?

FINDINGS OF FACT

1. Employer is a temporary staffing agency. Claimant suffered an admitted injury on July 22, 2019, while working as a warehouse order filler at Wayfair. Claimant was using furniture straps to move a sofa with a co-worker. One of the straps broke and caused Claimant to fall backward abruptly. Claimant extended her right arm to brace her fall and fell onto her right hand. Claimant landed on the concrete floor, which caused her right hand to twist and bend "in a freaky way." She testified she felt excruciating pain throughout her lower right arm, including her fingers, right hand, and wrist.

2. Claimant was referred to Workwell on July 23, 2019, where she saw Dr. Lynne Yancey. X-rays showed a fracture of the proximal phalanx of the middle finger. She was put in a splint and given restrictions to limit the use of her right hand.

3. Claimant was evaluated by Dr. Craig Davis, an orthopedic hand specialist, on August 30, 2019. Dr. Davis noted Claimant had been splinted since the injury and consequently had very little movement of her fingers. He recommended weaning from the splint and aggressive occupational therapy to regain motion.

4. Claimant experienced frequent painful "popping" in her ringer and right wrist on several occasions while participating in therapy and performing home exercises.

5. On September 11, 2019, Claimant had an unscheduled visit with Dr. Yancey after experiencing a "very painful pop" in her hand while performing home exercises. Claimant's worst pain was in the right middle finger and right thumb. The middle finger was red and swollen and exquisitely tender. Dr. Yancey ordered an MRI.

6. An MRI of the right middle finger was performed on September 16, 2019. It showed moderate soft tissue edema and mild bone marrow edema of the right middle finger and a possible full-thickness tear at the proximal margin of the radial collateral ligament at the third PIP joint.

7. Claimant was evaluated by Dr. Kulvinder Sachar on October 14, 2019. Dr. Sachar did not recommend surgery.

8. A physical exam by Dr. Yancey on January 17, 2020 showed reduced range of motion in the right wrist secondary to pain.

9. Claimant was evaluated for CRPS because of persistent pain and mild trophic changes. A triple-phase bone scan was consistent with post-traumatic arthritis but not CRPS. QSART and thermography testing were negative for CRPS.

10. In July 2020, Dr. Yancey documented pain affecting Claimant's entire right hand and wrist.

11. Dr. Davis administered injections to Claimant's middle finger in October and November 2020, which helped temporarily. On December 4, 2020, Timothy Abbott, PA-C in Dr. Davis' office noted Claimant was doing better until she tried to return to work full duty and experienced increased pain in her finger, hand, and right wrist. She also described increased popping in the wrist. Mr. Abbott recommended more PT.

12. On February 9, 2021, Dr. Davis added a diagnosis of right wrist strain, which he opined was "consistent with her mechanism of injury." He administered a steroid injection to the radiocarpal joint.

13. An MRI of the right wrist was performed on January 31, 2022. It showed some central thinning of the TFC but no discrete tear, and mild edema of the lunate, proximal triquetrum, and proximal capitate, and moderate first CMC osteoarthritis.

14. Claimant was evaluated by Dr. Ariel Williams on February 15, 2022. Claimant explained that she "fell backwards onto her right wrist and hand, catching herself with her wrist and middle finger. Since this time, she complains of swelling, constant aching, and spasms. She localizes the pain as being across the wrist, volar and dorsal hand, middle finger diffusely but especially DIP joint, and thumb. . . . She reports her symptoms have not significantly changed since the onset." Examination showed pain with resisted wrist extension. She was tender throughout the hand and wrist, greatest in the second dorsal compartment and snuffbox, but also diffusely in the first dorsal compartment, thumb CMC joint, distal radioulnar joint, and middle finger. Dr. Williams reviewed a January 31, 2022 MRI, which showed degenerative changes in the wrist and "quite a bit of inflammation" in the second dorsal compartment. Dr. Williams administered a steroid injection in the second dorsal compartment of the right wrist.

15. The next day, Claimant experienced worsening pain and could not extend her right thumb. An MRI showed a complete rupture of the EPL tendon at the distal radius near Lister's tubercle. As a result, Dr. Williams recommended EPL tendon transfer surgery. Multiple physicians, including Respondents' IMEs, have concurred that the EPL rupture was caused by the injection.

16. Claimant saw Dr. Matthew Delarosa on May 9, 2022 for a second opinion. Dr. Delarosa agreed that a tendon transfer was the best option. He also recommended an ulnar shortening osteotomy to address ulnar impaction shown on the MRI.

17. Dr. Delarosa performed the tendon transfer and ulnar osteotomy on June 10, 2022.

18. On February 1, 2023, Dr. Yancey documented that Claimant experienced a "pop" in her right wrist during PT on January 30, 2023, "and has increased pain and swelling in R wrist and thumb since."

19. In his office note dated February 17, 2023, Dr. Delarosa documented that Claimant had been recovering well from surgery "and then a few weeks ago she was doing a particular activity with therapy. She felt a pop and had swelling and pain in her thumb. . . . [T]he pain is somewhat resolving but is still quite uncomfortable." Dr. Delarosa observed swelling and bruising about the thumb CMC joint and discomfort along the FPL tendon. Dr. Delarosa diagnosed a right thumb CMC strain and FPL inflammation.

20. An MRI of the right wrist on March 17, 2023 showed the TFC was now torn.

21. Dr. L. Barton Goldman performed an IME for Respondents in April 2023. Regarding the mechanism of injury, Dr. Goldman noted Claimant had attempted to arrest her fall with a "typical reflexive maneuver of extending her right arm with the wrist in dorsiflexion resulting in a fall predominantly impacting the right middle finger but also the right hand and wrist." Dr. Goldman's injury-related diagnoses included:

1) Right third proximal interphalangeal joint radial collateral ligament sprain with posttraumatic osteoarthritis and focal PIP small ganglion wrist,
2) Right EPL strain,
3) Mild right median neuropathy at the carpal tunnel,
4) Status post right ulnar shortening osteotomy with EIP to EPL tendon transfer,
5) Probable right upper limb CRPS I. This was a provisional diagnosis based on clinical findings, pending repeat autonomic testing, and
6) Adjustment disorder with depressed mood.

Dr. Goldman did not believe Claimant was at MMI until further CRPS testing was completed. However, he provided an advisory impairment rating of 15% upper extremity, based on range of motion deficits in the right middle finger and right wrist.

22. QSART and thermogram testing on July 18, 2023 were negative for CRPS.

23. Claimant followed up with Dr. Delarosa on July 28, 2023. Dr. Delarosa opined that "a good percentage of her pain can be related to a TFC tear as well as STT inflammation and arthritis. I do think there is still some component of pain that is related to CRPS and some component which we have not completely identified the source. Additionally, I discussed with her that although she has some degeneration of her STT joint and her OMC joint, she had no issues with this previously before her fall and I do

think that there can be exacerbation of this with everything that is going on in her hand." He recommended an arthroscopic TFC debridement and CMC arthroplasty.

24. Dr. Thomas Mordick performed an IME for Respondents on September 26, 2023. Dr. Mordick concluded that the right wrist and thumb symptoms are unrelated to the work accident. He noted that right wrist symptoms and findings were not documented for many months after the accident. He also saw no evidence of ulnar injury on the bone scan. Dr. Mordick agreed that the EPL tendon rupture was caused by the injection performed by Dr. Williams in February 2022, but did not believe the injection was causally related to the original injury. In Dr. Mordick's opinion, the only accident-related condition was the middle finger, which was at MMI with no impairment and no need for further treatment.

25. Dr. Yancey left Workwell in the Fall of 2023, and Claimant's care was transferred to Dr. Gayle Long. Claimant saw Dr. Long on November 17, 2023. After reviewing Dr. Mordick's report, Dr. Long opined, "her index and middle finger symptoms and limitations have resolved, and it appears that her wrist problems are not related to this work injury. She is advised to seek care through her primary care doctor for degenerative (arthritis) changes in the right wrist, as well as pain management." Dr. Long put Claimant at MMI effective November 17, 2023, with no impairment.

26. Claimant requested a DIME, which was performed by Dr. David Yamamoto on April 2, 2024. Dr. Yamamoto opined that the surgery proposed by Dr. Delarosa is reasonably needed and causally related to the work accident. As a result, Dr. Yamamoto determined Claimant is not at MMI. Dr. Yamamoto stated,

> [Claimant] fell on her outstretched hand . . . . [T]here was an emphasis on the long finger of the right hand but clearly she injured her third and fourth digits and the thumb along with the right wrist when she fell. I am in agreement with the opinion of Dr. Delarosa that she would benefit from surgery.

27. Dr. Yamamoto assigned a provisional impairment rating of 22% of the right upper extremity and a 6% psychological rating for pain disorder and adjustment disorder.

28. Dr. Delarosa authored a report dated October 15, 2024 addressing causation of the recommended surgeries. He opined that Claimant's accident was a reasonable mechanism for an ulnar wrist injury and ulnar abutment, and the injection by Dr. Williams caused the EPL rupture. He opined that injury-related therapy caused the TFC tear and that the combination of immobilization and therapy aggravated Claimant's pre-existing CMC arthritis.

29. Dr. Micah Worrell performed an IME for Respondents October 17, 2024. He issued a report and testified at hearing. Dr. Worrell opined that Claimant's wrist and thumb symptoms are not related to the work accident. He saw no mention of wrist pain in Claimant's record until July 2020. In Dr. Worrell's opinion, any symptoms caused by the accident would have manifested within the first two weeks. He believes the thumb pain is

caused by age-related arthritis and was neither caused nor aggravated by the accident. He offered a similar opinion regarding the TFC tear. Dr. Worrell opined that Claimant reached MMI on February 24, 2020. He agreed that the surgery recommended by Dr. Delarosa is reasonably needed, but not causally related to Claimant's accident.

30. Claimant's testimony is generally credible.

31. Dr. Delarosa and Dr. Yamamoto's opinions regarding causation are credible and more persuasive than the contrary opinions provided by Dr. Mordick and Dr. Worrell.

32. Respondents failed to overcome the DIME's determination regarding MMI by clear and convincing evidence.

33. Claimant proved the surgery recommended by Dr. Delarosa is reasonably needed to cure and relieve the effects of her compensable injury.

CONCLUSIONS OF LAW

A DIME's determination of whether a claimant has reached MMI is binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(c). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the DIME is incorrect. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The DIME's opinion regarding the cause of a claimant's condition is an "inherent" part of the diagnostic assessment that comprises determination of MMI and impairment. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). Therefore, the DIME's finding that a particular condition is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Id*.

As found, Respondents failed to overcome the DIME's MMI determination by clear and convincing evidence. The opinions of Dr. Worrell and Dr. Mordick reflect mere differences of opinion and do not rise to the level of clear and convincing evidence. Claimant fell directly on her hand, which is a plausible mechanism for a wrist injury. Claimant testified she has had wrist pain since the accident, notwithstanding the fact that it was not documented until January 2020. The DIME physician found Claimant's account to be credible, as have multiple treating providers. Additionally, Dr. Goldman opined that Claimant injured her right wrist in the accident. Dr. Delarosa credibly opined that Claimant aggravated the pre-existing TFCC degeneration and thumb osteoarthritis in therapy after the tendon transfer surgery. The DIME concluded the treatment is related, and Respondents failed to disprove the DIME's causation determination by clear and convincing evidence.

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment

is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The mere fact that the respondents may have paid for certain treatment does not constitute an admission of liability and does not mean that any negative consequences of that treatment are automatically compensable. *Gordon v. Final Order Ross Stores Inc*., W.C. No. 4-878-759-05 (ICAO, August 20, 2015). 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).

The preponderance of persuasive evidence shows the surgery recommended by Dr. Delarosa is reasonably needed to cure and relieve the effects of Claimant's injury. Claimant's testimony regarding the accident and the symptoms she experienced is credible. Dr. Worrell agreed the surgery is reasonably needed but disagrees about causation. Dr. Delarosa and Dr. Yamamoto's opinions regarding causation are credible and more persuasive than the contrary opinions offered by Dr. Worrell and Dr. Mordick.

ORDER

It is therefore ordered that:

1. Respondents' request to overcome the DIME regarding MMI is denied and dismissed.

2. Respondents shall cover the arthroscopic TFCC debridement and CMC arthroplasty recommended by Dr. Delarosa.

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

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DATED: February 14, 2025

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 5-254-295-001

ISSUE

1. Whether Respondents established by a preponderance of the evidence that Claimant voluntarily resigned his position, making Claimant ineligible for temporary total disability (TTD) benefits.

FINDINGS OF FACT

1. Claimant was not present at hearing.

2. The application for hearing and hearing confirmation were mailed to Claimant at [redacted], and emailed to Claimant at [redacted] Respondents did not receive returned mail or undeliverable email notices.

3. The notice of hearing was mailed and emailed by the Office of Administrative Courts (OAC) to Claimant to the addresses above. The OAC did not receive returned mail or notice that the email was undeliverable.

4. The address to which the application for hearing, hearing confirmation, and notice of hearing were mailed is the same address Claimant provided to Employer. Ex. A p. 26.

5. Claimant received proper notice of the proceeding and failed to appear.

6. On October 18, 2023, the date of injury, Claimant was a non-CDL drywall delivery driver at Employer branch 7393 in Lafayette, Colorado. Claimant was hired April 10, 2023.

7. While delivering drywall on October 18, 2023, Claimant jumped into a window well and rolled his left ankle. Ex. C p. 33. He reported the injury to his supervisor.

8. Claimant never returned to work after October 18, 2023.

9. On October 23, 2023, Claimant reported to Advanced Urgent Care. Ex. D. Claimant was evaluated by Iris Kang, N.P. The work-related diagnosis was left ankle injury, pain, and left "medial an + top of foot." *Id.* at p. 35. Nurse Kang listed Claimant's work status as "unable to work" from October 23, 2023 to October 27, 2023. *Id.* Claimant was to "follow up with workman's comp. MD in 3 days." *Id.*

10. Claimant did not return to Advanced Urgent Care for medical treatment after October 23, 2023. Claimant did not meet with a physician as instructed by Nurse Kang.

11. Employer's branch manager reached out to Claimant during the week of October 23, 2023 and the week of October 30, 2023. Claimant did not respond.

12. Missy Dauphin testified at hearing. Ms. Dauphin is employed by ABC Supply Co., which purchased Employer in 2016. Ms. Dauphin is an HR Generalist and oversees Employer's human resource matters. Her job duties include handling employee relations.

13. Ms. Dauphin was directed to reach out to Claimant on November 3, 2023. When she called Claimant, Claimant answered his phone right away and "was very polite, very respectful." Ms. Dauphin asked Claimant why he had not responded to Employer's branch manager and Claimant responded that he "did not work there anymore."

14. Claimant did not tell anyone at Employer of his decision to quit before he spoke with Ms. Dauphin.

15. Claimant's last contact with Employer's branch manager was on October 19, 2023. After speaking with Claimant on November 3, 2023, Ms. Dauphin determined that October 19, 2023 was the date Claimant voluntarily resigned.

16. The ALJ finds Ms. Dauphin's testimony credible and persuasive.

17. A preponderance of the evidence supports a finding that Claimant voluntarily resigned his employment on October 19, 2023.

18. There is no evidence that Claimant voluntarily resigned his employment on October 19, 2023 because of his injury.

19. Because Claimant voluntarily resigned on October 19, 2023, one day after his October 18, 2023 injury, Claimant was not entitled to TTD. § 8-42-105(1), C.R.S. ("In case of temporary total disability of more than three regular working days' duration . . . ."); § 8-42-103(1)(a), C.R.S. ("If the period of disability does not last longer than three days from the day the employee leaves work as a result of the injury, no disability indemnity shall be recoverable . . . .").

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). 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 Off.*, 5 P.3d 385, 389 (Colo. App. 2000).

TTD

"In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." § 8-42-103(1)(g), C.R.S.; § 8-42-105(4)(a), C.R.S. Accordingly, a claimant who is responsible for the termination of employment is not entitled to temporary disability benefits absent a worsening of condition which reestablishes the causal connection between the injury and the wage loss. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 330 (Colo. 2004); *see Grisbaum v. Indus. Claim Appeals Off.*, 109 P.3d 1054, 1056 (Colo. App. 2005).

Because sections 8-42-103(1)(g), C.R.S., and 8-42-105(4)(a), C.R.S., provide a defense to an otherwise valid claim for temporary disability benefits, respondents shoulder the burden of proving, by a preponderance of the evidence, that the claimant was responsible for his termination and subsequent wage loss. *Poos v. Murfin Drilling Co.*, W.C. No. 5-185-172-002, 2025 Colo. Wrk. Comp. LEXIS 1, *18 (ICAO Jan. 17, 2025). The dispositive question in these cases is whether the employee performed a volitional act or otherwise exercised a degree of control over the circumstances resulting in his discharge. *Id.* (citing *Colo. Springs Disposal v. Indus. Claim Appeals Off.*, 58 P.3d 1061 (Colo. App. 2002); *Padilla v. Digital Equip. Corp.*, 902 P.2d 414 (Colo. App. 1994) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995); *Colo. Comp. Ins. Auth. v. Indus. Claim Appeals Off.*, 18 P.3d 790 (Colo. App. 2000)).

In this case, the evidence presented persuades the ALJ that Claimant is responsible for the termination of his employment and any subsequent wage loss. Despite his failure to communicate the fact to his Employer before November 3, 2023, Claimant voluntarily resigned his position on October 19, 2023. Outside of his statement confirming this fact to Ms. Dauphin, which the ALJ finds highly persuasive, this determination is supported by the facts that Claimant never responded to his branch manager after October 19, 2023, and Claimant never followed up with Advanced Urgent Care after October 23, 2023. Indeed, Claimant's failure to appear in this proceeding further supports the conclusion that he voluntarily quit his employment as he has never actively pursued this claim. Ultimately, the ALJ is convinced that Claimant voluntarily quit his position on October 19, 2023 and is responsible for his subsequent wage loss. As a result, Claimant was not eligible for any period of TTD. § 8-42-103(1)(g), C.R.S.; § 8-42-105(4)(a), C.R.S.

ORDER

It is therefore ordered that:

1. Due to Claimant's voluntary resignation on October 19, 2023, Claimant was not entitled to TTD.

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

SIGNED: February 14, 2025.

Robin E. Hoogerhyde
Administrative Law Judge

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ISSUES PRESENTED

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to the right side of his face on August 12, 2023.

II. If Claimant sustained a compensable facial injury on August 12, 2023, whether Respondent-Employer properly designated a medical provider pursuant to statue and rule of procedure.

III. If Claimant established that he sustained a compensable injury on August 12, 2023, what was Claimant's average weekly wage (AWW) at the time of his injury?

VI. If Claimant established that he sustained a compensable injury, whether he also established, by a preponderance of the evidence, that he is entitled to temporary disability benefits.

V. Whether Respondent-Employer is subject to penalties pursuant to § 8-43-408(1), C.R.S. for failing to carry workers' compensation insurance coverage on August 12, 2023.

