ISSUES

1. Whether Respondents established by clear and convincing evidence that the Division Independent Medical Examination (DIME) physician's determination that Claimant has not reached maximum medical improvement (MMI) is incorrect.

2. If Respondents overcome the DIME with respect to MMI, determination of Claimant's impairment rating, including whether Clamant has any impairment of her left shoulder.

3. If Respondents overcome the DIME with respect to MMI, and it is determined that Claimant has a permanent impairment of her left shoulder, whether Claimant has established that such impairment should be converted to a whole person impairment.

4. If the DIME is not overcome, whether Claimant established by a preponderance of the evidence that the left shoulder surgery recommended by Dr. Schwappach is reasonable, necessary, and causally related to her September 20, 2022.

FINDINGS OF FACT

1. Claimant worked for Employer as a physical therapist assistant providing home health care. On September 20, 2022, while leaving a patient's home, Claimant tripped over a paver, and fell on her left hip/buttock with her left arm outstretched, twisting her left knee. Claimant initially called a Concentra injury hotline, and elected to start with conservative home care for a week to see if her immediate symptoms resolved. Claimant testified that after falling, she felt sharp, deep pain in her left shoulder that was continuous, and did not resolve.

2. Claimant testified that she had a prior left shoulder injury in approximately 2008, which required a surgery. Claimant testified, credibly, that she had no medical treatment for her left shoulder since approximately three months after the 2008 surgery, and was able to function in her position as a home health care physical therapy assistant prior to her September 20, 2022 injury without work restrictions.

3. When her symptoms did not resolve, Claimant went to Concentra, where she saw Lacy Esser, PA, physician assistant for Claimant's authorized treating physician (ATP) Wendy Carle, M.D. Claimant reported mechanical catching in her left knee, coccyx pain, and left shoulder pain when reaching over 90 degrees.[1] Claimant reported that she had a left shoulder labrum repair surgery in 2006 or 2008. On examination of her left shoulder,

[1] Because the issues before the ALJ relate to Claimant's left shoulder, the ALJ's findings of fact are primarily limited to issues related to the left shoulder. Except as specifically stated, the ALJ makes no findings regarding other body parts.

Claimant had tenderness in the bicipital groove and anterior shoulder, and pain with active forward flexion at 160 degrees and abduction at 150 degrees. An x-ray of Claimant's left shoulder was unremarkable. Ms. Esser diagnosed Claimant with a coccyx contusion, left shoulder sprain, and left knee sprain, and referred Claimant for physical therapy. (Ex. 8).

4. Claimant attended two sessions of physical therapy, but elected to self-manage her physical therapy based on her experience as a physical therapy assistant.

5. On October 5, 2022, Claimant returned to Ms. Esser with continued tenderness in the bicipital groove and anterior shoulder, and pain on active range of motion, which had improved slightly. Ms. Esser ordered an orthopedic evaluation for Claimant's left shoulder and knee, and indicated Claimant might require a left shoulder MRI. (Ex. J).

6. Two weeks later, on October 19, 2022, Claimant saw Dr. Schwappach, who noted that Claimant had "pain-free range of motion of her shoulders, elbows, and wrists bilaterally." Dr. Schwappach indicated that Claimant's shoulder appeared to be resolving. (Ex. 6). Claimant testified that she did not recall reporting that her shoulder had full range of motion, and that Dr. Schwappach did not perform formal range of motion measurements. She also did not recall being completely pain free, although while sitting and not using her shoulder, she would not have pain.

7. On October 27,2022, Claimant saw Ms. Esser again, reporting that her shoulder remained painful with movement and pops, and that it felt similar to the labral tear Claimant had in the past. On examination, Claimant continued to have pain in the bicipital groove, and anterior shoulder, and pain with active range of motion. (Ex. 8).

8. On November 15, 2022, Claimant had a left shoulder MRI, which showed evidence of a previous rotator cuff and labral repair, a large full-thickness and nearly full width tear of the distal supraspinatus tendon, with moderate supraspinatus muscular volume loss (*i.e.*, atrophy of the muscles). The MRI report also states: "In addition, it appears there is probable marked attenuation or full-thickness tearing of the supraspinatus tendon distally at the greater tuberosity insertion anteriorly." (Ex. O).

9. On November 17, 2022, Claimant returned to Dr. Schwappach to address her left shoulder. Claimant reported that her left shoulder pain was currently 0/10, but increased to 7/10 on a bad day. She reported left glenohumeral pain when sleeping on her shoulder and with activity, associated with arm weakness, and limited range of motion worse with overhead activity and forward elevation. Based on his review of Claimant's MRI, Dr. Schwappach diagnosed Claimant with a complete left rotator cuff tear, and recommended a mini open rotator cuff repair. He also recommended surgery on Claimant's left knee. (Claimant had a pre-existing prosthetic knee joint, which became loose as a result of her work injury). (Ex. K).

10. Claimant saw Dr. Carle on November 21, 2022, reporting continuing shoulder pain, which she indicated rated a 0-7/10 during the day, and up to 10/10 at night. On rotator cuff testing, Claimant had positive tests for a painful arc and labrum stability (*i.e.*, positive

O'Brien's test), and a positive Speed's test at her biceps. Dr. Carle diagnosed Claimant with a traumatic rotator cuff tear. (Ex. 5).

11. On January 4, 2023, Claimant filed a Worker's Claim for Compensation, reporting injuries to her left shoulder and knee. (Ex. B). Respondents timely filed a General Admission of Liability (GAL) admitting for medical benefits. (Ex. C).

12. On January 18, 2023, Respondents' sent Claimant for an independent medical examination (IME) with William Ciccone, M.D. Dr. Ciccone opined that Claimant suffered a "minor injury to the left shoulder." He indicated that the Claimant's mechanism of injury could be associated with a rotator cuff tear, but opined that her shoulder range of motion was inconsistent with a rotator cuff tear. He further noted that the shoulder atrophy demonstrated on the MRI was consistent with a chronic tear. Dr. Ciccone indicated that he believed Claimant suffered a minor sprain/strain with a temporary aggravation of her left shoulder. He opined that injury had resolved, returned to baseline, and reached maximum medical improvement (MMI) on October 19, 2022; the first date she saw Dr. Schwappach. Dr. Ciccone noted that he could not explain why Claimant had full range of motion when she saw Dr. Schwappach, but diminished range of motion on his examination. He recommended no work-related medical treatment for the left shoulder. (Ex. L).

13. Dr. Schwappach performed surgery on Claimant's left knee on March 27, 2023, but had not yet requested authorization for surgery on Claimant's left shoulder. (Ex. K & 5). On April 21, 2023, Dr. Schwappach requested authorization for rotator cuff surgery. (Ex. 6). Based on Dr. Ciccone's opinion, Respondents denied authorization for the mini open rotator cuff repair recommended by Dr. Schwappach on April 25, 2023. (Ex. G).

14. Over the following months, Claimant saw Dr. Schwappach for post-knee surgery follow up, and continued to see Dr. Carle for both her shoulder and knee. (Ex. 5, J, & K). During this time, Claimant continued to experience ongoing left shoulder issues, including decreased range of motion, weakness, and pain, which had become worse with movements. On April 18, 2023, Claimant reported to Dr. Carle that her left shoulder interfered with her ability to work, and perform activities of daily living. For example, Claimant reported that she experienced significant pain shutting a car door with her left arm that took four days to calm down. Claimant attempted to manage her left shoulder pain with lidocaine patches and medications. (Ex. J).

15. At her examination on August 31, 2023, Dr. Carle noted that Claimants left shoulder active range of motion in flexion and abduction had decreased to 70 and 40 degrees with pain, respectively), with decreased strength. Claimant's passive range of motion was 130 and 100 degrees with pain, respectively). Dr. Carle referred Claimant to Scott Richardson, M.D., for an impairment rating and indicated Claimant would be at MMI at that time. (Ex. 4).

16. On September 22, 2023, Claimant saw Dr. Richardson for an impairment rating. Dr. Richardson placed Claimant at MMI on that date. He assigned Claimant an 18% left upper extremity impairment rating, and a 7% left lower extremity impairment rating for her

left knee. The two combined impairment ratings correspond to a 14% whole person impairment. (Ex. J).

17. On February 14, 2024, Claimant underwent a DIME with Michael Miller, M.D. (Ex. M and D). Dr. Miller found Claimant was not at MMI because he did not feel Claimant had received sufficient evaluation and treatment for her left shoulder. Dr. Miller testified at hearing, and noted that Claimant had no reports of pain, limited range of motion, or disability of her left shoulder prior to September 20, 2022. After the September 20,2 022 injury, Claimant developed progressive pain, limited range of motion, and progressive disability of her left shoulder, and that he believes Claimant's work injury on September 20, 2022 caused the worsening and progression of symptoms in her left shoulder.

18. Dr. Miller interpreted Claimant's MRI as showing two different tears, the full thickness supraspinatus tear, and a second tear more distal in the supraspinatus tendon at the greater tuberosity insertion. Dr. Miller acknowledged and agreed that Claimant had a prior shoulder injury and surgery, a pre-existing full—thickness rotator cuff tear, and that her MRI showed atrophy in the left shoulder musculature, but does not believe the fact that the MRI shows chronic changes excludes acute pathology. He opined that, at the least, Claimant probably sustained an aggravation of a pre-existing rotator cuff tear, if not an acute tear. He testified that the single visit with Dr. Schwappach where Claimant reported good range of motion (*i.e.*, October 19, 2022), did not warrant dismissing Claimant's complaints after that date as unrelated to her work injury.

19. Dr. Miller indicated that no adequate explanation for Claimant' ongoing symptoms had been determined, and that even Dr. Ciccone, a shoulder specialist, could not explain Claimant's continued range of motion deficits. Based on his examination and review of records, Dr. Miller concluded that Claimant has not reached MMI and requires further evaluation and treatment of her left shoulder as a result of the September 20, 2022 work incident. Dr. Miller's testimony and opinions were credible and persuasive.

20. Following the DIME, Respondents sent Claimant for an IME with Qing-Min Chen, M.D, an orthopedic surgeon. Dr. Chen noted that at his examination, Claimant's left shoulder was pseudoparalytic, and that if Claimant had suffered an acute on chronic aggravation of her rotator cuff, he would have expected Claimant to be pseudoparalytic earlier, and edema within the shoulder on MRI images, which he did not review. Dr. Chen opined that the surgery recommended by Dr. Schwappach is not reasonable or necessary at this time, because a new MRI needed to be performed to determine whether a different surgery, such as a shoulder replacement would be the appropriate treatment. Dr. Chen opined that Claimant remained at MMI, and agreed with Dr. Ciccone's assessment. Based on Dr. Chen's opinion, Respondents again denied authorization for Claimant's left shoulder surgery.

21. At hearing, Respondents agreed that if Claimant is not at MMI, and has work restrictions, she would be entitled to temporary disability benefits as determined by statute. The evidence at hearing was insufficient to determine the periods for which Claimant would be entitled to temporary 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 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. Miller's determination that Claimant has not reached MMI was incorrect. 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 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.” *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Indus. Claim Appears Office*, *supra*.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO Nov. 17, 2000). 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 v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

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.” § 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. § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, 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 Transportation 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 Public Schools* 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. National 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 Construction Management,* 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.

Respondents have failed to establish by clear and convincing evidence that Dr. Miller’s opinion that Claimant is not at MMI is incorrect. The evidence demonstrates that Claimant sustained an injury to her left shoulder on September 20, 2022, and that the

mechanism of injury was consistent with a shoulder injury. Claimant immediately felt symptoms in her left shoulder, and continued to report decreased range of motion and pain in the left shoulder after the date of injury. No credible evidence was admitted indicating that Claimant had existing pain, range of motion restrictions, or functional deficits before September 20, 2022 injury. Although Dr. Schwappach indicated on October 19, 2022, that Claimant was pain free with full range of motion, that finding is inconsistent with the remainder of Claimant's medical records. It also fails to account for the Claimant's report to Dr. Carle that her pain would wax and wane (*i.e.*, range from 0-1/10). The ALJ does not find it credible that Claimant recovered from her work injury on October 19, 2022, and spontaneously developed the same symptoms eight days later that were caused entirely by her pre-existing shoulder pathology. Dr. Miller's opinion that Claimant's September 20, 2022 work-injury resulted in at least an aggravation of her pre-existing pathology, and possibly an acute injury is credible and consistent with Claimant's course of treatment. That Dr. Ciccone and Dr. Chen expressed different opinions does not constitute clear and convincing evidence that Dr. Miller's determination of causation and need for further evaluation and treatment is highly probably incorrect.

Because Claimant is not at MMI, determination of any impairment rating for Claimant's left shoulder, and conversion of any impairment reserved for future determination.

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, W.C. No. 4-797-103 (ICAO Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

"A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury." *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999, (2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App.1990).

Respondents do not challenge that the left shoulder surgery recommended by Dr. Schwappach is reasonable or necessary, but do not agree that the need for surgery is causally-related to Claimant's work injury. While Claimant had pre-existing pathology in her left shoulder, the evidence demonstrates that Claimant was functional and asymptomatic prior to September 20, 2022. After her work injury, Claimant's left shoulder condition deteriorated to the point where she required surgery. The ALJ finds credible the opinion of Dr. Miller that Claimant sustained, at a minimum, an aggravation of her pre-existing condition. This aggravation led to the need for treatment, including the surgery recommended by Dr. Schwappach. Claimant's request for authorization of surgery as recommended by Dr. Schwappach is granted.

ORDER

It is therefore ordered that:

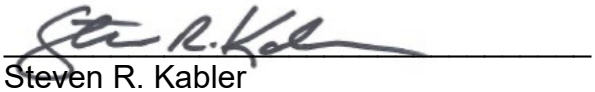
1. Respondents have failed to establish that the DIME's opinions with respect to causation and MMI are incorrect.

2. Claimant's request for authorization of surgery recommended by Dr. Schwappach 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 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 1, 2025



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

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that in June 2024 he suffered an injury arising out of and in the course and scope of his employment with Employer?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that medical treatment of his left arm, (including the reverse total shoulder surgery recommended by Dr. Matthew Javernick), is reasonable and necessary to cure Claimant from the effects of the work injury?

3. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits for the period of June 6, 2024 through August 27, 2024, and beginning September 1, 2024 and ongoing?

4. If the claim is found compensable, what is Claimant's average weekly wage (AWW)?

5. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that penalties should be assessed against Respondents for the period of July 10, 2024 through July 25, 2024, for failing to timely file a position on Claimant's case?

FINDINGS OF FACT

1. Claimant began employment with Employer on May 26, 2024 as a truck driver. Claimant's job duties included driving to various stops to pick up food wastes. The process included pulling out a platform/ramp to access the electric pallet jack. Claimant explained that at each stop it was necessary to manually pull the platform out, and then push it back into position. Claimant further testified that this platform weighed approximately 40 pounds.

2. Claimant testified that on June 5, 2024, he was assigned 16 stops. As a result, he moved the truck platform a total of 32 times. Claimant testified that this activity "destroyed" his shoulder. Claimant further testified that he did not report his concerns to Employer on June 5, 2024 because at the end of his shift he was "a little sore".

3. Claimant testified that on June 9, 2024[1], he woke up with left arm numbness. Claimant further testified that he notified his supervisor, Roy, that he wished to obtain medical treatment. It is Claimant's testimony that he was told to wait until Monday to obtain treatment.

Medical treatment prior to June 5, 2024

4. In 1991, Claimant suffered a crush injury to his right arm. This injury led to 19 surgeries on his right arm, and culminated in an amputation below the right elbow.

5. In 2017, Claimant's left shoulder was injured and he underwent two surgeries. The first surgery failed, which necessitated a revision and placement of 13 anchors in Claimant's left shoulder.

Medical treatment after June 5, 2024

6. On June 10, 2024, Claimant sought treatment at Advanced Urgent Care. At that time, Claimant was seen by Alyssa Stockman, PA. Claimant reported left shoulder pain with weakness and numbness from his shoulder and into his hand. PA Stockman diagnosed a left shoulder strain. The medical records of that date also reference evidence of "RBBB"[2] following an EKG. As a result, PA Stockman referred Claimant to the emergency department for further workup.

7. On June 10, 2024, Claimant was seen in the emergency department at Platte Valley Hospital. On June 10, 2024 x-rays were performed on Claimant's left shoulder. The x-rays showed decreased joint space of the glenohumeral joint; screws within the humeral head; and an osteophyte formation within the acromioclavicular joint.

8. On June 11, 2024, Claimant was seen by Don Downs, PA-C. Claimant described his mechanism of injury to PA Downs and reported pain, weakness, and decreased range of motion of the left shoulder. PA Downs opined that Claimant's condition was work related. PA Downs ordered magnetic resonance imaging (MRI) of Claimant's left shoulder and referred Claimant to physical therapy. While at the June 11, 2023 appointment, Claimant also reported that he had found the position with Employer because he had lost his Social Security benefits approximately four months prior and Claimant "had to go to work". Claimant also reported to PA Downs that he did not realize that the job would have "such significant demands on the left arm".

9. On June 13, 2024, Claimant underwent the recommended left shoulder MRI. The results showed a full-thickness and near full width retear of the supraspinatus tendon; a full-thickness and full width retracted infraspinatus tendon retear; infraspinatus fatty atrophy; subscapularis low-grade interstitial and articular sided tearing; torn retracted long of head of the biceps tendon; superior subluxation of the the humeral

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[1] June 9, 2024 was a Sunday.

[2] The ALJ infers that this abbreviation is for right bundle branch block, a heart related condition.

head; acromioclavicular and glenohumeral osteoarthritis; and diffuse labral tearing and degeneration.

10. On June 17, 2024, Claimant returned to PA Downs and reported left shoulder pain that was "burning, stabbing, aching." At that time, PA Downs discussed the MRI results and referred Claimant for an orthopedic consultation.

11. On July 1, 2024, Claimant was seen at Orthopaedic and Spine Center of the Rockies by Dr. Matthew Javernick. At that time, Dr. Javernick reviewed the MRI results and noted that the condition of Claimant's left shoulder appeared to be longstanding. Dr. Javernick summarized the MRI findings as "severe cuff tear arthropathy with superior migration of the humeral head and chronic appearing changes to the acromion with extensive erosive changes to the glenoid." Dr. Javernick recommended a number of potential treatment options including injections and a reverse total shoulder replacement. At that time, Claimant elected to pursue an injection. As a result, Dr. Javernick administered a steroid injection into the glenohumeral space.

12. On July 25, 2024, Respondents filed a Notice of Contest.

13. On September 23, 2024, Claimant attended an independent medical examination (IME) with Dr. Nathan Hammel. In connection with the IME, Dr. Hammel reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In the IME report, Dr. Hammel opined that Claimant did not suffer a work related injury to his left shoulder. In support of this opinion Dr. Hammel explained that Claimant's current and ongoing left shoulder symptoms are solely caused by the pre-existing condition of that shoulder. Specifically, Dr. Hammel referenced the radiology findings of acetabularization of the acromion and rotator cuff arthropathy. Dr. Hammel further opined that "the level of pathology objectively predates the claimed workplace injury".

14. Dr. Hammel's testimony was consistent with his IME report. Dr. Hammel testified that there is no evidence of a work injury that has caused an increase in pathology in Claimant's left shoulder. Dr. Hammel testified that the Claimant's left shoulder is severely arthritic, a process which has gone on for many years. Dr. Hammel also testified that Claimant's left shoulder had a chronic deficiency of the rotator cuff before the alleged work injury. Dr. Hammel explained that such a deficiency existed for a long period of time. Dr. Hammel testified that this is evidenced by the level of fat atrophy present in the torn tendons seen on the MRI.

15. Claimant asserts that his average weekly wage (AWW) is $1,535.70. Claimant calculated this amount based upon his period of employment from May 26, 2024 through June 8, 2024. The records admitted into evidence demonstrate that during that two-week period of employment, Claimant had total earnings of $3,071.40. Therefore, a one week average would be $1,535,70.

16. The ALJ credits the medical records and the opinions of Dr. Hammel. The ALJ finds Claimant's testimony regarding the nature and onset of his symptoms to be neither credible nor persuasive. The ALJ finds that it is more likely than not that prior to commencing employment with Employer, Claimant had the very same left shoulder symptoms that he asserts began on June 5, 2024. The ALJ specifically credits Dr. Hammel's opinion that there is no evidence of a work injury that has caused an increase in pathology in Claimant's left shoulder. Therefore, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that in June 2024 he suffered an injury arising out of and in the course and scope of his employment with Employer.

CONCLUSIONS OF LAW

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

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

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

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

preexisting disease or infirmity to produce disability or need for treatment." *H & H Warehouse v. Vicory, supra.*

5. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that in June 2024 he suffered an injury arising out of an and the course and scope of his employment with Employer. As found, the medical records and the opinions of Dr. Hammel are credible and persuasive.

6. All remaining endorsed issues, including the issue of penalties, are dismissed as moot.

ORDER

It is therefore ordered that Claimant's claim regarding an alleged June 2024 injury is denied and dismissed. All remaining endorsed issues, including the issue of penalties, are dismissed as moot.

Dated January 2, 2025.

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

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

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

ISSUES

I. Whether Respondent established, by a preponderance of the evidence, that they are entitled to withdraw their June 18, 2021, August 12, 2021, September 16, 2021, December 1, 2022 and/or September 3, 2024 Admissions of Liability (GAL) on the basis that Claimant did not suffer a compensable injury on May 28, 2021.

II. Whether Respondents are entitled to recover the costs of all medical and indemnity benefits paid under the claim on the basis that Claimant induced the award of said benefits through fraud.

III. If Respondents failed to establish that Claimant induced an award of medical and indemnity benefits through fraud, whether respondents have proven, by a preponderance of the evidence, that Claimant was overpaid temporary disability benefits in the amount of $166,964.48 based upon the Division Independent Medical Examiner's (DIME) June 6, 2021 date of maximum medical improvement (MMI).

IV. If Respondents established that Claimant was overpaid temporary disability benefits in the amount of $166,964.48, whether Respondents established, by a preponderance of the evidence, that they are entitled to recovery of this claimed overpayment.

V. Whether respondents have proven that claimant was not entitled temporary benefits for the period of May 28, 2021 to June 6, 2021 because he did not meet the criteria for threshold entitlement under CRS § 8-42-105(1), and if so, whether this increases the asserted overpayment by $1,227.68, which represents payment of those temporary disability benefits.

FINDINGS OF FACT

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

1. The procedural history in this matter is complex and the hearing record is voluminous. Indeed, the alleged injury dates back to May 28, 2021 and the parties submitted in excess of 900 pages of exhibits, including several hundred pages of medical records.

2. Employer is a family run business that performs a variety of residential, commercial and industrial electrical work. In addition to general electrical work, the company specializes in large electrified overhead commercial sign installation and maintenance. Claimant's father and mother, [redacted] and [redacted] [redacted] own the

business and Claimant has worked for the company in a variety of positions for many years. Claimant is a licensed electrician qualified to perform new and maintenance wiring on residential, commercial and industrial projects, including commercial sign installation.

3. The evidence presented persuades the ALJ that Claimant's job duties as an electrician for the company are physically demanding. Indeed, the ALJ is convinced that in order to perform his job duties, Claimant must have the physical ability to: 1. ascend/descend ladders, stairs and crane booms, 2. sustain prolonged and at times weighted overhead work, 3. maneuver in and around confined spaces, 4. maintain awkward working positions and lift, carry and manipulate heavy loads, including industrial sized tools such as grinders, hammer drills, large wood drills, portable band saws, large wrenches, etc.

4. On May 28, 2021, Claimant, his father and a helper were performing work on a project requiring the installation of approximately 40 feet of heavy gauge wire (cable) weighing 1.3 pounds per foot. The job called for the wire to be moved vertically in a conduit down a 12-foot wall for eventual hook-up to a 400-amp panel. Claimant testified that pushing the cable down the wall was unusually difficult and that he had to ascend and descend a ladder multiple times in order to drive the wire down the wall towards the panel for hook up at the junction box. As he forcing the wire down the wall, Claimant felt a pop in his left shoulder causing his left hand to go numb. Despite the condition of his left arm/hand, Claimant continued to work and with the assistance of his father and the helper on the outside of the building he was able to manipulate the wire to the panel. With the cable at the panel, Claimant set out to complete the job by terminating the wire at the box with benders and other hand tools. As Claimant was working the wire at the panel, his right shoulder and low back began to ach. Claimant testified that as he pressed on with his work, his father noticed that he was in pain and shaking his left hand. Claimant testified that his father asked him what was wrong and in response, he told his father that he felt a "pop" in his shoulder and that his arms and back were hurting, but that he would be OK and "let's just get it done".

5. Claimant's father filed a First Report of Injury on behalf of Employer indicating that Claimant, a regular employee of the company, with the title of "journeyman electrician" injured his "Upper Back Area" on May 28, 2021 at 12:30 p.m. "pulling wire in a conduit in an electric panel board." (Respondents Hearing Exhibit (RHE) W).

6. In addition to his position with Employer, Claimant is a traveling minister. He schedules himself for special appearances at churches and church camps around the country. Claimant testified that his ministry is "most important" to him and that, he had a ministry trip leaving May 29, 2021, so he wanted to finish the May 28, 2021 job expeditiously and get on his trip.

7. Due to Claimant's ministry trip, he was not seen by a medical provider for his shoulder and back complaints until June 7, 2021. (RHE H, p. 201). At Claimant's

initial appointment at Concentra Medical Centers on June 7, 2021, Nurse Practitioner (NP) Brendon Madrid obtained the following history:

> This is a 45 y/o male patient who suffered bilateral shoulder strains and low back strain while pulling heavy wire at work on 5/28/2021. He complains of pain in both shoulders and heard a pop in the left shoulder and pain in the lower back. He states his left shoulder popped and [he] felt a tingling and numbing in [his] left hand fingertips for 2 days. He states he has been out of town in Kansas because he is a traveling minister and couldn't come in.[1]

Id.

8. Physical examination revealed normal appearance in the shoulders bilaterally. There was no tenderness on palpation of the shoulders. Shoulder range of motion was full albeit with pain. Motor strength in the shoulders was normal as was motor tone. (RHE H, p. 202). Concerning the low back, Claimant reported mild tenderness at the right paraspinal structures at L5, T11-T12 and *palpation revealed right-sided muscle spasm*. Range of motion was normal. Muscle strength was normal. Motor tone was normal and sensation was intact to light touch in all dermatomes tested. Of note, special tests were deferred. *Id*. Claimant was diagnosed with right and left shoulder strains and low back strain. Claimant was released to modified work with the following restrictions: "No lifting, carrying pushing/pulling more than 10 pounds, no bending and no overhead work.

9. Insurer filed a General Admission of Liability (GAL) on June 18, 2021. (RHE V). This GAL admitted for injuries to Claimant's "neck, low back, sacrum, and right and left shoulders". *Id*. at 582. The GAL reflects that Temporary Total Disability (TTD) benefits were to be paid on an ongoing basis from May 29, 2021 and ongoing at a rate of $800.00/week. *Id*. at 580.

10. Decisions regarding Claimant's ongoing medical treatment included his reports of symptoms and pain, difficulty with particular activities, and lack of improvement. (See generally, RHE H). On June 28, 2021, Claimant returned to Concentra with continued complaints of left and right shoulder pain, back pain and right leg numbness and tingling. A treatment note from this encounter reflects that Claimant denied any previous low back or shoulder injuries.[2] (RHE H, p. 209). Although he was

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[1] During a subsequent appointment with a chiropractor on 9/14/2021, the following history was documented: "[Claimant] is an electrician for Ralph's Neon and Electric. [Claimant] reports had been pulling heavy wire as he stood and as he did this, he felt his back and shoulders strain and hurt. Had immd [immediate] onset of rather severe back and shoulder pain. [Claimant] continued to work and reported injury and was sent to Concentra for WC care". (RHE H, p. 265).

[2] Claimant's denial of prior back problems is inconsistent with the social media posts, which included a post from February 10, 2021, in which Claimant reports injuring his back prompting him to see a chiropractor. Indeed, in a video recording Claimant states: "I hurt my back two weeks ago and it is just crushing me." He explains to his audience that he had been told he needed 72-74 visits which "is not cheap by any means." (RHE AA.a). The medical records admitted into evidence contain SOAP notes

not working for Employer, Claimant indicated that his low back was aggravated with sitting and prolonged standing. As noted, Claimant is a traveling minister who is frequently out of the state preaching at a special appearance or a church camp. Records provided by Claimant demonstrate that he was traveling throughout the summer of 2021, including nearly all of June. (See RHE X, pp. 646-647).

11. During his June 28, 2021 appointment, diagnostic imaging was ordered, medication was prescribed, work restrictions were imposed and Claimant was referred to physical therapy. (RHE H, p. 211, 213). Claimant began physical therapy (PT) on July 2, 2021. (RHE G, p. 153). During his initial PT session, Claimant reported 7/10 back pain, 2/10 right shoulder pain and 4/10 left shoulder pain for the prior three days. *Id.* He demonstrated reduced and painful shoulder and low back range of motion along with positive rotator cuff impingement testing. Id. at 154.

12. Claimant returned to Concentra for a follow-up appointment on July 13, 2021. (RHE H, p. 216). During this encounter, Claimant reported that he had initiated PT and he was feeling the "same". *Id*. He complained of numbness and tingling in the right thigh and knee with prolonged sitting or standing. *Id*. His examination was unchanged. NP Madrid recommended continued PT and instructed Claimant to follow-up with Dr. Douglas Bradley in two weeks. *Id*. at pp. 218-219. Claimant's work restrictions were continued. *Id*. at 220.

13. An MRI of the lumbar spine was performed August 2, 2021. (RHE J). This imaging demonstrated facet arthropathy causing mild bilateral neural foraminal narrowing but no significant central canal stenosis along with small bilateral facet joint effusion at L4-5 and a disc bulge and facet arthropathy causing neural foraminal narrowing without significant central canal stenosis at L5-S1. *Id*. at 477. No acute lumbar spine abnormality was identified. *Id*. at 478.

14. Claimant returned to Concentra on August 24, 2021, where he was evaluated by Dr. Douglas Bradley. During this appointment, Claimant reported continued pain in both shoulders (5-6/10 left and 4-5/10 right) and low back (2-3/10). (RHE H, p. 237). Dr. Bradley prescribed Ibuprofen 800 tablets, ordered x-rays and an MRI of the shoulders. *Id*. at 238. He continued Claimant's work restrictions previously imposed on June 7, 2021.

15. Claimant was reevaluated by Dr. Bradley on September 7, 2021. (RHE H, pp. 255-261). Claimant's symptoms were noted to be improving. *Id*. at 256. Nonetheless, he continued to have aching pain in the anterior right shoulder and back along with sharp pain in the left shoulder. *Id*. Physical examination revealed positive AC (acromioclavicular) joint provocation testing but negative straight leg raise testing. *Id.* at 257-258. Claimant was given a referral to both a chiropractor and an orthopedic specialist to treat his low back and further evaluate his shoulders. *Id*. at 258. During this

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from Chiropractic Doctor Lora Walfoort who documents that on February 8th and 10th 2021, Claimant was complaining of "moderate muscle tightness and tenderness in [his] low back". (RHE I, p. 475).

appointment Claimant's work restrictions were liberalized to 20 pounds lifting/carrying and 30 pounds pushing/pulling. *Id*. at 253-254.

16. Claimant would initiate chiropractic treatment with Dr. Lance Weidner, D.C. (RHE H, pp. 265-286). He would also be evaluated by orthopedist, Dr. Jennifer FitzPatrick on October 11, 2021. (RHE F, pp. 140-142). Dr. FitzPatrick would review x-rays of Claimant's shoulders and conduct a physical examination, which revealed positive O'Brien's and a mildly positive Yergason's among other provocative testing results on the left side raising concern for a partial rotator cuff tear. *Id*. at 141. Moreover, Claimant's reported right shoulder pain was consistent with rotator cuff tendonitis. *Id*. Dr. FitzPatrick recommended follow through with the previously ordered MRI of the shoulders with return to the clinic one week after the MRI for review. *Id*.

17. MRI of the left shoulder was completed on October 28, 2021. (RHE J, p. 484). This imaging revealed multiple findings leading to the following diagnostic impressions:

1. Supraspinatus tendinopathy with suspected partial thickness tear involving the bursal surface.
2. Degeneration and/or tear involving the superior and posterior labrum.
3. Mild AC joint arthrosis.
4. Mild subacromial subdeltoid bursitis.

Id. at 484.

18. Claimant returned to Concentra on October 12, 2021 where he was evaluated by Dr. Richard Trifilo. (RHE H, p. 287). During this encounter, Claimant reported increased low back pain radiating down the right side of the back to the anterior aspect of the thigh with associated numbness and tingling. (RHE H, p. 287). Claimant was diagnosed with lumbar radiculitis and lumbar facet syndrome and given a pain management referral. *Id*. at pp. 289-290. Claimant's work restrictions were modified back to 10 pounds lifting/carrying and 20 pounds pushing/pulling. *Id*. at 291.

19. Consistent with his pain management referral, Claimant would follow-up with Dr. Jack Chapman at Parkview Medical Group Pain Management on November 16, 2021. (RHE F, pp. 143-148). After taking a history and following a review of Claimant's imaging, Dr. Chapman assessed Claimant with lumbar facet syndrome, lumbar facet arthropathy, lumbar degenerative disc disease and lumbar spondylosis. *Id*. at 147. Dr. Chapman recommended additional treatment consisting of medial branch blocks and facet rhizotomy. *Id*. at 147-148.

20. Following his November 16, 2021 evaluation with Dr. Chapman, Claimant would embark on a protracted course of care involving additional evaluation, imaging and treatment for his shoulders and back, including an MRI of the right shoulder and a series of injections and radiofrequency ablation (rhizotomy) directed to his lumbar spine. (See generally, RHE D, E, F, G, H, and J). Indeed, Claimant would be evaluated and

treated by Dr. David Weinstein, PA Jeremy Raulie, and Dr. Kenneth Finn, in addition to various providers and physical therapists at/through Concentra.

21. Claimant's back and shoulder treatment would continue into the summer of 2024 and beyond. He was last seen in Dr. Weinstein's office on July 3, 2024 and by Dr. Finn on October 24, 2024. (RHE D, pp. 64-66; RHE E, pp. 133-137). Despite substantial treatment throughout 2022-2023 Claimant reported to NP Theresa Kuhn on October 23, 2023, that his bilateral shoulder and low back symptoms were "the same". (RHE H, p. 433). Prior to this October 23, 2023 appointment, Claimant had to be compelled to attend a follow-up medical appointment on September 6, 2023, because he had not been seen by anyone at Concentra for nine months and no provider connected to his claim for 6 months. (RHE H, pp. 397-402). During his September 6, 2023 appointment, Claimant reported that he was traveling full time as a minister making it difficult to get into providers. *Id*. at 398. This evidence raises questions regarding the efficacy of Claimant's shoulder and low back treatment, the severity of Claimant's symptoms and his motivation to engage in treatment.

22. Between June 18, 2021 and December 1, 2022, Insurer would file additional GALs adjusting Claimant's temporary disability benefits to account for earnings associated with his concurrent ministry work. (RHEs S, T, U, V). During this period, Insurer made inquiries to Employer regarding the ability of the company to accommodate Claimant's work restrictions and return him to modified duty. Employer, [redacted] would consistently indicate that he had no work within Claimant's physical restrictions. (Claimant's Hearing Exhibit (CHE), 22). Accordingly, Insurer paid temporary disability benefits on an ongoing basis beginning May 29, 2021 at various rates but most consistently at a rate of $1,074.22. (RHEs M, S, CC, pp. 739-743).

23. While Claimant informed Insurer and his providers that he continued his concurrent ministry work after his May 28, 2021 injury, the evidence presented persuades the ALJ that he did not inform either Insurer or his medical providers about the level of physical activity he engages in while preaching. Information regarding Claimant's preaching style and demonstrated physical capacity was gathered from the internet, Claimant's social media, Claimant's ministry website and YouTube. Many of the churches livestreamed the services on YouTube. This material was gathered and preserved by Insurer's investigators. (Reiswig Testimony. See also, RHE BB, AA.g).

24. The ALJ is also convinced that Claimant did not inform Insurer or his providers that he was spending time fishing. The evidence presented supports a finding that Claimant is an avid fisherman in general and fly fisherman in particular. (See generally, RHEs Z, AA.c, AA.d, AA.e and AA.f). Indeed, during the time following his May 28, 2021 injury, i.e. 2023-2024, Claimant applied and qualified for multiple Colorado Parks and Wildlife Master Angler Awards for several species of fish in several locations throughout Colorado. (RHE Y).

24. After collection of the above-referenced materials, Insurer scheduled an independent medical examination (IME) with Dr. Scott Primack. Dr. Primack interviewed Claimant, he conducted a physical examination and reviewed both

Claimant's medical records, and the material regarding his preaching and fishing activities. He authored reports on April 16, 2024 and April 29, 2024. These reports reflect his records review and his detailed discussion of the videos and social media posts. (See generally, RHE B). Dr. Primack concluded no injury occurred on May 28, 2021. His conclusion was based upon his review of hours of unedited post-injury video in which Claimant repeatedly demonstrated fluid pain-free and frequent motion at the shoulder and the spine. *Id*. at 33-36. Prior to undertaking the aforementioned video review, Dr. Primack noted that as part of his examination, Claimant informed him that he had to "lean on the podium and slowdown in order for him to provide adequate sermons to his parishioners". *Id*. at 33. Claimant also reported that while working as a minister "his arms do not work well". *Id*. at 31.

25. Dr. Primack concluded that Claimant's demonstrated activity level during preaching sessions belied his claims of significant limitation as reported to his treating providers. Indeed, Dr. Primack noted:

> In the sermons, his movement patterns were always smooth. There was never any pain behavior. There was never a need for physical support during his sermons. I do not believe that this is an unconscious misrepresentation of [Claimant's] physical capacity. Given the extreme discrepancy about what is seen physically and what is stated verbally and "non-verbally" within the sermons to that in a clinical setting, [Claimant's] diagnosis is malingering. He very well may have an abnormal MRI of the lumbar spine as well as abnormalities at (sic) both MRIs of the shoulders; however, he clearly demonstrates fluid motion at the shoulders and spine over several hours video review. This is the reason one cannot solely rely upon imaging as "showing pain and impairment." Given his presentation today and the video analysis, there was no specific injury from 5/28/2021.

(RHE B, p. 36).

26. Dr. Primack indicated that if it was "felt" that Claimant suffered an injury on May 28, 2021, he reached MMI on June 6, 2021, which was supported by his demonstrated activity level during his sermon of the same 6/6/2021 date. (RHE B, p. 39).

27. Insurer filed a request for a 24 Month DIME with the 6/6/2021 MMI date as required by the Division. Contemporaneous with the DIME request, Respondent's filed an application for hearing on, among other things, a request to withdraw their previously filed GAL(s) and recover all medical and disability benefits paid on the basis that Claimant induced the payment of such benefits through fraud. (RHE Q). A request to hold the DIME in abeyance pending the outcome of the requested hearing was denied by the July 1, 2024 Prehearing Conference Order of Prehearing Administrative Law

Judge Gregory W. Plank. (RHE P). Accordingly, the requested DIME was completed by Dr. Miguel Castrejon on August 12, 2024.[3] (RHE A).

28. Dr. Castrejon took a history from Claimant, reviewed medical records and completed a physical examination. (RHE A). Claimant described his condition as "being the same to worse, depending on his activity level". *Id.* at 16. Dr. Castrejon assessed Claimant with a right and left shoulder strain, which he concluded were "stable". *Id.* at 19. He also diagnosed a lumbar strain which he also opined was "stable". *Id.* In addition to these strains, Dr. Castrejon, concluded that Claimant had the following diagnoses which were "unrelated" to the May 28, 2021 industrial event, right shoulder impingement syndrome, bilateral shoulder girdle myofascial pain syndrome, distal limb paresthesia, nondermatomal distribution, history of left hand surgery resulting in hand/digit paresthesia, status post right L3 to L5 lumbar medial branch radiofrequency ablation, performed 2/8/2023 by Dr. Finn.

29. Dr. Castrejon would raise Dr. Primack's IME conclusions noting simply that he (Castrejon) had not be supplied with the "complete" medical file, since he (Castrejon) was not provided with the video and photographic records that formed the basis for Dr. Primack's opinions. (RHE A, p. 20). Dr. Castrejon noted that Claimant's was a "complex case made so by various inconsistencies during the course of treatment of an individual who did not present for initial medical treatment until June 7, 2021, a period of approximately nine days following an alleged significant injury to both shoulders and lower back". *Id*. at 22. Nonetheless, Dr. Castrejon addressed the role that Claimant's preaching and fishing played in the development and continuation of his shoulder and low back symptoms. *Id*. at 22-23. Based on careful review of Dr. Castrejon's DIME report, the ALJ is convinced that Dr. Castrejon could not ascribe all of Claimant's shoulder and low back symptoms and need for treatment to the May 28, 2021 work incident. Nonetheless, the ALJ is persuaded that Dr. Castrejon causally related Claimant's initial symptoms and right sided low back muscle spasms to this incident leading him to conclude that Claimant sustained "mild" work related sprains of the low back and shoulders bilaterally. *Id.* at 20.

30. Dr. Castrejon initially indicated that MMI was "n/a" (RHE A, p. 25), despite noting the following under the heading "DATE AND DISCUSSION OF MMI":

> The Claimant is expected to have achieved maximum medical improvement prior to the Alaska fishing trip. The date of June 6, 2021, as noted by Dr. Primack, is therefore considered to be a reasonable date of maximum medical for what are expected to have been mild straining injuries.

(RHE A, p. 20). Dr. Castrejon assigned no impairment, no restrictions, and recommended no maintenance care. *Id*. at 20, 24. When the DIME Unit of the Division

[3] Prior to seeing Dr. Castrejon, Dr. Katheryn Murray would evaluate Claimant at Concentra on May 29, 2024. During this encounter, Dr. Murray opined that Claimant had reached MMI. She assigned May 29, 2024 at the MMI date noted further that Claimant had no permanent impairment and no need for work restrictions. (RHE H, pp. 463-469).

of Workers' Compensation mandated a specific MMI date, Dr. Castrejon, like Dr. Primack, chose June 6, 2021, the date of the first preaching video available. *Id*. at 26.

31. Following Dr. Castrejon's DIME, Respondents sent his report to Claimant's authorized treating physician, Dr. Kathryn Murray who had previously placed Claimant at MMI as of May 29, 2024. (See FN 3). Respondents also sent a link to the compilation video (RHE AA.b) of Claimant's sermons to Dr. Murray as discovered during the investigation into his social media and online presence. In the correspondence sent to Dr. Murray, Counsel for Respondents asked the following question: "Do you agree with Dr. Castrejon's "n/a" and with Dr. Primack that there was no injury that occurred at work on May 28, 2021 that caused the need for medical treatment or disability? (RHE H, pp. 472-473). Following review, Dr. Murray simply answered "yes" to this question. The ALJ finds this question misleading since it can be interpreted to suggest that Dr. Castrejon's "n/a" designation constitutes some evidence that Claimant did not suffer a work related injury as stated by Dr. Primack. As noted above, Dr. Castrejon's "n/a" notation simply addressed Claimant's MMI date and not whether Claimant suffered injuries as part of the May 28, 2021 incident. As found, the ALJ is convinced that Dr. Castrejon causally related a mild low back and bilateral shoulder strains to the May 28, 2021 mechanism of injury. Nonetheless, it is clear that Dr. Murray changed Claimant's MMI date to June 6, 2021 after review of the video tape of Claimant's sermons and Dr. Castrejon's DIME report. *Id*. at 473.

32. Dr. Primack testified at hearing as a Level II accredited expert in physical medicine and rehabilitation. (PMN&R). He testified consistently with his IME report explaining his opinions, while the video capturing Claimant's sermon activities was played for the ALJ. Dr. Primack explained from a physiological and functional perspective what actions, movements and behaviors were illustrated in the video and why these activities lead him to his conclusions. He testified that, although Claimant has pre-existing degenerative conditions in both shoulders and his back, if Claimant had suffered a new injury or an aggravation of these conditions on May 28, 2021, he simply would not have the physical capacity to do what he is seen doing in the video tapes on June 6, 2021 and afterward. He also testified that Claimant could not have gone salmon fishing in Alaska agreeing with Dr. Castrejon's explanation and conclusions in this regard.[4] According to Dr. Primack, if Claimant was truly experiencing the symptoms and complaints he was representing to his physicians, he would not have been able to function as he does in the videos from June 6, 2021 to May 28, 2023 In fact, Dr. Primack testified that the activities depicted in the videos could be injurious and aggravate pre-existing conditions themselves. (See e.g. 10/04/2021, starting 18:30, Ex. BB, 689-693; 10/06/2021, starting 25:28, Ex. BB, 695-695; 11/14/2021, 31:20, Ex. BB, 699). Dr. Primack testified that it is critical that a patient provide accurate subjective history in order for correct diagnosis, causation analysis, recommendations and appropriate restrictions to be made by a provider. The ALJ interprets Dr. Primack's report and testimony to suggest that the inconsistencies between Claimant's reported symptoms/functional abilities and his demonstrated capacity, as seen in the admitted

[4] According to Dr. Primack, fishing requires substantial use of the shoulders and stability in the low back.

video tapes,[5] supports a finding that Claimant was consciously exaggerating and otherwise misrepresenting his symptoms to his providers for financial and personal gain. Accordingly, Dr. Primack concluded that Claimant was malingering. (RHE B, p. 36).

33. Insurer filed a Final Admission of Liability (FAL) adopting Dr. Castrejon's DIME findings concerning MMI and impairment on September 3, 2024. (RHE M). As referenced in the 9/3/2024 FAL, Insurer paid a total of $168,192.16 in temporary disability benefits and $27,399.01 in medical benefits under the claim. *Id*. The asserted TTD and medical benefit payments are supported by the medial and indemnity payment logs located at RHE CC and the testimony of Brazee Smith. The FAL was filed after the application for hearing to withdraw the admission, and specifically reserved the right to withdraw the claim, the right to overpayment and the right to a repayment order. (Compare RHE Q and M).[6] Claimant was represented at the time the FAL was filed. He did not object to the final admission nor did he file an application for hearing to challenge the asserted overpayment, the date of MMI or any other disputed issues within thirty (30) days of the filing of the FAL. Accordingly, the ALJ finds that the case automatically closed as to any issue concerning Claimant's MMI date, Claimant's degree of permanent impairment or maintenance care. In short, the ALJ finds the opinions expressed by Dr. Castrejon in these regards are binding on Claimant.

34. Claimant submitted an April 29, 2018 article "Neon lights over Pueblo: [redacted] family has electricity in their blood." (CHE 25). This article provides the history of Employer's business, and Claimant's work for the company since a young age. This article indicates that, as of April 28, 2018, Claimant was the president of the company. The article indicated that Claimant's father Charlie [redacted] was working for Claimant. "He's the president now, I'm just the gopher." *Id*. at 195-196. Claimant had represented to Insurer and to his providers that he was an electrician, only. Claimant testified that he was not paid salary for the company, and that he was only a "journeyman electrician." Years of his salary-based paystubs were included in the hearing exhibits. (RHE X). When compared with the travel and expenses list he submitted, the ALJ is persuaded that his pay as "Salary-OFFICERS" with Employer, more probably than not, continued even when he was traveling for his ministry. (See e.g. RHE X, p. 646*, compared with* RHE X, pp. 636-637*,* March 20-March 28). Thus, the ALJ is convinced that Employer was probably paying Claimant's salary even though he was not working for Employer at any time after May 28, 2021. Included in the videos admitted into evidence is a recording done on September 19, 2021. This video was submitted by Respondents to cast light on Claimant's veracity credibility. The video contrasts Claimant's statements about his medical conditions in 2024 and in 2021. In 2024, he spoke to a church audience, confiding to them about a September 2021 Stage 3-4 lung cancer diagnosis and prognosis of 30 days to live. The aforementioned September 2021 video is a discussion of how grateful Claimant was that he did not have a cancer diagnosis. Significant to the temporary benefits issue(s) in this case, Claimant declares

[5] In addition to the documentary evidence regarding Claimant's fishing accolades. (RHE Y).

[6] Respondents' Application for Hearing also endorsed "Petition to Reopen Claim" which the ALJ finds was premature since the claim had not closed by June 6, 2024 when the application for hearing was filed.

in the video that he was “laying down our electrical business come the end of this year so I can focus directly on helping people”, suggesting to the viewer that the business would close and he would receive no further remuneration from Employer after 2021. (RHE AA.g). In reality, the evidence supports a finding that Claimant continued to be paid by Employer both before and after this declaration.

35. Shannon Reiswig, testified as an investigator employed by Insurer. Ms. Reiswig testified that she and another investigator interviewed Claimant at his home on Tuesday, September 19, 2023. During that interview, Claimant reportedly discussed the pain levels and resultant functional difficulties he experienced during his sermon on June 6, 2021. He reported “breathtaking pain” in his shoulders requiring him to switch his microphone from hand to hand. He told these Pinnacol representatives that, as of their interview, he had to lean against support in order to perform his sermons. The ALJ has carefully reviewed all video admitted into evidence outside of the courtroom. Based upon that review, the ALJ finds Claimant’s reports of functionally limiting pain levels inconsistent with the activity, movements, actions and behavior he engages in while preaching. Ms. Reiswig testified further that after the application for hearing was filed in this matter, Claimant shut down accounts and took down the videos and content from his social media.

36. Brazee Smith testified as Insurer’s Complex Claims Representative. Ms. Smith testified regarding the amount of benefits paid under the claim for lost wages (indemnity) and medical treatment. She testified that she considered Claimant’s purported resignation, his actual position as the owner of the company, the true nature of his physical activity during his sermon performances, and his fishing activities as material information upon which decisions were made. She testified that the adjusting/handling of the claim would have been different if Claimant had provided accurate information regarding his activities and material information regarding his position and ability to work for Employer. Indeed, she testified that the GALs in this claim were filed in reliance on statements made by Claimant and that Insurer would not have filed an admission if all facts had been known.

37. Ms. Smith testified that the benefits for Claimant’s medical treatment were paid on a fee scheduled basis. Although Claimant’s providers billed $94,594.83 for treatment related expenses, Ms. Smith testified that Insurer paid $27,399.01 to Claimant’s medical providers pursuant to the fee schedule. This amount is consistent with the medical payment detail admitted into evidence. (See RHE CC, pp. 725-738). Ms. Smith also testified that a total of $168,192.16 in indemnity benefits were paid to Claimant under the claim. Ms. Smith’s testimony regarding the amount of indemnity benefits paid is also corroborated by the indemnity payment detail admitted into evidence. (RHE CC, pp. 739-743). Insurer seeks reimbursement for a total of $195,591.17 in benefits paid (medical and indemnity) under the claim on the basis that Claimant induced the award through fraud. (RHE M).

38. The ALJ credits the testimony of Ms. Smith and the documentary evidence to find that Dr. Castrejon’s June 6, 2021 retroactive date of MMI creates a substantial overpayment in indemnity payments to Claimant. Indeed, Dr. Castrejon’s June 6, 2021

MMI date, which is now binding on Claimant due to his failure to object to the September 3, 2024 FAL and file an application for hearing challenging Dr. Castrejon's MMI date, would entitle Claimant to 8 days of TTD, assuming Claimant suffered a compensable injury, left work as a consequence of that injury and incurred a wage loss as a result. Claimant's daily wage rate is equal to $153.46. ($1,074.22/week ÷ 7 days = $153.46/day). Eight days of TTD (5/29/2021- 6/5/2021) at $153.46/day would entitle Claimant to payment of $1,227.68 in TTD benefits, again assuming Claimant meets the criteria for payment of TTD. Subtracting $1,227.68 from $168,192.16 yields an overpayment of TTD benefits to Claimant in the amount of $166,964.48. ($168,192.16 - $1,227.68 = $166,964.48). (RHE M).

39. Although not a complete collection of all financial information, evidence of Claimant's ability to repay the overpayment is included in the documents admitted into evidence. (See RHE X). Although neither party presented specifics regarding the amount that Claimant could pay to reduce the proven overpayment, the evidence presented persuades the ALJ that Claimant possesses the financial ability to repay the overpayment.

CONCLUSIONS OF LAW

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

Generally

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

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

C. In determining credibility, the ALJ should consider the witness' manner

and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, Claimant's reports to his providers regarding the severity and physically limiting nature of his symptoms after June 7, 2021 are inconsistent with the behavior and physical capacity he demonstrated during his sermons captured on video tape. Indeed, there are multiple concerning inconsistencies regarding Claimant's reported injuries, his capacity to work, his position with Employer and his history of prior injury to his low back. Nonetheless, the evidence presented, including Claimant's June 7, 2021 medical report and the DIME opinions of Dr. Castrejon persuade the ALJ that Claimant suffered a compensable strain to his low back and bilateral shoulders on May 28, 2021. While these strains were mild in nature, they did cause the need for limited treatment albeit on a delayed basis following Claimant's out of state ministry trip.

Compensability and Respondents' Request to Withdraw the June 18, 2021, August 12, 2021, September 16, 2021, and/or December 1, 2022, General Admissions of Liability

D. Insurers are permitted to "obtain relief from improvident or erroneous admissions." *H.L.J. Management v. Kim*, 804 P.2d 250 (Colo. App. 1990). Respondents are bound by the General Admission of Liability and required to continue paying until the law permits them to terminate benefits, or they obtain an appropriate order from the ALJ. *Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997).* Once an admission has been filed, the employer may not unilaterally modify that admission if the employer comes to believe an injury is not compensable. § 8-43-201(1); § 8-43-303(4). Rather, the Respondents must request a hearing before an ALJ and continue to make benefits payments until the ALJ enters an order allowing modification of the admission, in full or in part. *Id.*, see also *Rocky Mtn. Cardiology* v. *ICAO*, 94 P.3d 1182 at 1185 (Colo. App. 2004).

E. 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) and (2), 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.

F. The principal aim of the 2009 amendment to § 8-43-201, 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. specifically placed the burden on the party seeking to modify an issue determined by a general admission and made the withdrawal of an admission of liability the procedural equivalent of a reopening. In this case, Respondents, relying principally on the testimony of Ms. Smith and Dr. Primack, are seeking to modify an issue determined by the aforementioned GALs, namely compensability. Consequently, the burden rests with Respondents to prove that Claimant did not sustain a compensable injury.

G. 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.

H. 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 an electrician for Employer. Accordingly, the evidence presented supports a conclusion that Claimant’s alleged injury occurred in the course and scope of her employment. Nonetheless, the question of whether Claimant’s alleged injuries arose out of his employment must be answered in the affirmative before the injury can be found compensable.

I. In this case, the evidence presented persuades the ALJ that Claimant likely

had chronic pre-existing degenerative changes in his low back and shoulders. Moreover, the evidence presented supports a finding that Claimant sought treatment for complaints of low back pain and muscle tightness with chiropractor Lora Walfoort on February 8th and 10th 2021 and that Claimant delayed being seen for symptoms he associated with his May 28, 20921 work relayed injury until June 7, 2021. Accordingly, Respondents contend that it is "reasonable" to infer that no injury causing disability or the need for treatment occurred on May 28, 2021. The ALJ is not persuaded.

J. As noted, Claimant sought medical treatment for the first time upon returning home from a ministry trip on June 7, 2021. During this encounter NP Madrid performed a physical examination which revealed normal appearance in the shoulders bilaterally. While there was no tenderness on palpation of the shoulders and shoulder range of motion was full, motion in the shoulders elicited pain albeit with pain. (RHE H, p. 202). Concerning the low back, Claimant reported mild tenderness at the right paraspinal structures at L5, T11-T12 and his examination was accompanied by right-sided muscle spasm. *Id*. While Insurer contends that these findings constitute evidence of intervening injury based upon Claimant's sermon related activities on June 6, 2021, the ALJ concludes, based upon a totality of the evidence presented, that it is more likely that Claimant's upper-extremity pain and low back muscle spasms and need for treatment on June 7, 2021, were related to the minor sprains he suffered on May 28, 2021. Regardless, Dr. Castrejon concluded that the video evidence supported a finding of MMI as of June 6, 2021. Because the evidence supports a finding/conclusion that Claimant's symptoms and need for treatment on June 7, 2021 arose as a direct consequence of straining his shoulders and low back on May 28, 2021, while pulling heavy wire as part of his work duties for Employer, Respondents have failed to establish, by a preponderance of the evidence, that Claimant did not suffer a compensable injury. Thus, the request to withdraw any of the previously filed GAL's is denied and dismissed. Having concluded that Insurer has failed to establish that Claimant did not suffer compensable injuries to his shoulders and low back on May 28, 2021, the ALJ turns his attention to Insurer's request to withdraw the previously filed GALs on the basis that Claimant induced the award of medical and indemnity benefits reflected therein through fraud.

