OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-117-588-003

ISSUES

1. Whether Claimant established by a preponderance of the evidence grounds to reopen Claimant's claim for a change in condition.

2. If Claimant's claim is reopened, whether Claimant established by a preponderance of the evidence that the rhizotomy recommended by Dr. Kawasaki is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

3. If Claimant's claim is not reopened, whether Claimant established by a preponderance of the evidence that a rhizotomy constitutes reasonable, necessary, and related medical maintenance benefits designed to relieve the effects of her work-related injury or to prevent further deterioration of her condition pursuant to *Grover v. Indus. Comm'n*, 795 P.2d 705 (Colo. App. 1988).

FINDINGS OF FACT

1. Claimant has been employed by Employer for 33 years as a property manager. On September 5, 2019, Claimant sustained an admitted injury when she tripped and fell onto a cement floor, landing on her left arm/shoulder, and sustained a fracture of her right humerus.

Claimant's Prior Injury History

2. Claimant has a history of low back, left shoulder, and neck issues stemming from a work-related motor vehicle accident in 2013. Claimant was placed at MMI for the motor vehicle accident on June 23, 2014, and received an impairment rating of for her lower back, but no permanent impairment rating for the cervical spine or shoulder girdle. Claimant was released to work full duty on June 23, 2014. (Ex. G).

3. In 2015, Claimant saw Rick Zimmerman, D.O., for complaints of a two-year history of neck, bilateral shoulder, and paraspinal pain. Claimant's symptoms included headaches, neck, and shoulder pain, and bilateral intrascapular pain radiating behind her ears. Dr. Zimmerman diagnosed Claimant with "global myofascial pain with positive fibromyalgia screen" and prescribed amitriptyline. (Ex. H).

4. Claimant's next documented treatment prior to her September 5, 2019 work injury was an evaluation by Emily Piala, PA, at Wheat Ridge Internal Medicine on February 2, 2018, At that visit, Claimant reported chronic headaches and complaints of neck and bilateral shoulder pain. Ms. Piala referred Claimant for physical therapy for her shoulder pain. (Ex. I). No credible evidence was admitted that Claimant attended physical therapy following this visit or received further treatment for her shoulder or neck pain prior to September 5, 2019.

Post-September 5, 2019 Medical Treatment

5. Following her September 5, 2019 fall, Claimant was seen at the Lutheran Hospital emergency room and diagnosed with an acute fracture of the proximal humerus. She was placed in a splint and sling and advised to follow up with an orthopedist. Claimant's initial exam at Lutheran did not note neck or cervical pain. (Ex. J).

6. On September 9, 2019, Claimant saw orthopedic surgeon Thomas Mann, M.D., at Cornerstone Orthopedics. Dr. Mann diagnosed Claimant with a non-displaced fracture of the left proximal humerus neck and greater tuberosity with minimal displacement. Claimant's left arm was placed in an immobilizer and fracture brace, and she was provided medications for pain. (Ex. 7). At a follow up visit on September 19, 2019, Dr. Mann recommended Claimant continue non-surgical treatment, and indicated a 6 to 8-week healing time for the fracture. (Ex. K).

7. On September 27, 2019, Claimant began seeing authorized treating physician (ATP) Tomm Vanderhorst, M.D., at SCL Health, and treated with him through February 2021, when Dr. Vanderhorst retired. At Claimant's October 11, 2019 visit, Dr. Vanderhorst documented increased muscle tone in the left shoulder, levator scapula, and trapezius area, and decreased range of motion. Dr. Vanderhorst made similar findings throughout his treatment of Claimant. Although Dr. Vanderhorst's notes do not indicate specific issues with Claimant's neck, between October 11, 2019, and February 25, 2021, Claimant completed at least fifteen pain diagrams in which she indicated symptoms in her left trapezius, neck, and head (in addition to her arm and shoulder). (Ex. 5).

8. At her October 17, 2019 visit, Dr. Mann expressed concern that Claimant was developing a frozen shoulder, and recommended physical therapy. (Ex. 7).

9. Claimant returned to Dr. Mann on November 18, 2019. Dr. Mann indicated that Claimant showed excellent signs of fracture healing, but significant findings concerning for associated rotator cuff pathology, and recommended an MRI to rule out rotator cuff pathology. (Ex. M). The MRI was performed on December 2, 2019, and showed persistent edema, which Dr. Mann indicated was consistent with incomplete healing. The MRI also demonstrated findings concerning for a cartilage tumor, for which Dr. Mann recommended a consultation with a tumor specialist.[1] He also recommended a bone stimulator and physical therapy. (Ex. O & P).

10. On December 13, 2019, Dr. Vanderhorst responded to an inquiry from Insurer, and indicated Claimant was not yet at maximum medical improvement (MMI), and that he anticipated an impairment rating due to her significantly limited range of motion (Ex. 5).

11. Claimant attended physical and occupational therapy at SCL from December 23, 2019 through January 2020. During this time, therapy focused on strength and mobility of her left arm and shoulder girdle, and addressing adhesive capsulitis. Claimant's physical therapy records document reports of pain in the left shoulder, upper arm,

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[1] Dr. Vanderhorst opined that Claimant's cartilage tumor was a non-work-related preexisting condition. (Ex. 5).

scapula, and neck, and treatment for these areas, including the neck. Claimant's January 31, 2020 physical therapy record documents tightness and cramping in the cervical spine, upper trapezius, and soreness in the occipital area. (Ex. 6).

12. From February 5, 2020 through September 3, 2020, Claimant followed up with Dr. Vanderhorst approximately once per month. Claimant continued to experience limited range of motion in her left shoulder, and developed symptoms of subacromial impingement. (Ex. 5)

13. On November 11, 2020, Claimant saw a provider in Dr. Mann's clinic. [2] Claimant reported that she had been doing physical therapy and had received a subacromial bursa injection that did not provide benefit. She also noted pain radiating into her neck. The provider noted that Claimant had a recent MRI which showed a healed fracture, and referred Claimant for a dynamic ultrasound to evaluate for impingement due to a slight displacement of the healed fracture. (Ex. 10).

14. On January 25, 2021, Claimant returned to Dr. Mann who discussed the ultrasound findings. Claimant reported that her shoulder pain had not improved and that she also had neck pain. Dr. Mann indicated that some of her pain may be coming from her neck, which he indicated was outside his expertise, and recommended Claimant follow up with a spine specialist, and Dr. Vanderhorst. (Ex. 10).

15. At a follow up visit on February 22, 2021, Dr. Mann recommended Claimant undergo a neck evaluation due to ongoing neck and scapular pain into the left arm. He ordered a cervical MRI and referred Claimant to spine specialist, Andrew Castro, M.D. (Ex. 10).

16. Claimant saw Dr. Vanderhorst on February 25, 2021, reporting continued shoulder and neck pain. On examination, Dr. Vanderhorst noted tenderness to palpation in the neck, and reduced left lateral flexion and extension causing left-sided posterior lateral neck pain. Dr. Vanderhorst indicated that the cervical MRI recommended by Dr. Mann would be appropriate for evaluation of Claimant's chronic left neck and shoulder pain with associated weakness and to rule out cervical impingement/radiculopathy. (Ex. R).

17. The cervical MRI was performed on March 5, 2021, and showed arthritic changes at C6-7 contributing to mile central spinal stenosis and mild bilateral foraminal narrowing. (Ex. 8).

18. On May 10, 2021, Claimant saw Richard Lawley, M.D., at OCC for ongoing shoulder and neck complaints. Dr. Lawley opined that Claimant's neck pain may be related to prolonged shoulder pain and tightness vs. a cervicogenic etiology. He performed a left subacromial bursa steroid injection in Claimant's shoulder. (Ex. 10).

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[2] Pages 241-242 of Ex. 10 is an incomplete medical record from Orthopedic Centers of Colorado (OCC), with no provider signature page. Later records demonstrate that Dr. Mann moved from Cornerstone Orthopedics to OCC sometime between February 2020 and November 2020..

19. On May 17, 2021, John Ogrodnick, M.D., became Claimant's ATP after Dr. Vanderhorst retired. Claimant reported to Dr. Ogrodnick that she had neck pain from the beginning of her injury that radiated behind her left ear, and that movement of her left shoulder brought on the pain. The pain diagram Claimant completed for Dr. Ogrodnick was consistent with the pain diagrams she had completed for Dr. Vanderhorst over the previous two years. (Ex. T).

20. On May 21, 2021, Claimant saw Dr. Castro at OCC for evaluation of her neck pain. Based on his examination and review of imaging studies, Dr. Castro opined that Claimant's neck pain was "more related to her shoulder than her neck" and that there were no acute findings on her imaging studies. He did not recommend any cervical spine interventions. (Ex. U).

21. Claimant returned to Dr. Ogrodnick on July 13, 2021. At that time, Claimant reported left shoulder pain, neck pain, back pain, joint pain, headaches, and eye pain. She reported no progress in her condition, and that it continued to worsen. Claimant's pain diagram from this visit included her left shoulder, arm, neck, and trapezius area, consistent with her prior pain diagrams. Claimant reported her pain levels as 8/10. Dr. Ogrodnick placed Claimant at MMI, and assigned a 12% upper extremity impairment rating for range of motion deficits. He further indicated that Claimant's "cervical complaints are clearly reactive to shoulder/humeral injury and therefore would not contribute to impairment." Dr. Ogrodnick assigned a permanent work restriction of no overhead reaching with her left arm, and indicated no maintenance care was anticipated. (Ex. T).

22. On December 2, 2021, Claimant underwent a Division-sponsored independent medical examination (DIME), with Brian Beatty, D.O. Dr. Beatty assigned Claimant a 16% right upper extremity impairment rating. On examination of Claimant's cervical spine, Dr. Beatty noted tenderness to palpation along the trapezius and levator scapula, and decreased range of motion on the left (compared to the right). He indicated that he did not provide a rating for Claimant's cervical spine because there was no indication of cervical injury at the time of Claimant's fall. However, he also noted that he believed the pain generator for Claimant's shoulder had not been fully evaluated, and recommended evaluation by a pain specialist to see if Claimant would benefit from lower cervical spine injections. He further indicated if injections resolved her pain, then reassessment for a possible cervical spine impairment would be appropriate. He also recommended biofeedback to reduce tension in the trapezius region. (Ex. 12).

23. On January 28, 2022, Respondents filed a Final Admission of Liability, admitting for a 16% impairment rating and denying maintenance treatment. (Ex. B).

24. On February 23, 2022, Claimant filed an application for hearing seeking to overcome Dr. Beatty's DIME opinions, and challenging the denial of post MMI medical benefits. (Ex. C).

25. Claimant returned to Dr. Ogrodnick on March 3, 2022, reporting that she felt the same, and that she was continuing to experience pain in her neck and arms, with a left sided headache. Based on Dr. Beatty's determination that Claimant required further

workup for her cervical spine pain, Dr. Ogrodnick referred Claimant to Robert Kawasaki, M.D., for a physical medicine and rehabilitation consultation. (Ex. 5).

26. Claimant saw Dr. Kawasaki on April 12, 2022, for evaluation of her neck pain. Based on his examination and review of records, Dr. Kawasaki diagnosed Claimant with cervical spondylosis with potential radiation of pain to the shoulder girdle from the cervical facet joints at C5-6. Dr. Kawasaki recommended Claimant undergo a trial of medial branch block (MBB) injections at the C5-6 and C6-7 levels, which he noted typically cause radiation of pain into the trapezial and interscapular regions. He indicated if the MBBs were diagnostic and improved Claimant's shoulder girdle pain, a second MBB would be required before performing rhizotomies (*i.e.*, radiofrequency ablation or RFA). Dr. Kawasaki also recommended chiropractic and acupuncture treatment. (Ex. 11).

27. On April 19, 2022, at Respondents' request, Claimant had an independent medical examination (IME) with John Burris, M.D. Based on his examination of Claimant and review of medical records, Dr. Burris opined that Claimant's work-related injury was limited to a left proximal humerus fracture that was treated conservatively. He opined that Claimant's cervical spine was "not involved in the original event" and stated that Claimant's neck complaints were not documented until "many months" after the workplace event. "Therefore," Dr. Burris concluded, "[Claimant's] neck complaints cannot be causally related to the workplace event." Dr. Burris agreed with Dr. Ogrodnick and Dr. Beatty that Claimant reached MMI on July 13, 2021. He disagreed with Dr. Beatty's recommendation that Claimant undergo further evaluation of her beck complaints, and opined that no maintenance care was indicated. (Ex. X).

28. On May 11, 2022, Dr. Kawasaki performed MBB blocks at two levels of Claimant's cervical spine (C5-6, and C6-7), on the left side. Following the injections, Claimant reported improvement in her neck and shoulder pain for 7-8 hours, and improved mobility in her neck. Based on the diagnostic response to the MBBs, Dr. Kawasaki recommended a second set of MBB. (Ex. 11).

29. On May 17, 2022, the parties entered into a Stipulation through which Respondents agreed a general award of post MMI maintenance medical benefits, and to authorize one round of MBB injections, as well as acupuncture and chiropractic treatment. In exchange, Claimant agreed to withdraw her challenge to the DIME and waived her right to challenge any benefits, awards, and denials contained in the January 28, 2022 Final Admission of Liability. (Ex. C).

30. On June 1, 2022, Dr. Kawasaki performed a second set of MBB injections at C5-6 and C6-7 on the left. Again, Claimant reported significant improvement after the injection. Based on Claimant's response to the MBBs, on June 27, 2022, Dr. Kawasaki requested authorization to perform left sided C5-6 and C6-7 rhizotomies. (Ex. 11).

31. On August 16, 2022, Dr. Burris performed a second IME. Based on his examination and review of records, Dr. Burris again opined that Claimant's work-related injury was limited to "an isolated left proximal humerus fracture." He opined that Claimant's cervical condition was more likely than not significantly associated with

cervical spondylosis and independent and unrelated to her workplace injury. As support for this opinion Dr. Burris indicated that 1) Claimant's spondylosis predated the work place injury; 2) her cervical spine was not involved in the workplace event; 3) diagnostic testing did not demonstrate any acute cervical abnormalities; and 4) that her cervical complaints did not appear until approximately 16 months after the workplace injury. He opined that "it is not reasonable to assume that the workplace event caused, aggravated, accelerated, or contributed in any meaningful manner to [Claimant's] cervical condition." He also opined that the results of the MBBs identified cervical spondylosis as a potential pain generator. (Ex. X).

32. In November 2022, Claimant returned to SCL Health, and saw Robert McLaughlin, M.D. Dr. McLaughlin assumed the role of Claimant's ATP because Dr. Ogrodnick was no longer at the SCL Clinic. Claimant saw Dr. McLaughlin six times between November 16, 2022 and October 5, 2023. During these visits, Claimant continued to report posterior neck pain into the scapular and medial scapular region, and completed pain diagram consistent with her prior diagrams. Dr. McLaughlin reviewed Dr. Beatty's DIME report and other medical records, and concluded that Claimant's cervical condition was related to her September 5, 2019 work injury, and that Claimant was not at MMI. Dr. McLaughlin also agreed that Claimant should pursue the rhizotomies recommended by Dr. Kawasaki. (Ex. 5).

33. On April 18, 2023,. Dr. Burris performed a third IME and reviewed additional medical records of treatment since his prior report. Dr. Burris' opinions remained unchanged. (Ex., Z).

Testimony

Claimant

34. Claimant testified at hearing that after the September 5, 2019 fall, she did not notice pain in her neck until the pain in her left arm began to subside. She testified that she had had pain from her left shoulder, into the left side of her neck and the left side of her head. Claimant submitted photographs of her injuries taken within 1-3 days of September 5, 2019. The photographs (Ex. 4) show significant bruising on Claimant's left arm, shoulder, and chest. Claimant testified that she completed pain diagrams at her physician visits intended to include her neck in the areas of pain.

35. Claimant testified that when she was placed at MMI, her neck was painful, and rated that pain at a level of 7-8 out of 10. Claimant testified that her neck pain has not changed in location since being placed at MMI, and that her pain levels have not increased since being placed at MMI. Claimant testified that her current neck pain level is 6-7/10. She testified, credibly, that the injections performed by Dr. Kawasaki reduced her pain for three to four hours. Claimant is aware of Dr. Kawasaki's recommendation to perform rhizotomies, and would like to have that procedure.

36. With respect to her prior injuries, Claimant testified that she hurt her neck in a car accident in 2014, and that she had no further complaints of neck pain after a few weeks.

She testified that prior to her September 5, 2019 injury, she was able to swim, walk, go dancing, and play “racquets” with her daughter, and was able to perform her job without difficulty.

Robert McLaughlin, M.D.

37. Dr. McLaughlin testified by deposition and was admitted as an expert in occupational medicine. Dr. McLaughlin became Claimant’s ATP after Dr. Ogrodnick moved to another state in September 2022. Dr. McLaughlin’s testimony makes clear he reviewed prior medical records from at least Dr. Ogrodnick, Dr. Vanderhorst, and Dr. Mann.

38. Dr. McLaughlin testified that it typically requires significant force to sustain a humeral fracture, such as Claimant’s. Dr. McLaughlin opined, based on his examination of Claimant, and reports from Dr. Ogrodnick, Dr. Kawasaki, and Dr Beaty that Claimant’s cervical condition relates to her work-injury. His diagnosis was cervical strain and aggravation of cervical spondylosis (*i.e.*, arthritis or degeneration) with facet joint pain. He indicated that Claimant’s cervical spondylosis itself was not attributable to Claimant’s work injury, but the current need for treatment is causally related to her work injury. He further testified that Claimant’s mechanism of injury – falling on to her shoulder -- is a mechanism likely resulted in a twist or snap of her neck, and lead to the need for treatment for her cervical spine.

39. He testified that the lack of acute cervical abnormalities on Claimant’s imaging studies does not alter his opinion. Dr. McLaughlin opined that it is not surprising that Claimant did not have complaints of acute neck pain at the time of injury or in the emergency department, given the severity of her shoulder injury. He noted that Claimant’s pain diagrams from October and November 2019 indicate symptoms in the left side of Claimant’s neck, in addition to her left shoulder and arm, and also that Claimant received treatment from physical therapy in January 2020 for her cervical spine.

40. Dr. McLaughlin indicated that medial branch blocks are diagnostic tests to determine whether a nerve ablation will likely be successful. A patient’s improvement in pain for a few hours following an MBB is a positive response. He testified that Claimant’s response to the MBBs performed by Dr. Kawasaki indicates that her pain is likely facet joint-induced, and that the positive response is an indication to proceed with ablation of the nerve. Based on the mechanism of injury, diagnostic testing, provocative testing, and examination of the Claimant, Dr. McLaughlin opined that Claimant’s need for the rhizotomies is causally-related to her work injury. Dr. McLaughlin further testified that in his opinion, Claimant is no longer at MMI.

John Burris, M.D.

41. Dr. Burris testified by deposition and was admitted as an expert in occupational medicine. He testified that he performed three IMEs on Claimant, and reviewed the hearing transcript and Dr. McLaughlin’s deposition prior to his testimony. In general, Dr. Burris’ testimony was consistent with the opinions expressed in his IME reports (Exs. X

& Z). Dr. Burris testified he did not have Claimant's pre-September 9, 2019 medical records when he performed his IMEs, but subsequently reviewed them. He opined that Claimant's pain complaints from 2014, 2015 and 2018 are in the same anatomical location as her current complaints, with the exception of arm pain. Dr Burris agreed Claimant has spondylosis in her neck and that this pre-dated her work injury. He opined that the natural course of spondylosis would be for the condition advance over time, independent of an injury, and that it is possible to have asymptomatic spondylosis.

42. Dr. Burris disagreed with Dr. McLaughlin's opinion that it is "most likely" that Claimant's mechanism of injury resulted in some "twist" or "snap" of her neck, but agreed it was a possibility. However, he does not believe this occurred because he would have expected the Claimant to report this at the time of injury. He also agreed that generally, it takes "good force" to break the humerus.

43. Dr. Burris agreed that Claimant had a diagnostic response to the MBBs performed by Dr. Kawasaki. Dr. Burris testified, credibly, that the rhizotomy procedure recommended by Dr. Kawasaki would typically be a maintenance procedure, because the ablated nerves may regrow after the procedure. However, Dr. Burris does not believe Claimant's need for rhizotomies is causally-related to her work-related humerus fracture for the reasons previously expressed in his IME reports. Dr. Burris' opinions are not persuasive.

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

Claimant has failed to establish by a preponderance of the evidence that she has experienced a change in condition warranting reopening of her claim. Claimant's claim was closed pursuant to the Final Admission of Liability filed January 28, 2022. Although Claimant originally filed an application for hearing challenging the DIME, that application was withdrawn, and the parties stipulated to the admissions in the FAL with the exception of maintenance medical treatment, one round of MBBs, acupuncture and chiropractic care. Thus, Claimant's time to challenge MMI has expired. The issue before the ALJ is whether Claimant has experienced a change in her physical condition which warrants reopening of her claim.

When Claimant was placed at MMI on July 13, 2021, she reported ongoing neck pain to Dr. Ogrodnick rating her overall pain at 8/10. Claimant testified that her neck pain was 7-8/10 when placed at MMI. Following closure of Claimant's claim, she continued to report the same neck symptoms she reported since her date of MMI. At hearing, Claimant testified that her neck condition has been constant throughout and has not worsened. Claimant's testimony was that her current neck pain levels are 6-7/10, further indicating

that her pain has not worsened, but has improved since MMI. None of Claimant's treating providers have opined that Claimant's physical condition has worsened, although it appears a different treatment modality (*i.e.*, rhizotomies) has been identified which offers a prospect of pain relief. No credible evidence was admitted indicating that Claimant's physical condition has changed since being placed at MMI. Claimant's request to reopen her claim for a change in condition is denied.

Maintenance Medical Benefits

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Fin. Serv,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). 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. No.11*, 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. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has established that the rhizotomies recommended by Dr. Kawasaki and Dr. McLaughlin are reasonable and necessary to relieve the effects of Claimant's industrial injury or prevent further deterioration of her condition. Although the DIME physician did not provide a rating for Claimant's cervical spine, he did recommend that Claimant's cervical spine be evaluated and the need for potential injections explored. He further opined that if the injections provided relief, a cervical rating should be considered. The implication of Dr. Beatty's opinion is that successful cervical injections would indicate that Claimant's cervical condition is causally-related to her injury.

Based on the recommendation of her treating providers and Dr. Beatty, Claimant has undergone two medial branch blocks that are diagnostic procedures designed to evaluate the likely efficacy of rhizotomies. Claimant testified, and her medical records confirm, that the medial branch blocks resulted in relief of her cervical spine symptoms for an appropriate period of time. Respondents do not contend that the procedure is not reasonable or necessary, only that it is unrelated to her work injury.

Respondents' position relies primarily on the opinion of Dr. Burris, who testified that Claimant's cervical condition was unrelated to her work injury because: 1) Claimant's spondylosis predated the work place injury; 2) her cervical spine was not involved in the

workplace event; 3) diagnostic testing did not demonstrate any acute cervical abnormalities; and 4) that her cervical complaints did not appear until approximately 16 months after the workplace injury. With respect to Claimant's preexisting spondylosis, no credible evidence was presented that Claimant's spondylosis was symptomatic at the time of her injury. That Claimant reported shoulder and neck pain approximately 19 months before her work-related injury does not establish that she did not sustain an aggravation of that condition in September 2019.

The ALJ concludes that, more likely than not, that Claimant's cervical spine was involved in the workplace event. The ALJ credits Dr. McLaughlin's opinion that Claimant most likely sustained some sort of twist or snap to her cervical spine when she fell. Given the force required to fracture a humerus, it is unlikely that Claimant's neck was unaffected by the fall on her left shoulder/arm. Dr. McLaughlin also credibly testified that this action likely resulted in an aggravation of her preexisting spondylosis, which led to the need for the MBBs and a rhizotomy. The ALJ also credits Dr. McLaughlin's testimony that the lack of acute findings on Claimant's cervical imaging studies does not rule out the possibility of aggravation of her preexisting spondylosis.

Dr. Burris' belief that Claimant did not report neck pain or cervical issues until 16 months after her injury is inconsistent with Claimant's medical records. Claimant's pain diagrams from as early as October 11, 2019 demonstrate that Claimant reported symptoms in her neck, and completed numerous pain diagrams which identified her neck and head as areas of pain throughout her treatment. Claimant's physical therapy records also document reports of neck pain and treatment for neck pain in December 2019 and January 2020. Moreover, Claimant's arm was immobilized following her injury, and her treating providers found increased muscle tone in her trapezius and shoulder area.

Taken in its entirety, the ALJ concludes that it is more likely than not that Claimant's cervical symptoms, and need for rhizotomies are causally-related to her September 9, 2019 work injury. As Dr. Burris testified, the purpose of a rhizotomy is symptomatic relief, because the nerves affected are thought to regenerate which can cause symptoms to return. As such, the procedure is designed to relieve the effects of Claimant's industrial injury. Claimant's request for authorization of the RFA procedure is granted.

ORDER

It is therefore ordered that:

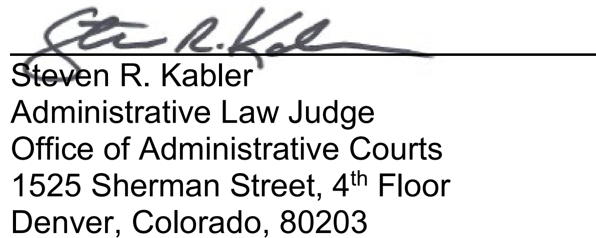
1. Claimant's request to reopen her claim for a change of condition is denied.

2. Claimant's request for authorization of the C5-6 and C6-7 rhizotomies recommended by Dr. Kawasaki is granted.

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

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

DATED: February 1, 2024



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-231-097-001 and 5-232-607-001

ISSUES

I. Whether the claimants established that the automobile accident that occurred on January 29, 2023, while driving to work is compensable.

II. Whether the respondents are responsible for the January 29, 2023, medical bills from UC Health, for each claimant.

PROCEDURAL HISTORY

The claimants, who worked for the same employer, were driving to work, and were involved in an automobile accident. Thereafter, each claimant filed an application for hearing. [Redacted, hereinafter MR] filed an application for hearing under WC No. 5-231-091-001. [Redacted, hereinafter WR] filed an application for hearing under WC No. 5-232-607-001. Since the claims arose out of the same accident, and involve the same employer, the claims were consolidated for this hearing.

STIPUILATION

The parties stipulated that if the claims are found to be compensable, then the January 29, 2023, medical bills from UC Health are related to the compensable claims.

FINDINGS OF FACT

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

1. The employer is a landscaping company that provides commercial landscaping, lawn maintenance, and snow removal services to their clients.
2. The employer's business is located in Loveland, Colorado.
3. The primary job duties of each claimant involved landscaping, lawn maintenance, and snow operations before, during, and after snow events.
4. During spring, summer and early fall, employees are given an opportunity to work 50 hours per week because most employees desire overtime pay. The employer tries to give all of its employees overtime whenever it is available. However, from November 1st to April 1st, employees drop to working 40 hours per week, consisting of 4 days, 10 hours per day, work weeks. The employer purposely tries to divide up maintenance tasks that can be done during any season to take place in the winter so that their employees are able to work 12 months per year.
5. With certain snowstorms, removal of snow cannot be done until it stops snowing. The employer, therefore, does ice mitigation for clients as well as equipment readiness,

and shop cleaning so employees can continue working, before working on removing snow. The employer does snow removal whenever it snows.

6. All employees must engage in snow removal as part of their job duties. According to the employer's Employee Handbook (Handbook), snow operations are an essential function of the employer's business and are considered an essential function of all employees. The Handbook also provides that being absent during snow operations, and without prior approval, is considered grounds for immediate termination. The employer's Handbook also indicates that snow operations may require employees to work abnormal hours and that "Snow operations performed by hourly employees outside of regular working hours, 6:00 a.m. – 6:00 p.m., may be paid at a premium rate of pay." However, despite the terms of employment, which required employees to be available on an as needed basis for snow removal, travel was not contemplated by the employment contract. What was contemplated by the employment contract was for each employee to show up at work, when requested, so they could work removing snow.
7. Although they worked for the same employer, each claimant had slightly different job duties, team assignments, and work assignments during winter and snow events. For example, WR[Redacted] was assigned to one crew. WR's[Redacted] job duties included operating heavy machinery, such as a loader, to remove snow. MR[Redacted] was assigned to different crew. MR[Redacted] used a shovel to remove snow since he did not have experience using heavy equipment.
8. Each claimant's job responsibilities required them to be on-call during the winter months so they could timely show up for work at the Loveland facility. That said, the manner in which each claimant got to work was up to each claimant.
9. Each claimant was paid an hourly wage depending on the work they did. WR[Redacted] was paid $19.50 per hour for landscaping work. He was paid $32.00 per hour for snow removal. His hourly rate for snow removal was based on his job duties, which included the use of heavy machinery - a loader - to remove snow. MR[Redacted] was paid differently. He was paid $20.00 per hour for landscaping. He was paid $27.00 per hour for snow removal, since he did not have experience using heavy machinery to remove snow, but instead used a shovel.
10. Each claimant was paid their hourly wage from when they arrived at the employer's Loveland facility until they left the employer's Loveland facility. The employer did not pay either claimant additional compensation in the form of a per diem or an increased hourly premium, associated with travel to the employer's place of business in Loveland. Neither claimant was paid for mileage to and from work and neither claimant was paid for travel time to and from work. They were paid more for snow operations because snow removal is a very important portion of the employer's business and the employees have to be available to work odd hours, such as coming in at 11:00 p.m., or midnight, and working long hours.
11. Neither claimant drove their personal car from their residence to the various job sites to start their day or drove their personal car from the various job sites home after their workday. Instead, each claimant was responsible for arriving at the employer's place of business in Loveland. Then, once they arrived at the Loveland facility and checked

in with their supervisor, they would be considered "on the clock." Then, each claimant would either be driven to the various job locations that required snow removal or, if authorized, would drive a company vehicle to each job location. Subsequently, at the end of the work shift, each claimant would return to the employer's place of business in Loveland, in the same manner, and then would be responsible for getting themselves home.

12. A snow event requiring snow removal operations was forecast for January 29, 2023, and into January 30, 2023.

13. The employer texted each of the claimants to report to the employer's business facility in Loveland for snow removal work. It was determined that the claimants would both arrive at work by 11:00 p.m. on January 29, 2023, to prepare and equip themselves for snow removal operations.

14. WR[Redacted] and MR[Redacted] are brothers-in-law and live in the same residence in Greeley, Colorado.

15. On the night of January 29, 2023, WR[Redacted] started driving himself and MR[Redacted] from their residence, in WR's[Redacted] pickup truck, to the employer's work facility in Loveland. They left at about 10:20 p.m. It was snowing and the roads were slushy. They traveled west on U.S. Highway 34. Then, WR[Redacted] turned onto Weld County Road 13 and drove northbound toward Weld County Road 60 and the employer's facility in Loveland Colorado.

16. At the same time, Mr. [Redacted, hereinafter DM] was driving his pickup truck southbound on Weld County Road 13 as the claimants travelled northbound. DM[Redacted] was allegedly driving under the influence of alcohol and/or drugs and was driving without his headlights on. Then, DM[Redacted] crossed into the northbound lane and collided with WR's[Redacted] truck, causing injuries to both claimants. Both claimants were injured and taken by ambulance to U.C. Health where they were provided with medical treatment.

17. Since the accident occurred before they arrived at work at the Loveland facility, and they were not being paid while driving to work, the accident did not occur during working hours. Nor did the accident occur on the employer's premises.

18. The police officer who investigated the accident concluded that the proximate cause of the accident was DM's[Redacted] use of alcohol and/or drugs. Moreover, the claimants did not establish that the road conditions - due to the snow - caused the accident. Thus, the weather and the slushy roads were not established to be the proximate cause of the accident.

19. The employer did not direct or require the claimants to take a particular route to work.

20. The claimants did not establish that travel is a substantial part of the service to the employer.

21. The claimants did not establish that travel was contemplated by the employment contract.

22. The claimants did not establish that the drive to work created a risk that was higher than any other worker driving to work at that time. They also failed to establish that

the risk of driving to work at that time was increased to such an extent due to the weather, or other factors, that any portion of the drive to work should be considered a zone of special danger, or that the entire drive to work was a zone of special danger.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether the claimants established that the automobile accident that occurred while driving to work is compensable.

An injury may be compensable if, at the time of the injury, the employee was performing services arising out of and in the course of the worker's employment. § 8-41-301(1)(b), C.R.S. 2020. "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 his employment and during an activity that had some connection with his work-related functions." *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1999). To establish that an injury arose 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." *Id.*

"In general, a claimant who is injured while going to or coming from work does not qualify for recovery because such travel is not considered to be performance of services arising out of and in the course of employment." *Id.* This doctrine is commonly called the "going to and from work" rule. *Id.* However, in some cases an accident that occurs while an employee is driving to or from work can be compensable.

The manner to determine whether certain circumstances exist, which can make an accident that occurs while driving to or from work compensable, is set forth in the *Madden* case. The *Madden* court held that:

> the proper approach is to consider a number of variables when determining whether special circumstances warrant recovery under the Act.
>
> These variables include but are not limited to:
>
> (1) whether the travel occurred during working hours,
>
> (2) whether the travel occurred on or off the employer's premises,
>
> (3) whether the travel was contemplated by the employment contract, and
>
> (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Madden at 864.

The Court further explained that the third variable has the potential to encompass many situations. The Court explained that the common link among compensable situations is when travel is a substantial part of the service to the employer. The Court explained that the examples can be summarized as follows:

> (a) when a particular journey is assigned or directed by the employer,

> (b) when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work,[1] and
>
> (c) when travel is singled out for special treatment as an inducement to employment, such as when the employer provides transportation or pays the cost of the employee's travel to and from work.

Id. at 865.

Then, the Court went on to explain the fourth variable, the zone of special danger. The Court explained that:

> the zone of special danger variable refers to injuries that occur off an employer's premises but so close to the zone, environment, or hazards of such premises as to warrant recovery under the Act. The court went on to explain that they have allowed recovery when an employee is injured on the premises of someone other than his employer. *See Martin K. Eby Constr. Co. v. Industrial Comm'n*, 151 Colo. 320, 323-24, 377 P.2d 745, 747 (1963) (affirming award to an employee who was injured in an automobile accident sixteen miles inside a missile site, while driving to a construction job). The Court also noted that they have allowed recovery for accidents occurring on public streets that must be crossed in the course of travel from employer-provided parking to the place of employment. *See State Compensation Ins. Fund v. Walter*, 143 Colo. 549, 555-56, 354 P.2d 591, 594 (1960).

Id. at 865.

In this case, the first two factors are not met. The travel did not occur during working hours and the travel or accident did not occur on the employer's premises.

The third factor – whether the travel was contemplated by the employment contract – was also not met when analyzed under the *Madden* factors. First, in this case, a particular journey was not assigned or directed by the employer. For example, the employer did not tell the claimants that they had to drive to a particular location for snow removal purposes. Instead, each claimant was required to show up at work, at the Loveland facility, and then they would either drive a company vehicle to the jobsite or be driven by a co-worker to the jobsite(s). Moreover, the employer did not require the claimants to take a special route to the Loveland facility. The claimants were allowed to drive any route they wanted. All that was required was for the claimants to be at work at the appropriate time so they could begin working.

Second, the claimants' travel was not at the employer's express or implied request and the travel did not confer a benefit on the employer, beyond each claimant being at

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[1] According to the supreme court, "[s]uch travel by an employee, i.e., that at the express or implied request of the employer or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work, has been labeled as 'travel status." *Madden v. Mountain West Fabricators*, 977 P.2d 861, 865 (Colo. 1999).

work. For example, the employer neither expressly, nor impliedly, requested the claimants to travel to a particular location for the benefit of the employer – such as specific jobsite. All the employer requested was that each claimant arrive at work at a particular time. Merely requiring a worker to arrive at work at a particular time, even if the employee is on-call, is not the type of travel that is expressly or impliedly requested which would make a workers' travel to work a covered activity. If so, all employees who are asked or required to be at work at a particular time based on workloads, would be considered traveling at the express or implied request of their employer and the going to and from work rule would be eviscerated.

Moreover, the claimants driving to work did not confer a benefit to the employer, other than the claimants being at work. For example, the claimants driving to work did not allow, or result in, the claimants using their personal car to drive to various jobsites throughout the day, for the benefit of the employer - thus alleviating the employer's responsibility to get each worker to a jobsite to remove snow. Again, the only benefit of requesting the claimants to come to work at a particular time – was for the claimants to be at work to work.

Third, travel was not singled out for special treatment as an inducement to employment. For example, the employer did not provide the claimants with transportation to and from work. Moreover, the employer did not pay any portion of the claimants' travel expenses to and from work and did not pay them for their time traveling to work.

Therefore, based on the totality of the evidence, the ALJ finds and concludes that travel was not contemplated by the employment contract. As a result, the third *Madden* factor is not met.

The fourth *Madden* factor looks at whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose. In this case, the claimants contend in their proposed order that:

> Late night travel during a snow event, and with late night travel rendering it more likely that intoxicated drivers such as DM[Redacted] will be on the road, created a "zone of danger" that did not normally exist during a regular, daily commute.

In *Madden*, the court explained that the fourth variable, the zone of special danger, refers to injuries that occur off an employer's premises, but so close to the zone, environment, or hazards of such premises as to warrant recovery under the Act. For example, the Court cited *Martin K. Eby Constr. Co. v. Industrial Comm'n*, 377 P.2d 745, 747 (1963), in which the court affirmed an award to an employee who was injured in an automobile accident sixteen miles inside a restricted missile site, while driving to a construction job. The Court also cited *State Comp. Ins. Fund v. Walter*, 354 P.2d 591, 594 (1960), in which the court allowed recovery where an employee was injured crossing a public street bisecting the premises of his employer while on his way to a parking area where a space had been assigned to him on the employer's premises.

In this case, the evidence did not establish that the accident occurred in a "zone of special danger" in proximity to the Loveland facility. For example, it was not established that the accident occurred at a dangerous intersection, or dangerous railroad crossing,

that was either in close proximity to the Loveland facility, or had to be crossed, to get to the Loveland facility.

Nor did the evidence establish that the entire drive to work should be considered a “zone of special danger.” For example, if there was a blizzard, and a travel advisory was issued, which told the general public to not drive, but yet the claimants were summoned to work and injured due to driving to work during the blizzard – such factors might result in a finding that the drive to work created a “zone of special danger.” But that is not what occurred here.

As stated above, the claimants also contend that driving on a Sunday night created a “zone of special danger” because the likelihood of being involved in an accident with an intoxicated driver is increased at night. The court, however, does not find this alleged factor to create a “zone of special danger” for the drive to work. Nor did the claimants present any credible or persuasive evidence that driving at night created such a risk, and that such risk can be elevated to result in a “zone of special danger” for the claimants’ drive to work. If such a factor were allowed to be an exception to the going to and from work exception, then any accident that occurred at night would be considered work related.

As a result, the ALJ finds and concludes that the claimants failed to establish, based on the totality of the evidence, that the accident occurred due to a “zone of special danger” created by the requirements that they arrive at work at 11:00 p.m. so they could perform their job.

After considering all the evidence, the ALJ finds and concludes that the claimants failed to establish that the “going to and from work” rule should not apply to the specific facts and circumstances in this matter. Thus, the ALJ finds and concludes that the claimants failed to establish by a preponderance of the evidence that the automobile accident is a compensable event.

ORDER

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

1. The claimants’ claims are denied and dismissed.

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

DATED: February 5, 2024

s/ Glen Goldman

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

ISSUES

I. What are the immediate legal and procedural consequences that Claimant's untimely death has on his claim for benefits, including reasonably necessary and related medical care and ongoing temporary disability benefits?

II. If Claimant remains the real party in interest to pursue a claim for medical and temporary disability benefits, whether Respondents established, by a preponderance of the evidence, that they are entitled to withdraw a previously filed admission of liability on the basis that Claimant did not suffer a compensable injury.

III. If Respondents failed to prove that Claimant did not suffer a compensable injury, whether Respondents established, by a preponderance of the evidence, that Claimant was responsible for his job termination, thus ending his entitlement to wage loss benefits.

IV. Whether Claimant established the amount of his average weekly wage?

V. Whether Respondents' election to file a Final Admission of Liability on November 17, 2023 and Claimant's choice not to file an objection to the same effectively closed the file as to all issues endorsed for hearing, including Respondents' request to withdraw a previously filed General Admission of Liability?

Because the ALJ concludes that Claimant's claim for additional medical benefits closed with his passing and he is no longer the real party in interest to assert additional claims for ongoing temporary disability benefits, this order does not address Issues III-V outlined above.

FINDINGS OF FACT

Based on the testimony and evidence presented, the undersigned ALJ enters the following findings of fact:

Claimant's History of Knee Pain & Treatment

1. Claimant is a former Sales Associate/General Manager for Employer. He has a history of bilateral knee meniscal repairs occurring approximately 10 years ago. Following these surgeries, Claimant experienced persistent knee pain and swelling. On July 15, 2019, Claimant presented to his primary provider (Kaiser Permanente) with complaints of joint pain, particularly in his shoulders. (RHE E, pp. 47-53). During this appointment, Claimant also reported knee pain and swelling. *Id.* at p. 50. Because Claimant expressed concern that his parents may have had rheumatoid arthritis, his

provider ordered bilateral shoulder x-rays and blood work, including a rheumatoid factor test. *Id*. at p. 51.

2. Claimant returned to Kaiser Permanente on August 12, 2020 with complaints of bilateral knee and ankle pain, which Claimant felt could be related to being on his feet all day at work. (RHE E, p. 58). X-rays were ordered and Claimant was instructed to take Mobic once a day for pain. *Id*. at p. 62. The results of Claimant's x-rays revealed no acute osseous abnormality, no joint effusion and "[p]reserved joint spaces." *Id.* at p. 68. Nonetheless, Claimant was given Osteoarthritis Care Instructions (RHE E, pp. 63-64). During his hearing testimony, Claimant confirmed that he had been prescribed Mobic before the alleged injury forming the subject of this litigation and that he was still taking it.

Claimant's Alleged October 4, 2022 Injury and Subsequent Treatment

3. Claimant alleged a work injury to his right knee on October 4, 2022. (Clmt's Hrg. Ex. (CHE) 1, p. 3) In a first report of injury completed October 5, 2022, Claimant asserted that the injury occurred at approximately 11:00 a.m. on October 4, 2022 and that he reported it this same day. *Id.* Review of the First Report documents that Claimant was in the process of moving mattresses in the store showroom when he felt a pop in his right knee. *Id*. The pop was accompanied by severe pain to the inside of the right knee while weight bearing or attempting to walk. *Id.*

4. Claimant's Exhibit 15 contains two photographs of the mattresses as they existed after the alleged injury. (CHE 15, pp. 87-88). Claimant testified these photographs accurately depicted how the mattresses were positioned when he was attempting to move one and felt the pop in his right knee. Claimant testified that he took the photos and sent them to his supervisor, [Redacted, hereinafter BS] because he wanted BS[Redacted], to see how he hurt himself. Claimant initially testified that "no one" instructed him to take the photos; however, he later changed his testimony and said that BS[Redacted] asked him to take the photos. BS[Redacted] testified that Claimant did not reach out to him on the date of injury, nor did he ask Claimant to take photos of the date of injury. (Depo. Tr. of BS[Redacted], p. 7, ll. 24-25).

5. Claimant sought treatment at Concentra for his alleged knee injury on October 5, 2022. (Resp. Hrg. Ex. (RHE) C, p. 14). Respondents' Exhibits contain select pages of records from the initial October 5, 2022 date of visit. These selected records do not mention of Claimant's reported mechanism of injury (MOI) or its occurrence at work. *See* RHE C, pp. 14-18. Per Claimant's exhibits, Claimant initially presented to Concentra "with [a] right knee injury after moving a mattress." (CHE 17, p. 104).

6. Regarding the MOI, Claimant advised Physician Assistant (PA), Tara Guy that he developed right medial knee pain "after pulling a 150# boxed mattress out from a vertical stack of boxes." He reported that he was "gripping at [the] "handle down low"

and felt a “sharp pull/pop” in his right knee when he pulled it out of the stack.[1] (CHE 17, p. 105). PA Guy noted that Claimant had a pre-existing history of bilateral meniscus repairs approximately 10 years prior and that he was already taking meloxicam and gabapentin. *Id.* at p. 105-106. Nonetheless, the record from this visit is devoid of any indication that Claimant had prior complaints of pain and swelling in the knees as referenced in the Kaiser records from July 15, 2019 and August 12, 2020.

7. Physical examination of the right knee elicited complaints of tenderness over the medial collateral ligament and range of motion testing was deferred due to pain. PA Guy assessed a “probable MCL strain” noting further that the “[h]istory and mechanism of injury . . . appear[ed] to be consistent with [Claimant’s] presenting symptoms and physical exam.” *Id.* at p. 106.

8. PA Guy administered a 60mg Ketorolac Tromethamine injection and prescribed a knee brace. (CHE 17, pp. 106, 113). She also assigned restrictions of no kneeling, no crawling, no stairs, no climbing, and no pushing or pulling more than 20 pounds. *Id.* at p. 107. Dr. Daniel Peterson reviewed and signed PA Guys October 5, 2022 documentation noting that Claimant’s objective findings were consistent with his history and a work-related mechanism of injury. *Id.* at p. 107, 112.

9. Claimant returned to Concentra three days later on October 8, 2022 reporting worsening knee pain. (CHE 17, p. 126). He was evaluated by Nurse Practitioner (NP) Paula Jiron-Finn who documented Claimant’s report of 3/10 right knee pain at best and a 9/10 at worst, despite using ice, elevating his leg, and using gabapentin. *Id.* Physical examination documented limited range of motion in all planes due to pain and crepitus with tenderness to palpation of the medial aspect of the right knee. *Id.* at p. 127. NP Jiron-Finn prescribed Nabumetone, 500mg, to be taken once every 12 hours. *Id.* at p. 128. She also requested an MRI, ordered physical therapy (PT) and provided Claimant a set of crutches. *Id*. at p. 128.

10. Respondents would subsequently file a General Admission of Liability (GAL), accepting liability for Claimant’s alleged October 4, 2022 injury.[2]

11. On October 13, 2022, Claimant was referred to an orthopedic specialist for evaluation. (CHE 17, p. 140).

12. The aforementioned MRI was performed the following month on November 21, 2022. (CHE 18, pp. 281-82). The history listed was: “Right knee pain. Twisted right knee. Difficulty weight-bearing.” The right knee MRI revealed the following impressions:

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[1] During a recheck on October 20, 2022, the MOI was documented as follows: [Claimant] was pulling a box with a mattress in it that weighed over 200lb. When he stood up he heard a pop in his right knee. He didn’t fall. He had difficulty walking and [had] instant pain.” (CHE 17, p. 154).
[2] Although referenced by both parties, neither Claimant nor Respondents included a copy of the GAL with their exhibits to the ALJ for review.

- Posterior horn and body medial meniscal tear.
- Osteoarthritis medial compartment, moderate to marked in severity, with severe cartilage erosion identified. There is reactive osteitis identified. From the arthritic changes, it is difficult to exclude an early osteochondral lesion or insufficient fracture in the area of edema that is present in the medial femoral condyle.
- Anterior cruciate ligament strain.
- Medial collateral ligament strain.
- Joint effusion with synovitis.
- Popliteus muscle strain is present. Inflammation in the prepatellar soft tissue is present.

Id. at p. 282.

13. Claimant's orthopedic evaluation was performed by PA Matthew Albrecht at the Orthopedic Centers of Colorado on November 22, 2022. (CHE 19, p. 286). PA Albrecht documented the following history regarding Claimant's October 4, 2022 injury:

> The [Claimant] is a 55 year old male who presents for an evaluation of the knee. . . . This is a workers comp injury. [Claimant] injured his right knee on 10/4/2022. He is a store manager at [Redacted, hereinafter MF]. He was try (sic) to move a bed by himself in the front of the store. As he was pulling on the bed it felt like something gave way in his knee. Since that time he said (sic) recurrent swelling and persistent pain. He has had feelings of instability. He has had difficult ambulating. He has also had difficulty standing for long periods of time. He has been treating his symptoms using rest, ice, activity modification, meloxicam, gabapentin, as well as crutches.

Id.

14. As part of his evaluation, PA Albrecht "reviewed and interpreted" Claimant's November 21, 2022 MRI of the right knee noting that it demonstrated tri-compartmental changes. Indeed, PA Albrecht noted a "complex tear of the posterior horn of the medial meniscus" in addition to "full-thickness articular cartilage loss and associated subchondral edema" on both the medial femoral condyle and the tibial plateau in the medial tibiofemoral compartment of the right knee. There was also "moderate to severe" degenerative change noted in the patellofemoral compartment with areas of full-thickness cartilage loss noted. Although no meniscal pathology was present in the lateral compartment, mild degenerative change was evident. (CHE 19, p. 287). No ligamentous pathology fractures or dislocations were noted nor were there any loose bodies present in the knee. *Id.*

15. PA Albrecht opined that Claimant's "history, symptoms, signs and imaging" were consistent with "an acute osteoarthritis exacerbation of the right knee."

(CHE 19, p. 287). PA Albrecht indicated that definitive treatment would consist of total knee arthroplasty (TKA) but set forth a set of conservative treatment options, including frequent icing, rest, activity modification, bracing, PT, supplements and medications and injection therapies such as corticosteroid, viscosupplementation, PRP and stem cell therapies. *Id.* Claimant elected to proceed with conservative care and underwent a corticosteroid and Durolane (viscosupplementation) injection on December 20, 2022 with Dr. Purcell. (CHE 19, p. 295, 298).

16. Claimant returned to Concentra on November 23, 2022 for a follow-up appointment. (CHE 17, p. 181). During this encounter, Claimant informed NP Jennifer Livingston that he had seen Dr. Purcell who told him he had "severe osteoarthritis" and would need a knee replacement. Id. at pp. 181-182.

17. Claimant returned to the Orthopedic Centers of Colorado approximately 3 months later on March 16, 2023, during which appointment he was evaluated by PA Andrew Domer. (CHE 16, pp. 92-94, Exhibit 19, pp. 298-299). Claimant reported improvement in his knee pain following his corticosteroid injection initially; however, he experienced a "very rapid recurrence of pain and symptoms in the right knee" which was persistent and "causing difficulty with even simple activities of daily living". *Id.* According to Claimant, the Durolane injection provided "very minimal relief" of his persistent pain. *Id.* PA Domer advised Claimant that the "only thing . . . likely [to] alleviate his current pain and symptoms and return him to normal functionality would be progression to total knee replacement." *Id.* at pp. 93, 299. Claimant expressed a desire to proceed and Dr. Michael Schuck requested prior authorization to proceed with the recommended TKA on April 17, 2023. (CHE 16, p. 91).

Dr. O'Brien's Medical Records Review

18. Upon receipt of the request for prior authorization, Respondents solicited a medical records review from Dr. Timothy O'Brien requesting his opinions on whether the recommended/requested TKA was reasonable, necessary and causally related to Claimant's alleged October 4, 2022 work injury. (RHE A, pp. 3-7).

19. After conducting his medical records review, Dr. O'Brien issued a report outlining his opinions on April 25, 2023. (RHE A). In his report, Dr. O'Brien opines that Claimant did not suffer an injury to his right knee on October 4, 2022. *Id.* According to Dr. O'Brien, the described MOI was "innocuous" and unlikely to cause meniscus tearing.[3] *Id*. at p. 5. Indeed, Dr. O'Brien noted, the MOI was not the type that "would produce a meniscus tear[4] and it certainly was not traumatic enough to overcome the injury threshold." *Id.*

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[3] Based upon his conclusion that Claimant was "merely pulling on a mattress" without twisting on a planted foot or undergoing acceleration or deceleration and in the absence of having something contact/impact the knee when he developed pain. (RHE A, p. 5).

[4] Because the meniscus tearing was in multiple planes, Dr. O'Brien concluded that it was "chronic and long standing rather than acute." (RHE A, p. 5).

20. According to Dr. O'Brien, Claimant's right knee symptoms were a consequence of the "expected and predictable manifestation of his end stage bi-compartmental osteoarthritis" rather than the described MOI in this case. (RHE A, p. 6). Moreover, Dr. O'Brien rejected any suggestion that the MOI in this case aggravated or accelerated Claimant's underlying osteoarthritis. Indeed, Dr. O'Brien noted: "The only type of injuries that result in a substantial aggravation or in an acceleration of underlying osteoarthritis are high energy injuries that cause inter articular fractures or multi ligamentous tearing." *Id*. Because Claimant did not suffer any such fractures or ligamentous tearing consistent with being an "accelerator" of his underlying osteoarthritis, Dr. O'Brien concluded that Claimant's pulling of a mattress "simply [did] not generate enough energy to result in a substantial aggravation or acceleration of [his] underlying osteoarthritis." *Id.* Accordingly, Dr. O'Brien concluded that Claimant's need for a TKA was solely related to Claimant's "long standing" pre-existing right knee osteoarthritis. *Id*. at p. 7.

21. The ALJ interprets Dr. O'Brien's report to suggest that Claimant's right knee pathology, as referenced in the November 21, 2022 MRI report is degenerative in nature and that Claimant's persistent symptoms and need for surgical treatment (TKA) is related to the natural progression of a pre-existing condition without contribution from the described October 4, 2022 MOI.

22. Based upon Dr. O'Brien's report, Respondents denied the request for prior authorization to proceed with the recommended TKA surgery. (CHE 16, pp. 99, 101). Respondents also noted that they would not continue Claimant's TTD (temporary total disability) benefits. *Id*. at p. 101.

Dr. Miguel Castrejon's Independent Medical Examination

23. Claimant sought an independent medical examination (IME) with Dr. Miguel Castrejon. Dr. Castrejon evaluated Claimant on June 21, 2023. (CHE 20, p. 305). Claimant described the following MOI to Dr. Castrejon:

> On October 4, 2022, a Tuesday, [Claimant] indicates that he was in the process of laying down a packed 200-pound mattress to avoid the mattress falling onto any customers. As he performed this activity, his right knee went into a semi-squatted position. As he pushed up on the mattress, he experienced a severe pain to the anteromedial aspect of his knee that was followed by swelling.

(CHE 20, p. 306).

24. Claimant also reported that he had suffered a work-related injury to his right knee in 2010 that required a partial medial meniscectomy from which he reportedly made a full recovery. (CHE 20, p. 310). Indeed, Claimant denied that he had further knee pain until the event of October 4, 2022. *Id.* He also denied the need for medical treatment or experiencing any limitation regarding his daily activities until the incident

occurring October 4, 2022. *Id.* At the time of the IME, Claimant was reporting difficulty with a significant number of his activities of daily living, including, but not limited to, bathing, dressing, standing, sitting, kneeling, squatting, twisting, driving, etc. (CHE 20, p. 306).

25. Although he recognized that the degenerative changes in the right knee were significant, Dr. Castrejon noted that there was "no documentation available that contradicts the claimant's statements with regard to being, essentially, asymptomatic until the work related activity of October 4, 2022." (CHE 20, p. 310). Moreover, Dr. Castrejon noted that there were "no employment records that document [Claimant's] inability to perform the requirement (sic) of his position or loss of worktime for unrelated knee issues." *Id*.