VI. Whether Claimant established, by a preponderance of the evidence, that he is entitled to disfigurement benefits and if so, the amount of such award.

FINDINGS OF FACT

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

Claimant's Employment and his August 12, 2023 Injury

1. Claimant worked for Employer as a ranch hand who would take care of cattle, mend and maintain fencing and perform general construction work around Employer's ranch.

2. Claimant was hired by the Employer on August 7, 2023.

3. Claimant testified that Employer agreed to pay him $400.00 a week for his work. Claimant testified that Employer also agreed to allow him to park his camper trailer on Employer's premises and hook it up to both a water and an electrical service free of charge. Claimant estimated the value of the lot rental space, in addition to the water and electrical hook up at $500.00 per month. ($400.00/month for lot rental and $100.00/month for utilities). Claimant's testimony was unrebutted. The ALJ credits Claimant's testimony to find that the reasonable value of Claimant's employer provided housing, including the lot rental and utilities to be $500.00 per month, or $115.38 per week. ($500.00 x 12 months ÷ 52 weeks = $115.38 per week). Thus, the ALJ finds Claimant's average weekly wage to equal $515.38. ($400.00 per week in wages + $115.38 in fringe benefit for the value of Employer provided housing expenses, i.e. lot rental and utilities).

4. On August 12, 2023, Claimant was tasked with transporting some cattle for branding using Employer's trailer. Claimant testified that the trailer was discovered to have two flat tires. Accordingly, Claimant and a co-worker set about changing the tires so the cattle could be loaded and moved. As the co-worker was jacking the trailer up, Claimant testified that the jack unexpectedly kicked back causing the co-worker to lose his grip on the handle. The handle flew upwards and forcefully struck Claimant on the right side of the face. Following the incident, Claimant retired to his trailer for the evening without seeking treatment. Claimant testified that the next morning (August 13, 2023), he woke with swelling and bruising about the right side of his face and blood in his right eye. According to Claimant, he saw Employer on the morning of August 13, 2023. Claimant testified that because of his obvious injuries, Employer directed him to seek medical treatment. Claimant testified that Employer did not designate a specific clinic or physician to attend to his injuries. Claimant proceeded to Spanish Peaks Regional Health Center where he was evaluated in the emergency room. (CHE 3, p. 57-61).

5. An August 13, 2023 treatment note from Spanish Peaks Regional Health Center notes that Claimant's injury occurred at 6 p.m. and he did not present to the Emergency Room (ER) until 8/13/2023, because he did not have a ride. (CHE 3, p. 57). Regarding the mechanism of injury (MOI), the note provides that Claimant was "pushing down on the [jack] and it popped back in (sic) him hitting him in the right cheek." *Id*. Physical examination revealed a 1 cm "partial-thickness" laceration on the right cheek just in front of the right ear along with "significant" swelling and some bruising and tenderness about the right side of the face with "extensive" hemorrhage in the right eye. Imaging (CT) of the brain was negative for intercranial bleeding but a facial CT revealed "extensive right sided facial fractures, including a "[c]omminuted fracture involving the lateral orbital rim and lateral orbital wall" and a "[c]omminuted orbital floor fracture with depressed fracture fragments but without evidence for entrapment of the muscle" in addition to "[c]omminuted anterior and lateral right maxillary wall fractures." (CHE 3, p. 53, 59). Based upon the nature and extent of the documented injuries in this case, the ALJ finds the treatment rendered in the ER on August 13, 2023, to constitute care delivered during a bona fide medical emergency.

6. Claimant was referred to Dr. David Book for a surgical consult. (CHE 3, p. 59). Claimant was also advised by the emergency room physician "to take the week off from work." *Id*. Claimant testified that he did in fact take the next week off from work due to his injury. Claimant testified that he returned to work after taking a week off and was then paid one-half of what he normally was paid. The ALJ interprets Claimant's testimony to support a finding that instead of being paid for two weeks of work or $800.00, Claimant received one-half of his pay or $400.00 for this two week period.

7. Claimant testified that after taking the week of August 13, 2023 through August 19, 2023 off, he returned to work and was paid approximately one-half of what he was paid prior to his August 12, 2023 injury.

8. Claimant consulted with Dr. Book regarding surgical intervention for his facial injuries on August 17, 2023. (CHE 3, p. 78). During this consult, Claimant informed Dr. Book that he was "changing a tire and the jack bounced to [his] face." *Id.* Dr. Book and Claimant discussed treatment options, to include operative care. Following the consultation, Claimant expressed a desire to proceed with surgery. *Id.*

9. On August 25, 2023, Dr. David Book performed an open reduction and internal fixation of Claimant's right zygomaticomaxillary complex fractures via multiple incisions and implant placement. (CHE 3, pp. 81-82). Claimant testified that following his surgery, he spent the night in the hospital. He also missed a day of work to travel

from Aguilar, Colorado to Colorado Springs, Colorado for the surgery and a day to travel home from the hospital. According to Claimant, he returned to work after taking these three days (8/24/2023, 8/25/2023 and 8/26/2023) off, but only worked about half the hours he typically worked for Employer. Based upon the scope of Claimant's injuries, the ALJ finds the treatment rendered by Dr. Book, including the August 25, 2023 surgery, reasonable, necessary and related to Claimant's August 12, 2023 work-related injury.

10. Claimant testified that following his surgery, he returned to work on August 27, 2023, but was unable to perform the full range of his work duties. While he testified that he was not able to perform his job as he had prior to August 12, 2023, Claimant provided no testimony regarding his wages upon his return to work on August 27, 2023. Although Claimant testified that he was earning half of his preinjury wages when he returned to work on August 20, 2023, he offered no similar testimony when questioned about his return to work on August 27, 2023.

The Termination of Claimant's Employment and Housing Agreement

11. Claimant's employment and housing agreement was terminated by Respondent-Employer on October 18, 2023. (CHE 2, p. 51). Claimant testified that he came home to find a notice that his employment was terminated and that he must vacate Employer's premises taped to his trailer door. Per the notice, Claimant was given until October 31, 2023 to quit the premises. *Id*. The termination and eviction notice provides that the housing agreement dated August 7, 2023 was not intended to create a "homestead" for Claimant. *Id*. Rather, the sole purpose of the housing agreement was to "provide a method of compensation" in exchange for Claimant's work duties as outlined in the agreement. *Id.* Because Claimant is primarily Spanish speaking and does not read English, he could not read the notice. Accordingly, he had a longtime friend (Paul Griego) read the notice to him. Claimant complied with the notice and left Employer's property by the October 31, 2023 deadline.

12. Claimant testified that after he was terminated on October 18, 2023, he worked performing casual labor for an average of $100.00 per week through October 31, 2023 when he left Employer's premises so he could pay for his truck insurance. Claimant is not claiming entitlement to temporary disability benefits after October 31, 2023.

13. Based upon the evidence presented, including Claimant's testimony and the content of Exhibit 2, the ALJ finds that Claimant was an employee of Respondent-Employer. Moreover, the ALJ is convinced that in addition to paying Claimant $400.00

per week in wages, Respondent-Employer provided the fringe benefits concerning Claimant's housing outlined at paragraph 3 above.

14. Claimant testified that after his employment was terminated on October 18, 2023, he continued to work odd jobs at substantially less earnings. Indeed, Claimant estimated that his income was roughly half of what he was earning with Respondent-Employer.

15. Claimant testified that Respondent-Employer advised him that he did not have workers' compensation insurance coverage.

The Testimony of Paul Griego

16. Paul Griego testified that he has known Claimant for approximately 25 years and Respondent-Employer for 30 years. He has worked for Employer in the past.

17. Mr. Griego testified that he was present outside of Claimant's trailer when Respondent-Employer told Claimant to look for another job because he did not have workers' compensation insurance coverage. He also heard Respondent-Employer inform Claimant that he would have to be "moving off his [Employer's] property."

Claimant's Disfigurement

18. Claimant is seeking a disfigurement award for the scarring associated with his reconstructive surgery and asymmetry of his face caused by his multiple fractures. Visual inspection of the outside of the face did not reveal any scarring associated with his facial surgery. Claimant reported scarring and the visual presence of a "metal plaque" on the inside portion of the right cheek, i.e. inside the mouth. As this scarring/disfigurement is not normally exposed to public view, the ALJ explained to Claimant that he could not award any benefit for this "disfigurement." However, the symmetry of Claimant's face was also observed which viewing revealed mild asymmetry of the face caused by a loss of fullness in the right cheek.

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 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. In this case, Claimant must prove his entitlement to benefits by a preponderance of the evidence. 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 claimant or respondents. Section 8-43-201(1), C.R.S. Rather, a workers' compensation claim is to be decided on its merits. *Id.*

B. In deciding whether Claimant has met his burden of proof, the ALJ is empowered: "To resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo.App. 2002). 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). In this case, the ALJ concludes that the Claimant is a reliable witness. His testimony is supported by the medical record evidence, the exhibits and the testimony of Paul Griego.

C. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge need not address 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 (Colo.App. 2000).

Compensability

D. A claimant's right to compensation initially hinges upon a determination that he/she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811

P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). Conversely, the "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). It is the burden of the claimant to establish causation by a preponderance of the evidence. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App. 2000). There is no presumption than an injury which occurs in the course of employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968). The evidence must establish the causal connection with reasonable probability, but it need not establish it with medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293. Here, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment and during an activity related to Claimant's job duties as a ranch hand, namely changing a tire in preparation of moving Employer's cattle. Nonetheless, the question of whether Claimant's injuries arose out of his employment as a ranch hand must be answered before the claim can be determined to be compensable.

E. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact and one which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo.App. 1996). In this case, the evidence presented supports a finding that Claimant was performing services for Respondent-Employer for a wage when he suffered injuries to the right side of his face while he and a co-worker were using a jack to change a flat tire on trailer he needed to complete his assigned work duties, namely moving Employer's cattle on August 12, 2023. This finding is buttressed by the objective findings referenced in Claimant's medical and diagnostic testing records. Based upon the evidence presented, the ALJ is convinced that the kick back of the jack caused Claimant's co-worker to lose his grip on the jack handle, which then struck Claimant in the face causing multiple facial fractures giving rise to his symptoms and need for treatment. As presented, the ALJ is convinced the evidence supports a conclusion that not only did Claimant's injuries occur within the time and place limits of his employment, but also that his injury/symptoms and need for treatment "arose out of" his work duties as a ranch hand for Employer. Accordingly, the ALJ is convinced that Claimant has established the requisite nexus between his work activities and his injuries after being

struck in the face with a metal jack handle on August 12, 2023. Thus, the claimed injuries are compensable.

Claimant's Entitlement to Medical Benefits

F. 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, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. Moreover, Respondents are only liable for authorized treatment.

G. Authorization to provide medical treatment refers to a medical provider's legal authority to provide treatment to the claimant with the expectation that the provider will be compensated by the insurer for said services. *Mason Jar Rest. v. Indus. Claim Appeals Office,* 862 P.2d 1026, 1029 (Colo.App.1993); *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo.App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo.App. 1995); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018). Authorized providers include those medical personnel to whom the claimant is directly referred by the employer, as well as providers to whom an authorized provider refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo.App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo.App. 1997). Consequently, treatment is compensable under the Act where it is provided by an "authorized treating physician." *Popke v. Indus. Claim Appeals Office,* 944 P.2d 677 (Colo.App.1997); *see also* §§ 8–42–101(1)(b)(3.6)(b), 8–42–107(8)(b)(I), 8–43–404(7), 8–43–501(3)(e)(III), 8–43–502(2), C.R.S. 2005 (all referring to "authorized treating physician").

H. Under § 8-43-404(5) (a)(I)(A), C.R.S., the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition(s). The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, has an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo.App. 2005). Section 8-43-404(7)(a), C.R.S. provides that "an employer or insurer shall not be liable for treatment provided pursuant to article 41 of Title 12, C.R.S. unless such treatment has been prescribed by an authorized treating physician." If the claimant obtains unauthorized care, the respondents are not required to pay for it. *In*

Re Patton, W.C. Nos. 4-793-307 and 4-794-075 (ICAO, June 18, 2010); see *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo.App. 1999); *Pickett v. Colorado State Hospital*, 32 Colo.App. 282, 513 P.2d 228 (1973). However, medical services provided during a bona fide emergency are an exception to the normal requirement that a claimant obtain authorization for all treatment connected to his/her industrial injury. Larson's Workers' Compensation Law, § 94.02[6] (1999); *Sims v. Industrial Claim Appeals Office, 797 P.2d 777* (Colo.App. 1990). There is no precise legal test for determining what constitutes a medical emergency.[1] Rather, the question of whether a claimant established the existence of a bona fide emergency is dependent on the particular facts and circumstances of the claim. *Timko v. Cub Foods,* W. C. No. 3969-031 (June 29, 2005). In this case, the ALJ is persuaded that the nature and extent of Claimant's injuries created an urgent need for medical attention. Accordingly, the ALJ is convinced that the treatment Claimant obtained in the ER at Spanish Peaks Regional Health Center was emergent in nature and thus Claimant was not required to obtain authorization for this initial treatment.

I. As noted, § 8-43-404(5) (a), C.R.S. affords an employer or its insurer the right in the first instance to select a physician to treat the injury. The statute requires the employer or insurer to "provide a list of at least four physicians . . . in the first instance, from which list an injured employee may select the physician who attends said injured employee." Similarly, Workers' Compensation Rules of Procedure, Rule 8-2(A), 7 Code Colo. Reg. 1101-3, states that "[w]hen an employer has notice of an on the job injury, the employer or insurer shall provide the injured worker with a written list . . ." In order to maintain the right to designate a provider in the first instance, the employer has an obligation to name the treating physician forthwith upon receiving notice of the compensable injury. *See Rogers v. Industrial Claim Appeals Office,* 746 P.2d 545 (Colo.App. 1987). The failure to tender the "services of a physician . . . at the time of injury" gives the employee "the right to select a physician or chiropractor." The employer's duty to designate is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Jones v. Adolph Coors Co.,* 689 P.2d 681 (Colo.App. 1984); *Gutierrez v. Premium Pet Foods, LLC*, W.C. No. 4-834-947 (ICAO, September 6, 2011). Here, the evidence presented supports a conclusion that Respondent-Employer was advised as to the nature of Claimant's injury and how it occurred. Indeed, after Claimant reported his injury to Employer on August 13, 2023, Employer advised him to see go get treatment, but did not specify where or whom to see. Based upon the evidence presented, the ALJ is persuaded that Employer failed to

[1] The exception is not limited to situations where life is threatened. *Bunch v. Industrial Claim Appeals Office of State of Colorado,* 148 P.3d 381 (Colo.App.2006).

provide Claimant with a list of providers from which to choose to attend to his injuries. The evidence also supports a conclusion that Claimant was referred to Dr. Book and he chose to follow-up with him for additional treatment, including surgery. Based upon the evidence presented, the ALJ is convinced that the right of selection passed to Claimant and he exercised his this right by selecting Spanish Peaks Health Center who subsequently referred him to Dr. Book as his authorized treating physician. Accordingly, the ALJ is convinced that Claimant's authorized physicians are the ER providers at Spanish Peaks Health Center and Dr. David Book.

Claimant's Average Weekly Wage

J. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of the 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).*

K. Section 8-42-102(2), C.R.S., sets forth certain methods of calculating the average weekly wage. Section 8-42-102(2)(b) provides that "[w]here the employee is being paid by the week for services under a contract for hire, said weekly remuneration at the time of the injury shall be deemed to be the weekly wage for the purposes of articles 40 to 47 of this title. Here, the ALJ is convinced that Claimant was paid at a rate of $400.00/week. Moreover, the evidence presented persuades the ALJ that Employer provided additional fringe benefits in the form of a space (lot) for Claimant to park his trailer as well as water and electrical service.

L. Pursuant to § 8-40-201(19)(b), the term "wages" includes the "reasonable value of board, rent, housing and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts by the division in each particular case, but does not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19)." Including non-cash benefits such as the value of Claimant's employer provided housing including the value of utilities "encompasses the recognition that a worker's earnings may be comprised, in significant part, of compensation other than money wages." *Young v. Indus. Claim Appeals Office*, 969 P.2d 735, 737 (Colo.App. 1998). Based on the evidence presented, the ALJ is persuaded that Claimant's AWW should include the value of his employer provided housing including the rental value of the lot and utilities (water/electric) Employer provided in this case. Including the value of Claimant's employer provided housing to Claimant's wages yields an AWW of $515.38. (Finding of Fact, ¶ 3). The ALJ finds that this figure most closely approximates Claimant's wage loss and diminished earning capacity at the time of his August 12, 2023 work related injury.

Claimant's Entitlement to Temporary Disability Benefits

M. To prove entitlement to temporary total disability (TTD) benefits, Claimant must establish that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo.App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo.App. 1998). A claimant is not required to present medical evidence of a disability or restrictions to establish entitlement to temporary disability benefits. *See Lymburn v. Symbiosis Logic*, 952 P.2d 831 (Colo.App. 1997). Rather, the Claimant's testimony alone may be sufficient to establish a disability. *Id*.

N. In this case, the ALJ credits Claimant's testimony to conclude that he missed one week (7 days) from work starting August 13, 2023, which is the date he sought medical treatment for the first time, as a result of a disability caused by his work-related injury. As the injury happened late on August 12, 2023, there would be no wage-loss benefits associated with that day; however, based upon Claimant's unrebutted and credible testimony, he was out of work and did not earn any wages from August 13, 2023 through August 19, 2023 due to medical incapacity caused by his August 12, 2023 work injury. Claimant also missed another three days of work associated with his August 25, 2023 surgery to address his work-related facial fractures. As noted at paragraph 9 above, these days included August 24, 2023, August 25, 2023, and August 26, 2023.

O. Based upon the evidence presented, the ALJ is persuaded that Claimant was "disabled" within the meaning of C.R.S. § 8-42-105, between August 13, 2023 through August 19, 2023 and again from August 24, 2023 through August 26, 2023 during which periods he experienced an actual wage loss. Thus, Claimant has proven that he is entitled to TTD benefits for these periods. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO, June 11, 1999). For the period from August 20, 2023, through August 23, 2023, inclusive, the

ALJ is convinced that Claimant is entitled to temporary partial disability benefits as he testified that he was earning half of his pre-injury earnings due to the ongoing effects of his August 12, 2023 work-related injury. Based upon Claimant's $400.00 weekly earnings and crediting his testimony that he was earning half of those wages after he returned to work on August 20, 2023, the ALJ concludes that Claimant is entitled to temporary partial disability benefits based on a $200.00 per week loss for August 20, 2023 through August 23, 2023.