Insurer's Request to Withdraw their Previously Filed Admissions Based Upon Fraud

K. Fraud may justify reopening an otherwise final award of benefits. *See Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905 (Colo. App. 1995). In cases where an ALJ finds that an admission of liability was induced by fraud, an insurer may be permitted to retroactively withdraw its admission. *Vargo v. Colorado Industrial Commission*, 626 P.2d 164 (Colo. App. 1981). In such cases of fraud, the admission of liability is considered "void ab initio." *Id*. In cases of fraud or overpayment, such a reopening may effect the earlier award as to money already paid. That is, respondents can be released from the obligation to pay under a prior admission or award. *Id.*

L. The elements of fraud were set forth by the Colorado Supreme Court in *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 (1937). In Goodspeed, the Court stated: "The constituents of fraud, though manifesting themselves in a multitude of

forms, are so well recognized that they may be said to be elementary. They consist of the following:

(1) A false representation of a material existing fact, or representation as to a material existing fact made with a reckless disregard of its truth or falsity; or concealment of a material existing fact, that in equity and good conscience should be disclosed.

(2) Knowledge on the part of the one making the representation that it is false; or utter indifference to its truth or falsity; or knowledge that he is concealing a material fact that in equity and good conscience he should disclose.

(3) Ignorance on the part of the one to whom representations are made or from whom such fact is concealed, of the falsity of the representation or the existence of the fact concealed.

(4) The representation or concealment made or practiced with the intention that it shall be acted upon.

(5) Action on the representation or concealment resulting in damages."

As noted by the Industrial Claim Appeals Panel (ICAP) in *Essien v. Metro Cab*, W.C. Number 3-853-693 (ICAO August 22, 1991), "[t]he existence of the elements [of fraud] is generally a question of fact for the determination of the ALJ", and because proof of fraud is a factual issue, the ALJ may base his decision on inferences drawn from circumstantial or direct evidence. *See Essien*, supra, citing *Electric Mutual Liability Insurance Co. v. Industrial Commission*, 154 Colo. 491, 391 P.2d 677 (1964). The existence of "fraud" does not necessarily require an intent to deceive. *See Pattridge v. Youmans*, 109 P.2d 646 (Colo. 1941); *Morrison*, 68 P.2d at 458 (fraud requires a false representation or representation made with disregard for the truth); *Alexander v. Midwest Barricade Co., Inc.*, W.C. No. 3-842-739 (I.C.A.O. March 30, 1992).

M. Based upon the evidence presented, the ALJ is not convinced that Insurer has proven the elements of fraud in order to withdraw the admissions in this case. While Claimant denied prior injury or back problems, and did not reveal his treatment, and recommendation for 72-74 chiropractic treatments to Insurer or his providers, careful review of the June 7, 2021 medical report of NP Madrid persuades the ALJ that the presence of muscle spasms during physical examination at this appointment constitutes some objective evidence of acute injury. Moreover, while Claimant's physical capacity during his sermons is inconsistent with his claims of functionally limiting pain and includes potentially injurious activity, such as frequent and repeated movement of both arms, rapid and quick walking, rapidly ascending/descending stairs, jumping up and down, climbing or stepping up from the ground onto the stage, dropping to one or both knees, repeated movements from the knees stressing the back, and coming back to standing with no hesitation, there is a dearth of evidence to establish that anyone asked him directly about his sermon related activities or that he actively concealed or misrepresented these activities from or to others. Based upon the

evidence presented as a whole, the ALJ concludes that Insurer has failed to prove, by a preponderance of evidence, that Claimant made false representations of existing material facts or concealed material existing facts with the intention that Insurer act upon those misrepresentations/omissions. In short, the ALJ is not persuaded that Insurer's filing of a GAL on June 18, 2021, August 12, 2021, September 16, 2021, and/or December 1, 2022, was induced by Claimant's material misrepresentations or omissions, and thus issued by mistake. Accordingly, Insurer's request to withdraw the admissions based upon fraud is denied and dismissed.

Insurer's Entitlement to Repayment of Disability and Medical Benefits

N. Although Insurer is not entitled to recover the costs paid for Claimant's medical treatment because they failed to prove that Claimant did not suffer a compensable injury or that the payment of medical benefits was induced by fraud, Insurer has timely pursued an overpayment in indemnity benefits in this matter. *Stroman v. Southway Services, Inc.,* W.C. No. 4-366-989 (ICAO August 31, 1999) at *3.

O. Pursuant to § 8–43–303(1) C.R.S., upon a prima facie showing that a claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id.* In 1997, The General Assembly amended subsections (1) and (2)(a) of § 8-43-303 to permit reopening of an award on grounds of fraud and overpayment, in addition to the already statutory reopening methods of error, mistake, or change in condition. *Haney v. Shaw, Stone, & Webster*, W.C. No. 4-796-763 (ICAO July 28, 2011) at *1; citing *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds Benchmark/Elite, Inc., v. Simpson*, 232 P.3d 777 (Colo. 2010).

P. The 1997 amendments also provide that no such reopening shall effect the earlier award as to moneys already paid except in cases of fraud or *overpayment*. *Haney*, at *1. The 1997 amendments added § 8-40-201(15.5) defining "overpayment" to mean:

> [M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

As noted above, if Insurer makes a prima facie showing that Claimant received an overpayment in benefits, for whatever reason, "repayment shall be ordered." Under the law applicable associated with Claimant's date of injury, the Act is clear that a repayment of temporary benefits paid beyond the Division IME's MMI date "shall" be ordered. In this case, the ALJ concludes that Dr. Castrejon's second response to the

DIME Unit constitutes his true opinion regarding MMI. Simply put, the ALJ finds/concludes that Claimant reached MMI on June 6, 2021. Under the Act, temporary disability benefits are not due to claimants after MMI is reached. See, § 8-42-105(3) (a), C.R.S. Also as found, the final admission of liability reflecting the determination of Dr. Castrejon that Claimant reached MMI on June 6, 2021, has not been objected to. Consequently, Claimant's right to challenge the date of MMI or his impairment rating provided by the DIME was foreclosed and the DIME opinions are now binding on him. Indeed, any issue regarding the DIME process or result is not properly before the ALJ. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 884 P.2d 1131 (Colo. App. 1994); *Robbolino v. Fischer-White Contractors*, 738 P.2d 70 (Colo. App. 1987). Absent a hearing challenging the date of MMI or the impairment rating of the DIME, permanent partial and temporary benefits are controlled by the DIME's determinations. See C.R.S. §§ 8-43-203(b) (II) (A) and 8-42-107(3) & (8) (b) (II); *see also Mattorano v. United Airlines*, W.C. No. 4-861-379 (July 25, 2013). Here, Insurer has proven that Claimant received temporary disability benefits for periods after June 6, 2021, i.e. after the termination of entitlement to such benefits. Insurer has proven that $166,964.48 in temporary benefits was paid beyond that date. By definition, this is an overpayment due to Insurer. Insurer has carried its burden and proven an overpayment exists in this case which it is entitled to recover.

Q. Insurer also contends that the overpayment should include the $1,227.68 in temporary disability for the eight day period between May 29, 2021 through June 5, 2021. Indeed, Insurer contends that Claimant was not entitled to temporary disability benefits during this time. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). A claimant must establish a causal connection between the industrial injury and the subsequent wage loss in order to be entitled to TTD benefits. Section 8-42-103, C.R.S.; *Liberty Heights at Northgate v. Industrial Claim Appeals Office,* 30 P. 3d 872 (Colo. App. 2001).

R. In this case, the evidence presented supports a conclusion that Claimant had arrangements to travel and perform sermons immediately after May 28, 2021. In the days before the June 6, 2021 MMI date provided by Dr. Castrejon, Claimant traveled from Pueblo to Torrington, Wyoming, and was there working from May 29 to May 30th. He then traveled to Ellinwood, Kansas and worked from June 1 to June 4th and finally, he traveled to Great Bend, Kansas and worked June 5 and June 6th. Accordingly, Claimant did not leave work with Respondent-Employer because of a disability caused by his May 28, 2021 work injury, he left work to pursue his concurrent ministry work. Moreover, the ALJ is not convinced that Claimant suffered an actual wage loss from Employer based on the wage records admitted in this case. (RHE X). Indeed, the evidence presented, supports a reasonable inference that Employer continued to pay Claimant, pursuant to his position in the company, despite not having any work within his imposed work restrictions. Accordingly, the ALJ finds/concludes

that Claimant was not entitled to the $1,227.68 in temporary disability benefits paid to Claimant for the time period of May 29, 2021 and June 5, 2021 and that this sum should be added to the $166,964.48 overpayment resulting in a total overpayment of $168,192.16.

Order of Repayment

S. The parties have been unable to agree on a schedule for repayment of the above referenced $168,192.16 overpayment. When recovery of a proven overpayment is not practicable, as is the case here with no continuing benefits, the statute authorizes the insurer to seek an order for repayment of the overpayment. Thus, the term "practicable" is not concerned with the impact of "recovery" of an overpayment on the amount of the claimant's benefits. Indeed, if recovery is not practical, the claimant's personal assets may be used for payment of an ALJ order of "repayment."

T. When the parties are unable to agree upon such a schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy regarding recovery. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. See *Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994). Nonetheless, a repayment order can be in the form of one lump sum. *Cerda v. Safeway Inc.* W.C. # 5-213-316 (April 1, 2024). The Act then provides a means for collection of an overpayment order. An insurer may follow the process for converting the order to a judgement of the district court and therefore allowing for collection under that court's jurisdiction "as in other cases." C.R.S. § 8-43-306(1).

U. Here, the parties presented scant evidence regarding Claimant's ability to repay the overpaid benefits. While the ALJ finds from the materials contained in RHE X that Claimant has the financial ability to repay the benefits, the ALJ must balance the right Insurer has to timely recovery of the overpayment while lessening the potential of creating an undue financial hardship on Claimant. Accordingly, the ALJ orders that the parties attempt to create a schedule for recoupment of the proven overpayment. If the parties are unable to agree to specific terms regarding recovery of the proven overpayment, either party may file an application for hearing on this issue and proceed to hearing before an ALJ within the Office of Administrative Courts.

ORDER

It is therefore ordered that:

1. Insurer's request to withdraw any previously filed admission of liability on the grounds that Claimant did not suffer a compensable injury or that Claimant fraudulently induced the filing of any said admission is denied and dismissed.

2. Insurer has established that Claimant has been overpaid temporary disability benefits in the amount of $168,192.16 and that they are entitled to recovery of this claimed overpayment.

3. Claimant shall repay the claimed overpayment. However, because no specific terms or schedule was set forth by the parties regarding Insurer's recoupment of the proven overpayment at hearing, the parties are ordered to attempt to establish a repayment schedule that balances Insurer's right to timely recovery while lessening the potential for financial hardship to the Claimant. If the parties are unable to agree on a repayment schedule, either party may file an application for hearing on the issue of recovery of the proven overpayment and proceed to hearing before an ALJ in the Office of Administrative Courts.

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

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

DATED: January 3, 2025

/s/ Richard M. Lamphere

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

ISSUES

Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his right hip as a result of the April 10, 2023 admitted work injury?

FINDINGS OF FACT

1. Claimant was employed with Employer as a HVAC Field Service Technician. Claimant's job duties included service maintenance and startup of commercial heating and cooling systems. Claimant testified he was hired by Employer in originally in 2003, then again in 2019 and again in 2022.

2. Claimant sustained an admitted injury on April 10, 2023 when he was pulling a torch and tank weighing 30 pounds out of the back of his truck to service a commercial unit at Colorado Mesa University. Claimant referred to the torch and tank as a "torch kit" during his testimony. Claimant testified that while getting his torch kit out of the truck, he put down the tailgate of his truck, put his right foot on the bumper of the truck, then got in an awkward position with his left knee on a toolbox and the sliding deck. Claimant testified he reached into the back of his truck with his right hand and pulled the torch kit up to get it over other equipment in the back of the truck. Claimant testified he felt a lot of activity in his low back including popping and lightning.

3. Claimant testified after pulling the torch and tank out of the truck, he stretched out and felt "OK" and finished working his shift, but had a co-worker assist in putting the torch kit back into his truck at the end of his shift. Claimant testified that the next day he could not get out of bed due to pain.

4. Claimant presented to Urgent Care on April 14, 2023 with complaints of low back pain and right hip pain. Claimant was diagnosed with a lumbar strain with lumbar radiculopathy. Claimant reported that his pain began 5 days ago when he was moving a torch in the back of his truck when he was in an awkward position.

5. Claimant was examined by a chiropractor, Dr. Hansen on the morning of April 18, 2023. Claimant reported with complaints of lower back and right hip pain. Claimant was noted to have lower back pain that goes into the right leg with numbing or tingling. Claimant was provided with myofascial release to his buttocks

6. Claimant was also evaluated by Dr. Fullmer, his authorized treating physician for the work injury, later in the afternoon on April 18, 2023. Claimant

completed a pain diagram for this visit in which he indicated he had pain in his low back and numbness in the back of his right leg. The pain diagram includes three "X" marks pointing to the outside of Claimant's right hip that Claimant testified were his attempts to reflect pain on the outside of his right hip. Claimant testified at hearing that he did not have any pain in his low ack or right hip prior to April 10, 2023.

7. The medical records from Dr. Fullmer indicate Claimant reported a history of an injury occurring April 11, 2023[1] when he was removing a torch kit from the back of his work truck in an awkward position. Claimant reported he felt pain along the right side of his lower back and the symptoms worsened about 2-3 hours later. Claimant reported he felt a stabbing pain with some pain shooting down his leg, but not past the knee. Claimant reported his pain was now primarily along the hip, buttocks and lower back. Dr. Fullmer noted that it was unclear to what extent Claimant's hip was a source of pain and would continue to monitor. Claimant reported he treated with his chiropractor who believed Claimant had sustained a muscle strain. Claimant was provided with work restrictions and conservative care including chiropractic treatment, massage and a home exercise program.

8. Claimant returned to Dr. Fullmer on May 2, 203 and reported he was feeling better with his pain level being a seven (7). Claimant reported the pain had moved into his right hip and buttocks with the pain feeling like he is being stabbed by a screwdriver in the right buttocks. Dr. Fullmer noted Claimant's pain was centered along the right sacroiliac ("SI") joint and piriformis muscle. Claimant was provided with a new home exercise program that focused on the piriformis.

9. Claimant was re-examined by Dr. Fullmer on May 10, 2023. Dr. Fullmer noted that Claimant reported he had begun physical therapy the day before and complained of 8/10 pain that was a constant sharp and aching pain that feels like there is "a screwdriver in my butt" that radiates down the buttocks to the back of the knee and into the right hip. Claimant reported that simple activities such as planting flowers would "send me through the roof'. Dr. Fullmer noted that examination revealed pain over the sciatic notch and with SI joint provocation. Claimant was continued on work restrictions, provided a prescription for Gabapentin and instructed to follow up in three weeks.

10. Claimant returned to Dr. Fullmer on May 30, 2023 and reported his pain level had dropped to a 5. Claimant indicated that the gabapentin was a "game changer". Claimant reported he had missed a few physical therapy and chiropractic appointments because he had been up in Steamboat. Claimant complained of ongoing pain in his right that does radiate into his groin. This is the first mention of pain radiating into Claimant's groin as the previous pain diagrams and medical records reported the pain radiating into the outside of Claimant's hip.

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[1] While the medical records indicate an accident history of April 11, 2023, the parties agree that the injury date in this case is April 10, 2023.

11. Dr. Fullmer noted that examination showed mild tenderness to palpation along the right SI joint and piriformis with a positive Faber test on the right with tenderness to palpation over the greater trochanteric bursa on the right. Dr. Fullmer noted that Claimant was endorsing some pain radiating around to the front of the right hip and ordered an x-ray of the hip to rule out any pathology. The x-ray of the hip showed mild osteoarthritic changes with no evidence of acute fracture or traumatic malalignment of the hip.

12. Claimant returned to Dr. Fullmer on June 20, 2023 with complaints of pain at a level of 8. Claimant reported he tried cutting back on his gabapentin, but that resulted in a return of his symptoms. Claimant described his pain as a stabbing pain in his buttocks with right hip pain as well. Claimant reported having issues with ladders and stairs. Dr. Fullmer noted that results of Claimant's hip x-ray from the previous visit which showed mild osteoarthritis and no acute abnormality. Dr. Fullmer recommended a magnetic resonance image ("MRI") of Claimant's low back and reviled Claimant's prescriptions for gabapentin and naproxen.

13. The MRI was completed on July 5, 2023 and showed a small right lateral broad-based disc bulge with associated right posterior annular fissure and mild right neural foraminal stenosis at the L4-L5 level. Based on the results of the MRI, Claimant was referred to Dr. Gill for surgical consultation.

14. Claimant continued to complain of low back pain and right hip pain and eventually underwent surgery for the low back that included a right L4-L5 minimally invasive decompression on March 18, 2024 under the auspices of Dr. Gill. Claimant testified at hearing that the surgery did not relieve his low back pain or his right hip pain as he still has some symptoms in his low back.

15. Claimant was referred by Dr. Gill to Dr. Godin for treatment of his right hip. Claimant was initially examined by Dr. Godin on June 3, 2024. Dr. Godin noted Claimant reported that he had hip pain following the injury that was not resolved by surgery. Claimant reported to Dr. Godin that he continued to have persistent right gluteal pain, right lateral hip pain, right anterior hip pain and groin pain. Claimant also described some weakness with hip motion. An MRI of the right hip was obtained and Dr. Godin noted that MRI demonstrated tearing of the right hip labrum with some associated chondral thinning and delamination with pincer and cam lesion present.

16. Dr. Godin diagnosed Claimant with anterior impingement of the right hip. Dr. Godin noted Claimant had evidence of significant femoral acetabular impingement both pincer and CAM type with labral tearing. Dr. Godin recommended a diagnostic hip injection with lidocaine. Claimant reported 75% improvement of his symptoms following the injection and, given the reported improvement, Dr. Godin recommended hip surgery.

17. Claimant underwent a right hip arthroscopic labral repair with 3 suture anchors, a right hip arthroscopic CAM osteoplasty, a right hip arthroscopic

debridement and acetabular chondroplasty with a platelet rich plasma ("PRP") injection into the right hip on June 25, 2024.

18. Following the surgery, Claimant underwent a course of physical therapy with Howard Head Sports Medicine. Claimant testified that after the surgery he has been doing well.

19. Respondents obtained a records review independent medical examination ("IME") with Dr. Ciccone which resulted in a report dated June 24, 2024. Dr. Godin reviewed Claimant's medical records in connection with his IME. Dr. Godin indicated in his report that Claimant's findings on MRI including the labral tear and CAM lesion were 100% pre-existing and not related to Claimant's April 10, 2023 work injury. Dr. Ciccone noted in his IME report that as of May 2, 2023, Claimant was noted to have full range of motion of his right hip with no groin pain reported. Dr. Ciccone further noted that in the examinations following Claimant's April 10, 2023 injury, there were no reports of groin pain associated with the injury.

20. Dr. Godin testified at hearing in this matter. Dr. Godin is a board certified orthopedic surgeon who practices out of the Steadman Hawkins clinic in Vail. Dr. Godin testified that Claimant reported to Dr. Godin that his right hip pain started when he was at work and grabbed a piece of machinery. Dr. Godin noted that when he first examined Claimant, Claimant had asked for hip replacement surgery, but Dr. Godin noted Claimant had too much cartilage and space remaining for a hip replacement surgery. Dr. Godin testified that his examination demonstrated that Claimant's hip flexor was inflamed with a labral tear which was shown on the May 9, 2024 MRI scan. Dr. Godin testified that the MRI also showed wear and tear of the cartilage in the hip. Dr. Godin testified that the MRI showed evidence on chronicity including the wear and tear of the cartilage. Dr. Godin testified that the Claimant had impingement of the hip joint that led to the labral tear. Dr. Godin testified that symptoms related to the labral tear could present as pain in the back of the hip or the front of the hip. Dr. Godin testified that the CAM lesion and overlay were pre-existing conditions, but opined that the acute on chronic conditions led to the surgery. Dr. Godin testified that he believed this mechanism of injury described by Claimant could cause the pain as a result of the underlying pre-existing condition. Dr. Godin testified that there was a chronicity involved in Claimant's condition, but it was Dr. Godin's opinion that Claimant had an underlying asymptomatic condition that became symptomatic as a result of the work injury.

21. Dr. Ciccone testified by deposition in this matter. Dr. Ciccone testified that while Claimant complained of hip pain following the work injury, this hip pain was not associated with the labral tear as the labral tear would manifest itself with complaints of groin pain. Dr. Ciccone noted in his testimony that Claimant's complaints of groin pain did not arise until weeks after Claimant's work injury. Dr. Ciccone testified that it was his opinion that the April 10, 2023 work injury did not result in an injury to Claimant's hip as the findings on MRI were degenerative and unrelated to the work injury.

22. The ALJ credits the testimony and opinions expressed by Dr. Ciccone in his report and deposition and finds that Claimant has failed to establish that it is more probable than not that his hip injury is a compensable component of his April 10, 2023 work injury. The ALJ notes that Claimant did not begin to complain of pain into the groin until May 30, 2023, seven (7) weeks after the work injury. The complaints of groin pain was consistent in Claimant's records after May 30, 2023, but was not present prior to that time.

23. The ALJ credits the testimony of Dr. Ciccone that Claimant's complaints of hip pain on the outside of his hip related to the low back condition for which Claimant was treating, and was not related to the issues identified on the May 9, 2024 right hip MRI for which Claimant underwent surgery with Dr. Godin.

24. The ALJ further notes that Dr. Godin testified that the condition for which he performed the surgery (the CAM lesion and labral tear) pre-existed Claimant's work injury. It was Dr. Godin's opinion that this pre-existing condition was an asymptomatic condition that became symptomatic as a result of the work injury. However, the ALJ credits the testimony of Dr. Ciccone and finds that the complaints related to the condition for which Claimant sought surgery manifested as complaints of pain in the groin that did not develop until 7 weeks after the injury and are found to be pre-existing and not related to the April 10, 2023 work injury.

25. The ALJ recognizes that if an injury aggravates, accelerates or combines with a pre-existing condition to cause the need for medical treatment, the injury is compensable under the Colorado Workers' Compensation Act. However, in this case, the ALJ finds that the preponderance of the evidence does not establish that it is more likely than not that the injury aggravated, accelerated or combined with Claimant's pre-existing condition to cause the need for the medical treatment related to Claimant's right hip.

CONCLUSIONS OF LAW

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

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

385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions: the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

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

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

6. As found, Claimant has failed to prove by a preponderance of the evidence that the medical treatment related to Claimant's right hip is related to the April 10, 2024 low back injury. As found, the medical records establish that Claimant's complaints related to the condition for which Dr. Godin performed the surgery did not develop until 7 weeks after Claimant's work injury and Claimant has failed to establish that the work injury caused the symptoms related to Claimant's right hip for which he sought medical treatment. As found, the report and testimony of Dr. Ciccone is found to be credible and persuasive regarding this issue.

ORDER

It is therefore ordered that:

1. Respondents are not liable for Claimant's claim for medical treatment related to his right hip and that portion of Claimant's claim in relation to the April 10, 2023 injury is denied and dismissed.

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

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

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-232-916-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits after April 19, 2024.

STIPULATIONS

At hearing, the parties entered into the following stipulations:

1. Claimant's average weekly wage (AWW) from the date of injury (February 23, 2023) through the date of Claimant's voluntary resignation (January 20, 2024) was $508.07, corresponding to a TTD rate of $338.71.

2. Effective February 1, 2024, Claimant's AWW increased to a new AWW of $802.20, corresponding to a TTD rate of $534.80.

3. Effective April 26, 2024, Claimant's AWW decreased to $708.06, corresponding to a TTD rate of $472.04.

4. Claimant is owed TTD benefits from February 23, 2023 through March 20, 2023.

5. Claimant is owed temporary partial disability (TPD) benefits from March 21, 2023 through January 20, 2024 in the amount of $6,565.48.

6. Claimant is owed TPD benefits from January 21, 2024 to April 18, 2024 in the amount of $3,702.48.

FINDINGS OF FACT

1. Claimant sustained an admitted injury in the course of her employment with Employer on February 23, 2023, when she struck her head on a metal shelf while unloading product from a delivery truck, sustaining a head contusion and mild concussion. Following the injury, Claimant was initially unable to work, but returned to work for Employer on modified duty on March 21, 2023. On January 20, 2024, Claimant voluntarily resigned her employment with Employer. (Ex. C).

2. At the time Claimant resigned her employment with Employer, she was subject to work restrictions limiting her to no more than to three 5-hour shifts per week, for a total of 15 hours per week. (Ex. 8).

3. Claimant then obtained employment with a different employer (Miramont) as a receptionist. Initially, Miramont accommodated Claimant's work restrictions which remained at three 5-hour shifts per week until March 18, 2024. (Ex. 8 and 9).

4. Claimant testified that as a result of her injury, she experienced symptoms of headaches, dizziness, nausea, fatigue, and memory issues. Claimant testified that her position at Miramont required her to answer phones, and work with a computer, which caused more frequent headaches, fatigue, and dizziness.

5. On March 18, 2024, Claimant saw her authorized treating physician (ATP) Edwin Baca, M.D., reporting worsening symptoms, including worsening headaches, fogginess, and fatigue corresponding with an increase in work and computer work. She also noted intermittent headaches with associated neck pain and tightness, with numbness and tingling down the bilateral upper extremities into the hands and fingertips. Dr. Baca modified Claimant's work restrictions to limit her to working ten hours per week over two 5-hour shifts. (Ex. 12). Miramont was unable to accommodate Claimant's revised work restrictions, and terminated Claimant's employment on April 18, 2024.

6. As of the date of hearing, Claimant had not worked since April 18, 2024. The record reflects that Claimant remained under the same 10-hour-per-week restriction at least until August 12, 2024. No credible evidence was admitted indicating that Claimant's work restrictions have been further modified.

7. At hearing, Trustyn Niceley, a human resources executive for Employer testified, credibly, that Employer was able to accommodate Claimant's work restrictions while she worked for Employer. Mr. Nicely also testified that Employer could have accommodate Claimant's increased work restrictions assigned by Dr. Baca in March 2024 (*i.e.*, 10-hours per week), if Claimant had remained employed by Employer.

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

Temporary Total Disability

Under the termination statutes, §§ 8-42-103(1)(g) and 8-42-105(4), C.R.S., an injured worker who is responsible for termination of employment is not entitled to temporary disability benefits absent a worsening of condition that reestablishes the causal connection between the work-related injury and the wage loss. *Delfosse v. Home Services Heroes Inc.*, W.C. No. 5-075-625-001 (ICAO Apr. 26, 2021), citing *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323 (Colo. 2004). "A wage loss is caused by a worsened condition if the worsening results in physical limitations or restrictions which did not exist at the time of the termination, and these limitations or restrictions cause a limitation on the claimant's temporary earning capacity which did not exist when the claimant caused the termination." *Id*. The claimant bears the burden of proof to establish a worsening of condition and resulting wage loss. *Id*.

A post-termination increase in work restrictions is not *per se* evidence of a worsening of condition and whether a changed condition caused the claimant's wage loss is a factual question for the ALJ. *See Apex Transp., Inc. v. Indus. Claim Appeals Office*, 321 P.3d 630, 632 (Colo.App.2014). An ALJ may consider several factors in determining that a worsened condition, and not an intervening termination of employment, caused the claimant's wage loss. *Id.* at 633.

Claimant has established by a preponderance of the evidence an entitlement to temporary disability benefits after April 18, 2024. When Claimant voluntarily resigned from her position with Employer on January 20, 2023, her wage loss was no longer the result of her injury. At that time, Claimant's was subject to a 15-hour-per-week restriction. Claimant's condition worsened in March 2024, necessitating increased work restrictions that did not exist at the time of her resignation (*i.e.*, limiting Claimant to 10-hour work weeks). These increased restrictions resulted in her termination from Miramont on April 18, 2024, and subsequent wage loss. Accordingly, Claimant has met her burden of establishing an entitlement to temporary disability benefits.

Employer's ability to accommodate Claimant's revised work restrictions does not alter Claimant's entitlement to temporary disability benefits. The Workers' Compensation Act does not create an affirmative duty on the part of a temporarily disabled claimant to seek work within his or her restrictions. *Schlage Lock v. Lahr*, 870 P.2d 615, 617 (Colo.

App. 1993). “Thus, a claimant’s ability to perform post-injury employment or willingness to seek employment does not necessarily reflect the degree of physical impairment resulting from the change in physical condition.” *Id*., citing *Denny's Restaurant, Inc. v. Husson,* 746 P.2d 63 (Colo. App. 1987). Nor does a claimant's hypothetical ability to perform some employment within his or her temporary medical restrictions sever the causal connection between the injury and the temporary wage loss. *See Eastman Kodak Co. v. Indus. Comm’n,* 725 P.2d 107 (Colo. App. 1986).

ORDER

It is therefore ordered that:

1. Claimant is entitled to temporary disability benefits beginning April 19, 2024, until terminated by law.

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

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

DATED: January 6, 2025

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-228-046-001

ISSUES

1. Whether Claimant established by clear and convincing evidence that impairment rating assigned by Division independent medical examination (DIME) physician Jade Dillon, M.D., is incorrect.

FINDINGS OF FACT

1. Claimant worked for Employer as a kitchen worker. On June 16, 2022, Claimant was reaching overhead for a cooking pot, when another large pot fell from above, striking her in the left side of her head.. Claimant reported head pain and a headache, but Claimant continued to work until the end of her shift that day.

2. The following day – June 17, 2022 – Claimant went to the Platte Valley Medical Center emergency department for complaints of headache, nausea, and dizziness. Claimant reported no loss of consciousness, and denied any other areas of pain. A head CT scan was performed and was normal, with no fractures or intracranial hemorrhage. She was diagnosed with a concussion, and discharged. (Ex. 1).

3. On June 20, 2022, Claimant saw Donald Fresques, NP at PMFC Brighton for continued headaches and blurred vision. Mr. Fresques' neurological examination of Claimant was normal. He diagnosed Claimant with a concussion without loss of consciousness, and excused Claimant from work. (Ex. 2).

4. Claimant returned to Mr. Fresques on June 23, 2022, reporting headaches, blurred vision, and left sided upper trapezius pain. Examination of Claimant's cervical spine was normal, except for reports of left upper trapezius pain, and her neurological examination remained normal. Mr. Fresques added a diagnosis of neck muscle strain. He modified Claimant's work restrictions to permit her to return to work, with a 5-pound lifting restriction, and limiting her to 5 hours of work per day. (Ex. 2).

5. On July 5, 2022, Claimant saw Ethan Moses, M.D., at PMFC Brighton, reporting the same symptoms, with the addition of memory problems, photophobia, and nausea. On examination, Dr. Moses noted additional musculoskeletal complaints, including hypertonicity in the cervical and trapezius muscles, and tenderness in the scapula and cervical muscles, with limited cervical range of motion. Again, Claimant's neurological examination was normal. Dr. Moses started Claimant on Naprosyn, amitriptyline, and modified her work restrictions to 6 hours per day. (Ex. 4)

6. On July 19, 2022, Claimant saw Mary Tribble, PA-C, at PMFC Brighton in follow-up. Claimant continued to report blurred vision, headaches, and dizziness. Ms. Tribble's examination findings were the same as Dr. Moses' from July 5, 2022. Based on Claimant's lack of reported improvement, Ms. Tribble referred Claimant for a neurological

evaluation. (Ex. 5). Claimant continued to see Ms. Tribble for follow up visits through August 25, 2022. At her July 27, 2022 visit, Claimant reported experiencing double vision, and could not complete a nystagmus test due to reported dizziness when she looked to the left. On July 27, 2022, Ms. Tribble ordered a head MRI. At later visits, Ms. Tribble noted no nystagmus, although Claimant continued to report dizziness when looking left. (Ex. 5).

7. Claimant returned to PMFC Brighton for evaluations with Dr. Moses, and Mr. Fresques through April 2023. During this time, Claimant was referred for (and received) physical therapy for approximately ten months, and massage therapy. Claimant reported no significant improvement in her reported headache and vision symptoms throughout this time. (Ex. 4 & 7). In addition to Ms. Tribble's neurological referral, Claimant was referred for vision and psychological evaluations. In April 2023, Annu Ramaswamy, M.D., at PMFC assumed responsibility for Claimant's care.

8. On September 2, 2022, Claimant saw neurologist Kate Kraus, M.D., at Advanced Neurological, and saw her four times through February 2, 2023. Dr. Kraus reviewed Claimant's MRI and confirmed it was unremarkable. Claimant reported having daily, left-sided headaches, with dizziness, blurry vision, light and sound sensitivity and nausea, relieved by laying down in a dark, quiet room. Dr. Kraus documented normal neurological examinations, including evaluation of the cranial nerves. She diagnosed Claimant with post-traumatic headaches, prescribed various medications for headaches. While Claimant reported some improvement of her migraine headaches with medication, she reported no other significant improvement in her symptoms. Claimant had no further documented neurological evaluations after February 3, 2023. (Ex. 7).

9. On November 30, 2022, Claimant saw Cheryl Fedel, O.D., at Brighton Eye Associates. Claimant reported blurriness and photophobia. Dr. Fedel was unable to perform some testing due to inconsistent responses, and recommended that Claimant undergo a full binocular vision evaluation with a vision therapy specialist. (Ex. 8).

10. On March 3, 2023, Claimant saw Kerry Jarvis, O.D., on referral from Mr. Fresques. Dr. Jarvis found Claimant to have an abnormal vestibular-ocular reflex and reported dizziness with ocular motor movements. He recommended occupational and physical therapy for dizziness and oculomotor defects, and recommended glasses. (Ex. 9).

11. Claimant's physical therapy visits both before and after March 3, 2023, included oculomotor exercises, which Clamant reported doing at home with limited improvement in her symptoms. At her June 2, 2023 physical therapy visit, claimant was discharged, noting that her treatment was not progressing. (Ex. I).

12. On March 20, 2023, Claimant saw Melanie Heto, Psy.D., for a psychological evaluation. Dr. Heto performed psychological testing which showed Claimant reported severe depression symptoms, and minimal anxiety. She also noted that Claimant scored in the high-risk range for pain catastrophizing, including high scores for magnification, rumination, and helplessness. Based on her evaluation, Dr. Heto diagnosed Claimant

with adjustment disorder with mixed anxiety and depressed mood. Claimant then attended six psychotherapy sessions with Dr. Heto through July 19, 2023. (Ex. 10).

13. On April 25, 2023, Claimant saw Dr. Ramaswamy at PFMC Brighton, with a primary complaint of left frontal headaches, with occasional blurred vision in the left eye. Claimant also reported neck pain with some stiffness. Although Claimant denied depression, Dr. Ramaswamy indicated that Claimant's testing for depression was elevated. On examination, he noted that Claimant's cervical spine motion was limited, but that it was more of an issue with looking upward which reportedly caused left eye pain. He diagnosed Claimant with a concussion without loss of consciousness, neck strain, head contusion, and headache. At the time, Claimant remained under work restrictions, which included a 40-pound lifting restriction. (Ex. 11).

14. On June 6, 2023, Dr. Ramaswamy placed Claimant at maximum medical improvement, and assigned Claimant permanent impairment ratings. Specifically, Dr. Ramaswamy assigned Claimant ratings in three categories: episodic neurological disorder, vestibular dysfunction, and cervical spine. With respect to the neurological disorder rating, he indicated that Claimant had a 10% whole person impairment each for cognitive dysfunction, depression, and persistent headaches. However, he assigned Claimant one 10% rating for "brain" without identifying the specific impairment for which the rating was assigned. The final impairment rating Dr. Ramaswamy assigned was a 10% whole person impairment for "brain," a 5% whole person rating for vestibular dysfunction, and a 12% whole person rating for cervical spine. The combined ratings correspond to a 25% whole person impairment rating. (Ex. 13).

15. On September 22, 2023, Claimant saw Tashof Bernton, M.D., for an independent medical examination (IME) at Respondents' request. Dr. Bernton issues a report (Ex. G), and testified by deposition as an expert in occupational medicine. Based on his examination and review of records, Dr. Bernton opined that Claimant had sustained a scalp contusion and possible concussion on June 16, 2022, but he opined that the incident was not a reasonable physiologic cause of Claimant's persistent severe symptoms, and that Claimant had reached MMI. He testified that Claimant's reported lack of improvement from her head injury was not consistent with recovery from a mild traumatic brain injury. Specifically, he indicated that symptoms from an injury, such as that sustained by Claimant, improve over the first six months, and that persistent symptoms after that period of time, are more likely due to psychological factors than physical effects of a brain injury.

16. Dr. Bernton opined that Claimant had no permanent injury to the neurologic system, vestibular system, or cervical spine, and that treatment based on the presumption that Claimant had permanent injuries related to the June 16, 2022 injury was not medically reasonable or probable. He opined that Claimant's injury was not on which would be reasonably expected to result in a permanent impairment, that the deficits she reported are not consistent with a physically-based neurologic deficit, and that Claimant's functional level was inconsistent with her reported level of cognitive difficulty. He further indicated that he found no evidence on examination of a vestibular injury. He also felt that the mechanism of injury was inconsistent with a significant cervical spine injury. He

diagnosed Claimant with somatoform disorder, opining that Claimant's complaints were not physically based and not due to a physical injury. . He further indicated that Claimant was clearly depressed and likely had significant somatoform complaints, and recommended further assessment to determine whether those complaints were work-related. At hearing, he testified that Claimant's evaluation by psychiatrist Robert Kleinman, M.D., addressed Dr. Bernton's concerns regarding depression, and that he agreed with Dr. Kleinman's opinions. He further testified that to have depression secondary to a work-injury, an injured worker must have a physical injury, which he does not believe Claimant has. (Ex. G).

17. On November 6, 2023, Claimant saw psychiatrist Robert Kleinman, M.D., for a Respondent-requested IME. Dr. Kleinman testified by deposition, and issued a report dated July 15, 2024 (Ex. H). During her examination with Dr. Kleinman, Claimant reported significant memory issues, such as forgetting where she was born, when she was married, her childhood, and the names of her parents and her five children. Dr. Kleinman noted that Claimant had recalled where she was born, how long she had been in the United Stats and how long she was married when she met with Dr. Heto, but Claimant reported that she had since forgotten everything. He found Claimant's claims of memory loss unconvincing. Claimant's mental status examination was consistent with dementia, although Claimant clearly does not have dementia, which would be inconsistent with her injury and her ability to work, drive and perform activities of daily living. (Ex. H).

18. In his report and testimony, Dr. Kleinman opined that Claimant did not have acute injury parameters to diagnose a traumatic brain injury, including that, at the time of her injury, she did not have a loss of consciousness, was not confused or disoriented (noting that she was able to continue work on the date of injury), she did not have amnesia, and did not have neurological findings. He further indicated that Claimant's course of recovery, current memory complaints, and mental status examination were not consistent with a neurocognitive disorder due to a traumatic brain injury, and there was no basis for diagnosing Claimant with that condition.

19. He noted that Claimant appeared depressed, but denied depression. He opined that because Claimant's cognitive and physical complaints were invalid, it would be incorrect to assume that Claimant's depression was related to her work injury. He further opined that any adjustment disorder Claimant may have had as the result of her work injury should have resolved. Dr. Kleinman concluded that Claimant was "invalid in her presentation and has invented and exaggerated complaints," and that she was systematically misrepresenting herself cognitively, catastrophizing, exaggerating, or possibly inventing her pain complaints. Ultimately, he diagnosed Claimant with factitious disorder, noting that if her testing and complaints were valid, Claimant would require 24-hour supervision and be unable to work or drive. He further opined that to the extent Claimant has depression, it is unrelated to her work injury. (Ex. H).

20. On December 14, 2023, Claimant saw Jade Dillon, M.D. , for a DIME. (Ex. 16). Dr. Dillon concluded that Claimant reached MMI on June 6, 2023, and sustained no permanent impairment from her work-related injury. Dr. Dillon indicated that Claimant sustained a mild traumatic brain injury and that the natural course of such an injury is to

steadily resolve over a period of one year. She indicated that Claimant's symptoms were subjective and existed in the absence of an identifiable condition or pathology related to her work-injury. She indicated that Claimant had no primary symptoms of cervical or thoracic spine injuries, and that the mechanism of injury was inconsistent with a spinal injury. She further testified that to the extent Claimant sustained a cervical strain, it was a transient muscular injury that did not justify a permanent impairment rating. She testified that Claimant did evidence balance issues during her examination, including a negative Romberg test, and does not have a vestibular disorder. Dr. Dillon testified that Claimant probably has an unspecified depressive disorder or unknown cause, but did not attribute it to Claimant's work injury. She indicated that to assign Claimant a mental impairment rating for, Claimant must also have a physical impairment rating, which Claimant did not have. In conjunction with the DIME, Dr .Dillon reviewed the reports of Dr. Bernton and Dr. Kleinman, and agreed with their conclusions that Claimant had no physical or mental impairments related to her June 16, 2022 work injury.

21. On June 11, 2024, Claimant saw David Yamamoto, M.D., for an IME at Claimant's request. D. Yamamoto issued a report (Ex. 17), and testified as an expert in occupational and family medicine. He opined that Claimant has not reached MMI, and requires further evaluation of her cervical spine, further assessment to determine if Claimant has a vestibular dysfunction, and further psychiatric evaluation. Based on his examination and review of medical records, Dr. Yamamoto diagnosed Claimant with a mild concussion, closed-head injury, ongoing headaches, cervical strain, and secondary depression.

22. Dr. Yamamoto opined that Claimant's ongoing headaches were related to the June 16, 2022 work incident, but that some of her symptoms, including her vision issues and ongoing photophobia were difficult to explain. He indicated that "it would be reasonable to state that this is a functional neurological disorder which has also been referred to as a conversion reaction." In testimony, he offered no explanation for this opinion. Dr. Yamamoto also indicated that Claimant's workup for vestibular issues was incomplete, that an evaluation by an optometrist was not an appropriate workup. and that Claimant should have seen an ENT physician or neurologist. He also noted that he found a positive Romberg test on his evaluation of Claimant, which demonstrated balance issues.

23. With respect to Claimant's cervical spine, Dr. Yamamoto does not believe Claimant had an adequate work up, and required additional imaging studies. He opined that Dr. Ramaswamy should not have assigned an impairment rating for Claimant's cervical spine until such imaging was performed.

24. Dr. Yamamoto further recommended that Claimant be evaluated by a psychiatrist who treats workers' compensation patients to determine if she qualified for a rating for depression, in addition to a rating for episodic neurological disorders.

25. In testimony, He opined that Dr. Dillon's DIME report was "inadequate" and did not fully address issues. He disagreed with Dr. Dillon's assessment that Claimant's cervical strain was resolved, but offered no cogent medical basis for that disagreement, other than his belief that the diagnosis of a factitious disorder is a "severe" or "strong" diagnosis. He also criticized Dr. Dillon's opinion that claimant did not have a vestibular issue, testifying

that her opinions were “a reach” without a full workup. He also testified that an injured worker may receive a mental impairment rating without a physical impairment rating if the mental issues were work-related and secondary to an injury.

26. Claimant testified that she remains employed by Employer performing the same job she performed prior to her injury. She testified that she continued to have headaches on the left side of her head, that are constant, but fluctuating in severity. She further testified that she has dizziness, nausea when the pain is severe, and ongoing memory issues. Claimant testified that she had none of these issues before June 16, 2022. She also indicated that none of the treatments she received has made her symptoms better.

CONCLUSIONS OF LAW

Generally

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

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

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

contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming DIME on Impairment

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

Claimant has failed to establish by clear and convincing evidence that the DIME's opinion regarding permanent impairment is incorrect. Dr. Dillon determined that Claimant did not sustain any permanent impairment from her June 16, 2022 work-related injury. In reaching this conclusion, Dr. Dillon determined that Claimant did not have any objective, physical evidence of impairment from a mild traumatic brain injury, did not sustain a permanent impairment to her cervical spine, and did not have a permanent impairment related to a vestibular dysfunction. Dr. Dillon agreed with the opinions of Drs. Bernton and Kleiman, both of whom opined that Claimant did not have a work-related permanent impairment.

Claimant's assertion that her condition was not fully evaluated is based on Dr. Yamamoto's opinion that Claimant requires further work up for her cervical spine, potential vestibular issues, and depressive symptoms. In the year between the work incident, (June 16, 2022), and Dr. Ramaswamy placing Claimant at MMI (June 6, 2022), Claimant was evaluated by providers at PFMC Brighton more than twenty times, received approximately ten months of physical and ocular therapy, saw neurologist Dr. Kraus four times, saw two different vision specialists, and was evaluated and treated by Dr. Heto for mental health issues. None of these providers determined that cervical imaging was warranted, or recommended additional psychological evaluations. When he placed Claimant at MMI, Dr. Ramaswamy recommended only additional medications, and 6 visits of counseling with Dr. Heto. Dr. Yamamoto's opinion that additional work up is necessary is not supported by the determinations made by Claimant's treating providers, and does not constitute clear and convincing evidence that Dr. Dillon's opinions are incorrect.

Although Dr. Ramaswamy assigned Claimant permanent impairment ratings, and Yamamoto disagreed with Dr. Dillon's opinions, these amount to differences of opinion regarding Claimant's diagnoses, workup, and impairment rating, and do not constitute evidence that is unmistakable and free from serious and substantial doubt demonstrating that Dr. Dillon's impairment rating is highly probably incorrect.

Claimant's argument that Dr. Dillon erred in finding that Claimant was not entitled to a mental impairment rating because she did not have a physical impairment rating is not persuasive. Although the Workers' Compensation Act has authorized recovery for purely mental injuries and mental impairment, the mental impairment must arise out of the course and scope of employment. See *Mobley v. King Soopers*, WC 4-359-644 (ICAO Mar. 9, 2011); *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004); and § 8-41-301(2)(a), C.R.S. Assuming, arguendo, Claimant is experiencing depression, Dr. Dillon opined that the cause of the depression is unknown, and agreed with Dr. Kleinman's opinion that it was unrelated to her physical work injury. Dr. Yamamoto opined that Claimant may be entitled to a rating for depression, but recommended additional evaluation. Dr. Heto diagnosed Claimant with adjustment disorder with mixed anxiety and depressed mood, but offered no opinion on the permanency of this condition, or whether Claimant was entitled to an impairment rating. The evidence does not demonstrate that Dr. Dillon's opinion that Claimant's potential depression is not causally-related to the June 16, 2022 injury is highly probably incorrect.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by clear and convincing evidence that the DIME physician's assigned 0% impairment rating is incorrect.

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

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

DATED: January 6, 2025

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-271-197-002

ISSUES

I. Whether Claimant established, by a preponderance of the evidence that he sustained a compensable injury.

II. If Claimant established that he sustained a compensable injury, whether he also established that he is entitled to all reasonable, necessary, and related care for his injury.

III. Whether Claimant established that he is entitled to Temporary Total Disability (TTD) benefits beginning April 17, 2024 and ongoing.

IV. What is Claimant's Average Weekly Wage?

FINDINGS OF FACT

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

1. Claimant was employed by the employer on April 17, 2024. He was employed as a "top man". He was responsible for ensuring that the crew had all the materials needed. He also took measurements for the laying of pipe.

2. Claimant reports that on April 17, 2024, he was hit by an excavator bucket while at a construction site. Claimant has provided different accounts of what happened. For instance, in a physical therapy examination on May 2, 2024, he claimed to have been knocked into a hole and ". . .fell approximately 10 to 15 feet down." (Exhibit I, Bates 181). However, when he later spoke to the construction manager, Adam Frady, a few days after the incident occurred, he did not repeat this. (Hearing Transcript from October 21, 2024, pg. 25, lines 5-7). Claimant would later report at hearing on October 21, 2024, about being pushed 10 feet forward, but never actually falling into a hole. (10/21/24 Tr., pg. 42-43; l: 25; 1-2).

3. The alleged incident on April 17 was investigated by Adam Frady. Mr. Frady noted that all of the other crew members working alongside Claimant did not report seeing any accident. (10/21/24, 8:21-25). This is in spite of Claimant's claim at hearing that three other crew members witnessed it. (10/21/24, 49:15-20). Indeed, the only one who confirmed to Mr. Frady that Claimant sustained an accident at work was Jairo Pineda, who was not on site at the time of the accident and could not have observed it. (09/24/24, 71:14-18). Mr. Pineda is also the brother-in-law of Claimant. (09/24/24, 73:6-8; 71:19-25). Mr. Frady also noted that no police were called, in spite of the fact that Claimant was

apparently reporting that his being hit by the bucket constituted an assault. (10/21/24, 26: 10-14).

4. Claimant did not seek immediate treatment. Instead, he was sent home by Mr. Pineda, contrary to the advice of Adam Frady that Pineda should call 911 for immediate emergency treatment since he claimed he was hit by a 9,000 pound machine.

5. Claimant did go to the Emergency Room at UC Health on the following day, April 18, 2024. He underwent imaging of his head and spine on this date. In particular, he had CT scans of his brain, neck, cervical spine, thoracic spine, chest/abdomen/pelvis, and lumbar spine. (Exhibit D, Bates 36-38). None of these images revealed any acute injuries. (Id.).

6. It was noted in the Emergency Room that the Claimant had no extremity pain, no memory loss, no gait abnormality, and no abdominal pain. (Exhibit D, Bate 33-34, 35). There was no bruising noted on an examination of his spine or extremities.

7. Claimant then had his first primary care visit with Dr. Tyler Backlas on April 30, 2024 at CommonSpirit Primary Care. It was noted again that Claimant reported he fell into a hole and had diffuse neck pain, back pain, and paresthesia down his bilateral arms and legs. (Exhibit H, Bates 156-57). It was noted all CTs produced "normal findings noting some degenerative changes [sic] lumbar spine and fatty liver." (Id.).

8. Claimant reported symptoms consisting of numbness, burning, tingling in all extremities. (Id.). It was noted he had neck and back pain. (Id.). He reported he had worse pain in his low back. (Id.).

9. During examination, it was noted that "[s]trength testing was limited by pain everywhere including bilateral shoulders, elbows, wrists, hips and knees." (Exhibit G, Bates 158). He was diagnosed by Dr. Backlas with acute bilateral lower back pain, neck pain, myalgia and paresthesia. (Exhibit H, Bates 155-56).

10. Claimant had an Independent Medical Examination with Dr. Marc Steinmetz on June 25, 2024. It was noted Dr. Steinmetz did not have a lot of medical records to review prior to this IME. This appointment was accordingly more important for Dr. Steinmetz's observations of Claimant and his examination.

11. Dr. Steinmetz went onto make a number of observations about Claimant during his physical examination. In particular, the following was noted:

a. It was indicated that Claimant walked around ". . .very fluidly and quickly in the waiting room and from the waiting room to the exam room. . ." (Id. at 9). However, it was noted that when Claimant was in the examination room, he ". . .moves very slowly and groans a little bit when he gets up and down off the exam table." (Id.).

b. It was noted during physical examination, Claimant could barely move his neck. However, again Claimant demonstrated the ability when he was not being directly examined of moving ". . .his neck side to side 90 degrees when he is talking about his

history and/or looking at the interpreter to his side." (Id.). Dr. Steinmetz indicated that Claimant "moves his neck around fully and normally at times while talking with no apparent pain when he is talking, moving his neck up and down, pointing to his feet and looking down to his feet with his chin touching his chest." (Id.).

c. Dr. Steinmetz noted Claimant ". . .bends forward to hand the phone over and twists his mid back when he is working with the phone with the interpreter to get the Google meets visit with his doctor set up; however, he does not forward flex his thoracic spine or low back hardly at all compared to that during the physical exam." (Id. at 10).

d. Dr. Steinmetz noted he barely moved his neck at all during the range of motion assessment, to only around 10 or 20 degrees. (Id.). For his thoracic and lower back, it was noted he could only forward flex to about 25 degrees and extension was noted to be 5 degrees. (Id.).

12. Dr. Steinmetz summarized his reasoning as to why he found no reliable evidence of any injury from April 17, 2024 at the end of his report. His reasoning consisted of the following:

a. his inconsistent unreliable history; b. the lack of verifiable acute objective; c. his subsequent June significantly stressful physical activities such as 'working for long hours', 'push-ups and squats', and lifting his 30-poiund nephew; and d. his inconsistent unreliable physical presentation to me such as him moving his spine normally and walking normally at times but at other times he would significantly limp and also not move his spine hardly at all.

13. Dr. Steinmetz credibly opined that the Claimant sustained no injury.

CONCLUSIONS OF LAW

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

Generally

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

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

consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case there is little evidence that Claimant sustained an injury in the manner he alleges. The incident he describes was unwitnessed and highly improbable, given the nature of the incident. As pointed out by Mr. Frady, when he received the call regarding the alleged incident, his first move would be to call 911 if someone got hit by equipment. He further elaborated "if someone's hit by a 9,000 pound machine, they need to go to the hospital immediately and let the paramedics make that call". Instead, the Claimant went home at the direction of his supervisor, Mr. Pineda.

E. 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 has 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).

F. In this case, Claimant has failed to establish that he was injured at work. I conclude that his testimony and the testimony of Mr. Pineda are not credible with respect to whether the Claimant was hit by the excavator bucket and thrown 10 to 15 feet. When Mr. Frady investigated the alleged incident, no one present were able confirm the incident occurred. Mr. Pineda, could not verify the incident since he was not on the job site at the time Claimant alleges the incident occurred.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish a compensable injury by a preponderance of the evidence. The claim for compensation is denied and dismissed.

DATED: January 9, 2025

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

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

address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable work injury in the course and scope of her employment on September 12, 2023.

2. Whether Claimant proved by a preponderance of the evidence that she is entitled to medical benefits reasonably necessary to cure and relieve her of the effects of her September 12, 2023 injury.

ISSUES WITHDRAWN

1. At the outset of the hearing, Claimant withdrew the endorsed issues of average weekly wage, temporary total benefits, and temporary partial benefits, and reserved those issues for determination at a later date.

FINDINGS OF FACT

1. Claimant is 35 years-old (d.o.b. 11/22/89) and has been employed by Employer since April 2017.

2. Claimant is a Field Service Representative for Employer. Claimant typically works from 6 a.m. to 6 p.m. Claimant's job requires that she travel to production sites northeast of Denver. Outside of 4-6 times a year when she can work from home, Claimant travels every day for work. *See* Ex. 12.

3. Employer pays Claimant a salary plus overtime. *See* Ex. 13. Claimant submits her hours worked through an online system. Claimant is paid by Employer for her time traveling to and from production sites.

4. When going to production sites, Claimant drives a truck provided by Employer. Employer pays for the gasoline and maintenance of that truck. Claimant does not use the truck for personal errands or non-work-related travel.

5. On September 12, 2023, Claimant was leaving a production site near Grover, Colorado. Claimant's visit was her last production site visit for the day and when she left the site she was heading home to Denver. Claimant was not familiar with the area, so she used the Google Maps application on her cellular telephone to give her directions back to Denver.

6. Claimant followed the route provided by Google Maps and she did not deviate from that route. Google Maps routed Claimant north on Highway 85 to then turn left to join Weld County Road 128 to Highway 25 south. While waiting to turn left, Claimant's truck was rear-ended by another vehicle traveling north on Highway 85. Ex. 1.

7. After being struck, Claimant's truck was no longer operational so she called her supervisor who drove to the site of the accident and then drove Claimant home. Claimant's supervisor took the same route back to Denver as the route recommended by Google Maps.

8. The ALJ found Claimant's testimony credible in its entirety.

9. On September 13, 2023, Claimant reported to Concentra Medical Center with neck and back pain as a result of the accident. Ex. 7. Claimant was diagnosed with spinal strains and referred to therapy. *Id.*

10. Claimant has seen providers at Rose Medical Center, Mountain View Pain Center, Health Images at Church Ranch, and ME Physical Therapy. Ex. 8-11.

CONCLUSIONS OF LAW

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

Assessing the weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals Off.*, 43 P.3d 637, 641 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Bodensieck v. Indus. Claim Appeals Off.*, 183 P.3d 684, 687 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385, 389 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that her injury arose out of the course and scope of employment with her employer. § 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her 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).

"As a general rule an employee injured while traveling to and from his place of employment is not entitled to compensation under the Workmen's Compensation Act." *Indus. Comm'n v. Lavach*, 165 Colo. 433, 437-38 (1968). However, there are "special circumstances which invoke well-recognized exceptions to the general rule." *Id.* at 438.

> [T]he proper approach [to determine whether a traveling employee's injury warrants an exception to the going to and from work rule] 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 v. Mt. W. Fabricators, 977 P.2d 861, 864 (Colo. 1999).

Here, a preponderance of the evidence supports the conclusion that Claimant suffered a compensable work injury on September 12, 2023. Considering the *Madden* variables, Claimant's injury occurred during working hours and was contemplated by her employment contract. Significantly, Claimant's travel was a "journey . . . assigned or directed by the employer," conferred "a benefit on the employer beyond the sole fact of the employee's arrival at work," was in "employer provide[d] transportation," and was time paid by Employer. *Id.* at 864-65. Claimant's travel is the exact type of travel considered a special circumstance excepted from the going to and from work rule. Claimant's travel is an express function of her job, for which Employer provides a vehicle, gas, and maintenance, and for which Employer pays her for completing. Nothing in the evidence suggests that Claimant was doing anything other than her job at the time she was injured.

Because Claimant's travel was an express part of her employment, Claimant's injury while traveling was both in the course of and arising out of her employment. Therefore, based on the totality of the evidence, Claimant proved it is more likely than not she suffered a compensable work injury on September 12, 2023, resulting in disability and the need for medical treatment.