26. Based upon the information available to him, Dr. Castrejon opined that the October 4, 2022 incident caused a "permanent aggravation of the claimant's underlying degenerative joint condition for which he will require [a] total knee arthroplasty." (CHE 20, p. 311). According to Dr. Castrejon, the "need for this procedure is considered a direct consequence of the industrial event of October 4, 2022." *Id.*

27. Dr. Castrejon did not have the benefit of reviewing Claimant's Kaiser records pre-dating the October 4, 2022 incident and he apparently accepted Claimant's representation that his knee was "essentially asymptomatic" prior to the work injury at face value.

28. As noted, the Kaiser records reveal that Claimant's underlying condition was not entirely asymptomatic for the time period he previously attested to. (*See* RHE E, pp. 47-69).

Dr. O'Brien's August 1, 2023 Supplemental Record Review Report

29. Respondents sent Dr. Castrejon's June 21, 2023 IME report to Dr. O'Brien for review and comment. On August 1, 2023, Dr. O'Brien authored a "Supplemental Record Review" report. (RHE A, p. 8). In his August 1, 2023 report, Dr. O'Brien reiterated his opinion that the activities Claimant was performing on October 4, 2022 "did not create new tissue damage to his arthritic knee." *Id*. at p. 9. Thus, the pain that Claimant experienced while performing these activities was/is a "reflection of [Claimant's] underlying arthritis but not of new tissue tearing in his knee." *Id.* Accordingly, it remained Dr. O'Brien's opinion that Claimant did not sustain a work related injury on October 4, 2022 nor did the incident with the mattress on that day aggravate or accelerate his underlying condition leading Dr. O'Brien to repeat his opinion that Claimant's need for a total knee arthroplasty was unrelated to the claimed October 4, 2022 injury. *Id.*

The Testimony of Dr. O'Brien

30. Dr. O'Brien testified as a Board Certified, Level II Accredited expert in orthopedic surgery. He has extensive surgical experience in performing total knee arthroplasty procedures.[5] Dr. O'Brien testified consistently with the opinions expressed in his April 25th and August 1, 2023 records review reports. Dr. O'Brien reiterated his opinion that Claimant did not injure his right knee on October 4, 2022, while moving a 150-200 pound mattress because the MOI was insufficient to cause tissue yielding. According to Dr. O'Brien, the condition of Claimant's right knee and his need for treatment are related to both the natural and probable progression of his pre-existing arthritis and chronic meniscal deterioration caused by the arthritic process and Claimant's previous injury leading to his prior arthroscopy.

31. While Dr. O'Brien testified that the radiographs obtained at Kaiser on August 12, 2020 were of limited value in determining the extent of Claimant arthritis because those x-rays were not weight bearing, he noted that the MRI performed November 21, 2022 supported his opinion that Claimant had long standing degeneration of the cartilage and meniscus of the right knee. Indeed, Dr. O'Brien testified that the pathology noted on the MRI supports a conclusion that the observed meniscal tearing was degenerative in nature because the tearing was noted in multiple planes and there was no other evidence of an acute injury, including warmth, swelling or bruising about the right knee. Consequently, Dr. O'Brien reiterated his opinion that while the need for a right TKA may be reasonable and necessary, it was not related to any incident which occurred while moving a mattress on October 4, 2022.

32. Dr. O'Brien testified that the content of the Kaiser records also supported his opinion that end stage arthritis, such as that present in Claimant's right knee, was never asymptomatic as the Kaiser records document pre-injury complaints of pain prompting Claimant's use of pain medication.

33. The evidence presented, including the MRI report, the Kaiser records and the testimony of Dr. O'Brien persuades the ALJ that Claimant was probably experiencing pain in the right knee pre-dating the October 4, 2022 incident and that this pain was likely emanating from the combined effects of the natural progression of his pre-existing degenerative osteoarthritis and the further deterioration of his medial meniscus caused by his prior arthroscopy.[6] Accordingly, Claimant's testimony that his right knee was asymptomatic before October 4, 2022 is unconvincing.

The Testimony of Dr. Castrejon

34. Dr. Castrejon testified as a Board Certified, Level II Accredited expert in Physical Medicine and Rehabilitation (PM&R). During his testimony, Dr. Castrejon reiterated his opinion that the October 4, 2022 incident involving Claimant's squatting down in order to lift and move a boxed mattress caused a substantial change in the condition of Claimant's right knee both in terms of pain and function. Accordingly, Dr.

[5] Dr. O'Brien testified that he has performed over 3,000 TKA procedures.
[6] Dr. Castrejon would later agree that the extent of degeneration demonstrated on MRI would likely have caused pain which pre-existed the October 4, 2022 incident.

Castrejon opined that the October 4, 2022 incident aggravated Claimant's underlying arthritic condition giving rise to his need for medical care. Although he did not review the Kaiser records, which he subsequently agreed established some element of pain prior to October 4, 2022, Dr. Castrejon testified there was no documentation to substantiate that this pain was functionally impairing prior to October 4, 2022. Thus, Dr. Castrejon opined that Claimant's need for a TKA was directly related to Claimant's moving the mattress in question.

35. Despite concluding that the October 4, 2022 incident aggravated Claimant's preexisting arthritis, Dr. Castrejon conceded that Claimant was both untruthful to him and the Court when he reported that his right knee was asymptomatic prior to October 4, 2022.

Claimant's Death

36. Claimant unexpectedly passed away on Wednesday, November 1, 2023. His death occurred eight days after the hearing was conducted in this claim and before an order regarding the merits of the questions raised at hearing was issued. Claimant's counsel was informed of the death on November 2, 2023, by [Redacted, hereinafter CO], Claimant's adult son. CO[Redacted] is, upon information and belief, Claimant's oldest son and next of kin. Claimant was not married but had one other son, [Redacted, hereinafter CR].[7] (CHE 21).

37. It is uncontested that Claimant's counsel does not represent Claimant's estate nor has the estate or a personal representative for the estate been joined as a party to the current litigation. Finally, Claimant's counsel advised the ALJ that he does not represent any dependent that would be recognized as such by the Colorado Workers' Compensation Act.

The November 17, 2023 Final Admission of Liability

38. Respondents filed a Final Admission of Liability (FAL) on November 17, 2023, following Claimant's untimely death. (CHE 21). The FAL was mailed to Claimant's address and counsel of record. *Id*. The FAL terminated Claimant's ongoing Temporary Total Disability ("TTD") benefits effective October 31, 2023. Respondents relied upon an email from Claimant's counsel dated November 2, 2023 that Claimant was deceased, along with an obituary documenting his death to have been November 1, 2023 to terminate ongoing TTD benefits in accordance with WCRP, Rule 6-2(A)(4). *Id.* Although the FAL denies liability for maintenance medical care, it admits to the payment of $16,791.66 in medical expenses. It further admits to a total of $26,037.53 in wage loss benefits: TPD in the amount of $1,260.89 for the time period of February 6, 2023 to March 21, 2023 and TTD benefits for the time period of March 22, 2023 through October 31, 2023. *Id.* A claimed overpayment of $378.96 is also reflected on the November 17, 2023 FAL. *Id.* Finally, the FAL contains the following statements in the "Remarks and basis for permanent disability award" section of the document: "Any and

[7] No information regarding CR's[Redacted] age or dependency status was provided to the ALJ.

all benefits and penalties not admitted to specifically are denied. Per the attached November 2, 2023 email from [Claimant's Counsel], temporary disability benefits terminated pursuant to WRCP 6-2(A) (4). Liability for death benefits is denied." *Id.*

39. The FAL plainly states it is a legal document listing the benefits that "have been or will be paid." (CHE 21). It provides for the right to object to benefits admitted or not admitted. *Id*. It also provides that if not objected to within 30 days of its filing, the "claim will be closed as to issues admitted in the Final Admission of Liability." (CHE 21 at page 3 of 7- Objection to Final Admission of Liability).

40. Neither Claimant nor his attorney of record filed an objection to the November 17, 2023, Final Admission of Liability. Accordingly, the FAL became final as a matter of law on the 31st day after its issuance. The ALJ takes administrative notice that the 30th day after November 17, 2023 was Sunday, December 17, 2023. Being that the last day to object fell on the weekend, the last day to file an objection became Monday, December 18, 2023. As noted, no objection was filed and no further admissions have been filed as of the date of this order. Accordingly, the ALJ finds that the claim automatically closed on December 18, 2023. Because Claimant died before Respondents filed their November 17, 2023 FAL, withdrawal of this FAL was not before the ALJ when the case was tired on October 24, 2023. As of the date of this order, Respondents have not sought to withdraw their November 17, 2023 FAL.

CONCLUSIONS OF LAW

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

Generally

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial*

Commission, 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). In this case, the opinions of Dr. O'Brien regarding the probable cause of Claimant's progressive symptoms and need for a TKA being related to pre-existing arthritis are supported by the totality of the evidence presented. Conversely, Respondents have established that the opinions expressed by Dr. Castrejon are based, in large part, upon Claimant's inconsistent and unreliable verbal reports. Accordingly, the ALJ concludes that the opinions of Dr. O'Brien are credible and more persuasive than those of Dr. Castrejon.

Claimant's Death

C. Claimant's unexpected death and Respondents decision to file a FAL on November 17, 2023 raises questions with regard to the identity of the real party in interest to the claim and claim closure. Here, Respondents contend that because Claimant's counsel does not represent either a surviving dependent or Claimant's estate, there is "no party upon whose behalf [Claimant's] counsel has submitted his proposed specific findings of fact and order regarding who is a real party in interest or has standing" in this claim. Accordingly, Respondents urge the ALJ to strike Claimant's proposed order.

D. Conversely, Claimant contends that the claim is closed and that Respondents "should be barred from seeking to withdraw their admission of liability, absent a showing of fraud." Moreover, because "Claimant is deceased, and Respondents only recourse is relief from payment of prospective benefits, which Claimant himself can no longer seek, Claimant argues that the issue of withdrawal of the GAL is moot. Initially the ALJ notes that Claimant had standing to bring his claim for benefits. Standing is a requirement that must be satisfied to decide a case on its merits. *Ainscough v. Owens*, 910 P.3d 851, 855 (Colo. App. 2004). A party has standing if (1) the party has alleged an actual injury from the challenged action; and (2) the injury affects a legally protected or cognizable interest. *O'Bryant v. Public Utilities Commission*, 778 P.2d 648 (Colo. 1989); *Bradley v. Industrial Claim Appeals Office,* 841 P.2d 1071 (Colo. App. 1992). The injury in fact requirement is satisfied if the party demonstrates that the activity complained of has caused, or has threatened to cause, injury to that party such that it can be said with fair assurance that there is an actual controversy for judicial resolution. *Dunlap v. Colorado Springs Cablevision*, 829 P.2d 1286 (Colo. 1992). Once the injury in fact is demonstrated, the party must show that the injury is to a legally protected interest emanating from a constitutional, statutory or judicially created rule of law that entitles the claimant to some form of judicial relief. *Board of County Commissioners v. Bowen/Edwards Associates*, 830 P.2d 1045 (Colo. 1992). While the ALJ is convinced that Claimant had standing to bring his claims initially, his unforeseen death now raises questions as to who the real party in interest is to any claims that survive his unexpected passing.

Real Party in Interest

E. “Real party in interest” is defined as the “[p]erson who will be entitled to benefits [if the] action is successful, that is, the one who is actually and substantially interested in the subject matter as distinguished from one who has only a nominal formal, or technical interest in or connection with it” (Black’s Law Dictionary, *Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, Sixth Ed. 1990, citing *Maryland Cas. Co. v. King*, 381 P.2d 153, 156 (Okla. 1963). Pursuant to Colorado Rule of Civil Procedure (CRCP) 17(a), “every action shall be prosecuted in the name of the real party in interest . . . .” CRCP, Rule 17(a). With Claimant’s death, the question for determination is who, if anyone, retains the right to assert any claims for medical and/or TTD benefits. Given that Claimant is deceased, his request for a right TKA cannot be granted. In this case, the ALJ agrees with Respondents that, as a matter of law, there is no party upon whom the claim for medical benefits can be bestowed. Accordingly, the ALJ concludes that the issue of Claimant’s entitlement to additional medical benefits is moot. An issue is moot when the relief sought, if granted, would have no practical effect. *Brown v. Colorado Department of Corrections*, 915 P.2d 1312 (Colo. 1996). Thus, Claimant’s request for medical benefits must be denied and dismissed.

F. It is also clear from the statements of Claimant’s counsel that he does not represent either Claimant’s estate or any surviving dependent. Thus, while Claimant’s estate/dependents can be the real party in interest to invoke the aid of the Court to vindicate any claim for accrued and unpaid TTD benefits (*Estate of Huey v. J.C. Trucking, Inc*., 837 P.2d 1218 (Colo. 1992), neither has been joined as a party to the current litigation nor does Claimant’s counsel represent their interests. Consequently, the ALJ concludes that there is no party upon whose behalf Claimant’s counsel has submitted his proposed specific findings of fact and order who is a real party in interest to a claim for ongoing TTD. To be clear, the ALJ is not reaching the merits for any claim of entitlement to TTD by the estate but rather that the estate is the real party in interest and that Claimant’s counsel does not have standing to bring any such claim. *Goodwin v. Dist. Court,* 779 P.2d 837 (Colo.1989); *Ogunwo v. Am. Nat'l Ins. Co.,* 936 P.2d 606 (Colo.App.1997).

Respondent’s Request to Withdraw their Previously Filed General Admission of Liability

G. Even if Claimant had not unexpectedly passed away, the ALJ is convinced that Respondents have established that Claimant did not suffer a compensable injury to his right knee on October 4, 2022 giving rise to his need for treatment or disability. Pursuant to § 8-43-201(1), C.R.S., Respondents bear the burden of proof regarding any attempt to modify an issue that has previously been determined by the filing of a general or final admission of liability or an order. *Section 8-43-201(1), C.R.S*.; *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (Oct. 1, 2013); *see also, Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Section 8-43-201(1), C.R.S. was added to § 8-43-201 in 2009 and provides, in pertinent part:

> …a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. (2) The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed.

H. The principal aim of the 2009 amendment to § 8-43-201(1), C.R.S. was to reverse the effect of *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). That decision held that while the respondents could move to withdraw a previously filed admission of liability, the respondents were not actually assessed the burden of proof to justify that withdrawal. The amendment to § 8-43-201(1), C.R.S. placed the burden on respondents and made such a withdrawal the procedural equivalent of a reopening. In this case, Respondents, relying principally on the opinions of Dr. O'Brien, are seeking to modify an issue determined by the aforementioned GAL, namely compensability. Consequently, the burden is on Respondents to prove that Claimant did not sustain a compensable injury.

I. A compensable injury is one that arises out of and in the course of employment and requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S.

J. 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 and scope 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). 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). In this case, there is little question that Claimant's alleged injuries occurred within the time and place limits of his employment and during an activity connected to his job-related functions as a General Manager for Employer's mattress store. Accordingly, the evidence presented supports a conclusion that Claimant's alleged injury occurred in the course and scope of his employment. Nonetheless, the question of whether Claimant's alleged injury arose out of his employment must be answered in the affirmative before the injury can be found compensable.

K. In this case, the evidence presented persuades the ALJ that Claimant had severe pre-existing, and probably symptomatic degenerative osteoarthritis in the right knee at the time of his alleged injury. 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 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).

L. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, as eluded to by Respondents, the occurrence of symptoms following an "accident" at work may represent the natural progression of a pre-existing condition that is unrelated to Claimant's employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). In this case, the ALJ credits the opinions of Dr. O'Brien to conclude that Claimant's right knee symptoms and need for a TKA were probably related to and emanating from the natural progression of his severe degenerative arthritis and prior arthroscopy.

M. Under the Workers' Compensation Act (Act) there is a distinction between the terms "accident" and "injury." An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2) (injury includes disability resulting from accident).

N. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an incident occurring at work without sustaining a compensable "injury." This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supported the ultimate finding that no injury occurred where a claimant experienced pain after being struck by a bed she was moving as part of her job duties). In this case, the totality of the evidence presented supports the conclusion that Claimant's employment related duties did not cause, aggravate, accelerate or combine with his pre-existing right knee condition so as to cause a disability or need for any treatment. Rather, the evidence presented persuades

the ALJ that Claimant's ongoing pain and subsequent need for treatment, including the request for TKA surgery was, more probably than not, related to the natural progression of his chronic pre-existing degenerative right knee osteoarthritis. Consequently, while Claimant would likely have benefitted from a TKA surgery, which the ALJ finds was otherwise reasonable and necessary, this procedure was not, to reasonable degree of medical probably, related to Claimant's work duties on October, 4, 2022. Rather the ALJ concludes that this treatment was necessary to address the ongoing symptoms/dysfunction caused by the progression of Claimant's pre-existing degenerative osteoarthritis in the right knee. Consequently, Respondents request to withdraw their previously filed GAL is granted.

ORDER

It is therefore ordered that:

1. As Claimant is deceased, his claim for medical benefits, in the form of a TKA is moot and as such the request for additional treatment is denied and dismissed.

2. Claimant is no longer the real party in interest to any claim for TTD benefits Due to his unexpected death. As Claimant's estate has not been joined as a party to this claim and Claimant had no known dependents there is no party upon whose behalf Claimant's counsel has submitted his proposed specific findings of fact and order who is a real party in interest to a claim for ongoing TTD. Accordingly, the current claim for TTD is denied and dismissed.

3. Respondents have met their burden of proof to establish that Claimant did not sustain a compensable right knee injury. Accordingly, the request to withdrawn the previously filed GAL is GRANTED.

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

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 5, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-236-503-001

ISSUES

- Did Claimant prove he suffered a compensable injury on April 6, 2023?
- If Claimant proved a compensable injury, did he prove entitlement to TTD benefits from April 7, 2023 through April 25, 2023?
- Did Claimant prove medical treatment provided by Alliance Family Practice, UC Health, Concentra, Dr. Pini, and Gray Neuropsychology Associates, and any referrals therefrom, was reasonably needed and authorized?
- Did Respondents prove Claimant's indemnity benefits should be reduced 50% under § 8-42-112(1)(d) because Claimant willfully misled employer about his ability to perform the job and was injured as a result?
- The parties stipulated to an average weekly wage of $855.44.

FINDINGS OF FACT

1. Claimant worked for Employer as a door-to-door salesperson selling high speed internet service. Claimant typically drove to a neighborhood and then walked from house to house with the goal of making sales.

2. The job entailed extensive walking. There is no persuasive evidence that Claimant's ability to perform the job was limited in any meaningful way before his work accident.

3. Claimant was injured on April 6, 2023 when he tripped and fell while walking up a driveway to a potential customer's home. Claimant testified he was walking up the driveway and tripped over an uplifted section of concrete that created a lip between two sections of concrete in the driveway. Photographs of the driveway confirm a raised lip that appears large enough that anyone could trip on it.

4. There is a small sidewalk near the top of the driveway leading to the front door, and an approximately 2-foot-wide strip of mulch, bushes, and decorative rock between the sidewalk and the home. There is a larger area of mulch, plants, rocks, and landscape lights on the other side (street side) of the sidewalk.

5. Claimant testified he tripped over the raised concrete lip, stumbled forward, and landed face first on a large rock in the landscaped strip next to the house.

6. At the time of Claimant's accident, [Redacted, hereinafter JR] was cleaning windows on the home next door to where Claimant fell. He saw Claimant fall "out of the corner of his eye." JR[Redacted] walked toward Claimant and was approximately 10 feet

away when Claimant got up. Although JR[Redacted] did not see how Claimant fell, he had a clear view of where Claimant landed. According to JR[Redacted], Claimant fell in the mulched area on the street side of the small sidewalk, not in the area adjacent to the home with the large rock. JR's[Redacted] testimony was generally consistent with his previous statements to Insurer's investigator as to where Claimant fell.

7. [Redacted, hereinafter RG] is an investigator for Insurer. She went to the accident site as part of her investigation. RG[Redacted] credibly testified that given the slope of the driveway and the distances involved, it was improbable that tripping on the raised driveway "lip" would cause Claimant to land face first on the landscape rock as he described.

8. Based on the credible testimony of JR[Redacted] and RG[Redacted], the ALJ infers that Claimant probably fell in the mulched area next to the driveway on the street side of the small sidewalk. He may have struck his face on the driveway or the sidewalk, but probably did not land on the landscape rock. Regardless, he clearly landed on his face.

9. Claimant texted his supervisor, [Redacted, hereinafter JH], shortly after the accident and stated, "Bad fall. Face plant into rock. Broken tooth, busted lip, broken glasses lots of blood." Claimant attached a photograph that showed a laceration on his right lower lip, a laceration and dried blood on the right side of his nose, bruising around the right eye, and dirt and gravel on the right side of his face. JH[Redacted] replied with concern and asked if Claimant needed to see a doctor. JH[Redacted] supervisor did not refer him to a doctor.

10. Claimant drove to Alliance Family Practice and saw Lindsey Suhr, PA-C. Claimant told Ms. Suhr he "tripped on a crack in the driveway" while walking at work. He reported pain along his nose and lip, a cracked front tooth, nausea, dizziness, and fatigue. Physical exam showed an abrasion on the left nares, a 2 cm laceration along the medial inferior anterior lip without active bleeding, and a chip on the bilateral front teeth. Ms. Suhr diagnosed a concussion, somnolence, a lip laceration, and a cracked tooth. She recommended a head CT because of Claimant's reported somnolence, dizziness, and vomiting. Ms. Suhr summoned an ambulance and Claimant was transported to the ER at Memorial Hospital North.

11. The AMR EMTs documented that Claimant's foot got caught in a "rut in the pavement of a driveway," causing him to fall facing the upward slant of the driveway. Physical examination showed a contusion on the forehead with swelling, lib abrasions, and dried and fresh blood in the mouth and on the teeth. The EMT also observed the top of Claimant's left front incisor "looks broken off."

12. The Memorial Hospital ER report dated April 6, 2023 documents a history of a trip and fall while walking up some concrete steps when his foot caught causing Claimant to fall forward and hit his face. The reference to concrete steps probably reflects a misunderstanding or miscommunication because Claimant had already told multiple people he tripped on a defect in the driveway. The ER physician noted the laceration on

Claimant's lower lip was small enough that it did not need to be sutured. Claimant's front tooth was chipped but was not loose. Imaging of his head, face, and spine showed no fractures.

13. On April 7, 2023 Claimant returned to Alliance Family Practice with complaints of light and noise sensitivity and moderate headaches. He was diagnosed with post-concussive syndrome.

14. Claimant followed up with Ms. Suhr on April 11, 2023. He reported ongoing sensitivity to light and noise and a severe headache. He requested an "extended leave of absence from work secondary to a head injury." Ms. Suhr took Claimant off work for a week.

15. Claimant reported similar symptoms at his next appointment, on April 18, 2023. He acknowledged prior head injuries and thought these may be compounding his present condition. Ms. Suhr kept Claimant off work for another week.

16. Employer completed a First Report of Injury on April 13, 2023. The injury was described as "IW reported that they tripped on a crack in a driveway while walking door-to-door performing their normal job duties."

17. Claimant saw Ms. Suhr again on April 25, 2023. He was improving but still having headaches and "some disjointed thoughts." Claimant requested a note allowing him to work with additional breaks. Claimant returned to work on April 26, 2023.

18. Insurer emailed Claimant a list of designated providers on an uncertain date. Employer is based in Broomfield, and the providers were all in the northwest Denver metro area. On April 18, 2023, Claimant texted JH[Redacted] about the designated provider list and stated, "The approved doctors are in Broomfield area. I am not capable of driving that far." Claimant indicated he had first learned about the designated providers "about an hour ago." JH[Redacted] was also unaware that Claimant had to use certain physicians, but instructed him to "make sure this is communicated to HR." The designated provider list and associated communication from Insurer were not submitted at hearing. Based on the evidence presented, the ALJ infers that Claimant first received the provider list on April 18, 2023.

19. Insurer subsequently arranged for Claimant to treat with Concentra in Colorado Springs. Claimant saw Dr. Marcie Wilde at Concentra on May 1, 2023. The Claimant told Dr. Wilde that he "tripped and landed face first." He reported ongoing symptoms including confusion, headache, dizziness, concentration difficulties, light sensitivity, and tenderness around the right eye. On examination of the fact, Dr. Wilde observed some residual ecchymosis of the lateral right eye. Claimant's balance was impaired with a positive Romberg sign. Dr. Wilde diagnosed a closed head injury, broken teeth, post-concussive headache, lip injury, and a facial contusion. She prescribed amitriptyline for the headache, and referred Claimant for dental, neurology, and neuropsychological evaluations.

20. On May 8, 2023, Claimant saw Dr. Peter Gulla at The Concussion Place on referral from Concentra. Dr. Gulla documented that Claimant's injuries occurred when he "slipped on a crack in a driveway walking up to a homeowner (he is a salesman for fiber optics), and upon slipping and falling, he struck the front of his face." Dr. Gulla diagnosed a concussion and acute post-traumatic headaches and recommended treatment for "concussion management."

21. Claimant saw Dr. Gulla six times until June 8, 2023, and the records document improvement in his fatigue, headaches, and cognitive issues.

22. Claimant was evaluated by Dr. Ryan Pini, a dentist, on May 16, 2023. Dr. Pini noted fractures in multiple teeth, many of which are unrelated to the work accident. The most significant fracture affected tooth #18, but Dr. Pini "can't say for sure if workers' comp is responsible for coverage of tooth #18." Dr. Pini made no specific treatment recommendations because he needed to decide "what TX he wants to send to workers comp."

23. Claimant underwent a neuropsychological evaluation with Dr. Steven Gray on May 24, 2023. Claimant reported ongoing concussion-related symptoms, including fatigue, concentration difficulties, and headaches. Dr. Gray noted "this is a highly complex case" given Claimant's significant comorbidities from multiple prior head injuries and pre-existing depression. He recommended two neuropsychological rehabilitation visits primarily for psychological support while waiting at least 60 days post-accident to complete formal neuropsychological testing. In the meantime, he recommended medication to assist with sleep and consideration of Rizatriptan for the headaches.

24. Claimant's last appointment with Dr. Wilde was on May 23, 2023. He described varying levels of improvement in his injury-related conditions, ranging from 50% improved to "resolved."

25. Claimant had no additional appointments with Concentra, Dr. Gulla, or Dr. Gray because the claim was denied and no further treatment was authorized.

26. Claimant was seen at Alliance Family Practice several times on and after May 31, 2023, for issues unrelated to his work injury.

27. Claimant was in a wheelchair for many years because of severe spinal pathology and morbid obesity. He had a gastric bypass in 2021 and lost considerable weight. As a result, he no longer needed the wheelchair. Thereafter, Claimant implemented an exercise regimen with significant walking.

28. On September 22, 2022, Claimant saw a podiatrist, Dr. Tyler Gloschat, for ankle pain and "blisters on his feet from the amount of walking he tries to get in." Examination also showed bilateral lower extremity weakness, worse on the right. Dr. Gloschat noted Claimant's shoes were too narrow and recommended wider shoes. He treated the blisters and recommended Claimant refrain from walking for a few days until the blisters healed. He further opined that after such a prolonged time using a wheelchair, Claimant's legs needed time "to become accustomed to walking again."

29. Claimant returned to Dr. Gloschat on October 5, 2022, and was "doing fairly well." Dr. Gloschat opined Claimant's lower extremity weakness "may be permanent due to nerve damage, however, my hope is that physical therapy will allow him to ambulate without dragging his feet. . . . [I]f this is a permanent problem, there are AFOs which can be fabricated to resolve the issue. The patient will continue to walk for exercise, and he will begin physical therapy in order to try and increase his strength, as well as decrease his foot drop."

30. Claimant continued to walk long distances on a regular basis. He testified he hiked the Manitou Incline more than once. Claimant testified he had not fallen because of foot drop in over a year before the accident, despite extensive and regular walking in a variety of environments. Claimant's testimony in this regard is unrebutted by any persuasive evidence.

31. On December 9, 2022, Dr. Gloschat documented that Claimant had been walking "up to 10 miles each day usually," but had recently stopped walking because of broken ribs suffered in a recent MVA. Dr. Gloschat recommended OTC orthotics and bilateral AFOs.

32. Claimant next saw Dr. Gloschat on February 3, 2023. He was still waiting for the AFOs "due to insurance reasons." Dr. Gloschat injected a neuroma on Claimant's left foot. They discussed Claimant's "daily walks" and Dr. Gloschat stated, "due to a recent fall, I recommend walking inside until the snow and ice have cleared." There is no additional information regarding the details of the recent fall. Dr. Gloschat also evaluated Claimant's shoes and opined "they are adequate for stability."

33. Claimant followed up with Dr. Gloschat on March 17, 2023. The neuroma had improved after the injection until someone stepped on his foot. He needed a new prescription for the AFOs because the previous order had expired. X-rays of the left foot showed no fracture and Dr. Gloschat diagnosed a contusion. He recommended Claimant continue PT and strength training.

34. Claimant saw Dr. Gloschat again on April 21, 2023. He reported his feet were "doing well" and the neuroma pain had resolved. However, Dr. Gloschat noted, "the patient fell between his last visit and this visit and injured his face. The reason for the falls is due to the weakness in his legs, and he is catching his shoes while he is walking. AFOs are medically necessary to prevent these falls and risks of injury." There is no indication in the report that Dr. Gloschat knew Claimant tripped on a raised concrete slab.

35. Claimant was hired by Employer in mid-February 2023 and commenced his regular duties on March 7, 2023. As part of the hiring process, Claimant completed a form for Employer asking if he had any "disabilities." He answered in the affirmative and listed diabetes, prior use of a wheelchair due to issues walking as well as other past physical issues. Claimant also discussed his pre-existing "disabilities" with JH[Redacted]. According to Claimant, he was never asked about, and therefore did not specifically mention his foot drop. But he did discuss regaining the ability to walk after being in a wheelchair for several years, and explained that he that he wore specific boots with ankle

support to avoid tripping and falling. Claimant believed he "could do the job with those boots." JH[Redacted] gave no indication he was concerned about Claimant's physical capacity to perform the work. The documents Claimant referenced were not offered into evidence, and JH[Redacted] did not testify. Additionally, Claimant's testimony regarding the utility of the boots is corroborated by Dr. Gloschat's report stating he evaluated Claimant's shoes and found them "adequate for stability."

36. Dr. McCranie performed an IME for Respondents on August 16, 2023. Dr. McCranie opined Claimant's fall was caused by his documented foot drop. She observed the foot drop during her evaluation, and her examination findings were similar to those documented by Dr. Gloschat. She opined this leads to dragging of the feet and creates a risk for falls. She further emphasized that Dr. Gloschat had stated the foot drop was the reason for Claimant's fall.

37. Additionally, regardless of the reason for the fall, Dr. McCranie opined the accident caused no need for treatment and no new disability. The lip laceration was minor and did not require treatment or sutures. In Dr. McCranie's estimation, all symptoms Claimant reported after the accident were pre-existing and disabling before the fall. She saw no objective basis for new treatment or disability associated with any of the claimed conditions. Accordingly, Dr. McCranie concluded the fall caused no "injury."

38. Claimant proved he suffered a compensable injury on April 6, 2023. The preponderance of persuasive evidence shows he tripped on the raised lip of the concrete slab, causing him to fall on his face. Claimant told multiple providers he "tripped" on the concrete lip, including Ms. Suhr and the EMTs shortly after the accident. The most closely contemporaneous accounts are most likely to be reliable regarding the specific event. Employer also documented he "tripped on a crack in a driveway." Furthermore, the fact that Claimant landed next to the driveway immediately uphill from the raised lip increases the probability that he tripped on the concrete defect rather than merely catching his foot on a level surface. The injury was directly caused by the uneven concrete and not precipitated by a pre-existing condition. Therefore, the "special hazard" rule does not apply.

39. Claimant proved the treatment he received at Alliance Family Medicine, from the EMTs, and at Memorial Hospital immediately after the accident was emergency treatment reasonably needed to cure and relieve the effects of his injury. Dr. McCranie's argument that Claimant required no treatment after falling on his face and suffering lacerations, bruises, a chipped tooth, and a minor concussion is not persuasive.

40. Alliance Family Medicine is authorized because Employer did not timely provide Claimant with a designated provider list.

41. The evaluations and treatment provided at and on referral from Concentra were reasonably needed to cure and relieve the effects of Claimant's injury. Claimant fell on his face. Dr. Wilde reasonably referred Claimant to a dentist to evaluate his chipped tooth. He also reported classic concussion symptoms, which justified evaluations by a neuropsychologist and head injury specialist.

42. Claimant proved he was disabled by the effects of the injury and suffered a wage loss from April 7, 2023 through April 25, 2023. It was reasonable and appropriate for Ms. Suhr to restrict Claimant from work for two weeks after the accident, considering his job required regular driving and extensive walking outdoors.

43. Respondents failed to prove Claimant willfully mislead Employer about his physical condition and was injured as a result.

CONCLUSIONS OF LAW

A. Compensability

To establish a compensable claim, a claimant must prove they suffered an injury while "performing service arising out of and in the course of employment." Section 8-41-301(1)(b). There is no presumption that an injury occurring at work or during work hours necessarily arises out of employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). The claimant must prove a causal nexus between the injury and their employment by a preponderance of the evidence. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

Injuries resulting from "employment risks" are generally considered to arise out of a workers' employment. *City of Brighton v. Rodriguez*, 318 P.2d 496 (Colo. 2014). A pre-existing condition or weakness that increases the employee's susceptibility to injury or increases the severity of an injury does not preclude a finding of compensability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Cowin & Co. v. Medina*, 860 P.2d 535, 538 (Colo. App. 1992).

On the other hand, injuries caused by "purely personal risks," including pre-existing medical conditions such as seizures, fainting spells, or heart disease, are generally not compensable, absent special circumstances. *City of Brighton, supra*. Where an injury is precipitated by a pre-existing nonwork-related condition, the injury is not compensable unless a "special hazard of the employment" increased the risk or severity of injury. *E.g.*, *Gates Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo. App. 1985). The classic case involves an epileptic seizure suffered at work. If the worker simply falls to the ground, the resulting injuries are not compensable. But if the employee falls from a ladder or scaffold, their injuries are covered. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, Claimant proved he suffered a compensable injury arising out of his employment on April 6, 2023. He tripped on the edge of an uplifted concrete slab, causing him to fall on his face. Claimant told multiple providers he "tripped" on the concrete lip, including Ms. Suhr and the EMTs shortly after the accident. These most closely contemporaneous accounts are most likely to be reliable regarding the event. Employer also documented he "tripped on a crack in a driveway." And the fact that Claimant landed next to the driveway immediately uphill from the raised lip increases the probability that he tripped on the concrete defect rather than tripping over his own feet or randomly catching his feet on a level surface. Although defects in driveways and sidewalks are common outside of work settings, they are employment risks for a door-to-door salesperson. The injury was directly caused by tripping on the uneven concrete and not

precipitated by a pre-existing condition. Therefore, the "special hazard" rule does not apply.

B. Authorized treating providers

The respondents are liable for medical treatment from authorized providers reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993).

Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had a referral or prior approval from the respondents. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-3. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (ICAO, January 12, 2010). As found, Claimant's treatment at Alliance Family Medicine, from the EMTs, and at the Memorial Hospital ER on April 6, 2023 was reasonably needed emergency treatment for his compensable injury. Claimant fell directly on his face and suffered lacerations, bruises, a chipped tooth, and a concussion. It was reasonable for him to seek treatment after such an incident. Providers and/or staff at Alliance Family Medicine determined it best that Claimant be evaluated in the emergency room, and summoned EMTs of their own volition. This, too, was entirely reasonable and appropriate.

Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith" upon receiving notice of the injury, or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Where, as here, the claimant lives in a large metropolitan area, the respondents must provide a list of at least four physicians or corporate medical providers. Section 8-43-404(5)(a)(I)(A). A written list of providers must be given to the injured worker in a verifiable manner within 7 business days after the employer receives notice of the injury.

In this case, Employer never provided Claimant with a list of designated providers. Insurer sent him a list on April 18, 2023, which is 8 business days after Employer received notice of the accident. Because the list was untimely, Claimant had the right to select his own physician, and he chose Alliance Family Medicine. Although Insurer subsequently agreed to authorize Concentra, that merely added additional authorized providers, and does not impact the authorization of Alliance Family Medine. *E.g., Montoya v. Sun Healthcare*, W.C. No. 4-622-266 & 4-619-272 (ICAO, October 12, 2006).

C. Treatment was reasonably needed

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 claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury. *E.g.*, *Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2000); *Villela v. Excel Corp*., W.C. No. 4-400-281 (ICAO, February 1, 2001). 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).

As found, Claimant proved the injury-related evaluations and treatment received from Alliance Family Medicine and Concentra were reasonably needed to cure and relieve the effects of Claimant's injury. Claimant suffered facial injuries and a concussion from falling on his face. After being released from the ER, he continued to experience symptoms consistent with a concussion, including dizziness and headaches. It was reasonable for him to pursue treatment in light of his ongoing symptoms. It was also reasonable for the treating providers to provide conservative treatment such as medications and make referrals to specialists for further evaluation. Dr. McCranie's opinion that Claimant required no treatment is not persuasive.

Admittedly, Claimant suffered multiple previous head injuries and experienced similar symptoms at various times before the injury. But an industrial injury need not be the "sole cause" of a need for medical treatment to be deemed a "proximate cause." Rather, it is sufficient if the injury is a "significant factor" in the sense that there is a "direct causal relationship" between the injuy and the need for treatment. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). Here, the persuasive evidence shows the work accident at a minimum aggravated and combined with his pre-existing condition, requiring evaluations and treatment to return Claimant to his pre-injury baseline.

Claimant received no injury-related treatment from Alliance Family Medicine after May 25, 2023.

Claimant testified he had substantially improved by the time of the hearing, and many of his injuries have resolved. As a result, it appears Claimant may be at or approaching MMI. But such a determination is beyond the ALJ's authority and must be made in the first instance by an ATP.

D. Claimant is entitled to TTD from April 7 through April 25, 2023

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Disability may be evidenced by a complete inability to work, or by restrictions or limitations that impair the claimant's ability to perform their regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). A claimant need not prove that the work-related

injury was the sole cause of the wage loss to establish entitlement to TTD benefits. Rather, eligibility for TTD requires only that the work-related injury contributes "to some degree" to a temporary wage loss. *PDM Molding, supra*. Once commenced, TTD benefits continue until the occurrence of one of the events listed in § 8-42-105(3)(a)-(d).

Claimant proved the work injury caused disability and a corresponding wage loss. Claimant suffered a concussion and reported ongoing concussion-related symptoms including dizziness, difficulty with concentration, and headaches. Claimant's job required driving and substantial walking on public streets and sidewalks. It was reasonable and appropriate for Ms. Suhr to take him off work for two weeks following the accident.

Claimant stipulated his entitlement to TTD ended when he returned to work on April 26, 2023.

E. Application of § 8-42-112(1)(d)

Section 8-42-112 (1)(d) provides for a 50% reduction of indemnity benefits where a claimant is injured as a result of willfully misleading the employer about his physical ability to perform the job. Section 8-42-112(1)(d) is an affirmative defense on which the respondents have the burden of proof. City of Las Animas v. Maupin, 804 P.2d 285 (Colo. App. 1990). The term "willful" means 'with deliberate intent' as opposed to mere thoughtlessness, forgetfulness, or negligence. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (1968); *Johnson v. Denver Tramway Corp.*, 171 P.2d 410 (1946).

As found, Respondents failed to prove Claimant's benefits should be reduced under § 8-42-112(1)(d). Claimant was asked during the hiring process if he had any disabilities. Claimant advised Employer of a variety of past and present disabilities including using a wheelchair for many years. Claimant further testified that he did not believe his drop foot would prevent him from safely performing his job, because he was able to walk extensively without issue in the year or so prior to his being hired. He further believed his boots provided adequate protection against the effects of his foot drop, which is supported by Dr. Gloschat's statement they were "adequate for stability." The documents Claimant completed at the time of hire regarding his physical limitations are not in evidence, and neither JH[Redacted] nor any other employer representative testified at hearing. Additionally, Respondents did not prove Claimant's was injured because of his pre-existing condition. As found, Claimant tripped on an uneven slab of concrete. The raised lip was high enough to pose a tripping hazard for anyone walking in that driveway, regardless of whether they have a footdrop.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including

treatment between April 6 and May 25, 2023 from Alliance Family Medicine, AMR, the UCHealth Memorial Hospital emergency department, Concentra, the May 16, 2023 evaluation by Dr. Pini, The Concussion Place, and Gray Neuropsychology.

3. Claimant's average weekly wage is $855.44, with a corresponding TTD rate of $570.29.

4. Insurer shall pay Claimant TTD benefits at the rate of $570.29 per week from April 7, 2023 through April 25, 2023.

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

6. Respondents' request for a 50% reduction of indemnity benefits under § 8-42-112(1)(d) is denied and dismissed.

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: February 6, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-226-449-002

ISSUES

1. Whether Claimant established by a preponderance of the evidence that the total right knee arthroplasty performed by Dr. Johnson was reasonable and necessary to cure or relieve the effects of Claimant's December 14, 2022 industrial injury.

FINDINGS OF FACT

1. Claimant worked for Respondent as the working director for the radiology department from 2018 through October 2023. Claimant's duties included taking call as a radiology technologist. On December 14, 2022, Claimant was at home and responded to a call at 3:00 a.m., which required her to drive to Respondent's hospital during a blizzard. After responding to the call, Claimant slipped and fell while walking to her vehicle, sustaining injuries to her right knee.

2. Claimant has a history of four right knee surgeries including a right tibial plateau fracture repair, anterior cruciate repair, meniscal repair, and hardware removal. (Claimant credibly testified she has had four total surgeries, not fourteen as indicated in her medical record). Before December 14, 2022, Claimant's most recent documented report of specific knee pain was in May 2020. Claimant's medical records from May 2020 and November 2022 demonstrate that Claimant experienced generalized body pain related to other conditions. On September 23, 2022, Claimant's primary care provider, Devon Garcia, NP noted that Claimant had full range of motion of her knees. (Ex. B, C, and 4).

3. Claimant credibly testified that the four previous surgeries to her right knee were more than twenty years ago, and after the fourth surgery (*i.e.*, hardware removal), her knee felt "new." She testified that since the hardware removal surgery, her right knee did not limit her ability to function, but that it would get "tweaky" at times. From which, the ALJ infers that Claimant had occasional episodes of pain in her right knee. Claimant testified that before December 14, 2022, she was reasonably active, and participated in horseback riding, snowmobiling, and household activities, such as gardening, and yard work. After the December 14, 2022 injury, Claimant credibly testified that she had difficulty putting weight on her leg, standing, using stairs, and entering/exiting her vehicle – activities she could perform without difficulty prior to her injury.

4. On December 15, 2022 injury (the day following her work-related injury), Claimant saw Mr. Garcia at Yuma District Hospital, who documented that Claimant was non-weightbearing and using crutches. On examination, Mr. Garcia found decreased range of motion of the right knee, with positive posterior drawer, varus, and McMurray tests. Claimant was referred for a right knee MRI which showed complete radial tears of the posterior roots of the medial and lateral meniscus with associated extrusion, a horizontal tear of the lateral meniscus, complex multidirectional tears of the anterior root of the lateral meniscus, intermediate to high-grade partial tearing of the anterior cruciate ligament graft

from her prior surgery, tricompartmental chondromalacia, intermediate-to-full thickness chondral loss at the weightbearing aspects of the anterior, mid, and lateral compartments, effusion, and post-traumatic and post-operative change at the proximal tibia. (Ex. F). Based on the results of the MRI, Claimant was referred to orthopedic surgeon Derek Johnson, M.D., at Centura Orthopedics & Spine. (Ex. G).

5. Claimant saw Dr. Johnson on February 14, 2023. Dr. Johnson noted that Claimant had a severe deformity of the right knee and post-traumatic arthritis. His diagnoses included primary arthritis, derangements of the posterior horn of the lateral meniscus, derangements of the anterior and posterior horns of the medial meniscus, sprain of the knee, and other specified complication of internal orthopedic prosthetic device, implants, and grafts. In his treatment recommendations, he indicated "I do not think there is much we can offer short of knee replacement [that would][1] offer meaningful long-term relief." Based on the evaluation, Dr. Johnson submitted a request for authorization of a total knee arthroplasty to Insurer, indicating a diagnosis of knee osteoarthrosis. (Exs. 4 & H).

6. Based on a medical record review from John Raschbacher, M.D., Respondents denied authorization for a total knee replacement. (Ex. 3). Dr. Raschbacher opined that Claimant's need for total knee arthroplasty was due to her significant underlying degenerative changes, and not related to the December 14, 2022 fall. He also opined that Claimant was at maximum medical improvement (MMI), for the December 14, 2022 fall. (Ex. I & 3).

7. On April 19, 2023, Dr. Johnson performed a right total knee replacement surgery. (See Ex. 4). Following surgery, Claimant underwent physical therapy, and was cleared to return to work on July 12, 2023 without restrictions. (Ex. 4).

8. On September 21, 2023, John Hughes, M.D., performed an IME at Claimant's request. Dr. Hughes opined that as a result of her work-related fall, Claimant sustained medial and lateral meniscus tears, and a partial tear of her anterior cruciate ligament graft. He opined that this injury accelerated Claimant's right knee arthritis and caused significant instability in Claimant's right knee, as evidenced by testing performed by Mr. Garcia. He indicated although Claimant had significant, preexisting right knee pathology, the need for right knee total arthroplasty was reasonable, necessary, and relate to her December 14, 2022 industrial injury, noting that no such surgery had been previously recommended. (Ex. 5).

9. On October 22, 2023, Dr. Raschbacher performed a second medical record review. Dr. Raschbacher opined that Claimant's total knee arthroplasty was not related to her work injury because the surgery is a treatment for arthritis, and not a treatment for an ACL or meniscal tear. He noted that Claimant described her right knee as her "bad" knee due to several prior surgeries. He further opined that the treatment for an ACL tear

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[1] Dr. Johnson's statement was "I do not think there is much we can offer short of knee replacement does not offer meaningful long-term relief." The ALJ infers from the context of the statement that he intended to indicate that only a knee replacement would offer long-term relief.

is ACL reconstruction, and that the need for doing an ACL reconstruction was obviated by doing a total knee arthroplasty. (Ex. K).

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).

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). Respondents are also liable for treatment where "employment-related activities aggravate, accelerate, or combine with a preexisting condition to cause a need for medical treatment." *Schoenberger v. Dillons Co.*, W.C. No. 4-934-299-02 (ICAO Aug. 10, 2016). 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 right knee total arthroplasty is reasonable, necessary, and causally related to her December 14, 2022 work injury. Claimant sustained work-related injuries to her knee including meniscal tears, and a partial tear of her ACL graft. Although Claimant had significant pre-existing arthritis in her knee, including significant chondral thinning at weightbearing portions of her knee, she was able to perform her job and function prior to December 14, 2022, and had not reported specific knee pain to her providers since May 2020. Claimant credibly testified that her right knee did not limit her function prior to December 14, 2022, although she did have occasional "tweaks" of her knee, and that after the December 14, 2022 injury, her function was significantly impaired. Although there was some dispute as to whether Claimant characterized her knee as "bad," her characterization is irrelevant to whether the need for surgery is causally related to her work-related injuries.

From Dr. Johnson's records, the ALJ infers that due to the preexisting arthritis in Claimant's knee, a traditional meniscal repair was not feasible. As such, Dr. Johnson recommended a total knee replacement as the only viable treatment option for her industrial injury. Nothing in the record credibly establishes that Claimant would have required a total knee replacement but for her work-related injury. Despite her significant preexisting knee arthritis, Claimant was functional before her injury and had not received knee-related treatment in more than two years. The ALJ credits Dr. Hughes' opinion that the need for surgery is causally related to Claimant's work injury. The ALJ concludes that Claimant's work-related injury combined with her preexisting condition to create the need for treatment, including the total knee arthroplasty she underwent on April 19, 2023. Claimant's request for authorization of the total knee arthroplasty is granted.

ORDER

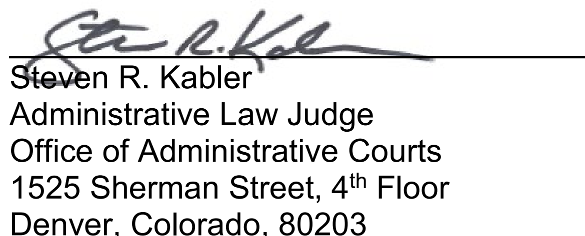
It is therefore ordered that:

1. Claimant's right knee total knee arthroscopy was reasonable, necessary, and causally-related to Claimant's December 14, 2022 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 6, 2024



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-226-909-001

ISSUES

- Did Claimant prove he suffered a compensable injury to his left knee on December 16, 2022?
- If Claimant proved a compensable injury, did he prove entitlement entitled to Temporary Total Disability (TTD) benefits from December 17, 2023 and ongoing?
- If Claimant proved entitlement to TTD benefits, did Respondents prove he was responsible for termination of his employment?
- Medical benefits and authorized providers.
- The parties stipulated to an average weekly wage of $1,198.82.

FINDINGS OF FACT

1. Employer is a craft brewery based in Monument. Claimant worked for Employer as the wholesale sales manager, overseeing beer sales throughout Colorado. His job required frequent site visits to liquor stores, bars, and restaurants that sold Employer's products. Because of the extensive travel, Employer provided Claimant with a company car. Claimant was paid a salary plus commissions, and there is no persuasive evidence he received additional compensation for work-related driving.

2. Each Friday afternoon, Claimant attended a weekly production and sales meeting at the brewery. The meeting was usually attended by Employer's owner [Redacted, hereinafter CW], the brewery operations manager [Redacted, hereinafter FM], and the sales manager [Redacted, hereinafter BN].

3. Claimant alleges an injury to his left knee on Friday, December 16, 2022. Claimant testified he left his apartment mid- or late-morning on December 16 and went out to his vehicle to drive to the brewery. There was snow on the ground, and Claimant testified his left foot slipped, causing him to fall and twist his knee. Claimant described experiencing a pop and immediate burning pain in his left knee.

4. Claimant testified he drove to the brewery and learned the meeting had been cancelled. He testified he spoke with CW's[Redacted] sister-in-law, [Redacted, hereinafter LA], who also works for Employer, and she recommended he go to the emergency room.

5. Claimant's testimony conflicts with several other pieces of evidence in the record. For example, Claimant testified the sales meeting was cancelled because CW[Redacted] was not present, but he told Respondents' IME that LA[Redacted] decided to cancel the meeting after he arrived at the brewery and told her about his injury.

FM[Redacted] credibly testified the December 16 meeting was not cancelled and Claimant was present, based on a post-meeting email Claimant sent at 2:45 PM that afternoon. CW[Redacted] credibly testified Claimant initially said he fell in the parking lot outside the brewery before the meeting on December 16. Claimant testified he was taking a lot of pain medications that interfered with his memory before being incarcerated on April 15, 2023. But the pre-incarceration medical evaluation states Claimant had run out of pain medication and was taking nothing. These and other discrepancies cast serious doubt on the reliability of Claimant's testimony.

6. But even if we accept Claimant's description of the accident, the injury is not compensable because it did not occur in the course of employment. Claimant testified the injury occurred at his home while he was preparing to drive to Employer's place of business for a regularly scheduled meeting. Injuries suffered while commuting to work are typically not compensable, and Claimant failed to prove any special circumstances to warrant departure from the general rule. Although Claimant frequently traveled to customer sites, he did not engage in any work-related travel the day of the alleged accident. Claimant was not paid for travel beyond his general salary, and the mere fact that he was using a company car does not convert him into a traveling employee while commuting to work. Employer received no benefit from Claimant's travel on December 16, 2022, beyond the mere fact of his arrival at work.

7. Claimant failed to prove he suffered a compensable injury on December 16, 2022.

CONCLUSIONS OF LAW

To establish a compensable claim, a claimant must prove they suffered an injury arising out of and in the course of employment. Section 8-41-301(1)(b); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

Under the "going and coming rule," injuries sustained while commuting to and from work are not compensable unless "special circumstances" create a sufficient nexus to the employment beyond the mere fact of the employee's arrival at work. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). *Madden* established an analytical framework centered on four "variables" to determine whether the requisite "special circumstances" exist. Those variables are: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether the travel was contemplated by the employment contract, and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose. *Id.* at 864. If the claimant establishes only one of the four variables, "recovery depends on whether the evidence supporting the variable demonstrates a causal connection

between the employment and the injury such that the travel to and from work arises out of and in the course of employment." *Id*. at 865.

No persuasive evidence was presented regarding Claimant's regular working hours, but regardless, Claimant had not done any work that day before leaving home. The accident did not occur on Employer's premises. Nor did the conditions of employment create any "zone of special danger" around commuting to work. Accordingly, the primary question is whether the travel was contemplated by the employment contract. *Madden* cited examples of situations that satisfy this factor, such as (a) when a particular journey is assigned or directed by the employer, (b) when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work, and (c) when travel was singled out for special treatment as an inducement to employment. The court emphasized those examples were "not an exhaustive list" of situations where travel can be considered part of the employment contract.

Travel is a substantial component of Claimant's job, and he was given a company car to mitigate the expense of using his own vehicle. Claimant routinely used the vehicle to visit customers. But the fact that Claimant travels as part of his job does not mean he is within the course of employment every time he uses or intends to use the company vehicle. Certainly, an accident that occurred while Claimant was at a customer site would be covered. *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). But the question is not simply whether the employment contract contemplates *some* travel on the employee's part. Rather, the dispositive issue is whether the contract contemplated the specific travel in which the employee was engaged at the time of the accident. Here, the accident occurred before he performed any work, at Claimant's home, while he was preparing to leave for the weekly sales and production meeting. Claimant failed to prove the existence of "special circumstances" to warrant an exception to the general rule that injuries suffered while commuting to work are not compensable. Thus, Claimant failed to prove he suffered a compensable injury arising out of and in the course of his employment.

ORDER

It is therefore ordered that:

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

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

to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: February 7, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

I. What is DIME physician Dr. Brian Shea's true opinion?

a. If Dr. Shea's true opinion is that Claimant has impairment, then whether Respondents have shown by clear and convincing evidence that the opinion has been overcome.

b. If Dr. Shea's true opinion is that Claimant has no impairment, then whether Claimant has shown by clear and convincing evidence that the opinion has be overcome.

II. Whether Claimant has shown by a preponderance of the evidence whether she is entitled to payment of an outstanding emergency visit bill from October 5, 2022 at Longmont Hospital.

PROCEDURAL HISTORY

A Final Admission of Liability (FAL) was filed on October 11, 2022 based on an MMI determination of August 23, 2022. Claimant challenged the FAL, requesting that a Division of Workers' Compensation Independent Medical Examination (DIME) physician be assigned to examine Claimant. Dr. Brian Shea was selected in this matter and issued a report.

Respondents filed an Application for Hearing (AFH) on March 31, 2023 challenging the DIME physician's opinion regarding impairment. Claimant filed a Response to AFH on April 28, 2023 adding the issues of reasonably necessary and related medical benefits, payment of outstanding bills and permanent partial disability benefits.