P. Concerning the period from August 27, 2023 through October 18, 2023, inclusive, the evidence presented fails to establish that Claimant's entitlement to temporary partial disability (TPD) benefits. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. Section 8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo.App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). In this case, Claimant failed to present any evidence regarding his wages after returning to work following his August 25, 2023 surgery. Rather, Claimant simply testified that he was not able to perform his job as he had prior to his August 12, 2023 injury. Thus, while Claimant may have been disabled as evidenced by his inability to perform the full scope of his work duties, he failed to establish that he suffered an actual wage loss related to his industrial injury during the above referenced time period. Claimant's assertion that he was earning half of his preinjury wages when he returned to work on August 27, 2023, is not supported by the evidence presented. Accordingly, it would amount to impermissible speculation to reach such a conclusion.

Q. Similarly, Claimant's request for TPD benefits after October 18, 2023 through October 31, 2023 fails but for the reason that Claimant failed to establish that he was disabled by his August 12, 2023 injury during this time period. Indeed, Claimant testified that he was only able to earn around $100.00 per week because people "wouldn't pay much." Consequently, the ALJ is not convinced, based upon the evidence presented, that Claimant's impaired earning capacity during the aforementioned time frame arises from a disability connected to his compensable injury. Accordingly, any claim for TPD for the time period extending from August 27, 2023 through October 31, 2023 must be denied and dismissed.

R. Based upon the evidence presented, the ALJ concludes that Claimant is entitled to TTD benefits in the amount of $343.59[2] ($515.38/week (7 days) × 2/3 =

[2] Pursuant to C.R.S. § 8-42-105(1), temporary disability must be total and last more than three regular working days before entitlement to disability benefits begins. In this case, claimant missed 10 days of work during which his disability was total. (August 13, 2023 – August 19, 2023 and August 24, 2023 – August 26, 2023). Subtracting the first three days leaves a period of TTD entitlement of 7 days, i.e. 1

$343.59). Claimant is also owed $120.14 in temporary partial disability. ($515.38/week - $200.00 (one-half of Claimant's regular earnings) = $315.38/week ÷ 7 days/week = $45.05/day × 4 days (August 20, 2023 – August 23, 2023) = $180.21 × 2/3 = $120.14) See C.R.S. § 8-42-106(1).

Penalties

S. Claimant seeks penalties against Employer for failing to carry Worker's Compensation insurance pursuant to C.R.S. § 8-43-408(5). 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.

Based upon the evidence presented, including Claimant's testimony and the testimony of Paul Griego, the ALJ is convinced that Respondent-Employer has failed to abide by the statutory provisions to carry workers' compensation insurance.

T. 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). Accordingly, interest is not included in the "penalty" amount Respondent-Employer is ordered to pay pursuant to C.R.S. § 8-43-408(5).

U. As noted, Claimant is entitled to $343.59 in TTD and $120.14 in TPD benefits for a total indemnity award of $463.73. Twenty- five percent (25%) of the compensation awarded is $115.93, which shall be sent to the Division of Workers'

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week. Because Claimant's period of disability did not last longer than two weeks from the day Claimant left work as a result of his injury, disability benefits are not recoverable from August 13, 2023 in this case. See C.R.S. § 8-42-103(1)(b).

Compensation Revenue Assessment Unit, 633 17th Street, Suite 400, Denver, CO 80202.

V. As Employer was not insured for workers' compensation liability at the time of Claimant's injury, C.R.S. § 8-43-408(2), requires Employer to pay to the trustee of the Division of Workers' Compensation ("Division") an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by some surety company authorized to do business in Colorado. Employer may contact the Division Trustee for assistance with its obligations in this regard. The Division Trustee may be contacted through the Division's customer service line at 303-318-8700 or by email to Mariya Cassin mariya.cassin@state.co.us. Because no medical bills were submitted at hearing, no specific payments for medical benefits are being awarded herein. The Division can also help Employer calculate medical payments owed under the fee schedule.

Claimant's Entitlement to Disfigurement Benefits

W. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Colorado Supreme Court held that the term "disfigurement" as used in the workers' compensation statute, contemplates that there be an "observable impairment of the natural person." In this case, the ALJ conducted a disfigurement viewing to determine the nature and extent of any observable impairment to Claimant's natural person, including the right side of his face. As part of that viewing, the ALJ observed mild asymmetry of the face caused by a loss in the fullness of the tissue comprising the right cheek. No surgical scarring was visible on the outside aspect of the right face. Based upon the in-court observation of the right outside aspect of Claimant's face, he has sustained a serious permanent disfigurement, which entitles him to additional compensation. Section 8-42-108 (1), C.R.S. Accordingly, the ALJ orders that Insurer shall pay Claimant $2,500.00 for the above-described disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore ordered that:

1. Claimant has proven that he suffered a compensable injury to the right side of his face while working as a ranch hand for Employer on August 12, 2023.

2. Respondent-Employer failed to properly designate a medical provider to attend to Claimant's injury in the first instance. Consequently, the right of selection

passed to Claimant. Claimant exercised this right by treating at Spanish Peaks Regional Health Center (Spanish Peaks). Accordingly, Spanish Peaks is an authorized under this claim. Dr. David Book is an authorized provider under this claim by virtue of the referral from Spanish Peaks. Employer shall pay Dr. David Book and the providers at Spanish Peaks Regional Health Center for all reasonable, necessary and related treatment provided to the Claimant to attend to his August 12, 2023 facial injuries, including but not limited to the surgery to reconstruct his fractured facial bones. All medical expenses shall be pain in accordance with the Colorado Workers' Compensation Medical Benefits Fee Schedule.

3. Claimant has proven an average weekly wage of $515.38 at the time of his August 12, 2023 injury, inclusive of the value of his Employer provided housing.

4. Respondent-Employer shall pay Claimant $343.59 in temporary total disability benefits and $120.14 in temporary partial disability benefits for a total indemnity payment of $463.73.

5. Employer shall pay to the trustee of the Division of Workers' Compensation ("Division") an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by some surety company authorized to do business in Colorado. The filing of any appeal, including a petition for review, shall not relieve Respondent-Employer of the obligation to pay the designated sum to the trustee or to file the aforementioned bond. C.R.S. § 8-43-408(2). Respondent-Employer shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

6. Respondent-Employer shall pay to Claimant $2,500.00 for the visible disfigurement described in paragraph W above.

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

DATED: February 20, 2025

/s/ Richard M. Lamphere

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

ISSUE

The issue addressed by this Summary Order concerns Claimant's entitlement to medical benefits. The specific question answered is:

I. Whether Claimant established, by a preponderance of the evidence, that the C3-C7 anterior cervical decompression and fusion (ACDF) surgery proposed by Dr. Koshak is reasonable, necessary and related to his January 3, 2023, admitted industrial injury.

Based on the evidence presented at hearing, the ALJ finds and concludes as follows:

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

B. The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

C. In this case, Claimant contends that the evidence presented supports a conclusion that he suffered an aggravation and/or acceleration of his pre-existing cervical degenerative disc disease (DDD) as part of his January 3, 2023 slip and fall and that this aggravation/exacerbation gave rise to his current neck and radicular extremity symptoms resulting in disability and the need for treatment, including the proposed C3-C7 ACDF procedure requested by Dr. Koshak. Claimant further insists that he overlooked and did not report the symptoms emanating from his cervical spine

because of the symptoms associated with his right shoulder injury were more intense and only abated after his February 8, 2023 right shoulder surgery. The ALJ is not persuaded.

D. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a pre-existing infirmity or disease to produce disability or the need for treatment for which workers' compensation is sought. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for the treatment of pain, so long as the pain is proximately caused by employment related activities and not an underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). In this case, the ALJ credits the opinion of Dr. Rauzzino regarding the lack of a temporal relationship between Claimant's slip and fall and the onset of his cervical spine symptoms more than two months later, which strongly suggests that the occurrence of Claimant's cervical symptoms may represent the natural progression of a pre-existing condition that is unrelated to his January 3, 2023 slip and fall. See *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Here, the totality of the persuasive evidence supports a finding that Claimant had significant pre-existing degenerative disc disease in his cervical spine that has seemingly progressed over the years. Indeed, a March 17, 2023 note from Dr. Simonich notes that he reviewed an x-ray of Claimant's cervical spine and found this imaging to "demonstrate moderate to severe multilevel DDD involving C3-7 with associated loss of lordosis. (Ex. J, p. 127). These findings were confirmed by MRI of the cervical spine obtained April 12, 2023, which demonstrated moderate spinal canal narrowing and severe bilateral neuroforaminal narrowing at multiple levels of the cervical spine. (Ex. I, p. 110-111). The evidence presented also supports a finding that Claimant did not complain of neck symptoms for weeks after his slip and fall, prompting Dr. Rauzzino to opinion that had Claimant suffered an acute injury to the nerves in his neck at the time of his slip and fall, there would have been an immediate onset of symptoms, which did not occur in this case. (Depo. Dr. Rauzzino, p. 34, ll. 6-25, p. 35, l. 1).

E. Claimant's suggestion that the right shoulder pain he experienced following his slip and fall was so intense that he did not notice pain his neck, is unconvincing. Based upon the evidence presented, particularly Dr. Rauzzino's testimony, the ALJ is persuaded that the reason Claimant's medical records are devoid of reports of neck pain early in the course of his treatment is likely due to the fact that he simply didn't have neck pain, not because any such pain was masked by the injury to his right shoulder. (Depo. Dr. Rauzzino, p. 26, ll. 12-25, p.27, ll. 1-23). In this case, the totality of the evidence presented persuades the ALJ that Claimants symptoms, disability and need for cervical spine treatment, including the proposed ACDF surgery

is, more probably than not, related to the natural progression of his severe cervical DDD rather than his January 23, 2023 slip and fall. The contrary opinions of Dr. Koshak are unpersuasive. Because Claimant has failed to establish a causal nexus between his January 3, 2023 slip and fall and his cervical spine shoulder symptoms and need for treatment, his request for medical benefits in the form of a C3-7 ACDF surgery must be denied and dismissed.

F. As noted above, a Claimant must not only establish that the proposed treatment he/she is seeking is related to his industrial injury, but also that it is reasonable and necessary. In this case, the evidence presented supports a conclusion that Claimant's neck, shoulder and upper extremity pain appears to be multifactorial without identification of a clear pain generator as is suggested by the Colorado Workers' Compensation Medical Treatment Guidelines (MTG's).

G. The MTG's enumerated at WCRP, Rule 17 are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). WCRP Rule 17-2(A) provides: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). Moreover, the Court is not bound by the MTGs in deciding individual cases based on the guidelines or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

H. While the Court is not required to utilize the medical treatment guidelines as the sole basis when deciding whether specific medical treatment is reasonable, necessary or related to an industrial injury or occupational disease, the Guidelines carry substantial weight as accepted guidance in the assessment and treatment of cervical spine pain. Here, questions remain as to the origin of Claimant's intransigent pain. Accordingly, the ALJ concludes that not all of Claimant's potential pain generators have been adequately defined and treated as required by the MTG's. Nor has Dr. Koshak offered specific reasons why a deviation from the MTGs is necessary in this case. Because significant harm can beset patients who undergo surgery without their pain generators being adequately defined, the ALJ concludes that it is not currently reasonable to proceed with the recommended C3-7 ACDF surgery recommended by Dr. Koshak.

IT IS THEREFORE ORDERED:

1. Claimant's request for authorization to proceed with a C3-7 ACDF surgery as recommended by Dr. Koshak is denied and dismissed.

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

DATED: February 20, 2025

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

This decision is final and not subject to appeal unless a full order is requested. The request shall be made at the Office of Administrative Courts, 2864 S. Circle Drive, Suite 810, Colorado Springs, CO 80906 within ten working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

If a party makes a request for a full order both parties shall submit a proposed full order containing specific findings of fact and conclusions of law within five working days from the date of the request. The proposed full order must be submitted by e-mail in Word or Rich Text format to OAC-CSP@state.co.us. The proposed order shall also be submitted to opposing counsel and unrepresented parties by e-mail, facsimile, or same day or next day delivery.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-227-527-003

ISSUES

- Did Claimant prove by a preponderance of the evidence that he suffered a whole person impairment to his left shoulder?

FINDINGS OF FACT

1. Claimant works as a Police Officer at Pikes Peak State College. He suffered an admitted injury to his left shoulder on November 29, 2022, while using a skid steer to clear debris at a firing range.

2. Claimant saw Dr. Emily Burns at the UCHealth Occupational Medicine Clinic on December 6, 2022, for left shoulder and biceps pain. Examination revealed tenderness over the biceps tendon and tenderness and stiffness in the upper trapezius. Dr. Burns ordered an MRI.

3. A left shoulder MRI on December 15, 2022 showed mild AC joint osteoarthritis and partial supraspinatus tear. Dr. Burns referred Claimant for physical therapy and an orthopedic evaluation.

4. Therapy records show pain with weakness and stiffness throughout Claimant's left shoulder, and sleep issues because of pain. Treatment was directed to various structures about the shoulder girdle including the pectoral, levator scapulae, and deltoid muscles.

5. Examination of the shoulder on January 5, 2023 showed tenderness over the left upper trapezius and scapular border.

6. Claimant saw Dr. James Duffey, an orthopedic surgeon, on January 25, 2023. Dr. Duffey diagnosed and "traumatic incomplete tear of the left rotator cuff," and administered an and intra-articular injection. The injection helped the shoulder range of motion but did not relieve the pain. As a result, Dr. Duffey recommended surgery.

7. Claimant started massage therapy on February 17, 2023. Claimant reported sharp pain in the superior aspect of the left shoulder and dull to sharp pain in the anterior chest, which worsened with activities of daily living. Claimant attended multiple massage sessions through August 15, 2023. The therapy notes reflect consistent problems in the upper left quadrant including the pectoral muscle, upper trapezius, supraspinatus, infraspinatus, subscapularis, deltoid, and bicep muscles.

8. On April 20, 2023, Claimant saw Dr. Thomas Noonan, an orthopedic surgeon at the Steadman Hawkins Clinic. Dr. Noonan recommended additional conservative care before attempting surgery. He administered a glenohumeral joint injection.

9. Dr. Noonan performed arthroscopic surgery on August 18, 2023, consisting of a rotator cuff repair, subacromial decompression, debridement of a labral tear, and biceps tenodesis.

10. Therapy records from September 2023 through February 2024 documented ongoing pain and stiffness throughout the entire left shoulder girdle including, but not limited to, the upper trapezius, levator scapulae, deltoid, and left biceps. The pain at times impaired Claimant's cervical range of motion.

11. Dr. Burns put Claimant at MMI on May 13, 2024, with a 4% upper extremity impairment, which converts to 2% whole person. Claimant was still experiencing issues with his left shoulder to include pain in the lateral deltoid and ROM deficits. Dr. Burns also noted that Claimant experienced pain as he resumed more regular activities such as holding his two-year-old grandchild and riding his motorcycle.

12. Claimant had a DIME with Dr. Thomas Higginbotham on August 20, 2024. He reported pain and discomfort about the left anterolateral shoulder and sleep disruption from rolling over on the left shoulder. Claimant stated that wearing his Kevlar vest put additional weight on the shoulder and caused a chronic strain sensation. Physical examination revealed bicipital groove tenderness, tenderness around the left pectoralis minor muscle, and a moderate tender point at the left infraspinatus musculotendinous junction. Dr. Higginbotham agreed that Claimant was at MMI as of May 13, 2024, and assigned a 9% upper extremity impairment, which converts to 5% whole person.

13. Respondent filed a Final Admission of Liability on September 13, 2024, admitting to Dr. Higginbotham's 9% scheduled rating.

14. Claimant testified he continues to experience symptoms of pain and stiffness in his left biceps, on the front of the shoulder between the clavicle and axilla, and on the top of the shoulder up toward the neck. Claimant explained that his job requires him to wear a Kevlar vest in the field, which exacerbates his symptoms. Firearm training also increases pain in the front and top of the shoulder up toward the neck. Claimant also experiences pain in his shoulder and trapezius when raking leaves and lifting his granddaughter and nephew. The pain disrupts Claimant's sleep and causes daytime fatigue.

15. Claimant's testimony regarding the symptoms and functional impairment related to his left shoulder is credible and persuasive.

16. Claimant proved he suffered functional impairment not listed on the schedule of disabilities.

CONCLUSIONS OF LAW

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL*

Swedish Healthcare System, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm at the shoulder," they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the trapezius or scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved he suffered functional impairment not listed on the schedule. Claimant's testimony is credible. Claimant's testimony is consistent with and supported by records from multiple providers documenting symptoms and limitations affecting areas proximal to the glenohumeral joint, including the left pectoral, muscle, scapula, and trapezius muscle. These proximal issues were noted before and after the surgery, including at the DIME appointment.

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant PPD benefits based on the DIME's 5% whole person impairment rating.

2. Respondent shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

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: February 21, 2025

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that the left total knee arthroplasty, as recommended by Dr. Hugh Brock, is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted March 18, 2024 work injury?

FINDINGS OF FACT

1. On March 18, 2024, Claimant was performing his normal job duties. On that date, Claimant and his coworkers were placing "wattles" at a job site. Wattles are long tube-like objects that are used as a barrier to keep substances from draining out of a designated area. They are often filled with straw or hay. Claimant testified that the wattles used at the jobsite on March 18, 2024 were each approximately 30 feet long.

2. While Claimant and his coworkers were unloading a bundle of seven or eight of these wattles, the bundle fell and hit Claimant on his left side. Claimant testified that he was struck with such force that he fell to the ground. Claimant further testified that he initially felt sore, but completed the rest of his duties that day. After his shift, Claimant iced his left knee. However, he continued to have left knee pain the following morning. As a result, he underwent medical treatment. Respondents have admitted liability for the March 18, 2024 injury.

Left knee treatment prior to March 18, 2024

3. Prior to the March 18, 2024 incident, Claimant suffered an injury to his left knee. Claimant testified that prior injury occurred in approximately 2022 while he was employed with Employer. Following that injury, Claimant underwent a "scope" of his left knee. Claimant testified that following his prior surgery he returned to full duty, with no issues and he was "100 percent".

Left knee treatment after March 18, 2024

4. Following the March 18, 2024 incident, Claimant received treatment on March 19, 2024 in the emergency department (ED) at Grand River Medical Center. In the medical record of that date, Dr. Lindsay Seilhan noted Claimant's report that he was struck on the lateral side of his left knee by "large pipes". On examination, Dr. Seilhan noted that Claimant had full range of motion of his left knee, with tenderness, but no laxity.

5. Or. Seilhan ordered x-rays of Claimant's left knee, which were performed on that same date. Radiologist Dr. David Breland noted in his report that Claimant's left knee had degenerative joint disease (OJO) and a joint effusion. There was no evidence of an acute fracture.

6. Dr. Seilman opined that Claimant suffered a contusion to the lateral knee, and a corresponding injury of the medial collateral ligament (MCL). Dr. Seilman recommended Clamant follow up with his primary care provider to discuss a possible MCL tear. Dr. Seilman prescribed pain medications, and Claimant was provided with a knee brace.