Medical Treatment

Respondents are liable for medical treatment that is causally related, reasonable, and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S.

Claimant's treatment at Concentra on September 13, 2023 was casually related, reasonable, and necessary to cure and relieve the effects of her industrial injury. Therefore, Respondents are liable for that treatment and all casually related, reasonable, and necessary treatment to relieve Claimant of the effects of the September 12, 2023 injury.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable industrial injury on September 12, 2023 arising out of and in the course and scope of her employment with Employer.

2. Respondents shall pay for Claimant's reasonable and necessary medical treatment causally related to the September 12, 2023 injury.

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

SIGNED: January 9, 2025.

Robin E. Hoogerhyde
Administrative Law Judge

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

ISSUES

I. Whether Claimant's claim is closed by virtue of his failure to object to a September 7, 2023, Final Admission of Liability (FAL). The question in this regard is whether Claimant established, by a preponderance of the evidence, that he did not receive or have actual notice of the September 7, 2023 FAL, and thus, had no opportunity to object to the FAL and request a Division Independent Medical Examination, which would have prevented the claim from closing by operation of law.

II. If the claim is closed, whether Claimant established, by a preponderance of the evidence, that he is entitled to reopen it based on an alleged error, mistake or worsening of condition.

III. If the claim is closed and Claimant established, by a preponderance of the evidence, that he is entitled to a reopen it based upon an error, mistake or worsening of condition, the date by which the claim is reopened.

IV. If Claimant established that he is entitled to have his claim reopened, whether the medical treatment he received through Adult Medicine Specialists, P.C. is authorized.

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

The September 7, 2023 Final Admission of Liability and Claim Closure

1. Claimant has failed to establish that he did not receive or have actual notice of the September 7, 2023 FAL. Accordingly, this claim is closed. Section 8-43-203(2)(b)(II)(A), C.R.S. specifies that the insurer must send a claimant a FAL containing a very specific notice of rights and procedures for contesting the FAL. *See Bowlen v. Munford,* 921 P.2d 59, 60 (Colo. App. 1996). The purpose of the statute is to create a procedural mechanism by which claims may be brought to a conclusion and afford a degree of finality and effectuate the Act's goal of, "[P]rompt payment of compensation without the necessity of a formal administrative determination in cases not presenting a legitimate controversy." *Dyrkopp v. Indus. Claim Appeals Office*, 30 P.3rd 821, 822 (Colo. App. 2001) See also, *Leewaye v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). If no timely objection is filed, the claim automatically closes as to the issues admitted in the FAL. (Id.) In *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004), the Court wrote, "We conclude that a claimant has thirty days after the date an employer files an FAL to file an application for hearing..." *Id*. at 264. If the claimant does not do so, the issues admitted in the final admission are closed. *Id.* See also, *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270 (Colo. App. No. 04CA1130, August 11, 2005), stating a claim automatically closes unless claimant files

an objection to the final admission within thirty days and requests a hearing on any disputed issues that are ripe for determination; *Newbrey v. Valley Excavating, Inc.,* W.C. No. 4535.529 (ICAO, Jan. 18, 2006).

2. Based upon the evidence presented, the ALJ is persuaded that Claimant's claim is closed due to his failure to object to the September 7, 2023 FAL. Nonetheless, claimant's in workers' compensation cases are entitled to actual notice of the FAL before the failure to object triggers a closure of the claim. *Bowlen v. Munford*, 921 P. 2d 59 (Colo. App 1996). Service of the FAL on a claimant by mail is sufficient for actual notice. *Id.* The FAL must be mailed to a claimant's home address unless he/she has designated another location. *See Id. at* 61; *Henriquez v. K.R. Swerdfeger Construction, Inc.*, WC 4-439-726 (ICAO, May 5, 2003) (noting claimant's entitlement to receive notice of the FAL at his home of record"). Requiring the FAL to be mailed to a claimant's home address "maximizes the likelihood that a claimant will receive notice, without any additional expense to the employer, thereby furthering the legislative goal of assuring the quick and efficient delivery of benefits at a reasonable cost to employers." *Id.* Because the failure to follow the claims procedure can result in the deprivation of a significant property interest, due process requires the FAL to be sent to a claimant in a manner reasonably calculated to provide notice that he must contest the FAL within 30 days to avoid case closure. *Id*.

3. Generally, service by mail is reasonably calculated to effect required notice. *See Schmidt v. Langel*, 874 P.2d 447, 451 (Colo. App. 1993). There is a presumption that a document that is properly addressed, stamped, and mailed was duly delivered to the addressee. However, the presumption is rebuttable and does not arise where there is conflicting evidence as to whether a specific document was received. *Jahshan v. CPP/Pinkerton's Inc*., W.C. No. 4-492-664 (ICAO, February 5, 2002). Here, the subject of whether the FAL was received is a question of fact because the issue is disputed and Claimant presented some evidence challenging the suggestion the FAL was actually mailed. Again, while evidence of a properly executed certificate of mailing creates a presumption that an admission was received, this presumption may be rebutted by competent evidence, including the testimony of the claimant. *Gostnell v. Berwick Electric*, W.C. No. 3-881-452 (Dec. 26, 1991). Accordingly, the ALJ must resolve the conflict. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993); *see also Denver v. East Jefferson County Sanitation Dist.*, 771 P.2d 16, 18 (Colo. App. 1988). In this case, the evidence persuades the ALJ that there were no errors or omissions in the September 7, 2023 FAL that would render it ineffective or void. Indeed, Claimant does not challenge the content of the September 7, 2023 FAL. Rather, he simply contends that he did not receive the FAL mailed to his home address, which deprived him of actual notice of and the opportunity to object to that FAL and file for a Division Independent Medical Examination. The ALJ is not convinced.

4. Here, the evidence supports a finding/conclusion that Claimant received the separate September 7, 2023 letter Ms. Fleming mailed to Claimant's home address, the same day that the FAL was purportedly sent to the same address. (Ex. N). That letter clearly explained the FAL was being separately mailed to Claimant, and his rights to contest and object to that FAL. Claimant admitted at hearing that he read and understood that letter, but did nothing in response. Claimant testified he understood from that letter that a FAL was being filed in his claim. Ms. Fleming also testified that she clearly explained the claim's closure and FAL's filing during a phone conversation she had with Claimant on September 6, 2023. Claimant knew how to reach Ms. Fleming, and Ms. Fleming invited Claimant to contact her if he had questions during their September 6, 2023 telephone conversation and in the September 7, 2023, letter she sent to Claimant. Based upon the evidence presented as a whole, the ALJ is convinced that had Claimant not received the FAL as he contends, he certainly knew it was being filed, and reasonably would have contacted Ms. Fleming or Insurer to ask where his copy of the FAL was. His failure to do so can reasonably be inferred to support a conclusion that he actually received that FAL. Claimant has a history of prior workers' compensation claims, including one with the same insurer identified in this claim. The ALJ is convinced, based upon the evidence presented, that Claimant is familiar with the general processes and procedures in workers' compensation claims and that he was aware a FAL had been filed in his case and that failure to object to that FAL would result in closure of his claim. In support of this conclusion, it is noted that on February 20, 2024, Mr. Murry and Claimant contacted Ms. Fleming. Notably, her entry to the note pad at page 121 of CHE 6 and her testimony persuade the ALJ that the request at that time was for a copy of Claimant's claim file, not a request for more medical care, a question about the claim's status, or inquiry about the FAL. Had Claimant truly not received the FAL, the ALJ finds/concludes that Claimant, more probably than not, would have asked about that document and his claim status at that time, or stated he never received that FAL, or asked some question about his claim. Instead, the only time Claimant asked about his claim, it was to get copies of his records. This is best explained by Claimant having no questions about a FAL he probably received after it was mailed to his home on September 7, 2023.

5. The evidence presented also supports a finding that Claimant never requested to go back to Concentra, (his authorized medical provider) after September 7, 2023. Had he truly not received the FAL closing his claim, the ALJ is convinced he probably would have requested to do so in light of his claims that his condition was worsening with the passage of time. Instead, he made no attempt to go back to Concentra, and never asked Ms. Fleming or Insurer to see a different medical provider. Failure to seek additional treatment with the authorized provider is consistent with Claimant understanding that his claim was closed by the September 7, 2023, FAL.

Claimant's prior experience in the workers' compensation system makes it more likely he understood his failure to object to the FAL, or request a Division IME, or file a hearing application, within 30 days of the September 7, 2023, had closed his claim. He therefore concluded he needed to go back to his personal medical doctor and pursue care on his own. When examined in the light of all the evidence and testimony, the ALJ finds Claimant's actions, and inactions, are explained by his knowledge of the FAL's filing, his receipt of the FAL by mail, and his understanding his claim was closed.

6. Regardless, Claimant testified he saw and read the FAL on Insurer's portal on February 20, 2024. Assuming he did not have knowledge of the FAL prior to this date and crediting this admission, the 30 days to file an objection to that FAL and request a Division-sponsored IME began to run on February 21, 2024, after Claimant viewed and read the FAL on Insurer's portal. *Duran v. Russell Stover Candies*, W.C. no. 4-524-77 (April 13, 2004); *Meskimen v. FFE Transportation*, W.C. No. 3-966-629; Henriquez *v. K.R. Swerdfeger Constuction,* W.C. No. 4-439-726 (May 5, 2003). In this case, the evidence supports a finding that Claimant did not file an objection or a request for a Division Independent Medical Examination (DIME) within 30 days after viewing and reading the FAL contained in Insurer's portal. Claimant's failure to so object means that even if the ALJ accepted Claimant's contention that he did not receive the September 7, 2023 FAL, which the ALJ does not, the FAL still closed the claim on all admitted and denied benefits as stated in the FAL Claimant read on February 20, 2024, except for the issue of reopening as endorsed in Claimant's March 13, 2024, Application for Hearing (RHE. P). Claimant may not now argue he should be allowed to request a Division-sponsored Independent Medical Examination (DIME), or that his claim remains open, as Claimant did not request that examination, object to the FAL, or endorse the issues of PPD or medical treatment in his March 13, 2024, Application for Hearing. The September 7, 2023, FAL, even if not received by Claimant at his home address, was received by Claimant on February 20, 2024, and therefore effectively closed the claim, due to Claimant's failure to object or request a DIME, on all issues except the question of reopening of the claim and his entitlement to additional treatment if the claim is reopened based on an alleged worsening of condition as endorsed in his March 13, 2024, Application for Hearing. Because Claimant did not timely object to the September 7, 2023 FAL within 30 days after February 20, 2024 or request a DIME within this same time period, the ALJ concludes that he precluded from now obtaining a Division-sponsored Independent Medical Examination, pursuant to C.R.S. Section 8-43-203 (2) (b) (II) (A) and *Berg v. Indus. Claim Appeals Office*, supra.

Claimant's Petition to Reopen the Claim

7. Section 8-43-303(1), C.R.S. provides in pertinent part that "at any time within six years after the date of injury, the director or an administrative law judge may,

after notice to all parties, review and reopen any award on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition . . .” The party seeking to reopen the claim shoulders the burden of proof to establish grounds for the reopening. *See Garcia v. Qualtek Manufacturing*, W.C. No. 4-391-294 (August 13, 2004); C.R.S. § 8-43-303(4).

8. Reopening of a claim may be granted based on an error or mistake of fact. C.R.S. § 8-43-303(1). Error or mistake refers to mistake of law or fact that demonstrates a prior award or denial of benefits was incorrect. *Renz v. Larimer Cty. School Dist.*, 924 P.2d 1177 (Colo. App. 1996). When a party seeks to reopen a claim based on error or mistake, the ALJ must determine whether an error or mistake was made, and if so, whether it was the type of error or mistake that justifies reopening. *Travelers Insurance Co. v. Indus. Comm’n*, 646 P.2d 399, 400 (Colo. App. 1981). When determining whether an error or mistake justifies reopening the ALJ may consider whether the alleged mistake could have been avoided through the exercise of available remedies and due diligence, including the timely presentation of evidence. *Jarosinski v Indus. Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2022); *Fisher v. Wal-Mart Stores,* W.C. No. 4-247-158 (ICAO August 20, 1998): *Travelers Ins. Co v. Industrial Comm’n,* 646 P.2d 399, 400 (Colo. App. 1981). Excusable neglect is not an error or mistake justifying the reopening of an award. *Id.*; See also *Klosterman v. Indus. Comm’n*, 694 P.2d 873, 876 (Colo. App. 1984). Parties are presumed to know the law. *Paul v. Industrial Commission*, 632 P.2d 638 (Colo. App. 1981). The power to reopen is permissive and is therefore committed to the ALJ’s sound discretion. *Cordova v. Indus. Claim Appeals Off*., 55 P.3d 186, 189 (Colo. App. 2002); *Justiniano v. Indus. Claim Appeals Off.,* 2016 COA 83 ¶ 9.

9. In this case, Claimant did not present evidence or testimony of any error or mistake showing that the prior award or denial of benefits as reflected in the FAL was incorrect. Indeed, Claimant’s attorney admitted at hearing that the FAL did not contain any errors or omissions. Moreover, he did not present evidence that the benefits admitted to in that FAL were wrong, or that the denial of permanent partial disability benefits, maintenance medical benefits, or other benefits was an error or mistake. Rather, he simply asserted that he did not receive the September 7, 2023 FAL, which the ALJ finds unpersuasive. Simply put, Claimant did not explain or prove what mistake or error occurred concerning the filing of the FAL that would justify a reopening of his claim. Reopening is not appropriate when facts and evidence are clear or should have been within the knowledge of the Claimant. *Colo. Dept. of Agriculture v. Wayne*, 493 P.2d 683, 684 (Colo. App. 1971). In this case, the ALJ agrees with Respondents’ that Claimant had at his disposal all information outlining his rights and obligations to object to the FAL or risk closure of his claim. His neglect in objecting to the FAL despite having this knowledge does not provide a sufficient basis to reopen this claim. As an

unrepresented party at the time the FAL was filed, Claimant was presumed to have knowledge of the statute under which he sought benefits. *Paul v. Industrial Commission,* 632 P.2d 638 (Colo. App. 1981). He is not entitled to special treatment in the application of procedural rules, and assumed responsibility for the consequences of his mistakes. *Manka v. Martin*, 200 Colo. 260, 614. P.2d 875 (1980). Accordingly, Claimant's request to reopen the claim based on error or mistake surrounding the filing and content of the FAL is denied and dismissed.

10. Concerning additional errors or mistakes that would serve to reopen the claim, Claimant cites his disagreement with Dr. Johnson's medical conclusions. Indeed, Claimant notes that reopening is justified on the grounds that Dr. Johnson "made a mistake in thinking that all of Claimant's current complaints were due to a preexisting condition". (See Claimant's Post-Hearing Position Statement, p. 13). In support of his contention, Claimant asserts that Dr. Johnson's opinion that Claimant's current symptoms were unrelated to his December 23, 2022 slip and fall was mistaken because he did not review a single record upon which to base his opinion and because Dr. Johnson did not explain "why he thought all of Claimant's current complaints were preexisting". *Id*. at 16. The ALJ is not persuaded, concluding instead that Dr. Johnson relied on his medical expertise, Claimant prior history intermittent low back pain from a previous injury, a February 9, 2023 MRI[1] and a May 17, 2023 report from Dr. Primack[2] to conclude that Claimant's symptoms were not related to his December 23, 2022 slip and fall but rather to "previous conditions", i.e. degenerative change, which the ALJ concludes is likely progressing naturally with the passage of time. Consequently, Claimant's request to reopen the claim based upon this alleged error/mistake is denied and dismissed.

11. Section 8-43-303(1), C.R.S. also provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen his claim, Claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 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. *Jarosinski v. Industrial 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 (ICAP, Oct. 25, 2006). The determination of whether a Claimant has sustained his/her burden of proof to reopen a claim on the basis that his/her condition has worsened is also one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004).

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[1] Demonstrating the presence of multilevel degenerative changes and an L1-2 disc herniation without nerve root encroachment.

[2] Concluding that Claimant had somatization disorder.

12. In this case, Claimant asserts that his use of a cane and reported inability to flex at the waist justifies reopening the case based upon a worsening of condition. Again, the ALJ is not convinced. As referenced above, the evidence presented persuades the ALJ that Claimant's current symptoms are, more probably than not, related to naturally progressing degenerative disc disease rather than the residual effects of his December 23, 2022 slip and fall. Careful review of the medical records supports a finding that Claimant expressed pain symptoms to Nurse Practitioner (NP) Jennifer Livingston that she felt were out of proportion to his injury prompting her to make a referral to Dr. Primack. (See 3/17/2023 report of NP Livingston, RHE A). Moreover, despite a varied and extended course of treatment, Claimant continued to complain of low back pain, all of which suggests that his underlying pre-existing degenerative condition was progressing. Finally, Claimant did not begin to complain of worsening pain until December 2023, about 12 months after Claimant's 12/2022 slip and fall, further supporting a conclusion that Claimant worsening symptoms are probably related to the natural progression of his pre-existing condition as opposed to a slip and fall (for which substantial treatment was afforded without significant benefit) occurring one year earlier. Indeed, the ALJ credits the medical record, including the opinions of Dr. Johnson to find/conclude that Claimant's persistent and worsening symptoms and increasing dysfunction are related to the probable progression of his degenerative disc disease rather than his December 23, 2022 work-related injury. As presented, the evidence also persuades the ALJ that Claimant's worsened symptoms and increasing dysfunction, which is related to the progression of his preexisting condition, have probably caused muscle spasms affecting his lumbar range of motion and prompted his use of a cane. Because these spasms, decreased range of motion and need for a cane are, more probably than not, related to the natural progression of Claimant's pre-existing degenerative lumbar disc/joint disease, he has not carried his burden to prove a change of condition that is causally connected to the original injury. Consequently, the claim remains closed.

DATED: January 9, 2025

/s/ Richard M. Lamphere

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

This decision is final and not subject to appeal unless a full order is requested. The request shall be made at the Office of Administrative Courts, 2864 S. Circle Drive,

Suite 810, Colorado Springs, CO 80906 within ten working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-258-854-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence entitlement to temporary disability benefits from September 20, 2021 until terminated by law.

FINDINGS OF FACT

1. Claimant worked for Respondent as a paraprofessional in an elementary school, and sustained injuries to her right knee on several occasions in 2021. Claimant's initial injury was on February 17, 2021. The second relevant injury was on September 20, 2021, and is the injury related with the present matter.

2. On February 17, 2021, Claimant sustained an admitted right knee injury arising out of the course of her employment with Respondent. (Ex. A). The February 17, 2021 injury is associated with WC No. 5-178-127. For the February 17, 2021 injury, Claimant received treatment primarily through Concentra, initially under the supervision of authorized treating physician (ATP) Jay Reinsma, M.D. (*See* Ex. 5, 6, 7, 9, & 10).

3. On June 22, 2021, Frederic Zimmerman, D.O., at Concentra assigned Claimant a 13% right lower extremity impairment rating, and opined that she was at maximum medical improvement. The following day, June 23, 2021, Dr. Reinsma placed Claimant at MMI, assigned work restrictions, and recommended medical maintenance care. (Ex. G).

4. On August 5, 2021, Respondent filed a Final Admission of Liability (FAL) admitting Claimant sustained a 13% right lower extremity impairment and that she reached maximum medical improvement on June 23, 2021 for the February 17, 2021 work injury. (Ex. G).

5. On September 20, 2021, Claimant sustained the second injury to her right knee arising out of the course of her employment with Respondent. (Ex. D). However, a separate workers' compensation claim was not opened at that time. Instead, on October 4, 2021 Respondent filed a General Admission of Liability (GAL) reopening the February 17, 2021 claim, presumably considering the September 20, 2021 injury to be a continuation or worsening of the February 17, 2021 injury. Respondent also admitted to continuing Temporary Total Disability (TTD) benefits beginning on September 21, 2021 at an Average Weekly Wage (AWW) of $763.74. (Ex. G).

6. Through the remainder of 2021 and into 2022, Claimant continued to receive treatment for her right knee through Concentra. On March 15, 2022, Dr. Reinsma determined that Claimant had reached MMI as of that date, noting that although Claimant was not at the end of healing, Claimant had declined remaining treatment options such as PRP injections. He further indicated that Dr. Zimmerman's June 22, 2021 impairment rating still applied. (Ex. 6).

7. Claimant then requested a Division Independent Medical Examination (DIME), which was performed by Justin Green, M.D. on August 24, 2022. Dr. Green found Claimant had reached MMI on June 22, 2021, and adopted Dr. Zimmerman's 13% lower extremity impairment rating. (Ex. 8).

8. Respondent's indemnity log for the February 17, 2021 injury claim (i.e., WC 5-178-127) demonstrates that from September 21, 2021 through March 21, 2022, Respondent paid Claimant TTD benefits totaling $13,238.16 at the rate of $509.16 per week (based on an AWW of $763.74). (Ex. H & I).

9. On October 20, 2022, Respondent filed an FAL for the February 17, 2021 injury, admitting to permanent partial disability benefits consistent with the 13% impairment rating assigned by Dr. Green. The FAL also admits to an MMI date of June 22, 2021, and to TTD from September 21, 2021 through March 14, 2022, in the amount of $12,729.00. Respondent asserted an overpayment of $509.16, representing the difference between the $13,238.16 of TTD benefits paid through March 21, 2022, and the $12,729.00 due from September 21, 2021 through March 14, 2022, but did not otherwise assert that the TTD benefits paid after MMI constituted an overpayment. No evidence was admitted indicating that Respondent has sought to recover the $12,729.00 in TTD from September 21, 2021 through March 14, 2022 as an overpayment. (Ex. H).

10. Claimant continued to receive treatment for her right knee through Concentra through at least October 2023. (Ex. 10).

11. On December 15, 2023, Claimant filed a new Workers' Claim for Compensation with respect to the September 20, 2021 injury, which was assigned WC 5-258-854. (Ex. 2). On December 18, 2023, the Division sent a letter to Respondent indicating that the Workers' Claim for Compensation had been submitted. (Ex. 2). On February 13, 2024, a Director's Order was issued directing Respondent to submit an admission of liability or file a notice of contest. (Ex. 2).

12. On February 14, 2024, Respondent filed a General Admission of Liability (GAL) admitting liability for the September 20, 2021 injury. (Ex. D).

13. Claimant then returned to Dr. Reinsma for treatment and evaluation on March 7, 2024. Dr. Reinsma opined that Claimant was at MMI for the September 20, 2021 injury "as of previous date of release," and indicated that Claimant was able to work modified duty, with some restrictions, including no crawling, kneeling, and avoiding restraining of students. He further indicated that from his review of all the records, Claimant has some permanent impairment as a result of the September 20, 2021 injury. (Ex. 5 & C). In

correspondence to Respondent's counsel on March 8, 2024, Claimant indicated that Dr. Reinsma would not treat or examine her for the September 20, 2021 injury claim, and indicated that she would be requesting a new physician. (Ex. 11).

14. On March 28, 2024, Claimant filed a request for change of physician for the September 20, 2021 injury, which Respondent denied on April 8, 2024, indicating that more than 90 days had passed since the date of injury, and no proposed new ATP was listed. (Ex. A and B). For reasons that are not apparent from the record, on September 13, 2024, Respondent scheduled Claimant for a demand appointment with Stephen Danahey at Concentra on September 30, 2024. (Ex. 13). Claimant attended the appointment with Dr. Danahey, on that date, and Dr. Danahey apparently assumed the role of ATP. (Ex. C).

15. On September 9, 2024, Respondent contacted Dr. Danahey regarding the demand appointment, and requested that he provide an opinion as to whether Claimant had reached MMI, and if so, had any impairment rating from the September 20, 2021 injury. (Ex. 13).

16. On October 22, 2024, Dr. Danahey saw Claimant and indicated in his report that Claimant had reached MMI for the September 20, 2021 injury "as previously noted," but provided no specific date. (Ex. 14). Dr. Danahey's report prompted an October 29, 2024 letter from Respondent's counsel, who requested that Dr. Danahey state a specific date of MMI. (Ex. 14). On November 6, 2024, apparently in response to counsel's letter, Dr. Danahey's October 22, 2024 report was amended to reflect an MMI date for the September 20, 2021 injury of "3/1/2021 Per Dr. Jay Reinsma," a date that was more than six months before Claimant's injury. (Ex. 16).

17. On November 14 and 15, 2024, Dr. Danahey further amended his October 22, 2024 report. In this second amended October 22, 2024 report, Dr. Danahey indicated that Claimant had reached MMI for the September 20, 2021 injury on March 15, 2022 (the date assigned by Dr. Reinsma on March 15, 2022). (Ex. C). He further indicated that the previously assigned permanent work restrictions were reasonable. He assigned Claimant a right lower extremity impairment rating of 15%, and a 3% whole person impairment for psychiatric impairment, and recommended maintenance care including up to two visits with an orthopedic knee specialist. (Ex. P. 28).

18. On November 25, 2024, in response to a letter from Respondent's counsel, Dr. Danahey confirmed that Claimant's date of MMI was March 15, 2022. (Ex. L).

19. The parties stipulated that Claimant's average weekly wage (AWW) at the time of the September 20, 2021 injury was $763.74.

20. At hearing, Claimant testified that she was terminated from her position with Respondent in August 2022, and was not offered modified duty. She indicated that since August 2022, she had worked in received unemployment insurance benefits of $9,716 between August 2022 and April 2023, and performed some other work resulting in income of $3,198.65. Claimant indicated she has not received other wages since March 2022.

CONCLUSIONS OF LAW

Generally

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

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

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

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§ 8-42-105(1) & 8-42-106 (1), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain temporary

disability benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

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. Similarly, TPD benefits continue until the employee reaches MMI, or fails to begin employment after being provided a written release for and offered modified employment in writing. § 8-42-106(2) (a)-(B), C.R.S.

Claimant has failed to establish by a preponderance of the evidence entitlement to additional temporary disability benefits for her September 20, 2021 injury. The evidence demonstrates that Claimant sustained a loss of wages following the September 20, 2021 work injury. Because Claimant was placed at MMI for that injury effective March 15, 2022, her entitlement to TTD for the September 20, 2021 injury ended on that date. Thus, Claimant was entitled to TTD benefits for the period of September 21, 2021 until March 14, 2022. However, Respondent paid Claimant TTD benefits for this entire period from the day after the date of injury (September 21, 2021), until the day before MMI (March 14, 2022).

Although Claimant sustained two injuries, she sustained one wage loss, for which she was compensated under the Act. Because Respondent paid Claimant her complete wage loss from September 21, 2021 through March 14, 2022, she has been fully compensated under the Act, and is not entitled to additional temporary disability benefits. That Claimant’s temporary disability benefits were paid under the February 17, 2021 claim (WC 5-178-127), does not change the conclusion that she was fully compensated. Temporary disability benefits are designed to replace the claimant's actual lost wages during the period she is recovering from an industrial injury. *Mesa Manor v. Indus. Claim Appeals Office*, 881 P.2d 443 (Colo. App. 1994). An injured worker “cannot lose more than one hundred percent of [her] actual wages, regardless of the number of industrial injuries.” *Clymer v. Minerex Corp.*, W.C. No. 4-149-019 (ICAO May 9, 1997). An award of temporary total disability benefits under the September 21, 2021 claim would compensate the claimant twice for the same wage loss. A second award of temporary disability benefits would result in Claimant being compensated for more than her actual lost wages, and receiving benefits to which she is not entitled..

ORDER

It is therefore ordered that:

1. Claimant's request for additional temporary disability benefits for her September 20, 2021 injury is denied and dismissed.

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

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

DATED: January 9, 2025

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-237-034-002

ISSUES

I. Whether Respondents proved by a preponderance of the evidence they are entitled to withdraw their admission of liability regarding temporary indemnity benefits from September 28, 2023, forward.

II. Whether Respondents proved by a preponderance of the evidence Claimant received an overpayment of temporary indemnity benefits to which Respondents are entitled to recover.

III. If Respondents proved Claimant received an overpayment of benefits, determination of a repayment schedule.

FINDINGS OF FACT

1. Claimant is 36-years-old. Claimant worked for Employer as a delivery associate.

2. Claimant sustained an admitted work injury on April 12, 2023. Claimant reported that, when attempting to stop a large package from falling, he twisted and experienced immediate pain in his back.

3. Claimant was initially diagnosed with low back pain and a lumbar spine strain and removed from all work.

4. On May 4, 2023, Insurer filed a General Admission of Liability ("GAL") admitting for medical benefits and temporary total disability ("TTD") benefits beginning April 24, 2023, ongoing.

5. Claimant subsequently sought an increase to his average weekly wage ("AWW"), which was agreed upon by Respondents and resulted in Insurer filing a second GAL on November 6, 2023. The second GAL admitted to an AWW of $848.67, increased from $713.07.

6. Claimant began physical therapy at Enhanced Motion Physical Therapy on May 16, 2023.

7. On August 29, 2023, Claimant underwent bilateral L4-L5, L5-S1 lumbar facet injections. Claimant reported experiencing approximately one-week of relief from the injections with no significant or sustained relief.

8. On September 5, 2023, Claimant's treating provider noted,

> Had a long discussion with patient and I have really been encouraging the patient to work toward returning to work in some sort of capacity with restrictions. He still experiences pain with bending, lifting, sitting for longer periods of time. He strongly feels that he is not ready yet to return to work, as his job is demanding and requires a great deal of physical labor, or sitting for longer periods of time on ride alongs. He is concerned about backtracking and losing progress that he finally feels that he is making with PT and following injections.

Ex. G. p. 145.

9. Claimant attended his 23rd physical therapy session at Enhanced Motion Physical Therapy on September 28, 2023. The physical therapist noted Claimant did not endorse any back pain at this appointment, and reported that his lower back was feeling pretty well, despite some persistent pain and stiffness.

10. Claimant subsequently continued to report low back pain, as well as the development of right hip pain radiating into his right lower extremity. Claimant reported limited function. Claimant's authorized providers continued to restrict Claimant from all work.

11. Claimant changed physical therapy providers and began physical therapy at Rocky Mountain Spine & Sport Physical Therapy on November 21, 2023. Claimant rated his back pain 5-9/10. He complained of back pain along with right radicular pain and right hip pain that was worse with sitting and transitions. Claimant reported being unable to return to work due to significant pain and that, despite being in physical therapy since May 2023, he was not improving. Claimant reported that his limitations prevented his ability to participate in work and home activities. Claimant further reported that his goals were to return to a prior level of function in his back so he could perform his work activities as a delivery driver without pain.

12. On November 21, 2023, Claimant completed a questionnaire for Rocky Mountain Spine & Sport Physical Therapy reporting that he had a 7/10 pain level with activity. The questionnaire asks the patient to rate their current levels of discomfort and capability performing various activities using a scale of "Extreme Difficulty or Unable to Perform Activity," "Quite a Bit of Difficulty," "Moderate Difficulty," "A Little Bit of Difficulty," and "No Difficulty." Claimant reported having "Quite a Bit of Difficulty" with the following activities: usual work, household or school activities; usual hobbies, including recreational or sporting activities; squatting; lifting an object, like a bag of groceries, from the floor; and performing heavy activities around the home. *Ex. D, p. 033*. He reported having "Moderate Difficulty" performing light activities around the home; getting into or out of a car; walking two blocks; and rolling over in bed. *Id*. On the Oswestry Disability Scale, Claimant selected the following answers, in relevant part: "It is painful to take care of myself, and I am slow and careful," "Pain prevents me from lifting heavy weights, but I can manage light to medium weights if they are conveniently positioned," "Pain prevents

me from participating in more energetic activities (eg. sports, dancing),” and “Pain prevents me from doing anything but light duties.” *Id. at 034*.

13. On December 6, 2023, Claimant reported to his authorized treating provider experiencing very minimal improvement with physical therapy. The provider noted Claimant was motivated to get back to his pre-injury self. The provider released Claimant to modified duty work, restricting Claimant from driving, standing more than 30 minutes, lifting more than five pounds, and bending.

14. Respondents repeatedly inquired as to Claimant’s work restriction status. On December 13, 2023, Claimant’s authorized treating physician (“ATP”) responded to a return to work inquiry from Insurer. The ATP signed off on modified duty job tasks indicating Claimant was able to perform certain seated duties, but only capable of working 4-hour shifts 3 days a week, with no standing more than 30 minutes at a time.

15. On December 20, 2023, Respondents offered Claimant a modified duty job pursuant to WCRP Rule 6. The modified duty job was within the restrictions approved by Claimant’s ATP and was to begin on December 27, 2023 at a rate of pay of $22.00/hour. *Id*.

16. Claimant did not appear for the modified duty job. Insurer thus filed a third GAL changing Claimant’s TTD to temporary partial disability (“TPD”) benefits beginning December 27, 2023, ongoing.

17. At a December 28, 2023 physical therapy session, Claimant reported “resigning” from his job the day prior. Claimant reported his back had been throbbing and experiencing an increase in pain in his right glute after bending down to put air in his tire. Claimant completed a questionnaire reported 5/10 pain with activity and “Quite a Bit of Difficulty” with usual work, household or school activities, usual hobbies, squatting, and performing heavy activities around the home. He reported “Moderate Difficulty” with lifting an object from the floor, and getting in or out of a car.

18. On January 4, 2024, the physical therapist Claimant reported feeling much better, but that he was still not back to his pre-injury workouts or functional abilities. On a questionnaire, Claimant reported 3-7/10 pain level with activity and selected the following answers, in relevant part: “It is painful to take care of myself, and I am slow and careful,” “Pain prevents me from lifting heavy weights, but I can manage light to medium weights if they are conveniently positioned,” “Pain prevents me from participating in more energetic activities (eg. sports, dancing),” and “I can perform most of my homemaking/job duties, but pain prevents me from performing more physically stressful activities (eg. lifting, vacuuming).” *Ex. D, p. 088*.

19. On January 23, 2023, Claimant completed a provider questionnaire and reported 5/10 pain level with activity. He selected the following answers, in relevant part: “I can take care of myself normally, but it increases my pain,” “Pain prevents me from lifting heavy weights, but I can manage light to medium weights if they are conveniently

positioned," "My social life is normal, but it increases my level of pain," and "My normal homemaking/job activities increase my pain, but I can still perform all that is required of me." *Id*., p. 104. Claimant reported "Quite a Bit of Difficulty" with usual hobbies, recreational or sporting activities, squatting, and performing heavy activities around your home. He reported "Moderate Difficulty" with usual work or housework, lifting an object from the floor, and performing light activities around his home. *Id.* at p. 105.

20. On January 30, 2024, Lawrence Lesnak, D.O. performed an Independent Medical Examination ("IME") at the request of Respondents. Claimant complained of frequent right lower lumbar aching sensation and burning sensations with intermittent sharp pains and occasional right lateral buttock pains. Claimant reported that his pain ranged from 0 at best to 70 at worst, on a scale of 100. Dr. Lesnak noted that, per his review of the medical records, "There has been essentially no documentation of any specific reproducible objective findings identified by essentially any of his evaluating/treating healthcare providers following his reported work incident of 04/12/2023." *Ex. C, p. 023*. He concluded that, while Claimant may have sustained a mild lumbar sprain/strain as a result of the work injury, there were no reproducible objective findings on his examination whatsoever to support Claimant's ongoing subjective complaints. He opined that Claimant reached maximum medical improvement ("MMI") no later than September 28, 2023. He further opined that Claimant did not sustain any permanent impairment nor require any maintenance care or restrictions.

21. On January 31, 2024 Claimant completed a provider questionnaire reporting 6/10 pain with activity. He selected the following answers, in relevant part: "I can take care of myself normally, but it increases my pain," "Pain prevents me from lifting heavy weights, but I can manage light to medium weights if they are conveniently positioned," "Pain prevents me from participating in more energetic activities (eg. sports, dancing)," and "I can perform most of my homemaking/job duties, but pain prevents me from performing more physically stressful activities (eg. lifting, vacuuming)." *Ex. D, p. 115*. Claimant reported having "Quite a Bit of Difficulty" with his usual hobbies, recreational or sporting activities, and performing heavy activities around his home. He indicated having "Moderate Difficulty" with usual work or housework, lifting an object from the floor, performing light activities around his home, and getting into or out of a car. *Id. at p. 114*.

22. On February 16, 2024 Claimant reported to the physical therapist that he was progressing with physical therapy, not experiencing as much pain with bending, and now able to do assisted squats. He rated his pain at 5/10.

23. On February 19, 2024, Claimant completed a questionnaire reporting 5/10 pain level with activity. He indicated that he had "Quite a Bit of Difficulty" with any of his usual work or housework, his usual hobbies, recreational and sporting activities, squatting, lifting objects from the floor, and performing heavy activities around his home. *Id. at p. 126*. Claimant reported "Moderate Difficulty" with performing light activities around the home, going up or down stairs or sitting for an hour. *Id*. Claimant said that pain prevented him from participating in "more energetic activities," "Pain prevents me from lifting heavy weights, but I can manage light to medium weights if they are conveniently positioned," "I

can take care of myself normally, but it increases my pain," and "My normal homemaking/job activities increase my pain, but I can still perform all that is required of me." *Id. at p. 127*.

24. Claimant again completed the provider questionnaire on February 27, 2024, reporting 5/10 pain. He indicated having "Quite a Bit of Difficulty" with his usual hobbies, including recreational or sporting activities, lifting an object from the floor, and performing heavy activities around home. Claimant reported having "Moderate Difficulty" with his usual work or housework and performing light activities around home. He reported "Extreme Difficulty" with squatting. Claimant again reported "I can take care of myself normally, but it increases my pain," "Pain prevents me from lifting heavy weights, but I can manage light to medium if they are conveniently positioned," "Pain prevents me from participating in more energetic activities (eg. sports, dancing)," and "I can perform most of my homemaking/job duties, but pain prevents me from performing more physically stressful activities (eg. lifting, vacuuming)." *Id. at p. 129*.

25. Claimant completed another provider questionnaire on March 6, 2024, reporting 5/10 pain. He reported "Quite a Bit of Difficulty" with his usual hobbies, recreational or sporting activities, as well as performing heavy activities around his home. He reported having "Moderate Difficulty" with his usual work or housework, lifting an object from the floor, and performing light activities around his home. Claimant reported having "Extreme Difficulty" squatting. *Id. at p. 131*. Claimant again selected "I can take care of myself normally, but it increases my pain," but specifically added next to the answer "Putting on sweats or pants." *Id. at p. 130.* He again reported: "Pain prevents me from lifting heavy weights, but I can manage light to medium if they are conveniently positioned," "Pain prevents me from participating in more energetic activities (eg. sports, dancing)," and "I can perform most of my homemaking/job duties, but pain prevents me from performing more physically stressful activities (eg. lifting, vacuuming)." *Id.*

26. Respondents obtained surveillance video of Claimant on February 1, 21 and 22, 2024, as well as March 13 and 15, 2024. *Ex. EE*. The ALJ reviewed the surveillance video and observed Claimant performing physical activities for extended periods of time, including weightlifting and washing the interior and exterior of his vehicle. Claimant is observed at a gym performing various exercises, including operating a heavy row machine and other weight lifting machines, and using free weights. Claimant is observed lifting and using heavy and medium weights, including 45-pound plates, more than one at a time on each side of the machine or the weight bar, with additional weight added (approximately an additional 25 pounds on each side). On all days observed, Claimant moved smoothly and easily through several sets and repetitions of heavy weight lifting exercises for his back, arms, shoulders, chest and legs. Claimant is observed carrying heavy and medium weight plates and bending over at the waist to return the weight plates to a low-level rack. Claimant is observed placing an item on the ground, repeatedly bending over at the waist, as well vacuuming out his vehicle. Claimant showed no perceptible signs of pain, hesitation or difficulty in performing any of these activities.

27. ATP Zeeshan Ahmed, M.D. evaluated Claimant on April 5, 2024. He wrote, “Back injury 1 year ago. Has been on 5lbs weight restriction, but an investigation by [Insurer] has revealed video footage of pt at the gym benching, squatting, etc with heavy weights. Suspect malingering. Pt states he is totally better and would like to close out the case.” *Ex. G., p. 219*. Dr. Ahmed released Claimant from care and placed at Claimant at MMI with no residual disability or restrictions.

28. Respondents filed a Final Admission of Liability (“FAL”) on April 17, 2024, using April 4, 2024 as the date ending TPD benefits. At that time, Claimant had been paid $19,963.95 in TTD benefits from April 24, 2023 to December 26, 2023 and $5,568.29 in TPD benefits from December 27, 2023 to April 4, 2024. *Ex. W*.

29. Claimant objected to the FAL and requested a Division Independent Medical Examination (“DIME”). A DIME was chosen through a Panel elimination. A DIME confirmation and invoice was provided by the Division of Workers’ Compensation DIME Unit on June 26, 2024.

30. Dr. Ahmed attended a Samms conference on August 1, 2024, at which time Respondents presented to Dr. Ahmed the February 2024 and March 2024 surveillance video of Claimant. Dr. Ahmed opined that, when comparing Claimant’s representation in the medical records with the video footage, Claimant misrepresented his abilities and function to his providers. *Ex. G, p. 224*. He concluded that, based on the video footage, his experience, and medical judgment, the appropriate date of MMI for Claimant was September 28, 2023, and that Claimant was able to return to regular duty work as of such date. *Id., pp. 224-225*.

31. Following the Samms conference, Claimant terminated the DIME. *Exs. O, N*. Claimant’s attorney subsequently withdrew as counsel for Claimant, and the order permitting withdrawal was issued on September 24, 2024. *Ex. M*.

32. Respondents filed an Application for Hearing in this matter on September 12, 2024, endorsing the following issues: temporary total disability benefits from September 28, 2023 to December 26, 2023, temporary partial disability benefits from December 27 to April 4, 2024, and “Withdrawal of admission regarding temporary benefits based upon fraud from 9/28/2024, forward. 8-43-201(1). Overpayment as the result of fraud; respondents seek retroactive reimbursement from Claimant for all temporary indemnity payments paid after September 28, 2023; repayment order.” *Ex. L*.

33. Claimant testified at hearing. Claimant testified that he had recently purchased a home around the time of his work injury and that he did everything he could in an attempt to get back to work. Claimant testified he returned to work in June 2024 and is now working 60-75 hours per week for a different employer. Claimant further testified that working out is one of his main hobbies and that he was very excited to be able to get back to exercising and lifting weights. Claimant testified that he does not believe working out is considered fraud. Claimant testified that the movements he is observed performing on

the surveillance video do not correlate with the movements required for his regular job for Employer, which involved walking 15,000 or more steps per day. Claimant testified that one of the doctors who evaluated him has bad reviews. Claimant testified he will pay back any determined overpayment.

Ultimate Findings

34. Claimant's testimony is not found credible or persuasive in light of the totality of the evidence.

35. Claimant was observed functioning for extended periods at a drastically different and higher level than Claimant represented to his providers. Claimant was clearly aware of his abilities and level of function, as he was participating in such activities. Claimant knowingly and intentionally mispresented his abilities to his providers when repeatedly completing forms specifically addressing his abilities and function. The misrepresentations regarding his ability and level of function were material, as Claimant's providers relied on Claimant to give a true and accurate assessment of his abilities when determining appropriate restrictions. Respondents were bound to rely on the restrictions imposed by the providers and continue payment of Claimant's temporary indemnity benefits.

36. Respondents proved it is more likely than not Claimant fraudulently supplied false material information upon which Insurer relied in paying temporary indemnity benefits, entitling Respondents to withdraw their admission of liability regarding temporary indemnity benefits paid September 28, 2023, forward.

37. Respondents have proved it is more likely than not Claimant was overpaid a total $12,790.64, representing TPD ($5,568.29) and TTD ($7,222.35) paid to Claimant from 9/28/2023 to 12/26/2023. Respondents are entitled to recover the overpaid amount.

38. No evidence was offered upon which the ALJ can reasonably determine a payment schedule or the terms of repayment.

39. Evidence and inferences contrary to the findings were not found credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Clark, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Withdrawal of an Admission of Liability

An ALJ may permit an insurer to withdraw an admission of liability and order repayment of benefits paid under the admission if the claimant fraudulently supplied false information upon which the insurer relied in filing the admission § 8-43-303(4) C.R.S.; *see also Renz v. Larimer County School Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). Because admissions of liability may not ordinarily be withdrawn retroactively, § 8-43-201(1) C.R.S. provides that the party seeking the reopening bears the burden of proof by a preponderance of the evidence to establish the existence of fraud. *See also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

To establish fraud or material misrepresentation a party must prove the following:

> (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation

or concealment of the fact with the intent that it be acted upon; [and] (5) Action based on the representation or concealment resulting in damage.

See In re Arczynski, W.C. No. 4-156-147 (ICAO, Dec. 15, 2005); *see also Morrison v. Goodspeed*, 68 P.2d 458 (Colo. 1937). Where the evidence is subject to more than one interpretation, the existence of fraud is a factual determination for the ALJ. *In re Arczynski,* W.C. No. 4-156-147 (ICAO, Dec. 15, 2005).

Respondents seek to withdraw admissions of liability regarding temporary indemnity benefits paid from September 28, 2023, forward. As found, Respondents proved it is more likely than not Claimant fraudulently supplied false information upon which Insurer relied in filing admissions and paying temporary indemnity benefits.

Surveillance video obtained of Claimant on multiple different dates clearly depicts a considerably different and higher level of function and ability than Claimant was reporting to his providers. Claimant is observed performing multiple physical activities, including weightlifting, for extended periods of time. Claimant is seen lifting and carrying medium to heavy weights, switching to multiple positions, repeatedly bending over at the waist (at times with weighted plates), and cleaning the exterior and interior of his vehicle, all with no perceived difficulty.

Claimant argues, in part, that the meaning of "heavy" weight is subjective and, based on his history of exercise and weightlifting, he does not consider the weight he is observed lifting heavy. Claimant's argument could be persuasive if there was not such a clear and egregious difference between Claimant's presentation on surveillance video and his reported abilities. Here, Claimant's demonstrated abilities and level of function do not merely hinge on reasonable differences in interpretations of "heavy" weight versus "medium" and "light." Claimant reported to his providers having quite a bit of difficulty with usual work or housework and hobbies, including recreational or sporting activities, lifting objects (such as a bag of groceries) from the floor, and performing heavy activities around his home. Claimant reported moderate difficulty performing light activities around his home, and extreme difficulty squatting. Claimant further reported pain prevented him from lifting heavy weights, participating in more energetic activities like sports, and performing more physically stressful activities like lifting and vacuuming. Claimant's abilities, as demonstrated on the surveillance video, are wholly consistent with his reports to his providers of difficulty with, or pain preventing, various types of lesser physical activities.

Claimant further argues that the video surveillance was obtained in February and March 2024, many months after he sustained the work injury and dozens of physical therapy appointments. He also notes that his providers encouraged him to participate in an exercise program. The issue here is not the improvement of Claimant's condition and abilities, but Claimant's misrepresentation of his abilities to his providers. Claimant reported to his providers a significantly lower level of ability and function than Claimant demonstrated on surveillance video. While such video was obtained in February and March 2024, it calls into question Claimant's credibility regarding his prior reports to providers, especially in light of the opinions of Claimant's ATP and other physicians who reviewed Claimant's records and examined Claimant. When comparing Claimant's

representations in the medical records with his presentation on the surveillance video, ATP Dr. Ahmed credibly opined that Claimant misrepresented his abilities and function to his providers. Additionally, the record reflects that Claimant's questionnaire answers regarding certain abilities and activities in February and March 2024 were generally the same in months prior. If Claimant was truthfully and accurately reporting his abilities and, as Claimant contends, the surveillance video simply demonstrates improvement of his condition and function over time, his questionnaire responses would reasonably reflect that.

Here, Claimant falsely represented his abilities and function to his providers, which was material to their assessment of Claimant's condition and assignment of work restrictions. Claimant's providers relied on Claimant to give a true and accurate assessment of his disability. Claimant was aware that his capabilities and level of function were higher than he was reporting to his providers, as he is seen on multiple dates engaging in various activities demonstrating his higher level of function. Claimant's providers and Respondents were unaware of Claimant's false representations regarding his ability and level of function until surveillance video was obtained. The ALJ is persuaded Claimant intentionally misrepresented his abilities and level of function to his providers with the intent that his providers would continue his restrictions and he could continue to receive temporary indemnity benefits. The ALJ is not persuaded by Claimant's contention that he was eager to return to work when Claimant clearly failed to accurately represent his abilities and level of function to his providers and, at one point, failed to begin an offer of modified employment that was within the restrictions approved by his ATP. As a result of Claimant's intentional false material misrepresentations, Respondents paid Claimant temporary indemnity benefits to which he was not entitled.

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.

Dr. Ahmed credibly opined that Claimant's appropriate date of MMI is September 28, 2023 and that Claimant was able to return to regular duty work as of such date. Dr. Ahmed's opinion regarding an MMI date of September 28, 2023 is supported by the credible opinion of Dr. Lesnak, who, in January 2024, opined Claimant was MMI as of his last physical therapy session with Enhanced Motion Physical Therapy on September 28, 2023. As such, Respondents are entitled to withdraw the admission of liability with respect to temporary indemnity benefits paid September 28, 2023, forward.

Overpayment

Section 8-40-201(15.5), C.R.S. defines overpayment as:

> [M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

ICAO and the Colorado Court of Appeals have previously allowed for recovery of overpayments of benefits resulting from retroactive withdraws of admissions of liability based on fraud. *See Stroman v. Southway Services, Inc.,* W.C. No. 4-366-989 (ICAO August 31,1999); *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981).

Section 8-43-207(1)(q), C.R.S. grants an ALJ authority to order repayment of workers' compensation benefits. The ALJ has authority to fashion a remedy with regard to overpayments. *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010). The ALJ has the authority to determine the terms of repayment and the recoupment schedule determined by the ALJ will not be disturbed absent an abuse of discretion. *Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo. App. 1994).

As found, Respondents proved is more likely than not Claimant was overpaid a total $12,790.64, representing TPD ($5,568.29) and TTD ($7,222.35) paid to Claimant from 9/28/2023 to 12/26/2023. Respondents are entitled to recover the overpaid amount.

No evidence exists in record upon which the ALJ can reasonably determine a payment schedule or the terms of repayment. Accordingly, such issue is reserved for future determination. If the parties are unable to agree upon a repayment schedule, Respondents may file an Application for Hearing on such issue.

ORDER

1. Respondents may withdraw their admission of liability with respect to temporary indemnity benefits beginning September 28, 2023, forward.

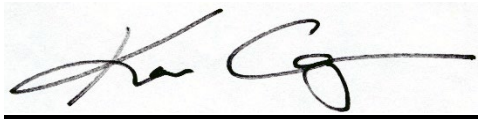
2. Claimant shall repay $12,790.64 in overpaid benefits to Respondents.

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: January 10, 2025



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

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she suffered compensable injuries to her face and right ankle on April 20, 2024. The specific question to be answered in this regard is whether Claimant was in the course and scope of her employment or whether she was engaged in a voluntary recreational activity at the time of her injuries.

II. If Claimant established that she suffered compensable injuries on April 20, 2024, whether she also established that she is entitled to all reasonable, necessary, and related medical treatment, including surgery to attend to an unstable right ankle fracture.

III. If Claimant established that she suffered compensable injuries, whether she also established her entitlement to temporary total disability benefits beginning April 21, 2024 through the present and ongoing.[1]

IV. If Claimant sustained compensable injuries, what was her average weekly wage at the time of said injuries?

Because the ALJ concludes that Claimant did not suffer injuries arising out of and in the course of her employment, this order does not address Issues II-IV as outlined above.

FINDINGS OF FACT

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

Claimant's April 20, 2024 Injury

1. Employer owns and operates a solo dental practice in Colorado Springs. Claimant is Employer's former office manager. She worked for Employer for 17 ½ but was unable to return to her position following an April 20, 2024, utility vehicle accident. Consequently, her employment was terminated.

2. On Thursday, April 18, 2024, Claimant along with multiple co-employees traveled with Employer to Moab, Utah for the weekend. According to Claimant, the

[1] See RHE B.

excursion to Moab was suggested by Employer during a staff meeting as a "team building, work-related" bonus trip based on Employer's fiscal production for 2023. Claimant testified that Employer's entire staff, including, Cindy McNulty, Brenda Vigil, Angie Cochran along with her husband, Robert[2] and she traveled with Employer to Moab. Claimant testified that spouses were invited to attend the April 2024 trip, but not all joined. Claimant testified further that she did not receive her regular hourly wage and had no expectation of receiving any wages during the trip in question. However, Employer paid for all expenses associated with the trip, including the gas to travel to Utah and all meals while there. This testimony was corroborated by Employer.

3. While in Utah, Claimant and her fellow employees participated in various activities, including hiking and cruising around a National Park and adjoining areas in Employer's personally owned utility terrain vehicles (UTVs). This was the second time that members of Employer's office had traveled to Moab for a weekend of hiking and UTV driving. Indeed, both Claimant and Employer testified that several employees of the practice traveled to Moab in 2022 where they stayed in a hotel, went hiking and rented UTVs to drive around the region.

4. While the group lodged at a hotel during the 2022 trip, the evidence presented persuades the ALJ that Employer provided housing to the group at his personal residence in Moab during the April 2024 trip.

5. Claimant was injured on Saturday, April 20, 2024, when the UTV she was driving was involved in an accident. During her testimony, Claimant agreed that she was voluntarily driving the UTV and that doing so was not part of her duties as Office Manager for the dental practice.

6. Claimant testified that she was driving a UTV, typically referred to as a Razor, around some sand dunes at the time of her accident. According to Claimant, she crested the top of a sand hill and dropped directly onto the side of an adjacent dune, hitting it "straight on".[3] After crashing into this dune, Claimant felt dizzy so she prepared to exit the vehicle. As she attempted to step out of the damaged vehicle, Claimant noticed that her right ankle was broken.

Claimant's Medical Treatment

7. Claimant testified that she proceeded to the hospital in Moab where she was treated in the Emergency Room (ER). An emergency department record dated

[2] At the time of this trip, Robert Cochran was working as Employer's IT specialist.

[3] Employer testified that he was riding with Claimant in the back of the UTV and that another employee was sitting in the passenger's seat next to Claimant. According to Employer, Claimant was driving at a high rate of speed and essentially launched the vehicle off the top of a sand dune, which then came down nose first into the side of the adjacent dune causing various injuries to the occupants and damage to the vehicle.

April 20, 2024 reveals that Claimant presented to the emergency room with complaints of a right ankle injury. According to this treatment note, Claimant told Dr. Patrick Scherer, D.O. that she was a "passenger" in a utility vehicle that went over a sand dune and came to a sudden stop causing her to jam her right foot into the floorboard. (CHE 1, p. 1). Based upon the evidence presented, including Claimant's testimony, the ALJ finds Dr. Scherer's notation that Claimant was a "passenger" at the time of the accident a probable documentation error.

8. Dr. Scherer's physical examination revealed two small, through and through, lacerations below Claimant's left lip along with tenderness, swelling and deformity about the right ankle. (CHE 1, p. 2). Claimant's right shoe and sock were removed, ice was applied to the ankle and multiple x-rays were ordered. *Id.*

9. X-rays revealed a transverse fracture of the distal fibula with full shaft anterior displacement and lateral angulation along with an avulsion fracture of the medial malleolus and a lateral subluxation/dislocation of the talus in relationship to the tibia. *Id*. at 6. Claimant was given pain medication and a closed reduction of the ankle was performed manually by Dr. Scherer with the assistance of the emergency room nurse. (CHE 1, p. 2). Following reduction, an attempt to splint the ankle was undertaken. Unfortunately, inadvertent movement of the ankle during the splinting process precluded exact boney orientation. *Id.* Indeed, post-reduction x-rays revealed improved but continued malalignment. *Id*. at 7. Consequently, Dr. Scherer performed a second reduction followed by splinting of the ankle. A second set of post-reduction x-rays demonstrated normal boney alignment. *Id*. at 8. Accordingly, attention was turned to cleaning and stitching Claimant's facial lacerations.

10. Following her emergent treatment, Claimant was advised that her ankle fracture was unstable and would require further orthopedic follow-up and probable surgery. (CHE 1, p. 3). Claimant was given a prescription for pain medication and discharged from the emergency room. *Id.*

11. Claimant returned to Colorado Springs immediately upon her discharge from the emergency room. She testified that Employer did not provide her with a designated provider list. Instead, Claimant testified that her daughter referred her to Dr. Brad Dresher for an orthopedic evaluation[4]. Claimant presented to Dr. Dresher's office on April 24, 2024 for her initial appointment. (CHE 2, p.p. 10-12). Dr. Dresher ordered additional x-rays and after review, concluded that Claimant had a displaced right bimalleolar ankle fracture. *Id*. at 11-12. Dr. Dresher recommended a staged surgery to address this injury. *Id.*

[4] Dr. Dresher is affiliated with the Colorado Springs Orthopedic Group.

12. Claimant was taken to the operating room for the first of a two-part surgery on April 25, 2024. There, Dr. Dresher performed a closed reduction of Claimant's bimalleolar ankle fracture by securing an external fixator to the right lower leg/ankle in anticipation of completing a future ORIF (open reduction internal fixation) procedure. (CHE 3, pp. 32-34).