During the August 23, 2023 hearing Claimant revealed she had been seen by a previously undisclosed medical provider just before her work related accident who treated her for the same body part as that claimed in this matter.

On October 30, 2023 this ALJ issued an Order Granting Respondents' Opposed Motion to Compel Claimant to Produce Identity of Medical Provider and Leave Evidence Open for Continued Hearing and hold position statements in abeyance. Two Status Conferences were held in this matter regarding the undisclosed medical records, the completion of the record and follow-up deposition of the DIME physician. This ALJ issued an order granting a motion to communicate with the DIME physician and obtain a Supplemental report on December 14, 2023.

FINDINGS OF FACT

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

The Injury and Procedural History

1. Claimant worked for Employer as a General Manager for their restaurant. On May 23, 2022 she was backing out of the walk-in refrigerator when she stepped on an empty tray and slipped, falling backward injuring her low back, mid back and bilateral upper arms. This claim was admitted for an injury on May 23, 2022.

Pre-Injury Medical Records

2. On September 1, 2019 Claimant was seen at Longmont United Hospital 45 minutes after she tripped on a plastic matt and fell on her right arm and shoulder, and felt a pop in her back, as documented by triage nurse Elizabeth Brewster. Nurse Cheryl Swift document no obvious signs of trauma. The attending physician, Dr. David Garfinkel, ordered ibuprofen 600 mg. and lidocaine patches as well as lumbar spine x-rays, which were negative. Claimant's reported pain in lower back was sharp and worsened by positional changes and improved with rest. The pain was in the midline and radiated to the left.

3. Claimant was discharged by PA Brandon Uttley who noted a history, examination and negative x-rays of the lumbar spine consistent with multiple areas of muscular strain including the lumbar spine and right upper arm, without neurologic symptoms or red flags for serious pathology. He opined that Claimant likely had a muscular strain of the right shoulder and/or triceps muscle. He recommended care with rest, ice, NSAIDs and stretching exercises.

4. On or around October 19, 2021, Claimant was involved in a motor vehicle accident (MVA). Claimant presented to Longmont United Hospital ER on October 22, 2021 where Dr. Michael Garfinkel documented that the MVA had happened 4 days ago. He noted that "[S]he was evaluated initially[1] and placed on Flexeril and she was advised to take ibuprofen however she is (sic.) only been taking flexeril without significant relief."

5. On October 22, 2021, Claimant had complaints of mid and low back pain following the car accident four days prior. X-rays of the lumbar and thoracic spine were normal as interpreted by Dr. Michael Seymour, noting that the lumbar vertebral body height and alignment were maintained, there was no advanced degenerative findings, and the paravertebral soft tissues were unremarkable. Claimant was diagnosed with a lumbar strain. Dr. Garfinkel prescribed ibuprofen 800 mg. and Tylenol in the emergency but at discharge he recommended she continue with over the counter (OTC) Lidoderm patches, ibuprofen and Tylenol, and follow up with Salud Clinic. She was advised to only return to the hospital if she had numbness, tingling, bowel or bladder dysfunction, or

[1] There is no indication of where she was initially evaluated and there were no records for October 19, 2021.

saddle anesthesia. At the time Dr. Garfinkel had not suspicions of any severe injury to the spine.

6. On November 29, 2021, Claimant presented to Chiropractic Wellness Center in Longmont and treated under Brian Foster, D.C., due to multiple complaints after a motor vehicle accident that occurred the prior month. The complaints included: headaches, neck pain, right cervical dorsal pain, left cervical dorsal pain, upper back pain, middle back pain, pain between the shoulder blades, lower back pain, right shoulder pain, left shoulder pain, and sleeping difficulty. Claimant rated her mid-back and low back pain at 7/10 with radiating pain in her hip and buttocks affecting her gait with decreased range of motion. Claimant had multiple other positive tests. Dr. Foster noted that Claimant's condition was responding to care, but was aggravated by normal activities of daily living. He further documented that due to her current levels of pain, the severity of symptoms, the severity of decreased range of motion, and diminished functional abilities, her prognosis was guarded at that time.

7. Dr. Foster initially recommended chiropractic care three times a week for two weeks. Claimant subsequently continued regular treatment with Dr. Foster, at times several visits per week, up through, and continuing after, the May 23, 2022 injury. On May 16, 2022 Claimant showed lumbar edema/inflammation, muscle hypertonicity, loss of range of motion, nerve root compression and irritation, and a positive straight leg test, positive prone knee bending test or Ely's test, and a positive Gillet test. She had 29 visits total with Dr. Foster. From the first one to the last one Dr. Foster would recommend that Claimant do stretches and exercises at home along using ice on the affected areas.

8. Claimant had an appointment on the date of the May 23, 2022 injury and reported ongoing pain in her lower back/pelvis/sacrum, which Dr. Foster indicated "seems to affect her walk/gait." It was noted that Claimant had mild inflammation of the joints in the lumbar spine with hypertonicity, misalignment when compared bilaterally, muscle spasms and decreased range of motion and pain complaints of 3/10. There was no documentation of a reported work-related injury during this visit. Dr. Foster indicated that he recommended Claimant continue with chiropractic visits once a month for up to another six (6) months, along with stretches and exercises to do at home, as well as continued use of ice in the affected areas.

The Injury Medical Records

9. Claimant was seen on May 24, 2022 at NextCare Urgent Care by PA Stephanie Boisvert, reporting neck pain, back pain and posterior upper arm pain with no radiation but aggravated with movement. The mechanism of injury was consistent with that described by other medical providers. There was bruising (ecchymosis) noted to the posterior right upper extremity (UE) with moderate tenderness to palpation (TTP), the left UE had TTP diffusely, TTP in bilateral paraspinal of the cervical spine, thoracic spine and lumbar spine. PA Boisvert ordered x-rays of the low back. She diagnosed acute bilateral low back pain; contusions of the upper arms; and mid back and neck pain. They recommended Claimant take ibuprofen or Tylenol for pain and cyclobenzaprine (Flexeril) for muscle spasms.

10. X-rays of the lumbar spine revealed some lucency over the right transvers process at the T12, likely summation of shadows, though may have also been a non-displaced fracture. But otherwise a normal diagnostic pursuant to Dr. Jessica Matthess.

11. Claimant was seen at Midtown Occupational Medicine on May 25, 2022 by Ashley Pospisil, NP, reporting minimal bilateral upper arm pain and a main complaint of mid-lower back pain. The pain was worse on the right side, and minimal in the center, improved when leaning forward and exacerbated with prolonged sitting. The pain was "muscle tightness," and she had no radicular symptoms. The neck was only "sore" and with minimal pain. NP Pospisil noted that Claimant reported “no other health conditions” when asked about her past medical history. On exam, she had decreased range of motion (ROM), had TTP in the lumbar spine, paralumbar, and perithoracic. NP Pospisil noted the evidence of resolving ecchymosis to the posterior right upper arm with minimal TTP. She ordered x-rays of the thoracic and lumbar spine, both of which were normal. She diagnosed lumbar contusion, neck pain, and contusions of the right and left upper arms. She recommended Claimant take the OTC medication for pain and the prescription from the NextCare provider. She provided work restrictions of no lifting more than 10 to 15 lbs., and no repetitive bending or twisting at the waist; and ordered massage therapy, rest and gentle stretching. The report was co-signed by Dr. Lawrence Cedillo.

12. On June 1, 2022 NP Pospisil attended Claimant in a follow up. She had left-sided low back pain that occasionally radiated to her left leg, tenderness to palpation of the left side back, with exacerbated pain when she sat or walked for prolonged periods. Claimant reported that her arm pain had resolved but she continued with left sided neck pain that radiated to the trapezius. She had an antalgic gait, decreased ROM, TTP in the lumbar paraspinals, especially on the left. NP Pospisil diagnosed lumbar contusion and strain, and contusion of the right upper arm and left upper arm. NP Pospisil ordered continued massage therapy but also physical therapy, and chiropractic care.

13. The last visit with Dr. Foster was on June 6, 2022, and Claimant reported the May 23, 2022 work injury at that time. While Dr. Foster stated that the case would be closed because of how she was feeling prior to the work accident, he also recommended one visit per month for the next three to six months as well as recommending stretches, home exercises and use of ice. The remainder of the report read very similarly and with the same general findings as the prior report on May 23, 2022 and the reports in May and April 2022.

14. Claimant returned a week earlier than expected on June 7, 2022 stating she was not tolerating light duty as it was difficult to adhere to all of the work restrictions as a general manager. NP Pospisil took her off work and continued her treatment plan.

15. Alexa Sheppard, D.C. evaluated Claimant on June 7, 2022 taking a history and reviewing available records. Dr. Sheppard noted that Claimant reported “no other health conditions” under past medical history. Dr. Sheppard found hypertonicity in the cervical and trapezius muscles, the thoracic and lumbar spine muscles, including trigger points. She recommended a course of treatment that included spinal manipulation to address somatic dysfunction, dry-needling directed at the trigger points and hypertonicity of the muscles, acupuncture directed at the acupoints, active release techniques for the myofascial dysfunction and adhesion or peripheral nerve entrapment. On June 9, 2022

Dr. Sheppard diagnosed both cervicothoracic and thoracolumbar sprain/strain with associated myofascial and facet dysfunction, muscle spasms, and segmental/somatic dysfunction.

16. On June 15, 2022, due to lack of improvement despite continued PT, massage therapy and chiropractic treatment, NP Pospisil ordered an MRI of the lumbar spine and continued Claimant off work until her next scheduled appointment.

17. Claimant had been off for two full weeks by June 23, 2022 and reported to NP Pospisil that she was worse. NP Pospisil noted multiple pain behaviors and positive Waddell signs such as complaints of lower back pain with axial loading of the spine, superficial skin tenderness to light touch, shoulders and pelvis rotating in the same plane eliciting low back pain and grimacing throughout the exam. She referred Claimant to a psychologist, Rebecca Hawkins, Ph.D.[2] and returned Claimant back to limited part-time work.

18. The MRI of June 30, 2022 showed mild L4-L5 degenerative disc disease with shallow left central disc protrusion but no significant nerve compression, spinal stenosis, or neural foraminal narrowing and mild lower lumbar facet hypertrophy as read by Dr. Craig Stewart of Health Images.

19. Waddell signs continued to be present in Claimant's evaluation on July 7, 2022 with NP Pospisil. At that time she reviewed the MRI results with Claimant noting no significant findings correlating to Claimant's complaints, despite Claimant's unchanging physical exam including significant limited range of motion and pain behaviors. She continued the same treatment plan and increased Claimant's hours slightly. Claimant was referred to Lawrence Lesnak, D.O., a physical medicine and rehabilitation specialist at CROM.[3]

20. Dr. Sheppard also noted multiple pain behaviors including flinching at light palpation, and noted Claimant's slow progress on July 19, 2022. On July 26, 2022 Dr. Sheppard remarked that the "[P]atient is responding slower than anticipated. Pain appears out of proportion with objective findings and portion of the examination are confounded by pain behaviors and excessive volitional guarding."

21. On August 23, 2022, Dr. Levi Miller at Colorado Rehabilitation & Occupational Medicine evaluated Claimant upon referral from Midtown. Dr. Miller reviewed the MRI and indicated the study was "reassuring," with no evidence of acute abnormality, though it was noted there was evidence of mild L4-5 disc desiccation with a shallow central disc protrusion without stenosis or nerve compression. He explicitly noted that "The patient denies similar symptoms in the past requiring professional medical treatment, specifically denies history of low back pain treated by physicians or chiropractors, or prior work-related injury."

22. Dr. Miller diagnosed a lumbar strain but no focal neurologic deficits, degenerative disc desiccation, a shallow central disc protrusion, mild facet arthropathy at

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[2] The records did not contain a copy of a report generated by Dr. Hawkins and this ALJ infers that an evaluation did not take place.

[3] Neither did the record contain a report from Dr. Lesnak, but did contain one from Dr. Miller of the same office, who is also a physical medicine and rehabilitation specialist.

L4-S1 without facet effusion, no significant central canal or neuroforaminal narrowing. He noted substantial pain behaviors throughout the visit, including positive limited Waddell's. Dr. Miller opined that the examination was overall benign and that Claimant's MRI was unremarkable with the exception of mild age-appropriate lumbar degenerative changes. Dr. Miller opined that she had had appropriate conservative care and that additional treatment was unlikely to improve Claimant's function. He stated Claimant was at maximum medical improvement (MMI).

23. NP Pospisil wrote on August 23, 2022 that she had spoken with the specialist, Dr. Miller, whom Claimant had seen earlier in the day. They "reviewed that with a benign MRI, examination, multiple (sic.) pain behaviors, and +Waddells signs that patient is at MMI and there is no medically indicated further interventions at this time." She informed Claimant that she was at MMI. Claimant was emotional in the clinic from the news as she continued to report significant pain. Claimant was released from care without restrictions, maintenance care or impairment.

24. Dr. Cedillo specifically agreed on September 9, 2022 with the date of MMI of August 23, 2022, the recommendation of no maintenance care and that there was no indication for impairment as related to the May 23, 2022 admitted injury, as stated by NP Pospisil.[4]

25. Claimant was evaluated by DIME physician, Dr. Brian Shea on March 10, 2023 and he issued a report on the same day. Dr. Shea reviewed the medical records provided encompassing 2019 through 2023. He was asked to evaluate Claimant's thoracic, lumbar and pelvic spine areas. He took a history from Claimant of the mechanism of injury, of falling backwards onto her back experiencing pain in her neck, back and upper bilateral arms. He identified pertinent information from the records, memorializing them. The subjective history including visualizing a normal gait, that she took Tylenol for pain, did minimal exercise or stretching,[5] worked full time and cared for her 4-year old. He stated that Claimant did complain of problems sleeping and a constant pain in the range of a 4-5 on a 0-10 scale. On exam, neurologically she was intact, had no gross motor or sensory deficits, but did have pain mannerisms with light touch to the muscles across her low back. She had limited motion of the lumbar spine but normal motion of the thoracic spine. He diagnosed low back pain with a lumbar strain from the slip and fall injury, and decreased range of motion. He agreed with Dr. Cedillo and Dr. Miller's date of MMI of August 23, 2022. He opined that Dr. Paz's date of MMI was decided in a somewhat cavalier manner.

26. Dr. Shea opined in his DIME report that Claimant had a 5% for specific disorder under Table 53IIB of the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*) and an 8% whole person impairment related to loss of range of motion,[6] which combined to a 13% whole person impairment. He noted that

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[4] It is to be noted that Dr. Cedillo was NP Pospisil's supervising physician during the course of Claimant's treatment and cosigned all of Nurse Pospisil's reports.

[5] This was contrary to what Dr. Foster, her prior chiropractor had recommended.

[6] Dr. Shea's ROM measurements were internally valid and consistent and did not require further measurements in accordance with the *Guides* despite Dr. Paz's contrary opinion. Dr. Shea was not required to complete anything other than Figure 83 from *the AMA Guides* and not the additional information added at the bottom to complete an impairment rating.

given Claimant's Waddell signs as noted on other provider's medical reports, and Claimant's exaggerated symptoms on exam, the range of motion impairment was likely too high and should be tempered, but that Claimant met the criteria for impairment of the lumbar spine. He recommended no work restrictions or maintenance care.

27. F. Mark Paz, M.D. on January 19, 2023 produced, at Respondents' request for an Independent Medical Record Review, a detailed report of his opinions. After review of the records, analysis of the findings of the providers and Claimant's response to treatment, Dr. Paz opined as follows:

> The current symptoms and findings on physical examination are consistent with nonorganic low back pain. The subjective symptoms during the course of care subsequent to the May 23, 2022, incident, are not supported by objective findings on physical examination. Therefore, the mechanism of slip and fall, with the diagnosis of lumbar contusion, more likely than not, did not require medical treatment following the evaluation on May 24, 2022.

He stated that Claimant had reached MMI on May 24, 2022 without impairment as she did not meet the criteria for impairment under the *AMA Guides* for a Table 53 diagnosis. He further opined that no restrictions or maintenance care was appropriate as Claimant had a nonorganic low back pain that should be address by her personal primary care physician. He concluded that based on a reasonable medical probability, it was not probable that the symptoms were causally related to the May 23, 2022 incident.

Medical Records Subsequent to MMI

28. On October 5, 2022, Claimant presented to Longmont United Hospital ER with complaints of acute on chronic low back pain, which Claimant attributed to her May 2022 work injury. Claimant reported that, the previous night, she felt a pop in the low back when rolling over in bed and had a significant worsening of low back pain. Claimant had taken no steps in order alleviate her symptoms before going to the ER, including no medications or done any other treatments for her back pain. A musculoskeletal examination of the cervical/back indicated "normal range of motion." Claimant had no lower extremity weakness, sensory changes, urinary retention, loss of bowel or bladder function, and had no groin numbness that would indicate a serious spinal condition. X-rays of the lumbar spine were unremarkable.

29. Claimant was discharged with medications for an acute exacerbation of chronic back pain. Dr. Regan Jernigan recommended Claimant consider use of OTC ibuprofen and Lidocaine patches, frequent application of heating pad or warm moist towel and Valium for more severe pain and could consider following up with physical therapy for soft tissue and possible dry needling. Dr. Jernigan concluded that Claimant had an acute exacerbation of her chronic low back pain following the incident of turning over in bed and should follow up with her "primary care provider."

30. Claimant received several bills associated with her October 5, 2022 ER visit at Longmont United Hospital, including imaging from Colorado Imaging Associates. Respondents sent notices of denial to the providers and Claimant's counsel on November 16, 2022, December 19, 2022, and again on April 24, 2023, advising that the bills were denied per W.C.R.P. 16 on the basis that the treatment performed was not authorized as maintenance care had been denied and there were no further recommendations for treatment by any of the authorized providers.

Dr. Paz's Testimony

31. Dr. Paz testified on behalf of Respondents as an expert in occupational medicine and as a Level II accredited physician, over Claimant's objection. Dr. Paz reviewed the DIME physician's report after he produced his original medical records review. He reviewed the MRI findings and found that the findings of the mild herniation at L4-L5 were not medically probable related to the admitted work injury. The herniation does not impact the surrounding neurologic tissue, the nerves exiting the spinal cord or the spinal cord itself. There was no inflammation in or about the disc or the facets which would indicate acute changes, but showed chronic changes. Dr. Paz specifically agreed with Dr. Miller's assessment of August 23, 2022 of the MRI findings as unremarkable other than the degenerative changes.

32. Dr. Paz discussed the mechanism of injury revealed in the medical records including from Claimant to her medical providers and the DIME physician, specifically that she slipped and fell backwards on May 23, 2022, and after the fall developed neck, back and arm pain. Dr. Paz opined that the lumbar spine MRI findings were not consistent with that kind of fall. He noted that the only objective findings was a contusion of the upper arms. He further opined that Dr. Shea did not identify a specific pain generator specific to this claim.

33. In discussing Dr. Shea's impairment rating and assessment of a rating under Table 53, Dr. Paz opined that it was inappropriate to assign a rating. He explained that for a rating to be assigned there had to be a specific correlation with the clinical findings or a clear physiologic tie, which was not present here. Despite the results of the MRI, there were nonspecific spinal complaints found by all the treating providers as well as the DIME. He opined that, given the Waddell findings and the absence of any abnormal objective findings on physical exam that correlated with the pathology found on MRI, there was no identifiable injury that may be related. He opined that, in accordance with the Level II accreditation teachings and the Division's Impairment Rating Tips, this type of patient could not be rated under Table 53 II B. Lastly, in the absence of a Table 53 rating, there could not be a range of motion impairment in accordance with Level II accreditation teachings. He opined that Dr. Shea was in error for not completing the range of motion testing and the required worksheets.

Claimant's Testimony

34. Claimant was called as a witness by Respondents and she testified that she had been involved in at least to prior accidents before her work related accident. The first she was treated through Longmont United Hospital due to a slip and fall in 2019. The second was a motor vehicle accident when she was hit going approximately 35 mph in October 2021. Both accidents involved treatment to her low back. She recalled she had x-rays taken related to the second October 2021 accident.

35. Claimant did not specifically recall providing Dr. Miller with information that might have lead him to conclude that "[T]he patient denies similar symptoms in the past requiring professional medical treatment, specifically denies a history of low back pain treated by physicians or chiropractors or a 19 prior work-related injury," and that the information was incorrect.

36. Claimant confirmed that she was attended at Longmont United on October 5, 2022, after being placed at MMI for the admitted work related injury, with worsening low back pain after she had rolled over in bed and felt a pop in her low back, causing pain mostly in the middle of the low back but non-radiating and worse with movement.

37. Claimant explained that she was the general manager at Employer's and she was very aware that there were multiple video cameras on the premises recording the employees constantly. She had access to the videos if she needed them. Respondents introduced six similar videos for Wednesday July 19, 2023.

38. Claimant confirmed that she was the individual working in the videos. The video showed Claimant working, bending down or squatting to reach a lower shelf either with items in her hand or without. She testified that she had difficulty stocking the make line but she continued to do it because she had to. This ALJ observed Claimant working with a smooth regular pace and did not show any modifications to her work flow or work progress.

39. Claimant was also asked questions regarding interrogatories she had responded to on July 6, 2023, specifically interrogatory No. 17 which asked "[S]tate with specificity any and all functional limitations you claim or you have, that are causally related to the May 23, 2022 work injury." Claimant answered as follows:

> Sometimes I have the limitations since my injury from May 23, 2022 are, I can't bend over to restock the make line at my job. I can sleep, turning one side or another, it's hard. Also, twisting or carrying trays of dough, it's painful in my back. I cannot carry my son as it is painful. I need to take, um -- check --- check and see for him to sit on my lap.

40. When questioned by Claimant's counsel, and to his clear surprise, Claimant admitted that prior to her work injury of May 23 2022 she had the type of pain that she experienced after the accident and she continued to have it.

41. On May 23, 2022 she experienced pain in the low back on the left side. She testified that she had treatment for her back up until her May 23, 2022 accident from her October 19, 2022 motor vehicle accident. She started seeing the chiropractor in December 2021 and continued thereafter for several months though she could not recall specifically how many.

42. After she was released by the workers' compensation providers, she continued to take Tylenol and ibuprofen once or twice a day for the pain and she continues to experience pain and symptoms since then in the low back, which are the same symptoms she was experiencing before she was seen at Longmont United on October 5, 2022.

43. Claimant denied that she was asked by the Midtown providers about prior injuries or treatment to her back. She also denied having volunteered the information that she had been treating with a chiropractor for her back. She denied that Next Care had asked her at any time about any prior accidents when she was seen on May 24, 2022. Claimant was emphatic that, if a provider asked her anything, she would answer them. That included Dr. Shea, as she stated he did not ask her anything about other accidents.

44. Claimant had never disclosed the prior provider, the chiropractor located at 15th and main in Longmont, to Respondents, despite discovery and requests.

Dr. Shea's Testimony

45. On September 15, 2023, Respondents took the post-hearing deposition of DIME physician, Dr. Brian Shea, an expert in neuromuscular medicine, osteopathic manual medicine and a Level II accredited physician with the Division of Workers' Compensation. Dr. Shea reviewed his DIME report and the mechanism of injury, recalling that Claimant provided the history. Dr. Shea stated that his opinion would be impacted if Claimant had been provided chiropractic care between October 2021 and April 2022, stating he would like to know how often Claimant had been seen. He agreed that Claimant did not disclose the information to him the same way she admitted she had not disclosed it to Respondents. He specifically noted that this was an important and a significant finding.

46. Dr. Shea corroborated that he provided a Table 53 impairment based on muscle strain, tightness, not necessarily the herniation shown on MRI as he did not know how much it were contributed to her symptoms. He explained that whenever he saw a diagnosis of muscle strain or lumbar strain, it implied that there was muscle tightness or muscle spasm. Dr. Shea remarked that Claimant had significant response to Waddell testing showing some exaggerated pain complaints, which caught his attention. This was also something that other providers noted since early in her treatment. He opined he gave too high a rating and that it should have been tempered but was following Division guidelines. It was based on a balancing of factors whether to give a rating or not and Claimant showed a myriad of factors including significant loss of range of motion, pain and rigidity and because of that qualified for a Table 53 rating at a minimum. However, was conditional on the review of the prior, previously unavailable, medical records from the chiropractor and the frequency of the visits.

Dr. Shea's Supplemental Report

47. Dr. Shea issued a Supplemental DIME report on January 7, 2024. He noted that the late exchanged chiropractic records indicated Claimant had been treated by the chiropractor for low back pain prior to and two weeks after the work injury encompassing dates of April 21, 28, May 5, 15 and June 6, 2022. He noted that all the records read similarly that Claimant had low back pain, pelvic pain and sacral pain that radiated to the buttock and hip affecting her gait and walk, with the only distinction that on June 6, 2022 he noted that Dr. Foster remarked Claimant had been doing well after her last treatment with no pain until her work related accident. The problem he identified was that the report then went on to read identical to the prior ones.

48. Based on Dr. Shea's analysis of the chiropractor's notes, he opined that Claimant had an ongoing chronic low back pain problem that was no different from prior to her work related accident. He, in effect, withdrew his prior assessed 13% whole person impairment stating it was not correct given the new records. He opined that no impairment was warranted under the workers' compensation system and to a reasonable degree of medical probability Claimant had no impairment related to the May 23, 2022 accident.

Ultimate Findings

49. While Claimant testified that she was truthful with her workers' compensation providers and the DIME physician, it is clear that she was not. As found,

the records show that Claimant either failed to disclose or did not disclose her prior injury to her low back and her ongoing treatment with the chiropractor through June 2022, showing lack of forthrightness. She also failed to disclose to Respondents this medical provider when providing a list of providers as required by the Division rules.

50. As found, Claimant did not mention to her Midtown Occupational Medicine providers any treatment, including chiropractic treatment from her October 2021 motor vehicle accident, as this is not listed as part of the past medical history and specifically advised that she had "no other health conditions." As found, Claimant is found not credible in this matter.

51. As found, Claimant also was noted to report to Dr. Miller that she did not have "similar symptoms in the past requiring professional medical treatment," and she specifically denied any history of low back pain treated by physicians or chiropractors. Clearly this is not correct as Claimant was seen for chiropractic care for her low back specifically from November 2021 through June 6, 2022. As found, Claimant was not credible in this matter.

52. As found, Claimant was required to produce a list of all providers who had treated her for the parts of the body or conditions alleged by the claimant to be related to the claim, during the period five years before the date of injury and thereafter through the date of the request pursuant to W.C.R.P. Rule 5-4(C) and failed to do so.

53. As found, Claimant appears to have intentionally not disclosed this information until she was under oath at hearing, and by this ALJ's assessment of Claimant's counsel's expression, did not even inform her counsel.

54. As found, it was appropriate to allow the DIME physician's review of the additional previously undisclosed records and allow the parties to obtain further response from the DIME physician.

55. As found, Dr. Shea's ultimate determination in this matter, considering review of all the records, is that Claimant had no permanent impairment associated with the workers' claim of May 23, 2022 and that the exacerbation of the Claimant's chronic conditions following the May 23, 2022 accident was only temporary in nature, returning to its baseline by the time she was placed at MMI on August 23, 2022.

56. As found, the charges from the October 5, 2022 visit to Longmont United Hospital was a further exacerbation unrelated to the May 23, 2022 claim but to her general chronic pain problems that existed prior to the May 23, 2022 accident, either related to the October 2021 motor vehicle accident or a prior chronic condition as referenced in the September 2019 Longmont United Hospital records, which referenced very similar complaints and symptoms to those made by Claimant in the October 2021 claim and the May 2022 claim.

57. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (2021). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). Claimant is not required to prove causation by medical certainty. Rather it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v.*

Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Overcoming DIME

A DIME physician's findings of MMI are binding on the parties unless overcome by "clear and convincing evidence." Sec. 8-42-107(8)(b)(III), C.R.S. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). 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." *Leming v. ICAO,* 62 P.3d 1015 (Colo. App. 2002); *Adams v. Sealy, Inc*., W.C. No. 4-476-254, ICAO, (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*.

A mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Gutierrez v. Startek USA, Inc.,* W.C. No. 4-842-550-01, *ICAO,* (March 18, 2016); *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 ICAO, (July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 ICAO, (Nov. 17, 2000); *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356, ICAO, (March 22, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

If the DIME physician offers ambiguous or conflicting opinions it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion. Section 8-42-107(8)(b), C.R.S.; see *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175, ICAO, (May 25, 2005) [aff'd, *Resources One, LLC v. Industrial Claim Appeals Office* 148 P.3d 287 (Colo. App. 2006)]; *Leprino Foods Co. v. ICAO*, *134 P.3d 475 (Colo. App. 2005); In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

Respondents have shown by clear and convincing evidence that Dr. Shea's original opinion laid out in his report of March 10, 2023 was in error. Dr. Shea's testimony and subsequent report of January 7, 2024, as well as review of the medical records, including the late exchanged chiropractic records are very credible and persuasive in this matter and constitute clear evidence that supports Dr. Shea's later opinion. As found, the

combination of Dr. Shea's deposition testimony and the January 7, 2024 letter are the DIME physician's ultimate and true opinion regarding Claimant's impairment, or lack thereof, in this matter. While Claimant may have had a temporary aggravation, which was appropriately treated conservatively as explained by Dr. Miller, she clearly had an ongoing chronic condition prior to her work injury. If Claimant had a prior ongoing chronic condition,[7] then any impairment she had was related to the prior chronic conditions and not to the temporary aggravation related to the May 23, 2022 incident. This conclusion is supported by Claimant's lack of credibility, specifically the fact that she failed to disclose to her providers that she had a prior back injury, that it was a chronic condition, that she had been having treatment of that chronic back condition through the date of the work related incident and which she failed to disclose it to Respondents as required by rule, until she was under oath on the stand at hearing. As found, Claimant had a chronic condition that had likely lasted for quite some time before the work related incident and which was only temporarily aggravated by the accident which occurred on May 23, 2022.

This ALJ was not persuaded by Dr. Paz's arguments that Claimant was at MMI as of May 24, 2022, the day after her work injury, or that no Claimant is entitled to a Table 53 rating when there is correlation between diagnostic testing and a Claimant's physical findings. First, Claimant's treating providers believed that Claimant needed to be stabilized to her pre-injury condition and did not reach MMI until Dr. Miller, NP Pospisil and Dr. Cedillo concluded that there was nothing further they could do medically as all conservative treatment had been exhausted. Secondly, under the *AMA Guides* and the Level II accreditation coursework, a physician may assign a Table 53 rating when there is no diagnostic evidence but where there is an unoperated soft tissue lesion with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with none-to-minimal degenerative changes on structural tests. A Claimant that has a substantial record showing that there is loss of range of motion, rigidity, and muscle spasm following an accident may be entitled to a Table 53 rating. Muscle spasms or hypertonicity are specific objective findings that may indicate there was pathology related to the injury. For example, if a patient suffered a lumbar strain with six months of treatment, they would normally receive 5% impairment (Section IIB). This case was the exception as Claimant's condition was a chronic low back condition that had existed well prior to the temporary aggravation of May 23, 2022. This ALJ did find persuasive Dr. Paz's conclusion that that based on a reasonable medical probability, it was not probable that the symptoms Claimant was experiencing were causally related to the May 23, 2022 incident.

Respondents have shown that the DIME physician's true opinion is that Claimant had no impairment or 0% impairment related to the May 23, 2022 incident as she only had a temporary aggravation of her preexisting ongoing chronic pain condition of her lumbar spine, which returned to baseline and required no further care. Therefore, the burden of proof shifted to Claimant to prove that Dr. Shea's true opinion was in error by clear and convincing evidence.

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[7] This ALJ questions whether Claimant had a chronic condition that went back further than even the September 2019 hospital visit, beyond those records provided of the chiropractor she saw between November 2021 and June 2022.

Dr. Shea did state originally he felt obligated to provide a table 53 rating of 5% whole person impairment despite Claimant's multiple signs of exaggeration, including multiple Waddell signs. However, after reviewing the chiropractor records that went through June 6, 2022, Dr. Shea noted there was no difference in the chiropractic notes in prior examinations immediately before and then after the occupational injury, and this ALJ's examination of those records found the same. Dr. Shea completely reversed his stance and opinion, withdrawing his prior assessed 13% whole person impairment, stating it was not correct given the new records. He opined that no impairment was warranted under the workers' compensation system related to the May 23, 2022 claim given the new evidence of the preexisting ongoing chronic pain condition and that Claimant's back issues were related to that chronic problem. He stated that to a reasonable degree of medical probability Claimant had no impairment related to the May 23, 2022 accident. This ALJ found Dr. Shea's ultimate and true opinion to be correct. Claimant did not provide any further evidence to dispute Dr. Shea's true opinion in this matter regarding the finding of the 0% whole person impairment rating. Claimant failed to show that Dr. Shea's true opinion was incorrect by clear and convincing evidence.

C. Authorized Medical Benefits

Respondents are liable for authorized medical treatment which is reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101(a), C.R.S. (2023); *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course and scope of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Clam Appeals Office*, *supra at* 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability, but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.*, *supra* at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball*, *supra*.

The record must distinctly reflect the medical necessity of any medical treatment needed to cure and relieve an injured employee from the effects of the industrial injury and any ancillary service, care, or treatment as designed to cure and relieve the effects of such industrial injury. *Public Service Co. of Colorado v. Industrial Claim Appeals Office of State of Colo.*, 797 P.2d 584 (Colo. App. 1999). The question of whether medical treatment is reasonable and necessary is one of fact for determination by an ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims* Office, 989 P.2d 251 (Colo. App. 1999). After a claim has been admitted, Respondents still have the right to challenge the reasonable necessity of treatment if it is not causally related to the injury. *Snyder v. Industrial Claim Appeals Office of the State of Colo*., 942 P.2d 1337 (Colo. App. 1997). Causation is a question of

fact for resolution by the ALJ. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

Here, as found, Claimant failed to show any causal connection between the incident of October 5, 2022 and the temporary aggravation of Claimant's underlying ongoing chronic condition, nor the reasonableness of the emergency medical care. First, Claimant had been placed at MMI on August 23, 2022 without impairment or maintenance care related to the incident of May 23, 2022 by her ATPs. This was affirmed by Dr. Shea, the DIME physician when he found Claimant to have reached MMI as of August 23, 2022 and required no further maintenance care. Further, when examining the ER records from the October 5, 2022 visit, this seemed to be just another exacerbation cause by Claimant's sleeping habits, which should have been easily addressed by Claimant based on recommendations by her providers in the past. The ER records specifically noted that Claimant did not take any medications or apply any efforts to address her pain before going to the emergency room and this ALJ does not find that this was a true emergency. This ALJ infers from the record that, had Claimant taken preventative measures, as recommended by Dr. Foster for stretching, exercising and using ice, as well as Claimant using over the counter medications, she would likely not have needed to be attended at the ER and could have gone to her PCP instead. Claimant was, in fact, referred by the ER to her PCP for her ongoing maintenance of her chronic pain condition. Therefore, even if it had been related to the temporary aggravation, which this ALJ specifically determines it was not, it was not reasonably necessary medical care to address her complaints. Claimant has failed to show that the treatment she received on October 5, 2022 was neither reasonably necessary nor related to the May 23, 2022 work related temporary aggravation of her ongoing chronic low back condition.

ORDER

IT IS THEREFORE ORDERED:

1. The DIME physician, Dr. Brian Shea's, true opinion was that Claimant had 0% impairment related to the May 23, 2022 work incident.

2. Claimant failed to overcome the DIME physician's true opinion by clear and convincing evidence. Claimant's claim for permanent partial disability benefit is *denied* and *dismissed*.

3. Claimant's claim for medical benefits for emergency services at Longmont United Hospital on October 5, 2022 is *denied* and *dismissed*.

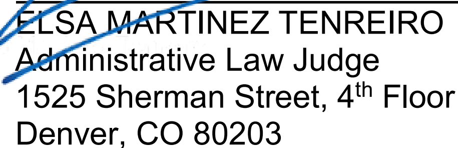
4. All matters not determined here are reserved for future determination.

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

for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

DATED this 8th day of February 2024.

Digital Signature



By: ______________________________
ELSA MARTINEZ TENREIRO
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-162-337-001

ISSUES

- Did Respondents overcome the DIME's whole person impairment rating by clear and convincing evidence?

- Did Claimant overcome the DIME's determination of MMI by clear and convincing evidence?

- Disfigurement.

- The parties stipulated that Respondents are entitled to a credit against PPD for any temporary disability benefits paid after MMI.

- The parties stipulated Claimant is entitled to a general award of reasonably necessary medical treatment after MMI from authorized providers, subject to Respondents right to dispute specific treatment in the future.

FINDINGS OF FACT

1. Claimant works for Employer as a chef. She suffered an admitted injury on November 20, 2020, when she was bitten by a spider on the left posterior calf.

2. Claimant developed an abscess caused by the spider bite. The abscess was drained, but she continued to experience pain and skin lesions. She was initially treated with antibiotics, but the symptoms persisted. Claimant saw multiple specialists, including a plastic surgeon, an infectious disease specialist, a rheumatologist, and a dermatologist. She was ultimately diagnosed with pyoderma gangrenosum, an inflammatory/immune system disorder that causes painful and purulent ulcerations in areas of previous trauma.

3. The most effective treatments have been systemic steroids, CellCept, and NSAIDs.

4. Dr. Annu Ramaswamy performed two record reviews and an IME at Respondents' request. In his initial report, dated January 10, 2022, Dr. Ramaswamy noted Claimant was pending a surgical evaluation by a plastic surgeon, and a determination of MMI would depend on whether surgery was recommended. He anticipated Claimant would have permanent impairment when she reached MMI.

5. Dr. Ramaswamy conducted an in-person IME on October 21, 2022. Claimant described chronic discoloration and burning pain in the left lower leg. She had attempted numerous treatment modalities that provided temporary symptomatic relief but had not resolved her condition. Claimant felt she had plateaued and was just being maintained with medications and occasional injections. She reported that "activity in

general" aggravated the pain and swelling in her leg. She was working part-time for Employer and her leg pain increased to 8/10 by the end of her workday. She has difficulty tolerating prolonged standing or walking and would sit or lie down to alleviate the pain. Claimant was working 5-6 hours per day, four days per week. Her manager was very supportive, and she received help from co-workers lifting heavy items. Dr. Ramasamy noted Claimant got approximately 7 hours of interrupted sleep on a typical night. However, some nights she sleeps very little because she "cannot get comfortable" and the throbbing leg pain keeps her awake. Her son had taken responsibility for any physically demanding tasks at home. Claimant still drove "fairly well" because she operates her automatic transmission vehicle using only her the uninjured right leg.

6. Dr. Ramaswamy opined Claimant was at MMI. He thought no additional treatment was likely to improve her condition and her ongoing treatment was merely maintenance. Dr. Ramaswamy opined Claimant will need maintenance care indefinitely, primarily immunosuppressive therapy and periodic steroids. Dr. Ramaswamy assigned a 5% whole person skin impairment under Table 1 on page 232 of the *AMA Guides*. He opined Claimant she had a Class 1 impairment because she had no in the performance of activities of daily living. Specifically, Dr. Ramaswamy noted she was "able to maintain her ADLs" despite increased pain with activity. Regarding permanent restrictions, he recommended no lifting more than 20 pounds, and that she alternate standing/walking and sitting "as much as possible."

7. Claimant followed up with her primary ATP, Dr. Shireen Rudderow, on March 6, 2023. Dr. Rudderow noted that Claimant "had little change for many months" and was therefore at MMI. Examination of the left calf showed some muscle weakness from disuse. Dr. Rudderow completed a formal narrative report on April 6, 2023 addressing permanent impairment. She assigned a 15% whole person impairment for a Class 2 skin impairment. Dr. Rudderow reasoned that Claimant required continuous treatment to manage her pyoderma and had limitations in activities of daily living due to leg pain and swelling. She recommended indefinite maintenance care, to include medications, injections, and other procedures deemed appropriate by her dermatologist. Dr. Rudderow assigned permanent work restrictions limiting Claimant to no more than 6 hours per day, 4 days per week, alternate standing and sitting as needed, and lifting "as tolerated."

8. Respondents requested a DIME to challenge Dr. Rudderow's rating. Dr. Philip Smaldone performed the DIME on July 28, 2023. Claimant described constant left leg pain throughout the day, aggravated by standing and walking. She was still working as a cook but it was painful to do so. Claimant could not tolerate walking more than 30 minutes at a time, and pain disturbed her sleep several times per week, especially if she worked longer than 6 hours.

9. Dr. Smaldone agreed with Dr. Ramaswamy that Claimant was at MMI as of October 21, 2022. But he disagreed with Dr. Ramaswamy's 5% rating. Instead, Dr. Smaldone opined Claimant fits the Class 2 category of impairment because she requires continuous treatment, and the injury limits her ability to perform ADLs. Specifically, he cited Claimant's inability to walk more than 30 minutes and her intermittent sleep

impairment. He thought Dr. Ramaswamy's 5% rating failed to adequately account for the limitations in ADLs. He also noted that Dr. Rudderow had assigned the identical 15% rating based on Class 2 skin impairment. He recommended Claimant follow up with the dermatologist for maintenance care indefinitely. Regarding work restrictions, Dr. Smaldone agreed that Claimant was limited to 6-hour shifts but thought the number of day worked per week should be left to Claimant to determine. He also agreed she needs to alternate sitting and standing as needed and needs a 5–10-minute rest break every hour.

10. Dr. Ramaswamy performed a supplemental record review on November 20, 2023, to review records generated since his October 2022 IME. He noted Claimant's appointments with specialists between his IME and Dr. Rudderow's date of MMI were limited to medication management, with no new treatments being offered and no improvement in Claimant's condition. Similarly, a rheumatology evaluation in December 2022 produced no new recommendations. Dr. Ramasamy disagreed with the 15% ratings assigned by Dr. Smaldone and Dr. Rudderow. He maintained his opinion that Claimant has no limitations in ADLs despite the fact that she can only walk 30 minutes at a time and the sleep disturbance.

11. At hearing, Dr. Ramaswamy elaborated on his definition of "activities of daily living" as that term is used in the *AMA Guides*. According to Dr. Ramaswamy, "activities of daily living" is a term of art, which refers to "cooking, taking care of yourself, getting dressed in the morning, driving." Dr. Ramaswamy testified he "checked with the Division" to confirm his understanding.

12. Dr. Smaldone and Dr. Rudderow's opinions regarding Claimant's degree of permanent impairment are credible and more persuasive than the contrary opinion offered by Dr. Ramaswamy.

13. Respondents failed to overcome the DIME's 15% whole person rating.

14. Claimant failed to overcome the DIME's MMI date by clear and convincing evidence. Dr. Ramaswamy persuasively documented that Claimant's condition had stabilized by his IME on October 21, 2022. Claimant agreed with that proposition. Although Claimant had a handful of additional specialist appointments between October 21, 2022 and March 6, 2023, all treatment was consistent with "maintenance care." Indeed, the dermatologist repeatedly described the ongoing plan as "medication management."

15. At the hearing, Claimant demonstrated visible disfigurement consisting of: (1) a large area of darkened and botchy discoloration wrapping around the lower portion of her leg, (2) another large area of redness extending down to the Achilles area, (3) an overall duskiness of Claimant's lower left leg when compared to the right leg, and (4) noticeable swelling of the lower left leg. The ALJ finds that Claimant shall be awarded $5,000 for disfigurement.

CONCLUSIONS OF LAW

A. Respondents failed to overcome the DIME regarding impairment

A DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing burden also applies to the DIME's determination of which impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

As found, Respondents failed to overcome Dr. Smaldon'e 15% rating by clear and convicing evidence. All rating physicians agree Claimant qualifies for a skin rating, and the only disagreement is whether she qualifies for a Class 1 or Class 2 impairment. The DIME and the ATP used idential methodology and calculated identical 15% Class 2 ratings. Dr. Ramaswamy advocates a Class 1 impairment, based on his narrow definition of "activities of daily living." But neither the *AMA Guides* nor the Division's Levell II accreditation curriculum support Dr. Ramaswamy's position. According to Appendix A of the *AMA Guides,* ADLs encompass a wide variety of activities, including very basic functions such as toileting, bathing, and eating, and higher level activities such as travel, sexual function, and engaging in recreational activities. Moreover, the ADLs listed in Appendix A specifically include "walking" and maintaining a "restful nocturnal sleep pattern," which Dr. Smaldone and Dr. Rudderow each cited in assigning a Class 2 impairment. The definition of ADLs found in the Level II cirriculum tracks Appendix A and states, "Ratings are primarliy based on the evlauation of activities of daily living, which include self-care and personal hygiene, communication, normal living postures (sitting, standing, lying down), ***ambulation***, travel, non-specialized hand activities (grasping, lifting, tactile discrimiation), sexual function, ***sleep***, and social and recreational activities.[1] Because walking and sleep are explicitly listed as examples of ADLs in the AMA Guides and Level II training materials, it was reasonable for Dr. Smaldone and Dr. Rudderow to equate limitations in those activities with limitations in "ADLs," without regard to how they might impact Claimant's ability to perform other activities.

At most, Dr. Ramaswamy has established that the classification of Claimant's impairment is an issue about which reasonable physicians can disagree. Dr. Ramswamy's opinions reflect a "mere difference of medical opinion" and do not rise to the level of clear and convincing evidence.

[1] Level II Curriculum (revised 10/2020), pp. 67, 89 (emphasis added).

B. Claimant failed to overcome the DIME's MMI date

As with whole person impairment, a DIME's determination of MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c).

As found, Claimant failed to overcome the DIME's October 21, 2022 MMI date by clear and convincing evidence. The DIME agreed that Claimant was at MMI as of Dr. Ramaswamy's October 2022 IME. By that time, Claimant's injury had stabilized, and nothing else was reasonably likely to improve her condition. Claimant herself told Dr. Ramaswamy she had "reached a plateau," and "is not getting any better, but she is not getting any worse and she feels that the current treatment is maintaining her condition." Claimant's few appointments between October 21, 2022 and March 6, 2023 were primarily for medication adjustments and are most reasonably seen as post-MMI "maintenance" visits.

C. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." The fact that Claimant received a skin rating for permanent medical impairment does not preclude an additional disfigurement award for the visible consequences of her injury. *E.g.*, *Gonzales v. Advanced Component Systems*, 949 P.2d 569 (Colo. 1997). As found, Claimant has sustained noticeable disfigurement as a direct and proximate result of her industrial injury. The ALJ concludes Claimant should be awarded $5,000 for disfigurement.

ORDER

It is therefore ordered that:

1. Insurer's request to set aside the DIME rating is denied and dismissed.

2. Claimant's request to overcome the DIME's MMI date of October 21, 2022 is denied and dismissed.

3. Insurer shall pay Claimant PPD benefits based on a 15% whole person rating, commencing October 21, 2022. Insurer may take credit for any temporary disability benefits paid to Claimant on or after October 21, 2022.

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

5. Insurer shall pay Claimant $5,000 for disfigurement.

6. As stipulated by the parties, Insurer shall cover medical benefits after MMI from authorized providers reasonably needed to relieve the effects of Claimant's injury or prevent deterioration of her condition.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ’s order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: February 9, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-212-738-001

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment in the form of a right knee arthroscopy as recommended by Michael Hewitt, M.D.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment in the form of medial branch blocks as recommended by John Sacha, M.D.

FINDINGS OF FACT

1. Claimant worked as a pizza delivery driver for Employer. On February 1, 2022 she was assigned to bring a pizza to a residence. After she dropped off the pizza, Claimant began descending the first of approximately eight outdoor stairs but fell. She does not remember falling but recalled that it was icy and the stairs were covered with wire/metal mesh. Claimant was on her back when she came to rest at the bottom of the stairs. Her symptoms included pain in her back, right leg and right arm. As she stood up, she could not use her right leg and noted pain in her right knee area.

2. Claimant immediately drove to Employer's facility and reported her fall. She remarked that "at the time everything hurt. Everything hurt. I was more focusing on my knee, but my whole body just felt like I went down a flight of stairs." She selected Concentra Medical Centers in Broomfield, Colorado as her Authorized Treating Provider (ATP).

3. On February 2, 2022 Claimant was initially evaluated at Concentra by Melissa Ginsburg, N.P. under the supervision of Troy Manchester, M.D. The record provides that Claimant sustained an injury to her right leg as a result of a slip and fall from a vertical distance of seven feet. Claimant's symptoms included upper leg pain, knee pain, lower leg pain and ankle pain. A physical examination of the right knee revealed an effusion and limited range of motion in all planes. Claimant was diagnosed with a right knee strain. She was referred for physical therapy and x-rays. There was no evidence of a neck or head injury.

4. An x-ray of Claimant's right knee on February 2, 2022 reflected no evidence of a fracture or dislocation. However, there were abnormalities in the suprapatellar soft tissues suggestive of joint effusion. Claimant received work restrictions. She subsequently worked modified duty with no wage loss.

5. On February 11, 2022 Claimant returned to Concentra for an evaluation. She mentioned new symptoms involving her neck and right elbow. The provider documented that Claimant was having muscle spasms and shooting pains in the neck. Claimant also reported ongoing swelling of the right knee as well as occasional sharp pains in the right elbow and neck. Physician's Assistant Alison Spatz diagnosed Claimant with a right leg injury including a knee

strain. Objective findings were consistent with a work-related mechanism of injury/illness.

6. On February 22, 2022 Claimant returned to Concentra and reported right knee pain levels ranging from 2-8/10. She also mentioned right elbow and neck pain with a headache after sleeping. A physical examination did not reveal right knee abnormalities. Diagnoses remained limited to a right knee strain and a leg injury. Claimant subsequently commenced physical therapy.

7. On March 3, 2022 Claimant returned to Concentra. She noted ongoing symptoms in the right medial knee. Claimant also reported pain in the right elbow, left shoulder, and posterior neck with associated weakness in the right arm. She also noted headaches. The diagnoses now included a cervical strain and a contusion of the right elbow. Claimant was referred for an MRI of the right knee to evaluate underlying pathology based on positive provocative testing for a medial meniscal tear and persistent swelling.

8. On March 11, 2022 Claimant underwent a right knee MRI. The imaging reflected a non-displaced fibular head fracture, probable tear of the posterior horn of the medial meniscus, a degenerative-type tear of the anterior horn of the lateral meniscus, mild osteoarthritis, and a small joint effusion.

9. On April 7, 2022 Claimant underwent an MRI of the cervical spine. The imaging showed moderate degenerative changes including severe C5-6 neural foraminal narrowing.

10. On April 11, 2022 Claimant underwent an orthopedic evaluation with Michael Hewitt, M.D. Dr. Hewitt explained that Claimant was injured on February 1, 2022 when she fell down approximately seven stairs and sustained a rotation injury to her right lower extremity. After conducting a physical examination and reviewing the right knee MRI, Dr. Hewitt assessed Claimant with a right knee medial meniscus tear and non-displaced fracture of the fibular head.

11. On May 25, 2022 Claimant began treatment with John Sacha, M.D. for her neck symptoms. She reported pain localized to the neck and headaches that radiated to the left trapezius. Physical examination revealed cervical paraspinal spasm and segmental dysfunction in the mid-left cervical spine. Furthermore, deep palpation reproduced headaches on the left side with mild pain on extension. Claimant also exhibited diminished range of motion. Dr. Sacha assessed Claimant with work-related injuries including post-traumatic cervical facet syndrome and whiplash associated disorder. He recommended a cervical facet injection and an occipital nerve block.

12. On August 16, 2022 Claimant presented to Gordon Arnott Jr., M.D. at Concentra. She noted complaints of occasional shooting pain in the right leg and right elbow with accompanying numbness and occasional locking in the middle finger. Dr. Arnott commented that the fibular head fracture was stable but the meniscal tear was unstable and pending surgery. Moreover, the ligament tear in the elbow had completely resolved and there was full range of motion. Claimant's most prominent complaint involved the neck. An injection had been proposed but denied.

13. On October 26, 2022 Claimant returned to Dr. Sacha for an examination. Based

on a documented adverse reaction to prior steroid injections, Dr. Sacha did not recommend further steroid injections. He instead suggested a medial branch block and radiofrequency neurotomy for the neck. In addressing Claimant's right knee, Dr. Sacha noted that she had no lasting relief from a knee injection by Dr. Hewitt. He commented that "she does not appear to be a surgical candidate and is likely at an endpoint for treatment."

14. On March 15, 2023 Claimant returned to Dr. Arnott at Concentra for an examination. She reported symptoms in her right knee and both hands. Dr. Arnott also noted a "concussion recheck." He recounted that Claimant had been visiting Dr. Hewitt for her right knee condition but had not seen him since October 3, 2022. Claimant had also been visiting Dr. Sacha for her neck symptoms but had not seen him since October 26, 2022. The plan for Claimant's neck was radiofrequency neurotomy after a C3-5 medial branch block. Dr. Arnott noted the procedures had not been authorized because "this may be due to chronic versus acute." After conducting a physical examination, Dr. Arnott diagnosed Claimant with a cervical strain, a right elbow contusion and a right knee strain.

15. On April 11, 2023 orthopedic surgeon Wallace Larson, M.D. issued a records review report. Dr. Larson concluded Claimant's right knee condition was not related to her February 1, 2022 industrial injury and constituted a degenerative condition. He reasoned:

> [Claimant's] identified traumatic condition is a nondisplaced fibular head fracture. That fracture is healed. She also has an identified relatively small degenerative meniscal tear. It is unlikely the meniscal pathology relates to her reported fall. Almost certainly it is the result of age-related degenerative changes within the meniscus, which is very common in middle-aged individuals and typically not symptomatic. It is very unlikely that the meniscal changes were either caused or aggravated by her reported fall.

16. On May 1, 2023 Claimant returned to Dr. Hewitt for an examination. Claimant reported increasing medial-sided right knee pain without specific trauma. Dr. Hewitt commented that Claimant wanted to proceed with repeat imaging and was considering an additional injection or knee arthroscopy. He determined the approach was reasonable to assess the meniscal tear as well as her progression of arthritis.

17. On May 15, 2023 Claimant underwent a repeat MRI of the right knee. The imaging reflected horizontal tearing of the free edge of the medial meniscus body. The MRI also revealed horizontal tearing involving the anterior horn of the lateral meniscus with peripheral extrusion and free edge tearing of the lateral meniscus body.

18. On June 5, 2023 Claimant returned to Dr. Hewitt for an examination. He recounted that Claimant was diagnosed with a medial meniscus tear and non-displaced fibular head fracture. She underwent conservative treatment including a cortisone injection with transient improvement. Symptoms returned and she was referred for a follow-up MRI. Dr. Hewitt interpreted the imaging as a small joint effusion, a tear involving the mid-zone of the medial meniscus, and a tear of the anterior horn of the lateral meniscus. Claimant remarked she had been symptomatic for greater than one year and wanted to proceed with a knee arthroscopy. Dr. Hewitt commented "the patient

understands knee arthroscopy does not significantly alter the natural history of arthritis."

19. On June 19, 2023 Claimant returned to Dr. Arnott for an examination. He recounted that Claimant was awaiting a PRP injection, a shot for the neck, and surgery for the right knee. Notably, Dr. Hewitt had not placed a formal surgical request.