7. On March 25, 2024, Claimant was seen by Mark Quinn, PA-Cat Grand River Clinic in Rifle. At that time, PA Quinn recorded Claimant's mechanism of injury as:

> He was standing on the uneven ground in dirt and weeds when other members of his crew were moving a bunch of soil barrier [wattles] on 3/18/2024. Each one of them is 18 feet long and each one of them weighs approximately 70 pounds. They had cut the straps that held a bunch of them together and one of them rolled off the truck, bounced on a trailer and then struck [Claimant] from the outside on the lateral side of his left knee causing a valgus strain to the medial left knee. He also has an injury to his hip, but it did not knock him down.

8. PA Quinn listed Claimant's diagnoses as a contusion of the left knee and a Grade 1 MCL sprain, and opined that imaging and physical therapy was not necessary. Claimant was provided a hinged knee brace. In that same record, Claimant reported to PA Quinn that he "has had multiple knee surgeries in the past and is well aware of exercises and not allowing it to get stiff, etc." PA Quinn noted that Claimant had undergone a prior arthroscopic left knee partial medial meniscectomy "a year ago".

9. On May 3, 2024, Respondents filed a General Admission of Liability (GAL) admitting for medical benefits related to the March 18, 2024 work injury

10. Subsequently, Claimant was seen by Or. Hugh Brock for an orthopedic consultation. Claimant testified that first he returned to Dr. Harris who performed the prior arthroscopy. Claimant further testified that Dr. Harris referred him to Dr. Brock. In a physical therapy record dated August 5, 2024, Andrew McClure, PT, DPT, noted Claimant's report that Dr. Brock had recommended a left total knee arthroplasty (TKA).

11. At the request of Respondents, on August 22, 2024, Claimant attended an independent medical examination (IME) with Dr. David Elfenbein. In connection with the IME, Dr. Elfenbein reviewed Claimant's medical records dating back to 2011, obtained a history from Claimant, and performed a physical examination. In the IME report, Dr. Elfenbein opined that the March 18, 2024 incident caused a temporary aggravation of the pre-existing arthritis in Claimant's left knee. With regard to the recommended knee replacement surgery, Dr. Elfenbein opined that Claimant's need for that surgery was not related to the incident at work. Rather, the need for a total knee replacement was due to

the osteoarthritis present in that knee. In support of his opinions, Dr. Elfenbein referenced his review of records following the 2022 left knee arthroscopy. Specifically, Dr. Elfenbein stated "there is documentation of continued knee pain even after his surgery despite the fact that he told me his symptoms completely resolved but then stated he had pain from Oto 2/10. Despite having had the alleged work injury, his knee pain would likely progress anyway because of the underlying osteoarthritis."

12. On September 17, 2024, Dr. Brock requested authorization for a left TKA

13. On September 19, 2024, Respondents filed a GAL admitting for medical treatment and for temporary total disability (TTD) benefits beginning September 11, 2024.

14. After reviewing additional records, on September 19, 2024, Dr. Elfenbein authored an addendum to the IME report. In the addendum, Dr. Elfenbein stated that the opinions expressed in the IME report were unchanged. Dr. Elfenbein stated that the incident on March 18, 2024 "was a minor and temporary aggravation of [Claimant's] pre-existing knee arthritis and knee pain." Dr. Elfenbein reiterated his opinion that Claimant's need for a total knee replacement was related to that pre-existing condition and not the work injury.

15. Based upon Dr. Elfenbein's opinions, on September 24, 2024, Insurer denied authorization for the requested surgery. That denial was communicated via a letter dated September 25, 2024.

16. The ALJ credits the medical records and the opinions of Dr. Elfenbein. The ALJ does finds Claimant's testimony that he had no left knee issues following the 2022 left knee surgical procedure to be unpersuasive. The ALJ specifically credits Dr. Elfenbein's opinion that Claimant's need for a left total knee replacement is related to that pre-existing condition of that knee, and not the March 18, 2024 work injury. The ALJ further finds that the March 18, 2024 work injury did not aggravate or accelerate the pre-existing condition of Claimant's left knee to necessitate the need for the left TKA. Therefore, the ALJ finds that Claimant has failed to show that it is more likely than not that the recommended left TKA is reasonable medical treatment necessary to cure and relieve him from the effects of the admitted March 18, 2024 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. *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. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that the left TKA, recommended by Dr. Brock, is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted March 18, 2024 work injury. As found, the medical records and the opinions of Dr. Elfenbein are credible and persuasive on this issue.

ORDER

It is therefore ordered that the Claimant's request for a left total knee arthroplasty is denied and dismissed.

Dated February 25, 2025.

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

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

service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301 (2), C.R.S. and OACRP 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 5-281-107-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment on July 12, 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 reasonable, necessary and causally related medical benefits for his July 12, 2024 industrial injuries.

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

5. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 13, 2024 until terminated by statute.

6. Whether Employer is subject to penalties pursuant to §8-43-408(1), C.R.S. for failing to carry Workers' Compensation insurance on July 12, 2024.

FINDINGS OF FACT

1. On July 12, 2024 Claimant was working for Employers Vicko Construction and Corporate Support Services as a laborer on a residential construction project. Claimant testified that while he was walking on the ground, a roofer tossed a pack of shingles off the roof of a home. The shingles struck Claimant on the neck and upper back area. He suffered injuries to his neck, head, back and shoulders. Respondents did not challenge the compensability of Claimant's injuries.

2. Claimant explained that he earned $20.00 per hour and worked approximately 48 hours each week. He thus earned an Average Weekly Wage (AWW) of $960.00.

3. Employers did not offer Claimant a list of designated medical providers. He thus visited the Intermountain Health Platte Valley Hospital emergency room on the date of the injury. Medical providers conducted a physical examination, performed blood tests and administered diagnostic testing that included CT scans of the head and cervical spine. The testing revealed a normal evaluation of the brain as well as no acute fracture or traumatic malalignment of the cervical spine. Providers directed Claimant to wear a

brace when upright and restricted him from lifting in excess of 10 pounds or climbing ladders. Because of the work restrictions, Claimant was unable to perform his job duties. He has not returned to work since the date of the accident.

4. Claimant incurred significant medical bills for treatment in the emergency room. The record reveals medical bills totaling $12,672.54.

5. On August 7, 2024 Claimant submitted a Worker's Claim for Compensation. The document specified that Claimant was working for Employers Vicko Construction and/or Victor Uriostegui as a laborer on a residential construction project in Commerce City, Colorado. A worker from a roofing company was removing extra shingles from the roof while Claimant was walking at ground level. The individual threw a pack of shingles off the roof that struck Claimant in the neck and upper back area. Claimant then sought medical treatment at the emergency room.

6. On August 20, 2024 the Division of Workers' Compensation (DOWC) issued letters stating that neither Employer Vicko Construction, Inc. nor Corporate Support Services possessed Workers' Compensation insurance on the date of Claimant's injury.

7. Claimant has established it is more probably true than not that he suffered compensable injuries during the course and scope of his employment on July 12, 2024. Initially, Claimant was working for Employers as a laborer on a residential construction project in Commerce City, Colorado. A worker from a roofing company was removing excess shingles from the roof while Claimant was walking at ground level. Claimant credibly explained that the individual threw a pack of shingles off the roof that struck him in the neck and upper back area. He suffered injuries to his neck, head, back and shoulders.

8. The record reveals that Claimant immediately sought medical treatment at the Intermountain Health Platte Valley Hospital emergency room. Based on Claimant's credible testimony, a review of the medical records, and Respondents failure to challenge the compensability of Claimant's claim, Claimant suffered neck, head, back and shoulder injuries that were proximately caused by his work duties during the course and scope of his employment. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered compensable industrial injuries on July 12, 2024.

9. 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 thus 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.

10. Claimant has demonstrated it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits for his July 12, 2024 industrial injuries. On July 12, 2024 Claimant visited the Intermountain Health Platte Valley Hospital emergency room. Medical providers conducted a physical examination, performed blood work and administered diagnostic testing. Claimant incurred significant medical bills totaling $12,672.54. All of the preceding care was designed to treat his industrial injuries. Claimant has thus proven that all of his medical care was authorized, reasonable, necessary and causally related to his July 12, 2024 work accident. Respondents are thus financially responsible for Claimant's past and future reasonable, necessary and related medical treatment for his July 12, 2024 industrial injuries.

11. Claimant credibly testified he worked approximately 48 hours each week and earned $20.00 per hour. He thus earned an AWW of $960.00. An AWW of $960.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

12. Claimant has proven it is more probably true than not that he is entitled to receive TTD benefits for the period July 13, 2024 until terminated by statute. Claimant sought emergency medical care on the date of the accident and providers assigned work restrictions including no lifting in excess of 10 pounds or climbing ladders. Because of the work restrictions, Claimant was unable to perform his job duties for Employer. He has not returned to work since he suffered injuries on July 12, 2024. Claimant has also not reached Maximum Medical Improvement (MMI). The preceding chronology reveals that Claimant's work activities 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. Claimant is thus entitled to receive TTD benefits for the period July 13, 2023 until terminated by statute.

13. Claimant earned an AWW of $960.00. Proposed orders were due in this matter on February 13, 2025. It has thus been 30 weeks and 5 days or 30.71 weeks since Claimant ceased working for Employer on July 13, 2024. Multiplying the AWW of $960.00 by 30.71 equals $29,481.60. Indemnity benefits of $29,481.60 at a TTD rate of 66.66% total $19,457.86.

14. Employers did not have an active Workers' Compensation insurance policy with any insurer effective on or prior to Claimant's July 12, 2024 date of injury. Based on the preceding sections of the present Order, Employers are required to pay Claimant $19,457.86 in TTD benefits. Twenty-five percent of $19,457.86 is $4,864.47. Accordingly, Employers shall pay $4,864.47 in penalties to the Colorado Uninsured Employer Fund created in §8-67-105, C.R.S.

15. This Order awards continuing TTD benefits until terminated by statute. The Order specifically awards indemnity benefits of $19,457.86 and penalties of $4,864.47 for a total amount of $24,322.33. Employers are thus required to pay the trustee of the Division a total amount of $24,322.33. In the alternative, Employers may file a bond with the Division signed by two or more responsible sureties approved by the Director or a surety company authorized to do business in Colorado. Employers may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may

be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employers calculate medical payments owed under the fee schedule.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the

need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

7. As found, Claimant has established by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment on July 12, 2024. Initially, Claimant was working for Employers as a laborer on a residential construction project in Commerce City, Colorado. A worker from a roofing company was removing excess shingles from the roof while Claimant was walking at ground level. Claimant credibly explained that the individual threw a pack of shingles off the roof that struck him in the neck and upper back area. He suffered injuries to his neck, head, back and shoulders.

8. As found, the record reveals that Claimant immediately sought medical treatment at the Intermountain Health Platte Valley Hospital emergency room. Based on Claimant's credible testimony, a review of the medical records, and Respondents failure to challenge the compensability of Claimant's claim, Claimant suffered neck, head, back and shoulder injuries that were proximately caused by his work duties during the course and scope of his employment. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered compensable industrial injuries while working for Employer on July 12, 2024.

Medical Benefits/Right of Selection

9. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a

particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

10. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

11. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck,* 996 P.2d at 229. 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. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

12. 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 Loy v. Dillon Companies*, 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 (ICAO, 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).

13. 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 thus 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.

14. As found, the record reveals that Claimant immediately sought medical treatment at the Intermountain Health Platte Valley Hospital emergency room. Based on Claimant's credible testimony, a review of the medical records, and Respondents failure to challenge the compensability of Claimant's claim, Claimant suffered neck, head, back and shoulder injuries that were proximately caused by his work duties during the course and scope of his employment. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered compensable industrial injuries while working for Employer on July 12, 2024.

Average Weekly Wage

15. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). The preceding method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." *Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777, 780 (Colo. 2010). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82.

16. As found, Claimant credibly testified he worked approximately 48 hours each week and earned $20.00 per hour. He thus earned an AWW of $960.00. An AWW of $960.00 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

17. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection

between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Off.*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

18. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period July 13, 2024 until terminated by statute. Claimant sought emergency medical care on the date of the accident and providers assigned work restrictions including no lifting in excess of 10 pounds or climbing ladders. Because of the work restrictions, Claimant was unable to perform his job duties for Employer. He has not returned to work since he suffered injuries on July 12, 2024. Claimant has also not reached MMI. The preceding chronology reveals that Claimant’s work activities 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. Claimant is thus entitled to receive TTD benefits for the period July 13, 2023 until terminated by statute.

19. As found, Claimant earned an AWW of $960.00. Proposed orders were due in this matter on February 13, 2025. It has thus been 30 weeks and 5 days or 30.71 weeks since Claimant ceased working for Employer on July 13, 2024. Multiplying the AWW of $960.00 by 30.71 equals $29,481.60. Indemnity benefits of $29,481.60 at a TTD rate of 66.66% total $19,457.86.

Penalties for Employer’s Failure to Carry Worker’s Compensation Insurance

20. Prior to July 1, 2017 §8-43-408(1), C.R.S., provided that in cases where the employer is subject to the provisions of the Colorado Workers’ Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits payable to the claimant were to be increased by fifty percent. However, effective July 1, 2017 §8-43-408, C.R.S. was amended and the language regarding a fifty percent increase in benefits was removed. The version of §8-43-408(5), C.R.S. in effect at the time of Claimant’s October 18, 2023 injury 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.

21. The penalty for failure to insure only applies to indemnity benefits and does not encompass medical benefits. *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc*., W.C. No. 4-155-231 (ICAO, Feb. 13, 1998). Statutory interest is not properly considered "compensation or benefits" within the meaning of §8-43-408(5), C.R.S. 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).

22. As found, Employers did not have an active Workers' Compensation insurance policy with any insurer effective on or prior to Claimant's July 12, 2024 date of injury. Based on the preceding sections of the present Order, Employers are required to pay Claimant $19,457.86 in TTD benefits. Twenty-five percent of $19,457.86 is $4,864.47. Accordingly, Employers shall pay $4,864.47 in penalties to the Colorado Uninsured Employer Fund created in §8-67-105, C.R.S.

Payment to Trustee or Posting of Bond

23. Under §8-43-408(2), C.R.S. Employer must pay to the trustee of the Division of Workers' Compensation (Division) an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. Alternatively, "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."

24. As found, this Order awards continuing TTD benefits until terminated by statute. The Order specifically awards indemnity benefits of $19,457.86 and penalties of $4,864.47 for a total amount of $24,322.33. Employers are thus required to pay the trustee of the Division a total amount of $24,322.33. In the alternative, Employers may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employers may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employers calculate medical payments owed under the fee schedule.

ORDER

1. Claimant suffered compensable injuries on July 12, 2024 during the course and scope of his employment.

2. Respondents are financially responsible for Claimant's past and future reasonable, necessary and related medical treatment for his July 12, 2024 industrial injuries.

3. Claimant earned an AWW of $960.00.

4. Claimant shall receive TTD benefits for the period July 13, 2024 until terminated by statute. Proposed orders were due in this matter on February 13, 2025. It has thus been 30 weeks and 5 days or 30.71 weeks since Claimant ceased working for Employer on July 13, 2024. Multiplying the AWW of $960.00 by 30.71 equals $29,481.60. Indemnity benefits of $29,481.60 at a TTD rate of 66.66% total $19,457.86.

5. Employer shall pay $4,864.47 in penalties to the Colorado Uninsured Employer Fund created in §8-67-105, C.R.S.

6. In lieu of payment of the above compensation and benefits to Claimant, Employers shall:

a. Deposit the sum of $24,322.33, adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Trustee; or

b. File a bond in the sum of $24,322.33 with the Division of Workers' Compensation within ten (10) days of the date 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 and benefits awarded.

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

d. The filing of any appeal, including a petition for review, shall not relieve Employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

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

8. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or order authorizing distribution provides otherwise.

9. Pursuant to §8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer is solely liable and responsible for the payment of all medical costs related to Claimant's work injury.

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

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

DATED: February 25, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

1. Whether Respondents established by clear and convincing evidence that the impairment rating (IR) assigned by Division Independent Medical Examination (DIME) physician, Robert Mack, M.D., was incorrect.

2. Whether Claimant established by clear and convincing evidence that the impairment rating (IR) assigned by the DIME physician was incorrect.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on December 14, 2022, when he fell from a height of approximately four feet onto a steel crane track (similar to a train track), landing on his back. As a result of the incident, Claimant sustained fractures to his third and fourth lumbar spine transverse processes, and a fracture of the left ninth rib.

2. Claimant was initially seen at St. Joseph Hospital on December 14, 2022, where x-rays showed acute fractures of the left third and fourth lumbar spine (L3 and L4) transverse processes with overlying subcutaneous edema. (Ex. 7). Claimant was released without treatment. (Ex. 9).

3. Claimant then initiated treatment at SCL Health Wheat Ridge with Hyeongdo Kim, D.O., (Claimant's primary ATP) who provided muscle relaxers and took Claimant off work. Claimant was later referred to Yusuke Wakeshima, M.D. a physical medicine and rehabilitation doctor on January 13, 2023. Claimant was provided an electronic stimulation unit for symptomatic relief, and treated with conservative measures. (Ex. 9).

4. On March 3, 2023, Dr. Kim noted that Claimant had shown significant signs of improvement, with decreasing pain and improved mobility. Dr. Kim placed Claimant at maximum medical improvement (MMI), and assigned a 5% whole person permanent IR for fracture of the posterior elements of the lumbar spine under AMA Guides Table 53, I.B. Dr. Kim also documented lumbar range of motion (ROM) measurements which resulted in a 0% IR under Table 60 of the AMA Guides.[1] (Ex. 9).

5. Dr. Kim documented the following relevant ROM measurements and associated impairments (Ex. 9):

Movement	Description	Range		
Lumbar Flexion	T12 ROM	60	60	60
	Sacral ROM	45	45	45
	True lumbar flexion angle	15	15	15
	Max. true lumbar flex. angle	**15**		

[1] The ALJ takes administrative notice of the AMA Guides for the purposes of this Order. *See Serena v. Pueblo Belmont OP Co. LLC*, W.C. No. 4-922-344-01 (ICAO Dec. 1, 2015).

	% Impairment	**0%**		
Lumbar Extension	T12 ROM	30	30	30
	Sacral ROM	5	5	5
	True lumbar extension angle	25	25	25
	Max. true lumbar ext. angle	**25**		
	% Impairment	**0%**		
SLR(Right)		60	60	60
SLR (Left)		55	55	57
Lumbar Lateral Flexion (R)	T12 ROM	30	30	330
	Sacral ROM	5	5	5
	Lumbar R lateral flexion angle	25	25	25
	Max. lumbar R lat. flex. angle	**25**		
	% Impairment	**0%**		
Lumbar Lateral Flexion (L)	T12 ROM	30	30	30
	Sacral ROM	5	5	5
	Lumbar L lateral flexion angle	25	25	25
	Max. lumbar L lat. flex. angle	**25**		
	% Impairment	**0%**		
TOTAL LUMBAR RANGE OF MOTION IMPAIRMENT		**0%**		

6. At Claimant's On March 16, 2023 visit with Dr. Wakeshima, he noted that Claimant was working full-time without restrictions, and had no pain issues. Dr. Wakeshima discontinued the electronic stimulation unit, and noted that Clamant did not require further maintenance care. (Ex. C).