13. Claimant did well post-operatively and returned to Dr. Dresher's office on May 1, 2024, where she was evaluated by Physician Assistant (PA-C) Kristina Hoffmann. (CHE 2, pp. 13-15). During this encounter, PA Hoffmann and Claimant discussed the second half of Claimant's two-part surgery in detail. *Id*. at 15.

14. Dr. Dresher performed the second half of Claimant's staged surgery on May 7, 2024. During this procedure, Dr. Dresher removed the external fixator. He also performed a right ankle arthroscopy with debridement of inflamed synovium, a right ankle arthroscopy for loose body removal (greater than 4 millimeters), an OCD debridement and mircofracture, an ORIF syndesmosis and an ORIF of the bimalleolar ankle fracture, including both the lateral and medial malleoli. (CHE 3, p. 41).

15. Dr. Dresher referred Claimant to the Colorado Institute for Sports Medicine (CISM) for post-surgical physical therapy (PT). (CHE 4). Claimant's PT records establish that she was evaluated by CISM physical therapist, Hannah Schwartz on June 25, 2024. (CHE 4, pp. 45-47). Claimant remained active in post-surgical PT through July 26, 2024. (CHE 4, pp. 75-76). Claimant testified that her last medical appointment with Dr. Dresher was scheduled for November 21, 2024. Because this appointment was scheduled to occur after Claimant's hearing, the medical record from this visit is not included in the exhibits admitted into evidence. Accordingly, it is unclear whether Dr. Dresher placed Claimant at maximum medical improvement.

The Testimony of Matthew J. Burton, DDS

16. Employer testified that he has operated a dental practice since 2002. He added that Claimant worked as the practice's office manager for 17 ½ years prior to her April 20, 2024 injury.

17. Since January 2008, Employer has sponsered a number of trips for his staff and their spouses. According to Employer, he has arranged for his staff to participate in contiuning dental education cruises and frequest trips to Denver for continuing education activities. While these trips were associated with official continuing education courses, Employer testified that he and his employees would also occasionally participate in other leisure/recreational activities afterhours and outside of work to include climbing the Manitou incline and running a bouncehouse 5K race together. He also arranged for Claimant and her family to use his time-share condo in

Steamboat Springs and he paid for Claimant and her husband to travel to Hawaii as an employment longevity bonus after she had worked for the practice for 10 years.

18. Employer testified that he considers and treats his employees like family members. He enjoys doing fun activities with them, unconnected to their work and often outside of working hours. He testified he was trying to do something nice when he allowed Claimant to stay at his timeshare in Steamboat Springs and paid for other activities for his employees.

19. In contrast to the continuing education cruises, Employer testified that there was no work-related component to the 2024 trip to Moab. Indeed Employer testified that there was "zero" mention of dentistry or dental practice during the 2024 Moab trip. Instead, Employer testified that the trips to Moab were organized as recreational opportunities so employees and their spouses could see a part of the country that they would not otherwise be able to see[5].

20. Employer testified that between the trips to Moab in 2022 and 2024, he purchased a vacation home in the area. Employer began making regular trips to Moab to landscape the yard and build a detached garage at this home. Over the course of the 2023 calendar year, Employer testified that he made 25 trips to Moab to work on the property. Employer testified that the office staff was interested in the progress he was making at the property during this time. Accordingly, Employer testified that he would routinely share pictures of the enhancements he made to the property with his staff when he returned to the office after weekends away in Moab.

21. Employer completed the work on his Moab property in early 2024, at which time the office staff expressed interest in seeing it. Because Employer had purchased a couple of UTVs and had a place to stay in Moab, he invited everyone to come to his house for a long weekend to hike and drive his UTVs. Employer testified that the 2024 Moab trip was discussed casually at lunch, that no formal invitation was sent out, that driving arrangements were spur of the moment, and that the people attending carpooled in his car and another employee's car to save on gas.

22. Employer testified that attendance on the trips to Moab was completely voluntary. Indeed, Employer testified that it was well known that attendance was voluntary because the office had taken a similar trip in 2022 and a staff member elected not to attend that trip. According to Employer, this staff member did not face any adverse consequences for not attending the trip nor was she paid a bonus for electing not to attend the 2022 trip.

[5] Although invited, Claimant's husband did not attend the 2024 trip to Moab.

23. Employer challenged Claimant's suggestion that the 2024 trip to Moab constituted a work bonus. Instead, Employer testified that he randomly paid monetary bonuses to employees prior to the 2024 trip to Moab. This was due to the "mom and pop" nature and based heavily on the financial health of the practice. Employer testified the last year he was able to pay bonuses was in 2017. This testimony correlates to the paystubs relied upon by Claimant. (CHE 5)[6]. According to Employer, he was unable to pay bonuses after 2017 due to expensive equipment purchases as well as the negative economic impact of the COVID-19 pandemic on the practice. Employer testified the pandemic resulted in employee wages being increased significantly. Although he testified that he did not pay any bonuses to staff after 2017, Employer noted that for the past couple of years (2022-2023) he bought a small Christmas gift for each of his staff members consisting of a poinsettia to which he attached $150-$300 in gift cards. Employer testified that the intent in giving this gift was to wish the staff a "Merry Christmas" and that the gift cards were not intended as bonuses. Indeed, Employer testified that in 2023, he gave out $150 in fifty-dollar bills that he "literally pulled out of [his] wallet." Further, Employer confirmed that the $150-$300 amounts were not issued through payroll.

24. Employer testfied that past bonuses were paid for a variety of reasons including: superior perfromance, longevity and for contributing to the success of the business. Employer denied that the 2024 trip to Moab was arranged as gratitude for the hardwork that everyone put into the practice; however, when pressed, he agreed that he paid for the trip to Moab to thank the staff for the dedication shown to the practice in 2023.

Claimant's Average Weekly Wage

25. At the time Claimant was injured, she was being paid $40.75 per hour. However, according to the wage records, her hours would fluctuate from week to week. For the time period of February 11, 2024 through April 10, 2024, Claimant worked a total of 289.36 hours. Multiplying the 289.36 hours by $40.95 give total wages of $11,791.42. Dividing this number by 59 days (the number of days between February 11, 2024 and April 10, 2024, accounting for the leap year) and multiplying by 7 days in the week gives an average weekly wage of $1,398.98.

CONCLUSIONS OF LAW

[6] Claimant's paychecks for tax years 2014-2017 document varying amounts of bonuses through payroll. There is no documentation of bonuses received in the tax years since 2017. Claimant testified that instead, she and other coworkers received small cash amounts of $300 in the past couple of years which she construed as bonuses.

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

Compensability

C. 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(l)(b), C.R.S.*

D. 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). The claimant need not actually be performing work duties at the time of the injury, nor must the activity be a strict employment requirement or confer an express benefit on the employer for an injury to be compensable. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Rather, the question is whether the activity is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment." *Id*. at 210. Whether an injury arises out of and in the course of employment are questions of fact for the ALJ. *Dover Elevator Co. v. Industrial Claim Appeals Office,* 961 P.2d 1141, 1143 (Colo. App. 1998).

E. In this case, there is no question that Claimant suffered injuries to her face and right ankle after crashing a sport utility vehicle on April 20, 2024, during a trip taken with her Employer and fellow employees. Instead, the question here is whether those injuries occurred while Claimant was performing a service arising out of and in the course of her employment. Section 8-40-201(8), C.R.S. provides that the term "employment" shall not "include [an] employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." Similarly, §8-40-301(1), C.R.S., defines the term "employee" to exclude any person "participating in recreational activity, who at such time is relieved of and is not performing any duties of employment." *See generally*, *McLachlan v. Center for Spinal Disorders*, W.C. No. 4-789-747 (ICAO, July 2, 2010).

F. Together Sections 8-40-201(8) and 8-40-301(1) act "to remove participation in a voluntary recreational activity from the employment relationship." In *McLachlan,* the claimant voluntarily participated in a street hockey game planned by fellow employees during a corporate sponsored retreat. When Mr. McLachlan hurt his shoulder during the game, the injury was deemed not compensable because §§ 8-40-201(8) and 8-40-301(1) were construed to provide that injuries sustained during participation in a recreational activity "presents the type of injury incurred during a deviation from employment so substantial as to remove it from the employment

relationship …" *McLachlan v. Center for Spinal Disorders supra*. For this reason, compensability must be denied if participation in the activity in question was voluntary, even though the employer promoted, sponsored or supported the activity. *White v. Industrial Claim Appeals Office,* 8 P.3d 621, 623-24 (Colo. App. 2000); *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). When determining whether the claimant's participation was voluntary the ALJ may consider various factors including whether the activity occurred during working hours, whether the activity occurred on or off the employer's premises, whether the employer initiated, organized, sponsored or financially supported the activity and whether the employer derived benefit from the activity. *See Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210-11 (Colo. 1996); *White,* 8 P.3d at 623. The first two factors carry greater weight than the other factors because the time and place of injury are particularly strong indicators of whether an injury arose out of and in the course of the employee's employment. *Price,* 919 P.2d at 211; *see* Larson, *Workmen's Compensation Law* §22.24(b). Ultimately, the question of whether the claimant's participation in the recreational activity was voluntary is one of fact for determination by the ALJ. *See Schniedwind v. Rite of Passage Inc*., W.C. No. 5-051-507 (ICAO, Mar. 12, 2019) (where the claimant voluntarily participated in a bicycle ride organized by the employer for its clients that resulted in only a small benefit to the employer, the bicycle ride was a voluntary recreational activity and claimant's injury during the ride was thus not compensable).

G. In this case, Claimant asserts that she was economically compelled to attend the Moab trip because it was a bonus offered in lieu of cash and if she did not attend, she would forfeit that bonus. In addition, Claimant contends that her injuries should be compensed on the basis that Employer initiated, paid for and derived a benefit from the trip, since it provided an opportunity for "team building and greater employee satisfaction". On the other hand, Respondent's contend that Claimant's participation in UTV driving over a weekend while away from the office, during which Claimant suffered injuries to her face and right ankle was voluntary and the activity constituted a recreational pursuit, i.e. she was not performing any duties of employment when she was injured. Accordingly, Respondents argue that the claim should be denied.

H. The common and ordinary meaning of the word "recreate" is "to give new life or freshness to." Webster's New Collegiate Dictionary, (1973). Thus, a "recreational activity" has been found to be "one which has a refreshing effect on either the mind or body." *Laurence White v. Denver School District #1*, W. C. No. 4-378-998 (September 16, 1999). Historically, an activity may be considered "recreational" for purposes of Worker's Compensation law even if the activity is also performed in the ordinary course of a claimant's regular duties. *Id*., *citing Dunavin v. Monarch Recreation*

Corp., 812 P.2d 719 (Colo. App. 1991) (off-duty ski instructor was engaged in "recreational activity" for purposes of § 8-40-301(1) while skiing on his free time).

I. While the undersigned concludes that the activity in which Claimant was involved is “recreational” in nature, the ALJ is cognizant that Claimant’s motivation for participation is an important factor in determining whether Claimant’s participation is voluntary. Indeed, the Courts have noted that it should not be understood that all participation in an activity which is "recreational" under an objective test necessarily mandates a denial of benefits. Rather, the Court of Appeals has noted that if the claimant's primary motivation for engaging in recreational activity is to satisfy the express or implied duties of employment the recreational activity would not be "voluntary" within the meaning of § 8-40-201(8). *See Dover Elevator Co., supra* (holding that where claimant's attendance at employer's Christmas party was not "voluntary" claimant’s injuries while bowling were compensable). Consequently, performance of the recreational activity would still constitute "employment" for purposes of § 8-41-301(1). In this case, the totality of the evidence presented persuades the ALJ that Claimant’s attendance was not mandated for the 2024 trip to Moab. Moreover, the ALJ is convinced that Claimant’s participation in UTV activities while on this trip was wholly voluntary. Indeed, Claimant was not coerced, pressured or cajoled in any fashion to drive the UTV. Instead, the ALJ credits Employer’s testimony to conclude that the 2024 Moab trip was a hastily planned weekend excursion affording a group of close friends an opportunity to enjoy each other’s company over a long weekend without any connection to work. Accordingly, the ALJ is not persuaded that the 2024 Moab trip constituted a bonus in lieu of cash as asserted by Claimant. Indeed, Claimant confirmed she was “off the clock” and out of State at the time of the injury. She did not receive any wages or consideration for the weekend trip and she was not compensated through paid time off (PTO). Simply put, the ALJ is not convinced that Claimant’s motivation to attend the trip or drive the UTV in question was to satisfy any express and/or implied duties of her employment as an Office Manager in Employer’s dental practice. Because Claimant’s injuries occurred while she was involved in a voluntary recreational activity which had no connection to her work as a dental Office Manager, the ALJ is convinced that her injuries did not arise out of and in the course of her employment. Accordingly, her claim for benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove that she sustained a compensable injury to her face and right ankle on April 20, 2024. Accordingly, her claim for benefits is denied and dismissed.

DATED: January 10, 2025

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

NOTE: If you are dissatisfied with the 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.

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that additional physical therapy is reasonable medical treatment necessary to maintain Claimant at maximum medical improvement (MMI) for the admitted August 8, 2023 work injury?

FINDINGS OF FACT

1. On August 8, 2023, Claimant suffered an injury to her right knee when she fell at work.

2. Respondents have admitted liability for Claimant's August 8, 2023 work injury.

3. Initially, Claimant's authorized treating provider (ATP) for this claim was Concentra Following her injury, Claimant underwent physical therapy.

4. On July 8, 2024, Claimant was seen at Concentra by Dr. Thomas Corson. In the medical record of that date, Dr. Corson identified Claimant's diagnosis as a right knee contusion. Dr. Corson opined that Claimant had reached maximum medical improvement (MMI) and had no permanent impairment rating.

5. On July 24, 2024, Respondents filed a Final Admission of Liability admitting for the MMI date of July 8, 2024, and for post-MMI maintenance medical treatment.

6. Subsequently, Insurer authorized Claimant to change from a Concentra physical therapist to a physical therapist affiliated with Steadman Hawkins Clinic Denver. Claimant testified that Steadman Hawkins Clinic Denver is affiliated with UC Health.

7. Claimant further testified that she would like to have authorization to obtain ongoing and as needed physical therapy. Claimant further testified she had previously been seen by her physical therapist every two weeks. At the hearing, Claimant agreed that the records indicate that she has been seen for physical therapy at UC Health eight times, at a frequency of approximately one time per month.

8. On September 24, 2024, Dr. Ryan Koonce with Steadman Hawkins Clinic Denver issued a referral for Claimant to attend physical therapy. However, this referral did not indicate the frequency or duration of the recommended physical therapy.

9. The ALJ takes administrative notice of the Colorado Medical Treatment Guidelines promulgated by the Colorado Division of Workers' Compensation;

specifically, Rule 17, Exhibit 6 (Lower Extremity Injury). Subsection (E)(2) of Rule 17, Exhibit 6 addresses knee conditions. The ALJ has reviewed this section and notes that conservative (non-surgical) treatment of various knee conditions include physical therapy. For example, Rule 17, Exhibit 6, (E)(2)(a)(vii)(C) states, in part,

> Benefits may be achieved through therapeutic rehabilitation and rehabilitation interventions. They should include range-of-motion (ROM), active therapies, and a home exercise program. Active therapies include proprioception training, restoring normal joint mechanics, and clearing dysfunctions from distal to proximal structures.

10. That same subsection (Exhibit 6, (E)(2)(a)(vii)(C)) addresses 12 sessions of an exercise program (including strength training); and four weeks of resistance training.

11. The ALJ credits the records admitted into evidence, Claimant's testimony, and the Colorado Medical Treatment Guidelines. The ALJ finds that Claimant has successfully demonstrated that it is more likely than not that continued physical therapy treatment constitutes reasonable medical treatment necessary to maintain Claimant at MMI for the admitted August 8, 2023 work injury. The ALJ also finds that an order for "perpetual" physical therapy is not appropriate. However, the ALJ finds that Claimant has demonstrated that it is more likely than not that it would be reasonable for her to continue physical therapy as post-MMI maintenance medical treatment. The ALJ further finds that such treatment should be for one year, at a frequency of one session per month.

CONCLUSIONS OF LAW

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

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

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

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

5. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

6. As found, Claimant has demonstrated, by a preponderance of the evidence, that additional physical therapy is reasonable medical treatment necessary to maintain Claimant at MMI for the admitted August 8, 2023 work injury. As found, Respondents shall pay for one year of physical therapy, at a frequency of one session per month, as post-MMI maintenance medical treatment. As found, the records admitted into evidence, Claimant's testimony, and the Colorado Medical Treatment Guidelines are credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. Respondents shall authorize one year of physical therapy, at a frequency of one session per month, pursuant to the Colorado Medical Fee Schedule.

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

Dated January 13, 2025.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

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

ISSUES

I. Whether Respondents overcame Dr. Higginbotham's DIME opinion on permanent impairment by clear and convincing evidence.

II. If Respondents have overcome the DIME opinion, determination of the appropriate impairment rating based on the preponderance of the evidence, including whether any scheduled permanent impairment rating should be converted to a whole person impairment rating.

III. Whether Claimant is entitled to a disfigurement award.

FINDINGS OF FACT

1. Claimant is a 37-year-old male. Claimant sustained an admitted work injury on September 7, 2022 when sheetrock fell onto the back of his right leg. Claimant treated with authorized provider Concentra and was initially assessed with a contusion of the right leg with right ankle pain.

2. Claimant first presented to authorized treating physician ("ATP") Scott Primack, D.O. on December 19, 2022. Claimant reported 9/10 pain in his right knee down to his ankle that he described as burning, stabbing, aching, and a pins and needles sensation, along with numbness and tingling. On examination, Dr. Primack noted swelling of the right lower extremity. Dr. Primack performed an NCV & EMG of the right lower extremity on the same date and documented the following impression: clinical and electrophysiologic evidence of a right deep greater than superficial fibular nerve neuropathy, a right tibial nerve neuropathy, and a mild right (neuropraxic) sural nerve neuropathy. His assessment was compartment syndrome of left lower extremity, lesion of left tibial nerve, left peroneal nerve injury.[1]

3. Claimant saw ATP Michael Simpson, M.D. on December 20, 2022, who had yet to review Claimant's EMG results. Review of symptoms was noted to be positive for color changes in the right leg, muscle weakness, numbness and tingling. Dr. Simpson noted, "On examination, his extremity is swollen, edematous. He has some vasomotor changes in his leg, worrisome for any early CRPS. Dysesthesias at sural nerve distribution. Mildly positive Tinel's of his common peroneal nerve. Distal sensation intact." Cl. Ex. 5, p. 042. Dr. Simpson remarked,

[1] Based on the totality of the evidence, the ALJ infers Dr. Primack's reference to "left" instead of "right" in his assessment is a typographical error.

> I do think most of his pain is neuropathic and I really think he strongly feel [sic] he needs referral to a pain management specialist to have a workup for CRPS to determine if he needs appropriate treatment for that. I have not scheduled him for a followup appointment, neither have I released him. As soon as his EMGs come back, if they do show compressive phenomenon at his peroneal nerve, I think he should be scheduled to see me back.

Id. at 043.

4. On January 12, 2023, Claimant underwent an MRI of right lower leg that was compared to a November 17, 2022 MRI. The radiologist noted the following impression, in relevant part: "Edema signal is seen throughout the visualized muscles of the leg. Findings might be seen with persistent muscular strain, delayed onset muscle soreness, infectious or inflammatory myositis, and denervation/neuropathy changes." R. Ex. N, p. 175.

5. On January 19, 2023, the radiologist issued an addendum to the January 12, 2023 MRI report. He noted that there was some abnormal signal along the course of the tibial nerve that could be related to adjacent complex fluid collection compressing the nerve versus possible lesion within or adjacent to the nerve.

6. Claimant underwent a right leg venous duplex on January 23, 2023 that was positive for deep vein thrombosis ("DVT").

7. On January 24, 2023, Claimant underwent a right knee MRI that was compared to the January 12, 2023 MRI. The MRI demonstrated an abnormal signal within the right common fibular nerve.

8. On January 24, 2023, ATP Daniel Peterson, M.D. noted Claimant presented with "a new issue" with his right arm. Claimant reported experiencing paralysis of the right arm. Dr. Peterson prescribed Claimant a knee scooter for use instead of his crutches.

9. On January 30, 2023, Dr. Peterson noted Claimant sought treatment at the emergency room for his right wrist and Claimant reported that the emergency room physicians thought his use of crutches was the likely cause of his right wrist issues.

10. On February 7, 2023, Claimant presented to Mark Meyer, M.D. upon the referral of Dr. Peterson. Claimant reported that his right foot swelling became progressively worse since November 2022. Dr. Meyer noted that Claimant had been diagnosed with a blood clot two weeks prior to his evaluation. Claimant was continuing to struggle with extreme swelling in his right foot and had no normal movement in the foot or toes. On examination, Dr. Meyer documented "Moderate swelling in the right calf with residual contusions. Moderate hypersensitivity that [sic] allodynia hyperalgesia in the calf. The right foot is in plantarflex, severe swelling throughout the foot, including the toes, plantar

surface of the foot and dorsum of the foot minimally above his malleolus." Cl. Ex. 6, p. 047. Dr. Meyer remarked,

> He states that the warm water running on his foot from the shower or bath him actually help it feel better. He's very sensitive to cold and barometric pressure changes. There is shiny appearance of trophic changes in the right foot and severe swelling throughout the right foot and only minimally in the right calf at this point. There is variable, hyperalgesia, allodynia, hyperesthesia, numbness, weakness. He has some findings consistent with CRPS. However, review of the MRI certainly indicates that this could be related to direct trauma of the nerves with neurogenic edema contributing. He is still on anticoagulants, and I do not think that the risk at this point of doing the LSB is worth the information.

Id.

Dr. Meyer remarked that only after the diagnosis regarding nerve trauma was better defined would he recommend considering Claimant for a spinal cord stimulator trial.

11. On May 30, 2023, Claimant complained to Dr. Meyer of pain in his knee down into his right lower extremity with severe neuropathic pain including his foot with variable swelling in the foot. Dr. Meyer noted Claimant had no tolerance for any range of motion or light/medium touch on the majority of his leg/foot. Claimant further reported pain in his right arm, wrist and hand. Dr. Meyer remarked, "His foot lower leg [sic] presentation are consistent with CRPS and severe neuropathic pain following likely crush injury to nerves and soft tissue. I discussed with Dr. Peterson and we both recomment [sic] Right L4 LSB." Id. at 049. His assessment was complex regional pain syndrome ("CRPS") I of the right lower limb.

12. On June 12, 2023, Claimant underwent a second right lower extremity venous doppler study revealing another DVT.

13. On June 20, 2023, Albert Hattem, M.D. performed a Physician Advisor Review for Insurer, addressing the request for a lumbar sympathetic block ("LSB"). Dr. Hattem noted that, the MTG for CRPS provides that, before proceeding with a sympathetic block, patients must meet the following criteria: (1) signs and symptoms are consistent with the Budapest criteria, (2) a psychological evaluation has been performed, and (3) there is no other diagnosis that better explains the signs and symptoms. Dr. Hattem opined that Claimant's signs and symptoms met the Budapest criteria with complaints of allodynia, edema, and decreased motion, as well as exam findings of hyperalgesia and edema. He noted, however, that there was no documentation Claimant had ever undergone a psychological evaluation. Additionally, he remarked,

> Also of significance, is that there are other diagnoses that explain [Claimant's] ongoing right lower extremity pain. He was diagnosed with a deep vein thrombosis that persists based on a followup ultrasound

> completed on 06/17/2023. In addition, both Dr. Meyer, a pain specialist, and Dr. Simpson, an orthopedic surgeon, questioned a nerve injury. Dr. Simpson, on 12/26/2022, opined that if a right lower extremity EMG/nerve conduction study demonstrated a compressive neuropathy, then [Claimant] may be a candidate for right lower extremity surgery.

R. Ex. L, p. 148.

14. Dr. Hattem noted that he had not reviewed the right lower extremity EMG but, if the EMG did demonstrate significant pathology, this would likely explain Claimant's ongoing pain symptoms. Accordingly, Dr. Hattem recommended that the request for the LSB be denied. Regarding Claimant's reported right wrist drop, Dr. Hattem noted it was possible Claimant's crutch use was causally related; however, he could not say with any confidence that a causal relationship existed without reviewing the emergency department records and an EMG of the right wrist.

15. Dr. Hattem issued a second report on June 21, 2023 after reviewing Dr. Primack's December 19, 2022 EMG/NCS report of the right lower extremity. Dr. Hattem remarked, in relevant part:

> This report was abnormal demonstrating electrophysiologic evidence of a right deep greater than superficial fibular nerve neuropathy, a right tibial nerve neuropathy, and a mild right sural nerve neuropathy. Dr. Primack, in addition, found clinical evidence for these conditions.
>
> . . .
>
> This abnormal study also supports the conclusion that there are other diagnoses that better explain the claimant's ongoing pain complaints other than CRPS.

Id. at 151-152.

16. On July 26, 2023, Claimant presented to Patience Jurkiewicz, PA (working under the direction of Michael Finn, M.D.) at authorized provider Capital Pain Institute. Claimant reported continued pain in the right lower extremity with variable swelling in his foot. PA Jurkiewicz noted Claimant had no tolerance for any range of motion or light/medium touch with the majority of his leg/foot. She remarked that Claimant's presentation was consistent with CRPS and severe neuropathic pain following likely crush injury to nerves and soft tissue. Her assessments were CRPS I of right lower limb and chronic pain syndrome. Claimant was prescribed Pregabalin to address his right lower extremity symptoms.

17. Dr. Simpson reexamined Claimant on August 22, 2023. He noted that the right lower extremity EMG/NCS demonstrated clinical evidence of right deep and superficial peroneal fibular nerve neuropathy as well as the right tibial nerve neuropathy and a right

sural nerve neuropathy. Claimant rated his pain at 10/10. Claimant reported the development of a drop rest of his right wrist. Under Plan/Recommendations, Dr. Simpson wrote,

> I know there has been mention of the fact by Dr. Primack that [Claimant] may have a compartment syndrome. I really do not see any evidence of this. He is very possibly could have had a compartment syndrome at the time of his original injury, which may lead to the mononeuropathy he had and the development of his chronic pain syndrome. I did not see him when he was first injured, so I cannot comment on this. Obviously, he has a somewhat inexplicable multi nerve neuropathy of his lower extremity involving the peroneal nerve, tibial nerve and the sural nerve. This most likely secondary to his crush injury and not due to multiple focal compressive neuropathies. Therefore, given the presence of his DVT, his EMG findings, and assessment of other providers, I really do not believe that any surgical decompression of his peroneal nerve would be in any way helpful. I think it is more likely that would actually exacerbate his symptoms and worsened his symptoms. That is just my opinion, but I would not feel comfortable suggesting surgery on [Claimant] at this point. Instead, I think the most appropriate treatment is the pain management procedures that Dr. Meyers has suggested and I would recommend those be continued. I do not have an explanation for his recent acquisition of his wrist deformity this far out from his injury. I think he probably does require psychiatric evaluation for his chronic pain disorder at this time.

Cl. Ex. 5, p. 045.

18. Claimant reported worsening pain to PA Jurkiewicz at a follow-up evaluation on August 23, 2023. PA Jurkiewicz prescribed Claimant Topamax to replace the Pregabalin. On examination of the right lower extremity she noted exquisite tenderness, hypersensitivity, slight red/purple discoloration and that the extremity was warm to touch.

19. On October 5, 2023, Claimant sought treatment at an emergency department after falling off a scooter in his home. A right lower extremity venous ultrasound was positive for DVT.

20. On October 31, 2023, Claimant presented to Kenneth Finn, M.D. at Capitol Pain Institute for an EMG of the right upper extremity. Claimant reported the development of a spontaneous right wrist drop. On examination, Dr. Finn noted diffuse non-anatomic weakness and diffuse decreased sensation not following a clear dermatomal pattern or peripheral nerve distribution. He noted that the NCV/EMG showed decreased conduction velocity of the right radial motor nerve and prolonged distal peak latency of the right radial sensory nerve. Dr. Finn's assessment was paresthesia of the skin. He remarked:

> The only abnormality is a drop in amplitude when stimulating the radial motor response above the elbow without loss of conduction velocity. Nerve conduction's [sic] for the most part were within normal limits. There was a slight prolongation of the radial sensory response of uncertain clinical significance. There is no clear evidence of radiculopathy or peripheral nerve entrapment otherwise.

R. Ex. K, p. 140.

21. At a follow-up evaluation on November 10, 2023, Dr. Peterson noted Claimant was seen by hematology and advised to stay on an anticoagulation medication, Eliquis, for at least six more months due to the blood clots. Dr. Peterson further noted Claimant had seen Dr. Finn, who performed an EDX study of the right upper extremity that was normal. Dr. Peterson wrote, "There is no physiological explanation for his apparent wrist drop which is clearly not complete loss of function." Cl. Ex. 1, p. 015. He noted Claimant could not undergo an LSB due to being on longer-term anticoagulation medications. Dr. Peterson opined Claimant was likely at maximum medical improvement ("MMI") and referred Claimant to Dr. Primack for an impairment evaluation.

22. Dr. Primack performed an impairment evaluation on January 15, 2024. Claimant reported 9/10 pain of the right lower extremity along with right hand weakness, clumsiness, and numbness/tingling. On examination of the right lower extremity, Dr. Primack noted a significantly decreased sensory examination, no significant vasomotor instability or significant pseudomotor atrophy, and some muscle weakness. Dr. Primack's assessment was injury of right sciatic nerve, DVT and right knee strain. He used the AMA Guides to assign a combined 23% lower extremity impairment (9% whole person) for the sciatic nerve injury and loss of range of motion. For the sciatic nerve injury, Dr. Primack assigned 10% lower extremity impairment under Tables 10 and 11 on page 42, with the sciatic nerve found in Table 51 on page 77, for the pain/sensory component. He found 8% lower extremity impairment for the motor component, combining for a 17% lower extremity impairment for sciatic nerve injury with pain. Dr. Primack assigned 7% lower extremity impairment for loss of motion at the knee.

23. On January 17, 2024, Dr. Peterson noted he spoke with Dr. Meyer and concluded that a spinal cord stimulation trial was not an option with Claimant's anticoagulation status. Dr. Peterson placed Claimant at MMI and recommended maintenance care with two years of medication and with follow-up with hematology specialist.

24. On January 30, 2024, Respondents filed a Final Admission of Liability ("FAL") admitting for Dr. Primack's 23% lower extremity impairment rating and maintenance treatment. Claimant objected to the FAL and requested a DIME.

25. Claimant relocated from Colorado to Oklahoma and continued care in Oklahoma.

26. On April 11, 2024, Claimant presented to Jason Leinen, M.D. at Oklahoma Sport Science and Orthopedics. On examination Dr. Leinen noted: diffuse erythema of right lower leg, mild swelling of lower leg into the foot and ankle, slightly plantarflexed right foot, hypersensitivity from the right knee down to the lower lower leg, foot and ankle. Dr. Leinen further noted tightness/tenting of the skin that created a shiny appearance and trace pitting edema through the length of the extremity. Range of motion was essentially normal. Dr. Leinen's assessment was chronic pain of right lower extremity and CRPS of the right lower extremity. He remarked, "I do tend to agree with the previous evaluator that this patient does have clinical findings consistent with CRPS along with some polyneuropathy likely from a an (*sic*) initial compressive neuropathy condition." Cl. Ex. 9, p. 075.

27. Thomas W. Higginbotham, D.O. conducted the DIME on May 23, 2024. Regarding the right lower extremity, Claimant reported constant burning pain, inability to weight bear with his heel or toes, no active motion of the right foot, pain with passive motion, and intolerance to light touch, cold weather and low barometric pressure. Claimant also reported pain and weakness with extended use of the right upper extremity. On examination of the right lower extremity, Dr. Higginbotham noted: exquisite superficial tenderness from light touch and mild pressure palpation, regional disturbance such as non-dermatomal sensations about the whole of the right lower extremity from the knee circumferentially to the toes, visible swelling of the right foot, non-dermatomal or multidermatomal neurosensory deficits to light touch, asymmetrical skin tone, temperature, and color, right calf and foot noticeably cold on touch comparatively, no hair growth on right leg, skin turgor is tight and shiny, marked hypersensitivity to light and pressure palpation, and no active range of motion of the right foot. On examination of the right upper extremity he noted: positive Finkelstein's test, mild-moderate lateral epicondylar tenderness on moderate pressure palpation, moderate tenderness about the right forearm extensor muscle mass on moderate pressure, and multi-dermatomal neurosensory deficits to light touch and pinprick with less sensation perceived on the right side from the fingers up to the mid-forearm. Manual grip strength was asymmetrical with perceived weakness on the right side.

28. Dr. Higginbotham noted the following clinical diagnoses:

Crush injury right lower extremity
Multiple nerve and vasculature crush injury of right leg
Complex regional pain disorder I, right lower extremity
Right lower extremity DVT
Postphlebitic syndrome
Long-term anticoagulation

Right knee contusion with strain/sprain
Right leg contusion with strain/sprain

Right radial neuritis with improper crutch use
Right wrist drop, improved

Bilateral bicipital tendinitis, moderate
Bilateral pectoralis minor muscle tendinitis, moderate
Chronic right iliopsoas muscle strain

Psychosocial confounders
Psychologic condition, NOS
Doubt functional neurological disorders
Chronic pain syndrome

Cl. Ex. E, p. 052.

29. Dr. Higginbotham agreed Claimant was at MMI as of January 17, 2024, opining that no other treatment options would significantly improve Claimant's impairment or functionality. He provided a final combined 26% whole person impairment rating under the AMA Guides, stating:

> **For the right lower extremity, 20% WPI** is assigned for a CRPS condition IAW Table 1A page 109 Station and gait under "can stand but walks with difficulty".
>
> **For the right lower extremity**, 10% LEI or **4% WPI** is assigned IAW Table 52, page 79, peripheral vascular disease Class 2. A 10% LEI assigned based on the presence of persistent edema of a moderate degree with intermittent claudication.
>
> **For the right upper extremity**, the persistent radial neuritis is discerned based on clinical examination. A frank radial neuropathy was not confirmed on electrodiagnostic studies. Table 14 of page 46 with a reference, specifically the radial nerve with the wrist placed in position of function.
>
> Sensory component
> Table 14 (5%) x Table 10 (26%) = 1.3% UEI
> Motor component
> Table 14 (40%) x Table 11 (12.5%) = 5% UEI
> The combined UEI is 6% or **4% WPI**.

Id.

30. Regarding Dr. Primack's impairment rating, Dr. Higginbotham wrote,

> The evaluating physiatrist chose to rate impairment based upon multiple nerve abnormalities discerned on electrodiagnostic studies and loss of range of motion of the right knee. This appears to be based on diagnoses of right sciatic neuropathy and right knee sprain. On review of the rating, the impairment derivations are appropriate.

> However, this Division examiner concurs with the clinical impressions of his treating orthopedist and another treating physiatrist that [Claimant] has a clinical complex regional pain disorder type I.

Id. at 053.

31. Referencing the MTG on CRPS, Dr. Higginbotham opined that Claimant "fulfills an assessment of CRPS I IAW Section C: Introduction to CRPS." *Id*. He wrote,

> Furthermore, under E. Initial Evaluation, 1. HX & PX
> a. (xvi) Medical History, and under G. Diagnostic Criteria and Procedures, 2. DIAGNOSTIC COMPONENTS OF CLINICAL CRPS, [Claimant] fulfill the criteria of the Budapest criteria with:
>
> A) Severe, generally unremitting burning and/or aching pain and/or allodynia.
> B) Swelling of the involved area.
> C) Changes in skin color.
> D) Asymmetry in nail and/or hair growth.
> F) Motor dysfunction: limited active range-of-motion, atrophy, tremors, dystonia, weakness.
> G) Subjective temperature changes of the affected area.
>
> All but E) Abnormal sweat patterns of the involved extremity was not present on this Division examination.
>
> Based on the strong clinical criteria, this Division examiner provides an impairment rating reflecting CRPS I of the right lower extremity. Referencing Table 1A page 109, Station and gait under "can stand but walks with difficulty", a 20% WPI is assigned. [Claimant] "can stand" and "walks" only with the assistance of crutches. He was observed contending with a couple of steps and down a shallow and short incline. The rating of right knee, ankle, or foot loss or motion is implied in a rating for CRPS 1. Assessing impairment for loss of motion of the lower extremity joints would be duplicative.

Id. at 054.

32. Dr. Higginbotham discussed the need for Claimant to undergo confirmatory diagnostic studies for CRPS as set forth in the MTG, stating:

> Under G. 1. Diagnostic Criteria and Procedures and G. 3. Diagnostic Components of Confirmed CRPS,
>
> "Clinical criteria alone are not dependable nor necessarily reliable and require objective testing. History of diagnostic tests and results including

> but not limited to any response to sympathetic nerve blocks, results of general laboratory studies, EMG and nerve conduction studies, radiological examinations, for demineralization, triple phase bone scan, or thermography with autonomic stress testing, and tests of sudomotor functioning such as Quantitative Sudomotor Axon Reflex Test (QSART)."
>
> [Claimant], despite clinical impression from treating providers, has not been afforded diagnostic studies in the assessment of a complex regional pain syndrome. The germane issue with this Division examination is the need of confirmatory diagnostic studies in assessing impairment for CRPS. His treating physiatrist and preferred WC provider are of the opinion that a lumbar sympathetic nerve block was not worth the risk given his anticoagulation therapy and their obvious assessments of clinical signs of CRPS. Nonetheless, a triple phase bone scan, thermography without autonomic stress testing, and extensive sudomotor functioning (QSART) are necessary.

Id. at 054-055.

33. Regarding his impairment rating of the right upper extremity, Dr. Higginbotham explained:

> [Claimant] is additionally impaired because of his right upper extremity. It has been construed clinically that he acquired a wrist drop or radial nerve palsy associated with constant and likely improper crutch use. The first assessment of such was on 01/24/2023. The full extent of this was not electrodiagnostically discerned until a right upper extremity EMG/NCS was performed on 10/31/2023. The electrodiagnostic study did not discern any radicular neuropathy. There has been improvement with the right radial nerve palsy, but there is still evidence of weakness with diminished range of motion of the wrist. It is this Division examiner's opinion that the electrodiagnostic study was not sensitive enough to discern a persistent neuritis.

Id. at 055.

34. In his discussion regarding maintenance care, Dr. Higginbotham acknowledged the importance of confirming a CRPS diagnosis, stating:

> Confirming CRPS is pertinent for identifying maintenance care. Should CRPS be confirmed, the Colorado DOWC Medical Treatment Guidelines Rule 17, Exhibit 7 on Complex Regional Pain Syndrome, Section H. Therapeutic Procedures-Non-Operative and Section I Therapeutic Procedures-Operative provides other treatment options.

Id. at 056.

35. On July 16, 2024, George Schakaraschwili, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Schakaraschwili concluded that Claimant sustained a severe crush injury to the right lower extremity, with objective evidence on EMG and MRI of significant injuries to the common peroneal, posterior tibial, and sural nerves with persistent neurogenic edema. He noted Claimant also developed persistent DVT. Dr. Schakaraschwili opined that these findings likely explained Claimant's clinical presentation of pain, swelling, discoloration, weakness, and patchy sensation loss.

36. Regarding the right upper extremity, Dr. Schakaraschwili stated:

> My interpretation of these [EMG] results is that the claimant likely suffered a neuropraxic injury to the radial nerve in the upper arm/axilla due to crutch use. This could result in mild weakness in the wrist extensors and weakness in finger extension but would not result in the global weakness exhibited on examination, nor would it cause a diffuse loss of sensation in the entire hand. Neuropraxic injuries are due to demyelination. The normal amplitudes with distal stimulation indicate that there was no significant denervation. Such an injury would be expected to spontaneously improve, typically within about 6 months.

R. Ex. D, p. 024.

He concluded:

> There is evidence that the claimant sustained a neuropraxic injury to the right radial nerve likely due to crutch use. Findings were mild and would have been expected to have resolved at this point. His examinations have been inconsistent and non-physiologic. I would recommend electrodiagnostic studies of the right upper extremity to determine if there is any persistent right radial neuropathy.

Id. at 029.

37. Dr. Schakaraschwili opined that Dr. Higginbotham failed to properly calculate Claimant's impairment rating by assigning a rating for CRPS without an established diagnosis. He explained:

> A diagnosis of complex regional pain syndrome has never been established consistent with the medical treatment guidelines. Although the claimant has exhibited signs consistent with Budapest criteria for CRPS, his presentation is also consistent with injuries to multiple nerves and concurrent chronic deep vein thrombosis. In addition, no diagnostic testing, as required by the guidelines, for a confirmed diagnosis of complex regional pain syndrome has been performed. There was no bone scan, no diagnostic lumbar sympathetic block, no infrared stress

> thermogram, and no autonomic testing battery (QSART). Therefore, a confirmed diagnosis of complex regional pain syndrome cannot be assigned.
>
> The impairment for peripheral vascular disease is appropriate, given the concurrent diagnosis of chronic deep vein thrombosis. A rating of the right upper extremity would require, in my opinion, repeat electrodiagnostic studies to confirm objective, permanent injury to the nerve. Multiple physical examinations have documented a non-physiologic examination of the right upper extremity with strength and sensation deficits far exceeding the radial nerve territory. Given these non-physiologic examinations, only objective evidence of a radial nerve injury should be rated.
>
> Further in his conclusions, Dr. Higginbotham himself acknowledged that a confirmed diagnosis of complex regional pain syndrome required diagnostic testing. He goes on to state that while his treating providers were of the opinion that a lumbar sympathetic nerve block was not worth the risk given his anticoagulation, he stated that a triple phase bone scan, thermography, and an autonomic testing battery were necessary.

Id. at 028.

38. Dr. Schakaraschwili opined that, without performance of the CRPS diagnostic test, a diagnosis of CRPS remained unconfirmed. He opined that, if there was no further workup for CRPS or if the testing was negative, an appropriate rating would include ratings for range of motion, peripheral nerve injury, and perhaps peripheral vascular impairment. If CRPS was confirmed, a rating for CRPS would be appropriate.

39. Respondents filed an Application for Hearing on June 24, 2024 endorsing overcoming the DIME regarding permanent partial disability benefits. Claimant filed a Response to Application for Hearing on July 20, 2024 endorsing medical benefits, average weekly wage, disfigurement, temporary total disability benefits, permanent total disability benefits, and conversion to whole person.

40. On August 5, 2024, Claimant presented to Clay Thomas Reed, M.D. for a hematology consultation for recurrent DVT. Dr. Reed diagnosed Claimant with recurrent acute DVT of the right lower extremity and recommended lifelong anticoagulation medication. He referred Claimant to a vascular surgeon for assessment of his right lower extremity.

41. On August 8, 2024, Claimant saw Andrew C. Gin, M.D. Dr. Gin noted a history of chronic right wrist drop and right foot drop. He opined he did not have anything to offer Claimant from an acute neurological management standpoint other than to suggest physical therapy for Claimant’s right ankle and foot. He released Claimant from his neurological care.

42. On August 20, 2024, Claimant underwent a right LSB, performed by Darryl D. Robinson, M.D. Claimant reported 9/10 pain pre-procedure and 8/10 pain post-procedure.

43. Dr. Leinen reexamined Claimant on September 3, 2024. Claimant continued to have right lower extremity complaints. He reported being unable to wear a shoe on his right foot and using crutches for mobility purposes. Dr. Leinen noted:

> [Claimant] also notes that he did undergo the lumbar stellate ganglion block about 2 weeks ago, but unfortunately received no benefit at all from this procedure. He continues to have complaints of right wrist pain and continues to wear the wrist brace despite the encouragement previously to try and get away from that and his relatively benign examination of this area before.

Cl. Ex. 9, p. 082.

44. Dr. Leinen remarked that Claimant's condition was "very consistent with a CRPS condition of the right lower extremity" *Id*. at 083. He started Claimant on Belbuca for pain and noted possible consideration of a dorsal column stimulator trial.

45. At hearing, Respondents identified as issues for determination overcoming the DIME's opinion on permanent impairment rating and, as necessary, repayment. Claimant identified disfigurement and, if Respondents overcame the DIME opinion, whole person conversion of the impairment rating. The parties stipulated that Respondents denied requests for CRPS testing. The record reflects Insurer denied an ATP's request for a LSB pre-MMI. There was no challenge to that position pre-MMI. Subsequent to being placed at MMI, Claimant requested that Respondents return him to Colorado for CRPS testing, which Respondents denied.

46. Claimant credibly testified at hearing. Claimant testified that because of his work injury, his right foot changes color to black, red, and purple. Claimant testified that his right foot swells to where it feels like it's going to explode. Claimant testified that his right foot is in constant pain, and he described the pain and symptoms like needles, numbness, burning and pain. Claimant testified that he now experiences almost daily temperature changes in his right foot and leg from both cold and hot. He testified that the skin on his right foot is completely dry and different from his left foot. Claimant testified that he also experiences pain in the toenails of his right foot and there is a purple stain on the bottom of his right foot.

47. Claimant further testified that as a result of his injury he uses underarm crutches 100% of the time. Claimant testified that he has been on crutch support since January 2023. Claimant testified that he cannot walk without crutches and has to even sit when he uses the restroom. Claimant testified he cannot stand for more than 20-30 minutes at a time.

48. Claimant testified that he is having pain and symptoms in his right wrist, which he attributes to being on crutches since January 2023 and having to support his weight and walk. Claimant further testified that he is also having back pain.

49. Dr. Primack testified on behalf of Respondents by post-hearing deposition. The ALJ has admitted Dr. Primack as an expert in physiology, physical medicine, neurology, EMGs and nerve injuries. Dr. Primack testified that his diagnosis of Claimant is a neuropraxic injury to the sciatic nerve. Dr. Primack explained the physiological difference between the specific sciatic nerve injury experienced by Claimant's traumatic event, and the condition of CRPS, noting that the difference lies in the fiber type affected within the nerve. He described the complexity of the sciatic nerve, explaining that there are two sub-nerves within the sciatic nerve - the fibular nerve (also known as the common peroneal nerve), and the tibial nerve. Dr. Primack explained that, within those sub-nerves are different fiber types, including alpha, beta, delta and unmyelinated C fibers. Dr. Primack testified that the unmyelinated C fibers are very slow in comparison to the fast-firing fiber types, which are tested on EMG. Dr. Primack testified that the right lower extremity EMG performed confirmed that Claimant's fast-firing fibers were affected, demonstrating an injury to the entire sciatic nerve. He explained that he did not assign an impairment rating for CRPS because it was clear that the work injury was to the sciatic nerve. Dr. Primack testified that the sciatic nerve injury and Claimant's DVT issues would reasonably result in Claimant's right lower extremity symptoms and complaints, which have been interpreted by Dr. Higginbotham to be caused by CRPS.

50. Dr. Primack testified that Dr. Higginbotham inappropriately diagnosed Claimant with CRPS because he does not have training in nerve injuries and does not understand the extreme complexity of nerve injuries. He explained that CRPS Type 1 does not involve a nerve injury, while CRPS type 2 involves a nerve injury along with affected unmyelinated C fibers. He explained that for CRPS, testing must be performed that can objectively distinguish the autonomic unmyelinated C fiber type injury, versus another specific injury to a specific nerve. He explained that you cannot solely rely on the Budapest criteria for a diagnosis of CRPS, stating:

> [The Budapest criteria] is data that you use, but you can't leave out that any nerve injury, most nerve injuries, when severe, will also have Budapest criteria, but they don't have CRPS.
>
> So yeah, we utilize Budapest criteria clinically, and then you need the confirmatory testing, especially in CRPS type 2 because you don't want to treat wrong and you don't want to disable someone who is not having CRPS type 2 but who has a nerve injury.

Primack Depo., p. 43:3-15.

Dr. Primack further explained:

> That is why once you hit Budapest criteria, that still doesn't mean the patient has CRPS. You need the confirmatory objective testing because part of Budapest criteria is subjective.
>
> And look if you are going to label someone or give someone that diagnosis, which is devastating, life-altering, vocational-altering, you better be sure you got it.

Primack Depo., p. 22:15-22.

51. Dr. Primack testified that Dr. Higginbotham thus erred by assigning an impairment rating for CRPS when there has not been a confirmed diagnosis pursuant to the MTG. Dr. Primack acknowledged that the Division recognizes that reasonable medical care may include deviations from the MTG in individual cases. He testified, however, that Claimant's case is not an unusual case that would justify Dr. Higginbotham providing an impairment rating for CRPS absent objective tests confirming a CRPS diagnosis.

52. Dr. Primack discussed the AMA Guides, the MTG, and the Impairment Rating Tips, and how they are used in conjunction with each other. He explained that, although the Impairment Rating Tips and AMA Guides do not specifically state that two confirmatory tests are required to rate CRPS, per the Impairment Rating Tips, you cannot provide a rating without a diagnosis. Per the MTG, you need to have confirmatory tests to make a confirmed CRPS diagnosis. He reiterated that the Budapest criteria is not enough to support a diagnosis in this case "[b]ecause you have sciatic nerve injury that will act, smell, taste the same as much as it would for CRPS type 2. So you needing the thermogram and autonomic test battery." Primack Depo., p. 56:6-11.

53. Dr. Primack acknowledged that the Division recognizes that reasonable medical care may include deviations from the MTG in individual cases. He testified, however, that Claimant's case is not an unusual case that would justify Dr. Higginbotham providing an impairment rating for CRPS absent objective tests confirming a CRPS diagnosis. Dr. Primack further testified that, even when considering CRPS in Claimant's case, Dr. Higginbotham was wrong in diagnosing CRPS Type 1 as, by definition, CRPS Type 1 is not a nerve injury.

54. Dr Primack opined that Claimant's functional problems are limited to his right lower extremity. He testified that an impairment for a sciatic nerve injury is limited to the lower extremity in the absence of the positive autonomic test battery or positive thermogram confirming a CRPS diagnosis. He explained that, if there is a confirmed CRPS diagnosis, CRPS is rated as a spinal cord issue.

55. Dr. Primack further testified that Dr. Higginbotham was incorrect in providing a rating for the right upper extremity and assuming that the EMG of Claimant's right upper extremity was not sensitive enough. Dr. Primack explained that the parameters on EMG

are highly sensitive and specific for radial nerve injuries – greater than 92 percent. He testified that Dr. Higginbotham's assumption regarding the lack of sensitivity of the EMG was wrong and indicates Dr. Higginbotham's lack of background in, and understanding of, electrical physiology. Dr. Primack explained that the right upper extremity EMG was appropriately interpreted by Dr. Finn, who noted slight prolongation of the radial sensory response of uncertain clinical significance. He testified that Claimant has wrist pain without clinical correlation. Dr. Primack testified that Dr. Higginbotham thus erred by assigning a rating for pain, without objective data and an actual diagnosis of a radial nerve injury.

56. The ALJ observed Claimant's right lower extremity at hearing. Claimant has permanent swelling of the right foot compared to the left foot. The skin of Claimant's right foot is discolored compared to the left foot. Claimant also has an altered gait and ambulates with crutches. Claimant submitted two photographs of his right foot, one taken on January 30, 2023 and one taken August 28, 2024. Both photos show swelling and discoloration of Claimant's right foot.

Ultimate Findings

57. The ALJ finds the opinions of Drs. Primack, Schakaraschwili, Finn and Hattem, as supported by the records, more credible and persuasive than the opinion of Dr. Higginbotham and Claimant's other treating physicians.

58. The ALJ finds that Respondents proved it is highly probable Dr. Higginbotham's permanent impairment rating is incorrect.

59. The preponderant evidence demonstrates Claimant's is entitled to 9% whole person impairment rating, converted from a 23% lower extremity impairment rating.

60. Claimant sustained a serious permanent disfigurement to areas of the body normally exposed to public view, entitling him to an award for disfigurement.

61. Evidence and inferences contrary to these findings of fact were not credible or persuasive.

CONCLUSIONS OF LAW

Generally

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

Clark, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Overcoming the DIME

The party seeking to overcome the DIME physician's finding regarding MMI and whole person impairment bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado 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 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WCs 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 on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME

physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

The Act provides, "For purposes of determining levels of medical impairment, the physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings." § 8-42-107(8)(c). A DIME physician must rate impairment in accordance with the provisions of the AMA Guides, Section 8-42-101(3.7), C.R.S.; Section 8-42-107(8)(c), *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). Whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating has been overcome by clear and convincing evidence are issues of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

The Colorado General Assembly, in the Act, has instructed the Director of the Division to promulgate rules establishing a system for the determination of medical treatment guidelines and utilization standards and medical impairment rating guidelines for impairment ratings. §§ 8-42-101(3)(a)(I), 8-42-101(3.7), C.R.S. The Division has created Impairment Rating Tips (also referred to as Desk Aid #11) to provide guidance to Level II providers conducting impairment ratings in Colorado. "The Impairment Rating tips, and other rating protocols, have been rendered by the General Assembly as part of a judge's inherent duty and power to find and apply the law." *Serena v. SSC Pueblo Belmont Op Co., LLC*, W.C. No. 4-922-344-01 (ICAO, Dec. 1, 2015), aff'd, *Serena v. Industrial Claim Appeals Office*, (Colo. App. No. 15CA2095, November 3, 2016)(not selected for publication). "We extend deference to the Workers' Compensation Division's interpretation of the AMA Guides as set forth in the Impairment Rating Tips. These Tips were written at the direction of the statute, § 8-42-101(3.5) (a) (II)." *Serena v. SSC Pueblo Belmont Op Co., LLC, supra*; *see also In re Claim of Freeman,* W.C. No. 4-942-096-01 (ICAO, May 4, 2016). While the Impairment Rating Tips are not part of the AMA Guides, they may be relevant to the assignment of an impairment rating. Therefore, a physician's application of those tips goes to the weight the ALJ gives to an impairment rating. *In re Claim of Gallegos*, W.C. No. 5-054-538-002 (ICAO, Feb. 11, 2020) *Serena v. SSC Pueblo Belmont, supra.*

The Impairment Rating Tips provide, "Impairment ratings are given when a specific diagnosis and objective pathology is identified." Respondents argue that Dr. Higginbotham erred by providing an impairment rating for CRPS without a diagnosis supported by objective testing as set forth in the MTG. Claimant argues that there has been a proper diagnosis of CRPS and that specific CRPS testing, while outlined in the MTG, is not required by the AMA Guides. As found, based on the totality of the evidence and the specific circumstances of this case, Respondents have established it is highly probable Dr. Higginbotham's opinion on permanent impairment is incorrect.

The Act and the Division rules mandate that all health care providers shall use the MTG that are promulgated by the Director. § 8-42-101(3)(B), C.R.S., WCRP 17-

2(A). The MTG are created with the assistance of medical professionals, who review and evaluate applicable evidence-based medical studies consistent with multiple national and international standards in guidelines development, recommendations, and quality of medical evidence. The MTG are regarded as accepted professional standards for care under the Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). Similar to the Impairment Rating Tips, although the MTG are not part of the AMA Guides, they may be relevant to the impairment rating under consideration by the ALJ. A physician's application of those guidelines when assessing an impairment rating, goes to the weight the ALJ gives to an impairment rating. *Ortiz v. Service Experts, Inc.*, W.C. No. 4-657-974 (ICAO, Jan. 22, 2009); *In re Claim of Wagoner*, W.C. No. 4-817-985-03 (ICAO, Oct. 12, 2013).

The Division states that the MTG are, indeed, "guidelines" with respect to treatment, and deviations may occur. Nonetheless, the MTG are instructive and can provide an objective basis for analyzing decisions regarding particular conditions, including CRPS. The MTG for CRPS emphasize the complexity of the condition, the need for a confirmed diagnosis, and set forth the particular process for confirming a CRPS diagnosis. The MTG repeatedly emphasize the need for objective testing when diagnosing CRPS, which is referred to in the MTG as a "controversial" diagnosis. WCRP 17, Exhibit 7.G.1 The MTG specifically state that, with respect to CRPS, "clinical criteria alone are not dependable nor necessarily reliable and require objective testing." Id. The MTG state:

> Significant harm can be done to individuals by over-diagnosing CRPS and subjecting patients to the side effects and potential morbidity of multiple sympathetic blocks, invasive procedures, or chronic medications, as well as psychological effects from the diagnosis. In order to safe guard against such harmful outcomes, patients should have objective testing to verify their diagnosis before such procedures are considered and/or are continued after the initial diagnosis. Several reviews on the subject have identified the need for more objective measurements.

Id.