20. On July 18, 2023 Respondents issued a letter to Dr. Hewitt stating that, despite the lack of a completed request for prior authorization, the right knee arthroscopy was denied based on Dr. Larson's report. On August 10, 2023 Respondents sent Dr. Sacha correspondence specifying that the cervical facet injection was being reviewed by Mark Paz, M.D. despite the lack of a formal request for prior authorization.

21. On October 10, 2023 Dr. Paz performed an Independent Medical Examination (IME) and issued a report on October 30, 2023. Dr. Paz reviewed Claimant's prior medical records, considered the history of Claimant's February 1, 2022 slip and fall, and performed a physical examination. He noted that Claimant suffered a right knee non-displaced fibular head fracture that had resolved, a right knee medial meniscus tear, and right knee osteoarthritis/chondromalacia in the medial femoral tibial compartment. Dr. Paz also remarked that Claimant had a history of neck pain and migraine headaches. In conducting a causation analysis, he reasoned that, considering the direct history of the February 1, 2022 work accident, findings on physical examination, and prior medical records, it was not medically probable that Claimant's subjective symptoms of neck pain were causally related to the February 1, 2022 work accident.

22. Dr. Paz detailed there were no objective findings corresponding to Claimant's subjective neck symptoms and noted there was an absence of neck pain reported at the time of her initial visit with Concentra. Claimant's neck pain and headaches were not reported until subsequent visits. Furthermore, although Claimant denied a prior history of neck treatment/symptoms, the account contradicts records predating her February 1, 2022 admitted injury. Notably, medical records reveal that Claimant previously received treatment for migraine headaches and neck pain at New West Physicians. Based on the preceding analysis, Dr. Paz commented that neck treatment was not reasonable, necessary, or causally related to the February 1, 2022 work incident.

23. Dr. Paz determined that Claimant's non-displaced right fibular head fracture was causally related to the February 1, 2022 slip and fall. Specifically, the diagnosis was consistent with the mechanism of injury and need for treatment. However, in addressing the medial meniscus tear, Dr. Paz concluded the condition was not causally related to the February 1, 2022 work accident. The basis for his opinion was that the mechanism of injury was not congruent with the diagnosis.

24. Dr. Paz explained that Claimant's osteoarthritis of the right knee was not likely causally related to the February 1, 2022 work accident. Specifically, Claimant's right knee condition pre-dated the incident. However, the right knee pre-existing osteoarthritis may have been aggravated secondary to the February 1, 2022 slip and fall. Nevertheless, Claimant's right knee symptoms were secondary to osteoarthritis. Because Claimant's degenerative, arthritic condition was the likely cause of her ongoing symptoms, the

surgery proposed by Dr. Hewitt was not likely to improve her condition

25. On November 6, 2023 Sander Orent, M.D., performed a virtual IME of Claimant. Claimant reported that she experienced a headache in the back of her neck as a result of the February 1, 2022 fall. Dr. Orent commented Claimant suffered work-related post-concussive migraines and that “there is certainly a mechanism of injury here how she could have hurt her neck.” He thus reasoned that the medial branch blocks requested by Dr. Sacha were reasonable, necessary and causally related to Claimant’s work injury. Dr. Orent noted that “[t]his is a patient who has never had [a] migraine headache.” He also explained that Claimant required right knee surgery and simply stated “there was an acute injury with acute swelling, acute damage, and major mechanism, and yet Dr. Paz feels that it is unrelated. I do not understand this.”

26. Claimant testified that, prior to the events of February 1, 2022, she had never suffered any pain or issues with her right knee. She specifically had not experienced locking, clicking, popping, swelling or crepitation. Claimant also did not have difficulties ascending or descending stairs, or any issues with standing for a period of time. Claimant did not remember falling but recalled sitting on the sidewalk/leaning against the bottom of the stairs. She noted that it was icy and the stairs were covered with a kind of a wire/metal mesh. Claimant recounted that she was sitting half on the ground and half on the stairs. Her right knee hurt badly and her right arm also injured, but she was concentrating on her knee because it was bent at an angle and painful.

27. Claimant explained that she had never previously suffered neck symptoms, but after she had COVID-19 the glands in the front of her neck stayed swollen and her neck remained sore. After her fall down stairs on February 1, 2022 Claimant suffered neck pain in the back of her skull near the top of her spine area. Claimant commented that she has never previously had diagnostic testing, received any injections, had chiropractic treatment or undergone massage therapy for her neck area. She noted her neck still feels stiff and she has difficulties rotating her head from left to right. Claimant explained that, because she had adverse reactions to cortisone injections in her elbow and knee, Dr. Sacha suggested medial branch blocks for her neck. She wishes to proceed with blocks because she suffers pain in her neck that shoots into the back of her skull approximately four times each week.

28. Dr. Paz testified at the hearing in this matter. He maintained that Dr. Hewitt’s proposed right knee surgery and Dr. Sacha’s recommended cervical medial branch blocks were not causally related to Claimant’s February 1, 2022 admitted industrial injury. In addressing the right knee, Dr. Paz initially explained that there were three injuries relevant to the proposed surgery: a fracture of the femoral head; a meniscal tear; and degenerative changes within the medial compartment of the knee. He commented that the proposed surgical procedure was not a repair of the meniscus, but instead a resection in which the damaged portion of the meniscus would be removed. Dr. Paz testified that the medial meniscal tear was unrelated to Claimant’s fall at work because the injury requires twisting, and Claimant did not report any twisting mechanism when she fell down the stairs. Notably, based on Claimant’s statements at the IME, she did not plant her right lower extremity as she fell. Importantly, Dr. Paz explained that torsion and rotational

movement tears the medial meniscus. In contrast, blunt force trauma cannot cause a meniscal tear. Therefore, Claimant's fall at work did not likely cause her medial meniscus tear.

29. Dr. Paz testified that the fibular head fracture was caused by blunt-force trauma that would not be a mechanism associated with a meniscal tear. He remarked that, while there was a related aggravation of arthritis, the arthritic portion of the knee is not amenable to surgery. Dr. Paz explained that a tear of the meniscus can be degenerative as part of a progressive disease affected by the adjacent arthritic structures. He agreed with Dr. Larson that the meniscal tear was unrelated to Claimant's fall at work and noted that degenerative tears are distinguishable from acute tears. Acute tears are relatively clean cut, but degenerative tears are identified as a mucus change within the tissues. They are not straight lines but rather a decay of the anchoring structures within the meniscus. Dr. Paz summarized that there was no evidence of an acute injury to the meniscal structure in the MRI study.

30. Dr. Paz also explained that Claimant's neck symptoms were unrelated to her work injury because there was both an absence of an objective diagnosis and an absence of a mechanism of injury. He commented that the strain diagnosis was unsupported because there were no localizing symptoms besides a spasm identified by Dr. Sacha months after the work event. Dr. Paz noted that at Claimant's initial evaluation there was no documented head trauma, no mechanism for a neck injury, and no findings consistent with a neck injury. He remarked that at the IME Claimant denied any pre-existing history of neck symptoms, but the record reveals a history of neck treatment/symptoms. Notably, records from New West Physicians dated May 20, 2019 and November 4, 2019 reveal an active problem and assessment of neck pain. Furthermore, a record dated August 30, 2021 reveals a report of neck pain and an assessment of migraine headaches. Dr. Paz thus concluded that the injections recommended by Dr. Sacha were not reasonable, necessary or related to the admitted work injury.

31. Claimant has failed to demonstrate it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical treatment in the form of a right knee arthroscopy as recommended by Dr. Hewitt. Initially, on March 1, 2022 Claimant slipped down approximately seven to eight stairs after delivering a pizza to a residence. Claimant did not recall the details of the fall, but simply came to rest at the bottom of the steps. Although Claimant suffered a blunt force injury in the form of a non-displaced fibular fracture, the record does not reveal that any planting or twisting of the right knee during the accident caused a meniscal tear.

32. On April 11, 2022 Dr. Hewitt explained that Claimant was injured on February 1, 2022 when she fell down approximately seven stairs and sustained a rotation injury to her right lower extremity. After conducting a physical examination and reviewing the right knee MRI, Dr. Hewitt assessed Claimant with a right knee medial meniscus tear and non-displaced fracture of the fibular head. By May 1, 2023 Dr. Hewitt suggested proceeding with surgery because it was reasonable "to assess meniscus tear as well as for progression of arthritis." On July 18, 2023 Respondents issued a letter to Dr. Hewitt stating that, despite the lack of a completed

request for prior authorization, the right knee arthroscopy was denied based upon the opinion of Dr. Larson.

33. After conducting a records review, Dr. Larson concluded Claimant's right knee symptoms were not related to her February 1, 2022 industrial injury because they constituted a degenerative condition. Dr. Larson detailed that it was unlikely Claimant's meniscal pathology was related to her slip and fall. He commented that the meniscal changes were "almost certainly" caused by "age-related degenerative changes within the meniscus, which is very common in middle-aged individuals and typically not symptomatic." Dr. Larson summarized that it was very unlikely that the meniscal changes were either caused or aggravated by the February 1, 2022 accident. Similarly, Dr. Paz determined that the meniscal tear was unrelated to Claimant's fall at work and noted that degenerative tears are distinguishable from acute tears. Acute tears are relatively clean cut, but degenerative tears are identified as a mucus change within the tissues. Dr. Paz summarized there was no evidence of an acute injury to the meniscal structure on the MRI study. He commented that the proposed surgical procedure was not a repair of the meniscus, but instead a resection in which the damaged portion of the meniscus would be removed. Dr. Paz testified that the medial meniscal tear was unrelated to Claimant's fall at work because the injury requires twisting, and Claimant did not report any twisting mechanism when she fell down the stairs. Notably, the record reveals that Claimant did not plant her right lower extremity as she fell. Importantly, Dr. Paz explained that torsion and rotational movement tears the medial meniscus, but blunt force trauma cannot cause a meniscal tear. Accordingly, Claimant's February 1, 2022 accident did not cause, aggravate or accelerate her right knee meniscal tear.

34. In contrast, Dr. Orent explained that Claimant required right knee surgery. He stated "there was an acute injury with acute swelling, acute damage, and major mechanism" of injury. However, Dr. Orent did not perform a causation analysis regarding Claimant's meniscal tear. Notably, Drs. Larson and Paz acknowledged that Claimant suffered a blunt force injury to her right knee during her fall on February 1, 2022. The accident specifically caused a non-displaced fracture of the fibular head. Dr. Orent's opinion fails to distinguish between a right knee injury and specific damage to the meniscus. Based on the persuasive opinions of Drs. Larson and Paz, the blunt force trauma did not cause Claimant's meniscal pathology. Instead, Claimant did not plant her right foot and then engage in a twisting motion that would cause a meniscal tear. Instead, Claimant's meniscal tears are related to degenerative changes that are not amenable to surgical intervention. Claimant's February 1, 2022 fall thus did not aggravate, accelerate or combine with her pre-existing meniscal condition to cause the need for a right knee arthroscopy as recommended by Dr. Hewitt.

35. Claimant has established it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical treatment in the form of medial branch blocks as recommended by Dr. Sacha. On May 25, 2022 Dr. Sacha's physical examination of Claimant's neck revealed cervical paraspinal spasms and segmental dysfunction in the mid-left cervical spine. Furthermore, deep palpation reproduced headaches on the left side with mild pain on extension. Claimant credibly explained that she had never previously suffered neck symptoms, but after she had COVID-19 the glands in the front of her neck stayed swollen and her neck remained sore. After her fall down stairs on February 1, 2022 Claimant experienced neck pain in the back of her skull near the top of her spine area. She

noted her neck still feels stiff and she has difficulty rotating her head from left to right. Claimant explained that, because she had adverse reactions to cortisone injections in her elbow and knee, Dr. Sacha suggested medial branch blocks for her neck symptoms. She wishes to proceed with the blocks because she suffers pain in her neck that shoots into the back of her skull approximately four times each week. Finally, Dr. Orent commented that the February 1, 2022 fall constituted a mechanism of injury that could have caused Claimant's neck symptoms. He thus reasoned that the medial branch blocks requested by Dr. Sacha were reasonable, necessary and causally related to Claimant's work injury.

36. In contrast, Dr. Paz explained that Claimant's neck symptoms were unrelated to her work accident because there was an absence of an objective diagnosis and a mechanism of injury. He commented that the strain diagnosis was unsupported because there were no localizing symptoms besides a spasm identified by Dr. Sacha months after the work event. Dr. Paz remarked that at the IME Claimant denied any pre-existing neck symptoms, but the record reveals a prior history of neck treatment/symptoms. Notably, records from New West Physicians dated May 20, 2019 and November 4, 2019 reveal an active problem and assessment of neck pain. Furthermore, a record dated August 30, 2021 reveals a report of neck pain and an assessment of migraine headaches. Dr. Paz thus determined that the neck treatment recommended by Dr. Sacha was not reasonable, necessary or related to Claimant's admitted work injury.

37. Despite Dr. Paz's opinion, the medical records, Claimant's credible testimony and the persuasive opinion of Dr. Sacha reflect that Claimant suffered a neck injury when she fell at work on February 1, 2022. Although Claimant had previously suffered symptoms in the front of her neck, she experienced pain in the back of her skull near the top of her spine area after her work accident. Importantly, on physical examination with Dr. Sacha, Claimant exhibited cervical paraspinal spasms and segmental dysfunction in the mid-left cervical spine. Furthermore, deep palpation reproduced headaches on the left side with mild pain on extension. Finally, although medical records reveal that Claimant had prior neck symptoms, Claimant did not undergo treatment for any type of neck condition prior to the February 1, 2022 fall. Accordingly, Claimant's work accident on February 1, 2022 aggravated, accelerated or combined with her pre-existing condition to produce a need for neck treatment in the form of medial branch blocks as recommended by Dr. Sacha.

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. 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).

5. 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).

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment in the form of a right knee arthroscopy as recommended by Dr. Hewitt. Initially, on March 1, 2022 Claimant slipped down approximately seven to eight stairs after delivering a pizza to a residence. Claimant did not recall the details of the fall, but simply came to rest at the bottom of the steps. Although Claimant suffered a blunt force injury in the form of a non-displaced fibular fracture, the record does not reveal that any planting or twisting of the right knee during the accident caused a meniscal tear.

7. As found, on April 11, 2022 Dr. Hewitt explained that Claimant was injured on February 1, 2022 when she fell down approximately seven stairs and sustained a rotation injury to her right lower extremity. After conducting a physical examination and reviewing the right knee MRI, Dr. Hewitt assessed Claimant with a right knee medial meniscus tear and non-displaced fracture of the fibular head. By May 1, 2023 Dr. Hewitt suggested proceeding with surgery because it was reasonable "to assess meniscus tear as well as for progression of

arthritis." On July 18, 2023 Respondents issued a letter to Dr. Hewitt stating that, despite the lack of a completed request for prior authorization, the right knee arthroscopy was denied based upon the opinion of Dr. Larson.

8. As found, after conducting a records review, Dr. Larson concluded Claimant's right knee symptoms were not related to her February 1, 2022 industrial injury because they constituted a degenerative condition. Dr. Larson detailed that it was unlikely Claimant's meniscal pathology was related to her slip and fall. He commented that the meniscal changes were "almost certainly" caused by "age-related degenerative changes within the meniscus, which is very common in middle-aged individuals and typically not symptomatic." Dr. Larson summarized that it was very unlikely that the meniscal changes were either caused or aggravated by the February 1, 2022 accident. Similarly, Dr. Paz determined that the meniscal tear was unrelated to Claimant's fall at work and noted that degenerative tears are distinguishable from acute tears. Acute tears are relatively clean cut, but degenerative tears are identified as a mucus change within the tissues. Dr. Paz summarized there was no evidence of an acute injury to the meniscal structure on the MRI study. He commented that the proposed surgical procedure was not a repair of the meniscus, but instead a resection in which the damaged portion of the meniscus would be removed. Dr. Paz testified that the medial meniscal tear was unrelated to Claimant's fall at work because the injury requires twisting, and Claimant did not report any twisting mechanism when she fell down the stairs. Notably, the record reveals that Claimant did not plant her right lower extremity as she fell. Importantly, Dr. Paz explained that torsion and rotational movement tears the medial meniscus, but blunt force trauma cannot cause a meniscal tear. Accordingly, Claimant's February 1, 2022 accident did not cause, aggravate or accelerate her right knee meniscal tear.

9. As found, in contrast, Dr. Orent explained that Claimant required right knee surgery. He stated "there was an acute injury with acute swelling, acute damage, and major mechanism" of injury. However, Dr. Orent did not perform a causation analysis regarding Claimant's meniscal tear. Notably, Drs. Larson and Paz acknowledged that Claimant suffered a blunt force injury to her right knee during her fall on February 1, 2022. The accident specifically caused a non-displaced fracture of the fibular head. Dr. Orent's opinion fails to distinguish between a right knee injury and specific damage to the meniscus. Based on the persuasive opinions of Drs. Larson and Paz, the blunt force trauma did not cause Claimant's meniscal pathology. Instead, Claimant did not plant her right foot and then engage in a twisting motion that would cause a meniscal tear. Instead, Claimant's meniscal tears are related to degenerative changes that are not amenable to surgical intervention. Claimant's February 1, 2022 fall thus did not aggravate, accelerate or combine with her pre-existing meniscal condition to cause the need for a right knee arthroscopy as recommended by Dr. Hewitt.

10. As found, Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment in the form of medial branch blocks as recommended by Dr. Sacha. On May 25, 2022 Dr. Sacha's physical examination of Claimant's neck revealed cervical paraspinal spasms and segmental dysfunction in the mid-left cervical spine. Furthermore, deep palpation reproduced headaches on the left side with mild pain on extension. Claimant credibly explained that she had never previously suffered neck symptoms, but after she had COVID-19 the glands in the front of her neck stayed swollen and her neck remained sore. After her fall down stairs on February 1, 2022

Claimant experienced neck pain in the back of her skull near the top of her spine area. She noted her neck still feels stiff and she has difficulty rotating her head from left to right. Claimant explained that, because she had adverse reactions to cortisone injections in her elbow and knee, Dr. Sacha suggested medial branch blocks for her neck symptoms. She wishes to proceed with the blocks because she suffers pain in her neck that shoots into the back of her skull approximately four times each week. Finally, Dr. Orent commented that the February 1, 2022 fall constituted a mechanism of injury that could have caused Claimant's neck symptoms. He thus reasoned that the medial branch blocks requested by Dr. Sacha were reasonable, necessary and causally related to Claimant's work injury.

11. As found, in contrast, Dr. Paz explained that Claimant's neck symptoms were unrelated to her work accident because there was an absence of an objective diagnosis and a mechanism of injury. He commented that the strain diagnosis was unsupported because there were no localizing symptoms besides a spasm identified by Dr. Sacha months after the work event. Dr. Paz remarked that at the IME Claimant denied any pre-existing neck symptoms, but the record reveals a prior history of neck treatment/symptoms. Notably, records from New West Physicians dated May 20, 2019 and November 4, 2019 reveal an active problem and assessment of neck pain. Furthermore, a record dated August 30, 2021 reveals a report of neck pain and an assessment of migraine headaches. Dr. Paz thus determined that the neck treatment recommended by Dr. Sacha was not reasonable, necessary or related to Claimant's admitted work injury.

12. As found, despite Dr. Paz's opinion, the medical records, Claimant's credible testimony and the persuasive opinion of Dr. Sacha reflect that Claimant suffered a neck injury when she fell at work on February 1, 2022. Although Claimant had previously suffered symptoms in the front of her neck, she experienced pain in the back of her skull near the top of her spine area after her work accident. Importantly, on physical examination with Dr. Sacha, Claimant exhibited cervical paraspinal spasms and segmental dysfunction in the mid-left cervical spine. Furthermore, deep palpation reproduced headaches on the left side with mild pain on extension. Finally, although medical records reveal that Claimant had prior neck symptoms, Claimant did not undergo treatment for any type of neck condition prior to the February 1, 2022 fall. Accordingly, Claimant's work accident on February 1, 2022 aggravated, accelerated or combined with her pre-existing condition to produce a need for neck treatment in the form of medial branch blocks as recommended by Dr. Sacha.

ORDER

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

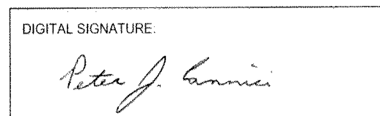
1. Claimant's request for a right knee arthroscopy as recommended by Dr. Hewitt is denied and dismissed.

2. Claimant's request for medial branch blocks as recommended by Dr. Sacha is granted.

3. 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 12, 2024.



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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he suffered a compensable injury on March 2, 2023.

2. If Claimant sustained a compensable injury, what is Claimant's average weekly wage?

FINDINGS OF FACT

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

1. Claimant is a 43 year-old man who worked for Employer as a truck driver and heavy equipment operator. He began working for Employer on May 9, 2022. (Ex. A). Claimant testified that his job duties consisted of delivering building materials and equipment to jobsites and operating heavy equipment. He occasionally performed manual labor, such as digging trenches for water and sewer lines.

2. Claimant credibly testified that he earned twenty-six dollars per hour and occasionally worked overtime.

3. On March 2, 2023, Claimant finished his driving tasks for the day. Around 3:30 or 4:00 p.m., Claimant started helping his coworkers dig a French drain. Claimant credibly testified that after shoveling for some time, he pulled up from the left side to throw the dirt over his right shoulder, when he felt a pop in his back and a sharp pain in his lower back on both sides. Claimant credibly testified that the injury occurred around 5:00 p.m., and he continued shoveling and threw a few more shovels of dirt and gravel before his supervisor told him and others to go home.

4. Claimant credibly testified that he did not report his injury on March 2, 2023, because he did not think it was a big deal, and he thought the pain would go away. Claimant credibly testified he went back to the shop to clock out, and then he drove home, which was about an hour and a half a way. Claimant further testified that when he arrived at home, his pain was worse and he was unable to stand up straight, so he took a hot shower for relief, which did not help, and went to his bedroom to rest. Claimant credibly testified that the pain was so extreme he could not sleep.

5. Claimant lived with two roommates, one of whom was [Redacted, hereinafter GS]. GS[Redacted] rented the room to Claimant and he also worked for Employer with Claimant. Claimant testified that when he arrived home on March 2, 2023, his one roommate was home, but GS[Redacted] was not.

6. GS[Redacted] testified he went to his girlfriend's house after work and returned home between 9:00 p.m. and 10:00 p.m. the night of March 2, 2023. He testified that Claimant's vehicle was not there and Claimant's bedroom door was closed. GS[Redacted] testified that Claimant was not home that evening. GS[Redacted], however, did not go into Claimant's room, nor did he knock on the door.

7. On March 3, 2023, Claimant arrived at work in the morning with red marks on his face. Claimant testified he has a mental condition, dermatillomania, which causes him to scratch at his face and/or pull his hair out, when he has anxiety. He testified that the March 2, 2023 injury, and resulting pain trigged his condition and he scratched at his face. He testified that he takes preventative medication for this condition but it does not help during acute attacks. Claimant's diagnoses of bipolar disorder and PTSD are noted throughout the records, but there is not a specific reference to dermatillomania. Claimant testified that he has similar occurrences with this condition once a month.

8. GS[Redacted] and [Redacted, hereinafter AG], another co-worker of Claimant, both testified they did not previously observe scratches or marks on Claimant's face at work. GS[Redacted] testified that when he saw Claimant on March 3, 2023, he asked him if he had gotten into a fight. Claimant said he had not been in a fight, but was not feeling well.

9. The ALJ finds Claimant's testimony credible. The ALJ finds that Claimant was home the evening of March 2, 2023, and scratched at his face that evening, causing the marks on his face the next day.

10. Claimant testified he arrived at work around 6:45 a.m., the morning of March 3, 2023. Claimant testified that the pain in his back was worse that morning. He could not straighten his back and had a hard time walking. He testified that he hauled one load and returned to the shop, and reported his injury to his supervisor at approximately 10:00 a.m. Claimant testified that his supervisor told him to "take care of" his injury, so he went to Stout Street Clinic to be evaluated. Claimant testified they turned him away because it was a workers' compensation case. Employer directed Claimant to a specific American Family Care (AFC) clinic to go to for evaluation.

11. Frances Schreiber, PA-C, at AFC, evaluated Claimant on March 3, 2023. Claimant reported having pain in the mid-back, central lower back, left buttock and right buttock. The pain was sharp, and the severity was mild. Claimant told Ms. Schrieber that he was shoveling at work the day prior, when he felt a sharp pain in his back after throwing dirt behind him. Claimant admitted to a prior back strain in 2007. Claimant was not experiencing any numbness, radiculopathy, bladder issues, or foot drop, but did complain of a headache and generalized back pain. It was noted that Claimant was bipolar and had PTSD. Imaging demonstrated a normal t-spine and an old compression fracture at Claimant's L-1. Claimant was diagnosed with low back pain, pain in the thoracic spine, and unspecified injuries to his thorax and low back. He was prescribed naproxen, a muscle relaxer, and told to go to the ER if lower extremity symptoms developed. (Ex. E).

12. Claimant returned to AFC for follow-up appointments on March 6 and 13, 2023. Claimant continued to experience generalized low back pain. Claimant's physical examination on March 13, 2023, showed no spasm or tenderness of spine or paraspinal muscles with no midline lumbar tenderness, no midline sacral tenderness, with diffuse tenderness of his lumbar muscles. Claimant had normal strength and sensation in his lower extremities and his straight leg raise test bilaterally was negative. Claimant had no focal neuro deficits on examination and was again diagnosed by Theresa Shieh, PA-C, with low back pain. Ms. Shieh noted that Claimant had persistent left-sided lumbar back pain, and had been kept out of work for 11 days. Ms. Shieh referred Claimant to Colorado Rehabilitation & Occupational Medicine (CROM) because his lower back pain was not improving. (Ex. E).

13. David Reinhard, M.D., at CROM, evaluated Claimant on March 21, 2023. Claimant's primary complaint was low back pain, and numbness down the back of his buttocks. Claimant reported he was shoveling and tossing dirt over his right shoulder when he felt acute onset of low back pain bilaterally. He also experienced numbness and pain in the gluteal region bilaterally. Claimant reported having constipation for days at a time and then bowel urgency, but no incontinence. Claimant reported a prior back injury and treatment between 2004 and 2009. Dr. Reinhard's physical examination and testing showed restricted range of motion, tenderness of the SI joints, bilateral tenderness in the lumbar spine, a negative straight leg raise test, with numbness in his bilateral buttocks. The Patrick maneuver was positive bilaterally. Dr. Reinhard diagnosed Claimant with a lumbar sprain, sacroiliac joint dysfunction, and cluneal neuropathy. He ordered physical therapy and referred Claimant for an MRI. Dr. Reinhard also noted on the WC164 form that Claimant was unable to work. (Ex. G).

14. Claimant's March 29, 2023 MRI results, showed a chronic L1 compression abnormality with loss of height at approximately 45%. There was no evidence of acute compression abnormality. The impression was minimal, mostly lower lumbar degenerative changes, and no significant canal or foraminal narrowing. (Ex. 9).

15. Claimant had a follow-up appointment with Dr. Reinhard on April 7, 2023, and he reviewed the MRI with Claimant. Claimant had not yet heard back from physical therapy, so he had been unable to begin therapy. Claimant's pain level was a 3/10 with bilateral gluteal numbness, and restricted lumbar range of motion. Dr. Reinhard opined that Claimant appeared to have primarily lumbar strain and sprain, with some SI joint involvement and painful muscle spasms. He further opined that Claimant's numbness in the gluteal region is most likely from irritation/compression from muscular hypertonia of the cluneal nerves since there was no neural compressive pathology noted on the MRI. Dr. Reinhard contacted CACC to get physical therapy started. Dr. Reinhard updated the WC 164 form to keep Claimant off of work for the next four weeks. (Ex. G).

16. CACC was not able to get Claimant in for physical therapy until, April 20, 2023. Claimant reported low back pain and numbness and tingling to bilateral glutes. He reported not being able to sleep for the past 14 days because of the pain, although the pain was improving. Claimant's recorded average range of pain was 3-4/10, worst being in the evening. Claimant's physical evaluation revealed decreased lumbar range of

motion, decreased lower extremity strength, increased lumbar arc of pain, right lateral lean upper and lower extremity tremors with movement, impaired breathing with myotomal testing and left lower extremity active range of motion, and significantly poor activity tolerance all limiting his functional abilities. Claimant was referred back to his physician regarding his bowel and bladder changes, saddle anesthesia, DTR and dermatomal impairments, and impaired breathing. The plan was for Claimant to receive physical therapy twice a week for four weeks. (Ex H).

17. Claimant had a follow-up appointment with Dr. Reinhard on May 3, 2023. Claimant had participated in three physical therapy sessions to date. The physical therapist spoke with Dr. Reinhard regarding her concern about Claimant's gluteal numbness. The pain was primarily left-sided, and was 2/10 pain that day. Claimant reported symptoms of feeling like he has to move his bowels or has to urinate frequently, but will only have a bowel movement every 2-3 days. The prescription for Senokot did not help him. Dr. Reinhard noted that on examination, Claimant was tender over the left SI joint, not the right. He had increased pain with lumbar flexion, where he had failed restricted range of motion. Claimant had asymmetric SI joint motion with forward bending. Patrick, Gaenslen, and Yeoman Tests were all positive on the left side. Dr. Reinhard added six physical therapy sessions and made a referral for a left SI joint injection. (Ex. G).

18. Claimant returned to CROM on June 7, 2023 noting completion of eight physical therapy sessions. He complained of 2/10 pain in his lumbar spine with continued bilateral gluteal numbness. He reported continued urgency with regard to both bowel and bladder function. The SI joint injection had not been authorized. Dr. Reinhard ordered an MRI of Claimant's pelvis due to the continuing bowel and bladder issues and gluteal numbness. (Ex. G).

19. Claimant underwent an MRI of his pelvis on June 10, 2023. According to the documented findings, there were no bone marrow signal abnormalities to indicate fracture, avascular necrosis, or a deconstruction marrow process. Claimant's sacroiliac joints were symmetric without effusion, erosions, widening, or ankylosis. The musculature of the hip and proximal thigh region was unremarkable. The impression was noted as "unremarkable exam." (Ex. 14).

20. Jeffrey Raschbacher, M.D. completed an independent medical examination (IME) of Claimant on July 18, 2023, on behalf of Respondents. He completed a records review and examined Claimant. In his IME report, Dr. Raschbacher noted that he reviewed medical records from AFC and CACC. At the hearing, Dr. Raschbacher testified that he "screwed up" his report because he actually reviewed Dr. Reinhard's records, but inadvertently listed them as documents from AFC.

21. In his IME report, Dr. Raschbacher noted that Claimant reported little benefit from physical therapy and had problems with his bladder dribbling. Dr. Raschbacher opined Claimant did not sustain a work-related injury. He noted that Claimant's "condition" consisted of complaints of low back pain without any objective evidence to corroborate his complaints. He reasoned that had Claimant sustained a lumbar strain from work-activities, he most certainly would have improved at this point in time, even without

treatment. The fact that Claimant continued to complain of low back complaints from an incident months prior and without objective pathology made it more likely that his complaints were not a result of work-activities. Dr. Raschbacher also opined that the mechanism of injury was not one that would be likely to produce SI joint dysfunction and Claimant's subjective symptoms were out of proportion to the paucity of objective findings. (Ex. I).

22. John Aschberger, M.D. performed an IME on August 14, 2023. Claimant explained his mechanism of injury as shoveling dirt from left to right with a twisting motion, and he told Dr. Aschberger that he experienced a sharp onset of pain at the low back. Dr. Aschberger reviewed and summarized, the medical records from AFC, Dr. Reinhard, Health Images and CACC. Dr. Aschberger's physical examination revealed localized sacral tenderness bilaterally, left worse than right. Claimant had restricted and painful SI joint range of motion, positive straight leg raise, positive passive straight leg raise, positive Patrick's test, and positive Gaenslen's test. (Ex. 15).

23. Dr. Aschberger assessed Claimant with a lumbosacral strain, SI joint irritation, and facet irritation. He noted Claimant exhibited no exaggerated pain behaviors. Dr. Aschberger opined that further treatment was warranted, including additional physical therapy, chiropractic intervention for mobilization of the SI joints and lumbar facets. He also opined that the interventional injections recommended by Dr. Reinhard were appropriate and reasonable. Dr. Aschberger concluded that Claimant's conditions were related to the work injury as described by Claimant. He opined that Claimant could perform light to light-medium work with restrictions. (Ex. 15.) The ALJ finds Dr. Aschberger's opinions to be credible and persuasive.

24. Dr. Raschbacher testified consistent with the opinions in his IME report. Dr. Raschbacher testified that he did not believe Claimant sustained a work-related injury on March 2, 2023. He testified there was no objective corroboration of Claimant's subjective complaints and this was an important factor when assessing causation. He testified as to his disagreement with Dr. Aschberger's assessment of relatedness. Dr. Raschbacher explained the typical progression of a lumbosacral sprain and how if this was in fact a correct diagnosis, then Claimant's complaints would have resolved by now. Based on Claimant's continued complaints of pain and dysfunction, coupled with the unexplained complaints of lower extremity dysfunction, Dr. Raschbacher opined it was more likely than not that Claimant did not sustain a work-injury. Dr. Raschbacher also testified that he no longer refers patients to CROM, and in his opinion, injectionists provide patients with injections without reason.

25. Dr. Raschbacher testified he was unlikely to rely on Claimant's subjective claims without objective evidence. When questioned as to what objective evidence he would consider, Dr. Raschbacher testified that objective evidence of Claimant's injury would include straight leg raise, Patrick's test, and muscle spasm. As Dr. Aschberger found, Claimant had restricted straight leg raise, positive Patrick's test, and a positive Gaenslen's test. (Ex. 15).

26. The ALJ finds Dr. Raschbacher's opinion to be credible, but not persuasive. Dr. Raschbacher's IME makes no reference to Dr. Reinhard, or AMC's referral of Claimant to Dr. Reinhard, and mistakenly attributes Dr. Reinhard's records to AMC. Dr. Raschbacher expressed a bias towards CROM and injectionists. Finally, Dr. Raschbacher does not address Claimant's objective tests such as a positive Patrick's test and a positive Gaenslen's test. As found, the ALJ finds Dr. Aschberger's opinions to be credible and persuasive.

27. The ALJ finds Claimant's testimony regarding the mechanism of injury and his subsequent subjective complaints of lumbar back pain, and bilateral numbness in the gluteal region to be credible.

28. Based on the totality of the evidence, the ALJ finds that Claimant proved by a preponderance of the evidence that he suffered a compensable injury on March 2, 2023.

29. The ALJ finds that Claimant is entitled to medical benefits that are reasonable, necessary and related. The ALJ finds that all medical benefits Claimant has incurred to date are reasonable, necessary and related. The ALJ further finds that the SI injection recommended by Dr. Reinhart is reasonable, necessary and related.

30. Prior to the work-related injury, Claimant earned $8,774.87 between January 1, 2023 and March 3, 2023. Claimant worked 8.71 weeks in 2023 (61 days ÷ 7 = 8.71). (Ex. J). The ALJ finds that Claimant's average weekly wage is $1,007.44. ($8,774.87÷8.71= $1,007.44).

CONCLUSIONS OF LAW

Generally

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

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

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

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

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 Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. 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 D/B/A Atlas Logistics*, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

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

The mere occurrence of symptoms at work, however, does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of

symptoms at work may represent the result of, or natural progression of, a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dep't Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). 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. *Boulder*, 706 at 791; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant's testimony at hearing was credible. On March 2, 2023, Claimant was performing repetitive, manual labor when he felt a pop and sharp pains in his lower back region. There is no objective evidence that Claimant was suffering from back issues on March 2, 2023. Claimant was fully functional while working for Employer prior to his injury. Claimant credibly testified that he delayed reporting the injury until the following day, March 3, 2023, because he hoped the injury was not significant, that the pain would resolve.

The totality of the evidence supports Claimant's testimony that he sustained a work-related back injury on March 2, 2023. He consistently reported the mechanism of injury to all providers. Dr. Reinhard, Dr. Aschberger and even Dr. Raschbacher noted objective physical exam results corroborating the occurrence of a lumbar and SI joint injury. Claimant's medical records document objective evidence to support Claimant's subjective complaints, such as positive straight leg raises, lumbosacral muscle spasm, and positive Patrick's tests. Claimant consistently demonstrated reduced and painful range of motion. Dr. Raschbacher's own physical examination demonstrated a positive Patrick's test. As found Dr. Raschbacher's opinion is credible, but not persuasive. Claimant's treating providers, and Dr. Aschberger opined that Claimant's condition is work-related. The ALJ find's Dr. Aschberger's opinion to be credible and persuasive. As found, Claimant has demonstrated by a preponderance of the evidence that he sustained a compensable injury within the course and scope of his employment on March 2, 2023.

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101, C.R.S. 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. Indus. Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Compensable medical treatment includes reasonably necessary diagnostic evaluations and testing. The respondents must cover diagnostic testing that has a reasonable prospect of diagnosing or defining the claimant's condition to suggest a course of further treatment. *Soto v. Corrections Corp. of America*, W.C. No. 4-813-582 (February 23, 2012).

Here, Claimant was referred to AFC by his employer after reporting the March 2, 2023 injury. All subsequent diagnostics, prescriptions and treatment performed thereafter were within the chain of referral and were reasonable and necessary according to authorized treating physicians. Specifically, Claimant has sustained his burden in demonstrating that the injection requested by Dr. Reinhard is reasonable, necessary, and related to the work injury. Dr. Aschberger specifically concurred and opined additional treatment may be necessary. Dr. Reinhard's recommendation for the SI joint injection is supported by consistent objective results on physical examinations. As found, all medical

benefits incurred to date are reasonable, necessary and related. The injection recommended by Dr. Reinhard is reasonable, necessary and related.

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his earnings at the time of injury. Under certain circumstances, however, the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. As found, prior to Claimant's work-related injury, he earned $8,774.87 between January 1, 2023 and March 3, 2023. This equates to 8.71 weeks Claimant worked in 2023 (61 days ÷ 7 = 8.71). The ALJ finds that Claimant's average weekly wage is $1,007.44. ($8,774.87÷8.71= $1,007.44).

Temporary Total Disability Benefits

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

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. § 8-42-105(3)(a)-(d), C.R.S.

As found, Claimant sustained an injury within the course and scope of his employment on March 2, 2023. He sought treatment on March 3, 2023, and Ms. Schreiber at AFC completed an M164 form restricting Claimant from work. (Ex. 5). Claimant's restrictions varied, but continued at every following medical appointment. Claimant has not been released to regular duty, there is no objective evidence in the record that Claimant was provided an offer of modified employment, and no authorized treating physician has opined that Claimant has reached MMI. As found, Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary benefits beginning March 3, 2023, and ongoing.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury on March 2, 2023.

2. Claimant is entitled to medical benefits that are reasonable, necessary and related. All medical benefits incurred to date are reasonable, necessary, and related.

3. The SI injection recommended by Dr. Reinhard is reasonable, necessary and related.

4. Claimant's average weekly wage is $1,077.44.

5. Claimant is entitled to temporary total disability from March 3, 2023 and ongoing.

6. Respondent shall pay 8% interest on all benefits due and not paid.

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

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

DATED: February 12, 2023

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

ISSUE

The issue presented for determination:

Whether the Claimant proved by a preponderance of the evidence that Claimant's hip symptoms and need for and hip treatment is related to her work injury of July 17, 2022?

FINDINGS OF FACT

1. The Claimant is a police officer for the [Redacted, hereinafter PD]. She sustained an admitted compensable injury on July 17, 2022 to her right knee.

2. The claimant testified that on July 17, 2022, a domestic violence call came in of an assault in progress. The claimant noted that it was the same male that she had arrested three weeks earlier for domestic assault and she responded. The suspect was running, and she pursued on foot, and she had to jump over some fences one of which was about 4 feet which was short enough that she could jump it and land without having to swing her body over the fence but when she jumped over it she landed straight-legged on her right leg. Claimant testified that she had immediate pain in her knee, hip and chest. Another officer assisted and apprehended the suspect as after the claimant sustained her injury she could not get back over the fence. (Tr. p. 46, ll. 20-25; p. 47, ll. 1-22).

3. The claimant testified that the above episode of jumping over the fence started the pain in her right knee and hip on July 17, 2022. Thereafter she continued to work and there was an incident that occurred where a little boy was in the middle of I-25 and Bijou. The claimant had to run on her hurt leg and another incident the same day where a drunk driver hit power poles that she responded to, again on the hurt leg, and it was after those events that she was able to report the condition to Lieutenant [Redacted, hereinafter SR], her supervisor. (Tr. p. 58, ll6-23).

4. The claimant testified that when she first saw [Redacted, hereinafter GG] on July 21, 2022, she told her that both her knee and hip hurt and that she did her best in describing her pain to all of her doctors that she had pain in her knee and her hip. (Tr. p. 48, ll. 17-21).

5. Ms. Homberger is the Respondent's occupational clinic P.A. She primarily sees she City's police and fireman when they are injured on the job as the City does not have a full time doctor in the occupational clinic. The doctor is only in the occupational clinic one day per week. (Tr. p. 13, ll.).

6. Ms. Homberger testified that she has her own medical license to practice medicine alongside a supervising physician and the four days per week that the supervising physician is not there, they consult over the phone if needed. She has been the full time PA for the City occupational clinic since 2015 and was seasonal or part time from 2007-2015. (Tr. p. 13, l. 25; p. 14, ll. 1-16) Included in her capabilities and responsibilities is providing a medical opinion as to whether an employee has sustained an occupational injury on the job and what body parts are as a result of that occupational injury. (Tr. 15, ll. 6-16).

7. Ms. Homberger testified that the claimant was initially placed at MMI with no impairment and a full duty release by Dr. Kurz, on July 26, 2022, but she had a telephone appointment with the claimant on July 28, 2022, at which time she determined that the claimant was not at MMI and needed treatment and took her off work. Ms. Homberger initially saw and evaluated the claimant on August 1, 2022. At that time Ms. Homberger requested an MRI of the right knee and a referral to an orthopedic doctor, Dr. Michael Simpson. (Tr. 18, ll. 4-24).

8. Based on his evaluation of the claimant on August 8, 2022, Dr. Simpson thought that the injuries sustained by the claimant were complex and determined that the claimant additionally needed an MRI of her lumbar spine, and the right hip and those were performed. Dr. Simpson, as well, referred the claimant to his partner Dr. Douglas Adams, a hip specialist, who first saw the claimant on August 26, 2022.

9. Ms. Homberger testified that the MRI of the hip that was performed on August 12, 2022, demonstrated the possibility of a right hip labral tear.

10. The ALJ has reviewed the deposition of Dr. Douglas Adams taken on October 25, 2023 and his medical records and reports. Dr. Adams was qualified as an expert in orthopedic surgery. He has been in practice as an attending physician since 2012. He was on active duty as an Army orthopedic surgeon between 2012 and 2021 and has been in private practice with Colorado Orthopedic Specialists since 2021. Dr. Adams is Board certified in orthopedics and specializes in hip surgery, including both hip preservation and hip replacement surgery.

11. Dr. Adams testified that in the course of practicing in his specialty since 2012 he has come to understand the pathology and the nature of tearing of the labrum of the hip and the different causative forces resulting in the tearing of the hip labrum. (Depo. Tr. op. 7, ll,16-21).

12. The claimant was referred to him by his partner Dr. Michael Simpson and he first saw the claimant on August 26, 2022. At that time, he reviewed the MRI of the right hip that had been done on August 12, 2022, and determined based upon the history, clinical examination and the MRI, that her presentation was consistent with a labral tear. Based upon that, Dr. Adams recommended and performed a confirmatory diagnostic injection into the hip joint where the labrum is present, and the claimant had a positive response to the injection. (Depo, p. 9, ll. 4-24).

13. Dr. Adams was asked to opine on the causation of the claimant's right hip complaints. He indicated that he took a history from the claimant including the fact that she was asymptomatic before the events of July 17, 2022. The claimant stated to him, similar to what she testified to, that she was chasing a suspect and jumped over fences and when she jumped over one fence, she noted knee pain and then as the day progressed noticed prominent hip pain as well. Dr. Adams stated in his opinion this mechanism is consistent with the amount of force sufficient to result in a labral tear. (Depo. Tr. p. 11, lls 20-22).

14. Dr. Adams, after the injection of August 26, 2022, saw the claimant again on September 12, 2022, and she was noting improvement with the injection but was still having significant pain in her right knee that Dr. Simpson was addressing.

15. Dr. Adams next saw the claimant on February 20, 2023, and the claimant was no longer having relief from the injection in the hip and had undergone surgery with Dr. Simpson for her knee condition. Dr. Adams suggested an additional injection in the hip and that was performed on February 20, 2023. (Depo. Tr. p. 13, lls. 11-23).

16. By April 26, 2023, all of the therapeutic effects of the additional injection had worn off and at that time Dr. Adams discussed with the claimant surgical options for the torn labrum. Dr. Adams requested preauthorization for surgery to repair the torn labrum but that was denied, and an IME was set up by the Respondent to evaluate whether the torn labrum surgery was reasonable and necessary/causally related.

17. Dr. Adams indicated that his previous note saying that the claimant was symptomatic in her right hip prior to July 17, 2022, was in error as it was transcribed using voice recognition software and that it had been corrected in his records. (Depo. Tr. p. 10, ll.17-24). (Dr. Olsen in his report desired to have it clarified as to whether the claimant had preexisting hip pain and he also wanted an MRI arthrogram performed as that according to Dr. Olsen was the gold standard for evaluating a hip labral tear.

18. Dr. Adams explained the difference between an MRI and an MR arthrogram and stated that it is debatable as to whether one is better than the other but that the MR arthrogram confirmed that the claimant had a labral tear that had now widened since the MRI of August 12, 2022, which Dr. Adams opined was due to the untreated pathology since the date of injury.

19. Dr. Adams confirmed in his deposition that the labral tear was caused by events described by the claimant in jumping over the fence and landing with sufficient force to tear the labrum.

20. Dr. Adams was asked about the cam lesion that is evident on the imaging studies that were performed and whether that cam lesion was responsible for the tear in her labrum. Dr. Adams testified that the cam lesion or deformity did not cause the labral tear as the claimant was asymptomatic prior to the events of July 17, 2022. (Depo. Tr. op. 21,ll 22-25). Dr. Adams further stated that a cam deformity does not cause symptoms, but it can cause failure of the surgery if not addressed at the time of surgery. And Dr. Adams testified that if the cam deformity is causing any injury to the labrum over time, the patient is symptomatic while it is occurring, which was not the case with the claimant. (Depo, tr. p.23, ll 1-11).

21. The Claimant underwent an IME with Dr. Olsen at the request of Respondents. The IME took place on May 25, 2023. Dr. Olsen prepared a report on June 14, 2023. Dr. Olsen determined that the Claimant did not sustain a hip injury on July 17, 2022. He also opined that the surgery proposed by Dr. Adams was not reasonable and necessary.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical Benefits–Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable 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 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. Div. 5 2009). The weight and credibility to be assigned expert testimony on the issue of causation is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

Although Respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002), (upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial*

Claims Office, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

Here, Doctor Adams and Ms. Homberg, both authorized treating providers have recommended hip surgery as related to the Claimant's work injury on July 17, 2022. I conclude that they are credible and persuasive in their opinion that the hip surgery is causally related to the work injury. In this case I am more persuaded by Dr. Adams' analysis that the analysis and opinions of Dr. Olsen.

ORDER

It is therefore ordered that:

1. The Claimant proved by a preponderance of the evidence that the proposed hip surgery recommended by Dr. Adams is reasonable, necessary and related.

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

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

DATED: February 13, 2024

Michael A. Perales

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-196-637-003

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that the PRP injections recommended by Dr. Hewitt on August 18, 2023, are reasonably necessary to cure and relieve Claimant of the effects of her October 28, 2021 injury.

FINDINGS OF FACT

1. Claimant was injured on October 28, 2021, while scrubbing belt switches overhead for Respondent-Employer.

2. Claimant began treating with her authorized treating physician, Dr. Annu Ramaswamy, on November 11, 2021. Claimant reported persistent right-sided neck and right shoulder pain and other symptoms, along with associated functional limitations. On physical examination, Claimant exhibited moderate trigger point activity involving the right trapezius and lavatory regions as well as in the right paraspinous musculature adjacent to C4-C7. Impingement testing was positive and there was rotator cuff weakness. Dr. Ramaswamy diagnosed Claimant with a neck strain and a right shoulder strain as well as impingement and myofascial pain in the neck and rhomboid regions. He recommended medications and physical therapy as well as temporary work restrictions.

3. Claimant returned to Dr. Ramawamy on November 17 and 23, 2021, Claimant underwent trigger point injections over the right trapezius and levator musculatures. At the appointments following each of these injections, Claimant reported having obtained relief from the injections. Claimant also obtained physical therapy during the next several months, consistently reporting neck and shoulder pain with difficulty lifting, reaching, carrying, pushing, and pulling. Claimant also reported constant aching, swelling, tightness, and pain in her neck and shoulder. A therapist noted consistent objective findings of pain and tightness in Claimant's neck and shoulder.

4. Claimant saw Dr. Levi Miller on January 28, 2022. Claimant reported to Dr. Miller that she had increased symptoms with reaching and overhead activities as well as pain with cervical movement and some pain radiating into her arms. Claimant also reported that she had been compensating for her right shoulder, causing left shoulder pain. Claimant exhibited decreased cervical range of motion, tenderness in her bilateral mid and lower paraspinal musculatures, and in her trapezius and levator scapula. Claimant was assessed with right shoulder sprain and cervical sprain. Dr. Miller recommended an EMG, chiropractic treatment, and medications. He also discussed the possibility of shoulder injections.

5. Claimant underwent an MRI of her cervical spine on February 5, 2022. The MRI showed “moderate multilevel mid cervical spondylosis, worst at C5-6 where there is moderate canal and severe left-sided foraminal narrowing. There is also moderate canal and moderate to severe left-sided foraminal narrowing at C4-5.” Claimant also underwent an MRI of her right shoulder that same day. The impressions were of “mild supraspinatus tendinosis with low-grade interstitial tearing,” “mild infraspinatus tendinosis with probable minimal interstitial tearing,” and “mild/moderate acromioclavicular degenerative joint disease with potential for subacromial impingement.”

6. Claimant underwent an EMG on February 11, 2022. With regard to Claimant’s upper extremities, the EMG showed moderate-to-severe right ulnar neuropathy at the elbow, mild left ulnar neuropathy at the elbow, and mild left carpal tunnel syndrome. That same day, Claimant had undergone a right shoulder subacromial/subdeltoid bursal injection.

7. On February 25, 2022, Claimant treated with Dr. Miller and reported she did not get any relief from the right shoulder injection. Claimant reported ongoing right shoulder and neck pain and other symptoms, including symptoms down her right arm. Dr. Miller recommended a pain psychology evaluation “in the setting of delayed recovery, poor response to treatment.”

8. On March 1, 2022, Dr. Ramaswamy noted that, “Dr. Miller mentioned pain psychology but the patient feels that she emotionally is stable. She feels that there is a plan at this time and therefore she feels that counseling will not be helpful.”

9. Claimant underwent bilateral shoulder subacromial injections on April 22, 2022.

10. On May 11, 2022, Dr. Ramaswamy discussed with Claimant that some of her treatment had been denied because she refused to undergo a psychological evaluation. Claimant indicated that she would still decline a psychological evaluation and that her frustration was due to denials of treatment, and that if she was treated effectively she would not be as frustrated. Therefore, Claimant would decline mental health evaluations.

11. On August 8, 2022, Dr. Ramaswamy issued a report based upon a *Samms* conference conducted with counsel for the parties. In that report, Dr. Ramaswamy noted that Claimant’s treatment had plateaued. It was his opinion that the main issues clinically involved the rotator cuff interstitial tear and potential cervical facet irritation and inflammation. Dr. Ramaswamy also noted that if C4-C6 medial branch blocks were non-diagnostic, then no further facet treatment would be recommended and Claimant would be at MMI. Regarding Claimant’s right shoulder, Dr. Ramaswamy felt that Claimant met the criteria for a platelet-rich-plasma (PRP) injection to assist with healing, noting that Claimant had evidence of tendon pathology and had exhausted all conservative care.

12. Dr. Ramaswamy also noted in the same report that, “A psychological evaluation was mentioned as being necessary for the patient to undergo the cervical facet procedure (peer reviewer). The patient declined that option as she was concerned that her condition would be deemed ‘psychiatric’ if she were to undergo that evaluation. She indicates that emotional distress at this point relates to the chronic pain and dysfunction that she has noted, as related to this Injury.”

13. On November 9, 2022, Dr. Ramaswamy responded to a questionnaire from Respondents. Dr. Ramaswamy indicated he expected [Redacted, hereinafter SZ] to reach MMI “after recovery from PRP procedure and post PRP PT.”

14. On January 11, 2023, Claimant saw Dr. Hewitt, who noted Claimant had been treating for subacromial impingement and a low-grade supraspinatus tear. He also observed that Claimant had treated with physical therapy, medications, and a cortisone injection. At that visit, Claimant underwent a right shoulder subacromial PRP injection with Dr. Hewitt.

15. On February 23, 2023, Claimant returned to Dr. Ramaswamy and reported improvement following the PRP injection, including greater range of motion and less pain.

16. Claimant returned to Dr. Hewitt on August 18, 2023, to address her right shoulder symptoms. Dr. Hewitt diagnosed Claimant with right shoulder impingement. He noted that Claimant had only mild improvement from the prior PRP injection nine months earlier, that physical therapy had been discontinued due to exacerbation of symptoms, and that Claimant had only two chiropractic visits because she found them not to be beneficial. However, he also noted that Claimant wished to hold off on a shoulder arthroscopy and instead consider a repeat PRP injection. Dr. Hewitt therefore requested prior authorization for a PRP injection.

17. Claimant underwent an independent medical examination (IME) with Dr. Lloyd Thurston on August 2, 2023, at Respondents’ request. At the IME appointment, Claimant described pain as being a three out of ten, more in the right shoulder than in the neck, though her pain was on average a four or five out of ten. Dr. Thurston performed a physical examination. He noted decreased right shoulder range of motion with pain behavior and positive impingement signs, a mildly decreased active cervical range of motion with accompanying pain behavior, and decreased active left shoulder range of motion with pain behavior.

18. Dr. Thurston felt that Claimant had sustained a minor work-related injury. Dr. Thurston felt that Claimant had myofascial pain in the neck. In his opinion, Claimant’s right shoulder pain and cervical spine pain were due to muscle strains rather than ligamentous sprains. In his opinion, the pathology identified on the right shoulder MRI was minor, degenerative, and age-related, and there was no indication that any of the minor MRI findings were caused by, aggravated, exacerbated, or “lit up” by the October 28, 2021 injury.

19. Regarding Claimant's left shoulder, Dr. Thurston felt that there was no injury to the left shoulder. He noted Claimant's late onset of symptoms and the absence of a mechanism of injury that would result in a left shoulder injury. He also felt that Claimant's "paresthesias of the skin" was a subjective complaint that should not be attributed to the October 28, 2021 injury.