7. On April 18, 2023, Respondents filed a Final Admission of Liability, admitting for a 5% whole person impairment consistent with Dr. Kim's impairment rating. (Ex. 1). Claimant then requested a Division-sponsored Independent Medical Examination (DIME), which was performed by Robert Mack, M.D., on September 15, 2023. (Ex. 2).

8. In the interim, Claimant saw Dr. Wakeshima four additional times -- June, 12, 2023, July 10, 2023, August 7, 2023, and September 6, 2023. (Ex. 8). At these visits, Claimant reported intermittent mild low back pain, with mild tenderness in the left lumbar paraspinal region. Claimant's highest reported low back pain level during this time was 2/10. At Claimant's September 6, 2023 visit, Dr. Wakeshima discharged Claimant from maintenance treatment. (Ex. 8).

9. On September 15, 2023, Dr. Mack performed the DIME examination. Dr. Mack agreed that Claimant reached MMI on March 3, 2023, and assigned Claimant a 5% impairment under AMA Guides Table 53.I.B which provides for a 5% whole person impairment for "fracture of posterior elements (pedicles, laminae, articular processes, or transverse processes)." He also assigned Claimant a 10% permanent IR for loss of ROM of the lumbar spine (4% for lumbar flexion, 2% for lumbar extension, 2% each for right and left lumbar lateral flexion). Under the AMA Guides' combined values table, these impairment ratings combine for a 15% whole person impairment. (Ex. 5).

10. Dr. Mack documented three identical ROM measurements each for Claimant's lumbar spine, including lumbar flexion, lumbar extension, lumbar lateral flexion (both right and left), and straight leg raising (SLR) (both right and left). (Ex. 3).

11. Specifically, Dr. Mack documented the following range of motion measurements and associated impairment ratings (Ex. 3):

Movement	Description	Range		
Lumbar Flexion	T12 ROM	80	80	80
	Sacral ROM	50	50	50
	True lumbar flexion angle	30	30	30
	Max. true lumbar flex. angle	**30**		
	% Impairment	**4%**		
Lumbar Extension	T12 ROM	30	30	30
	Sacral ROM	10	10	10
	True lumbar extension angle	20	20	20
	Max. true lumbar ext. angle	**20**		
	% Impairment	**2%**		
SLR(Right)		60	60	60
SLR (Left)		60	60	60
Lumbar Lateral Flexion (R)	T12 ROM	15	15	15
	Sacral ROM	0	0	0
	Lumbar R lateral flexion angle	15	15	15
	Max. lumbar R lat. flex. angle	**15**		
	% Impairment	**2%**		
Lumbar Lateral Flexion (L)	T12 ROM	15	15	15
	Sacral ROM	0	0	0
	Lumbar L lateral flexion angle	15	15	15
	Max. lumbar L lat. flex. angle	**15**		
	% Impairment	**2%**		
TOTAL LUMBAR RANGE OF MOTION IMPAIRMENT		**10%**		

12. On September 26, 2023, the Division sent Dr. Mack an "Incomplete Notice-DIME Report," requesting that Dr. Mack correct or clarify his report to comply with Division Rules and guidance. In relevant part, the letter states:

> **Table 53 Impairments Due to Specific Disorders of the Spine:** A 5% was assigned for the IIB for Fracture of posterior elements. It appears from the narrative report that the patient had fractures to the L3 *and* L4 processes of the lumbar spine. Please note per the Level II Curriculum page 192: Posterior element fractures – Should be *combined* if multiple levels are involved. Thus in this case 5% for the L3 transverse processes combined with 5% for the L4 transverse processes should be 10% and not the 5% assigned.

(Ex. 4) (emphasis original).

13. On September 26, 2023, Dr. Mack responded to the Division by email, stating: "I disagree on the "Incomplete Notice" … The Table 53 sites [sic] I-B as Fractures of the posterior elements: pedicles, laminae, articular processes or transverse processes. It is my medical opinion that transverse process fractures are a significantly less injury than [sic] the other three listed. The clinical difference between one or two transverse process fractures at adjacent levels is clinically insignificant. Therefore, in my opinion, a 5% rating

for [Claimant] is adequate." Dr. Mack refused to amend his report or change his assigned impairment rating, and requested that his email suffice to explain his rationale. (Ex. 5).

14. On October 5, 2023, the Division issued a notice that the DIME process had concluded, and that Dr. Mack had not provided a timely response to the September 23, 2023 Incomplete Notice. (Ex. 6).

15. Dr. Mack testified at hearing and was admitted as an expert in orthopedic surgery. Dr. Mack has performed DIME examinations for many years, but has not treated patients since 2010. Dr. Mack testified he evaluated Claimant's ROM using a goniometer, and that in his opinion the Claimant's measurements were valid. He indicated he believed Claimant sustained soft-tissue injuries in addition to the transverse process fractures, which contributed to the loss of ROM he found in Claimant's lumbar spine. He noted that Claimant's medical records documented edema representing soft-tissue injuries, and that scar tissue from the healing of these injuries would limit Claimant's ROM. With respect to his assignment of an impairment rating for Claimant's transverse process fractures, Dr. Mack testified that he is not required to follow the AMA Guides, and is entitled to his opinion as the DIME physician. The ALJ finds credible Dr. Mack's opinion that Claimant sustained soft-tissues injuries which resulted in loss of ROM in the lumbar spine.

16. On November 29, 2023, Allison Fall, M.D., performed an independent medical examination (IME) of Claimant at Respondents' request. Dr. Fall testified at hearing and was admitted as an expert in physical medicine and rehabilitation. She is level II accredited and familiar with the AMA Guides and its application. Dr. Fall testified that Dr. Mack erred in two respects. First, under the AMA Guides, Claimant should have received a 10% IR for his two transverse process fractures (5% each).

17. Second, Dr. Fall testified that she believes Dr. Mack erred by attributing Claimant's lumbar ROM deficits to his work-related transverse process fractures. Dr. Fall testified that after healing, a transverse process fracture would not be expected to result in lumbar flexion deficits, but could cause limitations in lumbar extension. She testified that on her examination, Claimant did not have lumbar extension deficits, and that the deficit she identified in extension could not be attributed to Claimant's work-related injury. However, in her examination report, Dr. Fall included a 4% impairment for loss of lumbar flexion in her impairment rating. (Ex. D). Dr. Fall's combined IR was 14% -- 10% for two transverse process fractures, and 4% for lumbar ROM deficits.

18. Dr. Fall documented the following ROM measurements using dual inclinometers:

Movement	**Description**	**Range**		
Lumbar Flexion	T12 ROM	84	70	70
	Sacral ROM	46	32	30
	True lumbar flexion angle	38	38	40
	Max. true lumbar flex. angle	**40**		
	% Impairment	**4%**		
Lumbar Extension	T12 ROM	26	26	26
	Sacral ROM	0	2	2
	True lumbar extension angle	26	24	24
	Max. true lumbar ext. angle	**26**		

	% Impairment	**0%**		
SLR(Right)		60	60	60
SLR (Left)		52	54	52
Lumbar Lateral Flexion (R)	T12 ROM	26	28	26
	Sacral ROM	2	2	4
	Lumbar R lateral flexion angle	24	26	22
	Max. lumbar R lat. flex. angle	**26**		
	% Impairment	**0%**		
Lumbar Lateral Flexion (L)	T12 ROM	24	24	24
	Sacral ROM	2	2	0
	Lumbar L lateral flexion angle	22	22	24
	Max. lumbar L lat. flex. angle	**24**		
	% Impairment	**0%**		
TOTAL LUMBAR RANGE OF MOTION IMPAIRMENT		**4%**		

19. Dr. Fall opined that Claimant's lumbar ROM limitations could pre-date his work injury and be attributable to other factors, including the Claimant's body habitus. Although, she acknowledged that she was not aware of evidence indicating Claimant had any prior back problems or treatment. In her report, Dr. Fall indicated that while it is possible Claimant did not have normal lumbar ROM before his injury, that information is not known, and according to the AMA Guides, Claimant's whole person impairment would be 14%. (Ex. D). Dr. Fall's opinion that Claimant's may have had pre-existing ROM deficits in his spine is speculative and unpersuasive.

20. Dr. Fall also testified she did not believe Dr. Mack's ROM measurements were correct, because Dr. Mack used a goniometer, rather than an inclinometer to assess Claimant's ROM. She testified that a goniometer is used to measure ROM for joints, and that spinal measurements should be performed using an inclinometer. Finally, she agreed with Dr. Kim's assigned MMI date of March 3, 2023.

21. On November 4, 2024, Claimant saw Anjun Sharma, M.D., for a Claimant-sponsored IME, and authored a report of the same date. (Ex. 11). His testimony was presented by deposition. (Ex. 12) Dr. Sharma agreed that Claimant reached MMI on March 3, 2023. Dr. Sharma testified that he performed lumbar ROM measurements using dual inclinometers, and that his measurements met the validity criteria under the AMA Guides. He indicated that he conducted an interview of Claimant lasting between 30 and 45 minutes, during which Claimant was sitting, and then performed an examination with Claimant standing for between seven and ten minutes. He agreed with Dr. Fall that Dr. Mack erred in using a goniometer to determine Claimant's lumbar ROM.

22. Dr. Sharma documented the following ROM measurements and associated impairments (Ex. 11):

Movement	**Description**	**Range**		
Lumbar Flexion	T12 ROM	72	70	69
	Sacral ROM	38	37	36
	True lumbar flexion angle	34	33	33
	Max. true lumbar flex. angle	**34**		
	% Impairment	**7%**		
Lumbar Extension	T12 ROM	16	18	19

	Sacral ROM	2	4	4
	True lumbar extension angle	14	14	15
	Max. true lumbar ext. angle	**15**		
	% Impairment	**3%**		
SLR(Right)		41	43	44
SLR (Left)		44	44	43
Lumbar Lateral Flexion (R)	T12 ROM	26	27	25
	Sacral ROM	2	3	3
	Lumbar R lateral flexion angle	24	24	22
	Max. lumbar R lat. flex. angle	**24**		
	% Impairment	**0%**		
Lumbar Lateral Flexion (L)	T12 ROM	27	25	24
	Sacral ROM	3	3	2
	Lumbar L lateral flexion angle	24	22	22
	Max. lumbar L lat. flex. angle	**24**		
	% Impairment	**0%**		
TOTAL LUMBAR RANGE OF MOTION IMPAIRMENT		**10%**		

23. Dr. Sharma testified that he believes Claimant's transverse process fractures resulted in "anatomical changes" that contributed to or caused Claimant's lumbar ROM deficits, but offered no cogent explanation as to the nature of the anatomical changes he referenced. He further indicated that although it was possible Claimant had a pre-existing lumbar deficits, nothing in Claimant's medical records documents the existence of such deficits before Claimant's work-place injury, and there was no evidence of other factors which could have caused a ROM deficit.

24. In her post-hearing deposition, Dr. Fall testified that there are multiple factors that could account for the differences between the lumbar ROM measurements she obtained in November 2023, and those obtained by Dr. Sharma in November 2024. These included the Claimant driving an hour before and sitting during Dr. Sharma's examination; and whether Claimant "warmed up." She indicated that it is more accurate to obtain ROM measurements near the time of MMI.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation 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 re: Whole Person Impairment Rating

A DIME physician's medical impairment rating may be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's findings must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving &* Storage *Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (June 25, 2015).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Indus. Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship exists between an injury and a particular impairment must be overcome by clear and convincing evidence. *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (Jan. 12, 2015). The rating physician's determination concerning the causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Indus. Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

A DIME physician must rate a claimant's medical impairment in accordance with the AMA Guides. § 8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). However, deviation from the AMA Guides "does not compel automatically rejection of the DIME opinion." *In Re Gurrola*, W.C. No. 4-631-447 (ICAO Nov. 13, 2006). "Instead, the ALJ may consider a technical deviation from the AMA Guides in determining the weight to be given the DIME physician's findings…." *Id*. A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Indus. of Colo.*, W.C. No. 4-350-36 (ICAO Mar. 22, 2000). Whether the DIME physician properly applied the *AMA Guides*, and whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp., supra*; *Paredes v. ABM Indus.,* W.C. No. 4-862-312-02 (ICAO Apr. 14, 2014).

The DIME physician, Dr. Mack, misapplied the AMA Guidelines in assigning Claimant a 5% IR fractures of the L3 and L4 transverse processes. Under the AMA Guides, Table 53.I.B., each transverse fracture constitutes a 5% whole person IR. The note to Table 53.I.B., indicates that "When two or more vertebrae are compressed or fractured, combine all impairment values." Dr. Mack did not follow with the AMA Guides, and instead assigned a total 5% rating for the Claimant's two transverse process fractures. Dr. Mack reasoned that transverse process do not warrant a 5% rating per fracture, because he did not deem them a significant enough injury to warrant the rating called for in the Guide. Dr. Mack's rationale for deviation from the AMA Guides is unpersuasive, and his impairment rating in this respect is clearly and convincingly incorrect. Accordingly, Claimant has met his burden of proof, and the DIME is overcome.

Determination Of Claimant's Impairment Rating

Once an ALJ finds that the DIME physician's rating has been overcome, the claimant's correct medical impairment rating becomes a question of fact for the ALJ to determine based on a preponderance of the evidence. *Garlets v. Memorial Hosp.*, W.C. No. 4-336-566 (ICAO Sep. 5, 2001). Once the DIME is overcome, the DIME's opinion regarding impairment is not given any special weight, and the ALJ is free to consider other medical evidence of the claimant's permanent impairment. *Id*.; *Mosely v. Indus. Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003). "The only limitation is that the ALJ's finding must be supported by the record and consistent with the AMA Guides and other rating protocols." *Serena v. Pueblo Belmont OP Co. LLC*, W.C. No. 4-922-344-01 (ICAO Dec. 1, 2015).

Claimant reached maximum medical improvement (MMI) on March 3, 2023. This is the date Dr. Kim determined MMI was attained. Further, Drs. Mack, Fall, and Sharma all agree that Claimant reached MMI on this date.

With respect to Claimant's impairment rating for fractures of the L3 and L4 transverse processes, the ALJ concludes that Claimant's whole person IR is 10% for this element of the rating. This rating is consistent with the AMA Guides Table 53.I.B, which provides for a 5% whole person rating for each fracture. Both Dr. Fall and Dr. Sharma agreed this is the appropriate rating for Claimant's transverse process fractures, and no

credible evidence was admitted demonstrating that a different rating is appropriate. As noted above, Dr. Mack's rationale for reducing Claimant's impairment rating is unpersuasive and inconsistent with the AMA Guides.

With respect to Claimant's lumbar ROM, the evidence establishes that, more likely than not, Claimant's lumbar ROM is impaired as the result of his work injury. Although, as explained below, the ALJ does not find the measurements taken by Dr. Mack for lumbar ROM reliable, the ALJ does credit his opinion that Claimant sustained soft-tissue injuries on December 14, 2022 which caused lumbar ROM deficits. The ALJ also finds credible Dr. Fall's opinion that transverse process fractures can result in lumbar extension deficits. Dr. Mack's opinion in this regard is more credible than Dr. Sharma's explanation that Claimant's ROM issues are related to "anatomical changes" related to his transverse process fractures, or Dr. Fall's opinion that Claimant's lumbar ROM deficits are unrelated to his injury.

Having determined that Claimant sustained ROM deficits to his lumbar spine as a result of his work injury, the ALJ must determine the appropriate impairment rating for those deficits. Four different physicians, Dr. Kim, Dr. Mack, Dr. Fall, and Dr. Sharma, have performed impairment ratings, with different results. However, the measurements taken by Dr. Kim and Dr. Mack offer little assistance in determining the appropriate impairment rating.

Dr. Mack's ROM measurements taken on September 15, 2023, are not measurements upon which the ALJ can rely to determine Claimant's impairment rating. Dr. Mack testified that he performed the ROM measurements using a goniometer, rather than an inclinometer as recommended by the AMA Guides. Section 3.3a of the AMA Guides, "General Principles of Measurement" cautions that spinal measurements do not lend themselves to measurement by goniometer and therefore may be inaccurate. Both Dr. Fall and Dr. Sharma agreed that lumbar ROM measurements require the use of inclinometers.

Moreover, the lumbar ROM measurements Dr. Mack documented are imprecise and do not contain indicia of reliability. Dr. Mack documented three identical ROM measurements for each lumbar movement. For example, Claimant's T12 flexion measurements were 80°, 80° and 80°, with associated sacral flexion of 30° each time; his lumbar extension measurements were 30°, 30°, and 30°; his sacral flexion of 10° each time; straight leg raise on each side was documented as 60° each time; and both left and right lateral flexion was documented as 15° for each test. The ALJ finds it highly unlikely that Claimant's ROM for every movement yielded the exact same result or that each measurement value was coincidentally a multiple of five degrees. Thus, the ALJ concludes that Dr. Mack's measurements are not reliable evidence of Claimant's lumbar ROM.

The ROM measurements taken by Claimant's ATP, Dr. Kim, on March 3, 2023 follow a similar pattern. With the exception of one left-sided straight leg measurement of 57°, Dr. Kim's measurements do not vary for a given movement, and also are in multiples of five degrees. The ALJ finds it highly unlikely that these measurements accurately

reflect Claimant's ROM. The data purportedly collected by Drs. Mack and Kim to calculate Claimant's impairment rating is imprecise, unreliable, and of limited evidentiary value in assisting the ALJ in determining Claimant's impairment rating.

In contrast, Drs. Fall and Sharma obtained ROM measurements that bear indicia of reliability and measurements performed according to the AMA Guides, despite the fact that they yielded different results. Table 60 of the AMA Guides (Impairment Due to Abnormal Motion of the Lumbosacral Region - Flexion/Extension) sets out the standard for impairment ratings related to lumbar flexion and extension. Dr. Fall's measurements yielded a 4% IR under Table 60 based solely on lumbar flexion. Dr. Sharma's measurements yielded a 10% IR based on a combination of lumbar flexion (7%) and lumbar extension (3%). Neither physician assigned an impairment rating based on lumbar lateral flexion. The ALJ thus concludes that Claimant is not entitled to rating for left or right lumbar lateral flexion.

For lumbar flexion, both Dr. Fall and Dr. Sharma found Claimant's Sacral Flexion Angle (SFA) to be between 30° and 45°. Under the AMA Guides, Table 60, three possible impairment ratings exist for lumbar flexion when the SFA is between 30 and 45°: 10% for a 0°- 19° maximum True Lumbar Flexion Angle (TLFA); 7% for 20°- 39°; and 4% for 40°+. Dr. Fall found Claimant's TLFA to be 40° (corresponding to a 4% IR), and Dr. Sharma found it to be 34° (corresponding to a 7% IR), which accounts for the difference in their lumbar flexion ratings. The AMA Guides provides for a set impairment rating under these circumstances rather than a range. In other words, the AMA Guides provide for either a 4% or a 7% IR, but not for a 5% or 6% IR. Thus, the ALJ concludes that Claimant is entitled to either a 4% or a 7% IR for lumbar flexion, and providing a different rating would not be consistent with the AMA Guides.