The MTG further state, "Because CRPS I is commonly associated with other injuries, it is essential that all related diagnoses are defined and treated." WCRP 17, Exhibit 7.E. Exhibit 7 of the MTG specifies the diagnostic components of *clinical* CRPS and *confirmed* CRPS. Section G.2 sets forth the following criteria for clinical CRPS, consistent with the Budapest criteria:

a. Continuing pain, which is disproportionate to any inciting event; and

b. At least one symptom in 3 of the 4 following categories:

- *Sensory*: reports of hyperesthesia and/or allodynia;

- *Vasomotor*: reports of temperature asymmetry and/or skin color changes and/or skin color asymmetry;

- *Sudomotor/edema*: reports of edema and/or sweating changes and/or sweating asymmetry; or

- *Motor/trophic*: reports of decreased range-of-motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).

c. At least one sign at time of evaluation in 2 or more of the following categories:

- *Sensory*: evidence of hyperalgesia (to pinprick) and/or allodynia (to light touch and/or deep somatic pressure and/or joint movement);

- *Vasomotor*: evidence of temperature asymmetry and/or skin color changes and/or asymmetry. Temperature asymmetry should ideally be established by infrared thermometer measurements showing at least a 1°C difference between the affected and unaffected extremities;

- *Sudomotor/edema*: evidence of edema and/or sweating changes and/or sweating asymmetry. Upper extremity volumetrics may be performed by therapists that have been trained in the technique to assess edema; or

- *Motor/trophic*: evidence of decreased range-of-motion and/or motor dysfunction (weakness, tremor, dystonia) and/or trophic changes (hair, nail, skin).

d. No other diagnosis that better explains the signs and symptoms. It is essential that other diagnoses which may require more urgent treatment, such as infection, allergy to implants, or other neurologic conditions, are diagnosed expediently before defaulting to CRPS.

e. Psychological evaluation should always be performed as this is necessary for all chronic pain conditions.

Section G.3 outlines the diagnostic components of confirmed CRPS:

a. A clinical diagnosis meeting [the criteria of clinical CRPS set forth in G.2], and

b. At least 2 positive tests from the following categories of diagnostic tests:

i. Trophic tests

- Comparative x-rays of both extremities including the distal phalanges.

- Triple phase bone scan.

ii. Vasomotor/Temperature test: Infrared stress thermography.

iii. Sudomotor test: Autonomic test battery with an emphasis on QSART.

iv. Sensory/ Sympathetic nerve test: Sympathetic blocks.

In Claimant's case, Dr. Higginbotham and Claimant's providers provided an assessment of CRPS solely based on clinical findings. Dr. Higginbotham specifically states he provided an impairment rating for CRPS based on "strong clinical criteria" and that he concurred with the "clinical impressions" of certain providers. To the extent Dr. Meyer, Dr. Finn (along with PA Jurkiewicz), and Dr. Leinen have assessed Claimant with CRPS, each have expressly done so based on Claimant's presentation and clinical findings. The record contains sufficient clinical findings that appear consistent with the Budapest criteria. Moreover, Drs. Primack, Hattem and Schakaraschwili acknowledge that Claimant appears to meet the Budapest criteria as set forth in the MTG. Thus, the crux of the issue here is not whether there are sufficient clinical findings but, whether providing an impairment rating solely based on such findings renders Dr. Higginbotham's DIME opinion highly probably incorrect. Based on the guidance provided in the Impairment Rating Tips and MTG, as well as the specific circumstances of this case, the ALJ finds and concludes it does.

As set forth in the MTG, while clinical criteria can be used to make a decision regarding initial treatment for CRPS, particular objective testing is required to confirm a CRPS diagnosis. WCRP 17, Exhibit 7.G.3 specifically provides that confirmed CRPS requires both a clinical diagnosis and at least two positive diagnostic tests. It is undisputed that Claimant has not undergone any of the diagnostic tests set forth in the MTG. Drs. Primack and Schakaraschwili credibly opined that Dr. Higginbotham erred in providing an impairment rating for CRPS without a confirmed diagnosis. Drs. Primack and Schakaraschwili further credibly opined that, pursuant to the Impairment Rating Tips, an established diagnosis is required to give an impairment rating, and per the MTG, objective testing is required for a confirmed diagnosis of CRPS.

Dr. Higginbotham himself acknowledges the need for Claimant to undergo confirmatory objective CRPS diagnostic testing pursuant to the MTG, yet curiously still chose to place Claimant at MMI. (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 Construction Management,* WC 4-356-512 (ICAO, May 20, 2004). Nonetheless, Dr. Higginbotham had the opportunity, under WCRP 11(E), to mandate that the required CRPS testing occur before placing

Claimant at MMI, or before he completing an impairment rating, and did not do so. While the AMA Guides do not specify that specific CRPS testing is required, the Impairment Rating Tips provide that impairment ratings are given when a specific diagnosis and objective pathology are identified. The MTG for CRPS are instructive in terms of what is reasonably considered a "specific diagnosis" and "objective pathology" with respect to the condition of CRPS. Accordingly, Dr. Higginbotham erred by assigning an impairment rating for CRPS based on Claimant's clinical presentation without objective testing to establish a confirmed CRPS diagnosis.

Even assuming, arguendo, no objective CRPS testing was required to provide an impairment rating under these circumstances, Dr. Higginbotham's DIME opinion on permanent impairment is further undermined by his failure to discuss Claimant's other diagnoses. Section G.2(d) of Exhibit 7 of the MTG provides that clinical CRPS requires that *no other diagnosis better explains the patient's signs and symptoms.* (Emphasis added). Dr. Higginbotham noted that Dr. Primack's impairment rating was based on multiple nerve abnormalities discerned on electrodiagnostic studies and deficits of right knee range of motion, with diagnoses of right sciatic neuropathy and right knee sprain. He stated, however, that he concurred with clinical impressions that Claimant has clinical CRPS. Dr. Higginbotham did not provide any explanation as to why he believed Claimant's other diagnoses, particularly the sciatic nerve injury, do not better explain Claimant's signs and symptoms.

Drs. Primack, Schakaraschwili and Hattem all credibly opined that Claimant has a sciatic nerve injury, with objective evidence on MRI and EMG, as well as clinical correlation. Drs. Primack, Schakaraschwili and Hattem further credibly opined that Claimant's sciatic nerve injury and persistent DVTs cause the same signs and symptoms consistent with the Budapest criteria and likely better explain Claimant's presentation. The ALJ credits the opinions of Drs. Primack and Schakaraschwili, with backgrounds in electrical physiology, and as supported by the opinion of Dr. Hattem and the medical records, over the opinion of Dr. Higginbotham. In light of other confirmed diagnoses that better explain Claimant's signs and symptoms, without confirmatory objective CRPS testing as required by the MTG, Dr. Higginbotham's reliance on the Budapest criteria to provide an impairment rating for CRPS is highly probably in error. Based on the totality of the evidence, Respondents have overcome Dr. Higginbotham's DIME opinion on permanent impairment.

Permanent Impairment Rating & Conversion

If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence." *Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When the ALJ determines that the DIME physician's rating has been overcome, the ALJ

may independently determine the correct rating. *Lungu v. North Residence Inn*, WC 4-561-848 (ICAO, Mar. 19, 2004). An ALJ's statutory power to render evidentiary decisions does not disappear merely because the ATP and the DIME doctor agree that a claimant has not reached MMI. An ALJ may thus determine whether a claimant has reached MMI and assign an impairment rating as a question of fact. *Destination Maternity and Liberty Mutual Insurance Company v. Burren*, 19SC298 (Colo. May 18, 2020); *see Niedzielski v. Target Corporation*, WC 5-036-773-001 (ICAO, Mar. 9, 2020) (when an ALJ determines that a DIME opinion has been overcome, the issue of the claimant's correct impairment rating becomes a question of fact and the ALJ may calculate the impairment based upon a preponderance of the evidence).

As Respondents overcame Dr. Higginbotham's DIME opinion on permanent impairment, the ALJ may assign an impairment rating based on the preponderance of the evidence. Based on the totality of the evidence, it is more probable than not Dr. Primack's 23% right lower extremity impairment rating is appropriate. There is objective evidence of a sciatic nerve injury, with clinical correlation, as well as range of motion deficits. Dr. Primack's impairment rating is in accordance with the AMA Guides. The preponderant evidence does not establish Claimant is entitled to a permanent impairment rating of the right wrist. As credibly testified to by Dr. Primack and specified in the Act and Impairment Rating Tips, impairment ratings cannot be assigned for chronic pain without identified objective pathology.

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. When an injury results in a permanent medical impairment not on the schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* WC 4-573-459 (ICAO, Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, WC 4-868-996-01 (ICAO, Feb. 1, 2016). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson–Wood*, WC 4-536-198 (ICAO, June 20, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007).

As found, the evidence demonstrates it is more likely than not Claimant sustained functional impairment beyond the lower extremity. Claimant's work injury his to his right lower extremity has caused functional loss extending beyond the extremity. Claimant's injury has permanently altered Claimant's station and gait and his ability to walk without crutch support. Claimant credibly testified that he is unable to stand for more than 20-30 minutes and has pain in his back as a result of crutch use and holding his foot off the ground. Based on the totality of the evidence, Claimant has sustained a functional impairment to a portion of the body not listed on the schedule of

impairments. Accordingly, Claimant is entitled to conversion of his scheduled impairment rating to a whole person permanent impairment rating.

Disfigurement

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

As found, Claimant sustained a serious permanent disfigurement to areas of the body normally exposed to public view. Respondents shall pay Claimant $6,506.33 for his disfigurement.

ORDER

1. Respondents overcame Dr. Higginbotham's DIME opinion on permanent impairment by clear and convincing evidence.

2. Claimant proved by a preponderance of the evidence his scheduled impairment rating should be converted to a whole person impairment rating.

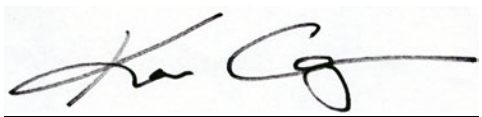
3. Claimant is entitled to a 9% whole person impairment rating, converted from a 23% scheduled lower extremity impairment rating.

4. Respondents shall pay Claimant $6,506.33 for his disfigurement.

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

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

DATED: January 13, 2025



Kara R. Cayce
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-250-493-003

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable lumbar spine injury during the course and scope of employment with Employer on April 30, 2023.

2. Whether Claimant has proven by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable and necessary medical benefits that are causally related to his April 30, 2023 lumbar spine injury.

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

5. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period May 1, 2023 until terminated by statute.

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

FINDINGS OF FACT

1. Employer operates and manages hotel properties. Claimant worked for Employer performing maintenance duties and repairing minor damage to guest rooms.

2. Claimant testified that on April 30, 2023 he was assessing a guest room for any damage or necessary repairs. He specified that, while repairing a dresser, he "picked up on the bottom, and [his] back popped." Claimant noted his back symptoms did not improve in his two days off work following the incident.

3. On May 3, 2023 Claimant texted Chief Engineer Stanley Sabick about his back condition. He detailed "[j]ust an fyi I have to go to the hospital my back is messed up can't move." Claimant did not state that he injured his back at work.

4. On May 9, 2023 Claimant exchanged a series of text messages with Mr. Sabick. Claimant reported that "I stood up a week ago doing an ewo and it popped and it was sore then we went to move sleds [snowmobiles] and pulled on them for a good few hours next morning

couldn't get up." Although Claimant remarked that he had been performing an "EWO" presumably on a guest room, he only mentioned that his back popped. He recounted that moving snowmobiles for a few hours, unrelated to his work duties for Employer, rendered him incapable of getting up the next morning. Claimant specifically stated that he was not able to get up the morning after he pulled on the snowmobiles. Claimant failed to mention during his text exchanges with Mr. Sabick that he sustained a work injury or was reporting a Workers' Compensation injury.

5. Mr. Sabick testified that Claimant never stated that he had injured his back at work and he was unaware of an alleged work injury until October. Instead, he was under the impression Claimant injured his back when pulling snowmobiles based on a phone call he had with Claimant at some point between May 3-9, 2023.

6. On May 9, 2023 Claimant presented to Louise A. Thielen, M.D. at Steamboat Medical with complaints of lower back pain. Dr. Thielen recounted that "[h]e just stood up a week ago and heard a pop in his back with sudden pain." Claimant specifically noted two types of back pain. He mentioned lower thgracic pain since he was a teenager. He also remarked that since April 29, 2023 he has experienced lumbar back pain. Claimant noticed a pop at the onset, "but does not recall doing anything strenuous." He just mentioned that he does quite a bit of lifting working in maintenance. Dr. Thielen diagnosed Claimant with acute midline low back pain without sciatica and chronic midline thoracic back pain. She did not assign any work restrictions.

7. On May 16, 2023 Claimant visited James Cotter, M.D. at the emergency room for his back condition. Dr. Cotter commented that .he "presents with back pain that started 2 weeks ago was sitting and stood up and heard a "pop." Claimant again did not mention any work-related incident. Imaging revealed acute bilateral lower back pain without sciatica. Dr. Cotter did not assign any work restrictions.

8. On June 19, 2023 Claimant received a letter from Employer because his requested leave period from May 4, 2023 through June 1, 2023 had ended, but he failed to return to work. The letter specified that

> [p]er Company policy, an associate who is absent from work for three (3) or more days without prior permission or without notice will be presumed to have voluntarily separated from employment unless satisfactory justification is received. Your current absence is without the prior permission of the Company and we have not been provided with satisfactory justification to verify your current unapproved and unexcused absence from work. In accordance with Company policy. . . . If we do not hear from you by 06/22/2023, we will proceed with the provisions of this policy and you will be separated from the Company.

9. Claimant's last day worked for Employer was April 30, 2023. On June 23, 2023 Employer terminated Claimant for job abandonment. Claimant failed to show up for work or contact Employer after his requested leave period ended. Employer's attendance policy specifically stated that a

> No Call, No Show occurs when an associate fails to call-off, fails to notify the manager of an absence, or fails to report to scheduled work within two hours of scheduled start time in accordance with applicable policy. One No Call, No Show will result in a written warning, while three (3) consecutive occurrences of No Call, No Show is excessive, considered to be job abandonment, and results in suspension pending termination.

10. Several months after his termination from employment Claimant filed a Worker's Claim for Compensation on September 13, 2023. He asserted he injured his lower back and hips on May 3, 2023 while he "[w]as doing an annual on a room I was working on a dresser when I stood up my back popped and began to hurt."

11. On December 6, 2023 Claimant presented to Casey Marie Dluhos-Sebestos, D.O. at Steamboat Medical Group to establish care because Dr. Yhielen had retired. He reported ongoing back pain that originally was in the right lower back but was now located in the left lower back radiating down his leg. Dr. Dluhos-Sebestos did not recount any mechanism of injury regarding the origin of back symptoms. She assessed Claimant with "chronic lumbar radiculopathy and sacroiliitis causing significant dysfunction" and referred him to Colorado Brain and Spine for an evaluation.

12. On January 8, 2024 Claimant presented for a physical therapy evaluation of midline lower back pain with bilateral radiculopathy and right hip pain. Claimant reported that he was moving a dresser and felt a "pop" in his back. He did not mention any work-related mechanism for his back symptoms.

13. Claimant testified at the hearing in this matter that he injured his back when he was pushing in a stuck or broken drawer on a dresser as part of his maintenance duties. He noted the injury occurred on April 30, 2023 and stated he reported to Mr. Sabick that he popped his back and was really sore after the incident.

14. Mr. Sabick testified that he was Claimant's direct supervisor. Claimant's job duties involved general building maintenance. The term "EWO" stands for "everything in working order." A EWO includes a checklist of about 150 items to review to verify that guest rooms are functional and operating correctly. A broken piece of furniture would not be a technician's responsibility and would be repaired by the furniture crew. Mr. Sabick commented that Claimant did not mention any back injury until a text notification on May 3, 2023. Between May 3-5, 2023 Mr. Sabick contacted Claimant through a telephone call to check on the status of his injury. The discussion focused on how Claimant had injured his back while moving snowmobiles. He also contacted Claimant through text messages to determine his work status. Mr. Sabick remarked that he needed to know how long Claimant might be off of work to get the time approved. However, Claimant never responded to the inquiries.

15. Claimant has failed to establish it is more probably true than not that he suffered a compensable lumbar spine injury during the course and scope of employment with Employer on April 30, 2023. Initially, Claimant explained that on April 30, 2023 he was assessing a guest room for any damage or necessary repairs. He specified that, while repairing a dresser, he "picked up on the bottom, and [his] back popped." Despite Claimant's assertion, his inconsistent

accounts and the conflicts in the medical records reflect that he did not likely suffer a back injury while working for Employer.

16. The record demonstrates conflicting accounts regarding the mechanism of Claimant's back injury. On May 3, 2024 Claimant texted supervisor Mr. Sabick about his back condition. He detailed "[j]ust an fyi I have to go to the hospital my back is messed up can't move." Claimant did not state that he injured his back at work. Between May 3-5, 2023, Mr. Sabick contacted Claimant by telephone to check on the status of his injury. The discussion focused on how Claimant had injured his back while moving some snowmobiles. He also contacted Claimant through text messages to determine his work status. Mr. Sabick remarked that he needed to know how long Claimant might be off of work to get the time approved. Claimant never stated that he had injured his back at work and Mr. Sabick was unaware of an alleged work injury until October. Mr. Sabick further commented that he was under the impression Claimant injured his back when pulling snowmobiles. Finally, on May 9, 2023 Claimant exchanged a series of texts with Mr. Sabick. During the exchange Claimant explained that "I stood up a week ago doing an ewo and it popped and it was sore then we went to move sleds [snowmobiles] and pulled on them for a good few hours next morning couldn't get up." Claimant specifically stated that he was not able to get up the morning after he pulled on the snowmobiles. He simply stated his back was sore when he stood up and felt a pop while doing an EWO. Claimant failed to mention during his text exchanges with Mr. Sabick that he sustained a work injury or was requesting medical treatment.

17. The medical records also provide conflicting accounts of the cause of Claimant's back symptoms. On May 9, 2023 Claimant presented to Dr. Thielen with complaints of lower back pain. Dr. Thielen recounted that "[h]e just stood up a week ago and heard a pop in his back with sudden pain." Claimant specifically noted two types of back pain. He mentioned lower thoracic pain since he was a teenager. He also remarked that since April 29, 2023 he has experienced lumbar back pain. Claimant noticed a pop at the onset, "but does not recall doing anything strenuous." Similarly, on May 16, 2023 Claimant visited Dr. Cotter at the emergency room for his back condition. Dr. Cotter commented that .he "presents with back pain that started 2 weeks ago was sitting and stood up and heard a "pop." Claimant again did not mention any work-related incident. Moreover, on December 6, 2023 Claimant presented to Dr. Dluhos-Sebestos for an examination. He reported ongoing back pain that originally was in the right lower back but was now in the left lower back radiating down the leg. Dr. Dluhos-Sebestos did not recount any mechanism of injury regarding the origin of back symptoms. She assessed Claimant with "chronic lumbar radiculopathy and sacroiliitis causing significant dysfunction" Moreover, on a January 8, 2024 physical therapy visit Claimant reported that he was moving a dresser and felt a "pop" in his back. Claimant did not mention any work-related mechanism for his back symptoms. Finally, Claimant testified that he injured his back when he was pushing in a stuck or broken drawer on a dresser.

18. The preceding chronology reveals significant inconsistencies in the cause of Claimant's back symptoms. Based on the medical records and text message exchanges, It is unclear whether Claimant sustained symptoms while moving snowmobiles, simply standing up, or working on a dresser for Employer. It is thus speculative to attribute Claimant's back symptoms to his job duties for Employer. Notably, Claimant stated that he stood up "a week ago doing an ewo and it popped and it was sore then we went to move sleds (snowmobiles)

and pulled on them for a good few hours next morning couldn't get up," A reasonable construction of the preceding text message reveals that Claimant was not able to get up the morning after he pulled on the snowmobiles. Working with the snowmobiles was the disabling event that caused Claimant to seek medical treatment. Claimant's work activities thus did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Claimant's request for Workers' Compensation benefits based on an April 30, 2023 back injury is thus denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

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

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

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician may provide diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms, there is no mandate that the claimant suffered a compensable injury. *Fay v. East Penn Manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a compensable lumbar spine injury during the course and scope of employment with Employer on April 30, 2023. Initially, Claimant explained that on April 30, 2023 he was assessing a guest room for any damage or necessary repairs. He specified that, while repairing a dresser, he "picked up on the bottom, and [his] back popped." Despite Claimant's assertion, his inconsistent accounts and the conflicts in the medical records reflect that he did not likely suffer a back injury while working for Employer.

9. As found, the record demonstrates conflicting accounts regarding the mechanism of Claimant's back injury. On May 3, 2024 Claimant texted supervisor Mr. Sabick about his back condition. He detailed "[j]ust an fyi I have to go to the hospital my back is messed up can't move." Claimant did not state that he injured his back at work. Between May 3-5, 2023, Mr. Sabick contacted Claimant by telephone to check on the status of his injury. The discussion focused on how Claimant had injured his back while moving some snowmobiles. He also contacted Claimant through text messages to determine his work status. Mr. Sabick remarked that he needed to know how long Claimant might be off of work to get the time approved. Claimant never stated that he had injured his back at work and Mr. Sabick was unaware of an alleged work injury until

October. Mr. Sabick further commented that he was under the impression Claimant injured his back when pulling snowmobiles. Finally, on May 9, 2023 Claimant exchanged a series of texts with Mr. Sabick. During the exchange Claimant explained that "I stood up a week ago doing an ewo and it popped and it was sore then we went to move sleds [snowmobiles] and pulled on them for a good few hours next morning couldn't get up." Claimant specifically stated that he was not able to get up the morning after he pulled on the snowmobiles. He simply stated his back was sore when he stood up and felt a pop while doing an EWO. Claimant failed to mention during his text exchanges with Mr. Sabick that he sustained a work injury or was requesting medical treatment.

10. As found, the medical records also provide conflicting accounts of the cause of Claimant's back symptoms. On May 9, 2023 Claimant presented to Dr. Thielen with complaints of lower back pain. Dr. Thielen recounted that "[h]e just stood up a week ago and heard a pop in his back with sudden pain." Claimant specifically noted two types of back pain. He mentioned lower thoracic pain since he was a teenager. He also remarked that since April 29, 2023 he has experienced lumbar back pain. Claimant noticed a pop at the onset, "but does not recall doing anything strenuous." Similarly, on May 16, 2023 Claimant visited Dr. Cotter at the emergency room for his back condition. Dr. Cotter commented that .he "presents with back pain that started 2 weeks ago was sitting and stood up and heard a "pop." Claimant again did not mention any work-related incident. Moreover, on December 6, 2023 Claimant presented to Dr. Dluhos-Sebestos for an examination. He reported ongoing back pain that originally was in the right lower back but was now in the left lower back radiating down the leg. Dr. Dluhos-Sebestos did not recount any mechanism of injury regarding the origin of back symptoms. She assessed Claimant with "chronic lumbar radiculopathy and sacroiliitis causing significant dysfunction" Moreover, on a January 8, 2024 physical therapy visit Claimant reported that he was moving a dresser and felt a "pop" in his back. Claimant did not mention any work-related mechanism for his back symptoms. Finally, Claimant testified that he injured his back when he was pushing in a stuck or broken drawer on a dresser.

11. As found, the preceding chronology reveals significant inconsistencies in the cause of Claimant's back symptoms. Based on the medical records and text message exchanges, It is unclear whether Claimant sustained symptoms while moving snowmobiles, simply standing up, or working on a dresser for Employer. It is thus speculative to attribute Claimant's back symptoms to his job duties for Employer. Notably, Claimant stated that he stood up "a week ago doing an ewo and it popped and it was sore then we went to move sleds (snowmobiles) and pulled on them for a good few hours next morning couldn't get up," A reasonable construction of the preceding text message reveals that Claimant was not able to get up the morning after he pulled on the snowmobiles. Working with the snowmobiles was the disabling event that caused Claimant to seek medical treatment. Claimant's work activities thus did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Claimant's request for Workers' Compensation benefits based on an April 30, 2023 back injury is thus denied and dismissed.

ORDER

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

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

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

DATED: January 13, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-242-622-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the bilateral SI joint and cervical spine corticosteroid injections recommended by Panorama Orthopedics & Spine Center (Panorama Orthopedics") are reasonable, necessary, and related to Claimant's June 5, 2023 industrial injury.

FINDINGS OF FACT

1. Claimant is 51 years old. Claimant worked for Employer as a clinical director and physical therapy assistant.

2. Claimant sustained an admitted industrial injury on June 5, 2023 when multiple LED light panels, each weighing approximately 100 pounds, fell towards him. The weight of the panels pushed Claimant, causing him to fall backwards and strike his head on the floor.

3. Claimant immediately experienced intense pain in his right leg, which he realized was broken. Claimant screamed for help to no avail. He then managed to crawl to his cellular phone to call 911.

4. Claimant was transported to the hospital by ambulance. Denver Health Paramedic Division documented a chief complaint of a right femur fracture. The paramedics placed Claimant's leg in a splint and administered fentanyl.

5. Claimant was admitted to Swedish Medical Center. He reported falling backwards, feeling a pop in his leg, and striking his head. The review of systems was noted to be negative for neck and back pain. Initial spine assessment indicated no midline tenderness and full cervical range of motion. Past medical history was unremarkable for conditions or injuries to body parts affected by the June 5, 2023 industrial injury. Claimant was diagnosed with a right displaced subtrochanteric femoral shaft fracture and head strike with posterior scalp hematoma. Claimant underwent emergent surgery to repair the femur fracture on June 6, 2023, performed by Steven J. Morgan, M.D.

6. Claimant was discharged from the hospital on June 7, 2023, but readmitted to the emergency department later that same day for evaluation of fever and possible sepsis following surgery. Claimant was released from the hospital on June 8, 2023. Claimant remained on dilaudid and oxycodone for pain.

7. On June 27, 2023, Claimant presented to authorized treating physician ("ATP") David W. Yamamoto, M.D. at Peak to Peak Family Medicine. Claimant reported that he

also injured his lower back as a result of the work injury, and complained of pain in the midline and right lower back and buttock area. Claimant further reported having neck pain and stiffness as well as a headache. On examination, Dr. Yamamoto noted tenderness at the L5-S1 level on the right and decreased range of motion. His assessments included, in relevant part, lumbar strain and neck sprain. He referred Claimant for an orthopedic evaluation.

8. Claimant returned to Dr. Yamamoto for follow up on July 12, 2023 with continued lumbar and cervical complaints. Dr. Yamamoto's examination revealed reduced cervical and lumbar range of motion, tenderness and tightness. Claimant attended subsequent follow up evaluations with Dr. Yamamoto on August 2 and September 7, 2023 with ongoing cervical and lumbar spine complaints. Dr. Yamamoto's findings and assessments were consistent with the previous visits.

9. On September 21, 2023, Claimant reported to Dr. Yamamoto continued cervical and lumbar spine complaints, with development of right-sided sciatica radiation into the right lower extremity and onset of clonus on the right. Claimant reported that he had some functional improvement and pain management with the Lidothol patches that were prescribed for his lumbar strain. Dr. Yamamoto noted cervical and lumbar findings on examination. He ordered a lumbar spine MRI and referred Claimant to Panorama Orthopedics for evaluation.

10. Claimant presented to Douglas C. Wong, M.D. at Panorama Orthopedics on September 29, 2023. Claimant reported increasing right-sided low back pain, right thigh pain, as well as bilateral ankle clonus. Dr. Wong noted that lumbar spine x-rays obtained on 7/17/2023 showed good disc height with no gross fracture. He remarked that he was more concerned about Claimant's clonus in the bilateral ankles as well as positive Hoffman signs in the hands bilaterally, which he noted were consistent with possible cervical cord compression. Dr. Wong diagnosed Claimant with cervical myelopathy and lumbar degenerative disc disease and ordered a cervical spine MRI.

11. Claimant underwent a lumbar spine MRI on October 1, 2023. The radiologist's impression was "1. Left central-subarticular disc extrusion at L5-S1 compressing and displacing the descending left S1 nerve root within the left L5-S1 subarticular recess. Please correlate for left S1 radicular symptoms. 2. Moderate left L4-L5 neural foraminal narrowing with otherwise mild multilevel neural foraminal narrowing. No high-grade spinal stenosis." Cl. Ex. 15, p. 193.

12. Claimant underwent a cervical spine MRI on October 16, 2023 that revealed multilevel degenerative changes without high-grade spinal canal stenosis or discrete cervical cord signal abnormality. There was severe foraminal stenosis on the left at C6-7.

13. Claimant continued to report lumbar and cervical spine complaints at an October 18, 2023 follow-up evaluation with Dr. Yamamoto. Dr. Yamamoto referred Claimant for physical therapy for treatment of his neck and low back.

14. On November 1, 2023, Dr. Wong the reviewed recent cervical and lumbar MRIs, noting no cord compression of the cervical spine. He remarked that the lumbar MRI demonstrated a left L5-S1 bulge, but that Claimant did not have left leg radicular pain. He opined that cervical or lumbar surgery was not necessary but recommended an EMG for Claimant's left arm numbness.

15. Claimant underwent an EMG of the left upper extremity on November 27, 2023, the findings of which were normal.

16. On the referral of Dr. Yamamoto, Claimant presented to Shasta Sickle, PA-C in the physical medicine and rehabilitation department at Panorama Orthopedics on November 29, 2023. PA-C Sickle's assessment included lumbar radiculopathy and lumbar degenerative disc disease. She opined that Claimant's complaints, as well as the on x-ray and exam findings, suggested that stenosis was causing Claimant's pain. She recommended bilateral S1 transforaminal epidural steroid injections for diagnostic and therapeutic purposes.

17. Claimant received the bilateral S1 transforaminal epidural steroid injections on December 6, 2023, administered by Michal Horner, D.O. at South Denver Surgery Center.

18. Claimant saw Dr. Yamamoto on December 28, 2023 and reported only temporary relief from the recent back injections.

19. On January 11, 2024, Claimant saw Sarah Marie Robbins, N.P. at Panorama Orthopedics. Claimant reported continued axial low back pain that radiated to the lateral side of his hips. NP Robbins noted that Claimant had mild improvement following bilateral L5-S1 injections and thus recommended proceeding with with bilateral L4 transforaminal epidural steroid injections. She further recommended bilateral C7-T1 epidural steroid injections to address the radicular symptoms in Claimant's left upper extremity and left-sided foraminal narrowing on cervical MRI.

20. On January 30, 2024, Claimant underwent bilateral L4-5 transforaminal epidural steroid injections administered by Dr. Horner.

21. Claimant underwent C7-T1 epidural steroid injections on February 9, 2024, administered by Dr. Horner.

22. On February 27, 2024, Claimant reported to NP Robbins that his neck was doing much better but that he continued to experience significant low back complaints, including worsening radicular symptoms on the left. NP Robbins referred Claimant for a surgical consultation.

23. On February 28, 2024, Claimant saw Cole Levi Neilsen, PA-C at Panorama Orthopedics, who noted on examination tenderness of the right SI joint, positive thigh

thrust, positive FABER test, positive pelvic distraction/compression, and positive right straight leg raise. He suspected sacroiliac dysfunction, noting it would be consistent with leg length discrepancy post femur surgery. He and Michael Lerseten, M.D. recommended an sacroiliac ("SI") joint injection.

24. On March 25, 2024, Claimant underwent a right SI joint injection, administered by E. Taylor Abel, M.D. at South Denver Surgery Center.

25. On April 1, 2024, Claimant reported to Dr. Yamamoto he was not yet sure if the recent SI joint injection was helpful. Dr. Yamamoto noted Claimant had no relief from the February 2024 cervical injection; however, at an April 16, 2024 evaluation, Dr. Yamamoto noted that the February 2024 cervical injection provided Claimant some relief.

26. On May 2, 2024, Qing-Min Chen, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. Chen opined that, in addition to the right subtrochanteric femur fracture, Claimant sustained cervical and lumbar strains as a result of the June 5, 2023 work injury. He, nonetheless, opined that Claimant reached maximum medical improvement ("MMI") for the cervical and lumbar strains on September 5, 2023. Dr. Chen concluded that Claimant's continued cervical and lumbar complaints are not work-related. Dr. Chen opined that Claimant has pre-existing neck and low back findings, including multilevel degenerative disc disease, which support chronic age-related conditions and degenerative changes. Dr. Chen concluded that the cervical and lumbar MRI findings are all age-related, chronic and degenerative, without evidence of aggravation from the June 5, 2023 work injury. Dr. Chen concluded there was no evidence on imaging of any SI joint injury. Dr. Chen further opined that there was no evidence the epidural steroid injections were necessary or that Claimant experienced any relief from the injections.

27. At a follow-up evaluation with NP Robbins on May 13, 2024, Claimant reported experiencing improvement following the SI injection but that the relief was complicated by knee issues. He reported experiencing relief from the cervical injections that had since worn off. NP Robbins recommended an additional bilateral SI joint injection, noting the prior right SI injection was somewhat helpful. She also recommended an additional C7-T1 injection, noting the prior injection in February was helpful for Claimant's radicular neck pain.

28. On May 29, 2024, Dr. Yamamoto noted that the March 2024 right SI joint injection was not helpful, and that bilateral SI joint injections were recommended. Dr. Yamamoto noted some improvement following the cervical injection. He further noted there was an EMG of the left lower extremity performed on March 28, 2024 that was normal.

29. Dr. Yamamoto reviewed Dr. Chen's IME report and authored a letter in response dated June 6, 2024. Dr. Yamamoto strongly disagreed with Dr. Chen's opinions regarding the relatedness of Claimant's ongoing cervical and lumbar spine complaints

and the need for the recommended epidural steroid injections. Dr. Yamamoto opined that Claimant sustained significant and life-altering injuries to his neck and low back as a result of the June 5, 2023 work injury, with ongoing symptoms, objective findings on examination, and need for additional treatment.

30. Claimant continued to report ongoing low back and neck symptoms to Dr. Yamamoto on June 19, 2024. Dr. Yamamoto noted that authorization for the bilateral SI joint injections was denied.

31. On July 19, 2024, Dr. Yamamoto noted Claimant thought the right SI joint injection in March 2024 may have been slightly beneficial. Dr. Yamamoto noted further treatment was on hold pending another IME.

32. On September 4, 2024, John Hughes, M.D. performed an IME at the request of Claimant. Claimant reported that the L4-5 injections were not helpful and that he could not tell whether the SI joint injection was helpful. Dr. Hughes noted Claimant experienced relief from the but without sustained benefit. Dr. Hughes noted that the records following the injections varied from mild to some improvement. He noted a lack of any preexisting conditions in his neck or low back. Dr. Hughes confirmed Dr. Yamamoto's diagnoses of work-related cervical and lumbar strains, but opined that the cervical and lumbar conditions were at MMI as they had become medically stable with non-radicular findings and negative responses to injections. Dr. Hughes' recommended that Claimant proceed with additional orthopedic, surgical, and psychiatric treatment as recommended by Dr. Yamamoto.

33. Claimant testified at hearing that he began to notice back and neck pain a few days after his discharge from the hospital. Claimant testified he noticed bruising, tenderness, and pain in his low back, along with burning sensations radiating into his buttocks while upright and difficulty bending over. Claimant testified that he noticed neck pain when using his walker and looking from side to side and up and down. Claimant further testified he noticed pain extending into his left should and arm, as well as numbness into his index, middle and ring fingers. Claimant testified that, prior to the work injury, he did not have any neck or low back symptoms or treatment. Claimant testified that he was on several pain medications following the work injury.

34. Claimant testified that he continues to experience low back symptoms, including a constant searing sensation into his left side around the hip, difficulty bending, lifting and sitting for long periods, and a jolting sensation down his legs. Claimant testified he also continues to experience consistent neck soreness, numbness in his index and ring fingers, decreased range of motion and pain in his left arm.

35. Claimant testified that prior the right SI joint injection decreased the pain and shooting sensations into his legs, reduced his use of pain medication, and increased his mobility and functionality, range of motion, and sitting tolerance. He testified that the prior cervical injections considerably improved his quality of life, resulting in improved range of motion and decreased numbness. He further testified that he experienced

approximately 6-7 months of relief from the cervical injections prior to his symptoms gradually returning. Claimant wishes to proceed with the recommended additional SI joint and cervical injections.

36. Dr. Chen testified at hearing on behalf of Respondents as a Level II accredited expert in orthopedic surgery. Dr. Chen testified consistent with his IME report and continued to opine that the recommended injections are not reasonable, necessary or related to Claimant's work injury. Dr. Chen testified that the initial emergency department records did not document neck or low back complaints or findings, which he would expect to see in the event of a traumatic injury to the neck or low back. Dr. Chen testified that, per his review of the MRI reports and records, there are no objective findings of a traumatic injury or aggravation to Claimant's cervical or lumbar spine. Dr. Chen testified that Claimant's neck and low back findings are chronic and degenerative and do not correlate with Claimant's reported symptoms. Dr. Chen testified that the injections Claimant has received were not diagnostic and did not have any objective benefits. He testified that the recommended injections do not meet the criteria under the Medical Treatment Guidelines, stating that 80% relief is required for authorization of additional injections. Dr. Chen testified that you can deviate from the Medical Treatment Guidelines, but that such deviation requires justification, such as sustained relief for three months with functional improvement.

37. The ALJ credits the opinions of Claimant's treating providers, including Dr. Yamamoto and NP Robbins, as supported by the records and Claimant's credible testimony, over the testimony and opinion of Drs. Chen and Hughes.

38. Claimant proved it is more probably true than not the recommended SI joint injections and cervical injections are causally related to Claimant's June 5, 2023 work injury and reasonably necessary to cure and relieve its effects.

CONCLUSIONS OF LAW

Generally

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

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

2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

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

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the

totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

As found, Claimant proved it is more likely than not the recommended cervical and lumbar injections are causally related to Claimant's June 5, 2023 work injury and reasonably necessary to cure and relieve its effects. As credibly testified to by Claimant, and consistently noted throughout the medical records, the mechanism of injury in this case was severe. Several panels each weighing approximately 100 pounds fell towards Claimant, causing Claimant to fall backwards, strike his head, and break his leg. Dr. Chen's argument regarding the absence of neck or low back complaints or findings in the initial emergency department records is unpersuasive to the ALJ, considering the severity of Claimant's leg injury at the time. It is reasonable to conclude the emergency room providers merely cleared Claimant's spine of any major concerns so they could proceed with repairing the fracture of Claimant's femur.

Claimant credibly testified he began to notice neck and low back symptoms soon after his release from the hospital and the records clearly document Claimant's complaints of such symptoms to his providers soon thereafter. Claimant has consistently reported ongoing neck and low back complaints and limitations after the June 5, 2023 work injury. Claimant credibly testified, and no evidence was offered to the contrary, that he did not have neck or low back symptoms, limitations, or the need for neck or low back treatment, prior to the work injury. Dr. Chen and Dr. Hughes opined Claimant did sustain cervical and lumbar strains as a result of the work injury. Claimant's ATP, Dr. Yamamoto credibly opined that Claimant's neck and low back condition and need for treatment are related to the June 5, 2023 work injury. To the extent Claimant has pre-existing chronic and degenerative conditions in his neck and low back, the ALJ is persuaded the June 5, 2023 aggravated such conditions producing disability and the need for treatment.

The Medical Treatment Guidelines state that "[p]atients should be reassessed after each injection session for an 80% improvement in pain … and evidence of functional improvement. A positive result would include a return to baseline function, return to increased work duties, and a measurable improvement in physical activity…" W.C.R.P. 17, Ex. 9, p. 52. Dr. Chen acknowledged that providers may deviate from the criteria in the Medical Treatment Guidelines, if justified. The records reflect Claimant's reports regarding the efficacy of the injections varied. Nonetheless, Claimant credibly testified he experienced relief and increased function from the cervical and SI joint injections, including six to seven months of relief from the cervical injections. Dr. Yamamoto had Claimant's records from and following the injections and credibly opined that Claimant needs the recommended additional injections. NP Robbins noted that the bilateral SI joint injections were indicated after Claimant benefited from the right SI joint injection. She further opined that additional C7-T1 injections were helpful and recommended another. Based on the totality of the evidence, it is more likely than not the recommended bilateral SI joint and cervical injections are reasonably necessary to cure and relieve the effects caused by Claimant's June 5, 2023 work injury.

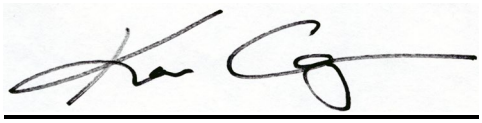
ORDER

1. The recommended bilateral SI joint and cervical spine corticosteroid injections recommended by Panorama Orthopedics are reasonable, necessary, and related to the June 5, 2023 industrial injury. Respondents shall authorize and pay for the injections subject to the Division of Workers' Compensation Medical Fee Schedule.

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

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

DATED: January 14, 2025



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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Permanent Total Disability (PTD) benefits as a result of her February 17, 2021 admitted right knee injury.

FINDINGS OF FACT

1. Claimant is a 51-year-old female who worked for Employer as a paraprofessional. Claimant testified that on February 17, 2021 she suffered a right knee injury while attempting to physically control a student experiencing behavioral issues.

2. On February 23, 2021 Claimant saw Authorized Treating Physician (ATP) Jay Reinsma, M.D. at Concentra Medical Centers for an evaluation. He noted that Claimant had visited Advanced Urgent Care on the date of the injury. Claimant reported that on February 17, 2021 she was attempting to help restrain a combative student. While Claimant was attempting to arise after going down to a knee, she experienced pain in her right knee. Dr. Reinsma diagnosed a right knee strain, prescribed physical therapy and assigned work restrictions.

3. On March 1, 2021 Claimant returned to Dr. Reinsma for an evaluation. She reported pain at the level of 0/10 and that her condition had returned to baseline. Dr. Reinsma released Claimant to full duty work and determined she had reached Maximum Medical Improvement (MMI).

4. On March 19, 2021 Claimant returned to Dr. Reinsma for an examination. She noted she had returned to full duty work but was experiencing knee pain. Dr. Reinsma suspected Claimant may have suffered an initial partial meniscus tear that had progressed to a complete tear. He ordered an MRI. Dr. Reinsma was uncertain of a new MMI date until he reviewed the MRI results.

5. On April 22, 2021 Claimant again visited Dr. Reinsma for an evaluation. He remarked that Claimant's right knee MRI revealed slight evidence of a strain to her MCL, she had no meniscal tears, and her ACL was intact. Dr. Reinsma commented that Claimant had returned to regular duty employment without increased pain or swelling. Although Claimant felt that physical therapy had been helpful, she still believed her right knee was going to "give out." Dr. Reinsma reasoned that, although Claimant had been having some "fear avoidance," she was pain-free and had achieved her functional goals. He thus determined Claimant had reached MMI and released her from care. Dr. Reinsma concluded Claimant had suffered no permanent impairment and did not recommend medical maintenance treatment.

6. On June 22, 2021 Claimant visited Frederic Zimmerman, D.O. for an examination. He assessed Claimant with a right knee strain and mild chondromalacia/osteoarthritis of the knee joint that was exacerbated by her work injury. Dr. Zimmerman agreed Claimant had reached MMI. He assigned a 5% lower extremity impairment rating for mild chondromalacia and an 8% rating for range of motion deficits for a total 13% right lower extremity impairment. Dr. Zimmerman also recommended maintenance care in the form of a one-time steroid injection over the next six months, if necessary, as well as a right patellar strap replacement in the next six months. He assigned permanent work restrictions of no kneeling, crawling or running. He noted that more objective restrictions could be measured with a Functional Capacity Evaluation (FCE).

7. On June 23, 2021 Claimant returned to Dr. Reinsma for an examination. He conducted a comprehensive discharge evaluation and concluded Claimant had reached MMI. Dr. Reinsma determined Claimant was able to return to modified duty with permanent work restrictions of no kneeling, crawling or squatting. He also suggested wearing a strap on the right knee as needed, and no running. Finally, Dr. Reinsma recommended medical maintenance care as noted by Dr. Zimmerman, in the form of a one-time steroid injection in the next six months if needed, and replacement of the patellar strap within the next six months if needed.

8. On August 5, 2021 Respondent filed a Final Admission of Liability (FAL) acknowledging that Claimant had sustained a 13% lower extremity impairment and reached MMI on June 23, 2021 for her February 17, 2021 work injury. Respondent also admitted that Claimant had received medical benefits in the amount of $4,126.17 and $9,115.45 in Permanent Partial Disability (PPD) benefits.

9. On September 17, 2021 Claimant returned to Dr. Reinsma for a one-time evaluation. Because Claimant continued to experience right knee pain and an injection administered by Dr. Zimmerman had failed, he referred Claimant for another MRI of her right knee.

10. On September 23, 2021 Claimant reported to Dr. Reinsma that she had re-injured her right knee three days earlier when she was attempting to restrain a combative student at work. Dr. Reinsma did not assign any additional restrictions but noted an MRI had been scheduled.

11. On October 4, 2021 Respondent filed a General Admission of Liability (GAL) reopening the February 17, 2021 claim. Respondent acknowledged continuing Temporary Total Disability (TTD) benefits beginning on September 21, 2021 at an Average Weekly Wage (AWW) of $763.74.

12. Through the remainder of 2021 and 2022, Claimant continued to receive treatment from Dr. Reinsma and other medical providers. On February 1, 2022 providers determined Claimant was not a surgical candidate based on her personal beliefs and she would not be comfortable receiving treatment through platelet-rich plasma (PRP). Because of a lack of continuing treatment options, Claimant was instructed to continue

her physiatry appointments. Dr. Zimmerman ultimately released Claimant from specialist care.

13. On March 15, 2022 Dr. Reinsma again determined Claimant had reached MMI. He reiterated Claimant's permanent work restrictions of no crawling, kneeling or squatting. Claimant subsequently continued to attend medical maintenance appointments.

14. Claimant requested a Division Independent Medical Examination (DIME). On August 24, 2022 Claimant underwent a DIME with Justin D. Green, M.D. of Front Range Center for Spine & Sports Medicine. Dr. Green reviewed Claimant's medical records and conducted a physical examination. Claimant detailed that she initially injured her right knee when she arose after attempting to restrain a student in an autistic classroom on February 17, 2021. Subsequently, in a different classroom, she knelt down and experienced a right knee pop and swelling while changing a diaper. Finally, she suffered additional swelling when a student fell on the anterior aspect of her right knee. Dr. Green summarized that Claimant had suffered a work-related right knee injury on February 17, 2021 with multiple interim right knee traumas. He diagnosed right knee chondromalacia. Dr. Green agreed with Dr. Zimmerman that Claimant reached MMI on June 22, 2021.

15. Relying on the *American Medical Association Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*), Dr. Green concurred with Dr. Zimmerman's final report of June 22, 2021 and assigned a 5% chondromalacia impairment pursuant to Table 40. Based upon the Division of Workers' Compensation (DOWC) Impairment Rating Tips, Dr. Green observed non-physiologic active range of motion deficits and chose to use the measurements obtained by Dr. Zimmerman on June 22, 2021. He thus assigned an 8% lower extremity range of motion impairment. Combining the ratings yielded a total 13% right lower extremity impairment. Dr. Green recommended medical maintenance treatment in the form of two to three visits over the next year for medication management, as well as one to two visits over the following year for patellar strap replacement.

16. On October 20, 2022 Respondent filed a FAL consistent with Dr. Green's DIME report. The document specified that Claimant had reached MMI on June 22, 2021 with a 13% lower extremity permanent impairment rating. The FAL also noted Claimant was entitled to receive medical maintenance benefits. Notably, Dr. Green had recommended two to three visits over the next year for medication management, as well as one to two visits over the following year for patellar strap replacement.

17. On December 27, 2022 Claimant had a pain management appointment with John Sacha, M.D. On January 10, 2023 Dr. Sacha diagnosed Claimant with adjustment disorder, reactive depression, and chondromalacia of the right knee. Dr. Sacha also prescribed Claimant trazadone and diclofenac for her knee pain.

18. Throughout the remainder of 2023, Claimant continued to attend follow-up appointments and psychiatry evaluations with Walter Torres, M.D.

19. Claimant returned to Dr. Reinsma on June 2, 2023. Claimant presented a three page letter with all her concerns. Dr. Reinsma noted he referred Claimant to another pain management doctor. Claimant advised she continued to have pain in the right knee and a rash on her face although none was visible on exam. The amitriptyline was discontinued but Claimant continued to take 30 mg of duloxitine daily. Claimant was to be going on a different antidepressant and they held off on changing her medications until her appointment with Dr. Torres. Dr. Reinsma reiterated that there were no changes in Claimant's permanent work restrictions.

20. Claimant subsequently underwent medical maintenance treatment and medication management with various authorized providers. On August 1, 2023 Claimant visited Dr. Zimmerman. She expressed interest in PRP injections for her right knee. Dr. Zimmerman perceived a very low chance of success and recommended against PRP injections. He advised Claimant to follow-up with John Aschberger, M.D.

21. On October 5, 2023 Claimant visited Dr. Aschberger for treatment. She reported going for a long drive five days earlier and suffering right leg swelling. Dr. Aschberger remarked Claimant was not a candidate for additional injections based on her evaluation with Dr. Zimmerman. He explained Claimant did not suffer any trauma to her right leg and any issues of a potential deep vein thrombosis needed to be evaluated under her personal health insurance because they were not Workers' Compensation-related.

22. On March 7, 2024 Claimant visited Dr. Reinsma for an examination regarding the September 21, 2021 date of injury. He commented that Claimant remained at MMI for the February 17, 2021 date of injury and recommended maintenance care. Dr. Reinsma diagnosed Claimant with a right knee strain and chronic pain syndrome. He specifically mentioned that Claimant should receive medication management for chronic pain with Dr. Aschberger and follow-up with Dr. Zimmerman for repeat injections as needed. Dr. Reinsma commented that Claimant's permanent work restrictions included no crawling or kneeling and to avoid restraining students.

23. On October 20, 2024 Claimant underwent a vocational evaluation with Donna Ferris, M.A. Ms. Ferris considered Claimant's medical history and performed a vocational assessment. She relied on Claimant's June 22, 2021 permanent work restrictions from Dr. Reinsma that included no kneeling, crawling or squatting. Ms. Ferris determined that, based on Claimant's educational and employment history, as well as a local labor market search, Claimant was not permanently and totally disabled. She located numerous full and part time positions within Claimant's permanent work restrictions that did not require prior experience and supplied on the job training. The jobs included various delivery positions, light cleaning work, server positions, food preparation, and cashier at fast food and casual dining establishments. Ms. Ferris further specified that there are platform-generated food delivery positions that involve picking up menu orders for delivery to customers. Some positions also include shopping at stores to fill grocery lists that are then delivered. The preceding positions do not require prior experience and offer maximum flexibility with scheduling and delivery locations. Ms. Ferris also identified the position of server at a senior living center that involves taking

and delivering menu items, bussing tables, light janitorial tasks and dishwashing. Finally, part-time light janitorial positions cleaning offices are also regularly available.

24. Ms. Ferris detailed at the hearing that she based her vocational opinions on the permanent work restrictions of Dr. Reinsma because he extensively treated Claimant over several years. He consistently maintained that Claimant's permanent work restrictions included no squatting, kneeling or crawling. Ms. Ferris persuasively testified that there are numerous positions in the local labor market that meet Claimant's permanent work restrictions and do not require prior experience including various delivery positions, light cleaning work, server positions, food preparation, and cashier at fast food and casual dining places. Notably, Claimant has no driving restrictions, no lifting restrictions and can use stairs. Consequently, Claimant is not permanently and totally disabled.

25. On cross-examination, Ms. Farris determined there were jobs available to Claimant even based on the increased restrictions supplied by Drs. Green and Zimmerman. Although fewer jobs would be available with additional restrictions, Claimant could still maintain newspaper or fast food delivery jobs. Ms. Ferris explained that there are numerous full and part-time positions available that do not require prior experience. She thus concluded that jobs were reasonably available to Claimant under her particular circumstances and she could thus earn wages.

26. Claimant has failed to demonstrate it is more probably true than not that she is entitled to receive PTD benefits as a result of her February 17, 2021 admitted right knee injury. Initially, on February 17, 2021 Claimant injured her right knee while attempting to restrain a combative student. ATP Dr. Reinsma diagnosed Claimant with a right knee strain and she underwent significant conservative treatment. On June 22, 2021 Dr. Zimmerman determined she reached MMI with a 5% lower extremity impairment rating for mild chondromalacia and an 8% rating for range of motion deficits for a total 13% right lower extremity impairment.

27. On August 24, 2022 DIME Dr. Green agreed that Claimant reached MMI on June 22, 2021. He assigned a 5% chondromalacia impairment and an 8% lower extremity range of motion impairment. Combining the ratings yielded a total 13% right lower extremity impairment. Dr. Green recommended medical maintenance benefits. On October 20, 2022 Respondent filed a FAL consistent with Dr. Green's June 22, 2021 MMI determination and 13% right lower extremity permanent impairment rating. The FAL also noted Claimant was entitled to receive medical maintenance benefits of two to three visits over the next year for medication management, as well as one to two visits over the following year for patellar strap replacement.

28. Through the remainder of 2021 and 2022, Claimant continued to receive treatment from Dr. Reinsma and other medical providers. On February 1, 2022 providers determined Claimant was not a surgical candidate. Claimant subsequently underwent pain management treatment with Dr. Sacha and psychiatry evaluations with Dr. Torres. On March 7, 2024 Dr. Reinsma mentioned that Claimant should receive medication management for chronic pain with Dr. Aschberger and follow-up with Dr. Zimmerman for

repeat injections as needed. Dr. Reinsma commented that Claimant's permanent work restrictions included no crawling or kneeling and to avoid restraining students.

29. On October 20, 2024 Claimant underwent a vocational evaluation with Ms. Ferris. She considered Claimant's medical history and performed a vocational assessment. Ms. Ferris relied on Claimant's June 23, 2021 permanent work restrictions from Dr. Reinsma that included no kneeling, crawling or squatting. Importantly, Dr. Reinsma consistently maintained that Claimant's permanent work restrictions remained unchanged. Notably, Dr. Reinsma extensively treated Claimant over several years both before and after she reached MMI. Ms. Ferris determined that, based on Claimant's educational and employment history, as well as local labor market research, Claimant was not permanently and totally disabled. She located numerous full and part time positions within Claimant's permanent work restrictions that did not require prior experience and supplied on the job training. The jobs included various delivery positions, light cleaning work, server positions, food preparation, and cashier at fast food and casual dining establishments. Ms. Ferris further specified that there are platform-generated food delivery positions that involve picking up menu orders for delivery to customers. Some positions also include shopping at stores to fill grocery lists that are then delivered. The preceding positions do not require prior experience and offer maximum flexibility with scheduling and delivery locations. Ms. Ferris also identified the position of server at a senior living center that involves taking and delivering menu items, bussing tables, light janitorial tasks and dishwashing. Finally, part-time light janitorial positions cleaning offices are also regularly available. Notably, Claimant has no driving restrictions, no lifting restrictions and can use stairs. Consequently, Claimant is not permanently and totally disabled.

30. The medical records and persuasive opinion of Mr. Ferris demonstrate that employment exists that is reasonably available to Claimant under her particular circumstances. Considering various human factors, including Claimant's physical condition, mental ability, age, employment history, education, and availability of work, reveals that there are a variety of jobs available in Claimant's local labor market within her permanent work restrictions. The positions include full and part time jobs that do not require prior experience and offer on-the-job training. The jobs include various delivery positions, light cleaning work, server positions, food preparation, and cashier at fast food and casual dining places. Claimant has failed to prove by a preponderance of the evidence that she is incapable of earning any wages, or that she is entitled to receive PTD benefits as a result of her February 17, 2021 admitted industrial injury. Claimant's claim for PTD benefits is thus denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

4. Under §8-40-201(16.5)(a), C.R.S., permanent total disability means "the employee is unable to earn any wages in the same or other employment." This definition was intended to tighten and restrict eligibility for permanent total disability benefits. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). A claimant thus cannot obtain permanent total disability benefits if he is capable of earning wages in any amount. *Id*. at 556. Therefore, to establish a claim for PTD the claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. *See* §8-43-201, C.R.S. The phrase, "to earn any wages in the same or other employment," "provides a real and non-illusory bright line rule for the determination whether a Claimant has been rendered permanently totally disabled." *Lobb v. Indus. Claim Appeals Off.*, 948 P.2d 115, 119 (Colo. App. 1997).

5. The Workers' Compensation Act defines "employment" as "[a]ny trade, occupation, job, position, or process of manufacture or any method of carrying on any trade, occupation, job, position or process of manufacture in which any person may be engaged." §8-40-201(8), C.R.S. "Wages" is the rate for which the employee is to be compensated for services. §8-40-201(19), C.R.S. For purposes of PTD "any wages" means more than zero. *See McKinney v. Indus. Claim Appeals Off.*, 894 P.2d 42 (Colo. App. 1995). In ascertaining whether a claimant is able to earn any wages, the test that must be conducted on a case-by-case basis is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Bymer*, 955 P.2d at 557; *Holly Nursing v. ICAO*, 992 P.2d 701, 703 (Colo. App. 1999). In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Bymer*, 955 P.2d at 558.

6. The claimant must demonstrate that his industrial injuries constituted a "significant causative factor" in order to establish a claim for PTD. *In Re Olinger*, W.C. No. 4-002-881 (ICAO, Mar. 31, 2005). A "significant causative factor" requires a "direct causal relationship" between the industrial injuries and inability to earn wages. *In Re of Dickerson*, W.C. No. 4-323-980 (ICAO, July 24, 2006); *see Seifried v. Indus. Comm'n*, 736 P.2d 1262, 1263 (Colo. App. 1986). The preceding test requires ascertaining the "residual impairment caused by the industrial injury" and whether the impairment was sufficient to result in PTD without regard to subsequent intervening events. *In Re of Dickerson*, W.C. No. 4-323-980 (ICAO, July 24, 2006). Resolution of the causation issue is a factual determination for the ALJ. *Id.*

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she is entitled to receive PTD benefits as a result of her February 17, 2021 admitted right knee injury. Initially, on February 17, 2021 Claimant injured her right knee while attempting to restrain a combative student. ATP Dr. Reinsma diagnosed Claimant with a right knee strain and she underwent significant conservative treatment. On June 22, 2021 Dr. Zimmerman determined she reached MMI with a 5% lower extremity impairment rating for mild chondromalacia and an 8% rating for range of motion deficits for a total 13% right lower extremity impairment.