20. Dr. Thurston felt that Claimant's symptoms were unusual and disproportionate to the mechanism of injury. He opined that Claimant's history met the criteria for a diagnosis of "malingering." He noted that malingering should be strongly suspected where there is the presence of a medicolegal context of presentation, a marked discrepancy between the patient's claimed stress or disability and the objective findings and observations, a lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen, and the presence of antisocial personality disorder. Dr. Thurston felt that three of the four criteria were present, though he did not clarify which three. However, he did note that Claimant had previously received a settlement for a prior workers' compensation injury.

21. Dr. Thurston wrote that the best course of treatment for Claimant would be to release her to full duty with no restrictions and for her to "take personal responsibility for her future health, employment, and physical wellbeing," as well as a complete cessation of further medical care.

22. Respondents also obtained a record review by Dr. Aaron Morgenstein, completed sometime around August 30, 2023, to address Dr. Hewitt's request for prior authorization for a repeat right-shoulder PRP injection. As part of the record review, Dr. Morgenstein contacted Dr. Hewitt and discussed the case. Dr. Hewitt informed Dr. Morgenstein that Claimant had a very mild partial rotator cuff tear with more signs of impingement, that Claimant had mild relief from the previous PRP injection, that physical therapy had failed to improve Claimant's shoulder symptoms, and that Claimant's shoulder symptoms were likely confounded by her neck pathology. Dr. Morgenstein noted that Claimant met some of the criteria set forth in the Medical Treatment Guidelines,[1] but not others. For example, there was evidence of tendon damage and non-response to other conservative measures, as well as a desire to avoid invasive shoulder surgery. However, the Guidelines also indicate that a PRP injection may be repeated once after four weeks "when significant functional benefit is reported but the patient has not returned to full function or full duty at work." Dr. Morgenstein noted that there was conflicting evidence regarding whether Claimant obtained anything more than a mild benefit from her first PRP injection and that there was no information regarding Claimant's work status.

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[1] *See* Rule 17, WCRP, Exhibit 4.

23. On the basis of Dr. Morgenstein's report, Respondents denied Dr. Hewitt's request for prior authorization for a repeat right shoulder PRP injection. Claimant filed an Application for Hearing to challenge the denial.

24. At hearing, Claimant testified that during the weeks following her January 2023 PRP injection she experienced relief with less cramping and more range of motion. She also testified that she was "able to function better after I had received the PRP." Claimant also testified that she continued to make progress with recovery of her right shoulder.

25. On cross examination, Claimant testified that she declined a recommendation by Drs. Miller and Ramaswamy for a psychological evaluation because, in her opinion, a psychological evaluation was not necessary.

26. The Court does not find Claimant's testimony credible with regard to her improvement in symptoms and function following the first PRP injections. The Court finds Dr. Hewitt's account that Claimant had only mild improvement in symptoms to be more credible. The Court also finds Dr. Morgenstein's account of his conversation with Dr. Hewitt, in which Dr. Hewitt reiterated that Claimant had only mild relief from the first PRP injection, to be credible.

27. Dr. Thurston also testified at hearing as an expert in occupational medicine. He testified consistently with his IME report. Specifically, he testified that he reviewed the results from the February 5, 2022 MRI of Claimant's right shoulder, which he felt demonstrated chronic findings. Specifically, the tendinosis reflected a tendon which had thickened, but which was not necessarily inflamed—just not particularly healthy. He also testified that Claimant was at MMI and not in need of any further medical treatment for her injury. He testified that, although Claimant would sometimes report feeling better, there was no indication that she was actually responding to treatment. To the contrary, he felt that Claimant's history met the criteria of malingering.

28. The Court finds Dr. Thurston's opinions as expressed in his IME report and his testimony to be credible and persuasive. Based on the mechanism of injury and the MRIs, Dr. Thurston's opinion that Claimant sustained no more than a muscle strain on the date of injury with respect to her right shoulder is well supported and the most probable explanation for Claimant's right shoulder pathology. The Court also finds persuasive Dr. Thurston's opinion that the medical providers in this case "are chasing her subjective symptoms, losing sight of the original mechanism of injury" and that Claimant's history meets the criteria for malingering.

29. Claimant's refusal to cooperate with Drs. Ramaswamy's and Miller's recommendation for a psychological evaluation for her pain complaints, insisting that an evaluation is unnecessary because she has no psychological diagnosis and should not be deemed "psychiatric," is based on circular reasoning. Claimant's non-cooperation with non-invasive psychological diagnostic

recommendations by her treating providers appears to be an attempt to avoid revelation of any psychological conditions that would cause a deviation from her desired course of treatment.

30. The Court further finds Dr. Morgenstein's opinions credible and persuasive that Claimant's case does not meet the criteria set forth in the Medical Treatment Guidelines for a repeat PRP injection of the right shoulder. The Court finds insufficient circumstance to justify deviation from the recommendations of the Medical Treatment Guidelines in this instance.

31. Therefore, the Court finds that Claimant has not proved by a preponderance of the evidence that the right shoulder repeat PRP injection recommended by Dr. Hewitt on August 18, 2023, is reasonably necessary to cure and relieve Claimant of the effects of her October 21, 2021 injury.

CONCLUSIONS OF LAW

Generally

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

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

testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

Medical Benefits

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

Even where a respondent has admitted for ongoing maintenance medical benefits, it is not precluded from later contesting liability for a particular treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo.App.1997). Further, when the respondents contests liability for a particular medical benefit, the claimant must prove that such contested treatment is reasonably necessary to treat the industrial injury and is related to that injury. *See Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1998); *Snyder*, 942 P.2d 1337.

As found above, Claimant has failed to prove by a preponderance of the evidence that the PRP injections recommended by Dr. Hewitt on August 18, 2023, are reasonably necessary to cure and relieve her of the effects of her work injury.

ORDER

It is therefore ordered that:

1. Claimant's request for an order awarding PRP injections as recommended by Dr. Hewitt on August 18, 2023, is denied.

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 13, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-230-953-002 and 5-238-496

ISSUES

- Did Claimant prove she suffered a compensable injury to her low back on February 2, 2023?

- The parties agreed to reserve the issue of temporary disability benefits if Claimant proves a compensable injury in W.C. 5-230-953-002.

- Did Claimant prove she suffered a compensable injury to her low back on May 1, 2023?

- If Claimant proved a compensable injury on May 1, did she prove entitlement to TTD benefits commencing May 2, 2023, subject to any applicable statutory offset?

- The parties stipulated to an average weekly wage of $1,590.05, for both claims.

- Medical benefits.

FINDINGS OF FACT

1. Claimant works for Employer as a correctional officer.

2. Claimant is alleging two injuries to her low back, on February 2, 2023 and May 1, 2023. These claims are denominated W.C. No. 5-230-953 and W.C. No. 5-238-496, respectively.

3. On February 2, 2023, Claimant was working on a project at the desk in her office. She asked a co-worker, Lt. [Redacted, hereinafter BV], to look at an e-mail on her computer screen. As Lt. BV[Redacted] approached Claimant's desk, she stood up to allow a better view of her monitor. As she stood up, Claimant developed severe pain in her low back and right leg. Claimant was unable to bear weight on her right leg because of the pain.

4. Claimant reported the incident to her supervisor shortly thereafter. Claimant was in too much pain to complete an incident report, so a co-worker filled out the report "as I was telling her what happened." The incident report states that Claimant was "attempting to stand out of chair in office [a] sudden movement."

5. Lt. BV[Redacted] testified at the hearing. He confirmed that Claimant exclaimed in pain while rising from her chair. Lt. BV[Redacted] recalled that Claimant had turned or leaned "slightly" to the left when she developed the pain. She did not stand quickly or suddenly or make any jerking motion. Lt. BV[Redacted] perceived it as "a normal standing movement." Lt. BV's[Redacted] testimony is credible.

6. Claimant was taken by ambulance to the St. Thomas More emergency department.

7. Claimant told the ER provider was sitting at her desk and twisted to the right when she felt the sudden onset of pain. She reported "a history of sciatica and states this feels slightly similar but significantly worse." The EMTs gave Claimant fentanyl which decreased her pain only slightly, from 10/10 to 9/10. The ER provider denied Claimant's request for spinal imaging because she demonstrated no neurological deficits that suggested acute structural pathology. Claimant was diagnosed with a strain and released.

8. Claimant was dissatisfied with the evaluation she received at St. Thomas More, so she went to the Parkview ER later that night.[1] Examination of her low back showed tenderness and limited range of motion, but intact neurological function. A lumbar MRI revealed age-related disc degeneration at L4-5 with a small posterior disc bulge contributing to mild central canal stenosis and mild bilateral foraminal narrowing. No acute spinal pathology was identified. Claimant was again diagnosed with a lumbar strain.

9. Employer referred Claimant to Concentra, and she saw Brendon Madrid, NP at her initial appointment on February 6, 2023. Claimant reported "extreme" pain with any motion of her back and ongoing numbness and tingling in the right leg. Claimant wanted to see a specialist "right away." On examination, she reported severe tenderness to palpation of the right SI joint and increased pain with traction of the right leg. Claimant walked with an antalgic gait, but the neurological examination was normal. Mr. Madrid diagnosed a lumbar strain and opined Claimant's symptoms appeared "out of proportion to the mechanism of injury and results of the MRI." Nevertheless, he referred Claimant to Dr. Michael Rauzzino for a surgical consultation, to Dr. Kenneth Finn for a pain management evaluation, and to physical therapy. Mr. Madrid imposed work restrictions of no lifting over five pounds, no responding to emergencies, and no takedowns.

10. Claimant followed up with Mr. Madrid on February 8, 2023, and reported no change in her symptoms. She could not tolerate PT. Claimant was taking Adderall, Prozac, and Seroquel from another provider, but refused to say why she was taking them.

11. Claimant saw Dr. Rauzzino on February 27, 2023. Physical examination showed paravertebral tenderness to palpation, limited ROM, and positive SLR on the right. Strength and sensation were normal. Dr. Rauzzino recommended conservative care, including PT, medications, and possible injections.

12. Respondent denied the February 2, 2023 claim on February 23, 2023. Thereafter, Claimant started seeing her PCP.

13. Claimant's PCP released her to work without restrictions as of April 3, 2023.

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[1] Claimant arrived at the Parkview ER shortly after midnight. As a result, the corresponding records are dated February 3, 2023.

14. Claimant returned to work in April 2023. She testified her back was doing "great" and she immediately started teaching firearms courses, which required laying, kneeling, positioning, and shooting for three days straight.

15. Claimant's symptoms flared in mid-April 2023 with no inciting event. On April 20, 2023, Claimant asked her PCP to order imaging of her entire spine because "the pain is starting to impact my day-to-day activities." On April 25, 2023, Claimant requested an immediate appointment because her back was "hurting so bad. I can barely move again."

16. Claimant alleges a second work injury involving her low back on May 1, 2023. On that date, Claimant was meeting with co-workers her office when a first responder call came over the radio about an inmate fight in progress. Claimant testified she ran up several flights of stairs to the location of the incident. She testified that she was running up the stairs with her staff behind her. On the second flight of stairs, she was turning left and the moment her right foot touched the step it just buckled, then both of her legs buckled. She felt excruciating pain in her back and leg, and her "whole leg went instantly numb."

17. Lt. [Redacted, hereinafter PC] responded to the inmate fight with Claimant on May 1. Lt. PC[Redacted] later completed an incident report stating he noticed Claimant was having physical problems while they were walking up the stairs.

18. Lt. PC[Redacted] also testified by post-hearing deposition consistent with the incident report. He testified they walked to the inmate incident, climbing several flights of stairs. At first, he was somewhat behind and beside Claimant on the stairs, but eventually he passed her. When Lt. PC[Redacted] reached the top of the stairs, he looked back and saw Claimant was having a difficult time and something was wrong. He reiterated they were all walking, not running up the stairs. He explained that supervisors (such as himself and Claimant) are neither encouraged nor required to run to incidents because they just direct first responders and typically do not have much "hands-on" involvement. Lt. PC's[Redacted] testimony is credible.

19. The claimant went to the Parker Adventist Hospital ER on May 2, 2023. She reported that she was running up stairs and developed acute pain in her low back and right leg. She said she originally injured her back in February 2023, but had improved since then. Examination showed tenderness over the right lumbar paraspinous muscles, bilateral glutes, and around the sciatic nerve. Lower extremity motor and sensory testing was normal. The ER physician thought Claimant had a symptomatic exacerbation of her disc herniation and sciatica but saw no indication for additional imaging. Claimant was diagnosed with acute low back pain and sciatica and given a Medrol Dosepak.

20. Employer sent Claimant a list of designated providers on May 5, 2023, and Claimant elected to return to Concentra.

21. Claimant saw Jennifer Livingston, FNP at Concentra on May 5, 2023. She described her new injury as "running up stairs to respond to emergency, when planted

right foot leg and back buckled." Claimant said her low back was "in agony," and her right leg was giving out frequently because of sharp, burning pain and numbness. Examination of Claimant's back showed bilateral muscle spasms but lower extremity strength and sensation were normal.

22. A lumbar MRI was performed on May 5, 2023. The radiologist interpreted the MRI as showing worsening of the central disc protrusion at L4-5 compared to the February 2023 MRI but not causing significant central canal stenosis, and an associated left foraminal protrusion at L4-5 that may abut the exiting nerve root.

23. Nurse Livingston referred Claimant back to Dr. Rauzzino to review the new MRI.

24. Claimant was evaluated by Dr. Rauzzino on May 9, 2023. She reported that she had been "running" up stairs and felt her legs buckle, associated with extreme pain in her low back. Dr. Rauzzino reviewed the MRI images and noted "slight progression of the central disc herniation at L4-5 but without significant impact on the exiting nerve roots." He opined the progression was "likely due to her recent injury." Dr. Rauzzino recommended an epidural steroid injection (ESI) followed by PT.

25. On June 26, 2023, Claimant saw another surgeon through her private insurance, Dr. Daneil Colonno. Claimant reported she initially developed back and leg symptoms in February 2023. She improved with conservative treatment but her symptoms severely intensified in May 2023. Dr. Colonno noted the MRIs showed relatively minor pathology at L4-5. On exam Claimant had a negative straight leg raise bilaterally. Dr. Colonno opined that Claimant's right-sided radicular symptoms not correlate with the primarily left-sided pathology at L4-5 shown on the MRIs. He recommended an ESI.

26. Claimant followed up with Dr. Colonno on October 10, 2023. He noted the ESI provided modest benefit but no clear improvement during the diagnostic phase. Claimant reported ongoing back pain and numbness affecting her "entire right leg in a multi-dermatomal pattern." Dr. Colonno stated, "I do not have a good explanation for the right lower extremity numbness." He suggested multiple tests including EMG/NCS, MRIs of the brain, cervical spine, and thoracic spine, and an updated lumbar MRI. He also recommended a right SI joint injection.

27. Claimant underwent a fourth lumbar MRI on November 8, 2023. According to Dr. Colonno, the new MRI showed an L4-5 central disc extrusion with migration but no clear nerve impingement, degenerative disc disease (normal wear/tear) and endplate changes. He saw no indication for surgery.

28. Claimant has a lengthy history of symptomatic lumbar degenerative disc disease, with documented complaints similar to those she described after the alleged work injuries. On February 7, 2018, Claimant completed a pain diagram showing pain, numbness, and tingling in her right lower back, buttocks, radiating down the right leg. On April 6, 2018, Claimant's PCP documented complaints of low back pain "for a couple of

years now." She had been receiving chiropractic treatment for a year that "never completely makes the pain go away." She complained of weakness in her right leg and walked with a guarded gait.

29. A lumbar MRI on April 24, 2018 showed degenerative disc disease and a minor posterior disc bulge at L4-5, with no stenosis or nerve root compression.

30. Claimant had a neurosurgical evaluation with Dr. Sana Bhatti on June 28, 2018. She described ongoing low back pain, right hip pain, and right leg paresthesias. Dr. Bhatti opined the etiology of Claimant's symptoms was unclear and not explained by the MRI findings. He recommended conservative care and referral to a pain management phyisician.

31. On December 11, 2018, Claimant reported ongoing low back pain and "sciatica." Chiropractic treatment had provided no lasting benefit. She was taking OTC Tylenol without relief. Examination of her back showed multiple trigger points, muscle spasm, and limited lumbar ROM. Strength was decreased in both legs. Claimant was referred to PT.

32. Claimant testified she did not pursue further treatment for her back after December 11, 2018.

33. Claimant injured or aggravated her low back while on vacation in late January 2023. [Redacted, hereinafter KG], Employer's Staff Coordinator, spoke with Claimant on January 31, 2023, her first day back from vacation. KG[Redacted] asked Claimant how her vacation was and what she did. Claimant told KG[Redacted] she went to Pagosa Springs to visit family and had tweaked her back while on vacation. KG[Redacted] thought nothing of it at the time, but later reported the conversation after learning Claimant had alleged a work-related back injury a couple of days later. KG's[Redacted] testimony is credible.

34. Dr. John Raschbacher performed an IME for Respondent on September 14, 2023. Dr. Raschbacher opined Claimant's reported severe symptoms and limitations were incongruent with the minor incidents she described. He noted Claimant's lengthy history of low back and radicular symptoms that were "essentially the same as she reported after making injury claims." He further opined that merely standing up from a chair or walking up stairs are not likely to cause, aggravate, exacerbate, or accelerate lumbar disc disease. As a result, Dr. Raschbacher opined Claimant suffered no work-related injury on February 2 or May 1, 2023.

35. Dr. Raschbacher testified at hearing consistent with his report. He opined the MRI findings of April 2018 and February 2023 were not appreciably different. Even though the L4-5 disc protrusion had increased by May 2023, Dr. Raschbacher did not believe the interval change was dramatic or medically significant. In any event, any progression would not have been caused by walking up stairs. He echoed Dr. Colonno's impression that the MRI findings do not correlate with Claimant's reported symptoms. The fact that Claimant's symptoms returned around April 20, 2023 with no inciting event is

consistent with the progression of her underlying pre-existing degenerative condition, which tends to worsen over time and fade in and out frequently with no clear cause. Ultimately, Dr. Raschbacher maintained his opinion that Claimant suffered no work-related injury on February 2, 2023 or May 1, 2023.

36. Dr. Raschbacher's opinions are credible and persuasive.

37. Claimant failed to prove she suffered a compensable injury on February 2, 2023.

38. Claimant failed to prove she suffered a compensable injury on May 1, 2023.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001).

A pre-existing condition does not disqualify a claim for compensation where the industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the mere fact that an employee experiences symptoms while working does not compel an inference the work caused an injury or aggravated a pre-existing condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965, 968 (Colo. App. 1985).

Injuries caused by "purely personal risks," including pre-existing medical conditions, are not compensable absent special circumstances. *City of Brighton v. Rodriguez*, 318 P.2d 496 (Colo. 2014). Where an injury is precipitated by a pre-existing nonwork-related condition, the injury is not compensable unless a "special hazard of the employment" increased the risk or severity of injury. *E.g.*, *Gates Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo. App. 1985). The claimant must prove that an injury directly and proximately caused the condition for which they seek benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The provision of medical care based on a claimant's report of symptoms at work does not establish an injury but only demonstrates that the employee claimed they were injured. *Washburn v. City Market*, W.C. No. 5-109-470 (June 3, 2020). The employer may refer the claimant to a medical provider so it does not forfeit the right to select the medical providers if the claim is later deemed compensable. *Id*. Even though a physician designated by the employer provides diagnostic evaluations, treatment, and work restrictions based on a claimant's reported symptoms, it does not necessarily follow that

the claimant sustained a compensable injury. *Fay v. East Penn Manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (April 24, 2020).

As found, Claimant failed to prove she suffered a compensable injury on February 2, 2023. Claimant merely stood up from a chair in a normal fashion and felt low back and right leg symptoms. She made no quick, jerking, or awkward motion, and made only a "slight lean" to the left when the symptoms began. There is no persuasive evidence of any biologically plausible reason that such an innocuous event would trigger debilitating back and leg symptoms. The episode more likely reflects the natural progression or spontaneous recurrence of Claimant's pre-existing low back condition or an injury she suffered while on vacation. Although the onset of symptoms occurred at work, the persuasive evidence fails to show the symptoms were proximately caused by her work.

The same reasoning applies to the incident on May 1, 2023. Lt. PC[Redacted] persuasively explained they were walking—not running—up the stairs at the time when Claimant's back and leg pain flared. The onset of symptoms occurred when Claimant merely "touched her foot" on a step. She did not twist, trip, stumble, or otherwise move in an awkward or forceful manner. The manifestation of symptoms probably reflected the natural waxing and waning of her pre-existing condition. This is consistent with medical records showing a flare in mid-April without incident, which became so bad she could "barely move again" only a week before May 1. Dr. Raschbacher's causation opinions are credible and more persuasive than any contrary opinions in the record. The medical providers who opined the symptoms were causally related to Claimant's work were under the mistaken impression she was "running" up a staircase to respond to an emergency at the time. Although the May 5, 2023 MRI shows progression of the disc protrusion at L4-5, there is no persuasive evidence connecting the change to walking up the stairs, as opposed to the natural progression of the underlying degenerative disc disease. Moreover, as Dr. Colonno explained, the findings do not correlate with Claimant's symptoms. Accordingly, any interval change in the MRI findings between February 2023 and May 2023 is probably incidental and not clinically significant.

ORDER

It is therefore ordered that:

1. Claimant's workers' compensation claim W.C. No. 5-230-953 is denied and dismissed.

2. Claimant's workers' compensation claim W.C. No. 5-238-496 is denied and dismissed.

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 14, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-247-545-001

ISSUES

- Did Claimant prove he sustained a compensable injury?

- If so, Did Respondents prove Claimant was not within the course and scope of employment due to a deviation from his employment?

FINDINGS OF FACT

1. Claimant was employed as facility maintenance employee. His job duties consisted of 50% delivering parts and running errands and 50% of general maintenance.

2. Claimant testified that he was involved in a motor vehicle accident on July 28, 2023 when he was delivering a part or supplies to [Redacted, hereinafter XK], a customer of the Employer. His company van was hit by a vehicle behind him when he stopped in traffic.

3. After the accident, Claimant went to XK[Redacted] and completed his delivery. He then returned to the employer. He reported the accident to his supervisor [Redacted, hereinafter SG]. SG[Redacted] took him to see [Redacted, hereinafter RG], the safety person. RG[Redacted] took the Claimant to UCHealth on Voyager for an evaluation, which is standard procedure following an accident. Claimant saw Dr. Siemer on the day of the accident.

4. RG[Redacted] testified that while the Claimant went to UCHealth, he was given a drug test. The drug test came back positive for THC and the Claimant was fired for the positive drug test. The termination occurred on August 4,

MEDICAL EVIDENCE

5. At the initial visit following the motor vehicle accident, Claimant told Dr. Siemer that he felt fine and was not having any complaints. Dr. Siemer did perform an examination which included the Claimant's neck, mid and low back. Dr. Siemer released him from care. The Claimant testified that he began experiencing pain in his neck and back beginning on the evening of July 28, 2023.

6. On August 8, 2024, Claimant returned to Dr. Siemer. At that visit Claimant began complaining of neck and mid and low back pain. The Claimant sought no treatment between July 28, 2023 and August 8, 2023.

CONCLUSIONS OF LAW

A. Generally

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

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

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

B. Compensability

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).

A claimant is required to prove by a preponderance of the evidence that at the time of the alleged injury he was performing service arising out of and in the course of employment and the alleged injury or occupational disease was proximately caused by the performance of such service. §8-41-301(1)(b)&(c), C.R.S. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." §8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An

"accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." 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 Industrial Outsourcing LP*, WC 4-898-391-01, (ICAO, Aug. 25, 2014).

Claimant has failed to sustain his burden of proof that he sustained an injury in the incident that occurred on July 28, 2023. Although an accident did occur where his vehicle was rear ended by another car, while Claimant was stopped in traffic, I am persuaded by the lack of immediate symptoms following the incident and the statements made by the Claimant to Dr. Siemer that he had no injury or pain at the initial visit. It was only after Claimant was terminated for testing positive on a drug test taken on the day of the incident that Claimant reported symptom to his head, neck and low back. Even assuming that the onset of symptoms occurred over the weekend, there was no additional treatment such as an emergency room visit that documented a delay in onset of symptoms. Not all work related incidents result in injuries. I conclude that the motor vehicle accident did not cause any injuries and the claim is not compensable.

ORDER

It is therefore ordered that:

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

2. Since the claims is denied, there is no reason to address whether Claimant deviated from his employment by taking another route than that preferred by the employer.

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

DATED: February 20, 2024

Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-240-048-002

ISSUES

I. Whether the Respondents proved by a preponderance of the evidence that the Claimant willfully violated a safety rule on May 7, 2023, entitling Respondents to reduce Claimant's benefits by fifty percent beginning June 13, 2023.

II. Whether Claimant proved by a preponderance of the evidence that he is entitled to reimbursement of the $664.00 for the cost of the replacement of Claimant's eye glasses and eye examination.

PROCEDURAL HISTORY

This matter is an admitted case for date of injury of May 7, 2023. Respondents filed a General Admission of Liability on June 2, 2023 admitting for medical benefits and temporary total disability (TTD) benefits beginning May 8, 2023 based on an average weekly wage of $1,404.25 and a TTD rate of $936.17.

Respondents filed a Petition to Modify, Terminate or Suspend Compensation on June 13, 2023 to modify temporary total disability benefits being paid by 50% based on an allegation that Claimant failed to obey a safety rule at the time of his injury, and that Claimant's injuries were caused by not wearing a seat belt at the time of the accident. This was pursuant to Sec. 8-42-112(1)(B), C.R.S.

Claimant filed a timely Objection to Petition to Modify on June 19, 2023 specifically stating that he had not violated a safety rule and that the seat belt was not working at the time of the accident.

Respondents an Application for Hearing (AFH) on September 8, 2023 on the issue laid out in the Petition to Modify. Claimant filed a Response to AFH on September 12, 2023, based on the objection but added the issue of payment of the eye exam and replacement prescription glasses as well as in-home care expenses, which was reserved for future determination.

STIPULATIONS OF THE PARTIES

The parties stipulated to reserve the issue of medical benefits in the form of home health care benefits provided by Claimant's spouse for later determination. That stipulation is approved and is ordered.

FINDINGS OF FACT

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

1. Claimant had been a commercial truck driver for approximately six years and started working for Employer on approximately March 21, 2023. In his prior job he was an oil field tanker driver, but for Employer there were multiple trucks, including a side

dump truck and a hauling truck, that he would drive. For example, they would pick up oil field cuttings up from the oil rig location, take them to a different location and dump them, then they would load up dirt and haul that back to the oil rig site, sometimes in a continuous cycle. Employer ran the trucks on two shifts of 12 hours. Claimant was prohibited from working more than 16 hours a day, though. Under DOT rules, truckers could work 14 hours a day and once a week, they could work an extra two hours.

2. Claimant had a commercial driver's license (CDL), in order to be able to carry out his job. He had to take a test, which was pretty extensive. He had to know the applicable traffic rules, including the rule that he had to wear a seat belt when operating a vehicle.

3. Claimant stated he only recalled that he had online training through videos provided by Employer. While he signed a sign-in sheet acknowledging attending an April 5, 2023 training where the Safety Manager went over a Health and Safety manual (HSE), he did not recall all the content of the training. He did recall training regarding Haz-Com policy and procedures, involving the handling of hazardous materials. Claimant also attended a training on May 4, 2023 discussing driver safety including not to drive a vehicle if it was not safe to drive and to report to Employer that it was not safe to drive. He also recalled signing in on this date.

4. Claimant denied he ever received a copy of the safety manual, emailed or otherwise. Claimant confirmed his email address. Claimant was provided with a copy of the manual in court and failed to recognize it, and again denied ever seeing the document. He stated that he did not have a computer at home and would not have had access to any to read such a large document. Claimant did recall receiving his certification confirming completion of the H2S course, but that was the only document he received by email.

5. When directed to the section on "Safe Driving" under "Seat Belts" Claimant confirmed it stated "Must always be worn when vehicle is in motion." Claimant knew that companies he had worked for in the past had a safety rules regarding the use of seat belts when operating a vehicle, not necessarily that Employer had one, but he was not surprised that they did and assumed that Employer had a safety rule to that effect, especially since when using a CDL he was requires to follow traffic rules. Claimant stated in his responses to discovery that Employer had a safety rule concerning wearing a seat belt.

6. Claimant would begin his shift each day by conducting a complete pre-trip safety inspection on his assigned truck in order to identify anything about the rig he believed would be operating in an unsafe manner. DOT requires CDL drivers to do a pre-trip inspection of no less than 30 minutes but DOT requirements under 49 CFR 396 have to do with vehicle operation and not seat belts. He went through everything, kicked the tires to make sure none were flat, he checked the lights, the safety flares, the triangles, the fluids in the tractor, and so on. And while the DOT did require some reporting in writing, Employer was not requiring any written reporting and provided no forms to Claimant to complete. On the morning of May 7, 2023, Claimant checked the seat belt and did not find anything that would indicate that it was not operating properly.

7. After the inspection, Claimant would generally proceed to his assigned oil rig site to pick up cuttings to be loaded. He would wait a little to get loaded, which was normal. He would get out of his vehicle to retrieve a manifest, a document the dump facility required. He would also get instructions from the rig site if they required a load of dirt, which he would load from the dump site. So it would be typical for him to get in and out of his truck multiple times a day. Once he arrived at the dump facility the truck would "weigh in" after which someone would flag them off the scale, the driver would get out to provide the paperwork, and at that time the driver would inform the dump facility if they needed a load of dirt or not. The driver would then proceed to wait until it was their turn to go up the hill to dump. The driver had to make sure the dump truck was clean of oil and scraps because they did not want build-up on the surface of the metal. Then they would drive to where they would be loaded with dirt. They would, once again have to drive to the scale to "weigh-out" and then collect the return paperwork.

8. On May 7, 2023, Claimant was at the dump facility, right after his truck was loaded with dirt when he noted that the seat belt was not operational. He was in the process of his second load and a normal day's work was about four loads per day. The dump facility was approximately 57 miles away from the Employer's yard in Evans, Colorado, and Claimant considered his options, as he was at the dump facility in Grover Colorado and the oil rig site was in Winsor, Colorado, somewhat on the way to his employer's yard.

9. Claimant had had other issues in the few weeks he had been working for this employer that did not affect the operation of the vehicle he was driving, and had called the issues in to the mechanic shop. One time it was the hydraulics of the trailer that were not operating and the other time was a side mirror that was broken. Despite the non-operational or broken issue, he was still advised to continue to operate the vehicle. He determined that he had a job to perform and the truck, itself, was operational, so he drove away from the dump facility. He had to deliver the load of dirt he had in his dump truck to the oil rig site, and then from there he was planning to go back to Employer's yard to report the problem to the mechanics. The broken seat belt did not make the vehicle non-operational. He believed the vehicle was still safe to operate. He did not notify Employer ahead of time that the belt was not working and he was not wearing a seat belt when the accident happened.

10. Claimant's motor vehicle accident occurred on May 7, 2023, approximately six weeks after he started his job. He had not driven this particular truck before that date, but this was his second trip of the day. He generally completed four loads a day but it varied. It was a semi-tractor truck that was pulling a side dump trailer. However, not wearing a seat belt did not cause the single-vehicle accident. The accident occurred about ten minutes into the drive from the dump facility on his way to the oil rig site. Claimant did not know why the accident happened.

11. Officer [Redacted, hereinafter RS] of the Colorado State Patrol completed an accident report on May 7, 2023, noting that Claimant's vehicle was southbound on Weld County Road 390. Officer RS[Redacted] assumed that the vehicle's tire had drifted off the right side of WCR 390 as it curved to the left. He noted that the vehicle rolled three quarter times, coming to a rest facing south on the left side of the right road edge. The

truck was severely damaged and had to be towed. Claimant was summoned to appear in court on June 27, 2023 for failure to use a seat belt and careless driving.[1]

12. Respondents filed a Driver's Accident Report Form on May 9, 2023 when Claimant was unavailable. It noted that Claimant was hauling a full load of dirt with a side dump and rolled the truck and trailer when he lost control around a bend, noting that preliminary investigation showed he was not wearing a seat belt.

13. Claimant was taken from his truck by paramedics of American Medical Response. They received the PSAP[2] call at 11:49 a.m. and were on route immediately. They arrived on the scene at 12:30 p.m. and departed the scene with Claimant by 12:43 p.m. They arrived at Banner NCMC at 1:36 p.m. They noted as follows:

> C: Roll over MVA, single occupant, single vehicle. Heavy damage to cab of semi-truck. Head pain, back pain, and lower left leg pain resulting from MVA. After the accident, it look the fire department approximately 30 minutes to extricate. His lower leg was pinned under the dash for the duration of the extrication.
>
> H: Single vehicle traffic accident involving a fully loaded semi-truck and trailer hauling dirt. Patient was the driver and sole occupant. He states that he was traveling approximately 45-50 mph when he rolled his semi-truck, unknown cause. He states that he remembers the accident and does not believe he lost consciousness. He was not seat belted. He states that his lower left leg hurts, his mid back hurts, as well as his head. His leg pain is just above the ankle and extends up into the calf. The pain is rated an 8/10. He is able to wiggle his toes, has pink/warm/dry skin, and a strong pedal pulse. There are multiple deep divots in the skin, from where the dash was resting on his leg for the duration of the extrication. No bleeding or crepitus noted. His back was visibly atraumatic but had significant pain when palpated down spine, near the mid to low back. Additionally, the backboard he was on for extrication was causing a significant increase in pain, so it was removed via controlled log roll with c-spine- precaution to soft mattress. He states that he has had problems with his mid/lower back for many years. At baseline, he has pain when he lies supine. The back pain is worse than his normal, rated at an 8/10 and "normal" is 3-4/10. Normal neuro assessment, and no numbness/tingling to extremities. His head had an approximate 2" laceration in the parietal portion of skull, with bleeding controlled via ABD pad. No crepitus noted to area. Lung sounds clear and equal. Abdomen soft and non tender. Pelvis stable. Pt is AAOx4.[3]

14. Claimant was initially seen at Banner North Colorado Medical Center by Ian Tate, M.D. on May 7, 2023. They documented that Claimant was involved in a motor vehicle collision, with a head injury, cervical spine injury, following exams and protocols including multiple CT scans. They provided differential diagnosis of head injury, cervical spine injury, internal hemorrhage, hollow organ injury, spinal injury, rib fracture, pneumothorax, and blunt abdominal trauma. They noted as follows (sic.):

> 44 yo M with hx HTN p/w rollover MVC, unrestrained. His main complaint is back pain. Laceration noted to right parietal scalp. This was irrigated and repaired, Tdap updated. Given the high mechanism, pan CT was indicated. CT brain negative for ICH or skull fx, CT cervical spine negative for fracture or subluxation. CT chest/abd/pelvis shows no rib fx however pt noted to have bilateral upper lobe pulmonary contusions as well as a sternal fracture. Spinal CTs notable for T12 burst fracture. Pt is neurologically intact with normal sensation and motor in all extremities. Case d/w Dr.

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[1] Neither party informed the court about the result of the hearing or whether the citation was upheld.
[2] PSAP stands for public safety answering point, a call center for first responders where 911 calls are routed.
[3] This ALJ infers that AAOx4 means awake, alert, and oriented to person, place, time and event.

Karampelas of neurosurgery who reviewed the imaging. He felt pt will need complex spine surgery and recommended transfer to Denver Health. I discussed the case with Dr. Dante

Yeh, trauma attending at Denver Health, who accepts pt for transfer.

15. The same day, on May 7, 2023 Claimant was transferred to the care of Joseph Ponce, M.D. a resident at Denver Health Medical Center for the T12 burst fracture and closed fracture of the sternum.[4] He noted that Claimant was transferred due to need for neurosurgical evaluation as well as admission to inpatient hospital setting with trauma acute care surgery. Claimant was admitted to higher level of care/stepdown versus ICU with trauma acute care surgery as primary and neurosurgery following.

16. An MRI was performed showing an acute burst-type compression fracture of the T12 vertebral body with less than 50% height loss and associated bone marrow edema and 3 mm retropulsion, with mild left foraminal narrowing. It was suggestive of disruption-anterior and posterior longitudinal ligaments and edema of the multifidus muscles and midline subcutaneous fat from the level T9-L2. They performed a new CT of the chest to show a fracture of the manubrium extending into the manubriosternal junction with associated hematoma and a suspected minimally displaced posterior fractures of the right 3-5th ribs.

17. Claimant had a spinal fusion performed posterolaterally at the T10-L2 on May 11, 2023 including rods to stabilize by Angela Downes, M.D. and Ashkaun Razmara, M.D. of Neurosurgery. It was an open reduction and internal fixation of T12 fracture, with percutaneous pedicle screw instrumentation bilaterally at T10, T11, T12, L1 and L2 with rods. They returned him to the surgical floor after surgical repair.

18. Dr. Fredric Pieracci determined that Claimant actually had an approximate 65% compression of the T12 vertebra. Claimant was released on May 13, 2023 with only a 10 lbs. restriction. Dr. Joon Koo Choi also noted that Claimant's pain was well controlled and that Claimant was on Oxycodone 5 mg every 6 hours as needed (p.r.n.), Dilaudid 0.5 mg every 2 hours p.r.n., Toradol 15 mg every 6 hours p.r.n., and for insomnia trazodone 50 mg nightly p.r.n. Claimant was instructed to return to the Neurosurgery Clinic for staple removal within 2 weeks and was to follow up with the Trauma Clinic regarding the rib fractures within 2-3 weeks.

19. On July 13, 2023 Dr. Nicholas Olsen was asked to perform a medical records review in this matter, by Respondents, regarding to what extent Claimant could have avoided his injuries if he had been wearing a seat belt. Dr. Olsen noted that given the nature of Claimant's injuries, it was clear that he had a hyperflexion injury resulting in the T12 burst fracture. If Claimant "had been wearing a lap belt and shoulder restraint, he would have been restrained from a hyperflexion injury resulting in the T12 fracture. It is clear that the additional safety of the seat belt and shoulder restraint would have substantially lessened [Claimant]'s injuries." He ultimately opined that "within a reasonable degree of medical probability, that, if [Claimant] had worn his lap belt and shoulder restraint, he would have likely avoided the mechanism that led to his T12 burst fracture and required the surgical stabilization procedure to treat his spine." Dr. Olsen

[4] These records are incorrectly labeled by Respondents as Banner North, 194-201. Based on the written context of records, these are records are from Denver Health upon admission to the surgical unit after transfer.

did not mention anything regarding the fracture of the manubrium extending into the manubriosternal junction with associated hematoma and posterior fractures of the right 3-5th ribs.

20. The Safety Manager investigated the accident by attempting to interview Claimant the day of the accident at the hospital but Claimant was not available due to his injuries and because he was later transferred to Denver Health Medical Center. However, he did interview Trooper RS[Redacted] who explained that the tire left the pavement causing the accident and that Claimant was cited for careless driving and driving without a seat belt. He also interviewed Claimant's co-worker, who had left the dump facility shortly after Claimant and had stopped to assist when he saw Claimant's truck had been involved in an accident. The Safety Manager stated that the direct cause of Claimant's accident was that he allowed his vehicle to drift off the road and he lost control of the vehicle. He noted that corrective action was a "stand down safety meeting discussing the importance of staying in control of your vehicle and wearing a seatbelt." He also listed "[I]mplemented a behavior-based safety observation program focused on employee safe operating procedures and best practices."

21. Claimant's co-worker wrote a witness statement noting that he had seen Claimant leave the dump facility with a load of dirt. When he left, as he was driving, he came upon a truck off the road on its side (the driver's side). He found out that Claimant was still in the truck, with gauze on his head but was able to talk and was alert, though quiet and scared. He ensured that someone had already called 911 then called his shift supervisor, making reports frequently. He noted that Claimant could not feel his legs and that the fire department did not arrive for 20 to 30 minutes. They had to use the "jaws of life" to extricate Claimant from the chassis, which took 30 to 45 minutes. Claimant was placed in one of the ambulances and was taken to NCMC. The date of this statement was not listed.

22. The Safety Manager testified at hearing, stating he started his employment with Employer on February 27, 2023. He was responsible for safety training, keeping Employer in compliance with applicable Occupational Safety and Health Administration (OSHA) standards and for investigating accidents, with the goal of finding the root cause of incidents when they occurred so that they could be prevented in the future.

23. The Safety Manager explained that Employer had safety rules in place on how employees needed to perform their jobs in a safe manner, contained in the Health, Safety and Environmental (HSE) Manual. He explained that he was responsible for the HSE and was the one to make changes if needed. He explained that the manual required employees to always wear seat belts when the vehicle was in motion. He explained that during the April 5, 2023 training he went over the HSE table of contents and noted that there were some sections that may not apply to all employees, but that they needed to review the remainder of the HSE and ask for guidance if they had questions. They also went in depth over the H_2S dangers, which is hydrogen sulfide, a deadly toxic gas common in the oil and gas industry, a training required by the oil fields with whom they worked.

24. The Safety Manager stated that he was in charge of disseminating the HSE to the employees and discussing the first few pages with them. He testified that he had

sent everyone that attended the April 5, 2023 meeting a copy of the HSE by email but did not require a confirmation from the employees that they had either received or understood the document. He obtained everyone's email addresses at the time of the April 5, 2023 meeting and a copy of the email was in evidence. Nothing in the email provided in the Exhibit showed that an attachment was included with the email, other than the mention of an attachment within the body of the email. He asked the trainees to verify that they received an email and he thought that all three of the employees had verified it since none of them spoke up. He indicated that a copy of the HSE was available at the dispatch office for employees to read. He further indicated that it was not his responsibility to convey to the employees what was in the HSE, and he was only responsible for making sure that the employee received the safety manual.

25. The HSE was a document of approximately 345 pages, which included policies, procedures and guidelines of zero accidents and that "[O]ther than "Acts of God", accidents are preventable, and the causal effect is related to unsafe and inefficient work procedures and methods, unsafe physical conditions, unsafe equipment, failure to follow procedures, and more likely a combination of several elements." The Safety Manager was responsible to communicate the company's policies and rules to new hires during orientation.

26. Claimant was identified by the Safety Manager as paying attention during the subsequent May 4, 2023 safety meeting in a picture contained in Respondents' exhibits, which Claimant attended with multiple other individuals. This was also confirmed by Claimant's signature of attendance on the roster. During this meeting they discussed driver safety like backing up, and when getting out of the vehicles to look and to verify if they were unsure or did not have spotters, and also about bloodborne pathogens. He specifically recalled advising the drivers that they needed to speak with management if something was wrong with the operation of the trucks, using the phrase "closed mouth doesn't get fed." He did not specifically recall addressing seat belts.

27. He explained that Employer enforced their safety rules, by progressive discipline, coaching or correcting behavior. He stated that, unless it was a severe rule violation or some sort of blatant disregard, which could escalate discipline up to termination, corrective action was preferred because they did not wish to lose employees. The HSE noted that disciplinary steps were verbal warning, written reprimand, suspension, and termination.

28. The HSE also required the Safety Manager to have "Post-Orientation Follow-up" that gave new employees a chance to ask questions and that managers should continually monitor the safety habits of those employees. The Safety Manager stated that all new hires like Claimant were considered short term employees. The HSE had multiple questionnaires and forms for employees to sign, including an "employee safety questionnaire," which asked "will you read and familiarize yourself with the new hire literature given to you at the time of your employment? Yes/No, which included employee and manager signature lines. When questioned whether these forms were ever signed by employees, the Safety Manager responded that he only required the employees to sign the "sign-in sheet" when they presented to orientation. The sign-in sheet was signed at the beginning of the orientation, which had a statement that "by signing this document you acknowledge you understand the topics discussed." As found,

at the time of signing, it is unreasonable to expect an employee to agree to understanding information that had not yet been communicated. It was misleading and somewhat disingenuous for an employer to assume that the employee was consenting to comprehend future content, rather than acknowledging that the session was merely an orientation, with topics generally outlined, such as “HAZ-COM Policies and Procedures."

29. The Safety Manager also stated that under DOT rules, trucks were to be inspected at least once a year. He confirmed that Claimant’s truck had failed to be inspected between August of 2020 and the Claimant’s accident date on May 7, 2023, a period of two and two third’s years. Or at least, there was no documentation that it was inspected, which was in violation of the DOT rules. Specifically, the HSE noted that mechanic shop managers were to “ensure that motor vehicles and equipment are operated and maintained per this policy, in addition to manufacturers, federal, state, and local; and enforce the rules of this policy.” Code of Federal Regulations, 49 CFR 396, §396.17 states that motor vehicles are to be inspected at least once every 12 months. The mechanics failed to do this, violating the policy manual which was implemented by Employer.

30. The Safety Manager did visit Claimant in the hospital a few days following the May 7, 2023 accident. He provided Claimant an incident report to complete but Claimant only reported that he was driving, the truck went off the road and rolled. He did not ask Claimant if he was wearing a seat belt or the reason why he was not.

31. At no time did Employer or any of their representatives test the seat belt of the truck after the accident. The HSE stated that the Safety Manager “shall” investigate any motor vehicle accident and properly collect the “evidence, witness statements, photographs of the scene, collection, and preservation of evidence at the scene, statements from the first responders, obtaining a copy of the report generated by local and government agencies…” and “[E]nsure that all evidence collected is preserved and secured…” The Safety Manager failed to do this, violating the policy manual which he himself authored or signed off on.

32. The Safety Manager believed Claimant was in violation of Employer’s safety rules by his failure to wear a seat belt on the day of his accident and believed that HR had terminated him because of it but was not certain that that was the case. He stated that if a seat belt was not working that it should have been reported to the dispatch office and they would send a mechanic out to fix the belt but could not say specifically how many mechanic trucks and how many actual working trucks they had to service.

33. Claimant was legally blind without his glasses. Even with glasses he barely had 20/40 vision. When EMS pulled him out of the tractor with the “jaws of life,” after the accident, his glasses were not on his face. They were lost at the time of the accident. Employer did not recover the rig after it was hauled off nor did they inspect the truck to retrieve Claimant’s property.

34. Claimant’s replacement glasses cost $664.00 including his eye exam.

35. As found, after the accident there was no evidence that the seat belt was tested to see if it was operational. The only testimony before the ALJ is the Claimant’s testimony that he was wearing his seat belt throughout the morning but when he got back

in the truck at the dump facility, after his “weigh out” and shortly before the accident, it was no longer working. There was no evidence before the ALJ that would indicate that under that set of circumstances that there was a rule from the employer to not drive the vehicle to complete the work he was assigned if the vehicle was operational, but not the seat belt.

36. As found, Claimant was not instructed during his trainings about the steps to take when equipment that was non-essential to the operation of the vehicle was broken in the field, only that employees needed to speak with management if something was wrong with the actual operation of the truck.

37. As found, Employer failed to provide the HSE in a verifiable manner, that would reach Claimant as the email failed to show that the HSE was actually attached. As found, Employer’s failure to properly articulate the rules in training, adequately explain and document those explanations, as well as their failure to show that the rules were enforced, not just generically state that “Employer enforced their safety rules,” was insufficient to show that Claimant was responsible for the violation of employer’s safety rule and that Claimant failed to obey a reasonable rule adopted by the employer for the safety of the employee.

38. Moreover, as found, Claimant credibly and persuasively stated that the vehicle was operational, and based upon prior experience with a couple of other incidents with issues with other trucks, having only worked for the employer for a short time, and since the truck was operational, he simply continued with his job duties as the company had permitted such action in the past and he had a job to perform. From Claimant’s past experience, and understanding when he had previously reported broken equipment, specifically the hydraulics and side mirror that were not essential to the operation of the vehicle, he was instructed to continue working with his equipment as it was. Employer failed on those occasions to state that those occasions were specific incidents not applicable to other incidents that might arise when other equipment failed but did not affect the operation of the truck. It was not unreasonable for Claimant to conclude that a reasonable action was to complete his route and return to the shop to get the seat belt fixed after he finished his route. As found this was not a “willful” violation but a reasonable action by Claimant, despite the sudden and unforeseen vehicle accident.

39. Further, as found, even if Claimant had received the HSE and had a method with which to read it, which this ALJ was not persuaded took place in this matter, after an exhaustive examination of the 345 page HSE, there were no policies or rules in place that addressed Claimant’s particular situation, especially in light of Employer’s failure comply with its own policies and procedures within the HSE. Claimant’s lack of knowledge of the steps to take in this particular situation, and Employer’s lack of clarity on how employees should address policy deviations even in light of their general knowledge that employer likely had a general safety rule that truckers were to use their seat belts, amounted to no safety rule. As found, Claimant did not act in a willful manner when he continued to perform his work, by driving the truck without the seat belt in place since the belt was broken and as he was following prior instructions by this employer, given in the prior six weeks experience, when his vehicle was operational but other equipment was not, and those instructions were not clarified that they were exceptions to any particular rule.

40. As found, Employer failed to show that Employer provided a copy of the HSE to Claimant, that Employer appropriately conveyed the safety rule in a clear manner, that Employer commonly enforced the safety rules contained in the HSE, or that Claimant acted in a willful manner when he realized that the seat belt was not functioning.

41. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). 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.

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

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Safety Rule Penalty

Respondents argued Claimant violated Sec. 8-42-112(1)(b), C.R.S., which states that "[W]here injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee" indemnity benefits shall be reduced by fifty percent. The intent of the statute is to establish a penalty to deter misconduct. *Wild West Radio, Incl. v. Industrial Claim Appeals Office*, 886 P.2d 304 (Colo. App. 1994). Under Sec. 8-42-112(1)(b) it is Respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule. *Triplett v. Evergreen Builders, Inc.,* W. C. No. 4-576-463 (May 11, 2004); *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo.App.1990). It was also Respondents' burden to prove that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo.App.1995); *Belongia v. All My Sons Moving*, ICAO, WC 5-178-718-001 (December 19, 2022). The question of whether the respondents met their burden to prove a willful safety rule violation is generally one of fact for determination by the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office, supra*.

The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissiveness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968); *Maria Strait v. Russell Stover Candies*, ICAO, WC 4-843-592 (December 12, 2011). However, a finding of willfulness does not require the ALJ to find the claimant, having in mind the rule, or a determination to break it. Rather, it is sufficient to show that the claimant, knowing the rule, intentionally did the forbidden thing. *Stockdale v. Industrial Commission*, 76 Colo. 494, 232 P. 669 (1925). Willful conduct may be inferred from the circumstances, including evidence that the claimant was aware of the rule and the obviousness of the danger. *Bennett Properties Co. v. Industrial Commission, supra*. However, if the Claimant has some plausible purpose to explain a violation of a rule the penalty may not be willful and therefore no violation would be applied. *In re Claim of Burd,* ICAO, WC 5-058-572-01 (July 9, 2019); *Curtis, Inc. v. Industrial Commission,* 483 P. 2d 406 (Colo.App.1971) (NSOP).

It is generally held that "warnings, prohibitions and directions meet the safety requirement for the protection of both employer and employee *if given by someone generally in authority and known to be heard and understood by the employee*." (*Emphasis added*.) *Industrial Commission v. Golden Cycle Corp.*, 246 P.2d 902, 126 Colo. 68 (Colo. 1952). Also, if an employer does not show that there is consistent

enforcement of the purported safety rule it may mean that the employer did not actually have a safety rule with any force or effect. *In re Claim of Burd, supra*; *Pacific Employers Insurance Co. v. Kirkpatrick,* 111 Colo. 470, 143 P.2d 267 (1943). In the *Burd* case, the employer allowed a conduct and did not clarify or provide some guidelines or restrictions with regard to the conduct, and it was reasonable for the employee to rationally conclude that the employer would allow such a conduct again. *In re Claim of Burd, supra*.

As found, Claimant did not receive the Employer manual, and the Safety Manager did not go over the specific safety rule regarding using a seat belt or any other rules regarding complying with State or Federal laws regarding seat belts. Employer failed to show that they had any confirmation that they had proof of such exchange other than an email that failed to show that the attachment was actually attached to the email. Further, Claimant was credible that he did not receive the HSE from Employer. Employer did provide some instruction regarding when the vehicle was not operational, but failed to provide guidance that might be understood by an employee when equipment that did not affect the actual operation of the vehicle, such as the hydraulics, mirrors, seat belts or other equipment. The Safety Manager lacked credibility that the safety rules were generally enforced, without any examples of which ones were and which ones were not, especially in light of Employer's complete disregard for their drivers' safety in failing to inspect the truck as required by their own HSE manual and federal DOT regulations.

Claimant was also credible and persuasive regarding the fact that Employer had communicated with Claimant previously that when equipment on the vehicle that did not affect the operation of the actual truck was involved, such as broken side mirrors or hydraulics, that he was to continue to operate the truck, without qualifying that those were isolated events that only involved those situations and did not apply to other equipment failure that did not involve the truck's operation. Claimant reasonably believed that he should continue to operate the vehicle and continue to his designated stop to deliver the truck load of dirt ordered by the oil rig site, acting conscientiously, thinking of his employer's interests. Claimant credibly testified that when he found the inoperable seat belt as he was leaving the site of the dump, he was only concerned about his obligation to employer to carry out his job and did not willfully violate a safety rule. As found, Claimant was credible and persuasive in this matter over the testimony of the Safety Manager and this ALJ finds that Claimant did not "willfully" violate a safety rule, even if there were an enforceable safety rule, which in this matter, it is found that there was not.

Respondents failed to show by a preponderance of the evidence that Claimant willfully violated an enforceable safety rule.

C. Medical Benefits

The Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101 (1)(a), C.R.S.; *Colorado Comp. Ins. Auth. V. Nofio*, *supra* at 716 (Colo. 1994). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for medical treatment. *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No.

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

Here, Claimant claims he is due and owing reimbursement for an eye examination and replacement glasses he lost during the motor vehicle accident. The glasses are not either reasonably necessary to cure nor relieve Claimant of the effects of the injuries he sustained during the motor vehicle accident. Therefore, Claimant failed to show by a preponderance of the evidence that he was entitled to the replacement glasses and the evaluation.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents' claim for a safety rule penalty is *denied* and *dismissed*.

2. Claimant's claim for reimbursement is *denied* and *dismissed*.

3. The parties' stipulation to reserve the issue of medical benefits in the form of home health care benefits provided by Claimant's spouse for later determination is approved and ordered.

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

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

DATED this 22nd day of February, 2024.

Digital Signature

By: ______________________________
ELSA MARTINEZ TENREIRO
Administrative Law Judge
1525 Sherman Street, 4th Floor

STIPULATIONS

At the commencement of hearing, the parties reached the following stipulations:

1. Claimant's Average Weekly Wage (AWW) is $1,714.58;

2. Claimant was not provided with a designated provider list. Thus, if the claimed injury is determined to be compensable, the right to select the authorized treating provider passed to Claimant.

3. The issue of disfigurement is not ripe for determination.

The parties' stipulations are approved.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable work related injury to her right shoulder on June 29, 2023.

II. If Claimant established that she suffered a compensable right shoulder injury, whether she also established, by a preponderance of the evidence, that she is entitled to all reasonable, necessary and related medical care to cure and relieve her of the effects of this compensable injury.