Each of Dr. Sharma's three TLFA measurements (34°, 33° & 33°) correspond to a 7% IR. One of Dr. Fall's TLFA measurements (40°) corresponds to a 4% IR, while the remaining two (38° & 38°) correspond to a 7% IR. Considering the totality of the evidence, the ALJ finds that a preponderance of evidence demonstrates that Claimant's TLFA likely is in the 20° - 39° range, and therefore corresponds to a 7% whole person impairment for lumbar flexion.

Similarly, , the AMA Guides Table 60 provides for set impairment lumbar extension ratings dependent upon the "True Lumbar Extension from Neutral Position (0%)" (TLE), and the degrees of lumbosacral motion lost and retained. As relevant to Claimant, Table 60 provides for a 3% IR for TLE between 15° and 19°; a 2% IR for 20°- 24°; and 0% IR for 25°+. Dr. Fall's and Dr. Sharma's TLE measurements differ significantly. Dr. Fall's measurements yielded one TLE of 26° which corresponds to a 0% IR, and two TLEs of 24% which corresponds to a 2% IR. Dr. Sharma's TLE of 14°, 14°, and 15° correspond to a 3% IR. The ALJ finds credible Dr. Fall's opinion that Claimant's ROM measured by Dr. Sharma may have been affected by Claimant driving and sitting prior to his measurements being taken. Claimant was seated for approximately 30 to 45 minutes, after driving to Dr. Sharma's IME, and was only standing briefly during the examination. The ALJ credits Dr. Fall's opinion that this lack of movement likely resulted in ROM measurements reflecting an overly-reduced ROM. However, the ALJ also finds that

Claimant's permanent ROM measurements more likely than not fall between the extremes of the measurements taken by Dr. Fall and Dr. Sharma, and are more likely within the 20°- 24° range, corresponding to a 2% whole person impairment rating.

Thus, the ALJ concludes, based on a preponderance of the evidence, that Claimant's permanent whole person impairment rating for impairment of lumbar range of motion is 9% (*i.e.*, 7% for lumbar flexion and 2% for lumbar extension). Under the AMA Guides' Combined Values Chart, Claimant's 10% whole person impairment for transverse process fractures, and 9% impairment for lumbar ROM combine for an 18% whole person impairment.

ORDER

It is therefore ordered that:

1. The Claimant has established by clear and convincing evidence that the DIME physician erred in assigning Claimant's permanent impairment rating.

2. Claimant is entitled to receive permanent partial disability benefits based on a 10% whole person rating for two transverse fractures, and a 9% impairment for lumbar range of motion, which combine to result in a 18% whole person impairment.

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: February 25, 2025

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence grounds for reopening his claim based on a change of condition.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to medical benefits if his claim is reopened.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to disfigurement benefits for his right hand.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on June 28, 2022, when he tripped on a rock and injured his right wrist. (Ex. 1, J). Claimant underwent treatment for his right wrist, and ultimately developed symptoms consistent with complex regional pain syndrome (CRPS) in his right hand. (Ex. C). Claimant received treatment from Brenden Matus, M.D., John Sacha, M.D., Donald Aspegren, D.C., and others.

2. In November 2, 2023, John Hughes, M.D., performed a Division-sponsored independent medical examination (DIME), after Claimant had been placed at maximum medical improvement (MMI) by his authorized treating physician Dr. Matus. As of November 2, 2023, Claimant's reported symptoms were limited to his right hand. Dr. Hughes documented several differences between the Claimant's right and left hand including, a "slightly shiny" appearance of the right hand; temperature differences; range of motion differences, and reduced grip strength in the right hand. (Ex. C).

3. Dr. Hughes diagnosed Claimant with sympathetically-mediated pain and probable CRPS of the right upper extremity. He placed Claimant at MMI effective November 2, 2023, and assigned Claimant a 10% whole person permanent impairment rating difficulty with digital dexterity of the right hand. Dr. Hughes found it was medically-probable that Claimant had CRPS in the right hand, and indicated that further diagnostic testing for CRPS was reasonable. (Ex. C).

4. On November 17, 2023, Respondents filed a Final Admission of Liability (FAL), admitting to the MMI date of November 2, 2023, and liability for a 10% whole person impairment as assigned by Dr. Hughes. Respondents further admitted for reasonable, necessary, and related maintenance care after MMI. (Ex. 1).

5. On December 18, 2023, Claimant saw Dr. Aspegren, and reported symptoms in his right upper extremity and also "some" symptoms in his left upper extremity. Other than documenting Claimant's reported left-sided symptoms, Dr. Aspegren did not further address Claimant's left hand. (Ex. 2).

6. On December 22, 2023, Claimant saw Dr. Sacha who recommended bilateral stellate ganglion blocks (SGBs). Although he recommended bilateral blocks in both extremities, Dr. Sacha did not document an examination or symptoms related to Claimant's left hand, although he diagnosed Claimant with CRPS, right greater than left. (Ex. 3).

7. On February 8, 2024, Dr. Sacha authored a letter to Respondents' counsel in which he addressed job positions Claimant could perform within his assigned work restrictions. The work restrictions related to Claimant's right hand, with no restrictions noted for Claimant's left hand. (Ex. 4).

8. On February 15, 2024, Dr. Sacha performed a left-sided SGB for a reported diagnosis of CRPS. Dr. Sacha noted that prior to the procedure, Claimant's left sided pain was 5/10 at rest and 8/10 with provocative maneuvers (wrist power grip, wrist extension and flexion, and raising arm in the air), and that Claimant had "greater than 80% relief in his left upper extremity pain indicating diagnostic response to procedure." (Ex. 3). A right-sided SGB was performed on February 22, 2024.

9. On March 1, 2024, Dr. Sacha noted that Claimant's pain returned after the SGB and recommended repeating the procedure. On physical examination, Dr. Sacha noted that Claimant had allodynia,[1] hyperpathia,[2] and duskiness and skin trophic changes on the right greater than left. His impression included bilateral CRPS. Dr. Sacha again recommended bilateral SGBs. (Ex. 3).

10. Dr. Sacha performed a second left-sided SGB on April 4, 2024. He noted that Claimant's left-sided pain was a 4/10 at rest, and 9/10 with provocative maneuvers, and that the SGB lowered Claimant's pain to 1/10 for both. (Ex. 3). A right-sided SGB was performed on April 12, 2024. (Ex. 3).

11. On April 22, 2024, Claimant saw George Schakaraschwili, M.D., for a Respondent-requested IME. Claimant reported that five or six months prior to the IME, he had begun experiencing symptoms in his left hand, in addition to his right, and had received SGBs for his both hands. Claimant reported burning, aching, paresthesias and stabbing pain in both hands. On examination, Dr. Schakaraschwili found redness and shininess of the Claimant's right hand, with minimal swelling, hyperpathia and full range of motion. Examination of the Claimant's left hand was unremarkable. He opined that for Claimant's right hand, he had met some, but not all of the diagnostic criteria for CRPS, and recommended further testing to confirm the diagnosis. (Ex. 5). With respect to Claimant's left hand, he indicated that there were no clinical signs to support a CRPS diagnosis. Although he acknowledged that the determination as to whether CRPS had spread to Claimant's left hand would be dependent on confirmation of the diagnosis on the right. He also indicated that autonomic testing on the left would not likely be helpful because

[1] Allodynia is "pain due to a non-noxious stimulus that does not normally provoke pain." 7 CCR 1101-3, Rule 17, Ex. 7, § D.2.

[2] Hyperpathia is "a condition of altered perception such that stimuli which would normally be innocuous, if repeated or prolonged, result in severe explosive persistent pain." 7 CCR 1101-3, Rule 17, Ex. 7, § D.9.

there were no thermographic images of the left hand when it was asymptomatic for comparison. (Ex. 5).

12. Claimant saw Dr. Sacha three times between April 29, 2024 and July 29, 2024. At these visits, Claimant continued to report symptoms in both hands. (ex. 3).

13. Claimant returned to Dr. Schakaraschwili on August 9, 2024, for autonomic and QSART testing and reporting continued symptoms in his left and right hand. Dr. Schakaraschwili noted that both of Claimant's hands were cold to the touch, there was some visible asymmetry of skin coloration, and no swelling of either hand. Claimant reported paresthesias in the right hand and mild hyperalgesia[3] on the left. Based on the testing performed, as well as Claimant's prior response to right-sided SGBs, Dr. Schakaraschwili opined that CRPS on the right side was confirmed. He further indicated that, because the testing involves a side-by-side comparison, it could not confirm the presence of CRPS on the left side in the absence of a grossly abnormal sweat response on the left. Because both hands were "cold" he indicated that thermographic testing could also not confirm CRPS on the left, because there were no prior thermographic images for comparison. He opined that Claimant's positive response to the left-sided SGBs performed by Dr. Sacha confirmed the presence of sympathetically mediated pain on the left, and noted that additional testing could potentially support a diagnosis of left-sided CRPS. (Ex. B).

14. On August 20, 2024, Dr. Sacha saw Claimant after reviewing the QSART testing. He opined that the testing showed dysautonomia consistent with CRPS on the right and "borderline" on the left. (Ex. 3).

15. Over the following months, Claimant returned to Dr. Sacha six times. During these visits, he reported increased burning, tingling and skin trophic changes during cold weather on the right-side, which Dr. Sacha indicated was expected. Dr. Sacha continued to document trophic changes in Claimant's right hand, including "duskiness." On October 31, 2024, Dr. Sacha performed a left-sided radiofrequency neurotomy, noting that Claimant experienced improvement with the procedure. (Ex. 3).

16. On November 7, 2024, Dr. Sacha authored a letter to Claimant's counsel in which he opined that Claimant's right-sided CRPS had worsened, and that Claimant had developed modest left-sided symptoms. He noted that Claimant had diagnostic responses to SGBs on both hands, and recommended ongoing treatment, including an additional radiofrequency neurotomy on the right, and physical therapy. (Ex. 9).

17. On December 3, 2024, Claimant saw Tashof Bernton, M.D., for a Respondent-requested IME. Dr. Bernton testified at hearing and was admitted as an expert in occupational medicine, internal medicine, and CRPS. During his examination, Dr. Bernton found that Claimant had no asymmetry color between his hands. He found that Claimant's left hand did not have sufficient swelling to prevent him from wearing a wedding ring, and that Claimant had slightly decreased grip strength on the left. He explained that autonomic

[3] "Hyperalgesia refers to an exaggerated response from a usually painful stimulation." 7 CCR 1101-3, Rule 17, Ex. 7, § D.8.

and QSART testing could not determine whether unilateral vs. bilateral CRPS was present because the testing relies on asymmetry between the two sides. Dr. Bernton indicated that his clinical examination of Claimant's left hand was benign, with no obvious swelling or trophic abnormalities, no restriction of left-hand motion, and no hyperalgesia. Dr. Bernton explained that Claimant has confirmed CRPS on the right, and "possible/probable, but not confirmed CRPS on the left per the Colorado Medical Treatment Guidelines, and that Claimant's functional status was unchanged. He indicated that the progression of CRPS symptoms from unilateral to bilateral is consistent with the known nature of CRPS. He testified that he cannot rule out Claimant having left-sided CRPS, and that if Claimant does have CRPS on the left it would be in its early stages and there are no current objective findings of CRPS. He testified that if Claimant has CRPS on the left side, treatment options exist, including blocks, medications, topical medications and oral medications, and that it would be treated the same as his right-sided CRPS. Dr. Bernton opined that Claimant remained at MMI, and recommended several potential treatment modalities as maintenance care.

18. Claimant testified at hearing that he began experiencing symptoms in his left hand approximately 1-2 months after his DIME appointment with Dr. Hughes. He described the symptoms in his left hand as being the same symptoms and in the same location as those in his right hand, and indicated that he has difficulty with gripping and squeezing, and pain between his fingers into his palm. Claimant testified that he had no prior issues with his left hand, and that his current symptoms interfere with the function of his left hand.

19. Claimant testified that the pain, swelling and redness in his right hand has remained consistent on the right side, although he believes he has lost muscle mass on the right side. He described his symptoms in both hands as waxing and waning, and that it varies with different activities. He indicated that he experiences a swelling sensation in both hands making his hands feel tight and constricted, although he testified that it is not visible.

20. Claimant presented at hearing wearing a glove on his right hand, which he testified that he wears most of the time when the temperature is below 50 degrees. He testified that he believes the glove protects his hand and keeps it warm. Claimant also keeps his right hand close to his chest to protect it from striking objects, and he believes he does this unconsciously.

21. Claimant testified that his right hand is red and "shiny" and that these changes vary from day-to-day. Claimant's right hand appears reddish in color and appears to have the same coloration as his left. The skin on the right hand is slightly shiny on the dorsal aspect, and slightly different than the appearance of his left hand. (Ex. 12).

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).

Reopening For Change In Condition

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

Dorman v. B & W Constr. Co., 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO July 19, 2004

Claimant has established a change in condition sufficient to warrant reopening his claim. When Claimant was placed at MMI on November 2, 2023, his CRPS-like symptoms were isolated in his right hand. After MMI, Claimant began reporting symptoms in his left hand which were suggestive of migration of CRPS to his left hand. The ALJ credits the testimony of Dr. Bernton that CRPS can progress from unilateral to bilateral. Dr. Sacha ordered and Claimant received SGBs in his left hand following MMI with diagnostic responses. In his August 9, 2024 report, Dr. Schakaraschwili noted that the diagnostic response confirmed the presence of sympathetically mediated pain. Moreover, Claimant exhibits additional signs consistent with CRPS in his left hand, including temperature changes. While the Claimant does not meet the criteria for a confirmed diagnosis of CRPS on the left side, a new or confirmed diagnosis is not specifically required to reopen a case for a change of condition. The ALJ credits Dr. Sacha's August 20, 2024 report in which he indicated that Claimant's QSART testing showed evidence of dysautonomia consistent with "borderline" CRPS on the left side. The ALJ also finds credible the testimony of Dr. Bernton that unilateral CRPS can become bilateral. The ALJ finds it more likely than not that Claimant has developed, at a minimum, CRPS-like symptoms in his left hand that did not exist when he was placed at MMI. Dr. Sacha and Dr. Bernton also opined that treatment options for Claimant's CRPS are available, including further blocks, ablations, and medications. The ALJ finds it more likely than not that his left-hand symptoms are causally-related to his work injury, and represent a change of condition which warrants reopening of his claim to receive medical treatment for the change of condition.

Disfigurement

With respect to Claimant's right-hand disfigurement, the ALJ was unable to discern any significant difference in color or skin appearance compared to his left hand. Both of Claimant's hands appeared red and with an abnormal skin appearance. However, Claimant's medical records do indicate that Claimant developed changes in color and appearance in his right hand. On March 1, 2024, Dr. Sacha noted that Claimant's right hand had "some duskiness and skin trophic changes on the right greater than left." From this, the ALJ infers that Claimant's left hand and right hand were appreciably different in color at that time. Moreover, in his Rule 8 IME on April 22, 2024, Dr. Schakaraschwili noted that Claimant had slight redness and shininess of the skin on the dorsum of his right hand, and his left hand was "unremarkable." On May 15, 2024, Dr. Sacha noted that Claimant had "moderate skin trophic changes with browning of the digits and modest swelling" on the right. Although Claimant's right hand does not appear significantly different than his left on visual inspection, based on Claimant's testimony and his medical records, the ALJ finds that Claimant has sustained a disfigurement of his right hand in the form of increased redness and shininess of the skin that is causally related to his work injury. To the extent Claimant's left hand is now similar in appearance to his right, the ALJ concludes that this more likely than not represents a more recent change in appearance of his left hand, than a lack of disfigurement of his right hand.

Claimant testified that he holds his right hand in a guarded position – keeping it close to his torso; and that he wears a glove to protect it. There is insufficient evidence to establish that these are permanent conditions, or that they constitute a 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. For the disfigurement of his right hand, Respondents shall pay Claimant $750.00, due to the skin trophic changes and color change.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his claim for a change of condition is granted.

2. Respondents shall pay Claimant $750.00 for disfigurement of his right hand. Respondents shall be given credit for any amounts previously paid for disfigurement in connection with this claim.

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

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

DATED: February 26, 2025

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

ISSUES

1. Whether Claimant proved by clear and convincing evidence that the DIME physician erred in his determination of maximum medical improvement.

2. Whether Claimant proved by a preponderance of the evidence that the DIME physician erred in his impairment evaluation.

3. Whether Claimant proved by a preponderance of the evidence that the situs of Claimant's functional impairment is not limited to the right upper extremity, thus warranting conversion to a whole-person impairment.

FINDINGS OF FACT

1. On January 11, 2023, Claimant was working as a field supervisor for Respondent-Employer spreading salt in a parking lot when he slipped on ice and fell. Claimant fell backward injuring his head and his right shoulder.

2. Claimant drove himself to Banner Northern Colorado Medical Center's emergency room. Claimant reported that he had a loss of consciousness at the time of his injury but was experiencing no head or neck pain. Claimant also reported that he had recently been experiencing sinus headaches. Claimant's past medical history documented a type-two acromioclavicular joint separation and chronic right shoulder pain. Claimant underwent a CT scan of his head and neck, which did not reveal any fractures, though there was concern about an acute subdural hemorrhage along the anterior cerebral falx and right anterior frontal convexity measuring up to three millimeters in thickness. Additionally, there was a small volume of acute subarachnoid hemorrhage along the right anterior frontal lobe. Claimant was kept overnight and underwent a CT scan the following day, which did not show any progression of his intracranial bleeding. An X-ray of Claimant's right forearm was also negative for any fracture.

3. Prior to his discharge, Claimant underwent a cognitive evaluation. The evaluation revealed some cognitive impairment in the areas of convergent thinking and divergent thinking. Claimant denied having any headache at the time of the testing and otherwise denied all other signs of a traumatic brain injury. Claimant and his wife both expressed to the evaluator that Claimant was at his baseline mental status, and both Claimant's wife and the attending nurse reported no observation of post-concussive symptoms. The evaluator recommended Claimant return if he

began experiencing any cognitive difficulties upon returning home and resuming normal activities.

4. On February 16, 2023, Claimant went to Medicine for Business and Industry (MBI), formerly known as Workwell, for treatment for his injury. Claimant was attended by Donald Downs, PA-C. Claimant reported that his head and shoulder were getting worse and that his pain level was a seven out of ten and throbbing. Claimant also reported that he had returned to work but continued to experience headaches and dizziness, the latter being mild and infrequent. Claimant also pointed out to PA Downs some swelling in his lower right arm. Regarding his prior history, Claimant acknowledged that he had a history of arthritis affecting all of his joints and that he had previously worked for an electric company for many years climbing poles and aggravating his neck and shoulders, though he believed both had been aggravated by his January 11, 2023 injury. On physical exam, Claimant exhibited tenderness over the subacromial space, pain with external rotation, decreased supraspinatus strength, and a positive impingement sign. PA Downs referred Claimant for a neurology consultation and for a repeat MRI. He also ordered physical therapy for Claimant's right shoulder.