8. As found, on August 24, 2022 DIME Dr. Green agreed that Claimant reached MMI on June 22, 2021. He assigned a 5% chondromalacia impairment and an 8% lower extremity range of motion impairment. Combining the ratings yielded a total 13% right lower extremity impairment. Dr. Green recommended medical maintenance benefits. On October 20, 2022 Respondent filed a FAL consistent with Dr. Green's June 22, 2021 MMI determination and 13% right lower extremity permanent impairment rating. The FAL also noted Claimant was entitled to receive medical maintenance benefits of two to three visits over the next year for medication management, as well as one to two visits over the following year for patellar strap replacement.

9. As found, through the remainder of 2021 and 2022, Claimant continued to receive treatment from Dr. Reinsma and other medical providers. On February 1, 2022 providers determined Claimant was not a surgical candidate. Claimant subsequently underwent pain management treatment with Dr. Sacha and psychiatry evaluations with Dr. Torres. On March 7, 2024 Dr. Reinsma mentioned that Claimant should receive medication management for chronic pain with Dr. Aschberger and follow-up with Dr. Zimmerman for repeat injections as needed. Dr. Reinsma commented that Claimant's permanent work restrictions included no crawling or kneeling and to avoid restraining students.

10. As found, on October 20, 2024 Claimant underwent a vocational evaluation with Ms. Ferris. She considered Claimant's medical history and performed a vocational assessment. Ms. Ferris relied on Claimant's June 23, 2021 permanent work restrictions from Dr. Reinsma that included no kneeling, crawling or squatting. Importantly, Dr. Reinsma consistently maintained that Claimant's permanent work restrictions remained unchanged. Notably, Dr. Reinsma extensively treated Claimant over several years both

before and after she reached MMI. Ms. Ferris determined that, based on Claimant's educational and employment history, as well as local labor market research, Claimant was not permanently and totally disabled. She located numerous full and part time positions within Claimant's permanent work restrictions that did not require prior experience and supplied on the job training. The jobs included various delivery positions, light cleaning work, server positions, food preparation, and cashier at fast food and casual dining establishments. Ms. Ferris further specified that there are platform-generated food delivery positions that involve picking up menu orders for delivery to customers. Some positions also include shopping at stores to fill grocery lists that are then delivered. The preceding positions do not require prior experience and offer maximum flexibility with scheduling and delivery locations. Ms. Ferris also identified the position of server at a senior living center that involves taking and delivering menu items, bussing tables, light janitorial tasks and dishwashing. Finally, part-time light janitorial positions cleaning offices are also regularly available. Notably, Claimant has no driving restrictions, no lifting restrictions and can use stairs. Consequently, Claimant is not permanently and totally disabled.

11. As found, the medical records and persuasive opinion of Mr. Ferris demonstrate that employment exists that is reasonably available to Claimant under her particular circumstances. Considering various human factors, including Claimant's physical condition, mental ability, age, employment history, education, and availability of work, reveals that there are a variety of jobs available in Claimant's local labor market within her permanent work restrictions. The positions include full and part time jobs that do not require prior experience and offer on-the-job training. The jobs include various delivery positions, light cleaning work, server positions, food preparation, and cashier at fast food and casual dining places. Claimant has failed to prove by a preponderance of the evidence that she is incapable of earning any wages, or that she is entitled to receive PTD benefits as a result of her February 17, 2021 admitted industrial injury. Claimant's claim for PTD benefits is thus denied and dismissed.

ORDER

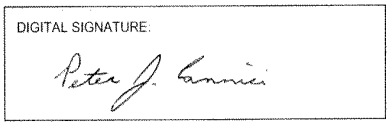
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for PTD benefits is denied and dismissed.

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

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

DATED: January 15, 2025.



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

Also in this Summary Order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2022); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUE

The issues addressed by this Summary Order concern Claimant's entitlement to medical benefits. The specific questions answered are:

I. Whether Claimant established, by a preponderance of the evidence, that the right shoulder capsular arthroscopic surgery with extensive debridement and arthroscopic distal clavicle excision recommended by Dr. Simpson is reasonable, necessary, and related to Claimant's November 11, 2022 work-related injury.

II. Whether Claimant established, by a preponderance of the evidence, that an additional lumbar epidural steroid injection as recommended by Dr. Finn is reasonable, necessary, and causally related to Claimant's November 11, 2022 work-related injury.

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

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

B. Where the reasonableness, necessity or relatedness of medical treatment is disputed, the claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo.App. 1984). The question of whether the need for treatment is causally related to an industrial injury is also one of fact. *Walmart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 521 (Colo.App. 1999).

C. In this case, the evidence presented persuades the ALJ that Claimant not only suffered acute injuries to his right shoulder and low back when he fell from a ladder onto his shoulder and back from a height of 6 feet, but also probably aggravated pre-existing arthritis in his right shoulder which is causing continued symptoms and ongoing dysfunction despite repair of his acute SLAP tear and later biceps tenodesis surgery. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a pre-existing infirmity or disease to produce disability or the need for treatment for which workers' compensation is sought. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for the treatment of pain, so long as the pain is proximately caused by employment related activities and not an underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

D. Nonetheless, the occurrence of symptoms following an incident at work may represent the natural progression of a pre-existing condition that is unrelated to that incident, as suggested by Dr. Chen. See *F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Here, the totality of the persuasive evidence supports a finding that Claimant probably had pre-existing arthritis and degenerative changes in his right shoulder affecting the capsule, the labrum and the AC joint. While it is possible that this pre-existing arthritis could become symptomatic and naturally progress over time, especially with continued use of the shoulder, the evidence presented supports a finding that Claimant did not complain of right shoulder pain nor did he have treatment directed to the right shoulder prior to his November 11, 2022 fall from height. Indeed, the record evidence supports a conclusion that Claimant's right shoulder was asymptomatic and non-disabling prior to his November 11, 2022 fall. Based on the evidence presented, the ALJ finds insufficient forensic evidence to support Dr. Chen's conclusion that Claimant's current symptoms, disability and need for treatment are related to the natural progression of this pre-existing arthritis. In contrast, the medical record, including the expert opinions of Dr. Simpson strongly persuade the ALJ that Claimant's fall probably activated quiescent

pre-existing arthritis in the right shoulder causing symptoms and disability that have persisted and worsened with the passage of time. Because Claimant has established that his compensable fall probably aggravated and/or accelerated his pre-existing arthritis resulting in persistent symptoms and disability, the ALJ finds and concludes that Claimant has established that the arthroscopic surgery, involving extensive debridement and distal clavicle excision, as recommended by Dr. Simpson is causally related to his November 11, 2022 fall. After careful consideration the ALJ finds the contrary opinions/conclusions of Dr. Chen unconvincing. Here, the ALJ is also is convinced that Claimant's condition will likely deteriorate resulting in worsening pain and greater functional decline if not treated. Furthermore, the totality of the evidence presented persuades the ALJ that the recommended surgery represents the best medical option to cure and relieve Claimant from the incessant pain and shoulder dysfunction caused by the industrially based aggravation of his pre-existing arthritis. Consequently, the ALJ concludes the procedure is reasonable and necessary.

E. In this case, Dr. Finn's testimony and medical records are persuasive regarding the reasonableness, necessity and relatedness of Claimant's need for an additional lumbar epidural steroid injection to cure and relieve him of the effects of his compensable November 11, 2022 low back injury. Dr. Chen did not provide a compelling contrary opinion concerning the effectiveness or reasonableness of Claimant's need for such an injection. Indeed, the medical record persuasively demonstrates that Claimant received over a year of significant relief from his first round of injections supporting a finding/conclusion that there was both a positive diagnostic and therapeutic response to the previous injections. Consequently, the ALJ is persuaded that Claimant has established, by a preponderance of the evidence, that Dr. Finn's recommendation/request for authorization to proceed with an additional lumbar epidural steroid injection is reasonable, necessary, and related to Claimant's November 11, 2022 work-related fall and resultant low back injury.

IT IS THEREFORE ORDERED:

1. Claimant has established that Dr. Simpson's request for authorization to proceed with a right shoulder arthroscopic capsular surgery with extensive debridement and distal clavicle excision is reasonable, necessary, and related to Claimant's November 11, 2022 work-related injury. Accordingly, Respondents shall authorize and pay for the costs associated with this shoulder surgery.

2. Claimant has established, by a preponderance of the evidence, that an additional lumbar epidural steroid injection as recommended by Dr. Finn is causally related to Claimant's November 11, 2022 work-related injury and that this injection is reasonably necessary to cure and relieve Claimant from the ongoing effects of his

November 11, 2022 work-related low back injury. Consequently, Respondents shall authorize and pay for the costs associated with this injection.

3. Payment for all medical benefits awarded shall be in accordance with the Colorado Workers' Compensation Medical Benefits Fee Schedule.

4. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

DATED: January 15, 2025

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

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-180-872-002

ISSUES

- Did Respondent overcome the DIME's 33% whole person impairment rating by clear and convincing evidence?

- If Respondent overcame the DIME, what is the proper rating, based on a preponderance of the evidence?

- The parties stipulated to an MMI date of October 2, 2023, and a general award of post-MMI medical benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a correctional officer. He suffered admitted injuries on August 2, 2021, when he slipped on a wet concrete walkway and fell on his back. Claimant felt immediate pain in his neck, low back, and right knee. Shortly thereafter, he developed pain in his mid-back.

2. Claimant was referred to Concentra for authorized treatment, where he saw Dr. J. Douglas Bradley on August 11, 2021. He reported pain in his lower back, neck, and right knee. Examination of Claimant's low back showed tenderness, bilateral muscle spasm and limited range of motion. He was also tender to palpation in the right lower cervical spine and right trapezius. Dr. Bradley diagnosed strains of the low back, neck, and right knee. He prescribed pain medications and referred Claimant to physical therapy.

3. Claimant returned to Concentra the next day and reported radiation of back pain from his low back "up into the thoracic area."

4. Claimant was evaluated by Jennfier Livingston, NP, on August 17, 2021. Claimant stated "his right mid back just under the shoulder blade still feels like there is a knot there. Causing increased pain. No better since the incident." Ms. Livingston added a diagnosis of "acute right-sided thoracic pain." Ms. Livingston ordered lumbar and thoracic MRIs.

5. On August 23, 2021, thoracic pain was added to the list of conditions being addressed in therapy.

6. On September 2, 2021, Dr. Bradley examined Claimant's thoracic spine and documented midline and right-sided tenderness, palpable bilateral muscle spasms, and limited range of motion.

7. Claimant completed an Injury Questionnaire on September 8, 2021, wherein the stated the injury affected his lower back from the tailbone "up through" his shoulder blades and into his neck.

8. Claimant was evaluated by PA Stephen Karagosian at Concentra on September 18, 2021. He reported ongoing pain from his lower back up to his neck. Examination showed tenderness throughout his thoracic spine, with painful and limited range of motion.

9. Claimant saw Dr. Lance Weidner, a chiropractor, on October 7, 2021. He reported "unchanged cervical, upper to mid thoracic pain to scapula [and] low back pain . . . all with immobility and spasms." Dr. Weidner noted pain to palpation, muscle spasms, trigger points, and segmental dysfunction in multiple areas of the cervical, thoracic, and lumbar regions. Dr. Weidner's diagnoses included acute right-sided thoracic pain and segmental and somatic dysfunction of the thoracic spine. Claimant received chiropractic treatment directed at his entire spine, including the thoracic region.

10. An MRI of the thoracic spine was completed on November 9, 2021. It showed degenerative changes and moderate to severe foraminal stenosis at multiple levels.

11. On January 25, 2022, Claimant was referred to Dr. Dwight Leggett, a physical medicine and rehabilitation specialist. Thoracic pain was included among the reasons for the referral.

12. Dr. Leggett evaluated Claimant on March 4, 2022. Claimant's symptoms included "achy and tight" mid back pain. The physical examination verified "high levels of myofascial tightness" and "noticeable elevation of tone" in the thoracic musculature. Dr. Leggett's diagnoses included thoracic back pain and multi-level thoracic spondylosis. He recommended trigger point injections as an adjunct to massage therapy.

13. On April 4, 2022, Dr. Leggett noted "he continues with profound myofascial tightness, tenderness and trigger points through the cervical, parascapular, and thoracic/lumbar paraspinal musculature." Dr. Leggett administered multiple sets of trigger point injections to Claimant's mid back over several months.

14. Claimant began seeing Dr. Kathryn Murray at Concentra on June 28, 2022. Dr. Murray's physical examination documented ongoing trigger points in the thoracic region.

15. On July 25, 2022, Claimant was having a pain flare and stated, "his thoracic and lumbar are the worst right now."

16. Providers at Concentra noted trigger points in the thoracic region on multiple occasions in September, October, and November 2022.

17. Claimant underwent bilateral radiofrequency nerve ablations (rhizotomies) targeting the L4-5 and L5-S1 facets in December 2022 and January 2023. The lumbar rhizotomies ablated the L3, L4, and L5 medial branch nerves.

18. In January and February 2023, Claimant underwent bilateral rhizotomies at C4-5 and C5-6. These rhizotomies ablated the C4, C5, and C6 medial branches.

19. On May 2, 2023, Ms. Livingston opined Claimant was approaching MMI and was ready for an FCE and impairment rating. Physical examination that date documented muscle spasms and trigger points in the lower thoracic region. Similar findings were noted on June 29, 2023.

20. Claimant completed the FCE on June 19, 2023. He reported pain in the neck, thoracic area, and low back.

21. Claimant had problems getting the rating done at a Concentra clinic. Therefore, Ms. Livingston referred Claimant to Dr. Primack for a rating.

22. Claimant saw Dr. Primack on October 2, 2023. Dr. Primack opined Claimant was at MMI, with a 27% whole person rating for the cervical and lumbar spines. Dr. Primack rated the lumbar and cervical rhizotomies under Table 53 sections II(C) and II(F):

Body Part	Table 53 rating
Cervical	II(C) 6% + II(F) 1% = 7%
Lumbar	II(C) 7% + II(F) 1% = 8%

23. For unknown reasons, Dr. Primack did not examine Claimant's thoracic spine or comment on the well-documented complaints of thoracic pain from multiple providers throughout the treatment record.

24. On December 22, 2023, Dr. Primack revised his impairment rating and deleted the additional 1% he had initially included under section II(F) for the cervical and lumbar ratings. Dr. Primack cited the Division's Impairment Rating Tips which state that bilateral "two level" rhizotomies should be rated using Table 53 II(C) only. Dr. Primack opined that Claimant underwent "two-level" rhizotomies for the cervical spine (C4-5 and C5-6) and lumbar spine (L4-5 and L5-S1), and therefore did not qualify for an additional 1% under section II(F). Dr. Primack's revised final rating was 25%.

25. Dr. Miguel Castrejon performed a DIME on May 20, 2024. Claimant reported intermittent to constant sharp and stabbing pain in his neck, low back, and mid back. The symptoms worsened with prolonged or repetitive activity and caused difficulty with routine activities such as sitting, bending, twisting, and traveling by car. Claimant was paying for massage therapy approximately once per week from his own pocket. Dr. Castrejon examined Claimant's entire spine. In the thoracic region, he found moderate muscle tenderness from T8 to T12, paraspinal muscle hypertonicity, and reduced thoracic ROM. Dr. Castrejon opined the work accident permanently aggravated the pre-existing multilevel degenerative changes in Claimant's spine. He agreed Claimant was at MMI and assigned a 33% whole person impairment.

26. Dr. Castrejon's rating differed from Dr. Primack's assessment in two major respects. First, he provided a 6% thoracic spine rating, whereas Dr. Primack did not rate the thoracic spine. Second, Dr. Castrejon included the additional 1% under Table 53 § II(F) for both the cervical and lumbar rhizotomies. Dr. Castrejon quoted the Impairment Rating Tips verbatim, and opined that Claimant qualified for the additional rating under

II(F) because three medial branch nerves were ablated in the cervical and lumbar spines (C4, C5, and C6, and L3, L4, and L5, respectively). Dr. Castrejon's Table 53 ratings for the lumbar and cervical spines were identical to those in Dr. Primack's first rating report:

Body Part	Table 53 rating
Cervical	II(C) 6% + II(F) 1% = 7%
Lumbar	II(C) 7% + II(F) 1% = 8%

27. Dr. Castrejon's opinions are credible and more persuasive than the contrary opinions offered by Dr. Primack.

28. Claimant's testimony is credible and persuasive.

29. Respondent failed to overcome the DIME's 33% whole person impairment rating by clear and convincing evidence.

CONCLUSIONS OF LAW

A DIME's whole person impairment rating is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). 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). 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).

Permanent impairment ratings must be "based on" the *AMA Guides to the Evaluation of Permanent Impairment* (3d ed. rev. 1991) ("AMA Guides"). Section 8-42-101(3.7); *Fisher v. Industrial Claim Appeals Office*, 484 P.3d 816 (Colo. App. 2021). Whether a rating physician correctly applied the *AMA Guides* is a question of fact for the ALJ. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). The Division's Impairment Rating Tips reflect "guidance" from the Division on various rating topics, and therefore may be relevant to determining the weight a rating should receive. However, the Rating Tips are not part of the *AMA Guides* and are not binding rules, *E.g., Davis v. Mohawk Industries, Inc.*, W.C. No. 4-674-003 (ICAO, July 21, 2011).

As found, Respondent failed to overcome the DIME rating by clear and convincing evidence. With respect to the ratings for Claimant's cervical and lumbar rhizotomies, Dr. Castrejon expressly quoted the Impairment Rating Tips and believes his ratings are consistent with the methodology set forth therein. Dr. Primack's opinion reflects a mere difference of opinion about the meaning of the Rating Tips and does not rise to the level of clear and convincing evidence. Dr. Primack interprets the term "levels" as used in the Tips as referring to intervertebral spaces or facet joints, *i.e.*, C4-5 or L3-4 are each one level. By contrast, Dr. Castrejon interprets the Tips as referring to the number of medial branch nerves that were ablated, rather than the number of facet joints addressed. In this view, a single facet joint, such as C4-5, involves two nerve "levels," because both the C4

and C5 medial branches must be ablated to target each half of the facet joint. Dr. Castrejon's interpretation is supported by Recommendation 110 at page 46 of the Cervical Spine Injury MTGs, which states that "RF neurotomy is not recommended for patients with . . . involvement of more than 3 *levels of medial branch nerves* per side." (emphasis added); s*ee also* Low Back Pain MTGs, p. 60, Recommendation 112 (identical language). Dr. Castrejon's interpretation is also a better fit with the examples used in the Tips, which include a rhizotomy performed at "6 cervical levels." If "levels" referred to facet joints in this context, as argued by Dr. Primack, a 6-level procedure would involve the entire cervical spine (C1-C7, or C2-T1). Such a rare procedure would seem an odd candidate for an example in a relatively brief guideline.

Dr. Castrejon's interpretation also finds support in case law, specifically *Corley v. Bridgestone Americas Inc.*, W.C. No. 4-993-719-004 (ICAO, February 26, 2020). In *Corley*, the DIME assigned an 8% rating under Table 53 II(C) + II(F) for rhizotomies involving L3, L4, and L5 medial branches, the same rating Dr. Castrejon assigned for Claimant's procedures at those same levels. This indicates that Dr. Primack's view is not universally shared by Level II physicians. Indeed, Dr. Primack initially gave the same Table 53 diagnoses as Dr. Castrejon, which further underscores the Rating Tips' lack of clarity. Dr. Primack cited no authority for his position other than his own interpretation of the Tips. Where, as here, reasonable physicians can disagree about a rating methodology under the *AMA Guides* or the Rating Tips, the DIME's determination must be upheld.

Nor did Respondent prove Dr. Castrejon erred by providing a thoracic spine rating. Dr. Castrejon applied Table 53 II(C) to Claimant's thoracic spine, which requires "[a] medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with moderate to severe degenerative changes on structural tests." Claimant satisfies all the criteria for a thoracic rating set forth in Table 53 II(C). He had a well-documented injury and experienced injury-related thoracic pain since the accident. Multiple providers noted positive exam findings in the thoracic region such as tenderness, hypertonicity, muscle spasm, and trigger points. The thoracic MRI showed moderate to severe degenerative changes, which Dr. Castrejon opined were aggravated by the accident. Claimant received treatment directed to the thoracic area, including physical therapy, massage therapy, and trigger point injections. Claimant reported ongoing thoracic pain at the DIME, which was substantiated by clinical examination findings. These factors amply support Dr. Catrejon's decision to include a thoracic rating.

ORDER

It is therefore ordered that:

1. Respondent's request to set aside the DIME's whole person impairment rating is denied and dismissed.

2. Respondent shall pay Claimant PPD benefits based on the DIME's 33% whole person rating. Respondent may take credit for any PPD benefits previously paid to Claimant in this claim.

3. As stipulated by the parties, Respondent shall cover medical treatment from authorized providers reasonably needed to relieve the effects of Claimant's compensable injury and prevent deterioration of his 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 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: January 16, 2025

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment on January 19, 2021.

2. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment on November 8, 2022.

3. Whether Respondents proved by a preponderance of the evidence that Claimant's claim for compensation for the January 19, 2021 injury was barred by the statute of limitations.

4. Whether Claimant proved by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits arising from his injury.

FINDINGS OF FACT

1. Claimant is a police detective who on January 19, 2021, was involved in a shooting arising out of his work. Claimant fired approximately twelve times with his short-barrel rifle while, roughly two or three feet to his left, another officer fired between fifteen and twenty shots from a pistol. Claimant was not wearing hearing protection.

2. On January 22, 2021, Claimant saw Donald Downs, PA-C, at Workwell, where he complained of sporadic bilateral ringing in the ears and some "cloudiness" in the left ear that he described as a tunnel sound that would last roughly thirty seconds before going away. Claimant denied any hearing loss, and an audiogram performed that same day did not demonstrate any hearing loss. PA Downs prescribed Claimant NSAIDs and released Claimant to regular duty. Dr. Lloyd Luke signed off on the report as well.

3. At Claimant's January 26, 2021 visit, Claimant reported to Dr. Luke that his tinnitus had resolved and he felt back to normal. A repeat audiogram was again within normal limits. Dr. Luke discharged Claimant as being at maximum medical improvement (MMI) with no impairment or need for work restrictions or maintenance medical care.

4. Several months later, on May 25, 2021, Claimant returned to Workwell where he was attended by PA Downs. Claimant reported that since he had been released at MMI he had been experiencing a significant muffling of voices such that he could not hear. Claimant reported that he had been on patrol several days earlier and was speaking with a convenience store clerk when her voice suddenly became

muffled. Claimant reported that this hearing loss was accompanied by ringing in his ears and was such that he could barely hear people or his partner. It lasted for three days but was no longer present on the date of the visit. PA Downs referred Claimant to an otolaryngologist for further evaluation.

5. Claimant returned to PA Downs on July 29, 2021. Claimant complained of pain of two out of ten in his ears. PA Downs noted that Claimant had seen otolaryngologist Dr. Thomas McKnight who found Claimant's hearing to be basically normal, with recommendations for distraction as a remedy for the tinnitus. PA Downs noted that because there is no real treatment for tinnitus, PA Downs only recommended Claimant wear hearing protection and return yearly for six years for audiograms. PA Downs reiterated that Claimant was at MMI with no impairment. Dr. Luke cosigned the report.

6. On July 21, 2022, Claimant returned to Dr. McKnight with continued complaints of bilateral tinnitus. Dr. McKnight noted that there were some inconsistencies in testing that showed hearing loss at around 3000 Hz, but due to the inconsistencies, Dr. McKnight felt that Claimant's hearing was normal. Dr. McKnight noted that the audiogram was overall reassuring, and he recommended that Claimant try masking strategies for his tinnitus.

7. The following day, July 22, 2022, Claimant underwent an otoscopy, which showed mild-to-moderate conductive hearing loss in Claimant's left ear. Dr. McKnight opined that the conductive hearing loss was "most likely related to middle ear retraction and Eustachian tube dysfunction rather than otosclerosis." Dr. McKnight discussed with Claimant the options of myringotomy and tympanostomy tube placement, but Claimant indicated that he wanted to think it over, as he was not having any "overt" symptoms at that time.

8. On November 9, 2022, Respondent-Employer filed an Employer's First Report of Injury, documenting a reported injury from November 8, 2022, in which Claimant reported an injury to his ear or ears due to proximity to gunshots while pursuing a suspect.

9. Claimant had a follow-up audiology visit on June 15, 2023. The testing showed mild mixed hearing loss in the low to mid frequencies in Claimant's right ear and mild conductive hearing loss in the low to mid frequencies in the left ear. The audiologist, Dr. Rachel White, noted that Claimant had reported a workplace acoustic trauma and felt that his tinnitus was getting worse, that he could not hear conversations, and that he would have to raise the volume on the television. She recommended an otologic consultation, recheck following medical intervention, and a trial with hearing aids if Claimant's hearing was stable.

10. On August 28, 2023, Dr. Jocelyn Tubbs authored a letter stating "[Claimant] was seen at Alpine ENT/All About Hearing on June 15, 2020 (sic) for an audiologic

assessment. He was last seen in 2022, and his hearing has not improved. It is recommended that he be fit with a pair of premium hearing aids[.]"

11. On March 13, 2024, Claimant filed a Worker's Claim for Compensation claiming a hearing injury from exposure to multiple gunshots without hearing protection, with a date of injury of November 8, 2022. Claimant indicated on the Worker's Claim for Compensation that he had last been employed with Respondent-Employer on December 15, 2023. Claimant also indicated on the Worker's Claim for Compensation that he notified Respondent-Employer on November 8, 2022. This Workers' Claim for Compensation was later assigned W.C. No. 5-266-977.

12. Respondents, on March 18, 2024, filed a Notice of Contest (NOC) denying Claimant's claim W.C. No. 5-266-977.

13. On May 22, 2024, Claimant filed another Worker's Claim for Compensation claiming an injury from exposure to noise from firearms on January 19, 2021. This claim was later assigned W.C. No. 5-273-277.

14. Respondents filed a Notice of Contest on June 5, 2024, denying Claimant's claim W.C. No. 5-273-277.

15. At the December 3, 2024 hearing, Claimant testified that on November 19, 2021, he was exposed to over fifty gunshots without hearing protection. He further stated that he reported both the exposure and his perceived hearing loss to his employer that same day.

16. Following the November 19, 2021 incident, Claimant testified that he did not experience any wage loss, was not placed on work restrictions, and was not recommended hearing aids at that time.

17. Claimant also testified regarding a second incident that occurred on November 7, 2022, during the apprehension of another suspect, when he was again exposed to nearby gunfire without hearing protection. According to Claimant, he did not immediately seek medical treatment for hearing loss in his left ear after this incident, as he was aware that he had an upcoming hearing test. However, Claimant testified that he did report this second exposure to his employer the following day.

18. Claimant stated that during a medical visit after the November 2022 incident, he was informed that his hearing had dropped below the threshold for normal hearing and that he had sustained hearing loss in both ears requiring hearing aids. He further testified that he was prescribed anti-inflammatory medication at that time.

19. At the time of the hearing, Claimant testified that he was using hearing aids and, when not wearing them, he had to rely more heavily on lip reading to understand

conversations. He explained that he did not fully appreciate the seriousness of his condition until his treaters advised him that he required hearing aids.

20. Claimant also testified that he had experienced ringing in his ears since childhood, though it had never been formally diagnosed and had not been as severe as it had become following his recent exposures.

21. The Court finds Claimant's testimony credible.

22. The Court finds that June 15, 2023, the first date that hearing loss was confirmed by audiogram, was the earliest date on which Claimant knew or should have known of the probable compensable character of his hearing loss arising from the January 19, 2021 exposure. Claimant had not sustained any wage loss up to that date resulting from his hearing loss or tinnitus. However, as of the June 15, 2023 audiogram, Claimant knew or should have known that he may be entitled to permanent disability benefits arising from a hearing impairment.

23. The Court finds that although Claimant had a prior history of tinnitus since childhood, Claimant's onset of hearing loss following the January 19, 2021 exposure was novel. Given the absence of prior documented hearing loss, the plausible causal relationship between the gunfire exposure without hearing protection and Claimant's hearing loss, and the temporal connection between the exposure and Claimant's subsequent complaints of hearing loss, the Court finds that Claimant has proved by a preponderance of the evidence that his hearing loss arose out of and in the course of his employment when he experienced the January 19, 2021 workplace exposure to gunfire.

24. The Court finds that Claimant has not proved by a preponderance of the evidence that his hearing loss was aggravated by the November 8, 2022 exposure so as to cause a need for additional medical treatment nor any additional disability beyond that which he would have had but for the November 8, 2022 exposure. The evidence does not document an incremental aggravation of Claimant's symptoms following the November 8, 2022 exposure, nor or is there any medical opinion of record documenting any aggravation of Claimant's condition so as to cause a need for additional medical treatment nor any additional disability beyond that which he would have had but for the November 8, 2022 exposure. Therefore, the Court finds that Claimant has not proved by a preponderance of the evidence that he sustained a compensable injury on November 8, 2022.

25. Claimant has proved by a preponderance of the evidence that the treatment summarized herein was reasonably necessary to cure and relieve Claimant of the effects of his January 19, 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).

Statute of Limitations

Respondents argue that Claimant's claim for benefits under W.C. No. 5-273-277 is barred by the statute of limitations.

Section 8-43-103(2), C.R.S., requires that a notice claiming compensation be filed within two years after the "injury." The limitation period commences when the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. *City of Boulder v. Payne*, 426 P.2d 194 (1967); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo.App.1997).

An injury is not compensable where a claimant continues to work and to receive regular wages. *Romero v. Indus. Comm'n*, 632 P.2d 1052 (Colo.App.1981). Further, an occupational disease is compensable only if it results in disablement. Thus, the time of injury for a disability arising from an occupational disease is when the disability manifests itself. *Subsequent Injury Fund v. Indus. Claim Appeals Office*, 899 P.2d 220 (Colo.App.1994). Therefore, when an occupational disease is at issue, the limitation period in § 8-43-103(2), C.R.S., begins to run as of the date the claimant becomes disabled.

In *City of Colorado Springs v. Industrial Claim Appeals Office of the State of Colorado*, 89 P.3d 504 (Colo.App.2004), a claimant sustained smoke-inhalation injuries such that in the early 1990s, he began experiencing shortness of breath and chest tightness, which progressed to coughing and congestion by 1992. The claimant consulted several doctors through the 1990s. It was not until 1999 that the claimant notified his employer that he suspected that he suffered a work-related injury. The claimant later retired in February 2000 because he believed he could no longer work. The ALJ ultimately found that although the claimant believed the condition was probably work-related as of 1992, the claimant did not miss any work until 2000, when the disease became disabling and resulted in the claimant's retirement. Therefore, the ALJ concluded that the claim was not barred by the statute of limitations.

On appeal, the Court of Appeals upheld the ALJ's determination that the claimant's claim was not barred by the statute of limitations. *Id* at 507. The court reasoned, "for a claimant to recognize the probable compensable nature of an injury, the injury must be of sufficient magnitude to cause a disability that would lead a reasonable person to recognize that he or she may be entitled to disability benefits." *Id* at 506. The Court of Appeals clarified that "until [the effects of the disease forced him to retire in 2000], claimant continued performing his regular duties and could not have maintained an action for workers' compensation disability benefits." *Id* at 507.

Similarly, in *Taylor v. Summit County*, W.C. No. 4-897-476-01 (March 18, 2014), the Industrial Claim Appeals Office addressed the issue as to whether an onset of disability which does not result in an onset of entitlement to disability benefits is sufficient to put a claimant on notice of the probable compensable character of his or her condition.

The claimant in *Taylor* sustained an injury on January 18, 2010, in a slip-and-fall accident, and reported the accident to her employer several days later. For nearly the next year, the claimant obtained medical treatment but was not provided any work restrictions. However, on January 11, 2011, the claimant was assigned work restrictions for her injury. At hearing, the ALJ determined that that first date of temporary work restrictions was the date on which the claimant first should have known of the probable compensable character of her injury.

On appeal, the respondents in *Taylor* argued, in part, that the definition of "disability" for purposes of the statute of limitations is such that it includes a condition that impairs a claimant's ability to do his or her normal job without regard to entitlement to compensation benefits. The ICAO panel noted, however, that although there are circumstances in which a claimant is "disabled" but not necessarily entitled to disability benefits, the "onset of disability" rule does not govern the statute of limitations for filing a workers' compensation claim. Rather, the panel explained that "the statute of limitations does not begin to run until the claimant, as a reasonable person, knows or should have known the 'nature, seriousness and probable compensable character of his injury,' with 'compensable' meaning entitlement to the payment of compensation benefits."

The Court finds the facts in this case analogous to those in Taylor. Here, Claimant continued to perform his regular duties as a police detective without any restrictions following the January 19, 2021, gunfire exposure. While he did experience some difficulty hearing while performing his duties, initial testing did not reveal any hearing loss. It was not until June 15, 2023, that hearing tests documented any actual hearing loss, and it was not until around August 28, 2023, that Claimant was recommended hearing aids. Furthermore, Claimant did not experience any wage loss until December 15, 2023. Moreover, Claimant testified that he did not fully appreciate the seriousness of his condition until his treaters advised him of the necessity of hearing aids.

The Court concludes that June 15, 2023, the first date that hearing loss was confirmed by audiogram, was the earliest date on which Claimant knew or should have known of the probable compensable character of his hearing loss arising from the January 19, 2021 exposure, as that would be the first date Claimant would have been on notice that he may be entitled to permanent disability benefits for his hearing impairment. Claimant's claim for compensation for that injury was filed on May 22, 2024, well within a year of when Claimant knew or should have known of the probable compensable character of his injury. Therefore, the Court concludes that Claimant's injury arising from his January 19, 2021 gunfire exposure was not barred by the statute of limitations at the time Claimant filed his claim.

Compensability W.C. No. 5-273-277

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41 301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844

(Colo.App.2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

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

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

Here, as found, Claimant did have a prior history of tinnitus since childhood. However, Claimant's onset of hearing loss following the January 19, 2021 exposure was novel. As found, given the absence of prior documented hearing loss, the plausible causal relationship between the gunfire exposure without hearing protection and Claimant's hearing loss, and the temporal connection between the exposure and Claimant's subsequent complaints of hearing loss, the Court finds and concludes that Claimant proved by a preponderance of the evidence that his hearing loss arose out of and in the course of his employment when he experienced the January 19, 2021 workplace exposure to gunfire.

Compensability W.C. No. 5-266-977

As found, the Court concludes that Claimant has not proved by a preponderance of the evidence that his hearing loss was aggravated by the November 8, 2022 exposure so as to cause a need for additional medical treatment nor any additional disability beyond that which he would have had but for the November 8, 2022 exposure.

Medical Benefits

Employer is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App.1990). A claimant must establish the causal connection between the compensable event and the need for medical care with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951).

A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Authorization refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo.App.1997). Section 8-43-404(5), C.R.S. (2011), gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005).

The Court concludes as found above that the treatment summarized herein was reasonably necessary to cure and relieve Claimant of the effects of his January 19, 2021 injury.

ORDER

It is therefore ordered that:

1. Claimant proved by a preponderance of the evidence that he sustained a compensable work injury arising out of and in the course of his employment on January 19, 2021.
2. Respondents failed to prove by a preponderance of the evidence that Claimant's claim for compensation for his January 19, 2021 injury was barred by the statute of limitations.
3. Claimant failed to prove by a preponderance of the evidence that he sustained a compensable work injury on November 8, 2022 arising out of and in the course of his employment.
4. Claimant proved by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits arising out of his January 19, 2021 injury.
5. All matters not determined herein are reserved for future determination.

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

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 16, 2025.

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

ISSUES

1. Whether Claimant established by clear and convincing evidence that the Division Independent Medical Examination (DIME) physician's opinion regarding maximum medical improvement (MMI) and impairment rating are incorrect.

2. If Claimant establishes that the DIME physician's opinions regarding impairment and MMI are incorrect, determination of Claimant's impairment rating and date of MMI.

3. Whether Claimant established by a preponderance of the evidence an entitlement to medical maintenance care.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of the course of her employment as a school resource officer on April 26, 2021, when she was struck in the head by a basketball that a student had kicked from a short distance away.

2. After the incident, Claimant saw providers at Workwell for her work-related injuries, under the direction of her authorized treating physician (ATP) Robert Dupper, M.D., Initially, Claimant reported symptoms including headaches, face pain, neck pain, and ringing in her ear. Approximately six weeks after the injury, Claimant began reporting tingling in her left upper extremity.

3. A cervical MRI performed on June 26, 2021 showed a mild disc bulge at the C4-5 level, and irregular disc bulges at the C5-6 and C6-7 level. The MRI also demonstrated multilevel degenerative changes with associated canal and foraminal narrowing at each level, most significant at the C6-7 level where a left paracentral disc protrusion resulted in mild flattening of the left lateral spinal cord. (Ex. 6).

4. Over the following two years, Claimant reported symptoms including daily headaches, left arm symptoms, memory issues, vision issues, emotional issues, cognitive complaints, tinnitus, dizziness, and neck pain. Claimant's initial diagnosis was head contusion, neck strain, dizziness, headache, and tinnitus in the left ear. Later, Dr. Dupper added additional diagnoses including cervical disc disorder (after a cervical MRI); adjustment disorder; concussion, and migraine headaches. Claimant was referred to multiple specialists including, but not limited to, orthopedic surgeon Robert Benz, M.D., neurologist Kenneth Morris, M.D., physiatrist Eric Shoemaker, D.O., optometrist Regina Chonka, O.D., and licensed professional counselor Maurene Flory, LPC. Claimant also received speech therapy, vestibular therapy, vison therapy, massage, and physical therapy. (See Ex. 5).

5. Claimant saw Dr. Benz in August 2021 for an evaluation of her cervical spine. (Ex. 5). Dr. Benz referred Claimant to Dr. Shoemaker who performed an epidural steroid injections which did not provide significant relief. (Ex. 7, 8). On December 13, 2021, Dr. Benz recommended an anterior cervical discectomy and fusion (ACDF) surgery to address her radicular complaints, but noted there was no guarantee it would alleviate all of Claimant's pain. (Ex. 7).

6. Claimant had a prior cervical injury which required surgery at the C5-6 level in 2004. She had ongoing treatment for that condition through at least August 2008. An August 9, 2008 cervical MRI showed broad-based protrusions at C5-6 and C6-7 with mild left-sided foraminal narrowing at C6-7. (Ex. 2). No credible evidence was admitted demonstrating that Claimant received treatment for her cervical spine between 2008 and her work injury in April 2021.

June 28, 2022 Hearing

7. Respondents' disputed that the requested surgery was causally-related to Claimant's work injury, and the issue proceeded to a hearing with the undersigned ALJ on June 28, 2022. Claimant's expert, Sander Orent, M.D., opined that Claimant sustained a cervical disc herniation as a result of the work injury, and that Claimant should undergo the surgery proposed by Dr. Benz. Dr. Orent's opinions were presented through a report dated February 10, 2022. (Ex. 2).

8. Respondents presented testimony and opinions from two experts, Brian Mathwich, M.D., and Brian Reiss, M.D., both of whom opined that Claimant's cervical complaints were unrelated to her work injury, and attributable to Claimant's pre-existing condition.

9. Dr. Reiss' testified at hearing, and authored a report dated May 10, 2022. In his report, Dr. Reiss opined that Claimant's neck pain was probably myofascial, and that her subjective complaints were out of proportion to objective findings. He indicated that Claimant's sensory abnormalities may represent C6-C7 cervical irritation, but attributed it to pre-existing degenerative conditions. He opined that they were not temporally related to Claimant's work injury. He further opined that Claimant's neck pain and headaches at that time were possibly a continuation of the work incident because there was no documentation of existing symptoms before her injury. (Ex. F). He also opined that Claimant's symptoms are likely myofascial in origin, and not related to the cervical spine pathology identified on her MRI. (Ex. 2)

10. Dr. Mathwich performed an IME on December 30, 2021, and issued a report of the same date. (Ex. E). Like Dr. Reiss, Dr. Mathwich opined that Claimant's radicular symptoms were not related to her work injury, and her existing pathology was not exacerbated. Dr. Mathwich indicated that Claimant did not report radicular symptoms until August 25, 2021 (which was inconsistent with Claimant's contemporaneous medical records). He opined that her radicular symptoms were an "expected progression of her underlying cervical pathology which would progress whether she was injured or not." The ALJ did not find the opinions of Drs. Mathwich, Reiss, or Orent persuasive. (Ex. 2).

11. Although the experts' opinions were not persuasive, the ALJ found the evidence established that Claimant was under no treatment for her cervical spine condition, and had no documented complaints for more than 12 years before the April 2021 injury. The ALJ concluded it was more likely than not that Claimant's symptoms were related to her work injury, than the that she spontaneously developed radicular symptoms independent of the work injury only six weeks after the injury. (Ex. 2).

12. On September 6, 2022, the ALJ issued a Final Order granting Claimant's request for authorization of the recommended ACDF surgery. The ALJ found that the Claimant had established by a preponderance of the evidence that Claimant's work injury combined with pre-existing pathology to cause left arm symptoms, and that the need for the ACDF surgery was reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. (Ex. 2).

Post-Hearing Medical Treatment

13. Dr. Benz performed the ACDF surgery on October 27, 2022 at the C5-6 and C6-7 levels. Following surgery, Claimant reported that her headaches dramatically improved, but she continued to have radiating pain in her left arm, neck pain, and positional dizziness. Claimant last saw Dr. Benz on January 20, 2023. (Ex. 7).

14. Claimant continued to treat with Dr. Dupper through 2022 and into 2023. Claimant reported improvement in her neck pain following the surgery, but continued to report pain and numbness in her left shoulder and arm, headaches, vision issues, and cognitive issues. On January 23, 2023, Dr. Dupper noted that Claimant's anxiety and depression were absent, her cervical range of motion was moderately limited, and that she continued to have cervical pain. Over the following months, Claimant's anxiety and depression appeared to wax and wane, per Dr. Dupper's records. (Ex. 5).

15. On April 27, 2023, Dr. Dupper responded to a letter from Insurer, and indicated that Claimant was not at MMI. He noted that she continued to have frequent headaches that had plateaued, and which were relieved with medications. He also reported that Claimant continued to have left-sided neck, shoulder, and arm pain, which had also plateaued. He indicated that Claimant was making progress with respect to her depression and anxiety, and would reach "mental health" MMI after six additional counseling sessions with Ms. Flory. He noted that Claimant had an appointment scheduled at Neuro Sight Vision Care to address her visual issues. (Ex. 5).

16. On May 4, 2023, Claimant saw Regina Chonka, O.D., for her vison issues including blurred vision, light sensitivity, imbalance, convergence and alignment issues, in the setting of a closed head injury. At the time, Claimant had completed nine months of visual therapy without resolution of her symptoms. Dr. Chonka recommended tinted prism glasses for her visual symptoms. (Ex. P).

17. On May 12, 2023, Chester Roe, M.D., an ophthalmologist, performed a peer review for Insurer, and opined that Claimant's treatment for vision symptoms, including

the glasses recommended by Dr. Chonka were medically appropriate and causally related to her mild traumatic brain injury. (Ex. 11).

18. In June 2023, Dr. Dupper ordered brain and sinus CTs to evaluate Claimant's headaches both of which were performed on June 26, 2023. The imaging showed a normal brain, but right frontal and right ethmoid sinus mucosal disease. (Ex. J).

19. On September 6, 2023, Dr. Dupper placed Claimant at MMI, performed an impairment rating, and released Claimant from care without permanent work restrictions. At the time, Claimant reported continuing headaches, mild dizziness, pain and numbness in her left arm, and minor word-finding difficulties. Dr. Dupper assigned Claimant a 17% cervical range of motion impairment, and a 10% impairment under Table 53 of the AMA Guides. The impairment rating combined for a 25% whole person impairment. He did not assign impairment ratings for any other body part. (Ex. H). As discussed in more detail below, Dr. Dupper recommended maintenance care beyond MMI.

20. In the interim, Dr. Mathwich performed a second IME on August 22, 2023. Based on his examination and review of record, he concluded that Claimant had sustained a mild concussion as a result of the work injury, but that the concussion had resolved. He noted that Claimant had complained of waxing and waning symptoms, which was not consistent with concussion recovery, and concluded that Claimant had no impairment as a result of the concussion. He also recommended no maintenance care for Claimant's concussion symptoms. (Ex. E).

21. Dr. Mathwich also repeated the conclusions stated in his December 30, 2021 report, that Claimant's cervical issues, including radiculopathy and impingement of the C5-6 and C6- neve roots were not permanently aggravated by her work injury. The basis for this conclusion was that Claimant's reported radicular symptoms did not appear until four months after the August 25, 2021 injury. (The ALJ notes that Claimant first reported radicular symptoms approximately six weeks after the injury, not four months). He therefore concluded that although Claimant had some impairment of her cervical spine, it was not related to the work injury. (Ex. E).

22. Dr. Mathwich testified at the present hearing that he believes Claimant sustained a muscular injury to her neck. He indicated that muscular injuries which result in muscle spasms can cause radicular-like symptoms that manifest as occasional, intermittent numbness. However, constant numbness would be more likely related to a cervical disc injury, which he would expect to appear within two weeks of the injury. He further opined that one would also not expect radicular symptoms to worsen without an additional injury.

23. On October 10, 2023, Respondents filed a Final Admission of Liability (FAL) admitting for a 25% whole person impairment, and admitting for reasonable, necessary, and related maintenance care after MMI. (Ex. 3).

24. Thereafter, Claimant proceeded to a DIME which was conducted by Jade Dillon, M.D. The only conditions Dr. Dillon attributed to Claimant's work injury were a cervical strain, and closed head injury with mild traumatic brain injury, which she opined had

resolved. Dr. Dillon placed Claimant at MMI effective May 22, 2022, based on Dr. Reiss causation opinion, which she characterized as containing "clear and convincing arguments" that her cervical condition was not related to her work injury. She opined that Claimants' migraine headaches, cervical degenerative disc disease, left-upper extremity symptoms, and dizziness were unrelated to her work injury. She opined that Claimant had no permanent impairment from her work injury, and recommended no maintenance care for any condition. (Ex. 15).

25. On July 1, 2024, Respondents filed a second FAL, consistent with Dr. Dillon's opinions, and denying liability for post-MMI medical benefits. (Ex. C).

26. Claimant continued to see Dr. Dupper through at least October 17, 2024. On June 20, 2024, June 26, 2024, and July 18, 2025 he indicated that Claimant was at MMI. He recommended an EMG study to investigate symptoms in Claimant's left hand and fingers, which he indicated was not related to Claimant's original injury. (Ex. 5 & H). In his October 17, 2024 report, Dr. Dupper noted that Claimant's condition had not changed, but now opined that Claimant had not reached MMI. The record contains no persuasive basis for his finding that Claimant was no longer at MMI. (Ex. 5).

Maintenance Medical Care

27. When Dr. Dupper placed Claimant at MMI on September 6, 2023, he made specific recommendations for maintenance care, based on his diagnoses of concussion, neck strain, dizziness and giddiness, chronic post-traumatic headaches, and tinnitus in the left ear. His maintenance recommendations included six additional months of counseling with Ms. Flory; monthly injections for migraines; follow-up appointments with Dr. Morris for migraines and Sarvjit Gill, M.D.,[1] for tinnitus and dizziness in November 2023; continued follow up for vision check-ups for at least one year; and ongoing prescriptions for tizanidine (a muscle relaxant), pregabalin (for nerve pain), and sertraline (Zoloft – an antidepressant). (Ex. H). Throughout her treatment, Dr. Dupper has opined that Claimant's cervical condition, headaches, vision issues, depression and anxiety, and tinnitus are causally-related to her work injury. (*See* Ex. 5).

28. Later, on June 20, 2024, Dr. Dupper recommended Claimant undergo an EMG for symptoms in her left arm, including pain and tingling in the wrist and hand, as maintenance care. (Ex. 5). In his July 18, 2024 note, he indicated Claimant had undergone an EMG/NCS study with Dr. Feldman, which showed an ulnar nerve lesion at the cubital tunnel. Dr. Dupper indicated that it was not likely related to the Claimant's work injury. (Ex. H). No credible evidence was offered demonstrating that further EMG/NCS studies have been recommended as maintenance care or that the EMG/NCS study performed are causally-related to Claimant's work injury.

29. In his report of August 22, 2023, Dr. Mathwich addressed maintenance care. With respect to Claimant's cervical symptoms, he again opined that her cervical issues were pre-existing and not work-related and thus, maintenance care was not warranted.

[1] Dr. Gill is an ENT physician who evaluated Claimant for tinnitus and dizziness on August 21, 2023. (Ex. 14).

However, he did agree that Claimant's prescriptions for tizanidine and pregabalin were appropriate, and should be refilled for up to 12 months post-MMI. (Ex. E). At hearing, Dr. Mathwich testified that his recommendation on these medications was based on his belief that Respondents had accepted liability for Claimant's cervical condition. He testified that he now believes the need for these medications is unrelated to Claimant's work injury.

30. Dr. Mathwich opined that Claimant had sustained a mild concussion as a result of the work injury, but that the concussion had resolved. He noted that Claimant had complained of waxing and waning symptoms, which was not consistent with concussion recovery. He opined that no maintenance care for Claimant's concussion symptoms was warranted. (Ex. E).

31. In October 2021, Dr. Dupper diagnosed Claimant with migraines, and prescribed sumatriptan, which was moderately effective. (Ex. 5). Claimant continued to complain of headaches after her ACDF surgery, although they were reportedly improved. (Ex. 9). Claimant began seeing Kenneth Morris, M.D., at UC Health in May 2022 for headaches, on referral from Dr. Dupper. (Ex. 5 & 9). After managing Claimant's headaches with sumatriptan, in July 2023, Dr. Morris prescribed Claimant an Emgality pen, to be injected as needed for migraine prevention. Over the following months, Dr. Morris noted that Claimant's migraines were under good control with Emgality. (Ex. 9).

32. In addressing Claimant's treatment for migraines, Dr. Mathwich noted that the migraine headaches did not begin until approximately one year after the April 2021 injury and were not related to the injury. (In fact, Claimant's medical records reflect that she was first diagnosed Claimant with migraine headaches on October 21, 2021 (less than six months post-injury)). (Ex. 5). Thus, he concluded any maintenance care for migraines would not be work-related. (Ex. E).

33. Claimant testified at hearing that she continues to see Dr. Morris monthly for migraine headaches, takes her prescribed medications, and she continues to see Ms. Flory for anxiety and depression. She testified that these treatments help with her symptoms and function. Claimant testified that she had no ongoing or consistent medical treatment for her prior cervical injury between 2008 and the April 2021 work injury, and that she was working full duty without restrictions or functional issues at the time of the injury. Claimant's testimony was credible.

CONCLUSIONS OF LAW

Generally

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

facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

The finding of a DIME physician concerning a claimant's medical impairment rating and MMI must 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).

Claimant has failed to establish by clear and convincing evidence that Dr. Dillon's opinions on MMI and impairment rating are incorrect. Dr. Dillon concluded that Claimant reached MMI on May 22, 2022 with no permanent impairment related to the April 26, 2021 workplace injury. Although the ALJ does not find Dr. Reiss' causation opinions persuasive, the DIME physician did find them compelling, and relied on his opinions when determining MMI. Claimant has presented no credible evidence indicating that Dr. Dillon failed to adhere to the AMA Guides with respect to Claimant's impairment rating or MMI determination, or presented any credible evidence indicating her opinion is highly probably incorrect. Although Dr. Dupper's opinion that Claimant reached MMI on

September 6, 2023 is credible, his opinion on MMI and impairment does not constitute evidence that is free from serious or substantial doubt that Dr. Dillon's opinion is highly probably incorrect. Instead, it is merely a difference of opinion between physicians.

Issue Preclusion

Notwithstanding, Claimant contends the ALJ's September 6, 2022 Order finding Claimant's neck condition causally-related to her industrial injury precludes re-litigation of the issue of relatedness of Claimant's condition. Thus, Claimant contends, the DIME physician's opinions cannot overcome the September 6, 2022 Order in which the ALJ authorized the ACDF surgery, finding it causally-related to her work injury. Claimant contends that "by virtue of the cervical spine being compensable, [she] is entitled to an impairment rating."

Because the ALJ's initial causation determination and the issue of whether the DIME physician erred are subject to different burdens of proof, the ALJ's September 6, 2022 order does not function as issue preclusion, nor does it bind the DIME with respect to causation for the purposes of MMI and impairment ratings.

"Issue preclusion bars re-litigation of an issue if: (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceedings; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding." Mahana v. Grand County, W.C. No. 4-430-7 (ICAO Feb. 15, 2007), *citing Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001). "The party seeking to preclude an issue from re-litigation bears the burden of establishing the elements of the doctrine." *Morris v. Indus. Claim Appeals Office*, 479 P.3d 49 (Colo. App. 2020).

The issues of impairment and MMI were not addressed at the June 28, 2022 hearing, and were not addressed in the corresponding order. Rather the issue was one of causation in the context of authorizing medical treatment. The burden of proof for determination of whether a condition is causally-related to a work injury for the purposes of medical treatment is preponderance of the evidence. *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).

In contrast, the present matter involves MMI and impairment rating, which is subject to a different burden of proof. A "DIME physician's opinion on the cause of a claimant's disability is an inherent part of the diagnostic assessment which comprises the process for determining MMI and impairment rating." *Jackson v. Select Comfort Corp.*, W.C. No. 4-914-418-03 (ICAO Nov. 17, 2016); *see also Egan v. Indus. Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). As such, DIME's opinion on causation in this context must be overcome by clear and convincing evidence. *Leprino Foods v. Indus. Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005) *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office,*

961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015). Accordingly, the issues addressed by the ALJ in the September 6, 2022 Order, and the present issues are not identical. As the Court of Appeals held in *Peitz v. Indus. Claim Appeals Office*, 2024COA 102 (Colo. App. 2024), the ALJ's "initial resolution of causation in the treatment context should not be given preclusive effect and thereby usurp the process for determining MMI."

The case cited by Claimant – *Lockhart v. Tetra Technologies*, W.C. No. 4-725-760 (ICAO May 21, 2009) – does not directly support the position that an ALJ's relatedness decision precludes a contrary finding by a DIME physician. In *Lockhart*, an ALJ initially found after a hearing that a claimant sustained a temporary aggravation of a pre-existing condition and limited the treatment to a set time. Later, a DIME physician determined the claimant was not at MMI and needed further treatment. In a second hearing to overcome the DIME, the ALJ found the DIME's opinion was overcome by clear and convincing evidence, relying on the treating physician's opinions regarding relatedness. The ALJ found that the "DIME report also created a conflict with the [order] regarding causal relatedness and, as found hereinabove, it was clearly erroneous." An ICAO panel found the ALJ did not err in applying issue preclusion because the issue of entitlement to ongoing medical benefits was present in both cases.

The cases that have discussed *Lockhart* in the context of issue preclusion have distinguished the case, noting that the ALJ ruled that the DIME's MMI opinion had been overcome by clear and convincing evidence, and did not reject the DIME determination based on issue preclusion. *See Jackson v. Select Comfort Corp.*, WC. No. 4-914-418-03 (ICAO Nov. 17, 2016); *Ortega v. JBS USA, LLC*, W.C. No. 4-804-825 (ICAO Jun. 27, 2013); *Robbins v. Qwest Corp.*, W.C. No. 588-918-010 (ICAO Dec. 19, 2022) (noting that *Lockhart* relied on an unpublished opinion *Grand County v. Indus. Claim Appeals Office*, 07CA0424 (Apr. 24, 2008)(NSOP), that conflicted with *Sunny Villa Acres, supra* and had no precedential value). Even if the ALJ did apply issue preclusion, the application of the doctrine in that case does not render it binding in the present matter, and appears inconsistent with the Court of Appeals holding in *Peitz, supra*.

Claimant has not presented clear and convincing evidence that the DIME physician's opinions regarding impairment and MMI are highly probably incorrect.. Instead, Claimant's argument rests on the assertion of issue preclusion. Because the September 6, 2022 Order does not function as issue preclusion, and Claimant has failed to otherwise meet her burden of proof, the DIME's determinations regarding MMI and impairment have not been overcome.

Because Claimant has not overcome the DIME, determination of Claimant's impairment rating and date of MMI is moot.

Medical Maintenance Care

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. Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). 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 District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* 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. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover,* 759 P.2d at 710-13; *Stollmeyer v. Indus. Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). 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*, WC No. 3-979-487, (ICAO Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna*, 77 P.3d at 866; *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Ctr.,* 919 P.2d at 704.