III. Whether Respondents are subject to penalties for failing to timely report Claimant's alleged injury to the Division of Workers' Compensation in accordance with C.R.S. § 8-43-101(1)(a).

FINDINGS OF FACT

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

Background and Claimant's Alleged June 29, 2023 Right Shoulder Injury

1. Employer runs several day program centers providing training services to developmentally disabled adults. One of these centers is known as "[Redacted, hereinafter VS]". Claimant is the former director of nursing for Employer. She was initially hired on August 8, 2015, and continued working through June 29, 2023, the date of the alleged injury in this matter. Her employment was subsequently terminated on July 6, 2023.

2. As part of her work duties, Claimant was responsible for hiring certified nursing assistants (“CNAs”), creating schedules for CNAs, and ensuring that there is coverage for CNAs at Employer’s four day program locations throughout Colorado Springs, all in an effort to assure the clients medical needs were met.

3. Claimant testified that prior to the date of injury in this matter, she was seeing her personal physician for carpal tunnel like symptoms and pain in her right elbow. She testified that her physician recommended obtaining an MRI of her neck in an effort to rule out cervical pathology as the cause of her elbow and wrist symptoms. Claimant testified that her right upper extremity symptoms began in the early part of 2023. Consistent with her testimony, a review of Claimant’s medical records reveals that she saw her personal medical provider on May 17, 2023 with complaints of right arm “paresthesias/numbness/pain”. (Resp. Hrg. Ex. (RHE) H, p. 312). The stated plan at this visit was to “obtain cervical MRI to evaluate for cervical radiculopathy” and start Claimant on 300 mg of Gabapentin to help with her night time symptoms. *Id.* During cross-examination, Claimant testified that her pain radiated up from her right hand into her right shoulder and that her right wrist and neck issues were also work related, but she failed to timely report them.

4. Claimant testified that on June 29, 2023, at approximately 8:30 a.m. she took a quadriplegic client to the restroom while working at a training program known as “[Redacted, hereinafter JS]”. (Clmt’s Hrg. Ex. (CHE) 2). According to Claimant, assisting this client in the bathroom generally took two people because the client suffers from contortions and uses a form fitting wheelchair making it difficult for one person to return and position the client in her chair after using the bathroom. Nonetheless, because the program center was short staffed, Claimant testified that she had to assist the client in the bathroom alone.

5. Claimant testified that while attempting to reposition the client in her wheelchair, she felt a sudden onset of pain in her right shoulder. Claimant testified that she was able to get the client into her wheelchair sufficiently to move her into the main portion of the program center where she obtained assistance from the only other staff member present to squarely position and secure the client in her wheelchair were she remained until she left for the day. Claimant provided a substantially similar mechanism of injury (MOI) to Dr. Paz as part of a December 26, Independent Medical Examination (IME) requested by Respondents. (See RHE G, p. 301).

6. Claimant testified that she continued working after the incident despite her shoulder pain because there was only one other staff member present in the program center at the time and she could not leave her clients. Nonetheless, Claimant did not inform anyone about her alleged injury. Instead, Claimant testified that she performed her usual duties caring for other clients until around noon when she was relieved by another CNA. According to Claimant, she then took a break to eat during which time she filled out a First Report of Injury form regarding her alleged shoulder injury.

7. On cross examination, Claimant testified that she did not know "exactly" what time she completed the handwritten First Report of Injury. Claimant testified that when submitting claims for her subordinates, she would scan in the written injury report and email it directly to "Risk." Claimant then testified that the reports would always be handed in, in-person and then scanned to Risk, and then she would send a copy to her manager as well.

8. Claimant was asked to attend a meeting at Employers' Garden of the Gods location on the date of her alleged injury. The meeting was to take place at 3:00 p.m. Claimant testified that an email regarding this meeting was sent to her between 9:30 and 10:00 a.m. but she did see the email until later in the day because she had been busy working with clients all morning. Claimant testified that she learned about the meeting, presumably by reading her email, "sometime" in the afternoon on June 29, 2023. Nonetheless, Claimant testified she left her location at approximately 2:30 p.m. to arrive at the 3:00 p.m. meeting on time, suggesting that she knew about the meeting no later than 2:30 p.m.

9. Claimant testified that she was unaware of the topic of the meeting until she "sat down" and they told her what it was about. According to Claimant, she was advised that the meeting was about a disagreement that occurred between herself and a couple of co-workers about a week prior to her alleged June 29, 2023 injury. (For details regarding Claimant's account of this dispute see RHE A, p. 26-27).

10. Claimant testified that at the conclusion of the 3:00 p.m. meeting she was suspended with pay. Claimant testified that she tendered her completed First Report of Injury paperwork at the conclusion of the meeting because she did not have time to submit it earlier in the day since she was busy with clients. She explained that she did not tender it before or during the meeting because she felt bombarded with and was trying to address the allegations surrounding the incident forming the subject of and request for the meeting. Accordingly, Claimant testified there was no opportunity to tender the paperwork before the conclusion of the meeting.

11. During cross examination, Claimant reiterated that she did not recall when the email arrived or when she saw it. When asked if she had previously testified that she did not know the purpose of the meeting, Claimant suggested she was aware of the purpose of the meeting from the outset and that her earlier testimony was that she could not recall or did not remember whether she knew what the meeting was about. The ALJ is not persuaded.

12. The evidence presented supports a finding that [Redacted, hereinafter TJ] (Claimant's supervisor) sent an email message to Claimant on June 29, 2023 at 9:49 a.m. advising her of a 3:00 p.m. meeting to be held that afternoon. (RHE A, p. 37). The message indicates:

> As you are aware, there was a situation in VS[Redacted] last week that I would like to chat with you about. Myself, HR and [Redacted,

> hereinafter EA] would like to meet with you at GOG at 3:00 today so we [can] have a discussion. I will send the invite out here shortly.

Id.

13. Claimant responded to TJ's[Redacted] email within 2 minutes of its receipt. Claimant responded: "Absolutely, I will need to wait for [Redacted, hereinafter EY] to come back from CPR since I am covering for her." (RHE A, p. 37). Based upon the evidence presented, the ALJ finds Claimant's testimony that she became aware of the email sometime in the afternoon on June 29, 2023 inconsistent with her 2 minute response to TJ[Redacted] at 9:51 a.m. The evidence presented persuades the ALJ that Claimant was probably aware of the scheduled meeting no later than 9:51 when she responded to TJ[Redacted]. The ALJ is also convinced, based upon the content of TJ's[Redacted] email, that Claimant was most probably aware of the purpose of the 3:00 p.m. meeting, i.e. the need to discuss the "situation" that occurred in VS[Redacted] prior to Claimant's June 29, 2023 alleged injury by 9:51 a.m. when she responded to TJ[Redacted]. Accordingly, Claimant's testimony that she was unaware of the topic of the meeting until she "sat down" and was informed what it was about is unpersuasive.

14. On the First Report of Injury form Claimant tendered at the close of the June 29, 2023 meeting, she indicated that her right shoulder and neck were injured. (RHE B, p. 40). She indicated further that she did not report the injury because she was the "only person on staff able to care for clients." *Id*. at p. 39. Although reserved for her supervisor's completion, Claimant completed Part 4 of the form noting that the injury was non-reportable since she returned to work and was seeking "attention" on her own by making an appointment with her primary care physician. *Id*. at p. 41. Claimant testified that she wrote the note at the top of Exhibit B, p. 41, which indicates she made an appointment for July 5, 2023, (there was an error in the date for the appointment, it was scheduled for July 5, not June 5). This portion of the First Report of Injury form contains the following notation, "EE (employee) was provided with a copy of the Designated Provider Letter" followed by a check box which is unmarked. *Id.* Nonetheless, Claimant signed the form as if her Supervisor had completed Part 4. *Id*.

15. Claimant was evaluated by her Primary Care Provider (PCP) Dr. Brian Artzberger on July 5, 2023 at 2:07 p.m. (RHE H, p. 313). Dr. Artzberger noted the following history:

> [Claimant] does a lot of lifting client at work. She was lifting someone last Thursday and injured her ***neck.*** She gets numbness and tingling in her arms. She has pain and numbness when she sleeps on her right side. She denies any history of specific trauma to the neck. She says teh (sic) numbness and tingling in her arms and hands has been going on for about a year. She had an MRI of her C-spine. It was done at UC Health. We do not have the results yet.

Id. at p. 313 (emphasis added).

16. Claimant testified that the medical report is incorrect, that she injured her shoulder and that Dr. Artzberger ordered an MRI of her shoulder. Based upon the content of Dr. Artzberger's July 5, 2023 note, the ALJ finds that Claimant probably reported an injury to her neck rather than her shoulder. Indeed, Dr. Artzberger's July 5, 2023 report is devoid of any reference to a shoulder injury or the need for an MRI to her right shoulder. (RHE H, p. 313). Moreover, Dr. Artzberger limited his physical examination to the neck and upper back, noting that there was "spasm" in the neck and right Rhomboid muscles. *Id.* Dr. Artzberger assessed Claimant with a "nonallopathic C-spine, muscle spasm, right elbow medial epicondylitis and carpal tunnel-right side". He restricted Claimant's lifting to a maximum of 25 pounds at work. *Id*. Claimant testified that Dr. Artzberger did not do a shoulder examination because he wanted her to see an orthopedic specialist; however, Dr. Artzberger's July 5, 2023 report is devoid of any plan to refer Claimant to an orthopedist.

17. On July 6, 2023, Dr. Artzberger drafted a letter "To Whom It May Concern". (RHE H, p. 314). The ALJ infers that the letter was requested by Claimant and provided directly to her as there is no name or address to whom or where the letter was to be directed. *Id*. Contrary to his July 5, 2023 report, Dr. Artzberger's letter indicates that Claimant was seen on July 5, 2023 "due to neck and ***shoulder*** problems due to heavy lifting". *Id.* (emphasis added).

18. On July 6, 2023 at 1:27 p.m. "[Redacted, hereinafter AM]" from PeakMed emailed Claimant advising her that a referral and patient contact information was sent to Orthopedic & Spine Center of Southern Colorado. (CHE 2).

19. Claimant testified she was terminated on the Thursday after June 29, 2023, the first Thursday in July. (July 6, 2023). Claimant testified she believed she was terminated in retaliation for making an OSHA report and an ethics complaint in October of 2022. (Exhibit A, pg. 002)

20. Claimant was evaluated by Physician Assistant (PA) "Mark" from an unknown clinic on September 18, 2023. (RHE H, p. 315). The report form this encounter notes: "Right shoulder pain. Since early July. Injured lifting a client. Was fired a week later. No current insurance. Did see Ortho mid July who recommended a shoulder MRI to rule out rotator cuff pathology. Does have full ROM of the shoulder but pain with overhead activities". *Id.* It was also noted that Claimant had co-occurring right arm paresthesia and right foraminal narrowing at C5-C6 along with bilateral foraminal narrowing at C6-C7 per a previously obtained cervical MRI. *Id*. Physical examination of the right shoulder was performed and noted to be positive for pain with active flexion and abduction over 90 degrees. *Id*. Provocative testing yielded positive results for the following tests: Empty Can, Neer/Hawkins and Push-off testing. *Id*. PA Mark noted that Claimant's examination was consistent with "[l]ikely acute rotator cuff pathology/supraspinatus tear. *Id.* He noted that Claimant "[n]eeds the shoulder MRI

ordered by Ortho". *Id*. Neither Claimant nor Respondents submitted the mid July report from Claimant's orthopedic appointment.

21. Claimant was evaluated by Dr. Paz at Respondents request on December 26, 2023. Following his IME, Dr. Paz issued a report outlining his findings/opinions. (RHE G). As part of his IME, Dr. Paz reviewed the above referenced mid July orthopedic report. Indeed, Dr. Paz documented the following from Claimant's July 14, 2023 orthopedic report.

> HPI: Left-hand-dominate 50-year-old female nurse chief complaint of right shoulder pain. Initially injured her shoulder on June 29, 2023. Lifting a patient to get her into her wheelchair. Felt immediate pain in her shoulder and feels that the pain is worsening with time.
>
> * * *
>
> Right shoulder exam: Active forward flexion of 170º external rotation with elbow at the side to 60º. Neer's and Hawkins were positive. O'Brien's was positive.
>
> * * *
>
> Diagnosis: Right shoulder pain: Symptoms consistent with possible rotator cuff tendinosis versus tear. Refer her for MRI.

(RHE G, p. 307).

22. Following his record review and physical examination, Dr. Paz opined:

> Considering the direct history provided during this evaluation, the findings on physical examination, and a review of the prior record, [Claimant's] findings are consistent with a diagnosis of right shoulder strain and right shoulder impingement syndrome. Based on the direct history provided during this evaluation and the history documented in the record, the mechanism of injury is consistent with the lifting of a client on June 29, 2023. The mechanism of injury is consistent with the diagnosis of right shoulder strain and right shoulder impingement syndrome. Therefore, based upon reasonable medical probability, it is medically probable that the right shoulder strain and right shoulder impingement syndrome are causally related to the June 29, 2023, incident.

(RHE G, p. 308).

23. Dr. Paz testified as a Board Eligible expert in Internal Medicine. He has practiced in the areas of Internal and Occupational medicine since 1991. He is Level II

Accredited. Dr. Paz testified consistently with his December 26, 2023 report noting that the MOI was consistent with the incident as described. He again concluded that Claimant had a right shoulder strain with impingement syndrome. Dr. Paz testified that claimant reported her cervical symptoms developed recently and that it was medically probable that the findings were consistent with the June 29, 2023, incident. Dr. Paz testified that there is no documentation of a shoulder strain contemporaneous to the injury in the July 5, 2023, record before adding that the July 14, 2023 report was the first documentation of findings consistent with his shoulder examination of Claimant.

24. [Redacted, hereinafter LR] testified that she is the risk coordinator who handles worker's compensation for the southern region for the employer. LR[Redacted] testified that she entered the claim, and she responded to [Redacted, hereinafter KC] in response to the only letter she received that had been sent by KC[Redacted]. LR[Redacted] testified that she does not file claims with Strategic Comp until they involve a reportable injury. LR[Redacted] testified that Claimant had not missed any work shifts due to the injury. Based upon the evidence presented, the ALJ is convinced that Claimant's lost time from work was secondary to her suspension and subsequent termination. Indeed, Claimant's PCP did not remove her from work entirely. Rather, he restricted her to lifting 25 pounds, which Claimant testified would not preclude her from working per her job description as tendered. (CHE 3).

25. LR[Redacted] filed the claim with on August 30, 2023. (Exhibit D) LR[Redacted] testified that she did not recall receiving the July 6, 2023, email in Claimant's Exhibit 2, and that had she received the email, she would have provided Claimant with a response. Claimant sent an email on August 30, 2023, in which she stated that she had been unable to obtain medical care, needs surgery, and would like to obtain treatment. (RHE C, pp. 46-47). LR[Redacted] provided a responsive email on August 30, 2023, in which she advised Claimant that she understood that Claimant was seeking care with her primary care provider rather than seeing a designated provider, that she gave Claimant the designated provider list, and advised her that the claim was filed and provided her with the claim number. *Id*. at p. 49.

26. [Redacted, hereinafter ES] testified as Employer's Senior Director of Community Impacts. ES[Redacted] testified that she attended the June 29, 2023, meeting as a neutral third party to listen to Claimant's perspective on events. ES[Redacted] testified that Claimant was advised that following interviews with other employees and review of video, there were concerns about her leadership and communication with staff members. ES[Redacted] testified that [Redacted, hereinafter RZ], the Director of Human Resources informed Claimant that she would be suspended pending the outcome of the investigation and at that time, Claimant stated something to the effect of "with that in mind, here is this injury report." ES[Redacted] testified that the meeting lasted approximately 30 minutes, and the worker's compensation issue was separate from the leadership issue, that 2 minutes, if that, were devoted to the worker's compensation discussion, and the balance of the meeting was about the suspension and leadership issues.

27. TJ[Redacted] testified that she is the Director of Disability Integration and Employment Services for Employer. She is claimant's supervisor. TJ[Redacted] testified that it was Claimant's job to hire and supervise certified nursing assistants to provide medical care to clients in the day care program.

28. Regarding Claimant's assertion that she was terminated for filing an OSHA complaint, TJ[Redacted] testified that she learned Claimant filed the OSHA complaint for the first time on the date of hearing and she was previously unaware Claimant had filed an ethics complaint against her.

29. TJ[Redacted] testified she initiated a corrective action against Claimant in October of 2022, due to issues with her leadership, how she addressed direct reports, how she addressed co-workers, and how she interacted with individuals who did not report to her. Although TJ[Redacted] testified that she was unaware that Claimant had filed an ethics complaint against her, the Corrective Action Report indicates that Claimant did not agree with the content of the report noting that she felt that the corrective action was "retaliatory for the Ethics Board compliant filed in early October as none of these issues were brought to my attention until after [the] complaint [was] filed". (RHE A, p. 2).

30. TJ[Redacted] testified that she investigated the June 21, 2023, incident, including watching surveillance video and that she and the director of human resources (RZ[Redacted]) set up a meeting on June 29, 2023, with Claimant to place her on administrative leave while they completed their investigation. TJ[Redacted] testified that there was no other situation in VS[Redacted] which her email could have been in reference to, other than the ongoing investigation into the June 21, 2023, incident.

31. TJ[Redacted] testified that Claimant provided her version of events and then Claimant was informed she would be placed on administrative leave, to which Claimant stated: "I figured this would happen, so here is this," and she placed the written injury report on the table face-down. TJ[Redacted] testified that she did not turn the report face up or look at it during the meeting, and there was no discussion of Claimant seeing her personal physician at that time. TJ[Redacted] testified that Claimant did not exhibit any pain behaviors, physical indications, or make any statements that she was injured or in pain during the June 29, 2023, meeting.

32. TJ[Redacted] testified that she and RZ[Redacted] called Claimant to terminate her employment, and RZ[Redacted] confirmed during that call that Claimant stated she would see her own provider for her injury.

33. TJ[Redacted] testified that Exhibit 3 is an accurate description of Claimant's job duties, that Claimant was responsible for hiring CNAs, and that Claimant was responsible for scheduling CNAs to assure proper coverage/staffing, and that Claimant did not advise TJ[Redacted] that she lacked sufficient CNA staff to provide proper care to clients. TJ[Redacted] testified that Claimant could have and would have been permitted to continue in her duties with the work restriction provided by Dr.

Artzberger on July 6, 2023, and that Claimant's alleged injury/restrictions would not have prevented her from performing her job duties as Director of Nursing.

CONCLUSIONS OF LAW

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

Generally

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

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

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

Compensability

D. A "compensable injury" is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v.*

Vicory, 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); Section 8-41-301(I) (b), C.R.S.

E. 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). In this case, there is little question that Claimant's alleged injuries occurred within the time and place limits of her employment and during activities normally associated with her employment as Employer's Director of Nursing, namely overseeing the care of a client participating in one of Employer's day programs. Based upon the evidence presented, the ALJ is persuaded that Claimant was in the course and scope of her employment when the alleged injury occurred. Nonetheless, the question of whether the alleged injury "arose out of" Claimant's employment must be resolved affirmatively before the injury can be deemed compensable.

F. The "arising out of" element required to prove a compensable injury is narrow and requires a claimant to show a causal connection between his/her employment and the injury such that the injury can be said to have its origins in work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001)*; Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for examination of the causal connection or nexus between the conditions and obligations of employment and the claimant's injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). In this case, Respondents contend that Claimant, as a nurse possessing the "requisite" medical knowledge, fabricated her shoulder injury by choosing a MOI which would be consistent with causing symptoms in her shoulder/neck. Indeed, Respondents argue:

> As a nurse, claimant possesses the requisite knowledge to

> fabricate a mechanism of injury which is consistent with her non-work related condition, but permits her to file a viable retaliatory claim against her employer following a second disciplinary issue in nine months. She further possessed sufficient knowledge of the clients at the location to select one which could not provide any evidence in the claim and involve a location where surveillance cameras could not be placed. Claimant's frustration with her employer over the condition of her staffing budget and reliability of such employees was evident. Claimant was, however, forced to admit that staffing shortfalls were ultimately her responsibility as the Director of Nursing. Claimant's discontent and irritation with her employer came to a head when she was suspended pending the outcome of the investigation into the June 21, 2023, incident. Rather than submitting the report at the time of the injury, noting it at any point in the 6 hours between the alleged time of occurrence and her leaving for the 3:00 p.m. appointment on June 29, 2023, claimant waited until learning the outcome of her suspension. Claimant's statement, which is approximated by both ES[Redacted] and TJ[Redacted] is conditional in both accounts, essentially stating that since that is the employer's decision, then claimant is filing a report of injury for the alleged injury. The injury that was not communicated to any other person until after the suspension was announced. The above circumstances, taken individually, may be dismissed as coincidence, but in conjunction they compel the conclusion that claimant fabricated her report of injury as retaliation for what she viewed as a second unjust investigation into her conduct.

(Respondents' Post Hearing Position Statement).

G. In support of their assertion that Claimant did not injure her shoulder on June 29, 2023, Respondents note that her medical record from May 17, 2023 documents the same symptoms she was experiencing on July 5, 2023, one week after the alleged incident in this case. According to Respondents, Claimant's symptoms included "pain as high as her neck and in the right shoulder radiating down the arm to the hand, with full range of motion" and only after her employment was terminated did her symptoms isolate into the shoulder with limited range of motion. Accordingly, Respondents speculate that Claimant's condition worsened due to a subsequent intervening cause, a progression of a pre-existing condition, or as outright self-limited participation with range of motion testing. As presented, the evidence fails to support Respondents suppositions. Claimant was suspended from work on June 29, 2023 and subsequently terminated on July 6, 2023 before she could see her physician. Although possible, there is a dearth of evidence to substantiate that Claimant's symptoms isolated to the right shoulder after she was terminated on July 6, 2023. As presented, the evidence supports a finding/conclusion that by July 14, 2023, approximately two weeks after the inciting event, objective examination/testing of Claimant's right shoulder

was yielding positive provocative testing results including a positive Neer's, Hawkins and O'Brien's test in combination with her subjective reports of worsening pain and range of motion loss. No persuasive evidence was submitted to establish that Claimant suffered any intervening injury between June 29, 2023 and July 14, 2023 to explain her objective testing results. Moreover, because the claim was denied and Claimant was financially unable to follow through with the recommended MRI, there is simply no imaging evidence to substantiate that Claimant had a progressive pre-existing condition in her right shoulder on June 29, 2023. Indeed, the most convincing explanation of Claimant's shoulder symptoms comes from the July 14, 2023, September 18, 2023 reports of Claimant's treating providers noting that Claimant's provocative testing results are consistent with "[l]ikely acute rotator cuff pathology/supraspinatus tear" and/or "rotator cuff tendinosis versus tear". Even Respondents retained expert, Dr. Paz concluded that Claimant's symptoms and need for treatment were consistent with the MOI as described.

H. Although the ALJ finds, certain aspects of Claimant's testimony contradictory and unreliable, she was been consistent with regard to the MOI in this case. Moreover, the objective testing results on physical examination two weeks after the inciting event and again on September 18, 2023 cannot be ignored. Based upon the evidence presented, the ALJ credits Claimant's medical records, specifically the July 14, 2023 and September 18, 2023 reports along with the December 26, 2023 IME report of Dr. Paz to find/conclude that the onset of symptoms in Claimant's right shoulder and her subsequent need for diagnostic testing/treatment arose as a direct consequence of lifting and repositioning a quadriplegic client on June 29, 2023, as Claimant described. Based upon the evidence presented, the ALJ is convinced that Claimant has established that her right shoulder injury arose out of and in the course and scope of her employment. Accordingly, the ALJ concludes that Claimant's alleged June 29, 2023 injury is compensable.

Medical Benefits

I. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of 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 the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to

those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, *supra*.

J. As found here, Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right shoulder and that this injury is the proximate cause of Claimant's need for medical treatment, including diagnostic testing in the form of a right shoulder MRI. This care is necessary to assess and treat, i.e. relieve Claimant from the acute effects of her injury. The specialist referrals and diagnostic testing were/are reasonable and necessary to determine the extent of injury in light of Claimant's ongoing pain and functional decline. Accordingly, the ALJ concludes that the treatment Claimant obtained through her PCP (Dr. Artzberger) and his referrals was reasonable, necessary and related to the June 29, 2023 injury. As noted above, the parties stipulated that Claimant was not provided with a designated provider list. In keeping with this stipulation, because the claimed injury is compensable, the right to select the authorized treating provider passed to Claimant. By her actions, the ALJ finds and concludes that Claimant exercised that right and selected Dr. Artzberger as her designated provider.

Penalties

K. C.R.S. 8-43-101 requires employers to report claims to the Division within ten days after notice of an employee's injuries where the employee has 1) contracted an occupational disease; 2) the injury results in permanent physical impairment; 3) the injury results in lost-time; 4) the injury results in active medical treatment for a period of more than 180 days after the date of injury; or 5) in injury involves a fatality.

L. A "lost time injury" is defined as one which causes the claimant to miss more than three work shifts or three calendar days of work. *Grant v. Industrial Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987). C.R.S. § 8-42-103 states that temporary total benefits are due where the industrial injury causes a "disability" lasting more than three work shifts, and the claimant leaves work as a result of the disability. *Lerum v. Chi Chi's Inc.*, 2001 WL 1654742, W.C. No. 4-533-135 (I.C.A.O. Nov. 27, 2001) citing *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000). Workers' compensation statutes pertaining to record of injuries and notice concerning liability merely establish threshold period of disability that triggers obligation of employer and/or its insurer to record and report injuries to division or to file notice concerning liability. *Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). If a violation occurs, but the violation is cured on or before twenty days after an application for hearing concerning a corresponding penalty is filed, then the party seeking penalties must establish by "clear and convincing" evidence that the violator knew or reasonably should have known that they were in violation. 8-43-304(4), C.R.S.

M. Whether statutory penalties may be imposed under § 8-43-304(1) C.R.S. requires a two-step analysis before penalties can be levied. First, the ALJ must first determine whether Respondents' conduct constitutes a violation of the Act, a rule or an

order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996). Here, the evidence presented supports a conclusion that Claimant's penalty allegation based on C.R.S. § 8-43-101 is unfounded in law or fact. Claimant and TJ[Redacted] provided evidence that Claimant's actual job duties as director of nursing do not require any lifting in excess of 25 pounds and that Claimant had sufficient budget to staff her location with two CNAs. The ten-day reporting requirement requires at least one of five conditions be met before a report must be filed. While Claimant missed more than three shifts following the injury, these shifts were not missed due to the injury. In fact, Claimant's job would have continued following the restrictions provided by Dr. Artzberger had claimant's employment not been suspended and subsequently terminated. It was not until August 30, 2023, when Claimant emailed the employer and advised that she may require surgery but was unable to obtain medical care, that the injury report became of a quality and nature that may cause permanent impairment and require lost-time. On August 30, 2023, respondents then timely filed a first report of injury which was followed up with a notice of contest on August 31, 2023.

N. Claimant filed her application for hearing on September 19, 2023, so Respondents had cured this violation well within the 20-day period. Claimant, therefore, is required to prove Respondents were or should have been aware of the violation of C.R.S. § 8-43-101, by clear and convincing evidence. The record supports no such conclusion. The employer was in possession of a first report of injury which noted that Claimant deemed the injury unreportable because she went back work and that she would be seeking her own care for through her primary care provider. Claimant affirmed this decision on July 6, 2023, during the phone call in which her employment was terminated. When Employer was advised that surgery may be necessary and Claimant was requesting a designated provider list, a first report of injury was filed and Claimant was provided with a designated provider list within 24 hours. Even on August 30, 2023, there was no conclusive evidence that any requirement regarding the need to report pursuant to C.R.S. § 8-43-101 C.R.S. was met, but Employer's filing of the first report on that date satisfied the requirement before the ten day requirement began tolling. As presented, the evidence persuades the ALJ that Claimant has failed to establish that a violation of the statutory provisions of the Workers' Compensation Act occurred. Accordingly, her claim for penalties must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's alleged June 29, 2023 right shoulder injury is compensable.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his left knee injury as provided by Dr. Artzberger and his referrals.

3. Claimant's request for penalties for an alleged violation of C.R.S. § 8-43-101 is denied and dismissed.

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

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

DATED: February 22, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-060-739-011

ISSUE

1. Whether the medical recommendations made by Claimant's Authorized Treating Physician (ATP) of Botox and Ajovy injections are reasonable, necessary, and related.

2. Whether Claimant is entitled to Permanent Total Disability (PTD) benefits.

PROCEDURAL ISSUES

At the conclusion of the first day of hearing on November 30, 2022, the ALJ kept the record open in case there was a need to supplement the record with documents prepared prior to the hearing. If either party wanted to introduce a document after November 30, 2022, counsel was to file a Motion seeking admission of the exhibit. On June 26, 2023, the second day of the hearing, Claimant resubmitted Exhibits 1-33, but Exhibit 12 included 50 pages of new medical records reflecting Michael Tracy, D.O.'s treatment of Claimant after the November 30, 2022 hearing.[1] Respondents objected to the admission of these new records, and the ALJ took this under advisement. Claimant did not file a motion for the admission of the records prior to the second day of hearing, which occurred seven months later. These records are not admitted into evidence. Exhibits 1-23 and 29-33 offered on November 30, 2022, are Claimant's Exhibits admitted into evidence and referenced in this Order. The ALJ took judicial notice of Rule 17, Exhibit 2 of the Medical Treatment Guidelines.

Even though the hearings were held virtually, Claimant did not appear for the second day of the hearing on June 26, 2023. Claimant's counsel asserted she was not present because of the headache she was experiencing. Both counsel agreed to proceed without Claimant's presence.

FINDINGS OF FACT

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

1. Claimant is a 52 year-old female who worked for Employer. On September 19, 2017, Claimant was involved in a motor vehicle accident (MVA) in the course and scope of her employment. This is an admitted claim.

2. Claimant's car was hit on the side and it rolled two times. Claimant testified she remembered waking up upside down, and someone opened the door. She undid her seat belt and crawled out of the car. (Tr. I 21:17-25).

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[1] At the November 30, 2022 hearing, Claimant's direct and cross-examination were completed. Additionally, the direct examination of Dr. Tracy was completed.

3. The Louisville Fire Protection District EMS responded to the scene. According to the report, a single white minivan was laying on its roof, and the vehicle had no impact damage. The damage was consistent with a low speed rollover. The front and side airbags deployed, and the driver self-extricated herself and crawled to the side of the road to lay down. EMS noted that Claimant was supine on the ground, alert, having a lucid conversation and answering questions appropriately. Claimant told EMS she did not believe she lost consciousness, but did not remember. EMS noted that Claimant's head, face, and neck were unremarkable. Claimant was "oriented to person, place, time, events; and that the neurological status was unremarkable." Claimant denied dizziness, nausea or headaches. (Ex. 14). Her Glascow Coma Scale (GCS) score was a 15, which is normal reading. (Tr. II 56:19-57:1).

4. EMS transported Claimant to Good Samaritan Medical Center (Good Samaritan). Claimant complained of right upper quadrant abdominal pain. While at Good Samaritan, Claimant had CT scans of her chest, abdomen, pelvis, head and C-Spine. Claimant's head CT revealed an old cerebellar infarct. Claimant denied any problems with her head or neck, specifically denying having a headache. Claimant demonstrated a normal range of motion with her cervical spine. (Ex. 4 at 70-110).

Medical Treatment

5. The following day, September 20, 2017, Claimant presented to Carson Family Chiropractic. According to the forms Claimant completed, she reported having a headache, dizziness, and nausea following the crash. Claimant specifically noted she experienced these symptoms at the accident site and in the emergency room. (*Id.* at 111-114). This is contrary to the records from EMS and Good Samaritan. Claimant continued to regularly treat with Carlson Family Chiropractic, and on October 12, 2017, Whitney R. Haas, D.C., referred Claimant to physical therapy. (*Id.* at 149).

6. On or about October 16, 2017, Claimant was evaluated by Colorado Brain Recovery. Claimant reported feeling dizzy immediately after the accident. Again, this is contrary to what Claimant reported to EMS and the providers at Good Samaritan. According to Claimant, her primary physician, Dr. Weiman, diagnosed her with a concussion a day after the accident. Claimant reported frequent problems with balance, nausea and dizziness. She also reported visual changes, including almost always being sensitive to light, having problems focusing, visual fatigue when reading, and problems with depth perception. (*Id.* at 159).

7. Claimant saw Mary Finck, DPT, on October 25, 2017, for a physical therapy evaluation. Claimant reported severe light sensitivity, ringing in her ears, dizziness, blurry vision and "severe concussion symptoms." (*Id*. at 168). Ms. Finck referred Claimant to Boulder Valley Vision for an assessment before beginning vestibular therapy. She also referred Claimant to Michael Tracy, D.O., for an assessment and pain management due to Claimant's neck and left arm symptoms, and also to manage Claimant's concussion.

8. Dr. Tracy evaluated Claimant on November 9, 2017. He recommended Claimant get a cervical MRI and a brain MRI. He noted Claimant was receiving cognitive therapy

at Boulder Brain Recovery, and had scored 74 on her Rivermead Post-Concussion symptoms questionnaire, which indicated a severe concussion. Dr. Tracy assessed Claimant with several injuries including postconcussional syndrome, convergence insufficiency, unspecified disorder of vestibular function (bilateral), cervicalgia, myalgia, and paresthesia of skin. (*Id.* at 195-97).

9. On November 30, 2017, Dr. Tracy and Claimant reviewed the results of her brain MRI. Dr. Tracy noted that in the left superior cerebellum there was an abnormal signal in encephalomalacia, likely chronic post-traumatic. He noted that it did not seem to cross into the left occipital lobe and was likely a consequence of her trauma. Because of the severity of her symptoms, Dr. Tracy recommended Claimant either enter an intensive outpatient rehabilitation program or an inpatient rehabilitation stay with a transition to an outpatient program. (Ex. 12 at 538-540).

10. On or about December 15, 2017, Claimant was admitted to Northern Colorado Rehabilitation Hospital, under the care of Revelyn Arrogante, M.D. In the progress note of that same date, Rebecca Beirden, M.D., noted that Claimant had an MRI in November that showed a small bleed in the cerebellum that was not noted at the time of Claimant's accident. Dr. Beirden noted that the bleed had been contained and there was no further bleeding. (Ex. 17 at 897).

11. Dr. Arrogante dictated a history and physical for Claimant on December 15, 2017. Dr. Arrogante noted that on the day of the accident, Claimant had a CT scan of her head that was normal.[2] She further noted that Claimant has had issues with headaches, vestibular problems and photosensitivity, so Dr. Tracy ordered another brain MRI. According to the medical record, Dr. Arrogante opined "[i]t appears that the radiologist had missed an area in the cerebellum which actually had a bleed which appears to have contained itself without further bleeding." (*Id.* at 1072).

12. Dr. Tracy and Dr. Arrogante were unaware that Claimant's September 19, 2017 CT scan (head), showed Claimant had an old cerebellar infarct. The ALJ finds that Claimant's cerebellar infarct was not related to the September 19, 2017 motor vehicle accident.

13. According to the December 26, 2017 progress note, Dr. Arrogante planned to continue using biofreeze for Claimant's headaches, but also noted she had talked to Claimant about possibly trying Botox injections for her headaches. (*Id*. at 913). A few days later on December 30, 2017, Claimant was evaluated by Carrie Campbell-Broughton, M.D., who noted Claimant had a good understanding of Botox treatments, and was hopeful the treatments would help. The plan was to give consideration to Botox for myofascial dysfunction to see if it helped with headaches. (*Id*. at 921).

14. Claimant was discharged from Northern Colorado Rehabilitation Hospital on January 4, 2018. (*Id.* at 1096-1099). Dr. Arrogante scheduled a January 18, 2018

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[2] It is unclear from the record whether Dr. Arrogante reviewed the CT scan or whether she received this information from another source.

appointment with Claimant for "physiatry-botox." (*Id*. at 1100). The first treatment of Botox made Claimant's headaches worse. (Ex. 2 at 34).

15. Dr. Arrogante referred Claimant to Health Psychology Associates for a psychological consultation secondary to concerns regarding post-traumatic stress disorder (PTSD) and difficulty coping following the accident. Molly Brady, PsyD, evaluated Claimant in January and February of 2018. Dr. Brady noted that Claimant was experiencing a higher level of somatic complaints than seen in 91% of patients, "indicating that she has the perception of severe illness." According to Dr. Brady, Claimant "perceives even the mildest pain she has experienced in the last month as intolerable and disabling. Patients with this profile tend to be preoccupied with their physical functioning. Somatic hypervigilance may be present, with the patient interpreting common symptoms as being severe and problematic." Notably, Claimant expressed frustration that "so much time has elapsed before her cerebellar bleed was initially identified." (Ex. 11 at 414-415). As found, the bleed was identified during Claimant's September 19, 2017 emergency room visit, and was noted to be an old cerebellar bleed, and not related to the motor vehicle accident.

16. On March 21, 2018, Dr. Brady gave Claimant a primary diagnosis of acute PTSD and a secondary diagnosis of pain disorder. (*Id*. at 428). Dr. Brady continued to treat Claimant for these diagnoses.

17. Dr. Tracy referred Claimant to neurologist, Katrina Pack, M.D. Dr. Tracy testified he was trying to treat Claimant's neck and back pain, and he referred Claimant to Dr. Pack to treat Claimant's headaches and brain. (Tr. I 84:17-21). Dr. Pack first saw Claimant on March 6, 2018, and noted that the reason for the referral was a "brain bleed." She reviewed Claimant's November 22, 2017 brain MRI, and the repeat March 2, 2018 MRI. She noted a chronic left cerebellar encephalomalacia, and opined it was "likely a consequence of the patient's trauma." Dr. Pack diagnosed Claimant with post-concussive syndrome and a traumatic brain injury. Dr. Pack explained the benefit of the Botox treatments for headaches is sometimes not seen until the second or third round of injections, so she recommended repeat injections. (Ex. 2).

18. Dr. Tracy continued to treat Claimant, and he took over her Botox treatments, even though he referred Claimant to Dr. Pack for her headaches. On April 17, 2018, Dr. Tracy administered Botox to Claimant for her chronic migraines. He noted this was her second overall Botox injection. (Ex. 12 at 631).

19. On March 28, 2019, at Claimant's six-month follow-up appointment, Dr. Pack noted that Claimant had completed her vestibular therapy and was still getting Botox injections from Dr. Tracy. Claimant was scheduled to add Ajovy to her regimen. Claimant reported having zero headache days with Botox, but she had a recurrence of daily headaches two weeks prior to the injections. Since Dr. Tracy was managing Claimant's headaches, Dr. Pack discharged Claimant from her practice, and told Claimant she would see her as needed. (Ex. 2).

20. At Claimant's July 17, 2019 appointment, Dr. Brady noted that Claimant and her sister acknowledged at the previous appointment that Claimant's depressive symptoms were more significant than Claimant previously reported.[3] Claimant said her depression was 8-9/10 on some days, and she would not get out of bed two to three days per week. Claimant acknowledged not previously disclosing the extent of her depression to her providers, including Dr. Tracy. Dr. Brady changed Claimant's primary diagnosis to major depressive order and her secondary diagnosis to acute PTSD. (*Id.* at 470-71).

21. Claimant saw Dr. Tracy for a follow-up evaluation on July 22, 2019. Dr. Tracy noted that since Claimant's last appointment, he had spoken with Dr. Brady who explained the underreporting of depressive type symptoms, and specifically the report from Claimant's sister that Claimant would often stay in bed for several days. According to Dr. Tracy "[t]hese depressive symptoms are causing significant functional impairment that was previously unknown to myself and Dr. Brady." According to the medical record, Ajovy is listed as a "current medication" that Claimant receives one a month via a subcutaneous injection. There is no objective evidence in the record as to when Ajovy was added to Claimant's regimen. (Ex. 12 at 644-46).

22. Claimant testified she receives Botox injections every 12 weeks. She testified the Botox relief lasts approximately nine and a half to ten weeks, and when the Botox stops working she has migraines. Claimant testified she has migraines for three and a half to four weeks, and when the migraines are bad, she sleeps most of the day. (Tr. I 33:17-35:17). Claimant further testified she has not worked since the accident. (*Id.* at 37:22-38:12).

23. Claimant testified that because this migraine cycle is so disruptive to her life, she has ongoing prescriptions for Botox and Ajovy, which help her function. (*Id*. at 26:21-27:6). Claimant testified that the Ajovy gets her through the three and a half to four weeks when the Botox wears off so she can "function better." (*Id.* at 73:21-4). Claimant also testified that during this time when the Ajovy allegedly allows her to "function better" she is in bed sleeping, cannot watch television or listen to the radio. *Id*. The ALJ finds Claimant's testimony regarding the effectiveness of Ajovy to be inconsistent and not credible.

24. As found, In March 2019, Claimant reported having zero headaches with Botox, and a recurrence of daily headaches two weeks prior to the injections. And over three years later, Claimant's testimony is that she has migraines for three and a half to four weeks, every twelve week period. The ALJ infers that Claimant's migraine cycle has worsened over the years she has been on a Botox regimen.

25. Claimant testified that she moved to Missouri in July or August of 2020, and returned to Colorado in February 2021. Claimant moved to Missouri and lived in student housing with her children, including her son who played college baseball in Missouri. (Tr. I 40:25-41:21).

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[3] The July 17, 2019 appointment was session 26 of 29. Session 25 of 29 was not included in the medical records admitted into evidence.

26. There is no objective evidence in the record that Claimant received regular Botox injections while she was living in Missouri. According to the medical records admitted into evidence, Claimant received Botox on June 9, 2020, and she was scheduled to return in 12 weeks for her next injection. (Ex. 12 at 725-729) Claimant returned to Colorado in December 2020 to see Drs. Tracy and Brady. On December 1, 2020, Claimant received Botox injections from Stephanie Rutz, PA-C, in Dr. Tracy's office. There is no objective evidence in the record that Claimant received Botox injections between June 9, 2020 and December 1, 2020. There is nothing in the medical record to indicate Claimant was non-functional during this time. Claimant expressed concerns regarding the efficacy of Ajovy. She noted having more headaches over the last several months, so she wondered if the Ajovy was still effective. Ms. Rutz noted that Claimant just received a three-month supply of Ajovy in Missouri, where she was living. (*Id.* at 731-736). There is no objective evidence in the record that Claimant was receiving monthly Ajovy injections in Missouri before this date. Upon her return from Missouri, Dr. Tracy resumed his migraine protocol with regular Botox and Ajovy injections.

27. Claimant's injuries have required extensive treatment, including, but not limited to, chiropractic care, massage therapy, physical therapy, inpatient-treatment in a rehabilitation hospital, multiple medications, psychological treatment, vestibular training, and speech therapy. The issue, however, is whether continued Botox treatments and prescriptions for Ajovy are reasonable, necessary and related.

Independent Medical Examination (IME)

28. Respondents retained Barton Goldman, M.D., to conduct an Independent Medical Examination (IME). Claimant's IME was scheduled for October 24, 2019 and then rescheduled to February 24, 2020. At the February 24, 2020 appointment, Claimant would not provide a written consent for the examination, and she became ill in the waiting area. Dr. Goldman did not proceed with the examination. There were still issues with Dr. Goldman obtaining all of the pages of the self-evaluation questionnaire from Claimant in late April 2020. In light of Covid and the stay-at-home mandates, Respondents requested a record review from Dr. Goldman. On June 28, 2020, Dr. Goldman issued his initial IME report. (Ex. M).

29. Dr. Goldman reviewed and analyzed Claimant's extensive medical records that were available to him. Dr. Goldman opined "the mechanism of injury and the constellation of [Redacted, hereinafter SG] waxing and waning symptoms discussed within these records do not support a medically probable provisional diagnoses of a chronic cervical strain and/or myofascial pain with mixed vascular and tension headaches as well as a disputed neurogenic thoracic outlet syndrome in the left upper limb pending the opportunity to examine [Claimant] in person." (*Id.* at 136). Dr. Goldman opined "[t]here are elements of [Claimant's] postconcussive presentation that are quite atypical and in some ways nonphysiologic that are likely being impacted upon by emotional and unconscious somatization variables. In particular, her providers are assuming that the left superior cerebellum pathology seen on radio diagnostics is an accident related phenomena when it was clearly present on CT scan of the head on the day of the accident and read as a chronic appearing lesion. This is an important point since a diagnosis of

cerebellar and hind brain injury has been incorrectly applied as the primary rationale for considering [Claimant's] condition as an objective and complex mild traumatic brain injury when in fact the preceding records do not support such a conclusion." (*Id.* at 138).

30. Dr. Goldman opined that Claimant was at maximum medical improvement (MMI) as of June 28, 2020, and he recommended she be released to full-time work within a modified sedentary to light work category. He felt she had a good prognosis to progress into a modified light to medium work category. (*Id.* at 139).

31. Dr. Goldman conducted a virtual interview with Claimant on August 6, 2021. On August 9, 2021, he examined Claimant. Dr. Goldman opined that Claimant's examination was most consistent with deconditioning and chronic cervical strain/myofascial pain. It was also "consistent with a fair amount of unconscious somatization." He opined, "[h]er headaches are best understood as a heterogeneous posttraumatic mixed vascular/tension headache phenomena with substantial myogenic/myofascial as well as stress triggers with secondary intermittent left occipital neuritis further complicated by a rebound analgesic component." (*Id.* at 174-175).

32. Dr. Goldman testified at the hearing consistent with his reports. He credibly testified that he has never seen someone drop so dramatically towards the end of the Botox cycle. Specifically, he has "never seen a patient with this type of such a dramatic, horrible, horrible, supposedly good, but not so good then horrible, horrible" cycle. (Tr. II 152:1-17).

33. Regarding ongoing Botox, Dr. Goldman opined Claimant has had diminished returns without evidence of any functional improvement from the use of Botox. (Ex. M at 136) Dr. Goldman testified consistent with the multiple medical reports he generated in this matter. He testified that ongoing Botox injections can negatively affect the cervical muscles by weakening the muscle and causing atrophy. Dr. Goldman explained his concern regarding "rebound headache phenomena from tolerance or adverse reaction to -- to, like, the injections she was receiving and the medications." (Tr. II 151:21-24). In other words, consistent use of Botox may be causing the actual headache cycle, due to its effects on the cervical spine.

Division Independent Medical Examination (DIME)

34. Khoi Pham, M.D., conducted a Division Independent Medical Exam ("DIME") of Claimant on November 16, 2020. Dr. Pham is a Level II accredited physician and board-certified Neurologist. He opined that Claimant reached MMI on August 19, 2020, and he gave her a 21% whole person impairment rating (1% psychological and 20% TBI/HA). Dr. Pham opined that Claimant should continue to see Dr. Tracy for maintenance care, but specifically noted the Botox and Ajovy injections should be discontinued because there is no evidence of a functional benefit. Dr. Pham opined "[t]here is a false belief from the patient, Dr. Tracy, Dr. Brady, all the therapists that the patient had contained left cerebellar hemorrhage that is causing all the patient's symptoms causing delayed recovery. Even with acute cerebellar ischemic or hemorrhage stroke (some big enough

to require surgical decompression) one typically sees quick recovery from cerebellar symptoms in affected patients." (Ex. L at. 100).

35. Dr. Pham agreed with the opinions of Dr. Goldman, and quoted some of his impressions in his DIME Report. Dr. Pham agreed that Claimant should be in the "sedentary to light work physical category without position restrictions and at least 10-lbs. occasional to frequent lifting ability." (*Id.* at 101).

36. With regard to maintenance medical treatment, and specifically the discontinuance of Botox injections, Dr. Pham's reasoning is based upon the Colorado Medical Treatment Guidelines Rule 17, and the fact that there was no evidence of functional benefit. Dr. Pham opined that "if Dr. Tracy was uncomfortable with management of the patient's headaches without Botox or trigger point injections, it is reasonable that she sees a Neurologist again." (*Id.*).

37. Dr. Goldman issued a supplemental report on December 28, 2021, substantially agreeing with Dr. Pham's recommendation and conclusions. (Ex M. at 179).

38. The ALJ finds the opinions of Dr. Goldman and Dr. Pham to be credible and persuasive.

ATP's Opinion

39. Dr. Tracy has served as Claimant's primary ATP since 2017, and he continues to actively treat Claimant. (Tr. II at 6:4-13). The ALJ recognizes and credits Dr. Tracy's opinions as the treating provider given his long history of treating Claimant.

40. The migraine protocol Dr. Tracy is following with Claimant was created by the pharmaceutical producers of Botox. It is not based on the Colorado Medical Treatment Guidelines. Dr. Tracy testified that the use of Botox protocol is for migraines, but is "off label" for cervicogenic headaches. (*Id.* at 54:10-55:23).

41. Dr. Tracy did not have Claimant's emergency room records and CT scans, until preparing for the hearing. (Tr. I 93:17-94:4). Similarly, he did not have copies of the first responder's medical records when treating Claimant. (Tr. II 7:2-15).

42. Dr. Tracy testified during cross examination that 90% of mild TBI patients recover in a three-to-nine-month period, and it is not common for an individual with a mild TBI to worsen in a three-to-nine-month period. (*Id.* 23:22-24:23). Dr. Tracy agreed with Dr. Goldman that Claimant's course of treatment is atypical. (*Id.* at 29:4-15). In referencing the Colorado Medical Treatment Guidelines Rule 17, Exhibit 2, Dr. Tracy testified that Claimant would be categorized as delayed recovery. (*Id.* at 37:11-14). He opined that there was no vocational goal setting or expected recovery. (*Id.* at 38:7-9). Dr. Tracy further testified that even if headaches are permanent, it is expected that the individual be functional and able to return to work as stated in Rule 17, Ex. 2. (*Id.* at 44:1-21). Dr. Tracy testified that Claimant's migraine cycle has been consistent for three years, and that in his many years of practice this is an extremely rare case. (*Id.* 40:23-41:16).

43. Dr. Tracy testified that Claimant's migraines are difficult to treat because no one knows the etiology of Claimant's migraines. (*Id.* 48:17-49:6). Dr. Tracy testified that Claimant should not be weaned off of Botox injections because this could cause her harm and would be a violation of his Hippocratic Oath. (*Id.* at 96:6-20).

44. Dr. Tracy's justification for a "no work" restriction is based upon the assumption that Claimant could not find a job because of her "unpredictable pattern of employment." Dr. Tracy, however, agrees Claimant can do sedentary work, just not consistently. (*Id*. at 33:7-25).

45. At the November 30, 2022 hearing, Dr. Tracy testified "that based on the simplicity of [Claimant's regimen], I think if we use Nurtec every other day that could replace Ajovy as a preventative." (Tr. I 105:20-106:1). At the June 26, 2023 hearing, Dr. Tracy testified that Ajovy is a preventative towards migraines, and there are no alternatives to Ajovy that he would recommend. (Tr. II 46:12-15 and 67:7-9). Dr. Tracy further testified in June 2023, if Claimant was allowed to be on Botox, Ajovy, and possibly Nurtec, this gave her the best chance at returning to work. (*Id.* 68:21-69:5). The ALJ finds Dr. Tracy's explanations and recommendations regarding Ajovy and Nurtec to be inconsistent and not credible.

46. Dr. Tracy does not believe Claimant has ever had an overlay of emotional somatization, and he never felt she was trying to make herself look worse. (*Id.* 52:20-24). This is in sharp contrast to the opinions of Dr. Brady, Dr. Goldman, and Dr. Zierk.

47. Dr. Tracy felt Dr. Goldman was downplaying Claimant's symptoms. He testified that Dr. Goldman "kind of blatantly ignored her complaints of headache and neck pain and the extent of how functionally disabling it was. . . . to paraphrase, he made it sound like she wasn't as bad as she sounded." (Tr. I 92:25-93:11). Dr. Tracy further testified that he felt "chastised" by Dr. Goldman. Dr. Tracy testified "we didn't have the luxury of the CT scan and the ER notes that Dr. Goldman provided, that showed that when they did a CT scan, at the time of the accident, looking for a brain bleed, they actually found this superior left cerebellar infarct. And you, know, we were kind of chastised for believing that this was the root of her symptoms when in fact, it was there at the time of the accident." (*Id.* 93:17-94:6) Finally, Dr. Tracy expressed his disagreement with Dr. Goldman's opinion that Claimant's Botox treatments should be discontinued. When asked why he disagreed with Dr. Goldman's opinion, Dr. Tracy testified "[y]ou have to ask Dr. Goldman why he wrote it. I think that because the patient didn't get 12 weeks of relief, he felt that it wasn't worth the expense to his client to pay it." (*Id.* at 95:2-24).

48. There is no objective evidence in the record that Dr. Tracy has tried other forms of therapy other than Botox and Ajovy to treat Claimant's migraines. Further, the ALJ credits the testimony of Dr. Pham and Dr. Goldman that there is no objective evidence that Claimant is receiving a functional benefit from the Botox and Ajovy injections.

49. Dr. Tracy's opinion regarding the ongoing reasonable necessity of Botox injections is credible, but not persuasive, particularly when compared to the opinions of Dr. Goldman and Dr. Pham.

50. The ALJ finds the opinions of Dr. Goldman and Dr. Pham to be credible and persuasive. The ALJ finds that continued Botox treatments and prescriptions for Ajovy are not reasonable, necessary or related to the September 19, 2017 motor vehicle accident.

Vocational Assessments

51. David Zierk, PsyD, is a clinical psychologist who was retained by Claimant's counsel to perform an Integrated Psychological & Vocational Evaluation of Claimant. Dr. Zierk examined Claimant on January 7, 2021, and issued a report dated February 15, 2021. Dr. Zierk prepared an addendum to his evaluation on February, 2022. In his evaluation he opined, "SG[Redacted] continues to experience debilitating headaches in concert with her biphasic Botox cycle and should not be blamed for the etiology of her medical condition, regardless of whether physical, mental or a hybrid mixture best explain her ongoing impairment and associated disability." (Ex. 22 at 1413). Mr. Zierk testified "we have a person who has a small window of significant disability that's headache intensive and according to the record, according to [Claimant's] testimony, during those particular times, she is incapacitating – has incapacitating and debilitating headaches and, therefore, by definition, can't work within those windows." (Tr. II 91:3-10).

52. Dr. Zierk credibly testified that Claimant's "psychological functioning is a contributing component to her incapacity to return to work and fully manage her headaches. . . . it seems to me as a psychologist, that her psychology is playing into her inability to sufficiently rebound further and get beyond her – this biphasic Botox cycle." (*Id.* 97:16-18).

53. Dr. Zierk testified that Claimant "has a wealth of experience in the medical field, office management, medical billing, scheduling, benefits coordination. And those skills are in high demand under present day circumstances." (*Id.* at 83:1-5). Regarding Claimant's return-to-work prospects, Dr. Zierk expressively stated "I think the ability to formulate vocational goals, restoration of purpose and meaning. I think it's critically important to further recovery, if you will. Certainly, we have risk factors from her upbringing that she's bringing into this injurious situation. Does that partially explain her unique delay and atypical recovery, likely." (*Id.* at 93:21-94:3). He further stated "it really has to come down to the idea of self-agency and self-control. To what extent can you regain some control over your unremitting disability, even if it's headaches?" (*Id.* at 94:9-12). He recommended Claimant work "with an all-star, state of the art therapist who understands neuropsychology, understands pathophysiology of chronic pain, and really assists her with gaining tools and a mindset that fosters her ability to cross that tight bridge and return to competitive employment." (*Id.* at 94:14-18).