5. Claimant underwent repeat MRIs of his brain and right shoulder on February 24, 2025. The MRI of the brain revealed superficial siderosis over the right frontal lobe which probably reflected a "remote" subarachnoid hemorrhage with no evidence of an acute intracranial hemorrhage, mass or infarct. The right shoulder MRI revealed a high-grade or full-thickness tear of the supraspinatus, infraspinatus tendinopathy, moderate acromioclavicular joint osteoarthritis, and mild subacromial subdeltoid bursitis across the supraspinatus tendon tear.

6. That same day, Claimant saw Dr. Lloyd Luke at MBI. Dr. Luke noted that Claimant's brain injury was "resolving" and that his neurology consultation was pending. Dr. Luke did not document any continued complaints by Claimant of headaches or periodic dizziness. Dr. Luke provided Claimant with no work restrictions.

7. Claimant was seen at Orthopaedic & Spine Center of the Rockies on March 1, 2023, where he was attended by Dr. Steven Seiler. Claimant complained of anterolateral shoulder pain. When asked to provide his prior medical history, Claimant did not identify his prior shoulder symptoms, but did provide a history of cardiovascular problems and acid reflux. Dr. Seiler reviewed Claimant's MRIs and examined Claimant. Dr. Seiler felt that the MRIs showing a full-thickness supraspinatus tear were consistent with a traumatic injury in January. Dr. Seiler and Claimant agreed that Claimant should proceed with shoulder surgery.

8. Claimant underwent a right shoulder arthroscopic rotator cuff repair, proximal biceps tenotomy, labral repair, and subacromial decompression on July 6, 2023 with Dr. Christopher Stockburger. Dr. Stockburger recommended post-surgery physical therapy.

9. Claimant followed up with Dr. Stockburger on November 1, 2023. Claimant reported that he was improving and working on strengthening. Several weeks later, on December 20, 2023, Dr. Stockburger released Claimant from care, noting that Claimant looked good overall. He recommended that Claimant follow-up on an as-needed basis.

10. On February 1, 2024, Dr. Luke performed an impairment rating. He noted that Claimant had suffered intracranial bleeds on his date of injury but that Claimant recovered fully from his head injury. Dr. Luke performed range-of-motion measurements on Claimant's right shoulder. Dr. Luke assigned Claimant a 19% impairment of the right upper extremity, based entirely on range-of-motion deficits, which would convert to an 11% whole person impairment. Dr. Luke recommended some maintenance medical care but otherwise released Claimant to full duty with no permanent work restrictions.

11. Several months later, on August 16, 2024, Claimant underwent a Division independent medical examination (DIME) with Dr. Marc Chimonas. Dr. Chimonas examined Claimant and reviewed Claimant's medical records. Dr. Chimonas expressed some concern about discrepancies between what Claimant reported to him and what was documented in the medical records. First, Dr. Chimonas noted that Claimant had told him and Dr. Seiler that he had no problems with the right shoulder prior to his work injury, but Dr. Chimonas noted that Claimant's problem list during his first visit at the emergency room was already pre-populated with chronic right shoulder pain. Second, Dr. Chimonas noted that Claimant reported to him that he continued to suffer from significant dizziness, headaches, and neck pain, but the provider and therapist notes were devoid of dizziness, headaches, or neck pain except for the initial visit at MBI. Although Claimant told Dr. Chimonas that he had in fact complained frequently to his medical providers and therapists of those complaints, Dr. Chimonas noted that the lack of documentation in the records of such complaints was contrasted against the documentation of unrelated issues, such as bee stings, flares, and pre-existing back pain. Therefore, Dr. Chimonas felt that Claimant was an unreliable subjective historian of his medical history and that the absence of documentation of such complaints in the medical records was likely accurate.

12. At the DIME, Claimant reported that his right shoulder felt only thirty percent better despite the surgery and physical therapy. Claimant denied any prior problems with his right shoulder. Claimant also complained of a new onset of left shoulder pain due to compensation. In addition to Claimant's complaints of dizziness, headaches, and neck pain, Claimant also complained of persistent difficulties with concentration and memory.

13. On physical examination, Dr. Chimonas noted that Claimant had full cervical range of motion. With regard to the upper extremities, Claimant exhibited weakness with cogwheeling and giveaway on the right side compared to the left with regard to all

muscles. Dr. Chimonas noted the distribution to be non-myotomal and non-physiologic. Claimant exhibited limited range of motion in the right shoulder.

14. Ultimately, Dr. Chimonas felt that Claimant reached MMI on February 1, 2024, the same date Dr. Luke had determined, reasoning that Claimant was seven months post-op for his shoulder. Dr. Chimonas assigned Claimant a 15% upper extremity impairment for his right shoulder based on loss of range of motion. Dr. Chimonas declined to assign an impairment for Claimant's head or neck because he felt that Claimant did not have any ongoing impairment for those body parts, reasoning that the only evidence for such an impairment was Claimant's subjective complaints, which he felt were unreliable.

15. Respondents filed a Final Admission of Liability (FAL) on September 10, 2024, consistent with Dr. Chimonas' DIME report. Claimant filed an Application for hearing several weeks later objecting to the FAL, challenging Dr. Chimonas' determinations as to MMI and impairment, and challenging Respondents' denial of maintenance medical benefits. Claimant also sought conversion of the upper extremity impairment rating to a whole-person impairment rating.

16. On November 21, 2024, Claimant underwent an independent medical examination (IME) at Respondents' request with Dr. Lawrence Lesnak. At the IME, Claimant reported that he continued to have posterior neck discomfort that would radiate into his posterior occiput two to three times per week, occasional right shoulder achiness after doing yard work or housecleaning activities also two to three times per week, and very rare episodes of numbness involving his right index, middle, and ring fingertips. Claimant denied any history of headaches or right shoulder symptoms from prior to his work injury and did not recall receiving treatment for any such symptoms prior to his date of injury.

17. Regarding Claimant's impairment rating, Dr. Lesnak opined that Dr. Chimonas erred in not normalizing Claimant's impairment relative to Claimant's uninjured left shoulder. Dr. Lesnak noted that Claimant had a prior history of chronic right shoulder pathology and, given his age, the Division's Impairment Rating Tips recommended normalizing the impairment rating based on the uninjured contralateral shoulder. Dr. Lesnak performed range of motion measurements for both shoulders and determined that Claimant had a residual 1% impairment rating for the right shoulder relative to the left based on loss of range of motion. Regarding the situs of Claimant's functional impairment for his right upper extremity, Dr. Lesnak opined that "there is absolutely no medical evidence to support that the patient's situs of injury or situs of the situs of functional impairment extends beyond his right glenohumeral joint whatsoever." Dr. Lesnak felt that Claimant had no other ratable body parts, as Claimant's head injury resolved six weeks after the date of injury as confirmed by the MRI. Regarding Claimant's complaints of cognitive deficits, Dr. Lesnak noted that there was no evidence to support a finding of such deficits.

18. Regarding the date of MMI, Dr. Lesnak opined that Claimant had reached MMI on February 24, 2023. He reasoned that Claimant's intracranial hemorrhages had nearly resolved and Claimant's subjective complaints were consistent with the subjective complaints documented in Claimant's pre-injury history, presumably referring to Claimant's documented history of right shoulder pain.

19. At hearing, Claimant testified on his own behalf. Claimant testified that prior to working for Respondent-Employer he worked as a lineman working overhead on power lines. In that job, he experienced bilateral shoulder problems while working overhead. Claimant testified that he did not receive any treatment for those problems other than chiropractic care and did not have any problems with his shoulders after leaving that job until his work injury. Claimant also testified that after leaving that job, he came to work for Respondent-Employer in the warehouse. After twelve years in that job, Claimant was moved to be a field supervisor, the same position Claimant was in on his date of injury.

20. Claimant testified that on the date of injury, he fell backwards and knocked himself out, losing consciousness. Claimant testified that he rested on a couch for fifteen to twenty minutes and began noticing head and neck pain as well as pain and numbness in his arms as well as a headache.

21. After being discharged from the emergency room, Claimant testified, he returned to work and continued to have headaches, neck pain, and right shoulder pain. Claimant testified that he spoke with Dr. Luke about his headaches but that nothing came of it. Claimant testified that he continues to experience headaches, neck pain, and shoulder problems, and that he also has memory problems and difficulty focusing.

22. On cross examination, Claimant testified that he had been having worsening headaches and ongoing shoulder pain in November 2022, just two months prior to his date of injury. Claimant testified that both Dr. Luke and Dr. Chimonas asked Claimant about his prior conditions and that Claimant told both that he had prior headaches. Claimant also testified that he told Dr. Lesnak that he had prior headaches as well as neck and shoulder pain.

23. The Court finds Claimant's testimony not credible or reliable. Although Claimant testified at hearing that he had worsening headaches and ongoing shoulder pain in November 2022, just two months prior to his date of injury, Claimant did not disclose his history of prior shoulder symptoms to Dr. Seiler at his first orthopedic appointment despite disclosing to Dr. Seiler other prior conditions such as a history of cardiovascular problems and acid reflux disease. Furthermore, despite Claimant's testimony to the contrary, both Dr. Chimonas and Dr. Lesnak documented that Claimant did not disclose his prior shoulder symptoms to them despite their inquiries into Claimant's prior medical history.

24. Dr. Lesnak also testified at hearing. Dr. Lesnak testified that during the IME, Claimant complained of occasional neck discomfort without radiation into the head two to three times per week. Dr. Lesnak testified that he asked Claimant about prior headaches, neck symptoms, or shoulder symptoms, and Claimant denied having had any.

25. According to Dr. Lesnak's testimony, the February 24, 2023 MRI of the brain showed very mild residual siderosis and almost complete resolution. Dr. Lesnak did not identify any documentation in the medical records of cognitive issues. In any case, Dr. Lesnak testified, it would not be normal for cognitive symptoms to arise months after the injury, and that it is nonphysiologic for symptoms to arise well after the injury. In his opinion, the brain bleeding resolved within six weeks and there was no record of cognitive dysfunction or neurological abnormalities warranting an impairment rating.

26. Regarding the shoulder impairment, Dr. Lesnak testified that shoulder normalization is part of the impairment rating tips but is not necessarily required of a level II accredited examiner. Nevertheless, Dr. Lesnak felt that Dr. Chimonas erred in failing to normalize the baseline range of motion based on Claimant's left shoulder.

27. The Court finds Dr. Lesnak's testimony credible, as it is consistent both with Claimant's medical history as documented throughout Claimant's medical records and is internally consistent. However, the Court does not find Dr. Lesnak's opinions persuasive with regard to his assertions that Dr. Chimonas erred in not normalizing the shoulder impairment.

28. Dr. Lesnak himself noted in his testimony that normalization, although part of the impairment rating tips, is not necessarily required of the rating physician. Indeed, the Court notes that the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised), does not require a rating physician to normalize based on the contralateral extremity. It is therefore within the examining physician's discretion to determine whether normalization is appropriate under the circumstances. Although Dr. Lesnak presents a plausible rationale for why normalization would be appropriate in this case, the Court does not find that Dr. Chimonas erred in choosing not to normalize Claimant's right shoulder impairment based on the left shoulder.

29. The Court finds that Dr. Chimonas did not err in placing Claimant at MMI effective February 24, 2023. Dr. Chimonas' rationale was that Claimant was seven months post-surgery for his right shoulder. Furthermore, the Court notes that Claimant had undergone post-surgery physical therapy and that there is no persuasive evidence that further medical treatment would be reasonably necessary to cure and relieve Claimant of the effects of the work injury for his right shoulder. Similarly, with regard to the cognitive complaints, in Claimant's cognitive evaluation the day after the injury, Claimant denied having any headache at the time of the

testing and otherwise denied all other signs of a traumatic brain injury, and both Claimant and his wife expressed to the evaluator that Claimant was at his baseline mental status. Furthermore, both Claimant's wife and the attending nurse reported no observation of post-concussive symptoms. The Court finds credible and persuasive Dr. Lesnak's opinion that Claimant's head injury resolved six weeks after the date of injury as confirmed by the MRI. Therefore, there is no credible evidence in the record that Claimant required further medical treatment to cure and relieve him of the effects of his head injury. Therefore, the Court finds that Claimant has not proved by clear and convincing evidence that Dr. Chimonas erred in placing Claimant at MMI effective February 24, 2023.

30. The Court further finds that Dr. Chimonas did not err in his determination of permanent impairment. Dr. Chimonas declined to assign an impairment for Claimant's head or neck because he felt that Claimant did not have any ongoing impairment for those body parts, reasoning that the only evidence for such impairment was Claimant's subjective complaints, which he felt were unreliable. Based on the findings above, the Court finds that Dr. Chimonas' rationale for declining to assign an impairment is well supported by Claimant's medical history and Dr. Chimonas' examination of Claimant, and that Dr. Chimonas was correct in assigning an impairment only for the right shoulder. Therefore, the Court finds that Claimant has failed to prove by a preponderance of the evidence that Dr. Chimonas erred in his impairment evaluation.

31. The Court finds that Claimant has failed to prove by a preponderance of the evidence that the situs of his functional impairment extends beyond the right upper extremity at the shoulder. While Claimant sustained a full-thickness supraspinatus tear, and while the supraspinatus muscle extends proximally from the glenohumeral joint into the torso, the medical evidence does not establish that Claimant's functional impairment extends beyond the upper extremity. Claimant's medical records do not document credible complaints of persistent pain, weakness, or dysfunction in anatomical structures beyond the upper extremity. The Court acknowledges that the supraspinatus originates in the torso, but the mere anatomical location of an injury does not dictate the situs of functional impairment. Accordingly, the Court finds that Claimant's impairment does not extend beyond the upper extremity and concludes that conversion to a whole person impairment is not warranted.

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).

Overcome DIME as to MMI

Section 8-40-201(11.5), C.R.S., defines MMI to be:

> "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement."

Claimant bears the burden of overcoming the DIME decision with respect to MMI by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S. *See Braun v. Vista Mesa*, W.C. No. 4-637-254 (April 15, 2010). Thus, Claimant must prove that it is "highly

probable" that Dr. Chimonas erred with regard to his determination of Claimant's date of MMI. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo.App.1995).

As found, the Court concludes that Dr. Chimonas did not err in placing Claimant at MMI effective February 24, 2023.

In placing Claimant at MMI effective February 24, 2023, Dr. Chimonas' rationale was that Claimant was seven months post-surgery for his right shoulder. Claimant had undergone post-surgery physical therapy and there is no persuasive evidence that further medical treatment would be reasonably necessary to cure and relieve Claimant of the effects of the work injury for his right shoulder.

Similarly, as found with regard to the cognitive complaints, the record of Claimant's cognitive evaluation the day after the injury showed that Claimant denied having any headache at the time of the testing and otherwise denied all other signs of a traumatic brain injury, and that both Claimant and his wife expressed to the evaluator that Claimant was at his baseline mental status. Furthermore, both Claimant's wife and the attending nurse at that visit reported no observation of post-concussive symptoms. Also, as found, Dr. Lesnak's opinion that Claimant's head injury resolved six weeks after the date of injury as confirmed by the MRI is credible. There is no credible evidence in the record that Claimant required further medical treatment to cure and relieve him of the effects of his head injury. Therefore, the Court concludes, as found, that Claimant has not proved by clear and convincing evidence that Dr. Chimonas erred in placing Claimant at MMI effective February 24, 2023.

Overcome DIME as to impairment

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8- 42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). However, the increased burden of proof required by DIME procedures is only applicable to non-scheduled impairments and is inapplicable to scheduled injuries. Section 8-42-107(8), C.R.S. A DIME physician's finding as to a scheduled permanent impairment rating may be overcome by a preponderance of the evidence. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo.App.2000).

Here, because Dr. Chimonas assigned Claimant an upper extremity impairment rating, his opinion is not entitled to increased deference. Therefore, Claimant bears the burden of proving by a preponderance of the evidence that Dr. Chimonas erred in his impairment evaluation.

However, as found, Dr. Chimonas did not err in his determination of permanent impairment. Dr. Chimonas declined to assign an impairment for Claimant's head or neck because he felt that Claimant did not have any ongoing impairment for those body parts, reasoning that the only evidence for such impairment was Claimant's subjective complaints, which he felt were unreliable. Based on the findings above, the Court finds

that Dr. Chimonas' rationale for declining to assign an impairment is well supported by Claimant's medical history and Dr. Chimonas' examination of Claimant, and that Dr. Chimonas was correct in assigning an impairment only for the right shoulder.

Respondents also raised a basis for challenging Dr. Chimonas' impairment rating of Claimant, arguing that Dr. Chimonas should have normalized the impairment rating based on the uninjured shoulder. Dr. Lesnak himself noted in his testimony that normalization, although part of the impairment rating tips, is not necessarily required of the rating physician. Indeed, the Court notes that the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised), does not require a rating physician to normalize based on the contralateral extremity. The Division's Impairment Rating Tips do not carry the force of a statute or rule. *Fisher v. Indus. Claim Appeals Off.*, 484 P.3d 816, 819 (Colo.App.2021). A rating physician has discretion as to whether to conduct normalization based on an unimpaired contralateral extremity. *Id*.

Therefore, the Court concludes that Claimant has failed to prove by a preponderance of the evidence that Dr. Chimonas erred in his impairment evaluation.

Conversion to whole person

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

The ALJ must thus determine the situs of a claimant's "functional impairment." *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883 (Colo.App.1996); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996); *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 Langton* 937 P.2d 883, 884; *Strauch* 917 P.2d 366, 369. Pain and discomfort that limit a claimant's ability to use a portion of the body may be considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *See Johnson-Wood v. City of Colorado Springs*, W.C. No. 4-536-198 (June 20, 2005); *Vargas v. Excel Corp.*, W.C. No. 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. *See Lovett v. Big Lots*, W.C. No. 4-657-285 (Nov. 16, 2007); *see also O'Connell v. Don's Masonry*, W.C. No. 4-609-719 (Dec. 28, 2006). In the case of a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021); *see also Brown v. City of Aurora*, W.C. No. 4-452-408 (Oct. 9, 2002).

In *Barry v. State of Colorado*, W.C. No. 5-150-172 (Feb. 13, 2023), a claimant sustained a work injury that involved a tear of his supraspinatus tendon. The claimant

underwent a surgical repair of the supraspinatus tendon and a subpectoral biceps tenodesis. The claimant was eventually placed at MMI with mild tenderness to palpitation in the biceps region and with limited shoulder range of motion in all planes. The authorized treating physician assigned the claimant a scheduled impairment rating for the upper extremity, and the respondents filed an admission consistent with the impairment rating. The claimant sought conversion of the impairment rating to a whole-person impairment. At hearing, it was noted that the claimant, at an IME, had no complaints of pain or restriction located anywhere outside of the left arm. Nevertheless, the ALJ determined that the claimant sustained a permanent impairment proximal to the claimant's arm at the shoulder, noting that the claimant's surgery involved structures such as the supraspinatus tendon that extended beyond the shoulder and that the claimant credibly testified that he had pain and associated functional limitations in areas proximal to his arm.