Although Dr. Dillon did not find any of Claimant's ongoing symptoms causally-related to her work injury, a DIME physician's causation opinion has no presumptive weight on issues other than MMI and impairment, such as a claim for maintenance medical benefits. *Yuetter v. CBW Automation, Inc.*, W.C. No. 4-895-940-03 (ICAO Feb. 26, 2018); *see also Wilkinson v. Walmart Stores*, WW.C. 4-674-582 (ICAO Oct. 26 2007); *Moore v. American Furniture Warehouse*, W.C. No. 4-665-024 (ICAO Jun. 27, 2007). As such, the DIME's causation opinions are not binding with respect to maintenance medical benefits, and are afforded no special weight.

Claimant has established by a preponderance of the evidence a need for ongoing maintenance care related to her work injury, in part. The evidence is undisputed that Claimant sustained a mild traumatic brain injury as a result of her work injury. As sequelae of this, Claimant has experienced headaches since her injury. Claimant's testimony and medical records, including those from Dr. Morris, indicate that Claimant has benefited and continues to benefit from medications and injections for migraines. No credible evidence was admitted indicating that the sinus condition identified on Claimant's brain and sinus CT scans in June 2023 is causally-related to Claimant's work injury, thus any treatment related to that condition is not compensable as maintenance care. The ALJ does not find persuasive the opinions of Dr. Mathwich or Dr. Dillon that Claimant's ongoing headache symptoms are unrelated to her work injury, or are exclusively related to her pre-existing

cervical degenerative disease. As such, Claimant is entitled to reasonable and necessary maintenance care for her work-related headaches.

Similarly, Claimant has established that prescriptions for tizandine and pregabalin are reasonable and necessary maintenance care for her cervical spine injury. Claimant has been consistently prescribed these medications over the course of her care. Dr. Dupper recommended ongoing prescriptions as maintenance care, and Dr. Mathwich agreed they were reasonable treatment. Although Dr. Mathwich opined that the need for these medications was not related to Claimant's work injury, the ALJ does not find his causation opinion persuasive. The ALJ finds persuasive Claimant's testimony that taking these medications help with her symptoms and function.

Claimant has failed to establish that ongoing care for symptoms in her left hand, fingers and thumb is causally related to her work injury. The EMG/NCV study Claimant underwent to evaluate these symptoms demonstrated that they were related to the cubital tunnel, and Dr. Dupper opined that they are not related to her work injury. Accordingly, treatment for Claimant's left-hand symptoms is not reasonable or necessary to relieve the Claimant from the effects of her work injury, and not compensable as maintenance care.

Claimant has failed to establish that ongoing mental health counseling is reasonable and necessary to relieve the effects of her work injury or prevent deterioration of her work-related condition. The most recent record from Claimant's mental health counseling with Ms. Flory admitted into evidence was from March 3, 2022, and the record contains no significant information regarding such treatment after that date. At least twice, in 2023 (April 27, 2023 and September 6, 2023), Dr. Dupper opined that a limited amount of counseling sessions were appropriate. (*i.e*., on April 27, 2023 that six sessions were appropriate; and September 6, 2023 that six months of counseling was appropriate). Although Claimant testified that she continues to see Ms. Flory, no credible evidence was offered to establish that continued counseling or medication after March 2023 (six months from Dr. Dupper's recommendation) are reasonable or necessary to relieve Claimant of the effects of her work injury, or prevent deterioration of her condition.

With respect to her vision, Claimant has not established that ongoing treatment for visual symptoms is reasonable or necessary to relieve the effects of her work injury or prevent deterioration, with the exception of the glasses prescribed by Dr. Chonka. The ALJ finds persuasive the opinions of Dr. Roe with respect to the relatedness of Claimant's glasses are reasonable, necessary, and related to her work injury. Thus, to the extent Claimant requires further visits with a vision specialist to address her prescribed glasses, such treatment is compensable as maintenance care.

Except as specifically addressed herein, Claimant has failed to establish that other additional maintenance care is reasonably necessary to relieve the effects of the injury or to prevent further deterioration of her condition.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by clear and convincing evidence that the DIME physician's determination with respect to MMI and impairment ratings are incorrect.

2. Respondents shall pay for authorized care that is reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition, including prescriptions for tizandine and pregabalin; treatment for work-related headaches; and vision treatment to the extent necessary to maintain Claimant's prescription for prism glasses.

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

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

DATED: January 16, 2025

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-227-611

ISSUES

1. Whether Respondents' Opposed Motion for Sanctions for Noncompliance with Discovery Orders requesting dismissal of Claimant's claim should be granted.

FINDINGS OF FACT

1. This matter involves an admitted claim, date of injury January 5, 2023.

2. On May 14, 2024, Claimant attended a Division Independent Medical Examination ("DIME") with Michael Maher, D.O. Dr. Maher opined that Claimant reached maximum medical improvement ("MMI") on September 5, 2023 with a combined 31% whole person permanent impairment rating.

1. On July 11, 2024, Respondents' filed an Application for Hearing endorsing the issues of overcoming the DIME on MMI and permanent impairment.

2. On July 29, 2024, Claimant filed a Response to Respondents' Application for Hearing endorsing additional issues of compensability, medical benefits, authorized provider, reasonably necessary, average weekly wage ("AWW"), disfigurement, Temporary Total Disability ("TTD") benefits January 5, 2023 through ongoing, Temporary Partial Disability ("TPD") benefits January 5, 2023 through ongoing, change of physician, MMI, maintenance care, and overcoming the DIME.

3. In preparation for hearing, Respondents sent interrogatories to Claimant's counsel on August 29, 2024. Respondents also scheduled an Independent Medical Examination ("IME") with F. Mark Paz, M.D. to take place on September 18, 2024.

4. Claimant failed to appear for the September 18, 2024 IME appointment. Respondents were invoiced $762.96 by Dr. Paz's office for Claimant's failure to attend the IME appointment.

5. Claimant did not provide Respondents answers to interrogatories within 20 days of August 29, 2024 pursuant to WCRP 9-1(B). On September 19, 2024, Respondents sent a letter to Claimant's counsel regarding Claimant's late responses to interrogatories. Respondents requested that Claimant provide his interrogatory responses no later than September 25, 2024.

6. On October 9, 2024, a prehearing conference was held, in part, on Claimant's Motion for an Extension of Time to Commence the Hearing up to 60 days. PALJ Royce Mueller granted Claimant's motion. The hearing was reset to commence on or before January 14, 2025.

7. The hearing was rescheduled for January 8, 2025.

8. Respondents rescheduled the IME appointment with Dr. Paz for 9:00 a.m. on November 5, 2024.

9. On October 15, 2024, a prehearing conference was held before PALJ Gregory Plank on Respondents' Motion to Compel Claimant's attendance at the rescheduled IME. In a Prehearing Order dated October 15, 2024, PALJ Plank granted Respondents' Motion to Compel Claimant's attendance at the rescheduled IME appointment with Dr. Paz on November 5, 2024.

10. Claimant did not provide his interrogatory responses to Respondents by September 25, 2024. On October 15, 2024, ALJ Steven Kabler issued an Order Granting Respondents' Opposed Motion to Compel Claimant's Answers to Interrogatories. Per the order, Claimant was to provide answers to Respondent's interrogatories within five business days of the signed order. Accordingly, interrogatory responses were to be provided no later than October 22, 2024.

11. Claimant did not provide interrogatory responses to Respondents by October 22, 2024. On October 25, 2024, Respondents sent Claimant's counsel a letter requesting that Claimant provide interrogatory responses by October 30, 2024.

12. Claimant failed to attend the rescheduled IME appointment with Dr. Paz on November 5, 2024. Respondents were invoiced an additional cancellation fee of $762.96 as a result. The invoice from Dr. Paz' office states "[Claimant] called to let us know he would not be able to show up to the office at his appointment with Dr. F. Mark Paz due to a flat tire." (Respondents' Ex. M, p. 56)

13. On November 8, 2024, Respondents filed an Opposed Motion for Sanctions for Noncompliance with Discovery Orders. Respondents requested dismissal of Claimant's claim pursuant to CRCP 37(b)(2)(C).

14. On November 18, 2024, Claimant filed an Objection to Respondents' Motion for Discovery Sanctions. As part of the objection, Claimant requested that Respondents' Motion be considered moot as Claimant's interrogatories were sent to Respondents' on November 14, 2024.

15. The interrogatory responses Claimant provided to Respondents on November 14, 2024 were unsigned. Signed interrogatory answers were provided to Respondents on November 21, 2024.

16. A prehearing conference was held on November 18, 2024 before PALJ Royce Mueller on, in relevant part, Claimant's motion for withdrawal and refiling of Respondents' Application for Hearing. PALJ Mueller issued a Prehearing Order dated November 18, 2024 denying Claimant's Motion for Withdrawal and Refiling of Respondents' Application for Hearing.

17. Claimant attended an IME with Dr. Paz on December 4, 2024.

18. On December 5, 2024, ALJ Kara Cayce issued an order directing the parties to set a hearing on Respondents' Opposed Motion for Sanctions for Noncompliance with Discovery Orders, stating that Respondents' motion nor Claimant's objection thereto contained sufficient information upon which ALJ Cayce could determine if sanctions should be imposed and, if so, the appropriate sanction under the circumstances.

19. The hearing was scheduled to take place before ALJ Cayce on December 13, 2024.

20. Prior to the December 13, 2024, hearing, counsel for Claimant inquired as to whether Respondents would accept reimbursement of the expenses incurred from the November 5, 2024 IME. Respondents rejected Claimant's offer. Nonetheless, prior to the hearing, counsel for Claimant sent payment of $762.96 to Dr. Paz' office for the IME cancellation fee.

21. At hearing, Claimant testified that he did not provide his responses to interrogatories on or before October 22, 2024. Claimant testified he did not recall if he was informed of the interrogatory deadlines or court order compelling his interrogatory responses.

22. When asked if he was notified of the September 18, 2024 IME appointment, Claimant testified that he did not have it noted on his calendar. Claimant testified he was aware of the order compelling him to attend the November 5, 2024 IME appointment. Claimant testified that he did not attend the November 5, 2024 IME appointment due to a flat tire, which he only discovered upon leaving his apartment to head to the IME appointment. Claimant testified he drove his vehicle to the nearest gas station in an attempt to fix the flat tire, but he was unable to do so. Claimant then called Dr. Paz' office and his attorney to notify them of the situation. Claimant testified he was unable to make other arrangements for transportation by that time.

23. Claimant testified that he put a lot of things on the "back burner" because he was busy working and dealing with mental stress from his brother's heart attack in September 2024. He testified that each time he remembered he needed to complete paperwork he again forgot to do so. Claimant testified that things were overwhelming in his life and he did not have a lot of time to do anything outside of work but sleep and eat.

24. The ALJ takes administrative notice of the OAC case file that, on December 31, 2024, Respondents filed an Unopposed Motion to Withdraw and Refile Application for Hearing for a Half Day on a Non-Trailing Docket. The motion which was granted by the OAC's Designee Clerk on December 31, 2024. This resulted in the cancellation of the January 8, 2025 hearing. Respondents re-filed the Application for Hearing on January 17, 2025.

25. The ALJ finds that Claimant failed to comply with discovery orders dated October 15, 2024 compelling Claimant to provide responses to interrogatories by

October 22, 2024 and to attend a November 5, 2024 IME. Accordingly, Claimant's failure to comply is presumed willful.

26. In light of Claimant's payment of the IME cancellation fee and considering the seriousness of Claimant's conduct and the prejudice to Respondents, the ALJ finds that no sanction shall be imposed at this time.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Sanctions for Discovery Violations

The purposes of discovery and pretrial procedural rules include the production of relevant evidence, the simplification of issues, the elimination of surprise and the encouragement of fair and just settlements. *Shafer Com. Seating, Inc. v. Indus. Claim Appeals Off.*, 85 P.3d 619, 621 (Colo. App. 2003). To uphold these purposes in Workers' Compensation matters, §8-43-207(1)(e), C.R.S. provides that ALJs "may rule on discovery matters and impose the sanctions provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery." In order for a discovery violation to be considered "willful," the ALJ must determine that the conduct was deliberate or exhibited "either a flagrant disregard of discovery obligations or constitutes a substantial deviation from reasonable care in complying with discovery obligations." *Reed v. Indus. Claim Appeals Off.*, 13 P.3d 810, 813 (Colo. App. 2000); *see In re Claim of Zvolanek*, W.C. 4-859-506-02 (ICAO, July 13, 2016).

WCRP 9-1(B) permits discovery in the form of written interrogatories. WCRP 9-1(E) provides that "[i]f any party fails to comply with the provisions of this rule and any action governed by, an administrative law judge may impose sanctions upon such party pursuant to statute and rule." Rule 9-1(F) specifies that once an order to compel has been issued and properly served upon the parties, failure to comply with the order to compel shall be presumed willful.

CRCP 37 provides for available sanctions for failing to cooperate in discovery. *Pinkstaff v. Black & Decker, (U.S.) Inc.*, 211 P.3d 698, 702 (Colo. 2009). The sanctions that can be imposed for willful failure to comply with permitted discovery are various and can range from assessment of costs and fees or prohibiting the disobedient party from presenting evidence, to rendering a default judgment or outright dismissal of a claim. *See* CRCP 37*; see also In re: Claim of Zvolanek*, *supra*.

Whether to impose sanctions and the nature of the sanctions to be imposed are matters within the fact finder's discretion. *Shafer Commercial Seating, Inc. v. Indus. Claim Appeals Off.*, *supra*. The fact finder is given flexibility in choosing the appropriate sanction and should exercise informed discretion in imposing a sanction that is commensurate with the seriousness of the disobedient party's conduct. *Id*. The Colorado Supreme Court has determined that, although the rule provides little guidance in the selection of a sanction, it should be applied "in a manner that effectuates proportionality between the sanction imposed and the culpability of the disobedient party ...." *Kwik Way Stores, Inc. v. Caldwell*, 745 P.2d 672 (Colo. 1987); *see Pinkstaff v. Black & Decker, (U.S.) Inc.*, *supra* at 702 ("When discovery abuses are alleged, courts should carefully examine whether there is any basis for the allegation and, if sanctions are warranted, impose the least severe sanction that will ensure there is full compliance with a court's discovery orders and is commensurate with the prejudice caused to the opposing party"). The sanction should therefore be commensurate with the seriousness of the sanctioned conduct. *See In re Claim of Nozik*, W.C. No. 4-874-669 (ICAO, Mar. 13, 2013). An ALJ's exercise of discretion in determining an appropriate discovery sanction is broad and binding in the absence of a clear abuse of discretion. *Pizza Hut v. Indus. Claim Appeals Off.*, 18 P.3d 867 (Colo. App. 2001); *Hall v. Home Furniture Co*.,

724 P.2d 94 (Colo. App. 1986) (ALJ's authority to impose a sanction is discretionary and may not be disturbed in "absence of clear abuse of discretion").

While dismissal is within the range of permissible sanctions that may be imposed for discovery violations, it is "the severest form of sanction" available. *Prefer v.PharmNetRx*, 18 P.3d 844, 850 (Colo. App. 2000). Moreover, the Colorado Supreme Court has held in the civil context that a "litigation-ending sanction" such as dismissal, may only be imposed where one of three factors is present. Those factors include (1) willfulness or deliberate disobedience of discovery obligations, (2) bad faith conduct which is a flagrant disregard or dereliction of discovery obligations, or (3) culpable conduct which is more than mere inadvertence or simple negligence but rather is gross negligence. *Kwik Way Stores, Inc. v. Caldwell*, *supra*; *see Nagy v. District Court of the City and County of Denver*, 762 P.2d 158 (Colo. 1988).

Here, Respondents seek discovery sanctions in the form of dismissal of Claimant's claim. Respondents argue that Claimant's failure to comply with discovery obligations is grossly negligent and has been prejudicial to Respondents by preventing their ability to prepare for hearing and creating unnecessary fees and litigation. Claimant argues that sanctions are not warranted as Claimant's conduct was not "willful or wanton," Claimant ultimately provided the interrogatory responses and attended the IME appointment, and acted in good faith by paying the IME cancellation fee.

It is undisputed Claimant failed to comply with ALJ Kabler's October 15, 2024 order compelling responses to interrogatories by October 22, 2024, and PALJ Plank's October 15, 2024 prehearing order compelling Claimant's attendance at the November 5, 2024 IME appointment. No argument or evidence was offered indicating these discovery orders were not properly issued or served. Accordingly, pursuant to WCRP 9-1(F), Claimant's failure to comply with the discovery orders is presumed willful. Nonetheless, based on the specific circumstances, dismissal of Claimant's claim at this juncture is not commensurate with the seriousness of Claimant's conduct.

In *Garrett v. McNelly Construction Co.*, W.C. No. 4-734-158 (ICAO, Mar. 29, 2010), the respondents filed an application for hearing on the issue of the extent of the claimant's permanent impairment. In the process of conducting discovery, the claimant failed to attend two IME appointments, one of which he was compelled by order to attend. The claimant also failed to timely answer interrogatories pursuant to an order compelling the production of his responses. The ALJ found that the claimant was in violation of the discovery orders, that his conduct was in flagrant disregard of his duties, and that the claimant did not offer any persuasive or credible reasons for his failures to comply. The ALJ thus determined that the appropriate sanction was dismissal of the claimant's claim. The Panel disagreed, concluding that the ALJ abused her discretion in dismissing the claimant's entire workers' compensation claim under the circumstances. The Panel noted that compensability had already been established and the "litigation" at issue was the respondents' application for hearing on the issue of permanent partial disability benefits. As the claimant's failure to comply with discovery did not obstruct the respondents' ability to defend compensability, the Panel reasoned that the ALJ's dismissal of the claim was more than merely "litigation-ending" ("Rather than merely

ending that 'litigation,' the sanction of dismissal precluded any further action the claimant might otherwise have taken to seek medical treatment for his injury.") The Panel concluded that dismissal of the claim was not commensurate to the seriousness of the claimant's conduct, set aside the ALJ's order dismissing the claim, and remanded the matter to the ALJ for further proceedings to determine an appropriate sanction.

Similarly, Claimant's claim is an admitted claim, compensability has been established, and the litigation at issue is Respondents' attempt to overcome the DIME on MMI and permanent impairment. Dismissal of Claimant's claim at this juncture would preclude Claimant from seeking any further action with respect to his compensable work injury, including medical treatment and other benefits. While dismissal of Claimant's claim may be an appropriate discovery sanction in the event of further noncompliance, based on the current circumstances, dismissal is not commensurate to the seriousness of Claimant's conduct.

The ALJ is persuaded Claimant's failure to attend the November 5, 2024 IME appointment was due to circumstances outside of his control. Claimant credibly testified, with record support, that he failed to attend the IME appointment due to a flat tire. Claimant discovered the flat tire upon leaving his apartment to attend the IME appointment, made an unsuccessful attempt to temporarily fix the tire, and was unable to timely make other arrangements for transportation. Claimant's other conduct, including his failure to attend the first IME appointment, his failure to timely provide responses to interrogatories after multiple follow-ups from Respondents, and an order compelling him to do so, is unreasonable and negligent. Claimant's conduct has resulted in additional fees incurred by Respondents, interfered with Respondents' ability to adequately prepare their case, and has delayed proceedings.

Nevertheless, as of the date of this hearing, Claimant has attended the IME appointment with Dr. Paz and provided answers to interrogatories. Such actions in and of themselves do not render Respondents' motion for sanctions moot, but the ALJ does take them into consideration here in determining the appropriate sanction. *See, Shafer, supra* at 622 (Supplying the requested information two to three days beyond the last imposed deadline was not substantial compliance with the discovery order, but merely a plausible explanation for the ALJ's decision not to impose the more severe sanction of default.) To the extent Respondents make arguments in their position statement regarding the inadequacy of Claimant's responses to interrogatories and other alleged issues resulting from the purportedly inadequate responses, such issues were not addressed at hearing. Additionally, as Respondents' Application for Hearing has been withdrawn and the January 8, 2025 hearing cancelled, Respondents have more opportunity to prepare their case.

Respondents offered no argument as to other sanctions that would be appropriate in lieu of dismissal of Claimant's claim. Respondents also offered no evidence upon which the ALJ could reasonably base an award of attorney fees, render a default judgment in terms of overcoming the DIME, or preclude Claimant from presenting certain evidence.

In light of Claimant's payment of the November 5, 2024 IME cancellation fee, the ALJ concludes no sanction shall be imposed at this time. This does not preclude Respondents from seeking sanctions in the future, including dismissal of Claimant's claim, in the event of any continued failure to comply with discovery obligations.

ORDER

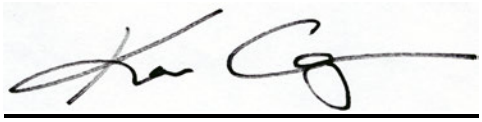
It is therefore ordered that:

1. Respondents' November 8, 2024 Motion for Sanctions for Claimant's Noncompliance with Discovery Orders 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: January 17, 2025



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

ISSUES

- Did Respondents prove that no additional treatment is reasonably needed or causally related to Claimant's June 7, 2011 admitted work injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a Detective. He suffered an admitted injury to his low back on June 7, 2011 in a work-related motor vehicle accident.

2. Claimant had intermittent low back problems dating back to the late 1980s. He received periodic treatment from a chiropractor, Dr. Richard Wolford.

3. Claimant returned to Dr. Walford in October 2009 for recurrent back pain. Examination showed soft-tissue pain, spasms, and trigger points. His symptoms improved with chiropractic treatment. There is no persuasive evidence that these intermittent low back problems caused any significant limitations or disability.

4. Claimant injured his back at work in February 2010, when moving a piece of furniture during the execution of a search warrant. A lumbar CT myelogram in May 2010 showed a herniated disc at L4-5 compressing the L5 nerve, and a disc protrusion at L3-4 without nerve impingement.

5. Claimant underwent at least one lumbar ESI and an SI joint injection with limited benefit.

6. Claimant had surgical evaluations with Dr. James Bee and Dr. James Sceats. Neither surgeon recommended surgery at present, although they indicated surgery may be appropriate in the future if his symptoms worsened.

7. Claimant was put at MMI on November 16, 2010, with no impairment and no permanent restrictions. Claimant returned to his regular work.

8. Claimant received no further treatment under the 2010 claim before the June 7, 2011 accident that is the subject of the current claim.

9. Treatment records after the June 2011 injury document worsened back pain and leg symptoms. Claimant's ATP, Dr. Eric Ridings, opined the accident aggravated Claimant's pre-existing discogenic symptoms. Claimant received extensive treatment, without significant benefit.

10. Claimant underwent an L3-L5 decompressive laminectomy with bilateral nerve root exploration and decompression on November 15, 2011. The surgery helped his leg symptoms temporarily, but they recurred shortly thereafter.

11. Claimant was prescribed Lyrica and pain medications for ongoing radicular symptoms.

12. Claimant returned to work in early 2012, but suffered an aggravation and could not continue.

13. Dr. Ridings put Claimant at MMI on June 6, 2012, with a 23% whole person impairment. Dr. Ridings imposed permanent work restrictions and recommended maintenance care consisting of medication management and possible lumbar fusion surgery in the future.

14. Dr. Ridings subsequently amended the rating after reviewing surveillance video. Dr. Ridings felt there were discrepancies between Claimant's stated limitations and his mobility demonstrated in the videos. Dr. Ridings opined Claimant had deliberately misrepresented his symptoms. As a result, he revised the rating to 18% whole person by reducing the impairment for range of motion loss. He also liberalized Claimant's work restrictions and rescinded the recommendation for future surgery. However, Dr. Ridings continued to provide medication management.

15. Dr. Timothy Sandell conducted a DIME on October 24, 2012. He agreed that Claimant was at MMI, and assigned a 15% whole person impairment rating. Dr. Sandell opined that Claimant needed ongoing maintenance care, primarily in the form of medications and physician visits. Dr. Sandell opined Claimant's ongoing symptoms were causally related to the June 2011 work injury. On January 15, 2013, Respondents filed a Final Admission of Liability admitting to Dr. Sandell's rating and to a general award of medical treatment after MMI.

16. Dr. Ridings retired from active practice in late 2012, and Claimant's maintenance care was transferred to CCOM. Providers at CCOM prescribed Lyrica and Celebrex from the initial visit. Flexeril (cyclobenzaprine) was added in October 2013.

17. The last documented appointment at CCOM took place on December 3, 2013. On that date, Claimant prescribed Lyrica 150mg twice a day, Celebrex 200 mg twice a day, and Flexeril 10 mg at bedtime.

18. Dr. Joseph Brooks took over Claimant's maintenance care in 2014. Dr. Brooks continued to prescribe Lyrica, Celebrex, and Flexeril at similar dosages as were prescribed by CCOM.

19. Dr. Elizabeth Wilcox (last name Bisgard at the time) performed an IME for Respondents on January 13, 2014. Dr. Wilcox recommended Claimant continue with six months of pool therapy and Lyrica, although she noted the Lyrica was not providing much pain relief per the medical records. She suggested that Claimant's symptoms may be related to Charcot-Marie-Tooth disease. In August 2014, Dr. Wilcox performed a records review and opined that all of Claimant's medications should be discontinued as they were not providing symptom relief or increased function.

20. Dr. Miguel Castrejon performed an IME for Respondents on July 30, 2014. Electrodiagnostic testing showed no evidence of Charcot-Marie-Tooth disease.

21. Dr. Castrejon took over as Claimant's primary ATP in June 2016. Since that time, Claimant's condition has primarily been maintained with medications, including Lyrica, Flexeril, and Celebrex, at essentially the same dosages he was prescribed at CCOM. Claimant has also received periodic chiropractic treatment, massage therapy, and injections for flare-ups.

22. Dr. Allison Fall performed an IME for Respondents on September 14, 2017. Dr. Fall reviewed extensive records, including multiple years of pre-injury chiropractic records. Dr. Fall opined it was appropriate for Claimant to continue seeing Dr. Castrejon at approximately three-to-six-month intervals for medication monitoring. She also opined that Lyrica, Celebrex and cyclobenzaprine were reasonably necessary. She thought chiropractic and massage therapy approximately once per month was medically reasonably, necessary, and appropriate for up to one year, by which time she anticipated Claimant's condition would be stable enough to prevent recurrent aggravations. She opined he would need medication indefinitely.

23. A lumbar CT was completed on November 3, 2020 because of increased back and right leg pain. It showed a hemilaminectomy defect at L4-5 with disc bulging and a superimposed right central disc protrusion, high grade stenosis at L4-5, and a central disc herniation at L5-S1. Dr. Castrejon opined the imaging showed a "reherniation at L4-5 with right-sided involvement that corresponds to Claimant's right leg symptoms." Claimant was not interested in additional surgery and preferred to manage the symptoms conservatively, with medications and periodic massage therapy.

24. Dr. John Hughes performed an IME for Respondents in late 2021. Dr. Hughes' report was not offered at hearing, but it was described in Dr. Castrejon's records. Dr. Hughes diagnosed work-related lumbar spine injuries and radicular lumbar pain post decompression laminectomy at L3-L5. Dr. Hughes concurred with the ongoing use of Lyrica to address Claimant's persistent radicular symptoms. He also agreed that Celebrex and cyclobenzaprine were appropriate. There is no indication that Dr. Hughes questioned the causal relationship between Claimant's ongoing symptoms and the work accident.

25. On January 20, 201, Dr. Castrejon reviewed the effectiveness of Claimant's maintenance care regimen. He pointed to benefits such as increased tolerance for standing, walking, sitting, and participating in his regular home exercise program. Claimant was attending approximately one massage therapy session per month, and Dr. Castrejon noted "the cost-benefit ratio of one massage treatment per month that limits greater use of medication, urgent care follow-ups AND which contributes to improve the quality of life for this individual." He further opined, "it is clear that there has been progression at the surgical site," based on the recent CT findings, and hoped that regular maintenance care would help Claimant avoid more aggressive treatment down the road.

26. On April 14, 2023, Dr. Castrejon responded to an inquiry from Respondents about Claimant's anticipated future maintenance treatment in relation to the work-related

injury. He indicated Claimant will require Celebrex, Lyrica, cyclobenzaprine, and omeprazole indefinitely. Dr. Castrejon opined these medications were prescribed to control inflammation, neuropathic pain, muscle spasms, and GI side-effects. The medications decreased Claimant's pain and improved his function.

27. In December 2023, Claimant applied for work as an investigator for the El Paso County District Attorney's Office. As part of the application process, Claimant completed questionnaires on which he denied pain in his back, extremities, or joints that would limit his ability to bend, squat, or lift 50-100 pounds. On one form, Claimant denied that he was currently being treated for any musculoskeletal conditions, or that he had any work restrictions. However, on other forms, he reported a history of low back pain, disc disease, and surgery. He also disclosed that he had an "active work comp claim, or any disabilities from a work-related injury." Claimant completed a physical examination and demonstrated the ability to lift and carry 50 pounds and was deemed "medically acceptable" for the position.

28. Dr. Wilcox performed a records review for Respondents in June 2024 to address continued maintenance care. Dr. Wilcox indicated Claimant's treating providers appeared to be unaware of Claimant's preinjury low back problems. She was critical of the documentation contained in Dr. Castrejon's reports, which she found "frustrating" because of a "copy-forward" technique. She cited Claimant's recent job application and pre-employment physical testing as evidence that his pain complaints are probably exaggerated. Finally, Dr. Wilcox opined that any ongoing symptoms and limitations reflected the natural progression of Claimant's pre-existing condition rather than the work injury, and therefore, Claimant requires no additional treatment for the June 2011 work injury.

29. Dr. Castrejon responded to Dr. Wilcox's report on August 3, 2024. Dr. Castrejon acknowledged Claimant's pre-injury back problems, including the 2010 work injury, but thought Dr. Wilcox had overstated their significance. He noted that Claimant had worked for the Sherrif's Office since 1994 without limitation despite his intermittent back pain. Furthermore, Claimant saw two spine surgeons after the 2010 injury, neither of whom thought he was a surgical candidate. Claimant was put at MMI for the 2010 injury with no impairment and had returned to his regular job without restrictions. Thereafter, Claimant suffered an admitted injury in June 2011, which substantially increased his symptoms and functional limitations, and ultimately resulted in a two-level spine surgery. Dr. Castrejon opined the June 2011 accident combined with and permanently aggravated Claimant's pre-existing degenerative changes. Dr. Castrejon emphasized his lengthy treatment relationship with Claimant and documentation of ongoing symptoms and multiple flare-ups that responded to chiropractic treatment, massage therapy, and medications. Dr. Castrejon indicated the treatment helped reduce Claimant's pain and improved his ability to function.

30. Dr. Wilcox testified at hearing consistent with her report. She reiterated her impression that Claimant exaggerated or misrepresented his symptoms. She testified that all pathology shown on the 2020 imaging is the result of age-related degenerative changes and entirely unrelated to the 2011 accident.

31. Dr. Castrejon's opinions are credible and more persuasive than the contrary opinions offered by Dr. Wilcox.

32. Respondents failed to prove Claimant requires no further treatment causally related to the June 2011 admitted industrial injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the industrial injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond maximum medical improvement (MMI) if the claimant requires periodic maintenance care to prevent further deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Even where the respondents admit liability for medical benefits after MMI, they retain the right to challenge the compensability and reasonable necessity of specific treatment. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003).

Ordinarily, the claimant must prove by a preponderance of the evidence that an injury directly and proximately caused the condition for which they seek benefits, and that the requested treatment is reasonably necessary. *Walmart 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). But § 8-43-201(1) places the burden of proof on the party seeking to modify an issue previously determined by an admission or order. Because Respondents are attempting to terminate a general award of medical benefits after MMI, they must prove that no further treatment is reasonably needed or causally related to the work injury. *Salisbury v. Prowers County School District RE2*, W.C. No. 7-702-144 (June 5, 2013); *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (October 1, 2013).

Respondents failed to prove Claimant's entitlement to medical benefits after MMI should be terminated. The persuasive evidence shows Claimant still needs maintenance care for injury-related back pain and radicular symptoms. Dr. Castrejon's opinions are credible and more persuasive than the contrary opinions offered by Dr. Wilcox. Dr. Castrejon's opinions are based on a lengthy treatment relationship and are consistent with other persuasive evidence in the record. Multiple treating and examining providers have opined Claimant needs maintenance care causally related to the work accident, including Respondents' own IMEs in 2017 and 2021. Claimant's pre-injury history of low back problems has been known for years, and the theory of compensability in this case has been premised on an aggravation of a pre-existing condition since Dr. Ridings' first report. Dr. Castrejon persuasively opined the November 2020 CT scan shows progression of pathology "at the surgical site." Therefore, Claimant's symptoms remain at least partially attributable to the work injury, notwithstanding the apparent simultaneous progression of other non-injury-related degenerative changes. An industrial injury need not be the sole cause of the need for treatment, so long as there is a "direct causal relationship" between the injury and the treatment. *Seifreid v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1996); *Pickering v. Hercules Commercial*, W.C. No. 5-049-650-

002 (ICAO, November 16, 2018). Lyrica, Celebrex, and cyclobenzaprine have been the mainstays of Claimant's maintenance regimen since MMI. The dosages have remained relatively stable for over a decade, which refutes Dr. Wilcox's assertion that Claimant's current need for treatment is solely related to a more recent progression of spinal pathology. The persuasive evidence shows medications are still reasonably needed and causally related to the injury.

ORDER

It is therefore ordered that:

1. Respondents' request to terminate Claimant's entitlement to post-MMI medical treatment is denied and dismissed.

2. All issues not decided herein, and not previously closed by operation of law, are reserved for future determination.

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

DATED: January 17, 2025

DIGITAL SIGNATURE
Patrick C.H. Spencer II

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

ISSUES

1. Has Respondent Employer demonstrated, by a preponderance of the evidence, that Claimant was responsible for the termination of her employment on April 27, 2024, thereby resulting in the termination of payment of temporary total disability {TTD) benefits pursuant to Sections 8-42-105(4) and 8-42-103(1)(9), C.R.S.,?

2. Has Respondent Employer demonstrated, by a preponderance of the evidence, that Claimant's average weekly wage (AWW) should be an amount lower than the admitted AWW of $620.00?

3. Has Claimant demonstrated, by a preponderance of the evidence, that Claimant's AWW should be an amount higher than the admitted AWW of $620.00 due to concurrent employment?

FINDINGS OF FACT

1. Claimant worked for Employer at a "skilled gaming" facility. On December 9, 2022, Claimant was injured while at work. Specifically, Claimant suffered gunshot wounds to her right arm and her face.

2. On May 21, 2024, Claimant and Respondent Employer went to hearing on the issues of compensability and medical benefits.

3. On May 28, 2024, the ALJ issued Findings of Fact, Conclusions of Law, and Order, finding that Claimant suffered a compensable work related injury on October 9, 2022, and Respondent Employer was liable for reasonable, necessary, and related medical treatment. In addition, the ALJ found that at the time of Claimant's work injury, Respondent Employer did not carry workers' compensation insurance.

4. Due to Respondent Employer's uninsured status, the CUE Fund became involved in this matter. On August 6, 2024, the CUE Fund filed a General Admission of Liability (GAL). In that document, Claimant's date of injury was identified as October 9, 2022. In addition, Claimant's average weekly wage (AWW) was identified as $620.00 per week.

5. On September 12, 2024, the CUE Fund filed a Petition to Modify, Terminate, or Suspend Compensation.

6. The reason for a proposed modification is that both Claimant and Respondent Employer assert that Claimant's AWW should be an amount other than the admitted AWW of $620.00.

7. With regard to termination of compensation, Respondent Employer asserts that Claimant was responsible for the termination of her employment, and her wage loss is not due to her work injury.

Termination of Claimant's employment

8. Following her October 9, 2022 work injury and subsequent medical treatment, Claimant returned to work for Respondent Employer in early 2023[1].

9. Claimant testified that when she returned to her position with Respondent Employer she had a lifting restriction of no more than one pound. Claimant further testified that due to that work restriction, she negotiated with Respondent Employer to allow her to utilize "helpers" during her shifts. Claimant explained that she had a total of three helpers. One (her spouse) helped her with security; the second (her daughter) assisted with her duties in managing the gaming machines and money; and the third was a woman that assisted Claimant with her cleaning duties. These helpers were not employed by Respondent Employer. Claimant testified that she personally paid these individuals for their help.

10. Timothy Bryson is a co-owner of Respondent Employer's business. He testified that Respondent Employer did not authorize Claimant to utilize "helpers". Claimant was expected to perform all of her job duties herself.

11. Gary Bryson is also a co-owner *of* Respondent Employer's business. He testified that employees are not allowed to use "helpers" in performing their job duties. He further testified that when handling and counting money, only employees are to engage in those activities. Additionally, only employees are to have use and access of the company's keys.

12. Claimant's job duties included managing the use of the company's keys. These keys opened doors, and also opened the area of the gaming machines where money was collected.

13. At times, the keys were misplaced by Claimant and by other employees. Respondent Employer notified all employees that if the keys were lost during one's shift, that employee would be terminated. Claimant was aware *of* this notice. and the consequences of losing the keys.

14. Claimant's employment with Respondent Employer ended on April 27, 2024. Claimant's final shift began the night of April 26, 2024 and lasted into the morning *of* April 27, 2024. During this shift, Claimant was responsible for the keys, and the keys were lost. Claimant testified that it was actually one of her "helpers" that lost the keys.

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[1] Based upon the wage records discussed below, the ALJ infers that Claimant returned to employment with Respondent Employer in February 2023.

15. Upon learning of the lost keys, Respondent Employer informed Claimant that despite the company rule regarding the keys, Claimant would not be terminated. Instead, Respondent Employer elected to suspend for two weeks. Claimant testified that at the time of her suspension, Timothy Bryson informed her that she could not utilize helpers. Claimant further testified that she decided that she would not return after the suspension without her helpers.

16. When he learned of the suspension, Claimant's spouse (who is not employed by Respondent Employer), returned to Claimant's place of employment and assaulted an employee. Following these actions by Claimant's spouse, Claimant was informed by Gary Bryson that she was "86-ed" from the establishment. At that time, Claimant understood that her employment had been terminated.

17. Shortly thereafter, Claimant was contacted by Timothy Bryson and told that she was not permanently terminated and instead needed to be off work until an investigation was completed surrounding the assault. Regardless of this conclusion by Respondent Employer, Claimant had already decided not to return to this employment without her helpers.

18. The ALJ finds that Respondent Employer has successfully demonstrated that it is more likely than not that Claimant was responsible for the termination of her employment. The ALJ finds that the reason for Claimant's termination of employment was her loss of the keys, after a warning. Claimant knew that losing the keys would lead to the loss of her employment. Claimant asserts that because it was her helper that lost the keys, that she is not at fault for the loss of her employment. The ALJ is not persuaded.

19. The ALJ credits the testimony of Respondent Employer witnesses that only employees are to handle the keys. Claimant acted volitionally when she allowed her unauthorized "helpers" to access and use the keys. Therefore, Claimant exercised some direction or control over the actions that resulted in the loss of her employment, specifically the loss of the keys. Although Respondent Employer initially informed Claimant of a suspension, the decision to convert that suspension to a termination was reasonable, particularly in light of the prior notification that loss of the keys would lead to termination. It was also reasonable for Respondent Employer to investigate the actions of Claimant's spouse before her return. Claimant further exercised direction and control over the termination of her employment when she elected not to return without her helpers, thereby resigning from her position.

Wages

20. While working for Respondent Employer, Claimant was paid every two weeks. At hearing, neither party provided wage records from the time of Claimant's 2022 work injury.

21. Claimant testified that she worked 40 hours per week and was paid $13.00 per hour, plus tips. Claimant further testified that that she was also paid a weekly "bonus" of $100.00.

22. Respondent Employer provided wage records for pay periods beginning February 22, 2023 through May 3, 2023. During those pay periods, Claimant was paid wages and reported tips as follows:

February 22, 2023, total $913.00, ($832.00 in wages; $81.00 in tips);
March 8, 2023, total $1,330.00 ($936.00 in wages, $394.00 in tips);
March 22, 2023, total $1,255.00 ($975.00 in wages, $280.00 in tips);
April 5, 2023, total $ 1,442.00 ($1,040.00 in wages, $402.00 in tips);
April 19, 2023, total $1,040.00 ($1,040.00 in wages, $0.00 in tips);
May 3, 2023, total $1,040 ($1,040.00 in wages, $0.00 tips).

23. During this 12 week period, Claimant was paid a total of $7,020.00. When this amount is divided by 12, it equals a weekly average of $585.00. Respondent employer argues this is the correct calculation of Claimant's AWW.

24. Claimant asserts that her AWW should be higher than the admitted $620.00, due to concurrent employment. At the time of her work injury, Claimant was self-employed as a hair stylist. Claimant provided copies of handwritten receipts to indicate her earnings at her salon.

25. Tax records admitted into evidence at hearing show that in 2021, Claimant reported gross receipts or sales for her business of $14,000.00. After listing deductions, Claimant ultimately reported a business loss of $65,880.00. Claimant argues that due to the Covid-19 pandemic, her 2021 tax return is not reflective of her typical earnings as a hair stylist.

26. Claimant provided a printout of records from the Internal Revenue Service (IRS) that appears to also be for the 2021 tax year. In that document, the amount of $1,886.00 is identified as the amount of wages, salaries, tips. In that same document, "other income" is identified in the amount of $46,887.00. However, it is unclear to the ALJ if the amount of $46,887.00 includes earnings from her work with Respondent Employer, her self-employment as a hairstylist, or both, or neither. Additionally, it is unclear if this amount was Claimant's own earnings, or if it also includes income from her spouse or any dependents.

27. Claimant failed to provide any other tax returns regarding her work as a hair stylist. Claimant provided handwritten receipts purportedly demonstrating her salon earrings in 2022. Upon careful review of these receipts, the ALJ does not find these records to be credible, nor persuasive.

28. With regard to the calculation of Claimant's AWW, the ALJ credits the payroll records for the 12 week period in 2023. The ALJ recognizes that this was for a period of time other than when Claimant suffered her work injury in October 2022.

However, given the lack of documentation from the time of Claimant's injury, the ALJ finds the 2023 wage records to be the only record, (and therefore the best example) of Claimant's average wages.

29. With regard to her concurrent employment as a hair stylist, the ALJ credits the IRS records that demonstrate that in 2021 Claimant reported a business loss. The ALJ finds no other compelling or persuasive evidence of an actual amount earned in concurrent employment.

30. The ALJ finds that Respondent Employer has successfully demonstrated that it is more likely than not that Claimant's AWW at the time of her work injury was $585.00.

31. The ALJ also finds that Claimant has failed to demonstrate that it is more likely than not that her AWW should be increased to reflect concurrent employment. Therefore, the ALJ does not calculate any additional amount to Claimant's AWW.

CONCLUSIONS OF LAW

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

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

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

4. Sections 8-42-105(4) and 8-42-103(1)(9), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not

be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office,* 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing,* W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. See *Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

5. As found, Respondent Employer has demonstrated, by a preponderance of the evidence, that Claimant committed a volitional act that resulted in her termination of employment. As found, the ALJ credits the testimony of Respondent Employer witnesses over the contradictory testimony of Claimant regarding the use of "helpers". The ALJ also notes that Claimant was aware of the expectations regarding safeguarding the keys. Claimant knew, or reasonably should have known, that her continued loss of the keys was a failure to meet the expectations of Respondent Employer. The ALJ further concludes that Claimant exercised some direction or control over the reasons for her termination when she lost the keys. Additionally, when Claimant was informed of her suspension, she elected not to return to this employment without her helpers. As found, this was effectively a resignation of this employment. Therefore, Claimant's actions constitute volitional acts that resulted in the termination of her employment.

6. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995).

7. Section 8-42-102(2), C.R.S. requires the ALJ to base a claimant's AWW on their earnings at the time of the injury. Under some circumstances, the ALJ may determine a claimant's TTD rate based upon their AWW on a date other than the date of the injury. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No.* 7, W.C. No. 4-240-475 (ICAO, May 7, 2007).

8. As found, Respondent Employer has successfully demonstrated, by a preponderance of the evidence, that Claimant's AWW is properly calculated to be $585.00. As found, the payroll records admitted into evidence are credible and persuasive.

9. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that an additional amount should be included in calculating her AWW for concurrent employment. As found, Claimant's tax records demonstrate a business loss. In addition, Claimant's purported evidence of her concurrent employment was neither credible, nor persuasive.

ORDER

It is therefore ordered:

1. Claimant's average weekly wage (AWW) is calculated to be $585.00.

2. Claimant' was responsible for the termination of her employment.

3. Claimant's temporary total disability benefits shall be terminated as of April 27, 2024.

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

Dated January 21, 2025.

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

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

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

oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. It is recommended that you send a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-265-935-001

PROCEDURAL MATTERS

During the deposition of Dr. Fall, Claimant objected to the testimony of Dr. Fall and Respondents objected to the report of Dr. Knight. However neither party provided any explanation as to how they were prejudiced by the testimony/reports of either expert. As such, both objections are overruled.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence that he sustained a compensable injury.

II. If Claimant established that he sustained a compensable injury, whether he also established that he is entitled to all reasonable, necessary, and related care for his injury.

III. Whether Claimant established that he is entitled to Temporary Total Disability (TTD) benefits beginning January 19, 2024 and ongoing.

FINDINGS OF FACT

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

1. Claimant was employed by the employer on January 19, 2024. He was loading boxes on to a FedEx truck. He described a rail in the truck that the workers would use to push the boxes inside the trailer. He alleges that slipped off a step and hit his back on the rail. The incident was unwitnessed. The Claimant did not report the incident as work related until February 5, 2024.

2. Claimant did go to the Emergency Department at UCHealth on January 19, 2024 but did not mention that he sustained a work related injury. The history of present illness (HPI) was "[redacted] is a [redacted]-year-old [redacted] with history of hypertension, pancreatitis who presents for evaluation of back pain that started this morning. Patient reports that the pain is localized to the area between his shoulder blades and radiates around the front of his abdomen. The pain is sharp and worse with deep breaths. Associated nausea and vomiting. Patient reports that this feels different than the pain he has had with pancreatitis in the past. Denies fever, chills, cough. He reports he drank a few shots of alcohol today to celebrate his new job. . ." The CTA imaging revealed a compression fracture of T7. The notes indicated that the Claimant denied falls or trauma with multiple interviews.

3. On February 1, 2024, Claimant returned to UCHealth complaining of lumbar radiculopathy. The notes on this date indicate that he had some chronic back pain with no falls but he may have twisted his back. A MRI of the lumbar spine was taken which showed no acute fracture; congenital narrowing of the central canal; mild degenerative disc disease (DDD) at L4-5 with moderate central canal stenosis with a mild posterior disc bulge; and mild DDD at L5-S1 with a mild posterior disc bulge with central canal stenosis.

4. Claimant testified at the hearing that he was stepping up his foot slipped off the step which caused him to fall backwards. He tried to grab on to the rail with his left hand and that is when his back twisted and turned and hit the rail.

5. Obviously, Claimant did have a fracture at T7, however it is unclear as to how this fracture occurred. Although the fracture was identified by imaging on January 19, 2024, the physicians offer no opinion on causation of the fracture. The Respondents IME doctor, Dr. Fall did do a causation analysis with respect to the thoracic fracture as well as the lumbar spine issues. It was her opinion that the mechanism of injury described by Claimant did not cause the compression fracture at T7. Additionally, she opined that with respect to the lumbar spine, there was no evidence at the UCHealth visit on February 1, 2024 of any acute disc injury, such as an extrusion compressing a nerve or any indication that the cauda equine nerves were being compressed.

6. Claimant also had an IME done by Dr. Knight. Dr. Knight is of the opinion that the compression fracture at T7 as well as the lumbar symptoms were as the result of the incident as described by Claimant. However, these opinions were based on the Claimant's representation that he did not disclose the alleged work incident initially because he was fearful of losing his job.

CONCLUSIONS OF LAW

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

Generally

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

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even

if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

Compensability

D. To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. *See* § 8-41-301, C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case there is little evidence that Claimant sustained an injury in the manner he alleges. The incident he describes was unwitnessed. Additionally, the Claimant did not mention a fall on the rail at his initial visit to UCHealth on January 19, 2024. Also, the description of the incident has changed over time beginning on February 1, 2024 when he mentions an incident when he is twisting his back as opposed to later when he hits the rail with his back.

E. In this case, Claimant has failed to sustain his burden of proof by a preponderance of the evidence that he was injured at work. I conclude that the opinions of Dr. Fall are credible and persuasive that neither the T7 compression fraction or

symptoms in the lumbar spine, including radiculopathy were due to the incident as described by Claimant. I am not persuaded by Dr. Knight's opinions that the thoracic disc fracture or the lumbar spine symptoms were related to alleged incident as described by Claimant. Her opinions are based on the statement by Claimant that he did not disclose the fall because he was fearful of losing his job if he reported the alleged incident. The fact that Claimant specifically denied any fall or trauma to the physicians at UCHealth repeatedly on January 19, 2024, makes the Claimant's subsequent disclosure of an alleged work injury less believable.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish a compensable injury by a preponderance of the evidence. The claim for compensation is denied and dismissed.

DATED: January 22, 2025

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

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

procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-263-367-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a left knee injury during the course and scope of his employment with Employer on October 19, 2023.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits, including a total left knee replacement, for his October 19, 2023 left knee injury.

FINDINGS OF FACT

1. This matter involves a denied claim. Claimant is a 65-year old male who alleges an injury to his left knee on October 19, 2023. Claimant testified that he was pushing a cart of towels into Employer's parking lot. The wheels locked and he fell over the top of the cart. Claimant asserted he struck his left knee on concrete and rolled onto his left side. He experienced a popping sensation and his left knee began to give out when he moved around after the fall.

2. Claimant testified that he has had no problems with his left knee since he underwent a meniscal repair 25 years earlier. He regularly performed physically demanding work involving significant walking without any left knee symptoms. However, the record reveals that Claimant suffers from chronic, degenerative osteoarthritis of the left knee. Importantly, on May 26 2020 Claimant reported to his medical provider Nathaniel Moore, M.D. that he was experiencing left leg pain and his leg was giving out. The condition caused him to suffer multiple falls. Claimant specifically recounted that he recently fell down a flight of stairs and fell at work. Dr. Moore assessed Claimant with left leg weakness and monoplegia of the left lower limb. Monoplegia is paralysis of one limb. Claimant noted he had a brace due to the preceding knee conditions. Moreover, on April 26, 2022 Dr. Moore diagnosed Claimant with uncontrolled osteoarthritis of the left knee. Claimant wanted to try Synvisc injections for his condition. By July 27, 2022 Dr. Moore also assessed Claimant with worsening derangement of the left knee. Notably, Claimant recounted his knee felt unstable and was giving out. He also experienced left leg weakness. Claimant noted a new injury to his left knee three weeks earlier and sought an MRI. The preceding chronology contrasts with Claimant's testimony that he was not having any left knee symptoms prior to the October 19, 2023 incident.

3. On October 23, 2023 Claimant visited Nurse Practitioner Nicole McPhee at Concentra Medical Centers for an evaluation. NP McPhee recounted that on October 19, 2023 Claimant fell over a cart he was pushing at work and landed on his hands and knees. He sought an evaluation for left knee pain. Claimant reported constant left knee pain and that his knee "gives out" when he ascends/descends stairs. NP McPhee diagnosed Claimant with a left knee strain and other instability of the left knee. She referred Claimant for a left knee MRI.

4. A November 8, 2023 MRI did not reveal an acute injury to Claimant's left knee.

Instead, the imaging demonstrated degenerative tearing of the medial meniscus with grade I chondral loss in the medial compartment. The ligaments were intact. There was bone marrow edema in the medial compartment, but the lateral compartment was well-preserved.

5. Claimant received conservative treatment for several weeks but was eventually referred to Cary Motz, M.D. at Orthopedic Centers of Colorado for an orthopedic evaluation. On January 16, 2024 Claimant visited Dr. Motz and reported constant and aching left knee pain as a result of his fall at work on October 19, 2023. Claimant noted that his symptoms are exacerbated by motion of the knee, weight-bearing and walking. Dr. Motz diagnosed Claimant with primary osteoarthritis of the left knee and administered a Synvisc injection.

6. On June 18, 2024 Claimant underwent an Independent Medical Examination (IME) with Timothy S. O'Brien, M.D. Dr. O'Brien reviewed Claimant's medical records and conducted a physical examination. He concluded that Claimant did not suffer a left knee injury as a result of the October 19, 2023 incident. Dr. O'Brien maintained that there is no medical evidence that Claimant sustained any injuries that would have required medical care related to the October 19, 2023 incident. He reasoned that the mechanism of injury was minor and Claimant hit the ground with his hands and both knees. The energy created by his body's impact with the ground was thus distributed through four points of contact. The injury mechanism did not result in substantial tissue breakage or yielding.

7. Dr. O'Brien detailed that the November 8, 2023 left knee MRI demonstrated no evidence of an acute injury. There were only chronic, degenerative changes including, most prominently, the complete loss of cartilage covering the medial femoral condyle that takes years to become evidenct. The MRI findings reflected end-stage arthritis of the medial compartment of the left knee that also develops over a number of years. Dr. O'Brien attributed Claimant's condition to his age, genetic makeup, and history of a prior injury that led to the need for an arthroscopic meniscectomy. Claimant's continuing pain constituted a manifestation of his pre-existing and long-standing left knee medial compartment arthritis. Although Claimant is currently a candidate for a total left knee replacement, the October 19, 2023 work incident neither aggravated nor accelerated his underlying arthritis and thus did not cause the need for surgical intervention.

8. Dr. O'Brien also testified at the hearing in this matter. He maintained that Claimant did not injure his left knee during the October 19, 2023 fall. He explained that, after reviewing video of the incident, Claimant landed on his hands and knees when he struck the ground. Claimant landed on his left hand, right hand, left elbow and then left hip. Claimant never contacted the ground with his left or right knees. He thus did not suffer a left knee injury. Claimant instead suffered from a degenerative meniscal tear and end-stage osteoarthritis as revealed on MRI. Dr. O'Brien also explained that the Synvisc injections Claimant has received were designed to address his left knee osteoarthritis. Similarly, a total knee replacement would address Claimant's pre-existing, osteoarthritic condition, and not any injuries from the October 19, 2023 incident. Claimant requires a total knee replacement as a result of his long-standing osteoarthritis, internal knee derangement and weakness. None of the preceding conditions were causally related to or aggravated by the October 19, 2023 event.

9. On October 30, 2024 the parties conducted the post-hearing evidentiary

deposition of Cary Motz, M.D. Dr. Motz remarked that Claimant's left knee MRI reflected a degenerative medial meniscal tear and arthritis in the medial compartment of the knee. There were no acute findings. Dr. Motz viewed the video of the October 19, 2023 accident at his deposition and determined it was consistent with Claimant's injury. He diagnosed Claimant with osteoarthritis of the left knee. After Claimant had undergone physical therapy and not responded to viscosupplementation injections, Dr. Motz referred him to Dr. Michaelson for a left knee replacement. He explained that the October 19, 2023 fall aggravated or accelerated Claimant's need for a total left knee replacement. Dr. Motz predicated his opinion on Claimant's lack of left knee symptoms until the October 19, 2023 event. He reasoned that, even if there were inconsistencies in the degree of impact of Claimant's knee with the ground, an impact is not necessary for a knee to become symptomatic. Claimant could have twisted his knee and suffered significant symptoms during the fall. Dr. Motz thus concluded that the October 19, 2023 incident aggravated Claimant's pre-existing left knee osteoarthritis.

10. On December 6, 2024 the parties conducted the rebuttal post-hearing evidentiary deposition of Dr. O'Brien. He disagreed with Dr. Motz that the October 19, 2023 incident aggravated or accelerated Claimant's need for a total left knee replacement. Dr. O'Brien concluded that Claimant's need for the surgery was the same on the day before the incident and the day after. The October 19, 2023 event did nothing to affect the natural progression of Claimant's pre-existing, degenerative left knee osteoarthritis.

11. Claimant has failed to establish it is more probably true than not that he suffered a left knee injury during the course and scope of her employment with Employer on October 19, 2023. Initially, Claimant explained that on October 19, 2023 he was pushing a cart of towels into Employer's parking lot. The wheels locked and he fell over the top of the cart. Claimant asserted he struck his left knee on concrete and rolled onto he left side. He experienced a popping and burning sensation in his left knee area. Importantly, in contrast to Claimant's testimony, video of the incident does not show that Claimant's left knee actually hit the ground. Instead, the video reveals that Claimant used his arms to break his fall and rolled onto his left side. Claimant did not appear to strike his left knee and notably grabbed his right knee immediately after the incident.

12. Claimant testified that he has had no problems with his left knee since he underwent a meniscal repair 25 years earlier. He regularly performed physically demanding work involving significant walking without any left knee symptoms. However, the record reveals that Claimant suffers from chronic, degenerative osteoarthritis of the left knee. Importantly, on May 26 2020 Claimant reported to his medical provider Dr. Moore that he was experiencing left leg pain and his leg was giving out. The condition caused him to suffer multiple falls. Dr. Moore assessed Claimant with left leg weakness and monoplegia or paralysis of the left lower limb. Moreover, on April 26, 2022 Dr. Moore diagnosed Claimant with uncontrolled osteoarthritis of the left knee. By July 27, 2022 Dr. Moore also assessed Claimant with worsening derangement of the left knee. Notably, Claimant recounted his knee felt unstable and was giving out. He noted a new injury to his left knee three weeks earlier and sought an MRI. The preceding chronology contrasts with Claimant's testimony that he was not having any left knee symptoms prior to the October 19, 2023 incident. Finally, a November 8, 2023 MRI did not reveal an acute injury to Claimant's left knee. The imaging only reflected a degenerative meniscus tear and end-stage osteoarthritis.