54. Dr. Zierk testified that Claimant has made no effort whatsoever to return to the workforce since her injury. (*Id.* at 96:23-25).

55. Dr. Zierk agreed that, even assuming the headaches played a role in work restrictions, based upon her skill set, Clamant could work through temp agencies, as an independent contractor, or even operate her own business. He opined "there's increased

flexibility in the labor market. I would certainly give it that. From a remote perspective, and as well as that you're talking about taking her skills, [which] are sufficiently valuable, perceived as being valuable, and accommodating her accordingly." (*Id.* at 113:3-19).

56. Dr. Zierk ultimately opined, however, "Claimant's realistic capacity to resume competitive employment is directly related to her experience of headaches. . . . when the positive effects of her Botox injection begins to wear off, she experiences a resurgence of significant headache symptoms that directly lower her capacity for productive and sustainable engagement. Consequently, it is opined [Claimant] remains incapable of resuming competitive employment on a sustainable and predicable basis as a direct result of the index event and her experience of biphasic headache symptoms." (Ex. 22 at 1405).

57. Respondents retained vocational consultant, Katie Montoya, to evaluate Claimant. On April 20, 2021, Ms. Montoya issued an initial report documenting her vocational assessments and conclusions. (Ex. N at 181). She issued a supplemental report on November 8, 2022. (*Id.* at 187). Ms. Montoya testified at the June 2023 in support of her reports.

58. Ms. Montoya assessed Claimant's education, which included a high school diploma, training in a respiratory therapy program, attending community college, and attending BYU for a semester. (*Id.* at 183). During cross examination, Claimant testified that she earned a bachelor's degree in 1995 from BYU in the health promotions field. (Tr. I at 46:8-12). Ms. Montoya testified that Claimant omitted this fact during their interview. (Tr. II 258:10-15).

59. Ms. Montoya noted Claimant's vast skill set working in physician offices. This included three and a half years as an office manager with Dr. Jensen and a year at Boulder Neuro and Spine scheduling patients. She also worked as an ultrasound technician while attending a phlebotomy program. Claimant testified that she had a wide range of experience in sedentary positions including working as an independent transcriptionist and operating her own childcare business for five years. (Ex. N at 185). Claimant testified to having reasonable computer skills and basic accounting skills such as experience with QuickBooks. (Tr. I 53:21-54:4).

60. Ms. Montoya conducted a follow-up vocational assessment per her November 8, 2022, report. (Ex. N at 187). Ms. Montoya noted that Claimant received her Botox injection six days before the interview, and was able to drive and sit in an office with lights. Claimant told Ms. Montoya she had been volunteering at [Redacted, hereinafter BO] selling dabs or calling BO[Redacted]. Ms. Montoya noted that Claimant was also working with [Redacted, hereinafter PG] Group 10 hours per month (which allows Claimant work based upon her own schedule). *Id*. at 188. Claimant admitted to Ms. Montoya that she had not submitted any job applications or made any attempt to secure work. *Id*. According to Ms. Montoya, Claimant explained that she wants to work. Ms. Montoya gave Claimant information for the Ticket to Work Program and the Division of Vocational Rehabilitation. Ms. Montoya also spoke about short-term, temporary assignments. (*Id.* at 192).

61. Ms. Montoya opined that Claimant could earn a competitive wage in the Denver/Longmont/Boulder geographic area within the restrictions provided by Dr. Pham and Dr. Goldman. These restrictions included work in the sedentary to light work category with lifting up to 10 pounds, and no specific limitations on sitting, standing, or walking. Ms. Montoya opined that return-to-work options included: general clerical, reception, customer services, patient services, order entry, compliance, and scheduling. She could also do work as a greeter, cashier, or service desk.

62. With regard to return to work, even presuming the nature and extent of Claimant's headaches are credible, Ms. Montoya testified that Claimant could contract with a transcriptionist company or do independent contractor work with [Redacted, hereinafter DH] or [Redacted, hereinafter UR], and still earn and sustain competitive wages. (Tr. II 252). Ms. Montoya and Dr. Zierk both agreed that Claimant could enter the work force, sustain employment, and earn wages through a temporary company. *Id*. In fact, Dr. Zierk, Claimant's expert, agreed on cross examination that Claimant would be capable of earning wages through temporary agencies or as an independent contractor given her skill set. (Tr. II at 112-113).

63. Ms. Montoya credibly testified that Dr. Zierk did not conduct any labor research to reach the conclusions in his report. (Tr. II 253:14-17).

64. Both Dr. Zierk and Ms. Montoya testified that Claimant has not tried to obtain employment since the accident. Claimant, however, testified that in October and November 2022, she applied for about 25 jobs, but did not receive any responses. (Tr. I 38:4-12). The ALJ does not find Claimant's testimony credible.

65. Ms. Montoya credibly testified consistent with her vocational reports. She concluded that Claimant more likely than not can earn wages and sustain employment in the Longmont geographical area based upon the restrictions from Dr. Pham and Dr. Goldman, even given the alleged extent of the headaches. Ms. Montoya's testimony, and conclusions, are credible and persuasive.

66. Claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent total disability benefits.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of

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

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

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

Medical Benefits

Section § 8-42-101(1)(a), C.R.S., imposes upon every employer the duty to furnish such medical treatment as may reasonably be needed at the time of the injury and thereafter during the disability to cure and relieve the employee from the effects of the injury. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury or to maintain his condition at MMI. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Indus. 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. Indus. 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 Colo., Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

Dr. Pham and Dr. Goldman credibly opined that Claimant's ongoing Botox treatments are not providing Claimant a functional benefit and should be discontinued. Their opinions are credible, persuasive, and supported by the Colorado Medical Treatment Guidelines Rule 17:

> Long-term maintenance plans are necessary in chronic headache management. Medications may be necessary for an indefinite period; however, a distinction should be made between headache conditions that were pre-existing and those caused by the TBI. In mTBI, *most cases will not result in debilitating frequent headaches.* If the patient is suffering from debilitating headaches, a full review of the diagnosis, triggering events, and psychosocial issues should take place. All headache treatment modalities should be focused on independence and return to function. Even if headaches are permanent, it is expected that the individual will be functional and able to return to work.

(Exhibit 2, page 65).

Dr. Tracy testified that there is no triggering event causing Claimant's headaches. (Tr. II 43:12-20). The migraine protocol Dr. Tracy is following with Claimant was created by the pharmaceutical producers of Botox. It is not based on the Colorado Medical Treatment Guidelines. When asked whether Botox is recommended for cervicogenic or other headaches based upon the Medical Treatment Guidelines, Dr. Tracy testified that he thought it was "debatable" (*Id*. at 54:6-9). Dr. Tracy explained "medical treatment guidelines say that it's not recommended because it's not FDA indicated. But in refractory patients that don't have treatment options, sometimes we have to use treatments off-label, which we do all of the time." He explained that using Botox for cervicogenic headaches is an off-label use of Botox. (*Id*. at 54:10-22). Dr. Tracy, however, has not demonstrated any functional benefits Claimant is attaining from this treatment. Dr. Brady, Dr. Zierk, and Dr. Goldman all agree that somatization is a component of Claimant's headaches, but Dr. Tracy is the only provider who believes there is no psychological connection to Claimant's condition.

Dr. Goldman credibly testified that in his opinion, the Botox injections are creating an increasing weakness in Claimant's cervical muscles, and this decreases a patient's ability to control their head in terms of dizziness or visual issues. It can also create rebound analgesic headaches creating a cycle where patients have short-term relief, but then it rebounds and the symptoms are worse. (*Id.* at 185:6-21). He further testified that the Guidelines are clear that Botox is not indicated for just treating cervicogenic headaches, and can make them worse in the long run. (*Id.* at 186:12-15).

As found, Claimant lived in Missouri from July/August 2020 to February 2021. During this time, she did not receive regular Botox treatment and Ajovy injections. There is no objective evidence in the record, however, that Claimant was unable to function during this time period. As found, Claimant's testimony that she cannot function without Botox and Ajovy is not credible.

Dr. Tracy has not established a modality that returns Claimant to function and independence. He conceded that Claimant has not attempted to return to work after the injury. (Tr. II 44:10-18). As found, Claimant's testimony regarding her attempts to work is not credible. Claimant testified she is unable to work, yet Claimant volunteers at BO[Redacted], and PG[Redacted]. Claimant testified that she submitted approximately 25 job applications between October and November 2022, yet she failed to tell Dr. Tracy, Dr. Zierk or Ms. Montoya about this.

Based upon a reasonable degree of medical probability, Dr. Goldman believes that Claimant should be expected to return to work at this juncture given the strong lack of objective evidence supporting her underlining disability. The mere fact the Claimant claims Botox helps her is not a medically justifiable reason to continue this treatment as the standard of care is not met under the Medical Treatment Guidelines Rule 17. As found the opinions of Dr. Pham and Dr. Goldman are credible and persuasive, and support the discontinuation of Botox injections in this matter.

With respect to the discontinuation of Ajovy, the opinions of Dr. Pham and Dr. Goldman are credible and persuasive. Dr. Tracy's testimony regarding the use of Ajovy was not persuasive. Claimant's testimony regarding the effectiveness of Ajovy was also inconsistent and not persuasive. Claimant testified the Ajovy allows her to "function better" during the period of time the Botox is not working. But she also testified that she is not functional and unable to work during this three and a half to four week period while the Botox is not working. Dr. Pham and Dr. Goldman opined that the Ajovy injections are not medically necessary nor are they reasonable, and should be discontinued. Claimant has failed to prove by a preponderance of the evidence that ongoing Botox and Ajovy injections are reasonable, necessary and related.

Permanent and Total Disability Benefits

Section 8-40-201(16.5)(a), C.R.S., defines permanent total disability as the claimant's inability "to earn any wages in the same or other employment." Under the statute, the claimant carries the burden of proof to establish permanent total disability. In determining whether a claimant is permanently and totally disabled, the ALJ may consider a wide range of factors including the claimant's age, work experience and training, the claimant's overall physical condition and mental abilities, and the availability of work the claimant can perform. The ALJ is given the widest possible discretion in determining the issue of permanent total disability, and ultimately the issue is one of fact. *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). *In the Matter of the Claim of Janine Jones-Roberts, Claimant,* W.C. No. 4-819-127-07, 2015 WL 546080, at *5 (Feb. 2, 2015).

The Act requires Claimant to prove that it is more likely than not that she cannot earn any wages in her relevant geographical labor market. The basis of the Claimant's claim is simple: she claims entitlement to permanent and total disability benefits because of allegedly debilitating headaches that last three and a half to four weeks in a pattern cycle every 12 weeks. Claimant testified that she is unable to work during this three and a half to four week period.

The consistent and reasonable work restrictions provided by Dr. Pham and Dr. Goldman are credible and persuasive, and conclude based upon a reasonable degree of medical probability that the Claimant can return to work in the light to sedentary vocational category. These restrictions are based upon medical opinions, not Claimant's own perceived disability and lack of efforts to return to the work force. Ms. Montoya and Dr. Zierk agree that the Claimant could secure stable employment in the Longmont area within these restrictions.

Presuming Claimant has headaches that she believes prevent her from being functional, the persuasive medical evidence, the Medical Treatment Guidelines, and the credible vocational opinions are that Claimant should be able to return to sedentary to light duty even if the headaches are permanent. Claimant has made minimal, if any, efforts to procure employment, and it is not probable that Claimant fits within the most improbable of mathematical statistics that she is unable to work in the positions outlined by Ms. Montoya. Simply put, the extent of the Claimant's presentation of her symptoms is not reliable.

As found, in early 2018, Dr. Brady concluded that Claimant was experiencing an extremely high level of somatic complaints, "indicating that she has the perception of severe illness symptoms." Moreover, Claimant expressed frustration that "so much time has elapsed before her cerebellar bleed was initially identified." (Ex. 11 at 414-415). As found, however, the Claimant's cerebellar infarct was not related to the motor vehicle accident. Yet, her treating providers, including ATP, Dr. Tracy, treated Claimant with the belief she suffered a cerebellar bleed from the accident. For years, Claimant has believed she suffered a brain bleed in the accident. The ALJ infers that Claimant's somatic complaints are partially related to her mistaken belief that she suffered a cerebellar bleed in the accident.

While Claimant asserts her headaches are deliberating and prevent her from working, she has not made an effort to attempt to secure employment. On one hand, Claimant asserts that she needs Botox and Ajovy to function. Claimant testified that the Ajovy is necessary to help her "function better" during the three and a half to four weeks the Botox does not work. On the other hand, Claimant asserts that despite the Botox and Ajovy, she cannot work and sustain employment because the headaches are debilitating. As found, Claimant's testimony is not credible.

The standard is not whether she can find "traditional employment." It is whether Claimant can earn wages and sustain employment. Ms. Montoya and Dr. Zierk both agree Claimant can earn wages and sustain employment through independent contract work such as a transcriptionist, running her own business, working with an agency doing temporary short- or long-term assignments, and even doing DH[Redacted] or UR[Redacted] given her claimed headache cycle. Both experts believe that remote work within an unconventional work schedule is also an option for Claimant given her skill set.

The ALJ finds Ms. Montoya's opinions to be credible and persuasive. Based on the totality of the evidence, Claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled.

ORDER

It is therefore ordered that:

1. Claimant is not entitled to permanent and total disability benefits.

2. Botox injections are not reasonable, necessary or related to the industrial injury.

3. Ajovy is not reasonable, necessary or related to the industrial injury.

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 22, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-201-908-001

ISSUES

I. Whether Respondents have proven by clear and convincing evidence that the Division IME opinion of Dr. Martin Kalevik has been overcome with respect to permanent impairment.

FINDINGS OF FACT

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

1. On March 28, 2022, the claimant was working for the employer when a wall fell on him, pinning him to the ground.
2. The claimant was taken by ambulance to Saint Joseph Hospital's Emergency Room. He presented to the emergency room with head trauma, and complaints of shoulder, chest wall, back, and head pain. He was also having trouble breathing. Claimant underwent various radiological tests, which included radiological tests of his lumbar spine. The tests demonstrated nondisplaced fractures of his 9th and 10th ribs, compression fracture at T12, and bilateral pars defects at L5 in his lumbar spine.
3. On March 31, 2022, the claimant was seen at Concentra. At this appointment, the claimant presented with injuries to his back, ribs, chest, left arm, neck, and head.
4. On April 4, 2022, the claimant returned to Concentra. At this appointment, the claimant presented with right-sided headaches, neck discomfort, as well as persistent left rib and right parasternal chest pain. He also complained of low back pain - without radiculopathy. Based on the claimant's symptoms, physical therapy was prescribed to treat the claimant's neck and low back and to address "objective impairment/functional loss and to expedite return to full activity." The claimant was also referred for an orthopedic spine evaluation.
5. On April 14, 2022, the claimant was seen by Dr. Stephen Pehler at Orthopedic Centers of Colorado. The claimant presented for evaluation of his neck and low back pain. Based on his assessment, Dr. Pehler ordered an MRI of the claimant's cervical and lumbar spine. He also prescribed an LSO brace for the claimant's low back injury, tramadol for pain, and Flexeril – a muscle relaxant.
6. On April 14, 2022, the claimant underwent a cervical and lumbar MRI. The cervical MRI showed a mild C5-C6 spondylosis, mild disc bulge and uncovertebral spurring with a small broad based central and left paracentral disc protrusion causing a ventral thecal sac deformity with no canal narrowing but with moderate to severe left sided foraminal narrowing. The lumbar MRI showed a right L5 pars defect and possible left L5 pars defect, trace anterolisthesis at L5-S1 contributing to mild bilateral foraminal narrowing, and a small left paracentral disc protrusion at L4-L5 contributing to mild bilateral foraminal narrowing at that level.

7. Due to ongoing neck and low back pain, the claimant was referred to Dr. Long Vu. Dr. Vu performed cervical and lumbar spine injections. The injections included lumbar medial branch blocks, bilaterally, at the L3, L4, and L5 levels. The medial branch blocks did not provide the claimant with relief.
8. Conservative treatment failed to relieve the claimant's neck symptoms. Therefore, on October 21, 2022, the claimant underwent cervical spine surgery that was performed by Dr. Pehler. Dr. Pehler performed a cervical disc arthroplasty at C-5-6, with an interbody fusion device and cage.
9. On January 11, 2023, the claimant returned to Concentra and was seen by Dr. Dombro. At this appointment, the claimant's chief complaints were cervical and lumbar pain-which were not going away. He also complained of numbness in his left bicep. In the notes of Dr. Dombro's report, the mechanism of injury was repeated - which included "trauma to head, neck, back, and chest after a heavy wall fell on him at a construction site." In the assessment portion of her report, Dr. Dombro listed a cervical disc disorder, but did not list lumbar spine disorder-despite the claimant's consistent complaints of back pain which started immediately after the accident and continued. But Dr. Dombro did note that the claimant was scheduled to see his spine doctor so he could be evaluated for lumbar injections. And Dr. Dombro also indicated that she might order an impairment rating since she felt the claimant was not being compliant with attending physical therapy. Nevertheless, Dr. Dombro concluded that the objective findings were consistent with the history and/or work-related mechanism of injury. Thus, she did not dispute that claimant's cervical and lumbar pain complaints were due to his work injury.
10. On January 23, 2023, the claimant was seen by Dr. John Sacha, via a referral from Dr. Dombro. Dr. Dombro referred the claimant to Dr. Sacha for an impairment rating. Dr. Sacha took a detailed history and performed a physical examination. Based on his assessment, his final impressions were:
    i. History of major trauma.
    ii. Status post C5-6-disc replacement.
    iii. T12 compression fracture.
    iv. Lumbar radiculopathy.
    v. Rib fracture.
11. Dr. Sacha then determined the claimant's impairment due to the work injury under the AMA Guides. Using American Medical Association Guides for evaluation of permanent impairment, 3rd Edition Revised, Dr. Sacha concluded that due to the work accident, the claimant sustained a 24% whole person impairment for the claimant's cervical, thoracic, and lumbar spine injuries.
12. Dr. Sacha noted and concluded the following:

    First, the cervical spine, history of surgery with ongoing symptoms receives 9% whole person permanent impairment. Then, we go to range of motion section, 6% whole person permanent impairment. No other impairment is appropriate, then going to combined values chart, page 254 of the

guidelines, 9% combines with 6% to give a total of 14% whole person permanent impairment for the cervical spine.

For the thoracic spine, compression fracture, 25% is 2% whole person permanent impairment. Then, going to range of motion section, he receives 1%, then going to combined values chart, page 4 of the guidelines, 2% combined with 1% to give a total of 3% whole person permanent impairment.

Then, for the lumbar spine, the patient receives 7% whole person permanent impairment with moderate change on structural test done. Then, for the range of motion section, 2% whole person permanent impairment. Then, going to combined values chart, page 4 of guidelines 7% combines with 2% give a total of 9% whole person permanent impairment.

No impairment is given to the rib fractures as they have resolved.

Then going to combined values chart, page 254 of the guidelines, the 14% of the cervical spine is combined with 9% of the lumbar spine, which combines with 3% of the thoracic spine using the combined values chart, on page 4 of the guidelines to give a total of 24% whole person permanent impairment due to this injury.

13. The ALJ finds the impairment rating performed Dr. Sacha for the claimant's cervical, thoracic, and lumbar spine is consistent with, and supported by, the underlying medical records and the history of the accident provided by the claimant.

14. On January 25, 2023, Dr. Dombro evaluated the claimant again. But because she had yet to receive the impairment rating from Dr. Sacha, she scheduled the claimant to return the next week for case closure after she had time to review the impairment rating.

15. On January 31, 2023, the claimant returned to Dr. Dombro for case closure and review of the impairment rating that was performed by Dr. Sacha. At this appointment, Dr. Dombro noted that the impairment rating had been completed and that the claimant had reached MMI. In this report, she did not question any portion of the impairment rating provided by Dr. Sacha. In other words, she did not question Dr. Sacha's conclusion that the claimant injured his neck, thoracic, and lumbar spine, and that such injuries should be rated as part of this claim pursuant to the AMA Guides.

16. Based on the evidence submitted at the hearing, the ALJ finds that the claimant's injuries include, but are not limited to, his cervical spine, thoracic spine, and lumbar spine.

17. After the claimant was placed at MMI, and provided a 24% impairment rating by Dr. Sacha, for the claimant's cervical, thoracic, and lumbar spine injuries, a Division Independent Medical Examination (DIME) was requested.

18. On June 20, 2023, the claimant underwent a DIME with Martin Kalevik, D.O. Dr. Kalevik obtained a detailed history from the claimant, reviewed his medical records, and performed a physical examination. His clinical diagnosis due to the work injury included:

i. Cervical disc disorder – resulting in cervical disc arthroplasty at C5-6.

ii. Thoracic compression fracture at T12.

iii. Multiple rib fractures.

iv. Lumbar disc disorder and low back pain.

19. Dr. Kalevik then determined the claimant's medical impairment due to his work accident. Like Dr. Sacha, Dr. Kalevik also provided the claimant with an impairment rating for his cervical, thoracic, and lumbar spine work injuries. Dr. Kalevik determined the claimant suffered a 25% whole person impairment rating. Just one percent more than Dr. Sacha. Dr. Kalevik assessed the claimant's impairment as follows:

> For range of motion deficits involving the cervical spine, pp.88-89, he receives 4% whole person. Using Specific Disorders Table 53 IIE, p.80, for the cervical disc replacement, he receives an additional 9% whole person. These are combined for a spine impairment total of 13% whole person.
>
> For range of motion deficits involving the thoracic spine, p.96, he receives 1% whole person. Using Specific disorders Table 53 IA, T12 compression fracture 25%, he receives 2% whole person. These are combined for a spine impairment total 3% whole person.
>
> For range of motion deficits involving the lumbar spine, p.98, he receives 4% whole person. Using Specific Disorders Table 53 IIC, he receives 7% whole person. These are combined for a spine impairment total of 11% whole person.
>
> Combining all regional totals using the combined values chart, the total whole person impairment is 25%.

20. The ALJ finds that the impairment rating provided by Dr. Kalevik is consistent with, and supported by, the underlying medical records. Moreover, the rating provided by Dr. Kalevik is consistent with the impairment rating provided by Dr. Sacha.

21. On October 22, 2023, and at the request of Respondents' counsel, the claimant underwent an IME with Douglas Scott, M.D. As set forth in his report, the purpose of the IME was to determine whether there was an error [by the prior physicians] in determining the claimant's impairment. Dr. Scott obtained a history from the claimant, reviewed the claimant's medical records, and performed a physical examination. Based on his assessment, it was his opinion that the claimant did not injure his lumbar spine during the work accident. His opinion seems to be primarily based on the fact that the initial emergency room report does not diagnose the claimant with a lumbar spine injury and that the report does not indicate the claimant complained of lumbar pain – but instead complained of high lumbar pain over his T12 vertebra.

22. In the discussion section of his report, Dr. Scott does not discuss the claimant's consistent and ongoing complaints of low back pain that are documented throughout the medical records while the claimant was treating for his work injuries. For example, on April 4, 2022, just one week after his work accident, the claimant complained of low back pain. Moreover, Dr. Scott failed to address the fact on April 14, 2022, about

2½ weeks after the work accident, the claimant was evaluated by Dr. Pehler for cervical and low back pain. Moreover, he fails to discuss that at the April 14, 2022, appointment with Dr. Pehler, and based on his assessment, Dr. Pehler ordered an MRI of the claimant's lumbar spine, and prescribed an LSO brace for the claimant's low back injury. As a result, the ALJ does not find the opinion of Dr. Scott – that the claimant did not injure his low back during the work accident and is not entitled to an impairment rating – to be credible or persuasive.

23. Moreover, Dr. Scott was scheduled to testify at the hearing. However, he could not attend the hearing. As a result, the ALJ allowed the Respondents the opportunity to take his deposition after the hearing. That said, Dr. Scott refused to have his deposition taken regarding his IME in this case. He therefore did not provide any testimony as to whether Dr. Kalevik erred in rating the claimant's lumbar spine as part of this claim.

24. The ALJ finds that there is merely a difference of opinion between Dr. Scott and Dr. Kalevik as to whether the claimant suffered a lumbar spine injury under this claim and whether it should be rated. Moreover, the difference of opinion is the opinion of Dr. Scott, which the ALJ does not find persuasive, compared to the opinion of Dr. Kalevik, which the ALJ does find persuasive and well supported by the medical record. Thus, the ALJ does not find the respondents established that Dr. Kalevik erred in any way in assessing the claimant's impairment, which was proximately caused by the work accident – and rating the claimant's cervical, thoracic, and lumbar spine.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

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

I. Whether Respondents have proven by clear and convincing evidence that the Division IME opinion of Dr. Martin Kalevik has been overcome with respect to permanent impairment.

The finding of a DIME physician concerning the claimant's medical impairment rating shall 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 finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and 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 (ICAO, 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. Industrial Claim Appeals Off.,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Off.,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Off.,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *Yeutter v. Indus. Claim Appeals Off.*, 487 P.3d 1007 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or 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. Industrial Claim Appeals Off.,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present

questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Off.,* 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Indus.* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). 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 Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

As found in this case, the claimant injured his cervical, thoracic, and lumbar spine on March 28, 2022, when a wall fell on him, pinning him to the ground. Thereafter, the claimant was treated for his injuries until he was placed at MMI by his authorized treating physician, Dr. Dombro. Throughout his claim, the claimant has complained of low back pain.

In order to determine the claimant's impairment, due to his work accident, Dr. Dombro referred the claimant to Dr. Sacha. Dr. Sacha evaluated the claimant and concluded that the claimant injured his cervical, thoracic, and lumbar spine due to the work accident. He also determined the claimant suffered a 24% impairment, pursuant to the AMA Guides. The 24% impairment rating encompassed the claimant's cervical, thoracic, and lumbar spine.

After Dr. Sacha determined the claimant suffered a 24% impairment due to his work accident, the claimant underwent a DIME with Dr. Kalevik. Dr. Kalevik evaluated the claimant and also determined that the claimant injured his cervical, thoracic, and lumbar spine and was entitled to an impairment rating for each under the AMA Guides. Dr. Kalevik applied the AMA Guides and concluded that the claimant suffered a 25% whole person impairment for the claimant's cervical, thoracic, and lumbar spine injuries.

The ALJ finds and concludes that the impairment rating provided by Dr. Sacha and Dr. Kalevik, which includes a rating for the claimant's lumbar spine injury, is consistent with the underlying medical records and therefore well supported by the medical records.

Respondents had the claimant evaluated by Dr. Scott. Dr. Scott was of the opinion that the work accident did not result in an injury to the claimant's low back and therefore Dr. Sacha and Dr. Kalevik erred in rating it. The ALJ, however, does not find Dr. Scott's opinion to be persuasive because his opinion that the claimant did not injure his lumbar spine is inconsistent with the underlying medical records that establish the claimant has consistently complained of low back pain since the work accident occurred and throughout the claim and his doctors have treated his low back. Thus, Dr. Scott's opinion that the claimant's lumbar spine should not be rated does not rise to the level of evidence that renders a factual proposition highly probable and free from serious or substantial doubt. He merely has a different opinion – and an opinion that the ALJ does not find persuasive. As a result, Dr. Scott's opinion does not establish that it is highly probable that the DIME physician, Dr. Kalevik, erred by providing an impairment rating for the claimant's lumbar spine.

The respondents, in their proposed order, point to various portions of the medical record to support their contention that clear and convincing evidence exists to support a finding that the DIME physician erred in rating the claimant's lumbar spine. The ALJ, however, finds that the respondents focus on selected portions of the medical record is

myopic and does not take into consideration the record as a whole. Thus, the ALJ does not find such arguments to be persuasive.

As a result, the ALJ finds and concludes that the respondents have failed to overcome the opinion of the DIME physician regarding the claimant's impairment by clear and convincing evidence.

ORDER

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

1. The respondents failed to overcome the opinion of the DIME physician by clear and convincing evidence.
2. The claimant's work injury caused a 25% whole person impairment rating.
3. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: February 23, 2024

/s/ Glen Goldman

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled to penalties imposed against Respondents for alleged violations of failure to pay in accordance with ALJ Cayce's May 25, 2022 Order; W.C.R.P. Rules 5-5(F); and Rule 5-6(A); pursuant to Sections 8-43-304(1) and 8-43-305, C.R.S.

Respondents' affirmative defense are that they have shown that they have cured any alleged violations pursuant to Sec. 8-43-304(4), C.R.S. and/or shown that other penalties were barred by Sec. 8-43-304(5), C.R.S.

FINDINGS OF FACT

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

Claimant's Testimony:

1. Claimant testified that she had previously been before ALJ Kara R. Cayce, who issued a decision on May 23, 2022 and awarded benefits, which she believed were paid late.

2. Claimant did state that she received some late payments after that and would panic because she did not know how she would pay her bills, then she would contact her attorney. She was threatened with the loss of her home when she failed to pay her home owners' insurance and had to borrow money to pay the insurance. She also had her auto insurance cancelled due to non-payment related to late payment of benefits.

3. Claimant stated that she eventually did receive back TTD benefits on September 28, 2022 after the filing of the DIME report and has continued to receive benefits since that time.

4. In addition to workers' compensation benefits, Claimant also received social security benefits since March 2023.

Prior Order:

5. The Findings of Fact, Conclusions of Law and Order issued by ALJ Cayce were served on May 25, 2022 to both counsel present before this ALJ. ALJ Cayce noted that Claimant had sustained a compensable claim on July 29, 2020 when she was attached during a robbery. She was struck in the right side with a shopping cart by one perpetrator while another swung a machete at her. She was pushed back approximately 10 feet into a glass wall. ALJ Cayce ordered Respondents to pay medical benefits, temporary total disability benefits and interest but denied penalties for failure to specify

which payments, if any, were paid late, and specifically found that payments were made in accordance with a prior order issued by ALJ Peter J. Cannici and pursuant to the parties' stipulation.

Medical Records:

6. On February 28, 2023 Claimant was evaluated by Dr. John T. Sacha for a demand impairment rating. He noted that Claimant was six months postop, followed by her psychiatrist, Dr. Gary Gutterman as well as both of her surgeons for maintenance. He stated that it was appropriate to place Claimant at maximum medical improvement (MMI) as of the date of the evaluation and have case closure. He cited that Claimant had not been working since her injury, was on multiple medications including narcotics, and performed a physical exam. He listed the diagnosis of lumbar radiculopathy, status post lumbar fusion and hip surgery of the right hip and reactive depression. He did not comment on permanent work restrictions as he was awaiting a functional capacity evaluation. Dr. Sacha recommended maintenance care of medication refills for the next twelve to twenty four months, follow-ups with Claimant's surgeons during that period, continue with her psychiatrist for the following two month for maintenance medications and recommendations, eight sessions of pool physical therapy and eight to ten months of a gym and pool pass. Lastly he allowed a onetime repeat of a lumbar epidural.

7. Dr. Sacha wrote that the areas proper for impairment were the right hip, low back and psychological, with apportionment of the preexisting lumbar fusion. He evaluated Claimant using the *AMA Guides to the Evaluation of Permanent Impairmen*t, Third Edition (*Revised*), calculating a 19% whole person impairment (WPI) rating which included a 13% WPI for the lumbar spine, a 10% for the right hip (converted from a 26% lower extremity impairment) and a 7% WPI for the psychiatric impairment, minus the 10% for specific disorder of the spine apportioned from the prior fusion which was independently disabling.

8. Claimant requested a Division of Workers' Compensation Independent Medical Examination (DIME) physician and John Hughes, M.D. was selected. The evaluation took place on August 1, 2023, when Dr. Hughes issued a report. He was asked to assess both hips, lumbar spine, sacroiliac joint and psychological conditions. Dr. Hughes took a history that Claimant was a 53 year old warehouse manager that was assaulted by shoplifters and her boss discouraged her from filing a claim. Dr. Hughes reviewed the medical records that were consistent with Claimant's account of being struck, reporting to nurse practitioner John Vermilyen on August 13, 2020 that Claimant was hit by a shopping cart in the upper thigh and shins and had anxiety and could not sleep. This is also consistent with ALJ Cayce's findings.

9. She was eventually referred to Dr. Gutterman for a post-traumatic stress disorder (PTSD) evaluation, who continued to treat her. Claimant was also referred to surgeons James Genuario, who noted right hip dysplasia and cam deformity of the right femoral neck with superimposed right hip injuries and recommended further CT, and Dr. Omer Mei-Dan who recommended a full total hip replacement as a periacetabular osteotomy (PAO) would be too difficult given her damaged cartilage and her age. Claimant was also evaluated by independent medical examining (IME) surgeon Timothy

O'Brien at Respondents' request, who felt that Claimant's work injuries of July 29, 2020 were minor contusions that had healed uneventfully and expeditiously.

10. Dr. Hughes documented that Claimant's care was transferred to Dr. Sacha's care, who referred Claimant for acupuncture care to Dr. Samuel Chan, noting that eventually Dr. Genuario performed right hip arthroscopic labral repair, femoralplasty, capsulorrhaphy and partial excision of the anterior-inferior iliac spine, followed by a PAO performed by Dr. Mei-Dan, followed by a revision PAO by Dr. Mei-Dan. Dr. Lee assessed that, while pain had improved in the hip, Claimant had complete numbness down the anterior and lateral aspect of her right thigh associated with significant paresthetic pain. This was when Dr. Sacha placed Claimant at MMI. Despite this, Claimant continued to see both of her hip surgeons and Dr. Genuario proceeded with another arthroscopic right hip acetabuloplasty, a sub-spine decompression and lysis of adhesions on April 18, 2023. Claimant also had an IME by surgeon, Dr. David Elfenbein who related the ongoing care and need for the surgery to the work related claim and opined that Claimant had not reached MMI. Claimant had additional surgery in May 2023 under Dr. Mei-Dan for hardware removal and to address meralgia paresthetica. Claimant also had post-surgical PT.

11. Other history provided by Claimant was a preexisting problem with ongoing depression for which she was being prescribed duloxetine 30 mg once a day that started off and on since age of 18 but no other systemic problems. She had prior bilateral carpal tunnel release surgeries done around 1998 to address work-related CTS, a right hand injury around 2000 with a good surgical outcome and a childhood lumbar spine injury that resulted in a 2016 fusion from L3 to S1 with a good result.

12. At the time of Claimant's evaluation with Dr. Hughes, Claimant's continued medication were monitored by Dr. Gutterman and included duloxetine 60 mg one a day, trazadone, Lunesta, meloxicam and clonazepam.

13. Dr. Hughes found Claimant not to be at MMI and was in agreement with her treating surgeons and Dr. Elfenbein that Claimant required further surgical care and needed to continue with her post-surgical rehabilitative treatment before reaching MMI. He provided a provisional impairment rating for the right hip conditions including the impaired ranged of motion of the right hip, the neuropathy of the right hip due to the lateral femoral cutaneous nerve sequelae and an impairment for sensory component of 14% WPI. He further opined that Claimant did not aggravate her preexisting condition related to her prior lumbar spine but that if Claimant had increased pain in the lumbar spine it was referred from the hip and did not meet criteria for a spine specific disorder.

Pleadings:

14. Respondents filed a General Admission of Liability on July 1, 2022 admitting to an average weekly wage of $1,486.00, paying temporary partial disability benefits (TPD) and temporary total disability (TTD) benefits, with a significant offset for other benefits received by Claimant.

15. Respondents filed a Final Admission of Liability based on Dr. Sasha's report on April 4, 2023 admitting for a 4% WPI and a 7% WPI as well as the 26% lower extremity impairment of the right hip. Claimant's admitted to the scheduled permanent partial

disability (PPD) benefits, which were capped after a payment of $2,604.46 due to prior indemnity payments of almost $93,000.00 and other offsets.

16. On May 30, 2023 Respondents filed another Final Admission of Liability changing the scheduled PPD amount to be paid to $6,162.57 before it being capped and noted the payments of the other WPIs that were identified by Dr. Sacha, which were still capped. Otherwise the FAL remained unchanged.

17. Division's Notice of DIME Report "Not at MMI" was emailed to both counsel on August 3, 2023, giving notice that 1) the DIME Unit received the DIME report; 2) Claimant was not at MMI; 3) the parties were to communicate with the DIME Unit if the case was settled or abandoned; and 4) if counsel did not receive the DIME physician's report, they were to contact the DIME unit.

18. On August 30, 2023 Claimant filed an Application for Hearing (AFH) on multiple issues of penalties.

19. Another General Admission was filed on September 12, 2023 admitting to ongoing TTD in accordance with Dr. Hughes' DIME report's not at MMI determination, with an offset for social security disability, paying past due benefits, including interest due.

Check Stubs and Logs:

20. The first check stub in evidence was one dated July 22, 2022 but it did not indicate a date of receipt or when it was cashed.

21. The payment log showed that a check for $15,013.11 was issued on September 7, 2023 and that the check cleared.

22. The only other indemnity payment on the log showed prior to this date was a payment of $2,604.46 paid on March 24, 2023. This is consistent with the payment shown on the FAL of April 4, 2023 above.

23. A document was submitted into evidence as Respondents' Exhibit C, bate 46[1] which was titled "Basic Claim Information." It showed that the electronic funds transfer (EFT) date was confirmed as September 11, 2023 for the $15,013.11 check.

Ultimate Findings:

24. As found, ALJ Cayce's Order was final as of June 14, 2022 and no petition to review was filed.

25. As found, Claimant's Application for Hearing was filed on August 30, 2023.

26. As found, Respondents cured any violation of W.C.R.P. Rule 5-5(E) by filing a GAL on September 12, 2023 and issuing payment of past due benefits with interest on September 7, 2023.

27. As found, Respondents did not act unreasonably when filing the September 12, 2023 GAL at the time they were advised the needed to take action.

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[1] Respondents labeled it Resp. Ex. 46, which this ALJ corrected to be Exhibit C, Bate 46 to continue chronologically with Respondents' prior submissions.

28. As found, there was no order requiring Respondents to pay benefits following the filing of the DIME report.

29. Testimony and evidence inconsistent with the above findings was either not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. (2022). 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.

The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. This decision does not specifically address every item contained in the record and the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion. The ALJ has specifically rejected evidence contrary to the above findings as not credible or unpersuasive. Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).

In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence, including the causal relationship between the work-related injury and the medical condition for which Claimant is seeking benefits. Sec. 8-43- 201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). A claimant is not required to prove causation by medical certainty; instead, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which they seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See Industrial Commission v. Riley, 165 Colo. 586, 441 P.2d 3 (1968).

In deciding whether a party has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See Bodensieck v. ICAO, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. Arenas v. ICAO, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers’ compensation proceeding is the exclusive domain of administrative law judge. University Park Care Center v. Industrial Claim Appeals Office, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. Cordova v. ICAO, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See Burnham v. Grant, 24 Colo. App. 131, 134 P. 254 (1913); see also Heinicke v. ICAO, 197 P.3d 220 (Colo. App. 2008). To the

extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. Colorado Springs Motors, Ltd. v. Industrial Commission, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See Prudential Ins. Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); Kroupa v. Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Penalties Generally

Section 8-43-304(1), C.R.S. authorizes the imposition of penalties not to exceed $1,000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." Whether statutory penalties may be imposed under Sec. 8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must ascertain whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of an action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Indus. Claim Appeals Off.,* 107 P.3d 965 (Colo. App. 2003) ("reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact.") *In Re Claim of Murray*, W.C. No. 4-997-086-02 (ICAO, Aug. 16, 2017). There is, however, no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). The question of whether a party's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005); *see Paint Connection Plus v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010). Where the violator fails to offer a reasonable factual or legal explanation for its actions, the ALJ may infer the opposing party sustained its burden to prove the violation was objectively unreasonable. *Human Resource Co. v. Indus. Claim Appeals Off.*, 984 P.2d 1194, 1197 (Colo. App. 1999). Section 8-43-305, C.R.S. allows for a penalty to continue as each day is a separate penalty.

Section 8-43-304(4), C.R.S. gives parties the opportunity to cure alleged violations within twenty (20) days of the mailing of an application for hearing asserting penalties. The statute states that if the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation. "Clear and convincing evidence" means evidence which is stronger than a mere "preponderance," it is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995).

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* W.C. no. 4-619-954 (ICAO. May 5, 2006). However, any penalty assessed should not be excessive or grossly disproportionate to the conduct in question. When determining the penalty, the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm

suffered by the other party and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products v. Indus. Claim Appeals Off.,* 126 P.3d 323 (Colo. App. 2005); see also *Colorado Dep't of Labor & Empl. v. Dami Hospitality, LLC*, 442 P.3d 94 (Colo. 2019).

In this matter, there are multiple penalties being alleged as follows:

1. Penalty for Alleged Violation for Failure to Pay Consistent with the ALJ Order:

Claimant alleged that Respondents' failed to pay TTD benefits consistent with ALJ Cayce's Order served on May 25, 2022 and was entitled to penalties under Sec. 8-43-304(1) and 8-43-305, C.R.S. for the violation. The alleged violation was for a period from June 15, 2022 through July 18, 2022.

Pursuant to Sec. 8-43-304(5), C.R.S. "[A] request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty."

As found, under Case Number 5-148-638-002 ALJ Cayce issued Findings of Fact, Conclusions of Law and Order on May 23, 2022, though it was served on May 25, 2022. The order became final on June 14, 2022, as no petition to review was filed to appeal that matter. The statute of limitation of one year on penalties expired as of June 14, 2023. Claimant's counsel litigated the prior matter representing Claimant and there was no mention of Claimant being unaware of the prior order issued by ALJ Cayce. Since Claimant's AFH was filed on August 30, 2023 for the penalties claimed for late payments from June 12, 2022 through July 18, 2022, pursuant to Sec. 8-43-304(5) the right to claim this penalty was past. Further, Respondents filed a General Admission of Liability on July 1, 2022 that admitted to benefits ordered by ALJ Cayce and any potential violation would have been cured over one year prior to the filing of the AFH. As found, Claimant failed to prove a violation occurred for which penalties were due for this period.

2. Penalty for Alleged Violation for Failure to File GAL Pursuant to W.C.R.P. Rule 5-5(F):

Under W.C.R.P. Rule 5-5(F) the rule states that "[W]ithin 20 days after the date of mailing of the Division's notice of receipt of the Division Independent Medical Examiner's report, the insurer shall either admit liability consistent with such report or file an application for hearing."

Respondents argued that the Notice of "Not at MMI" versus the "Final DIME" reports are differentiated by the fact that the later states that Respondents have 20 days to file an admission. There is no statutory provision that requires Division to provide such notice to Respondents as the requirement to file is subsumed in the rule above.

Here, Division's Notice of DIME Report "Not at MMI" was emailed to both counsel on August 3, 2023, giving notice that the DIME Unit had received the DIME report. Twenty days after the letter would have been August 23, 2023 and the GAL was filed on September 12, 2023, though the first payment of retroactive funds was issued on September 7, 2023. As found, Respondents cured any violation of W.C.R.P. 5-5(E) within thirteen days, well within the twenty day statutory requirement of Claimant filing the AFH on August 30, 2023. Therefore, it was Claimant's burden to prove by clear and convincing evidence that Respondents knew or reasonably should have known they were in violation. The ALJ finds Claimant failed to meet her burden to show that Respondents knew or reasonably should have known they were in violation of the rule or any violation of the rule was objectively

unreasonable under the clear and convincing standard that applies. There was no persuasive evidence presented in this matter that showed that the adjuster, acting on behalf of insurer, had received the DIME report or the Notice of "Not a MMI" from counsel before the time she issued the payment or filed the FAL. Neither was there a showing by clear and convincing evidence that the Insurer acted unreasonably by the filing of the FAL once they were advised of the report and need for action. Therefore, Claimant failed to prove by clear and convincing evidence that any penalties were due for violation of W.C.R.P. Rule 5-5(F).

3. Penalty for Alleged Violation for Failure to Pay Indemnity Benefits Pursuant to W.C.R.P. Rule 5-6(A):

Under W.C.R.P. Rule 5-6(A) "Benefits and penalties awarded by order are due three (3) business days after the order becomes final. Any ongoing benefits shall be paid consistent with statute and rule."

Claimant alleged a rule violation under W.C.R.P. Rule 5-6(A) in this matter, and not a statutory violation. Here, there was no indication that an order by an ALJ was involved, ordering Respondents to pay benefits pursuant to the DIME physician's determination of not at MMI. Therefore, Rule 5-6(A) is inapplicable as the rule specifically references an order. While Respondents may have owed benefits beginning August 28, 2023 because they had twenty days to file an admission and pay benefits pursuant to the Admission, which would have been considered due three business days after the date of the admission pursuant to W.C.R.P. Rule 5-6(B), Claimant failed to plead or argue the application of this rule before this ALJ and this ALJ declines to considered it at this time. Claimant has failed to show that Respondents violated W.C.R.P. Rule 5-6(A).

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's request for a penalty for failure to pay TTD benefits pursuant to Order is *denied* and *dismissed.*

2. Claimant's request for a penalty for a violation of W.C.R.P. Rule 5-5(F) is *denied* and *dismissed.*

3. Claimant's request for a penalty for a violation of W.C.R.P. Rule5-6(A) is *denied* and *dismissed.*

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

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

address for the **Denver Office of Administrative Courts** or email the Petition to Review to oac-ptr@state.co.us. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a Petition to Review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 26th day of February, 2024.

DIGITAL SIGNATURE

By: ______________________________
ELSA MARTINEZ TENREIRO
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he injured his right hand during the course and scope of his employment with Employer on June 14, 2023.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his June 14, 2023 industrial injury.

3. Whether Claimant has proven by a preponderance of the evidence that the right to select an ATP passed to him 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.

4. Whether Denver Health was an authorized provider within the chain of referral.

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

6. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period June 15, 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 June 14, 2023.

STIPULATION

The parties agreed that electricians are required to lift up to 50 pounds.

FINDINGS OF FACT

1. Employer hired Claimant as an electrician in mid-February 2023. Claimant testified that he earned approximately $670.00 per week. His testimony is consistent with wage records that reveal he earned an average of $670.92 per week for the 18 pay periods from February 11, 2023 through June 16, 2023. An Average Weekly Wage (AWW) of $670.92 thus constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

2. Claimant acknowledged that, prior to his employment with Employer, he was convicted of felony forgery. He was also convicted of misdemeanor assault for an arrest in September 2022.

3. Employer first purchased a Workers' Compensation insurance policy from [Redacted, hereinafter PH] that became effective on September 15, 2023. Therefore, on June 14, 2023 Employer was uninsured for Workers' Compensation injuries.

4. On the morning of June 14, 2023 Claimant was assigned to work on a jobsite at [Redacted, hereinafter JA] in Denver. Claimant testified that sometime between 10:00 AM and 11:00 AM he was using a hand drill above his head when the drill bit caught on a nail or screw. The impact twisted his right hand and caused his ring finger to bend backwards. Claimant remarked that at the time of the accident he was wearing work gloves.

5. Claimant called owner of Employer [Redacted, hereinafter TB] at approximately 11:49 AM to report the injury. He explained that he had injured his hand and bent his fingers back while drilling. Claimant remarked that he needed help, but TB[Redacted] responded that he would prefer Claimant complete the job. TB[Redacted] detailed that he did not want to go to Claimant's location because he had all his tools and materials out at another job site. Claimant then commented that, because of his finger injury, it was going to take several more hours to complete his work. He ultimately did not complete his job until 2:00 PM. Claimant then drove to the job site where TB[Redacted] was working at approximately 2:30PM. TB[Redacted] suggested not to immediately visit urgent care, but to contact him in the morning. Claimant then went home and iced his hand for the rest of the day.

6. TB[Redacted] testified that he did not believe Claimant suffered an injury at work on June 14, 2023. He explained that, when he saw Claimant's hand less than four hours after the accident, it was extremely swollen. Based on TB's[Redacted] own experience with broken fingers, he believed Claimant's hand injury could not have occurred only four hours earlier. In addition, TB[Redacted] testified that, when he picked up payment from the site where Claimant was injured, the homeowner advised that Claimant did not mention the injury.

7. At 5:23 AM on June 15, 2023 TB[Redacted] texted Claimant inquiring about his condition. Claimant responded that his hand was still swollen and he needed to visit urgent care. TB[Redacted] instructed Claimant to visit a nearby urgent care facility. Claimant testified he chose CareNow Urgent Care and scheduled an appointment for 12:30 PM on June 15, 2023.

8. On June 15, 2023 at 12:30 PM Claimant visited Physician's Assistant Sarah Kleinschmidt at CareNow. He explained that he had suffered a work injury to his right hand and she ordered x-rays. Claimant commented that, while he was drilling into a ceiling, the drill hit a nail and twisted his right hand. The imaging revealed a displaced fracture of the shaft of the fourth metacarpal bone. PA Kleinschmidt noted "based on the History and Physical it is my opinion that there is a greater than a 50% probability that this is a work related injury." She thus referred Claimant to Phillip Hayman, M.D. at Hand Surgery Associates and asked Claimant to return to CareNow on June 19, 2023 at 12:00 PM for a recheck.

9. Claimant testified that Hand Surgery Associates required a $250.00 prepayment prior to an examination. Employer paid the $250.00 prepayment. Dr. Hayman then saw Claimant on June 16, 2023 and recommended open reduction internal fixation surgery of the right hand. Hand Surgery Associates placed Claimant on the surgery schedule.

10. Claimant then called CareNow to inform them of the specifics of his visit with Dr. Hayman. CareNow advised Claimant that he no longer needed a follow-up appointment on June 19, 2023. Claimant testified that Hand Surgery Associates subsequently removed him from the surgery schedule because Dr. Hayman did not accept Medicaid. He explained that he could not afford to pay for the surgery and sought to locate another surgeon.

11. On June 22, 2023 Claimant visited Nurse Practitioner Kimberly Ann Mahowald at his primary care provider Centura Health. NP Mahowald noted that Claimant was a 46-year-old male who suffered a right hand fracture after a drill slipped seven days earlier. He went to urgent care and was diagnosed with a spiral fracture. She remarked that Claimant received a brace and was referred to a hand specialist who did not take Medicaid and would not see him unless he could pay $5000 up front. NP Mahowald diagnosed Claimant with a closed fracture of the right hand with a non-union and placed an ambulatory referral to a hand surgeon.

12. On July 26, 2023 TB[Redacted] sent Claimant a text message stating that he did not believe Claimant injured his hand at work. He explained that Claimant's right hand could not have swollen so significantly in the 3.5 hours between the time of injury and seeing him on June 14, 2023. TB[Redacted] also added that Claimant provided conflicting accounts to two different health care providers. He finally suggested that Claimant retract the claim for Workers' Compensation.

13. On August 7, 2023 Claimant visited hand surgeon Matthew D. Folchert, M.D. at Denver Health Orthopedics-Hand for an examination. Dr. Folchert recounted that Claimant suffered a work-related injury to the right ring finger. Claimant reported he was working as an electrician on June 14, 2023 when a drill caused his ring finger to bend backward and he heard a snap. He was subsequently diagnosed with a spiral fracture of the right fourth metacarpal shaft and referred for surgery. However, prior to the surgery, there was an issue with payment from either Employer or Workers Compensation and the procedure was cancelled. He was ultimately scheduled to visit Dr. Folchert approximately eight weeks from his date of his injury.

14. Claimant reported that his pain had significantly improved since the work accident. However, his right ring finger felt shorter and there was a loss of knuckle prominence when making a fist. Claimant also noted painful cracking sounds and diminished grip strength. On physical examination, Claimant demonstrated normal right hand range of motion but his ring finger appeared shortened at the metacarpal. Claimant demonstrated clinical and radiographic evidence of healing with abundant bridging callus. Nevertheless, Dr. Folchert suggested a possible surgical malunion correction with

osteotomy and fixation using screws. After discussing conservative and surgical considerations, Claimant planned to review his options.

15. Although Claimant had good hand function and x-rays showed complete healing of the fracture, he exhibited a deformity consistent with a shortened and displaced metacarpal malunion. Claimant also had a click and there was concern for potential tendon entrapment. Dr. Folchert thus performed surgery on Claimant's right hand at Denver Health on November 7, 2023. The procedure specifically involved a right ring finger A1 pulley release with radial slip of FDS excision. Claimant subsequently underwent post-operative evaluations.

16. On January 19, 2024 Claimant returned to Dr. Folchert for an evaluation. After the November 7, 2023 surgery Claimant still had significant stiffness and developed a hypertrophic scar volarly that limited his motion and accentuated his extensor lag. Based on a physical examination and grip strength findings, Dr. Folchert advanced Claimant's restrictions and permitted up to 40 pounds lift/grip/carry on the right hand with future progression dependent on improved motion and strength. He estimated Claimant would require another two to three months of therapy and home exercises to regain appropriate range of motion and grip strength. Claimant would follow-up in six weeks.

17. Claimant has established it is more probably true than not that he injured his right hand during the course and scope of his employment with Employer on June 14, 2023. Specifically, Claimant's credible testimony and the persuasive medical records reveal that Claimant injured his right ring finger while working for Employer. Initially, Claimant explained that on June 14, 2023 he was working at a residence performing electrical work. While using a hand drill above his head, the drill bit twisted his right hand and caused his ring finger to bend backwards.

18. Although Claimant reported his injury, TB[Redacted] asked Claimant to complete his job. Claimant then finished his work, discussed his injury with TB[Redacted] and went home to ice his hand. On the following morning, Claimant visited PA Kleinschmidt at CareNow and explained that he had suffered a work injury to his right hand. She specifically noted "based on the History and Physical it is my opinion that there is a greater than a 50% probability that this is a work related injury." Imaging revealed a displaced fracture of the shaft of the fourth metacarpal bone. Subsequent medical records consistently reflect that, while Claimant was working as an electrician on June 14, 2023, a drill caused his right ring finger to bend backwards. He was diagnosed with a spiral fracture of the right fourth metacarpal shaft and referred for surgery.

19. In contrast, TB[Redacted] maintained that he did not believe Claimant suffered an injury at work on June 14, 2023. He explained that Claimant's hand was extremely swollen less than four hours after the accident. Based on TB's[Redacted] own experience with broken fingers, Claimant's hand injury could not have occurred only four hours earlier. TB[Redacted] also testified that, when he picked up payment from the site where Claimant was injured, the homeowner noted Claimant did not mention a work injury.

20. Despite TB's[Redacted] testimony, the record reveals that Claimant has consistently maintained he injured his right hand while performing electrical work for Employer on June 14, 2023. He immediately reported the incident and was diagnosed with a spiral fracture of the fourth right metacarpal. Therefore, based on Claimant's credible testimony and a review of the medical records, Claimant suffered a right hand injury that was proximately caused by his work duties during the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered a compensable right hand injury while working for Employer on June 14, 2023.

21. Claimant has proven it is more probably true than not that the right to select an ATP passed to him 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 him.