The respondents in *Barry* appealed, arguing that the ALJ's determination was not supported by substantial evidence. The ICAO panel agreed and set aside the ALJ's order. The Panel reasoned that the claimant did not have complaints of symptoms beyond the shoulder at the arm and that "The claimant has minimal pain or functional limitations from his left shoulder injury, and those symptoms he does have are located on, and are limited to, the loss of the use of his arm." The panel further elaborated that "all of the prior Panel decisions cited by the ALJ as support for the decision featured testimony or other evidence indicating pain or other symptoms located in areas of the torso separate from the shoulder."

Similar to *Barry*, and as found above, Claimant sustained a full-thickness supraspinatus tear. While the supraspinatus originates in the torso, the mere anatomical location of an injury does not dictate the situs of functional impairment. As found, Claimant's medical records do not document credible complaints of persistent pain, weakness, or dysfunction in anatomical structures beyond the shoulder joint itself. Accordingly, the Court finds that Claimant's impairment does not extend beyond the shoulder and concludes that conversion to a whole person impairment is not warranted.

ORDER

It is therefore ordered that:

1. Claimant has not proved by clear and convincing evidence that the DIME physician erred in his determination of MMI.

2. Claimant has not proved by a preponderance of the evidence that the DIME physician erred in his determination regarding impairment.

3. Claimant has not proved by a preponderance of the evidence that the upper extremity impairment should be converted to a whole-person impairment.

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

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

DATED: February 27, 2025.

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 5-239-476-001

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Martin Kalevik, M.D. that Claimant suffered a 15% whole person permanent impairment rating for her back as a result of her March 18, 2023 admitted industrial injuries.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period March 19, 2024 through November 14, 2024.

FINDINGS OF FACT

1. Claimant worked as an Overnight Lead at Employer's assisted living facility. On March 18, 2023, when she was helping a patient get back into bed, she felt a sharp stabbing pain on her back and neck.

2. Claimant obtained treatment through Authorized Treating Physician (ATP) Concentra Medical Centers. She specifically received diagnostic testing, physical therapy, pool therapy, acupuncture, chiropractic treatment, injections and medications.

3. On August 8, 2023 ATP John T. Sacha, M.D. determined Claimant had reached Maximum Medical Improvement (MMI). He assigned a 5% whole person permanent impairment rating for the lumbar spine pursuant to Table 53 of the *American Medical Association Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). Because Claimant's range of motion measurements were invalid, he asked her to return for repeat testing on August 22, 2023. Dr. Sacha assigned work restrictions of no lifting in excess of 10 pounds and only occasional bending and twisting. He recommended maintenance care consisting of pool therapy, a pool pass for 12 months, eight sessions of physical therapy, medications and follow-up visits for the next three to six months.

4. On August 22, 2023 Claimant returned to Dr. Sacha for an examination. In assigning an impairment rating, Dr. Sacha determined Claimant again provided inconsistent and invalid range of motion measurements and was thus not entitled to any range of motion impairment. He thus maintained his 5% whole person rating. Dr. Sacha recommended discharge of Claimant to a "medical maintenance program."

5. On November 15, 2023 ATP Katherine Byrd, D.O. assessed Claimant with the following: (1) acute right-sided lower back pain with right-sided sciatica; (2) an acute thoracic myofascial strain; and (3) a lumbar strain. She determined Claimant had reached MMI. Dr. Byrd assigned permanent restrictions of no lifting in excess of 10 pounds and

limited/occasional bending/twisting. She authorized medical maintenance care with ATP Dr. Sacha as needed.

6. On February 9, 2024 Claimant returned to Dr. Sacha for an evaluation. He assessed Claimant with a lumbar radiculopathy and lumbar facet syndrome. Dr. Sacha was considering radiofrequency ablation and medial branch blocks as an alternative to surgery. He detailed that, "at this point [Claimant] is a good candidate for medial branch block and radiofrequency neurotomy as an alternative to surgery."

7. On May 2, 2024 Respondents filed a Final Admission of Liability (FAL) acknowledging that Claimant had reached MMI on November 15, 2023 with a 5% whole person permanent impairment rating. The FAL admitted to medical maintenance treatment pursuant to Dr. Sacha's August 22, 2023 report.

8. On June 24, 2024 Dr. Sacha administered bilateral medial branch blocks to levels L3-L5 of Claimant's lumbar spine. Claimant exhibited greater than 80% pain relief from the procedure that reflected a diagnostic response.

9. On June 28, 2024 Dr. Sacha noted that Claimant reported excellent relief from the blocks for more than six hours. He commented that Claimant was a good candidate for radiofrequency neurotomy.

10. On August 9, 2024 Claimant returned to Dr. Sacha for a two-level bilateral radiofrequency neurotomy or rhizotomy. He documented that Claimant suffered from lumbosacral facet syndrome. The procedure specifically consisted of a L3-4 radiofrequency neurotomy and a L4-5 radiofrequency neurotomy with fluoroscopic guidance.

11. On August 23, 2024 Claimant visited Dr. Sacha for a follow-up appointment. Records reflect that Claimant was "only a week and a half out and already 40% improved, way ahead of schedule."

12. On September 3, 2024 Claimant underwent a DIME with Martin Kalevik, D.O. He reviewed Claimant's medical records and conducted a physical examination. Dr. Kalevik diagnosed Claimant with thoracic spine pain that was not work-related as well as lumbar spine pain and lumbar facet dysfunction. He noted that, based on Claimant's verbal history, she had undergone radiofrequency ablation on August 1, 2024 that he presumed was bilateral at the L3-L5 levels. Dr. Kalevik agreed with Dr. Bird that Claimant had reached MMI on November 15, 2023.

13. Relying on the *AMA Guides*, Dr. Kalevik assigned a 9% whole person impairment rating for range of motion deficits of the lumbar spine. Under Table 53, IIC he also assigned a 7% whole person impairment rating for a two-level, bilateral rhizotomy at L3-L5. Combining the ratings yields a 15% whole person permanent impairment rating as a result of Claimant's March 18, 2023 industrial injury.

14. Dr. Kalevik recommended maintenance follow-up with Dr. Sacha for one year from the date of MMI for medication management and trigger point injections if warranted. He also remarked that Claimant should be authorized for gym and pool passes for one year.

15. On January 17, 2025 the parties conducted the pre-hearing evidentiary deposition of Dr. Kalevik. He explained that, at the time of Claimant's November 15, 2023 date of MMI, she had not yet received any medial branch blocks or radiofrequency ablations. Therefore, at the time of MMI, Claimant only warranted a 5% whole person impairment rating pursuant to the *AMA Guides*. There was not be a rating for the blocks at the time of MMI because she had not yet received them.

16. Dr. Kalevik testified that at the time he evaluated Claimant, she was able to perform range of motion testing with consistent and valid effort. He maintained that, based on Table 53 IIC of the *AMA Guides*, Claimant warranted a 7% whole person rating for a two-level, bilateral rhizotomy. He explained that a rhizotomy did not constitute maintenance care, but was active treatment that should have been addressed while the claim was open. Dr. Kalevik remarked that the case should have been reopened for the rhizotomy procedure, but maintained that Claimant reached MMI on November 15, 2023. He commented Claimant "is due a rating for the ablation. Whether you assign it to November 15th or a later date, she still should have a rating for the ablation. That was a surgical procedure, and that should have been included for a rating."

17. Dr. Sacha testified at the hearing in this matter. He explained that Claimant warranted a 5% whole person permanent impairment rating pursuant to the *AMA Guides* for pain with minimal changes in structural testing. Dr. Sacha determined Claimant provided inconsistent and invalid range of motion measurements and was thus not entitled to any range of motion impairment. He maintained that Claimant reached MMI on August 8, 2023. Dr. Sacha administered medial branch blocks to Claimant on June 24, 2024 that were diagnostic, and a radiofrequency ablation on August 9, 2024. Claimant reflected 40% improvement by August 23, 2024.

18. Dr. Sacha explained that Claimant had not fully recovered from the radiofrequency ablation by the date of the DIME on September 3, 2024. Notably, although Dr. Kalevik did not have the records from the radiofrequency ablation, he nevertheless assigned an impairment rating. Furthermore, Dr. Kalevik was incorrect in assigning an impairment rating for the radiofrequency ablation several months after Claimant had reached MMI. The radiofrequency ablation constituted maintenance care. Dr. Sacha remarked "we redo impairment ratings after a surgical procedure like radiofrequency, but we do it at the appropriate time. That was – it was the appropriate impairment rating but at the incorrect time."

19. Claimant also testified at the hearing. She remarked that she worked for Employer as an overnight shift lead. Claimant's duties included direct care of residents and assisting them with activities of daily living. Claimant also helped clean the buildings and distribute medications to residents.

20. Claimant explained that she was unable to return to work after her March 18, 2023 work injury because of her excruciating back pain. She subsequently could not return to work because of her restrictions and did not receive a modified-duty job offer. Claimant has not earned any wages since March 18, 2023.

21. Medical records from March 29, 2023 reflect Claimant's work restrictions as no lifting in excess of five pounds, primarily sedentary duty only, changes of position from standing/walking/sitting as needed, no bending or twisting at the spine, and use of a walker or cane for balance. At the time Claimant reached MMI on November 15, 2024, her permanent work restrictions included no lifting in excess of 10 pounds and limited/occasional bending and twisting.

22. Dr. Sacha confirmed Claimant was on light duty restrictions since the first time he saw her and they have "never changed." He testified that Claimant would not have been able to perform her prior job duties without modifications of her restrictions.

23. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Kalevik that Claimant suffered a 15% whole person permanent impairment for her back as a result of her March 18, 2023 admitted industrial injuries. Initially, Dr. Kalevik assigned a 9% whole person impairment rating for range of motion deficits of the lumbar spine. He commented that, at the time he evaluated Claimant, she was able to perform range of motion testing with consistent and valid effort. Moreover, under Table 53, IIC he assigned a 7% whole person impairment rating for a two-level, bilateral rhizotomy at L3-L5. Combining the ratings yields a 15% whole person permanent impairment rating.

24. Dr. Kalevik detailed that, based on Table 53 IIC of the *AMA Guides*, Claimant warranted a 7% whole person rating for a two-level rhizotomy. He increased the Table 53 rating from 5% to 7% because Claimant underwent a rhizotomy on August 9, 2024 or between the original impairment rating and the DIME appointment. Dr. Kalevik explained that a rhizotomy did not constitute maintenance care, but was active treatment that should have been addressed while the claim was open. He remarked that the case should have been reopened for the rhizotomy procedure, but maintained that Claimant reached MMI on November 15, 2023. He summarized the rhizotomy "was a surgical procedure, and that should have been included for a rating."

25. In contrast, Dr. Sacha explained that Claimant warranted a 5% whole person permanent impairment rating pursuant to the *AMA Guides* for pain with minimal changes in structural testing. Dr. Sacha determined Claimant provided inconsistent and invalid range of motion measurements and was thus not entitled to any range of motion impairment. He explained that Claimant had not fully recovered from the radiofrequency ablation or rhizotomy by the date of the DIME on September 3, 2024. Furthermore, Dr. Kalevik was incorrect in assigning an impairment rating for the procedure several months after Claimant had reached MMI. The radiofrequency ablation constituted maintenance care. Dr. Sacha remarked that the timing of Dr. Kalevik's impairment rating was an

administrative error and should have been performed after additional post-rhizotomy treatment.

26. Despite Dr. Sacha's opinion, Respondents have failed to demonstrate that it is highly probable that Dr. Kalevik's 15% whole person impairment rating was incorrect. Dr. Kalevik explained the difference in the ratings by highlighting the change in impairment under Table 53 following the rhizotomy. Dr. Sacha agreed that Dr. Kalevik had explained the difference in their Table 53 ratings. Notably, Dr. Sacha testified that following the rhizotomy, a 7% permanent impairment rating pursuant to Table 53 would be appropriate. Dr. Kalevik did not change his opinions on the MMI date and was adamant that even if performed under maintenance care, Claimant was entitled to a rating for the rhizotomy. Although Dr. Sacha was critical of Dr. Kalevik's assigned Table 53 rating for a two-level rhizotomy, his comments constitute a mere difference of opinion. Respondents have thus failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Kalevik's impairment rating for Claimant's industrial injuries were clearly erroneous. Accordingly, Claimant suffered a 15% whole person permanent impairment as a result of her March 18, 2023 admitted industrial injuries.

27. Claimant has demonstrated it is more probably true than not that she is entitled to receive TTD benefits for the period March 19, 2024 through November 14, 2024. Initially, Claimant's job duties included direct care of residents and assisting them with activities of daily living. Claimant also helped clean the buildings and distribute medications to residents. She credibly explained she was unable to return to work after her March 18, 2023 work injuries because of her excruciating back pain. Claimant subsequently could not return to work because of her restrictions and did not receive a modified-duty job offer. Notably, Claimant has not earned any wages since March 18, 2023. Furthermore, medical records from March 29, 2023 reflect Claimant's work restrictions as no lifting in excess of five pounds, primarily sedentary duty only, changes of position from standing/walking/sitting as needed, no bending or twisting at the spine, and use of a walker or cane for balance. At the time Claimant reached MMI on November 15, 2024, her permanent work restrictions included no lifting in excess of 10 pounds and limited/occasional bending and twisting. The preceding chronology reveals that Claimant's work activities caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. Claimant is thus entitled to receive TTD benefits for the period March 19, 2024 through November 14, 2024.

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).

Overcoming the DIME on Impairment

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Indus. Claim Appeals Off.,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Indus. Claim Appeals Off.,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Off.,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S. *See Yeutter v. Indus. Claim Appeals Off.*, 487 P.3d 1007, 1012 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Off.*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a

DIME physician's determination of MMI or impairment rating, the finding on causation is also entitled to presumptive weight. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

7. "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc.,* 961 P.2d at 592. In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. "Maximum medical improvement" means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and no further treatment is reasonably expected to improve the condition. §8-40-201(11.5), C.R.S. MMI represents the optimal point at which the permanency of a disability can be discerned and the extent of any resulting impairment can be measured. *Paint Connection Pul v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010). MMI exists when the underlying condition causing the disability has become stable and no additional treatment will improve the condition. *Golden Age Manor v. Indus. Comm'n*, 716 P.2d 153 (Colo.App.1985).

9. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Kalevik that Claimant suffered a 15% whole person permanent impairment for her back as a result of her March 18, 2023 admitted industrial injuries. Initially, Dr. Kalevik assigned a 9% whole person impairment rating for range of motion deficits of the lumbar spine. He commented that, at the time he evaluated Claimant, she was able to perform range of motion testing with consistent and valid effort. Moreover, under Table 53, IIC he assigned a 7% whole person impairment rating for a two-level, bilateral rhizotomy at L3-L5. Combining the ratings yields a 15% whole person permanent impairment rating.

10. As found, Dr. Kalevik detailed that, based on Table 53 IIC of the *AMA Guides*, Claimant warranted a 7% whole person rating for a two-level rhizotomy. He increased the Table 53 rating from 5% to 7% because Claimant underwent a rhizotomy on August 9, 2024 or between the original impairment rating and the DIME appointment. Dr. Kalevik explained that a rhizotomy did not constitute maintenance care, but was active treatment that should have been addressed while the claim was open. He remarked that the case should have been reopened for the rhizotomy procedure, but maintained that Claimant reached MMI on November 15, 2023. He summarized the rhizotomy "was a surgical procedure, and that should have been included for a rating."

11. As found, in contrast, Dr. Sacha explained that Claimant warranted a 5% whole person permanent impairment rating pursuant to the *AMA Guides* for pain with

minimal changes in structural testing. Dr. Sacha determined Claimant provided inconsistent and invalid range of motion measurements and was thus not entitled to any range of motion impairment. He explained that Claimant had not fully recovered from the radiofrequency ablation or rhizotomy by the date of the DIME on September 3, 2024. Furthermore, Dr. Kalevik was incorrect in assigning an impairment rating for the procedure several months after Claimant had reached MMI. The radiofrequency ablation constituted maintenance care. Dr. Sacha remarked that the timing of Dr. Kalevik's impairment rating was an administrative error and should have been performed after additional post-rhizotomy treatment.

12. As found, despite Dr. Sacha's opinion, Respondents have failed to demonstrate that it is highly probable that Dr. Kalevik's 15% whole person impairment rating was incorrect. Dr. Kalevik explained the difference in the ratings by highlighting the change in impairment under Table 53 following the rhizotomy. Dr. Sacha agreed that Dr. Kalevik had explained the difference in their Table 53 ratings. Notably, Dr. Sacha testified that following the rhizotomy, a 7% permanent impairment rating pursuant to Table 53 would be appropriate. Dr. Kalevik did not change his opinions on the MMI date and was adamant that even if performed under maintenance care, Claimant was entitled to a rating for the rhizotomy. Although Dr. Sacha was critical of Dr. Kalevik's assigned Table 53 rating for a two-level rhizotomy, his comments constitute a mere difference of opinion. Respondents have thus failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Kalevik's impairment rating for Claimant's industrial injuries were clearly erroneous. Accordingly, Claimant suffered a 15% whole person permanent impairment as a result of her March 18, 2023 admitted industrial injuries.

Temporary Total Disability Benefits

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

regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

14. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive TTD benefits for the period March 19, 2024 through November 14, 2024. Initially, Claimant's job duties included direct care of residents and assisting them with activities of daily living. Claimant also helped clean the buildings and distribute medications to residents. She credibly explained she was unable to return to work after her March 18, 2023 work injuries because of her excruciating back pain. Claimant subsequently could not return to work because of her restrictions and did not receive a modified-duty job offer. Notably, Claimant has not earned any wages since March 18, 2023. Furthermore, medical records from March 29, 2023 reflect Claimant's work restrictions as no lifting in excess of five pounds, primarily sedentary duty only, changes of position from standing/walking/sitting as needed, no bending or twisting at the spine, and use of a walker or cane for balance. At the time Claimant reached MMI on November 15, 2024, her permanent work restrictions included no lifting in excess of 10 pounds and limited/occasional bending and twisting. The preceding chronology reveals that Claimant's work activities caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. Claimant is thus entitled to receive TTD benefits for the period March 19, 2024 through November 14, 2024.

ORDER

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

1. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Kalevik regarding Claimant's impairment rating. Claimant suffered a 15% whole person permanent impairment for her back as a result of her March 18, 2023 admitted industrial injuries.

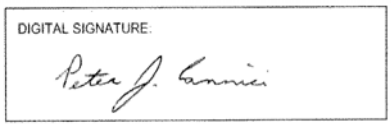
2. Claimant shall receive TTD benefits for the period March 19, 2024 through November 14, 2024.

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: February 28, 2025.



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Administrative Law Judge
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