22. Claimant has demonstrated it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits for his June 14, 2023 industrial injury. The record reveals that Claimant initially sought reasonable, necessary and related medical care with PA Kleinschmidt at CareNow. He explained that he had suffered a work injury to his right hand and she ordered x-rays. The imaging revealed a displaced fracture of the shaft of the fourth metacarpal bone. PA Kleinschmidt referred Claimant to Dr. Hayman at Hand Surgery Associates. After Employer paid $250.00, Dr. Hayman saw Claimant on June 16, 2023. He recommended open reduction internal fixation surgery of the right hand. Hand Surgery Associates placed Claimant on the surgery schedule. CareNow then advised Claimant he no longer needed a follow-up appointment on June 19, 2023. Hand Surgery Associates subsequently removed him from the surgery schedule because Dr. Hayman did not accept Medicaid. Claimant explained that he could not afford to pay for the surgery on his own. He thus sought to locate another surgeon.

23. The preceding chronology reflects that Claimant did not demonstrate through his words or conduct that he chose CareNow or Dr. Heyman as authorized physicians to treat the industrial injury. Claimant initially visited CareNow for emergency treatment of his injured right hand. He reasonably sought immediate care for his injury and was diagnosed with a displaced fracture of the fourth metacarpal. Although CareNow referred Claimant to Dr. Heyman, Claimant credibly explained the clinic did not accept Medicaid and would not perform surgery. Claimant thus sought to find a provider who would accept Medicaid and treat his condition.

24. On June 22, 2023 Claimant visited NP Mahowald at primary care provider Centura Health. NP Mahowald noted that Claimant had been referred to a hand specialist who did not take Medicaid and would not see him unless he could pay $5000 up front.

She referred Claimant for surgery with Dr. Folchert at Denver Health. Claimant's conduct reveals that he did not select CareNow, but chose Centura Health as his Authorized Treating Provider (ATP). Based on the referral by NP Mahowald, Denver Health was thus also authorized to treat Claimant. After Dr. Folchert performed surgery, Claimant underwent post-operative evaluations. By January 19, 2024 Dr. Folchert estimated Claimant would require another two to three months of therapy and home exercises to regain appropriate range of motion and grip strength. The treatment Claimant received from ATP Centura Health and Dr. Folchert at Denver Health constituted reasonable, necessary and causally related care for his industrial injury. Accordingly, Employer is financially responsible for Claimant's medical care from ATP Centura Health as well as his surgery and continuing treatment through Dr. Folchert at Denver Health.

25. The record reveals that Medicaid paid for Claimant's care and treatment. Specifically, Medicaid paid at least $16,058.29 in medical expenses between June 15, 2023 and December 15, 2023. The payments included Claimant's treatment with CareNow Urgent Care, Denver Health, and his surgery with Dr. Folchert. Claimant also received medical care from Centura Health and continued to receive treatment from Dr. Folchert through January 19, 2024. He estimated Claimant would require another two to three months of therapy and home exercises to regain appropriate range of motion and grip strength. The record reveals that all of Claimant's medical treatment for his right hand injury was reasonable, necessary and causally related to the June 14, 2023 industrial accident. In addition to the $16,058.29 that Medicaid has paid for Claimant's medical care, he will incur additional costs for treatment. Combining Medicaid payments and future care, the approximate present value of medical benefits totals approximately $20,000.00. Employer is thus financially responsible for Claimant's medical expenses in the amount of $20,000.00.

26. Claimant has proven it is more probably true than not that he is entitled to receive Temporary Total Disability (TTD) benefits for the period June 15, 2023 until terminated by statute. Initially, Claimant suffered a displaced fracture of the shaft of the fourth metacarpal bone. He required surgery, but was unable to undergo the procedure because Employer lacked worked Compensation coverage and a he could not find a physician who accepted Medicaid. Claimant has thus been unable to work for Employer since he was injured on June 14, 2023.

27. By August 7, 2023 when Claimant visited hand surgeon Dr. Folchert, he reported that his pain had significantly improved since the work accident. Although Claimant had good hand function and x-rays showed complete healing of the fracture, he exhibited a deformity consistent with a shortened and displaced metacarpal malunion. Claimant also had a click and there was concern for potential tendon entrapment. Dr. Folchert thus performed surgery on Claimant's right hand at Denver Health on November 7, 2023.

28. After the November 7, 2023 surgery Claimant still had significant stiffness and developed a hypertrophic scar volarly that limited his motion and accentuated his extensor lag. Based on a physical examination and grip strength findings, on January 19, 2024 Dr. Folchert advanced Claimant's restrictions and permitted up to 40 pounds

lift/grip/carry on the right hand with future progression dependent on improved motion and strength. As the parties agreed, electricians are required to lift up to 50 pounds. Dr. Folchert estimated Claimant would require another two to three months of therapy and home exercises to regain appropriate range of motion and grip strength.

29. The preceding reveals that Claimant's right hand 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. Claimant is thus entitled to TTD benefits for the period June 15, 2023 until terminated by statute. Claimant earned an AWW of $670.92. As of the date position statements were due in this matter on February 7, 2024, it has been 34 weeks since Claimant's injury. Based on Dr. Folchert's comments on January 19, 2024 Claimant can expect an additional eight weeks of treatment. Combining 34 plus 8 yields 42 weeks of TTD benefits. Multiplying the AWW of $670.92 by 42 equals $28,178.64. Indemnity benefits of $28,178.64 at a TTD rate of 66.66% totals $18,783.88.

30. Employer did not have an active Worker's Compensation insurance policy with any insurer effective on or prior to Claimant's June 14, 2023 date of injury. Notably, Employer first purchased a Workers' Compensation insurance policy from PH[Redacted] that became effective on September 15, 2023. Therefore, on June 14, 2023 Employer was uninsured for Workers' Compensation injuries. Based on the preceding sections of the present Order, Employer is required to pay Claimant $18,783.88 in TTD benefits. Twenty-five percent of $18,783.88 is $4,695.97. Accordingly, Employer shall pay $4,695.97 in penalties to the Colorado Uninsured Employer Fund created in §8-67-105, C.R.S.

31. This Order awards continuing medical benefits as well as continuing TTD benefits until terminated by statute. In addition to the $16,058.29 that Medicaid has paid for Claimant's medical care, he will incur additional costs for treatment. The approximate present value of all medical benefits that will be owed by Employer is thus approximately $20,000.00. The Order awards medical benefits of $20,000.00, indemnity benefits of $18,783.88, and penalties of $4,695.97, for total compensation of $43,479.85. Employer is thus required to pay the trustee of the Division a total amount of $43,479.85. 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 he injured his right hand during the course and scope of his employment with Employer on June 14, 2023. Specifically, Claimant's credible testimony and the persuasive medical records reveal that Claimant injured his right ring finger while working for Employer. Initially, Claimant explained that on June 14, 2023 he was working at a residence performing electrical work. While using a hand drill above his head, the drill bit twisted his right hand and caused his ring finger to bend backwards.

8. As found, although Claimant reported his injury, TB[Redacted] asked Claimant to complete his job. Claimant then finished his work, discussed his injury with TB[Redacted] and went home to ice his hand. On the following morning, Claimant visited PA Kleinschmidt at CareNow and explained that he had suffered a work injury to his right hand. She specifically noted "based on the History and Physical it is my opinion that there is a greater than a 50% probability that this is a work related injury." Imaging revealed a displaced fracture of the shaft of the fourth metacarpal bone. Subsequent medical records consistently reflect that, while Claimant was working as an electrician on June 14, 2023, a drill caused his right ring finger to bend backwards. He was diagnosed with a spiral fracture of the right fourth metacarpal shaft and referred for surgery.

9. As found, in contrast, TB[Redacted] maintained that he did not believe Claimant suffered an injury at work on June 14, 2023. He explained that Claimant's hand was extremely swollen less than four hours after the accident. Based on TB's[Redacted] own experience with broken fingers, Claimant's hand injury could not have occurred only four hours earlier. TB[Redacted] also testified that, when he picked up payment from the site where Claimant was injured, the homeowner noted Claimant did not mention a work injury.

10. As found, despite TB's[Redacted] testimony, the record reveals that Claimant has consistently maintained he injured his right hand while performing electrical work for Employer on June 14, 2023. He immediately reported the incident and was diagnosed with a spiral fracture of the fourth right metacarpal. Therefore, based on Claimant's credible testimony and a review of the medical records, Claimant suffered a right hand injury that was proximately caused by his work duties during the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered a compensable right hand injury while working for Employer on June 14, 2023.

Medical Benefits

11. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.;

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

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

13. 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).

14. 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).

15. As found, Claimant has proven by a preponderance of the evidence that the right to select an ATP passed to him 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 him.

16. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his June 14, 2023 industrial injury. The record reveals that Claimant initially sought reasonable, necessary and related medical care with PA Kleinschmidt at CareNow. He explained that he had suffered a work injury to his right hand and she ordered x-rays. The imaging revealed a displaced fracture of the shaft of the fourth metacarpal bone. PA Kleinschmidt referred Claimant to Dr. Hayman at Hand Surgery Associates. After Employer paid $250.00, Dr. Hayman saw Claimant on June 16, 2023. He recommended open reduction internal fixation surgery of the right hand. Hand Surgery Associates placed Claimant on the surgery schedule. CareNow then advised Claimant he no longer needed a follow-up appointment on June 19, 2023. Hand Surgery Associates subsequently removed him from the surgery schedule because Dr. Hayman did not accept Medicaid. Claimant explained that he could not afford to pay for the surgery on his own. He thus sought to locate another surgeon.

17. As found, the preceding chronology reflects that Claimant did not demonstrate through his words or conduct that he chose CareNow or Dr. Heyman as authorized physicians to treat the industrial injury. Claimant initially visited CareNow for emergency treatment of his injured right hand. He reasonably sought immediate care for his injury and was diagnosed with a displaced fracture of the fourth metacarpal. Although CareNow referred Claimant to Dr. Heyman, Claimant credibly explained the clinic did not accept Medicaid and would not perform surgery. Claimant thus sought to find a provider who would accept Medicaid and treat his condition.

18. As found, on June 22, 2023 Claimant visited NP Mahowald at primary care provider Centura Health. NP Mahowald noted that Claimant had been referred to a hand specialist who did not take Medicaid and would not see him unless he could pay $5000 up front. She referred Claimant for surgery with Dr. Folchert at Denver Health. Claimant's conduct reveals that he did not select CareNow, but chose Centura Health as his Authorized Treating Provider (ATP). Based on the referral by NP Mahowald, Denver Health was thus also authorized to treat Claimant. After Dr. Folchert performed surgery, Claimant underwent post-operative evaluations. By January 19, 2024 Dr. Folchert estimated Claimant would require another two to three months of therapy and home exercises to regain appropriate range of motion and grip strength. The treatment Claimant

received from ATP Centura Health and Dr. Folchert at Denver Health constituted reasonable, necessary and causally related care for his industrial injury. Accordingly, Employer is financially responsible for Claimant's medical care from ATP Centura Health as well as his surgery and continuing treatment through Dr. Folchert at Denver Health.

19. As found, the record reveals that Medicaid paid for Claimant's care and treatment. Specifically, Medicaid paid at least $16,058.29 in medical expenses between June 15, 2023 and December 15, 2023. The payments included Claimant's treatment with CareNow Urgent Care, Denver Health, and his surgery with Dr. Folchert. Claimant also received medical care from Centura Health and continued to receive treatment from Dr. Folchert through January 19, 2024. He estimated Claimant would require another two to three months of therapy and home exercises to regain appropriate range of motion and grip strength. The record reveals that all of Claimant's medical treatment for his right hand injury was reasonable, necessary and causally related to the June 14, 2023 industrial accident. In addition to the $16,058.29 that Medicaid has paid for Claimant's medical care, he will incur additional costs for treatment. Combining Medicaid payments and future care, the approximate present value of medical benefits totals approximately $20,000.00. Employer is thus financially responsible for Claimant's medical expenses in the amount of $20,000.00.

Average Weekly Wage

20. 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.

21. As found, Claimant credibly testified that he earned approximately $670.00 per week. His testimony is consistent with wage records that revealed he earned an average of $670.92 per week for the 18 pay periods from February 11, 2023 through June 16, 2023. An AWW of $670.92 thus constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

Temporary Total Disability Benefits

22. 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.

23. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period June 15, 2023 until terminated by statute. Initially, Claimant suffered a displaced fracture of the shaft of the fourth metacarpal bone. He required surgery, but was unable to undergo the procedure because Employer lacked worked Compensation coverage and a he could not find a physician who accepted Medicaid. Claimant has thus been unable to work for Employer since he was injured on June 14, 2023.

24. As found, by August 7, 2023 when Claimant visited hand surgeon Dr. Folchert, he reported that his pain had significantly improved since the work accident. Although Claimant had good hand function and x-rays showed complete healing of the fracture, he exhibited a deformity consistent with a shortened and displaced metacarpal malunion. Claimant also had a click and there was concern for potential tendon entrapment. Dr. Folchert thus performed surgery on Claimant's right hand at Denver Health on November 7, 2023.

25. As found, after the November 7, 2023 surgery Claimant still had significant stiffness and developed a hypertrophic scar volarly that limited his motion and accentuated his extensor lag. Based on a physical examination and grip strength findings, on January 19, 2024 Dr. Folchert advanced Claimant's restrictions and permitted up to 40 pounds lift/grip/carry on the right hand with future progression dependent on improved motion and strength. As the parties agreed, electricians are required to lift up to 50

pounds. Dr. Folchert estimated Claimant would require another two to three months of therapy and home exercises to regain appropriate range of motion and grip strength.

26. As found, the preceding reveals that Claimant's right hand 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. Claimant is thus entitled to TTD benefits for the period June 15, 2023 until terminated by statute. Claimant earned an AWW of $670.92. As of the date position statements were due in this matter on February 7, 2024, it has been 34 weeks since Claimant's injury. Based on Dr. Folchert's comments on January 19, 2024 Claimant can expect an additional eight weeks of treatment. Combining 34 plus 8 yields 42 weeks of TTD benefits. Multiplying the AWW of $670.92 by 42 equals $28,178.64. Indemnity benefits of $28,178.64 at a TTD rate of 66.66% totals $18,783.88.

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

27. 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 August 10, 2021 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.

28. 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).

29. As found, Employer did not have an active Worker's Compensation insurance policy with any insurer effective on or prior to Claimant's June 14, 2023 date of injury. Notably, Employer first purchased a Workers' Compensation insurance policy from PH[Redacted] that became effective on September 15, 2023. Therefore, on June 14, 2023 Employer was uninsured for Workers' Compensation injuries. Based on the preceding sections of the present Order, Employer is required to pay Claimant $18,783.88 in TTD benefits. Twenty-five percent of $18,783.88 is $4,695.97. Accordingly, Employer

shall pay $4,695.97 in penalties to the Colorado Uninsured Employer Fund created in §8-67-105, C.R.S.

Payment to Trustee or Posting of Bond

30. 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."

31. As found, this Order awards continuing medical benefits as well as continuing TTD benefits until terminated by statute. In addition to the $16,058.29 that Medicaid has paid for Claimant's medical care, he will incur additional costs for treatment. The approximate present value of all medical benefits that will be owed by Employer is thus approximately $20,000.00. The Order awards medical benefits of $20,000.00, indemnity benefits of $18,783.88, and penalties of $4,695.97, for total compensation of $43,479.85. Employer is thus required to pay the trustee of the Division a total amount of $43,479.85. 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 right hand injury on June 14, 2023 during the course and scope of his employment with Employer.

2. Employer is financially responsible for payment of Claimant's reasonable and necessary medical expenses for the treatment of his right hand injury totaling approximately $20,000.00.

3. Claimant earned an AWW of $670.92.

4. Claimant shall receive TTD benefits for the period June 15, 2023 until February 7, 2024. Claimant shall also receive additional TTD benefits for approximately eight weeks or until terminated by statute in the total amount of $18,783.88.

5. Employer shall pay $4,695.97 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 $43,479.85, 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 $43,479.85 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.

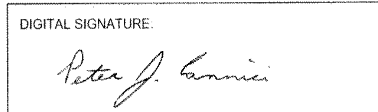
9. Pursuant to §8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer is solely liable and responsible for the payment of all medical costs related to Claimant's work injury.

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 26, 2024.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-238-750-001

ISSUES

1. Whether the surgery Claimant underwent with Dr. Reister on July 6, 2023, was reasonably necessary to cure and relieve her of the effects of her January 6, 2023 injury.

2. What amount most fairly represents Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a military family life counselor at a school in East Aurora who provided counseling to children of military servicemen and servicewomen. On January 6, 2023, she was outside the cafeteria calling children in for lunch when she slipped on ice and fell backward, landing on her right hand, thumb, and elbow.

2. On February 1, 2023, Claimant sent an e-mail to management stating:

   > "I slipped on the ice three weeks at one of my schools while working. Initially, I was fine, but sore. Sunday morning, I woke up with intense pain in my shoulder. I worked Monday, but took PTO Tuesday so that I could get another day on the muscle relaxants. I am seeing a shoulder specialist Friday for an assessment."

3. On February 3, 2023, Claimant saw Dr. Steven Horan at Health One with complaints of right shoulder acute pain from the past two weeks, which she described as being along the shoulder blade and deep in the shoulder. Claimant reported that she fell on ice and had a forcible external rotation of the right arm. Dr. Horan assessed Claimant with right rotator cuff tendonitis and strain of the right subscapularis muscle due to forceful external rotation. He recommended physical therapy and provided Claimant with an injection.

4. Claimant first went to Concentra on February 8, 2023, where she was attended by Dr. Paul Schadler. Claimant reported that her right shoulder symptoms had worsened about two weeks earlier. Claimant reported that the pain was worse posteriorly. Dr. Schadler recommended Claimant begin physical therapy.

5. Claimant underwent an MRI of the right shoulder on February 10, 2023. The MRI showed "[h]igh-grade interstitial tearing of the intra-articular portion of the long head biceps tendon" and "moderate to high-grade partial-thickness articular surface tearing of the superior labrum."

6. On February 17, 2023, Claimant returned to Dr. Horan. Dr. Horan noted that at the last appointment that the majority of the pain was on the medial side of Claimant's right scapula. At this appointment, Claimant was complaining of pain on the medial aspect of her right elbow. In his assessment, he noted that "[a]lthough the MRI is suggestive of a SLAP tear and biceps tendon tear, this is completely asymptomatic on examination and the patient is not complaining about it at all." He did note that Claimant's pain was originating from the medial portion of her scapula and the medial portion of her elbow. He recommended physical therapy.

7. On April 6, 2023, Claimant saw Dr. Reister at Concentra. Examination of Claimant's shoulder showed a positive painful resisted supination, positive Speed's test, and positive impingement test. He felt that the shoulder pathology was surgical only with regard to the biceps tendon, which was "just basically shredding inside the joint" and the labral tear at the same place. He also noted that Claimant had some mild tendinosis in the area of the shoulder of the rotator cuff. Dr. Reister recommended biceps and labral surgery with an assessment at the time of surgery of the need for decompression. He requested from Respondents prior authorization for the procedure.

8. Dr. William Ciccone performed a record review for Respondents on April 18, 2023. In his report, he opined that Claimant sustained a minor sprain or strain to the right shoulder as a result of her injury. He felt that the injury was minor and that her two-week delay in onset of shoulder pain was inconsistent with an acute injury. He further noted that Claimant's MRI findings were degenerative in nature and that the February 8, 2023 visit documented an intact range of motion with nondiagnostic pain and that Claimant had no physical exam findings associated with an acute rotator cuff or biceps pathology at the February 17, 2023 visit. Therefore, he felt that Claimant's need for surgery was unrelated to Claimant's work injury.

9. On April 20, 2023, Respondents issued a letter to Dr. Reister denying his request for prior authorization for right shoulder surgery, citing Dr. Ciccone's April 18 report.

10. Despite the denial, Claimant proceeded with the right shoulder arthroscopic surgery on July 6, 2023, consisting of bicipital tenotomy and acromioclavicular joint resection as well as debridement of the labrum, glenohumeral joint, and undersurface of the rotator cuff.

11. On October 27, 2023, Dr. Schadler determined Claimant to be at maximum medical improvement and released her to full duty.

12. Claimant filed an Application for Hearing challenging Respondents' denial of prior authorization for the right shoulder surgery.

13. On December 26, 2023, the parties took the deposition of Dr. Ciccone in preparation for hearing. Dr. Ciccone opined that Claimant's shoulder symptoms were probably not related to her work injury. He reasoned that most people who fall and are injured have pain at the time of injury rather than development of pain two weeks later as was the case with Claimant.

14. Dr. Ciccone also observed that the MRI showed tearing of the long head of the biceps tendon and of the labrum. However, he noted there was no rotator cuff tearing. He opined that such findings could be degenerative and unrelated to trauma.

15. Dr. Ciccone also pointed out in his testimony that the February 8, 2023 medical report documented full range of motion in the right shoulder and no pain in the acromioclavicular joint, and the February 17, 2023 report documented a normal examination of the shoulder with no impingement signs or biceps signs. Because Claimant had full range of motion in her shoulder, Dr. Ciccone felt that surgery was not reasonably necessary, as surgery is typically aimed at improving some functional deficit.

16. However, Dr. Ciccone also noted that the April 6, 2023 report documented pain with resistance to strength which differed from prior examinations.

17. Dr. Ciccone ultimately testified that Claimant likely sustained a sprain or strain of her right shoulder at the time of her work injury and that such an injury would not necessitate surgery.

18. The Court finds Dr. Ciccone's testimony and opinions credible and persuasive.

19. At hearing on January 4, 2024, Claimant testified on her own behalf. Claimant testified that on the date of injury she was working as a military family life counselor at a school in East Aurora, providing short-term counseling to children of military servicemen and servicewomen. On the date of injury, she was outside the cafeteria to call children in for a lunch group when she slipped on ice and fell backward, landing on her right hand, thumb, and elbow.

20. Claimant testified that despite the fall, she did not report the injury to her employer that day because she was unsure of the extent of her injuries, and she continued working. It was not until January 30th that she spoke with her supervisor, who advised her to reach out to human resources.

21. Claimant testified that she saw Dr. Horan on February 3, 2023, and February 17, 2023, initially seeking treatment for her shoulder. However, she saw Dr. Reister after Dr. Horan left the practice. Dr. Reister recommended surgery, but Claimant testified that she did not undergo the procedure until July due to scheduling conflicts and a vacation.

22. During cross-examination, Claimant testified that her pain was not minor in the first two weeks following the incident and progressively worsened. She had difficulty raising her arm, laying on her right side, and had limited range of motion. She initially saw a chiropractor, but it did not help with her shoulder pain. Her primary care doctor at Concentra, Dr. Horan, recommended physical therapy, but did not suggest surgery. Claimant continued working and did not take time off for her shoulder injury until her surgery in July. She testified that despite the surgery, she still experiences pain and cannot lay on her right side.

23. The Court finds Claimant's testimony credible.

24. The Court finds that Claimant has not proved by a preponderance of the evidence that the July 6, 2023 surgery was reasonably necessary to cure and relieve her of the effects of her January 6, 2023 injury. Although the Court finds Claimant's testimony credible that she experienced gradually worsening shoulder pain from the outset of her injury, the Court also finds significant that Claimant's pain complaints did not correlate with the biceps tendon and labrum damage evident on the MRI and that Claimant exhibited full range of motion early on in her treatment. Additionally, despite having undergone the surgery, Claimant continues to experience right shoulder pain with no evidence that the surgery improved the function of her right shoulder. The absence of a functional deficit related to the biceps and the labrum early in treatment suggests that the surgery was aimed at curing a condition that was neither the source of Claimant's pain nor a cause of any functional deficit.

25. Claimant's wage records show that she earned gross wages twice monthly in the amount of $2,575.00. This corresponds with an average weekly wage of $1,188.46. The Court finds this to best represent Claimant's wage earning capacity as of the date of injury.

CONCLUSIONS OF LAW

Generally

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

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

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

Medical Benefits

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

As found above, Claimant has not proved by a preponderance of the evidence that the July 6, 2023 surgery was reasonably necessary to cure and relieve Claimant of the effects of her January 6, 2023 injury.

ORDER

It is therefore ordered that:

1. Claimant has not proved by a preponderance of the evidence that the July 6, 2023 surgery was reasonably necessary to cure and relieve her of the effects of her January 6, 2023 injury.

2. Claimant’s average weekly wage is $1,188.46.

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

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

DATED: February 27, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-048-176-002

ISSUE

1. Whether Claimant overcame the Division Independent Medical Examination (DIME) opinion by clear and convincing evidence.

2. Whether there was an overpayment, and if so, what is the appropriate reimbursement plan?

Procedural History

This hearing was initially set for July 19, 2023. Claimant did not appear for the hearing, and on July 21, 2023, the ALJ issued a Show Cause Order. Claimant, through counsel, responded to the Show Cause Order on August 4, 2023. The hearing was reset for September 15, 2023. On September 8, 2023, Claimant's counsel filed a Motion to Withdraw as Counsel. Claimant again failed to appear at the September 15, 2023 hearing, but her counsel, who had not yet been granted leave to withdraw appeared on Claimant's behalf. Counsel for the parties agreed to continue the hearing one more time, and in the interim, attempt to settle the matter. The parties did not reach a settlement, and on October 3, 2023, the ALJ granted Claimant's counsel's Motion to Withdraw. A Notice of Hearing was sent on October 10, 2023, and it was sent to Claimant via email. There is no indication in the record that Claimant did not receive the Notice of Hearing. Claimant did not appear for the November 1, 2023 Hearing.

FINDINGS OF FACT

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

1. Claimant is a 40 year-old female who worked for Employer as a flight attendant. On May 30, 2017, Claimant suffered an admitted work injury when the plane experienced turbulence and she hit her back on the inside shelf of a cabinet that held beverages.

2. Claimant went to the emergency department at Oro Valley Hospital on May 31, 2017. Janelle Doyle, M.D., evaluated and treated Claimant. Dr. Doyle noted that Claimant had a contusion on her back, but there was no evidence of a fracture. She diagnosed Claimant with a lumbar contusion and lumbar strain. (Ex. D).

3. Claimant saw Frank Stagg, M.D., at U.S. HealthWorks Medical Group on June 1, 2017. Dr. Stagg confirmed the diagnosis of a lumbar contusion and included the additional diagnosis of a cervical strain. Claimant had a follow-up appointment with ATP, Dr. Stagg on June 5, 2017. He provided work restrictions for Claimant including a lifting

restriction of 10 pounds and a prohibition from pushing, pulling, bending, and stooping. Claimant was also referred for physical therapy. (Ex. F).

4. At Claimant's June 12, 2017 visit with Dr. Stagg, the diagnosis of a cervical strain was removed, and the only diagnosis remaining was a lumbar contusion. Maximum medical improvement was expected to be reached by June 22, 2017. (*Id.* at 105-106).

5. On June 20, 2017, Dr. Stagg ordered an MRI because Claimant had made no progress after three weeks. He noted Claimant had been to three physical therapy sessions, and was not working. (*Id.* at 108-111).

6. Claimant returned on June 29, 2017, for a follow up appointment. Dr. Stagg noted in the medical record that Claimant's injury was 75% better, and he was waiting for the MRI results. (*Id.* at 113-117). The following week, on July 6, 2017, Marvin Bates, M.D. evaluated Claimant and noted she was 80% better, and they were still awaiting her MRI results. Claimant's diagnosis was noted as a contusion of lower back and pelvis. (*Id.* at 119-123).

7. Dr. Stagg evaluated Claimant on July 13, 2017. He noted that her MRI findings did not warrant a referral to a surgeon. Without explanation, Dr. Stagg added lumbosacral strain to Claimant's diagnosis, in addition to lumbar contusion. He noted Claimant was about the same, and he referred her to a pain specialist. (*Id.* at 126-131).

8. Claimant received epidural spine injections on August 21, 2017 and September 13, 2017, at the Pain Institute of Southern Arizona. She received a right sacroiliac joint injection on February 21, 2018. (Ex. B at 37).

9. Respondents retained Timothy O'Brien, M.D. to complete a records review. Dr. O'Brien issued a report on September 6, 2017. Dr. O'Brien opined that Claimant never had a cervical spine injury, her lumbosacral contusion healed on or before July 6, 2017, and Claimant's ongoing pain was not caused by the contusion not having healed. Dr. O'Brien concluded that Claimant had reached maximum medical improvement (MMI) and the epidural spine injections recommended after evaluation at the Pain Institute of Southern Arizona would not help the workers' compensation injury. He continued to explain that Claimant was not a surgical candidate, that there were no permanent impairments, and Claimant could return to work without restrictions. (Ex. C).

10. On April 29, 2018, Joseph Christiano, M.D., conducted a neurosurgical evaluation of Claimant. Dr. Christiano noted that the source of Claimant's pain was unclear and he requested a repeat MRI of her lumbar spine. (Ex. B).

11. Claimant was seen again by Dr. Christiano on July 30, 2019, and he concluded that Claimant had exhausted all conservative treatment options and recommended she pursue lumbar spine surgery. (Ex. A).

12. On October 23, 2019, Dr. Christiano performed a right L4-5 lumbar microdisectomy on Claimant. Claimant was referred to, and attended, additional physical therapy for recovery from the surgical procedure. Following the surgery, Claimant experienced

uncontrolled pain despite being prescribed narcotics, which her providers attributed to opioid dependency. (Exs. A and B).

13. Claimant was seen by Justin Field, M.D., for complaints of lumbar pain on May 29, 2020. Based on a review of Claimant's MRI scans and a finding of recurrent right L4-5 HNP with moderate foraminal stenosis and spondylosis, Dr. Field recommended Claimant undergo a spinal fusion surgery. (Ex. B)

14. On August 27, 2020, Dr. Field performed a laminectomy and a spinal fusion at L4-5 on Claimant. She was referred to, and attended, physical therapy for recovery from the surgical procedure. (*Id.* at 38-39)

15. Zoran Maric, M.D., conducted an Independent Medical Examination (IME) of Claimant on April 28, 2021. He opined that Claimant sustained a lumbar constusion/strain as a result of the May 30, 2017 work injury. The subsequent MRI scans did not show any structural injuries, just normal age-related changes. Dr. Maric opined that Claimant does not have objective findings to substantiate her complaints, and in his opinion, her persistent subjective pain complaints were no longer organic in nature. He opined that any physical injuries Claimant sustained should have resolved by the middle of July 2017. Dr. Maric concluded the only additional treatment he recommended was supportive care for a period of three months to "wean or detox" Claimant off of the narcotic medication. (Ex. B).

16. Dr. Maric completed an additional IME on November 15, 2021, where he largely echoed the medical opinions included in his April 28, 2021 IME report. On February 28, 2022, Dr. Maric confirmed that he believed Claimant reached MMI on July 11, 2017, which was six weeks after the industrial injury. (*Id.*).

17. On July 11, 2023, Claimant had a DIME appointment with Robert McLaughlin, M.D. Dr. McLaughlin examined Claimant and issued his DIME report on July 31, 2022. Dr. McLaughlin specifically found that Claimant's diagnosis of lumbar contusion, was the only diagnosis related to her work injury, and the following diagnoses were ***not*** attributable to the work injury:

1. Chronic pain;
2. Opioid dependence;
3. Status post L4-5 discectomy;
4. Status post L4-5 fusion;
5. Depression;
6. Anxiety;
7. Possible somatoform disorder;
8. Overactive bladder;
9. Dyspareunia; and
10. Pelvic pain unclear etiology

(Ex. A).

18. Dr. McLaughlin concluded Claimant was at MMI on July 11, 2017, and he gave her a 0% impairment rating as a result of the compensable injury on May 30, 2017. Dr. McLaughlin also concluded that there were no necessary work restrictions related to the workers' compensation injury and that there was no additional treatment necessary for recovery from the work injury. (*Id.*).

19. Dr. McLaughlin based his MMI decision predominantly on Dr. Maric's IME, the mechanism of injury as described by Claimant, Dr. O'Brien's record review, and Claimant's multiple MRIs and electrodiagnostic studies. (*Id.*).

20. Claimant did not present any evidence to overcome Dr. McLaughlin's MMI date of July 11, 2017. The ALJ finds Claimant reached MMI on July 11, 2017.

21. With respect to the 0% impairment rating, Dr. McLaughlin opined that Claimant experienced a lumbar contusion as a result of the reported work injury of May 30, 2017, that had resolved. (Ex. A).

22. Claimant did not present any evidence to overcome Dr. McLaughlin's impairment rating. The ALJ finds Claimant has a 0% impairment rating.

23. Respondents provided Claimant with Temporary Total Disability (TTD) benefits from May 31, 2017 through July 18, 2022. (Ex. I).

24. Respondents filed a Final Admission of Liability (FAL) on September 13, 2022. In the FAL, Respondents admitted for medical benefits. The FAL reflects the DIME opinion of a July 11, 2017 MMI date, a 0% impairment rating, and no maintenance care. The FAL also states "the TTD benefits paid after the MMI date of July 11, 2017 represent an overpayment. Specifically, there is an overpayment of $120,736.45 in TTD benefits. Respondents reserve the right to collect the overpayment by any method allowed under Colorado law." (Ex. H).

25. The ALJ finds that Respondents have proven by a preponderance of the evidence that they are entitled to reimbursement of an overpayment of TTD benefits in the amount of $120,736.45.

26. There is no evidence in the record with respect to Claimant's ability to pay the overpayment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find

that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

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

Overcoming DIME Opinion

A DIME physician's opinions concerning MMI and impairment carry presumptive weight and may be overcome only by clear and convincing evidence. §8-42-107(8)(b)(III), C.R.S. The party seeking to overcome the DIME physician's findings bears the burden of proof by clear and convincing evidence. *Magnetic Eng'g, Inc.* 5 P.3d at 385. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colo. Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). 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*., WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

Dr. McLaughlin concluded that Claimant reached MMI on July 11, 2017, and had a 0% impairment rating. He also concluded that there were no necessary work restrictions or maintenance care related to the injury. In explaining his rationale for these conclusions, Dr. McLaughlin referred to the medical opinions from IME physician, Dr. Maric, the record review completed by Dr. O'Brien, Claimant's description of the mechanism of injury, and the lack of objective findings on the multiple MRIs and electrodiagnostic studies performed on Claimant.

As found, Claimant did not present any evidence to challenge Dr. McLaughlin's MMI date or impairment rating. Claimant failed to overcome Dr. McLaughlin's DIME opinions, by clear and convincing evidence. As found, Claimant reached MMI on July 11, 2017 with a 0% impairment rating.

Recovery of Overpayment

Money received by a claimant that was paid in error constitutes an overpayment. §8-40-201(15.5)(a)(III), C.R.S. As found, Respondents overpaid Claimant TTD benefits in the amount of $120,736.45. The Colorado Court of Appeals has held that ALJs have discretion to fashion an appropriate remedy with regard to overpayments. *See Turner v. Chipotle Mexican Grill*, W.C. No. 4-893-631-07 (I.C.A.O. Feb. 8, 2018), *citing Simpson v. Indus. Claim Appeals Offi*ce, 219 P.3d 354 (Colo. App. 2009); *see also Arenas v. Indus. Claims Appeals Office*, 8 P.3d 558 (Colo. App. 2000); *see Louisiana Pacific Corp v. Smith*, 881 P.2d 456 (Colo. App. 1994). Respondents seek a payment of $500 per month from Claimant to repay the overpayment. Claimant did not present any evidence with respect to her ability to repay the overpayment. There is no objective evidence in the record that Claimant is employed or currently has an income source. The ALJ finds that a monthly payment of $200 is reasonable.

ORDER

It is therefore ordered that:

1. Claimant failed to prove by clear and convincing evidence that the DIME opinion regarding maximum medical improvement and permanent impairment is incorrect.

2. Claimant must repay the overpayment of $120,736.45 to Respondents. The ALJ orders Claimant to pay back this amount at a rate of $200 per month until the entire amount has been reimbursed.

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

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

DATED: February 27, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-130-814-004

ISSUE

I. Has Claimant shown, by a preponderance of the evidence, that Respondents should pay penalties for violation of C.R.S. §8-42-105(3)(c)? If so, what is an appropriate penalty?

FINDINGS OF FACT

Based upon the evidence received, the ALJ makes the following Findings of Fact:

1. On February 12, 2020, Claimant sustained an admitted injury to her low back when she slipped and fell on ice. She initially treated at Centura Health in Canon City. She was treated by Physician's Assistant Steven Quackenbush.

2. Over the next several months, Claimant received conservative treatment. Eventually she was referred to Dr. Stanton at Colorado Springs Orthopedic Group for a surgical evaluation. After evaluation, Dr. Stanton recommended surgery.

3. After being referred to Dr. Stanton, Claimant did not return to Centura Health and was not seen by P.A. Quakenbush until April 17, 2023

4. Dr. Stanton performed L5-S1 anterior-posterior lumbar fusion surgery on June 17, 2022. Following the surgery, Dr. Stanton provided post-surgical care, including office visits, x-rays, physical therapy, medications and provided work restrictions. On March 13, 2023, Dr. Stanton also placed Claimant at MMI and indicated that Claimant was able to return to work full duty on October 21, 2022.

5. The ATP, Dr. Reiter placed Claimant at MMI on May 19, 2023 and determined that Claimant had a 21% whole person impairment. Respondents filed a final admission of liability on May 30, 2023 admitting to the impairment rating.

Testimony on Temporary Total Disability/Penalties

6. Claimant testified that when her TTD stopped, it delayed her ability to make her mortgage payment and car payment.

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

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

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

Penalties, Generally

d. C.R.S. § 8-43-304(1) provides for penalties against an employee, employer or insurance carrier who does any of the following: "(1) violates any provision of the . . . Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or the Panel; or (4) fails,

neglects, or refuses to obey any lawful order of the director or the Panel." *Pena v. ICAO*, 117 P.3d 84 (Colo. App. 2004).

e. Whether statutory penalties may be imposed under § 8-43-304(1) C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…"

f. Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (ICAO,. Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

g. The question of whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see also Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*. If the claimant makes such a prima facie showing the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra, Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

h. Given the absence of ongoing treatment from Centura after Dr. Stanton assumed care for the Claimant, it was reasonable for the adjuster to assume that Dr. Stanton had become "the" authorized treating physician. Since the termination of Claimant's TTD was based on this reasonable, albeit incorrect assumption, no penalty is awardable.

ORDER

It is therefore Ordered that:

1. Dr. Stanton was not "the" authorized treating physician for purposes of C.R.S. §8-42-105(3)(c). As such it was error for the adjuster to terminate Claimant's TTD based on his determination that the Claimant was released to return to work full duty. Claimant is entitled to TTD until May 19, 2023 when she was placed at MMI by Dr. Reiter.

2. The request for penalties by Claimant is denied and dismissed.

3. Respondents shall pay interest at 8% for all benefits not paid when due.

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 28, 2024

/s/ Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-194-823-002

ISSUES

1. Whether Respondents established by clear and convincing evidence that the DIME physician incorrectly determined Claimant was not at maximum medical improvement.
2. If Respondents prevail, whether Respondents established by clear and convincing evidence that the DIME physician's provisional permanent impairment rating was incorrect.
3. Whether Claimant established by a preponderance of the evidence that Claimant is entitled to temporary total disability benefits from March 8, 2022 until terminated by law.

FINDINGS OF FACT

1. Claimant worked for Employer as an aircraft mechanic. On January 3, 2022, Claimant sustained an admitted injury to his left knee arising out of the course of his employment with Employer. The injury occurred while Claimant was standing on a raised boom lift that would not lower. To release the boom lift, Claimant was required to jump up and down on the lift until it released. Claimant testified that his left knee was injured in the process, and he noticed pain and swelling in his knee after the injury occurred.

2. Before the injury at issue, Claimant sustained work-related injuries to his left knee, including a meniscal tear and ACL strain in 2019, for which he underwent arthroscopic debridement on October 17, 2019. (Ex. F). After physical therapy and treatment, Claimant was placed at MMI on March 2, 2020 by his authorized treating physician, James Hebard, M.D., at Concentra. At MMI, Dr. Hebard indicated that Claimant's knee was not sore at rest, non-tender to palpation, and "stiff but not tender to full symmetrical ROM." (Ex. 10). Claimant reported at that time that he had returned to work full duty, and that his knee felt good although it was "a little achy here and there with work and therapy exercises." (Ex. 10). No credible evidence was admitted demonstrating Claimant received further treatment for his left knee after March 2, 2020, until after the January 2022 industrial injury.

3. Claimant credibly testified that from March 2, 2022 until January 3, 2022, he was able to perform his work-related duties, which were very physical and included lifting and carrying heavy equipment, standing, walking, squatting, and crawling in small spaces. Claimant testified he had no medical care during this period, and had no issues with work or recreational activities. He further testified that after the January 3, 2022 injury, he could not perform his job duties due to his knee injury, and that he was not able to perform modified duties, because Employer did not offer modified work. Claimant has not worked since January 3, 2022. Claimant's testimony was credible.

4. Following his January 3, 2022 injury, Claimant first sought treatment on January 10, 2022 at Concentra. Claimant was referred for an orthopedic evaluation and x-rays of his knee were performed. (Ex. 12 & 13). The x-ray was interpreted as showing degenerative disease with osteophyte protrusion along the joint spaces, and a suspected depressed fracture of the lateral tibial plateau, with effusion in the joint. (Ex. 13). At the January 10, 2022 visit, the treating provider, Teryn Mori, PA-C, recommended work restrictions including no kneeling, squatting, or crawling, and indicated Claimant was able to return to work at modified duty on January 13, 2022. (Ex. 12).

5. Claimant's next documented medical treatment was at Concentra on January 25, 2022, where he underwent a left knee MRI and was examined by Keith Meyer, NP, nurse practitioner for Jeffrey Baker, M.D. Claimant reported he was standing on a boom lift, working on the tail of an aircraft when the boom became stuck. He indicated he jumped up and down on the boom, and as he was coming down from a jump, the boom released and came upward, jamming into his left knee. Claimant reported feeling his knee pop, and experiencing intense pain in his left knee. Claimant also reported his prior left knee surgery from 2019, and indicated that following that surgery, his left knee was "never back to 100%." NP Meyer diagnosed Claimant with a left knee strain, indicated that the injury diagnosis was consistent with his stated mechanism of injury, and referred Claimant for physical therapy. Work restriction including limitations of walking, standing, crawling, kneeling, climbing, and squatting were recommended.(Ex. 12)

6. The January 25, 2022 MRI was interpreted as showing diffuse tricompartmental grade 4 cartilage damage with large effusion and extensive synovitis, without osteophyte formation. The interpreting radiologist noted that these findings were "highly suspicious for underlying inflammatory arthropathy." Claimant was also noted to have severe chronic maceration of both menisci with extrusion from the joint space, a chronic appearing partial tear of the anterior cruciate ligament, and partial tearing of the deep medial collateral ligament from the femoral attachment.(Ex. C).

7. Claimant was then referred to an orthopedic surgeon for evaluation, and came under the care of Lucas Schnell, D.O., at Concentra. At his February 7, 2022 examination, Dr. Schnell noted moderate effusion, and patellar crepitus of the left knee. Dr. Schnell opined that surgical treatment was not recommended, and that Claimant did not have mechanical symptoms of a torn meniscus. He performed a left knee intraarticular steroid injection for "severe arthritis." In commenting on causation, Dr. Schnell noted that Claimant has underlying pre-arthrosis of the knee which he exacerbated. He indicated that he believed the action of jumping up and down likely could have caused the inflammatory reaction in Claimant's knee. (Ex. C).

8. Claimant attended physical therapy at Concentra over the following two weeks, and saw Jeffrey Baker, M.D., at Concentra on February 21, 2022. Claimant reported constant pain of variable intensity, difficulty walking, stiffness, and tenderness, and that his pain was not relieved with physical therapy. On examination, Dr. Baker noted swelling in the left knee, diffuse tenderness at the anterolateral aspect, lateral joint line, and undersurface of the patella. Claimant's range of motion was 125 degrees flexion with pain, and 5 degrees of extension with pain. Dr. Baker found positive ligamentous laxity on

anterior drawer, Lachman's, and varus stress tests. He assigned continued work restriction, including walking and standing limited to 30 minutes per day, and 10-pound lifting and pushing restrictions. (Ex. B).

9. On March 7, 2022, Claimant returned to Dr. Baker reporting that his knee symptoms were unchanged. On examination, Dr. Baker noted the same swelling, diffuse tenderness, and positive ligamentous laxity tests as his February 21, 2022 examination. He also noted crepitus on palpation and limited range of motion in all planes. Dr. Baker then released Claimant to full duty work, placed him at MMI without an impairment rating, and indicated that he would "close the case so [Claimant] can follow up with his PCP for referral to Ortho to discuss replacement. His underlying pathology is chronic in nature." (Ex. B).

10. On March 16, 2022, Respondents filed a Final Admission of Liability (FAL), consistent with Dr. Baker's MMI determination. (Ex. 4).

11. Claimant was under work restrictions imposed by his treating providers from January 4, 2022 until March 7, 2022, when Dr. Baker placed Claimant at MMI and released Claimant to full duty, and received TTD benefits for this period. (Ex. 4).

12. On March 28, 202, Claimant requested a Division-sponsored independent medical examination (DIME), and objected to the FAL. (Ex. 5 & 6).

13. On April 20, 2022, Claimant saw Kelly Sanderford, M.D., an orthopedic surgeon, outside of the workers' compensation system. Dr. Sanderford's examination was consistent with Dr. Baker's examination. Based on his review of Claimant's MRI films, Dr. Sanderford indicated that Claimant's condition was "an acute on chronic injury." He further indicated that he did not believe Claimant could perform his normal work activity and recommended a sedentary work restriction, including no crawling, kneeling, squatting, no operation of machinery, and wearing a splint or brace at work. (Ex. 13).

14. On January 3, 2023, Alicia Feldman, M.D., performed a DIME examination and issued a report. (Ex. D). Dr. Feldman reviewed Claimant's medical records, including his March 2, 2020 record placing him at MMI from his prior work-related left-knee injury, and a left knee x-ray report from September 2, 2019. Based on her examination and review of medical records, Dr. Feldman determined that Claimant was not at MMI, and should consult with an orthopedic surgeon for a probable total knee arthroplasty and post-operative care. In explaining her rationale, Dr. Feldman wrote:

> "I do not feel that the claimant has reached maximum medical improvement. He has had a significant change in function and range of motion following the work-related injury. There has been a significant change in his imaging between 2019 and 2022. I feel that further treatment such as a total knee arthroplasty would result in significant functional gains and as a result he has not reached maximum medical improvement. Per the Colorado Work Comp Treatment Guidelines, lower extremity knee, aggravated arthritis, 'Occupational relationship, the provider must establish the occupational

relationship by establishing a change in the patient's baseline condition and a relationship to work activities including but not limited to physical activities.' There is a clear change in the patient's baseline condition following the work-related activities and so per the Colorado Work Comp Treatment Guidelines, the aggravated osteoarthritis is work-related. The work-related aggravated osteoarthritis requires further treatment, and the claimant is not at maximum medical improvement." (Ex. D).

15. Dr. Feldman indicated there had been a clear change in Claimant's subjective pain, function and objective range of motion measurements compared to when he was placed at MMI in 2020. She further opined that Claimant's osteoarthritis was not previously symptomatic, and appeared not to be present in his 2019 x-rays. Dr. Feldman agreed with Dr. Sanderford's assessment of work restrictions, and indicated Claimant as not capable of returning to full duty work. (Ex. D).

16. Following Dr. Feldman's DIME report, Respondents engaged orthopedic surgeon Adam Farber, M.D., to perform a record review. (Ex. A). Dr. Farber testified at hearing and was admitted as an expert in orthopedic surgery. Based on his review of medical records, Dr. Farber opined that there was no objective evidence that Claimant's work injury resulted in an acute exacerbation or acceleration of Claimant's pre-existing osteoarthritis because the imaging studies did not document an acute structural aggravation of his condition. Because he did not meet or talk with the Claimant, Dr. Farber was unable to opine on whether Claimant's pre-injury baseline condition was affected by his January 3, 2022 injury.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Overcoming DIME on MMI

Respondents contend that Dr. Feldman's opinion that Claimant is not at MMI is incorrect. MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion,* W.C. No. 4-732-992 (ICAO Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transp. v. Indus. Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Pub. Sch.,* W.C. No. 4-974-718-03 (ICAO Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Indus. Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. Nat'l By-Products, Inc.,* W.C. No. 4-320-606 (ICAO Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Constr. Mgmt.,* W.C. No. 4-356-512 (ICAO May 20, 2004). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI.

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge,* W.C. No. 4-914-378-02 (ICAO June 25, 2015). 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 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. Indus. Claim Appears Office*, *supra*.

A 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). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Indus.,* WC 4-712-812 (ICAO Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Respondents have failed to establish by clear and convincing evidence that the DIME physician's opinion that Claimant is not at MMI is incorrect. The evidence demonstrates that Claimant sustained an injury to his left knee arising out of the course of his employment with Employer. Dr. Schnell opined that Claimant's work injury exacerbated his pre-existing osteoarthritis, and that the action of jumping up and down likely caused an inflammatory reaction in his knee. No credible evidence was offered to demonstrate that Claimant's left knee was significantly symptomatic in the nearly two years between being placed at MMI from his 2019 injury and the work injury at issue. When Claimant was placed at MMI in from the earlier injury, he had full range of motion of the knee, and occasional achiness with work and exercise. Following his work injury, Claimant had swelling, limitations of range of motion, and pain in his knee which prevented him from working. When Dr. Baker placed Claimant at MMI in March 2022, he offered no cogent rationale for doing so, given Claimant continued to report symptoms that were essentially unchanged since the January 2022 injury.

Dr. Feldman opined that Claimant was not at MMI. Citing the Colorado Workers' Compensation Treatment Guidelines for occupational relationship of aggravated arthritis of the knee, Dr. Feldman found that Claimant had a significant change in function and range of motion following his January 2022 injury, and that there was a clear change in his baseline condition. She opined that further treatment had the potential for significant functional gains, and that further treatment could include treatment, "such as a total knee arthroplasty." Consequently, she recommended Claimant be evaluated by an orthopedic surgeon. The validity of Dr. Feldman's suggestion that Claimant may require a total knee arthroplasty is not an issue before the ALJ, nor could the ALJ order such treatment in the absence of a recommendation from an ATP. *See Potter v. Ground Servs. Co.*, W.C. No. 4-935-523-04 (ICAO Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-

937-329-03 (ICAO May 15, 2018) *citing Short v. Property Mgmt. of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995). However, the evidence does demonstrate that Claimant sustained, at a minimum, a symptomatic aggravation of his pre-existing knee arthritis, resulting in limitations in function and pain. Claimant's knee function did not return to his pre-injury levels, and he continued to experience pain in his knee. Dr. Feldman's opinion that Claimant be evaluated for potential future treatment because his injury-related symptoms have not resolved consistent with her opinion that Claimant has not reached MMI.

Dr. Farber's opinion does not establish that Dr. Feldman's MMI determination is highly probably incorrect. The crux of Dr. Farber's opinion is that Claimant's work injury did not result in a "structural" change to his knee, and therefore the need for further treatment cannot be causally related to his work injury. However, a structural change is not required to establish an aggravation of a pre-existing condition, and purely symptomatic aggravation is sufficient if it caused the Claimant to need treatment he would not otherwise have required but for the work injury. *In re Claim of Frank O'Neil Cambria*, WC No. 5-066-531-002 (ICAO May 7, 2019). Dr. Farber was unable to credibly opine whether Claimant's work-related knee injury caused symptomatic aggravation because he did not speak with the Claimant and had no information upon which he could gauge Claimant's pre-January 2022 baseline condition or function.

Respondents have failed to establish by evidence that is highly probable and free from serious doubt that Dr. Feldman's determination that Claimant is not at MMI is incorrect.

Because Respondents have failed to overcome the DIME's MMI opinion by clear and convincing evidence the issue of whether her provisions impairment rating is incorrect is not ripe for determination.

TEMPORARY TOTAL DISABILITY BENEFITS

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* § 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998).

TTD benefits 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. The occurrence of any one of these conditions is sufficient to terminate TTD benefits. *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661, 662 (Colo. App. 1995).

Claimant was under work restrictions which precluded him from working from the date of injury until March 7, 2022, and received TTD for that time period. Claimant's TTD ended on March 7, 2022, based on Dr. Baker's MMI determination and release to full duty.

MMI and release to full duty are two distinct bases for terminating TTD under § 8-42-105(3). Because Respondents have failed to overcome the DIME opinion with respect to MMI, only one basis exists for termination of TTD – Dr. Baker's release to full duty. After Dr. Baker discharged Claimant, he recommended that Claimant follow up with his primary care provider and obtain an orthopedic surgery referral. Claimant then saw Dr. Sanderford, who opined that Claimant was unable to return to full duty work and opinion to which Dr. Feldman agreed. Although the record does not indicate whether Claimant saw Dr. Sanderford on a referral from his primary care provider, the obvious intent of Dr. Baker's recommendation was that Claimant see an orthopedic surgeon, thus his recommendation constituted an orthopedic referral in the ordinary course of treatment. *See Cabela v. Indus. Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008).

While the DIME physician's is given presumptive weight, the DIME's opinion on release to full duty is not entitled to such weight. *Talboys v. The Greenhouse Restaurant*, W.C. No. 4-597-998 (ICAO Sep. 25, 2013). Generally, the ALJ may not disregard the ATP's opinion concerning work restrictions, unless the record contains conflicting opinions from multiple attending physicians. *See Burns v. Robinson Dairy, Inc.*, 911 P.2d 661, 662 (Colo. App. 1995). Dr. Baker and Dr. Sanderford offered differing opinions of Claimant's work restrictions, which are both relevant to determination of Claimant's TTD claim. *See e.g., Fabjancic v. Maxim Healthcare*, W.C. No. 5-050-580-01 (ICAO Nov. 21, 2018).

The ALJ finds Dr. Sanderford's restrictions to be the more credible based because Dr. Baker's full duty release is in apparent conflict with his other findings. Specifically, between February 21, 2022, when Dr. Baker had in place work restrictions, and March 7, 2022, when Dr. Baker released Claimant to full duty, there was no documented change in Claimant's condition or function. When Dr. Baker discharged Claimant on March 7, 2022, it was not because Claimant's condition had improved, but his opinion that his pathology was pre-existing. Dr. Baker's recommendation that Claimant consult with an orthopedic surgeon to discuss knee replacement indicates that Claimant's physical condition and function had not improved. The ALJ infers that Dr. Baker's return to full duty was a function of closing Claimant's workers' compensation case, rather than an assessment of his physical and functional abilities to perform work.

The ALJ therefore concludes that Claimant is entitled to temporary total disability benefits from March 8, 2022, until terminated by statute.

ORDER

It is therefore ordered that:

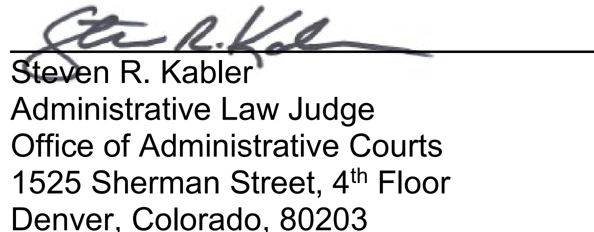
1. Respondents have failed to overcome the Dr. Feldman's MMI opinion by clear and convincing evidence.

2. Claimant's is entitled to for temporary total disability benefits from March 8, 2022 until terminated by statute.

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

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

DATED: February 28, 2024



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