13. Dr. O'Brien persuasively concluded that Claimant did not suffer a left knee injury as a result of the October 19, 2023 incident. He explained that, after reviewing video of the incident, Claimant landed on his hands and knees when he struck the ground. Claimant landed on his left hand, right hand, left elbow and then left hip. Claimant never contacted the ground with his left or right knees. The energy created by his body's impact with the ground was thus distributed through four points of contact. Dr. O'Brien detailed that the November 8, 2023 left knee MRI demonstrated no evidence of an acute injury. There were only chronic, degenerative changes including, most prominently, the complete loss of cartilage covering the medial femoral condyle that takes years to become evident. The MRI findings reflected end-stage arthritis of the medial compartment of the left knee that also develops over a number of years. Claimant's continuing pain constituted a manifestation of his pre-existing and long-standing left knee medial compartment arthritis. Although Claimant is currently a candidate for a total left knee replacement, the October 19, 2023 work incident neither aggravated nor accelerated his underlying arthritis and thus did not cause the need for surgical intervention.

14. In contrast, Dr. Motz explained that the October 19, 2023 fall aggravated or accelerated Claimant's need for a total left knee replacement. He diagnosed Claimant with osteoarthritis of the left knee and administered left knee viscosupplementation injections. Dr. Motz viewed the video of Claimant's accident at his deposition and determined it was consistent with Claimant's injury. He reasoned that, even if there were inconsistencies in the degree of impact of Claimant's knee with the ground, an impact is not necessary for a knee to become symptomatic. Dr. Motz further commented that, regardless of impact, Claimant could have twisted his knee and suffered significant symptoms during the fall. He thus concluded that the October 19, 2023 incident aggravated Claimant's pre-existing left knee osteoarthritis. However, Dr. Motz predicated his opinion on Claimant's lack of left knee symptoms until the October 19, 2023 event, but was not provided with medical records that revealed ongoing knee symptoms. Therefore, he was unaware of Claimant's chronic left knee pain, knee derangement, knee instability, frequent falls and leg weakness. Moreover, Dr. O'Brien disagreed with Dr. Motz that the October 19, 2023 incident aggravated or accelerated Claimant's need for a total left knee replacement. Dr. O'Brien concluded that Claimant's need for the surgery was the same on the day before the incident and the day after. The October 19, 2023 event did nothing to affect the natural progression of Claimant's pre-existing, degenerative left knee osteoarthritis.

15. The record reveals that Claimant has suffered from chronic, degenerative left knee osteoarthritis for a number of years. The October 19, 2023 incident did not accelerate his symptoms and his need for a knee replacement constitutes the natural progression of his condition. Claimant's work activities thus did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Claimant's request for Workers' Compensation benefits based on an October 19, 2023 work injury is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A

claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

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. 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 Construction 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).

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician may provide diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms, there is no mandate that the claimant suffered a compensable injury. *Fay v. East Penn Manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered a left knee injury during the course and scope of her employment with Employer on October 19, 2023. Initially, Claimant explained that on October 19, 2023 he was pushing a cart of towels into Employer's parking lot. The wheels locked and he fell over the top of the cart. Claimant asserted he struck his left knee on concrete and rolled onto he left side. He experienced a popping and burning sensation in his left knee area. Importantly, in contrast to Claimant's testimony, video of the incident does not show that Claimant's left knee actually hit the ground. Instead, the video reveals that Claimant used his arms to break his fall and rolled onto his left side. Claimant did not appear to strike his left knee and notably grabbed his right knee immediately after the incident.

9. As found, Claimant testified that he has had no problems with his left knee since he underwent a meniscal repair 25 years earlier. He regularly performed physically demanding work involving significant walking without any left knee symptoms. However, the record reveals that Claimant suffers from chronic, degenerative osteoarthritis of the left knee. Importantly, on May 26 2020 Claimant reported to his medical provider Dr. Moore that he was experiencing left leg pain and his leg was giving out. The condition caused him to suffer multiple falls. Dr. Moore assessed Claimant with left leg weakness and monoplegia or paralysis of the left lower limb. Moreover, on April 26, 2022 Dr. Moore diagnosed Claimant with uncontrolled osteoarthritis of the left knee. By July 27, 2022 Dr. Moore also assessed Claimant with worsening derangement of the left knee. Notably, Claimant recounted his knee felt unstable and was giving out. He noted a new injury to his left knee three weeks earlier and sought an MRI. The preceding chronology contrasts with Claimant's testimony that he was not having any left knee symptoms prior to the October 19, 2023 incident. Finally, a November 8, 2023 MRI did not reveal an acute injury to Claimant's left knee. The imaging only reflected a degenerative meniscus tear and end-stage osteoarthritis.

10. As found, Dr. O'Brien persuasively concluded that Claimant did not suffer a left knee injury as a result of the October 19, 2023 incident. He explained that, after reviewing video of the incident, Claimant landed on his hands and knees when he struck the ground. Claimant landed on his left hand, right hand, left elbow and then left hip. Claimant never contacted the ground with his left or right knees. The energy created by his body's impact with the ground was thus distributed through four points of contact. Dr. O'Brien detailed that the November 8, 2023 left knee MRI demonstrated no evidence of an acute injury. There were only chronic, degenerative changes including, most prominently, the complete loss of cartilage covering the medial femoral condyle that takes years to become evident. The MRI findings reflected end-stage arthritis of the medial compartment of the left knee that also develops over a number of years. Claimant's continuing pain constituted a manifestation of his pre-existing and long-standing left knee medial compartment arthritis. Although Claimant is currently a candidate for a total left knee replacement, the October 19, 2023 work incident neither aggravated nor accelerated his underlying arthritis and thus did not cause the need for surgical intervention.

11. As found, in contrast, Dr. Motz explained that the October 19, 2023 fall aggravated or accelerated Claimant's need for a total left knee replacement. He diagnosed Claimant with osteoarthritis of the left knee and administered left knee viscosupplementation injections. Dr. Motz viewed the video of Claimant's accident at his deposition and determined it was consistent with Claimant's injury. He reasoned that, even if there were inconsistencies in the degree of impact of Claimant's knee with the ground, an impact is not necessary for a knee to become symptomatic. Dr. Motz further commented that, regardless of impact, Claimant could have twisted his knee and suffered significant symptoms during the fall. He thus concluded that the October 19, 2023 incident aggravated Claimant's pre-existing left knee osteoarthritis. However, Dr. Motz predicated his opinion on Claimant's lack of left knee symptoms until the October 19, 2023 event, but was not provided with medical records that revealed ongoing knee symptoms. Therefore, he was unaware of Claimant's chronic left knee pain, knee derangement, knee instability, frequent falls and leg weakness. Moreover, Dr. O'Brien disagreed with Dr. Motz that the October 19, 2023 incident aggravated or accelerated Claimant's need for a total left knee replacement. Dr. O'Brien concluded that Claimant's need for the surgery was the same on the day before the incident and the day after. The October 19, 2023 event did nothing to affect the natural progression of Claimant's pre-existing, degenerative left knee osteoarthritis.

12. As found, the record reveals that Claimant has suffered from chronic, degenerative left knee osteoarthritis for a number of years. The October 19, 2023 incident did not accelerate his symptoms and his need for a knee replacement constitutes the natural progression of his condition. Claimant's work activities thus did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Claimant's request for Workers' Compensation benefits based on an October 19, 2023 work injury is thus denied and dismissed.

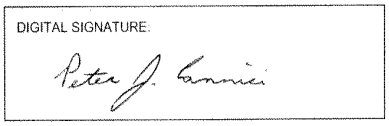
ORDER

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

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

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

DATED: January 22, 2025.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-178-983-002

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that the L5-S1 bilateral decompression and discectomy recommended by Dr. Timothy Ryken is reasonable, necessary, and causally related to Claimant's May 9, 2021 work injury.

FINDINGS OF FACT

1. Claimant suffered an admitted work injury on May 9, 2021. Ex. 3 p. 10. Claimant has not been placed at maximum medical improvement (MMI). Ex. C.

2. On May 9, 2021, Claimant was working as a sauté line cook at the Olive Garden. It was Mother's Day and very busy. Generally, sauté line cooks are required to do a lot of lifting, bending, and twisting as a part of their job.

3. On May 9, 2021, Claimant was working 6 or 7 sauté pans on separate burners in front of him. Below the burners were drawers filled with ingredients for the meals he was making. The drawers held containers of ingredients somewhere between 10 x 10 and 12 x 12 and 4 to 6 inches deep. Claimant bent over to grab a container of shrimp out of the lowest drawer. The container weighed around 10 to 11 pounds. While reaching down and grabbing the container, Claimant felt and heard a pop in the center of his low back. Claimant felt instant discomfort but not what he would describe as pain.

4. Claimant immediately informed the other line cooks about his back and then he let management know because he "knew something wasn't right." Claimant finished his shift and while waiting for the bus to head home his discomfort got worse. By the next morning, "everything became more severe" and Claimant was experiencing pain in his left leg as well as his back.

5. Claimant had no history of low back pain or left leg pain before May 9, 2021.

6. Claimant testified that he sought medical attention at Denver Health Emergency Room 24-48 hours after the incident, however no medical record of that emergency room visit was admitted into evidence. Claimant did present to the Denver Health Emergency Room for back and leg pain on June 4, 2021 and June 16, 2021. Ex. L p. 57-78; Ex. L p. 79-110. Claimant consistently reported the May 9, 2021 injury as the reason for his back and leg pain.

7. Claimant underwent a MRI on July 31, 2021. Ex. 8 p. 27-29. The MRI showed:

> L4-L5: Posterior annular fissure with a small left central protrusion. There is also a small left foraminal protrusion. Mild bilateral facet arthropathy and small facet joint effusions.

> Mild bilateral subarticular zone narrowing. Mild bilateral foraminal narrowing. No significant spinal canal narrowing.
>
> L5-S1: Mild bilateral facet arthropathy. Small bilateral facet joint effusions, greater on the left. Diffuse disc bulge with superimposed posterior annular fissure. Central and left paracentral disc extrusion with extruded contents measuring 1.4 x 0.9 x 1.4 (CC by AP by TV). There is resultant severe left subarticular zone narrowing with compression of the descending left L5 nerve root and posterior and right lateral displacement of the remaining cauda equine nerve roots. Severe spinal canal narrowing with the thecal sac measuring 5 mm in AP dimension.

Ex. 8 p. 28.

8. Claimant originally saw Dr. Andrew Castro at Orthopedic Centers of Colorado on August 16, 2021 for a surgical evaluation. Ex. 9. Claimant reported how he was injured consistent with his report at Denver Health Emergency Room. *Compare* Ex. L *with* Ex. 9. According to Dr. Castro, Claimant had a "[l]arge lumbar disc herniation at L5-S1 secondary to a lifting injury at work. I think there is a very obvious causal relationship to his ongoing symptoms and the work injury." Ex. 9 p. 32.

9. Dr. Castro discussed options with Claimant including surgical intervention. Ex. 9 p. 32. Claimant was scared of the potential negative outcomes from surgery and declined to pursue surgery at that time.

10. Claimant began treating with Dr. Hyeongo Kim on September 15, 2021. Ex. 10. Dr. Kim selected "yes" on the Colorado Department of Labor and Employment Division of Workers' Compensation (Division) Physician's Report of Worker's Compensation Injury questionnaire asking "Are your objective findings consistent with history and/or work-related mechanism of injury/illness?" *Id.* at p. 34. Dr. Kim placed temporary restrictions on Claimant's job duties, including no repetitive bending or twisting at the waist and walking and standing restrictions of no more than 15 out of every 60 minutes. *Id.*

11. Dr. Castro referred Claimant to Dr. Robert Kawasaki for non-surgical intervention of his back and leg pain. Dr. Kawasaki performed a left S1 transforminal epidural steroid injection and S1 spinal nerve root block on Claimant on November 19, 2021. Ex. 12 p. 55-56.

12. On December 8, 2021, Dr. Kim noted that Claimant had reduced pain and lower left extremity symptoms after the steroid injection and spinal nerve root block. Ex. 13 p. 59. Claimant met with Dr. Castro on December 27, 2021, and reported that his symptoms had nearly all resolved after the injection with Dr. Kawasaki. Ex. 14 p. 68.

13. By March 2022, Claimant's left-leg symptoms were returning. Ex. 15 p. 71. Dr. Castro recommended a repeat MRI to make sure Claimant's hernia had not enlarged. *Id.* at p. 72.

14. Claimant had a repeat MRI on March 24, 2022. Ex. 15 p. 72. The findings included:

> L4-L5: Desiccation and height loss of the disc. There is a small inferiorly directed central disc extrusion with mild facet arthrosis. There is mild to moderate spinal stenosis with bilateral subarticular recess stenosis and contact of the descending L5 nerves. Mild to moderate bilateral foraminal stenosis.
>
> L5-S1: Desiccation and height loss of the disc. Diffuse disc bulge with a left subarticular disc extrusion in the setting of an annular fissure. Mild facet arthrosis. Moderate spinal stenosis with left greater than right subarticular recess stenosis and compression of the descending S1 nerves. Moderate bilateral foraminal stenosis.

Id. at p. 72-73; *see* Ex. 16.

15. Claimant underwent a second left S1 transforaminal epidural steroid injection and S1 spinal nerve root block with Dr. Kawasaki on August 3, 2022. Ex. 19. Dr. Kawasaki noted that "[i]f patient fails to benefit from this injection, surgical intervention would [be] reasonable." *Id.* at p. 93.

16. Claimant reported that the second injection by Dr. Kawasaki improved his symptoms between August 2022 and February 2023. *See* Ex. 20. On February 16, 2023, Claimant returned to Dr. Kim and reported he was "doing quite well" and therefore he "wishes not to proceed with any surgical intervention as he is doing well for now." Ex. 20 p. 100.

17. Dr. John Raschbacher performed an independent medical record review on Respondents' behalf on March 10, 2023 based on a request to refer Claimant to a new neurosurgeon. Ex. J. Dr. Raschbacher opined:

> The recommendation made on 02/16/23 for another neurosurgery evaluation is not necessary and it is not reasonable. Assuming this is or was an accepted claim, then it would be related to his work injury of 05/09/21 if it were done. However, [redacted] appropriately does not wish to pursue surgery for his current level of symptomology. He is functioning quite well and therefore there is no need to consult a spinal surgeon. If the condition changes, then that would have to be reassessed.

Id. at p. 29.

18. On May 9, 2023, Claimant returned to Dr. Kim reporting that his left leg "started hurting again a few weeks ago" and "[t]he same numbness and tingling are starting to

come back again." Ex. 20 p. 100. Claimant continued reporting worsening back and leg symptoms between June and October 2023. Ex. 21-24.

19. Because Dr. Castro was no longer practicing in Colorado, Dr. Kim referred Claimant to a new neurosurgeon, Dr. Timothy Ryken. Ex. 24 p. 146; Ex. 25 p. 158.

20. On April 29, 2024, Claimant underwent a third MRI, which Dr. Raschbacher found "medically indicated in my medical opinion, that a repeat MRI of the lumbar spine be obtained and that it be compared to prior MRI to see if there has been an objective basis for complaints of worsening." Ex. J p. 33; *see* Ex. 25 p. 162.

21. On April 30, 2024, after meeting with Claimant and reviewing his medical history including the most recent MRI, Dr. Ryken's assessment was:

> Massive L5S1 disc disruption with left over right radiculopathy and cauda equine compression with sympotoms [sic]. Plan: This needs to be addressed surg[i]cally and expeditiously. In my opinion he should have had surgery after his first MRI and has been very fortunate to not have had more significant progression at this point.

Ex. 28 p. 160.

22. On May 21, 2024, Dr. F. Mark Paz performed an Independent Medical Evaluation (IME) of Claimant on Respondents' behalf. Ex. K. In his report authored July 8, 2024, Dr. Paz opined that the L5-S1 bilateral decompression and discectomy is not causally related to Claimant's May 9, 2021 work injury.

> Considering the direct history provided by [redacted] during this evaluation, the findings on physical examination, and a review of the record provided to this office, based on reasonable medical probability, it is not medically probable that the lumbar spine disc extrusions, disc bulge, and degenerative facet disease, are causally related to the May 9, 2021, referenced incident. The basis for this opinion is that the mechanism of injury, as reported by [redacted] and documented in the record available for review, is inconsistent with the diagnoses of lumbar spine disc extrusion, disc bulge, annular fissure, and degenerative joint disease.

Ex. K p. 43.

23. Respondents denied the requested surgery on the basis it was not causally related to Claimant's May 9, 2021 work injury.

24. Dr. Mark Winslow performed an IME of Claimant on Claimant's behalf on October 23, 2024. Ex. 28. Dr. Winslow opined that the L5-S1 bilateral decompression and

discectomy is reasonable, necessary, and causally related to Claimant's May 9, 2021 work injury. *Id.* at p. 200-201.

> The patient's injury mechanism (twisting, bending, and turning) is well-documented as a common cause of lumbar disc herniation. Guidelines states that there is good evidence that twisting, bending, and torsional forces are accepted mechanisms for acute lumbar disc pathology. This supports the assertion that the patient's lumbar disc herniation was directly related to the workplace injury. . . . [Dr. Paz's] IME conclusion that causality was not established is not consistent with the guidelines, as causality is well-supported by the mechanism, medical records and subsequent findings as well as in line with treating providers.

Id.

Testimony of Dr. Paz

25. Dr. Paz was admitted as an expert in internal medicine and is Level II accredited by the Division.

26. In his professional opinion, Claimant's reported mechanism of injury, bending over and lifting a container weighing approximately 10 pounds, could not have caused the lumbar disc herniations seen on Claimant's MRI. Therefore, in his opinion, it is not medically probable that the recommended surgery is causally related to Claimant's work injury.

27. Claimant's MRIs show posterior annular fissures at both L4-L5 and L5-S1. In his professional opinion, Claimant's disc herniations were not acute but rather were degenerative because "[a] degenerative change ruptures through where that annulus has deteriorated. So there's a . . . point where it breaks down and allows essentially any pressure axial loading on the spine, a load being carried in the upper extremities to break through that or it will break out without any lifting activities." Tr. p. 32 l. 2-7.

28. The most common cause of herniated discs is "lifting associated injuries" where the individual is lifting at least 30 pounds. Tr. p. 30 l. 20 – p. 31 l. 7. Bending and twisting would not cause an acute herniated disc and, further, would not aggravate a preexisting degenerative condition leading to an acute herniated disc.

29. Dr. Paz conceded that the Colorado Medical Treatment Guidelines at 7 C.C.R. 1101-3 Rule 17 Exhibit 1 state that bending and twisting can cause lumbar radiculopathy. However, lumbar radiculopathy is a symptom compared to a herniated disc which is a specific diagnosis. In his professional opinion, an individual cannot herniate a disc by bending and twisting. Therefore, while lumbar radiculopathy can be caused by bending and twisting, disc herniation cannot.

30. Dr. Paz agreed that the recommended L5-S1 bilateral decompression and discectomy recommended by Dr. Ryken is reasonable and necessary.

31. The ALJ finds Dr. Paz's opinion that bending and twisting cannot cause a disc herniation, and, therefore, that it is not medically probable that Claimant's work injury caused his herniated discs, unpersuasive. First, it appears that Dr. Paz possibly did concede that a disc can be herniated by bending and twisting without any lifting activities when he testified that there's a point where the annulus degenerates to the point where a disc "will break out without any lifting activities." Tr. p. 32 l. 2-7. Second, Claimant's consistent reports of no prior low back or left leg pain before he bent over to pick up the container of shrimp, his symptoms immediately after that injury through the date of hearing, and his medical imaging all support a finding that, at a minimum, his work injury aggravated preexisting degenerative conditions in his low back causing the disc herniations. And third, Drs. Castro, Kim, Raschbacher, and Winslow all opined that Claimant's disc herniations were causally related to his May 9, 2021 work injury. Ultimately, the ALJ finds that evidence far outweighs Dr. Paz's opinions to the contrary.

CONCLUSIONS OF LAW

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

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

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385, 389 (Colo. App. 2000).

L5-S1 Bilateral Decompression and Discectomy Surgery

Respondents are liable for medical treatment that is causally related, reasonable, and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable, necessary, and causally related is one of fact for the ALJ. *Hobirk v. Colo. Springs Sch. Dist. #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As found, Claimant has established by a preponderance of the evidence that Dr. Ryken's recommended L5-S1 Bilateral Decompression and Discectomy Surgery is reasonable, necessary, and causally related to Claimant's May 9, 2021 work injury. The great weight of the evidence supports a conclusion that Claimant's work injury caused his disc herniations at L4-L5 and L5-S1 and that the recommended surgery will help cure and relieve the effects of Claimant's work injury.

ORDER

It is therefore ordered that:

1. The recommended L5-S1 bilateral decompression and discectomy surgery is reasonable and necessary medical treatment to treat Claimant from the effects of his work injury.

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

SIGNED: January 22, 2025.

Robin E. Hoogerhyde
Administrative Law Judge

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

when filing a Petition to Review, see O.A.C.R.P. Rule 27. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-266-391-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with one or more of the Respondents.

2. Whether Claimant established by a preponderance of the evidence that one or more of the Respondents was his statutory employer pursuant to §8-41-401, C.R.S.

3. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits to cure or relieve the effects of an industrial injury.

4. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary disability benefits.

5. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. On February 20, 2024 Claimant was installing drywall on a construction project located at 966 Webb Peak Drive, in Eagle, Colorado (the "Webb Peak Project"). Claimant fell from a ladder approximately 15 feet, sustaining injuries, including, but not limited to, a head injury with loss of consciousness, and wrist fracture. (Ex. 5). Claimant was taken by Eagle County Paramedic Services to Vail Health Hospital. (Ex. 5 & 6).

2. At Vail Health, Claimant was seen in the emergency department where he was evaluated and underwent diagnostic imaging. Claimant was diagnosed with a skull fracture, subdural hematoma, subarachnoid hemorrhage, multiple facial bone fractures, and a right wrist fracture. (Ex. 6). Claimant later received treatment for his injuries at Swedish Medical Center. (Ex. 7).

3. Neither party offered witness testimony at hearing.

Stipulations

At hearing, the parties entered into the following stipulations that were approved and accepted by the ALJ:

4. Summerwood LLC I and Keystone East Ranch Corporation admit that they were uninsured for workers' compensation purposes on February 20, 2024.

5. Summerwood LLC I stipulates that it hired Elmer Martinez to perform drywall texturing work at Keystone East Ranch Corporation's 966 Webb Peak Drive project and is unaware of any workers' compensation insurance coverage maintained by Elmer Martinez.

6. Summerwood LLC I stipulates that Elmer Martinez hired Claimant .

7. Summerwood LLC I does not challenge that Claimant was injured in the course and scope of his employment with Elmer Martinez on February 20, 2024 on the Webb Peak Project.

8. Summerwood LLC I stipulates based upon the above that it is a statutory employer of Claimant for workers' compensation purposes.

9. Summerwood LLC I does not challenge that Claimant has had restrictions that impair his ability to do his pre-injury employment - specifically no heavy lifting and activity as tolerated as of February 21, 2024 ongoing.

10. Summerwood LLC I does not challenge that Claimant has been off work due to his injury since February 21, 2024.

11. Summerwood LLC I does not challenge that Claimant has obtained reasonable and necessary medical care through Eagle County Paramedic Services, Swedish Medical Center, and Vail Health Center.

12. Summerwood LLC I does not challenge that Claimant's average weekly wage at the time of injury was $940.00.

13. Claimant agrees to dismiss with prejudice Louis and Jules Glisan from this matter.

14. Claimant agrees to dismiss without prejudice Keystone East Ranch Corporation and further agrees that he will not make a claim as to Keystone East Ranch Corporation as a potential statutory employer unless the Colorado Uninsured Employer Fund is unable to provide him benefits due to the insolvency of the fund.

15. In the event that Keystone East Ranch Corporation is ever pursued by either Claimant or the Colorado Uninsured Employer Fund regarding the events of this case, the admissions and stipulations of Summerwood LLC I may not be imputed to Keystone East Ranch Corporation, though said admissions and stipulations are not confidential.

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

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove his injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, *supra*. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co, supra*; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014).

By virtue of the parties' stipulations, and the admitted exhibits, Claimant has established by a preponderance of the evidence that he sustained injuries arising out of the course of his employment on February 20, 2024.

Statutory Employer

Under § 8-41-401(1)(a), C.R.S., an entity which contracts out part or all of its work to any contractor is the statutory employer of the contractor and the contractor's employees. Section 8-41-401(1)(a), C.R.S., renders a general contractor liable for injuries to employees of a subcontractor if the general contractor contracted out part of its regular business operation to the subcontractor. Section 8-41-401(2), C.R.S., prevents an injured employee from reaching "upstream" to impose liability on the general contractor if the subcontractor has procured insurance which covers the injury. The general test to determine an entity's status as a statutory employer "is whether the work contracted out is part of the regular business of the constructive employer." *Finlay v. Storage Tech. Corp.*, 733 P.2d 322, 323 (Colo. App. 1986).

Based on the parties' stipulations, Claimant has established, by a preponderance of the evidence, that Summerwood LLC I was a statutory employer under § 8-41-401(1)(a), C.R.S., with respect to Claimant at the time of his injury.

Medical Benefits

An injured employee is entitled to medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. § 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. Colo. Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

By virtue of the parties' stipulations, and the admitted exhibits, Claimant has established that he is entitled to reasonable medical treatment necessary to cure or relieve the effects of his February 20, 2024 industrial injury, including treatment received from Eagle County Paramedic Services, Vail Health Hospital, and Swedish Medical Center.

Temporary Disability Benefits

To prove entitlement to temporary disability benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Temporary disability 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.; See also § 8-42-106 (1)(b), C.R.S. (for temporary partial disability benefits) The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) *citing Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)).

By virtue of the parties' stipulations, and the admitted exhibits, Claimant has established that he is entitled to temporary disability benefits from February 21, 2024 until terminated pursuant to the Act.

Average Weekly Wage

Section 8-42-102(2), C.R.S., requires the ALJ to calculate a claimant's average weekly wage (AWW) based on a claimant's monthly, weekly, daily, hourly, or other earnings. The overall objective in calculating the AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., *supra*; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007).

By virtue of the parties' stipulations, Claimant has established that his average weekly wage at the time of injury was $940.00.

ORDER

It is therefore ordered that:

1. Respondent Summerwood LLC I was Claimant's statutory employer on February 20, 2024 pursuant to § 8-41-401, C.R.S.

2. Claimant sustained a compensable injury on February 20, 2024, arising out of his relationship with Summerwood LLC I as a statutory employer.

3. Respondents were uninsured and did not carry workers compensation insurance at the time of Claimant's injury.

4. Claimant is entitled authorized medical care that is reasonable and necessary to cure or relieve the effects of his February 20, 2024 industrial injury.

5. Claimant is entitled to temporary disability benefits beginning February 21, 2024, until terminated pursuant to the Act.

6. Claimant's average weekly wage at the time of injury was $940.00.

7. Respondent Louis Glisan and Jules Glisan are dismissed with prejudice.

8. Respondent Keystone East Ranch Corporation is dismissed without prejudice. Claimant will not make a claim as to Keystone East Ranch Corporation as a potential statutory employer unless the Colorado Uninsured Employer Fund is unable to provide him benefits due to the insolvency of the Fund.

9. The admissions and stipulations of Summerwood LLC I as set forth in paragraphs 5-12 of this Order may not be imputed to Keystone East Ranch Corporation, though said admissions and stipulations are not confidential.

10. 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: January 22, 2025

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that his claim should be reopened for medical benefits pursuant to section 8-43-303(2)(b), C.R.S.

2. Whether Claimant has proven by a preponderance of the evidence that the C4-C5 anterior discectomy and fusion (ACDF) surgery recommended by Dr. Randall Allison is reasonably necessary to cure and relieve Claimant of the effects of his December 5, 2022 work injury.

FINDINGS OF FACT

Initial Work Injury

1. On December 5, 2022, Claimant sustained an admitted industrial injury, when he fell off a roof. Ex. C. Two days after his fall, Claimant presented at Middle Park Health Granby Emergency Department and was diagnosed with several fractured ribs on his left side, cervicalgia, pain in his left elbow, and pain in his left hip. Ex. G. Claimant also reported his right arm felt "a little shaky and weak," Ex. G p. 45, and Claimant had decreased sensation over his right arm, Ex. 3 p. 44.

2. Claimant underwent a CT scan of his cervical spine on December 7, 2022. Ex. 3 p. 35-36. The scan showed evidence of "[t]race degenerative anterolisthesis C4-5. Multilevel facet arthrosis appearing severe on the left at C4-5 and C5-6 and right C3-4 level . . . ." *Id.*

3. Claimant was seen by his employer designated authorized treating physician (ATP) Dr. Mark Paulsen starting on December 28, 2022. Ex. G p. 58. Claimant reported his neck was "very stiff" and he had left-side complaints throughout his body. *Id.* After his fractured ribs healed, Claimant continued to see Dr. Paulsen for neck pain. *See generally* Ex. G.

4. Dr. Paulsen referred Claimant to Dr. Patrick Bevan for an orthopedic evaluation. Ex. G p. 65-66. Due to Claimant's continued pain, Claimant was also evaluated by Dr. Matthew Eckermann, who recommended Claimant undergo bilateral C3-C6 medial branch blocks as well as a cervical MRI. Ex. G p. 71.

5. On February 28, 2023, Claimant had an MRI of his cervical spine. Ex. I p. 252. The MRI findings were:

> Trace degenerative anterolisthesis at C4-5.
> No vertebral body fracture.
> Multilevel disc desiccation and mild-to-moderate loss of disc space height.

> Left-sided facet joint effusions at C4-5 and C5-6.
>
> . . . .
>
> C2-C3: Mild to moderate facet arthropathy. No significant canal or foraminal narrowing.
>
> C3-C4: Severe right and mild left-sided facet arthropathy. Mild disc osteophyte complex. No canal narrowing. Mild to moderate bilateral foraminal narrowing.
>
> C4-C5: Mild right and severe left-sided facet arthropathy. Large central disc extrusion causing severe canal narrowing and mild cord compression. Moderate right and severe left-sided foraminal narrowing.
>
> C5-C6: Mild right and severe left-sided facet arthropathy. Tiny central disc protrusion and mild endplate spurring. No canal narrowing. Mild right and mild-to-moderate left-sided foraminal narrowing.
>
> C6-C7: Mild to moderate facet arthropathy. No significant canal or foraminal narrowing.
>
> C7-T1: Mild bilateral uncovertebral spurring. No significant canal or foraminal narrowing.

Ex. I p. 252.

6. On March 10, 2023, Claimant underwent bilateral C3-C5 branch blocks with Dr. Eckermann. Ex. G p. 82. Claimant also underwent physical therapy to address his neck pain.

7. On March 28, 2023, Claimant saw Dr. Paulsen and complained of left shoulder pain with overhead activities. Ex. G p. 90. Claimant received a corticosteroid injection to address his shoulder pain. Ex. G p. 95.

8. On April 21, 2023, Claimant underwent bilateral radiofrequency ablations at C3-C5 with Dr. Eckermann. Ex. G p. 100. On June 30, 2023, Dr. Eckermann administered bilateral occipital nerve blocks to Claimant. Ex. G p. 109.

MMI and Maintenance Care

9. Dr. Paulsen placed Claimant at maximum medical improvement (MMI) on September 13, 2023, without impairment or work restrictions. Ex. G p. 119 ("His shoulder pain resolved completely and he has had excellent progress after cervical spine injections from the pain service. At present he feels like he is at MMI, but still wonders if he may not have another recurrence of the neck pain. He is at full duty, no work restrictions, and

is not needing any further physical therapy."); Ex. G p. 121 ("We discussed how he is doing and agree that he is at MMI as of today.").

10. For maintenance treatment, Dr. Paulsen stated that Claimant "will need maintenance therapy, particularly follow-up with the pain service, potentially could need injections and physical therapy again." Ex. G p. 121.

11. On September 20, 2023, Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Paulsen's findings. Ex. C p. 11.

Medical Treatment Since Placed at MMI in September 2023

12. On January 17, 2024, Claimant returned to Dr. Paulsen complaining of "worsening stiffness and pain" without radicular symptoms. Ex. G p. 127. Dr. Paulsen referred Claimant back to Dr. Eckermann. *Id.*

13. Claimant met with Dr. Eckermann on February 9, 2024. Ex. G p. 132. Claimant reported his current neck pain was right-sided in nature. *Id.* According to Dr. Eckermann, Claimant "has had large C4-5 cervical disc herniation causing severe spinal stenosis but until now patient has not been symptomatic from the disc herniation." *Id.* Dr. Eckermann discussed the case with Dr. Randall Allison and recommended a MRI to reevaluate Claimant's C4-C5 disc herniation. *Id.*

14. Claimant met with Dr. Allison on February 19, 2024. Ex. D p. 15. Dr. Allison's notes state:

> [Claimant] is a 61 y.o. male w/ C4/5 severe cervical stenosis s/p fall from a ladder. Has not improved over the past year with conservative management. Pain in the neck and shoulder consistent with C5 radiculopathy. Will plan for C4/5 ACDF [anterior discectomy and fusion]. Both operative and nonoperative courses discussed in detail. Given his cord compression I think cervical decompression is appropriate.

Id. at p. 16.

15. Dr. Marjorie Eskay-Auerbach reviewed Dr. Allison's request for surgical authorization for a C4-C5 ACDF for Claimant. Ex. F. According to Dr. Eskay-Auerbach, "the requested surgery may be medically reasonable and necessary; however, it is not work related. The findings on MRI of an extruded disc are related to degenerative changes in the cervical spine consistent with age related changes." *Id.* at p. 38. Dr. Eskay-Auerbach opined "there is no mechanism of injury to cause a cervical disc herniation as the incident [is] described, and cervical stenosis is a degenerative change and unrelated to trauma." *Id.*

16. Monika Koehler, PA-C, wrote a letter appealing the denial. Ex. D p. 18. According to PA Koehler, Claimant's previous diagnoses of shoulder pain in March 2023 was in fact radiculopathy likely caused by the disc herniation at C4-C5. *Id.*

17. Dr. Eskay-Auerbach did not change her opinion based on the appeal. Ex. F p. 40-41. Dr. Eskay-Auerbach wrote:

> If the subject occupational event was the cause of [redacted] condition, he would have presented with acute radiculopathy or myelopathy, which he did not. He presented with only pain, with no neurological def[i]cits. There are no neurological findings on examination after the occupational incident to suggest that [redacted] multilevel degenerative spondylosis and in particular a disc herniation at C4-5 was symptomatic. My opinion remains unchanged with respect to the work relatedness of this incident.

18. Dr. Qing-Min Chen performed an independent medical examination (IME) of Claimant on behalf of Respondents on August 23, 2024. Ex. E. Like Dr. Eskay-Auerbach, Dr. Chen concluded that Claimant's current symptoms were a result of degenerative changes and not his December 2022 injury. *Id.* p. 25 ("If this is truly an acute traumatic disc extrusion, one would expect nerve related issues and/or myelopathic findings, which is not the case here. For all these reasons, while the claimant does have a C4-C5 disc extrusion, it does not appear to be work related and does not appear to be causing any specific symptoms that are objectively verifiable.").

19. Claimant reported to Dr. Chen that his current symptoms were pain, ache, shooting, tender, weak, and sore. Ex. E p. 32. Claimant did not report spasms or numbness. *Id.*

Claimant

20. Claimant testified that prior to his December 5, 2022 fall, he had no neck or shoulder pain.

21. After his fall, Claimant underwent physical therapy, injections, and ablations to treat his neck and shoulder pain. Claimant testified the injections and ablations helped "for a little bit" but the effects did not last and did not help with his "arm movement." Claimant was still experiencing neck and shoulder pain at the time Dr. Paulsen placed him at MMI but he wanted to go back to work.

22. Claimant testified that his symptoms have worsened since he was placed at MMI by Dr. Paulsen. After being placed at MMI, he began experiencing shockwaves of pain moving through his chest and down into his legs. He cannot use his hands at times because they shake.

23. The surgery recommended by Dr. Allison was not recommended to Claimant prior to his being placed at MMI.

24. Claimant has not had any additional neck injuries since his December 5, 2022 fall.

25. The ALJ finds Claimant's testimony credible based on his consistent reporting, reasonableness, motives, and demeanor.

Dr. Randall Allison

26. Dr. Allison was admitted as an expert in neurosurgery at the hearing and is Level I accredited by the Colorado Department of Labor and Employment Division of Workers' Compensation (Division). Dr. Allison is one of Claimant's treating physicians.

27. Dr. Allison met with Claimant in February 2024. From reviewing Claimant's medical records and speaking with Claimant, Dr. Allison concluded Claimant experienced a fall after which he has had pain in his neck that has waxed and waned over the past two years.

28. With a fall from 8-10 feet, it is unsurprising that Claimant would have the type of symptoms he is currently experiencing. The worsening of Claimant's symptoms are due to the spinal cord compression and spinal nerve compression he is experiencing where the C4-C5 disc is herniated. An ACDF at C4-C5 would improve that compression and, therefore, Claimant's symptoms and condition.

29. There is evidence of Claimant's herniated disc at C4-C5 that can be seen on the CT scan that was done at the hospital immediately after Claimant's fall. *See* Ex. 3 p. 35-36. The CT scan revealed anterolisthesis of the C4 vertebrae over the C5 vertebrae which is usually a direct result of some ligamentous straining.

30. In his professional opinion, Claimant has had a worsening of condition since Claimant was placed at MMI in September 2023. By the time he saw Claimant in February 2024, Claimant's radiofrequency ablations had worn off resulting in a return of his axial neck pain and he reported burning radicular pain into his right shoulder.

31. In his professional opinion, Claimant's work injury is the cause of Claimant's current pathology because Claimant had no cervical pain prior to the December 2022 fall. Considering Claimant's MRIs and medical history, it is more probable than not that Claimant's fall either caused or exacerbated the disc herniation at C4-C5 and that disc herniation is causing both nerve compression and spinal cord compression at C4-C5.

32. In his professional opinion, Claimant has been experiencing radicular symptoms since his December 2022 fall. The shoulder pain Claimant complained of in March 2023 was more likely than not radiculopathy from stenosis at C4-C5 because it is along the exact distribution of C5 nerve root. Claimant underwent physical therapy and stretching which would relieve his symptoms for a period of time but the symptoms would then worsen, which is typical with a compressed nerve.

33. Delayed onset of symptoms is common in cases of acute injury. An individual can injure a joint and have the onset of symptoms days, months, and years after the injury. In his professional opinion, Dr. Chen's opinion that had Claimant's work injury caused or aggravated the herniated disc at C4-C5, then Claimant would have had an acute onset

of radicular symptoms at the time of the fall is too absolute as symptoms can develop at different times.

34. In his professional opinion, the anterolisthesis seen on the December 7, 2022 CT scan is evidence of Claimant's neck ligaments being stretched or torn as a result of his fall. Over time, with the ligaments not as strong as they need to be, degeneration and disc herniation can occur. Thus, the onset of Claimant's radicular symptoms are because of degenerative changes caused by Claimant's work injury.

35. Dr. Allison testified that regardless of whether Claimant experienced radicular symptoms immediately after the fall or only later, Claimant still requires the recommended surgery because he has spinal cord compression and spinal nerve compression.

36. It is possible, but not probable, that Claimant's fall did not cause or exacerbate the disc herniation at C4-C5. Without pre-injury and post-injury imaging to conclusively determine that the fall was the cause of the herniation, he relied on Claimant's symptoms of having no neck pain prior to the fall and neck pain after the fall, along with imaging showing disc herniation, to determine there is a direct correlation between Claimant's injury, herniated disc, and neck pain. Because he first saw Claimant 14 months after the fall, he would not call Claimant's disc hernia an "acute herniation" but instead a disc that has degraded after trauma to then cause the symptoms Claimant presented with in February 2024.

37. In his professional opinion, the recommended surgery is reasonable, necessary, and causally related to Claimant's December 5, 2022 work injury. The surgery is reasonable and necessary because Claimant has a compressed spinal cord and compressed nerves at C4-C5, which feed into the shoulders and arms. During his examination of Claimant, he noted Claimant was having burning pains in his shoulders as well as burning pains into the back of the neck and pains in the axial spine in the neck which can be apparent with a disc collapse like Claimant has. Further, Claimant's spinal cord compression is dangerous because you can lose sensation and motor function "from that level below as time goes on if that degeneration worsens" although Claimant was not experiencing myelopathy the time of his examination. And the surgery is causally related because Claimant had no cervical pain prior to his December 2022 work injury.

38. There are no less intrusive options available to Claimant at this point because Claimant has gone through the less invasive recommendations (physical therapy, stretching exercises, injections, and radiofrequency ablations) and he continues to have unresolved symptoms.

39. The recommended surgery is both meant to cure Claimant's current symptoms and prevent myelopathy based on the severe stenosis of Claimant's spine documented in his MRIs. It is because of the herniated disc at C4-C5 that Claimant is at risk of myelopathy. The additional stenosis documented in Claimant's MRIs does not put him at risk of myelopathy because that stenosis is not impinging on Claimant's spinal cord.

40. Dr. Allison conceded that when looking at Claimant's imaging alone, one cannot tell if Claimant's herniated disc was caused by acute trauma or degenerative changes. But because Claimant had no neck pain prior to his work injury, it was more probable that the herniated disc was the eventual result of his fall on December 5, 2022. This conclusion is supported by the anterolisthesis seen on Claimant's December 7, 2022 CT scan.

41. Overall, the ALJ finds the opinions of Dr. Allison to be credible and persuasive evidence that Claimant has experienced a worsening in his work-related medical condition to the extent he is no longer at MMI and that there are further medical benefits, specifically an ACDF at C4-C5, that are reasonably expected to improve Claimant's condition.

42. Overall, the ALJ finds the opinions of Dr. Allison to be credible and persuasive evidence that the ACDF at C4-C5 is reasonable, necessary, and casually related to Claimant's December 5, 2022 work injury.

Dr. Qing-Min Chen

43. Dr. Chen was admitted as an expert in orthopedic surgery at the hearing and is Level II accredited by the Division. Dr. Chen was hired by Respondents to complete an IME of Claimant.

44. When Claimant presented for his IME on August 23, 2024, he reported tremors in both his arms but did not report radicular pain, which consists of numbness, tingling, and sensory loss. Dr. Chen testified that tremors indicate a neurological problem rather than spinal cord compression and spinal nerve compression which is what the ACDF of Claimant's C4-C5 vertebra is meant to address.

45. Dr. Chen testified Claimant's MRI does show a disc herniation at C4-C5 which is pressing on a nerve, however, had that herniation been caused by his work injury he should have immediately felt radicular symptoms. In his professional opinion, Claimant suffered a cervical strain at the time of his fall and there was no acute disc herniation at C4-C5.

46. There were no significant changes to Claimant's cervical spine between his 2023 and 2024 MRIs. In his opinion, based on Claimant's age and multiple degenerative disc disease, Ex. E p. 34, Claimant having a spontaneous onset of symptoms from a herniated disc, rather than an onset from his work injury, is not surprising. Dr. Chen testified that in his professional opinion, "there is certainly some amount of coincidence but pathologically speaking on an MRI I don't see any objective evidence or permanent aggravation or even temporary aggravation really."

47. Claimant's medical records from prior to the December 2022 work injury establish that Claimant was previously diagnosed with chronic pain in his lumbar and thoracic spine. *See* Ex. H p. 157. In his professional opinion, this diagnosis indicates surgery is not reasonable for Claimant at this time because he should undergo a psychological

evaluation to address that chronic pain pursuant to W.C.R.P. Rule 17 Exhibit 8 Recommendation 123 and Recommendation 145.

48. In his professional opinion, the recommended surgery is not reasonable or necessary. Claimant has chronic pain, uses tobacco, and did not indicate radicular pain when examined in August 2024. Dr. Chen testified that according to W.C.R.P. Rule 17 Exhibit 8 Recommendations 123 and 145, these factors weigh against the recommended surgery being reasonable and necessary.

49. Dr. Chen conceded that documentation from Claimant's medical records showed that in March 2023, Claimant showed greater than 90% pain relief with the bilateral medial branch blocks at C3-C5. Ex. 7 p. 564. While Claimant later reported to him that he received 50-60% pain relief from those procedures, Ex. E p. 21, generally a finding of more than 80% pain relief is considered diagnostic.

50. Dr. Chen agreed that Claimant has undergone a change in condition since he was placed at MMI.

51. Dr. Chen also agreed that C5 radiculopathy can present itself as shoulder pain and that after Claimant was placed at MMI he returned to Dr. Paulsen and Dr. Eckermann complaining of right shoulder pain.

52. And Dr. Chen conceded that on December 7, 2022, when Claimant presented to the hospital, it was noted that Claimant had decreased sensation over his right arm, Ex. 3 p. 44, and that decreased sensation "can be" a symptom of radiculopathy.

53. The ALJ finds the opinions of Dr. Chen less credible and persuasive than those of Dr. Allison. Dr. Chen's opinion that Claimant's 8-10 foot fall from a roof with force enough to cause multiple fractured ribs only resulted in Claimant experiencing a cervical strain is incredible based on the objective medical evidence in the record. A CT scan two days after the injury showed possible evidence of a herniated disc at C4-C5 and at that time Claimant complained of right arm weakness and it was noted he had decreased sensation in his right arm. An MRI three months after the fall confirmed Claimant had a herniated disc at C4-C5. Claimant underwent medial branch blocks and radiofrequency ablations at C3-C5, with diagnostically significant relief of his symptoms, indicating Claimant's pain is being generated from C3-C5. And Claimant had no prior history of neck pain before the fall. These facts make it more likely than not that Claimant's fall caused or exacerbated that herniated disc and Dr. Chen's opinions to the contrary are unpersuasive. And Dr. Chen's conceded Claimant has undergone a change in his condition since being placed at MMI.

54. The totality of the evidence at hearing supports a finding that Claimant has experienced a worsening in his work-related condition to the extent that he is no longer at MMI.

CONCLUSIONS OF LAW

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

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

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385, 389 (Colo. App. 2000).

Petition to Reopen

Section 8-43-303(1), C.R.S., authorizes the reopening of a claim on a number of grounds, including error, mistake, or a change in condition. The claimant bears the burden of proof to establish, by a preponderance of the evidence, that the worsening of their physical or mental condition is causally related to the industrial injury. § 8-43-303(4), C.R.S.; *Richards v. Indus. Claim Appeals Off.*, 996 P.2d 756, 758 (Colo. App. 2000). However, a change of condition by itself is not sufficient to justify reopening, and the claimant must also establish that reopening is appropriate because the claimant's degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Id.*

By contrast, under *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1988), once respondents admit for maintenance medical benefits after MMI, the claimant is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity. In turn, once admitted, "[b]ecause future maintenance medical benefits are, by their very nature, not yet awarded, those benefits remain open and are not closed by an otherwise closed FAL." *Bolton v. Indus. Claim Appeals Off.*, 2019 COA 47, ¶ 24. Accordingly, since the issue of medical maintenance benefits has not closed based on the FAL, a claimant does not need to seek reopening to obtain future medical maintenance benefits as admitted under *Grover*. Instead, the claimant only needs to apply for a hearing in cases where the respondents refused payment for specific maintenance treatment that has been denied as unrelated, unreasonable or unnecessary. *Walker v. Life Care Ctrs. of Am.*, W.C. No. 4-953-561-02 (Mar. 30, 2017) (citing § 8-43-203(2)(d), C.R.S. (once any liability is admitted, payments shall continue according to admitted liability)).

Since reopening a claim to obtain general maintenance medical benefits is not possible because the issue of maintenance medical care is not closed, to justify reopening a claim to obtain further medical benefits, a claimant has to establish that his condition has worsened to the extent that he is no longer at MMI and there are further medical benefits that "are reasonably expected to improve the condition." *See Mockmore v. Joslins*, W.C. No. 4-343-875 (Apr. 8, 2005). Indeed, the Act expressly recognizes the distinction between maintenance medical benefits and further medical benefits to improve a claimant's condition. Namely, the Act provides that MMI means 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." § 8-40-201(11.5), C.R.S. However, the Act further clarifies "[t]he requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement."

As discussed above, based on the totality of the evidence, the ALJ concludes that Claimant has established that it is more likely than not that he has experienced a worsening in his work-related condition so that he is no longer at MMI and that there are further medical benefits that are reasonable expected to improve his condition. Therefore, Claimant has established reopening of his claim pursuant to section 8-43-303(1).

C4-C5 ACDF

"Section 8-42-101(1)(a), C.R.S. provides that the respondent is liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury." *Adame v. SSC Berthoud Operating Co.*, WC 4-784-709 (ICAO Jan. 25, 2012). The Colorado Medical Treatment Guidelines (Guidelines) are contained in W.C.R.P. Rule 17, 7 C.C.R. 1101-3, and "are regarded as accepted professional standards for care under the Workers' Compensation Act." *Id.* (citing *Rook v. Indus. Claim Appeals Off.*, 111 P.3d 549 (Colo. App. 2005)). "It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is

reasonable and necessary for the claimant's condition." *Id.* However, an ALJ is not mandated to "award or deny medical benefits based on the Guidelines." *Id.*

As found, Claimant established by a preponderance of the evidence that the recommended C4-C5 ACDF is reasonable and necessary to treat Claimant for the effects of his work injury. As credibly testified to by Dr. Allison, Claimant's disc herniation at C4-C5 was either caused by or exacerbated by his December 5, 2022 fall and that herniation is causing spinal cord and nerve compression. An ACDF at C4-C5 is expected to relieve that compression. Therefore, the recommended ACDF is reasonable and necessary medical treatment to treat Claimant from the effects of his work injury.

While there was testimony by Dr. Chen that certain prerequisites to spinal fusion surgery included in W.C.R.P. Rule 17 Exhibit 8 Recommendations 123 and 145 have not been met, based on the totality of the evidence the ALJ determines that any failure to satisfy all prerequisites in those recommendations, such as to complete a psychological evaluation of Claimant or to engage Claimant in tobacco cessation efforts, does not prevent a finding and conclusion that the recommended surgery is reasonable and necessary.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his claim is granted.

2. The recommended C4-C5 ACDF is reasonable and necessary medical treatment to treat Claimant from the effects of his work injury.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see O.A.C.R.P. Rule 27 (1 C.C.R. 104-3). You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

SIGNED: January 23, 2025.

Robin E. Hoogerhyde
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-271-836-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable right lower extremity injuries during the course and scope of employment with Employer on April 19, 2024.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable and necessary medical benefits that are causally related to his April 19, 2024 injuries.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period April 30, 2024 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 45 year old male with a date of birth of July 22, 1979. He alleges a right knee injury that occurred at work on April 19, 2024. He was working for Employer as a drywall finisher and completing the final punch list of drywall repairs in newly-built homes. Claimant asserts he opened a closet door and fell into a crawlspace hole in the floor.

2. Claimant detailed that he arrived at work a 7:00 a.m. on April 19, 2024. He remarked that a supervisor with the general contractor for the project opened the garage door of the house to let him inside. As he was inspecting the work to be done, he found a small closet that required drywall repairs. As he opened the closet door, he took a step inside with his left leg and fell into a crawlspace hole. Claimant explained that he twisted his right knee when he fell into the crawlspace. Claimant contacted his supervisor KV who was in Colorado Springs. JO arrived to help Claimant at the scene.

3. The crawlspace into which Claimant fell is inside a small closet between the great room and dining area of the home. It is across from the kitchen island. The floor of the closet is almost entirely taken up by the crawlspace access, with only a few inches on either side of the crawlspace hole. The crawlspace hole is rectangular, with the shorter sides to the door and rear of the closet. Based on the tape measure pictured in photographs admitted into evidence, the entire closet space is approximately 24 inches by 30 inches. The hole itself is about 16 inches by 22 inches. There is an access cover for the crawlspace that matches the flooring material for the closet. In a finished home, the cover is placed over the hole, flush with the floor.

4. JO testified through an evidentiary deposition in this matter on November 8, 2024. He was a construction manager for general contractor Century Communities on the project. JO met Claimant on the morning of April 19, 2024 outside of the garage door about 7:15 a.m. JO unlocked the house for Claimant. JO testified he walked Claimant through the house to show

him necessary drywall repairs. Notably, JO opened this closet and showed Claimant there was a spot inside the closet, at eye level, that needed to be repaired. The access cover was over the hole, although not flush. JO specifically explained that the cover was turned so it was sitting on top of the hole. There was a gap between the sides so building inspectors had easy access to the crawlspace.

5. Approximately 30-40 minutes later, JO received a call from KV stating that Claimant had fallen. JO went to the house. JO remarked that Claimant was lying on the ground outside the closet when he arrived. Claimant told him one of his feet went down the hole and he injured his right knee. JO noticed the cover over the hole was pushed down, and it looked as if Claimant had stepped on the lid. He commented that, because the cover was pushed down, Claimant's "leg must have gone through the front side of where the access is." JO helped Claimant over to the wall to sit up. Claimant pulled up the pant leg and showed him the injured knee.

6. KV testified through an evidentiary deposition in this matter on November 8, 2024. KV was Claimant's supervisor on the date of the incident. He explained that Claimant called him on the morning of April 19, 2024 and told him he had fallen into the crawlspace area. KV drove to the location of the incident after receiving the call. In the meantime, he called JO to check on Claimant. When KV arrived at the location, Claimant was sitting on the floor, leaning against the wall. Claimant reported he opened the closet looking for drywall touchups and stepped into the open crawlspace. One leg was inside the closet while the other leg remained on top of the floor. Notably, KV explained that the crawlspace access cover was off the hole. He detailed that the access cover was not over the hole because, if an inspector comes and it is not open, the inspection will not occur. Notably, the house was getting ready for a final inspection because it was ready to be occupied. The crawlspace remains partially open because there is no specific time for the inspector to arrive.

7. On April 19, 2024 Claimant visited Care Now Urgent Care for his right leg injury. He was evaluated by Nurse Practitioner Lisa Blackwater. Claimant recounted that he was opening and inspecting a closet that had a crawlspace. The crawlspace was uncovered. As he took a step, he fell through the hole up to his right knee while his left leg remained at floor level. A physical examination revealed mild right knee swelling and an open wound. A right knee x-ray showed joint effusion. Claimant received a soft knee brace because of swelling and fluid in the right knee. He was advised to take Ibuprofen and follow-up. NP Blackwater assigned work restrictions and noted Claimant could return to modified duty on the following day.

8. An Employee Incident Report was prepared on April 19, 2024. Claimant recorded that as he was going into a closet, he fell into an access hole to the basement. His right knee remained outside. The crawlspace did not have a cover.

9. On April 23, 2024 Claimant returned to Care Now Urgent Care and visited Physician's Assistant Ashley Nichols. PA Nichols recorded in the "initial history" that Claimant was opening and inspecting a closet that had a crawlspace. The crawlspace was uncovered. As he took a step, he fell through the hole up to his right knee while his left leg remained at floor level. However, in the "interval history" PA Nichols recorded that when Claimant was working on April 19, 2024, he stepped with his left foot into a hole in the closet of a jobsite. He

fell through the hole with his left lower extremity. Claimant's right knee was wedged against the door frame of the closet with his leg bent and ankle against the ground. His hip was in external rotation and abducted. Claimant remarked that he did not directly hit his knee on any surfaces, but had some knee pain from the force of the fall. After conducting a physical examination, PA Nichols assessed Claimant with sprains of the right knee and right ankle, a contusion of the right hip and an effusion of the right knee. She assigned work restrictions including no lifting carrying, pushing/pulling in excess of five pounds. PA Nichols also restricted Claimant from crawling, kneeling, squatting or climbing. She advised Claimant to use crutches and referred him for a right knee MRI.

10. Claimant continued to work for Employer in a restricted capacity until April 29, 2024. He explained that he ceased employment because it was very difficult for him to continue working with his injury. However, on cross-examination Claimant revealed that he has occasionally worked drywall jobs for friends since the date of injury, He summarized that he completed a total of about four jobs. He earned $170.00 from the first job and $250.00 from the second job, but could not recall the amounts he earned from the other projects.

11. On April 26, 2024 Claimant underwent a right knee MRI. The imaging included the following: (1) a full-thickness complete rupture of the distal PCL; (2) a high grade partial to full thickness ACL tear; (3) posteromedial corner strain with medial meniscocapsular junction injury; (4) a grade 3 MCL injury with tears of the proximal and distal portions of the MCL; (5) a grade 1 LCL strain; and (6) moderate joint effusion with synovitis and diffuse soft tissue edema.

12. On May 1, 2024 Claimant returned to Care Now and visited Jessica Leitl, M.D. Dr. Leitl diagnosed Claimant with various strains of the right knee. She assigned work restrictions of no crawling, kneeling, squatting or climbing. Dr. Leitl also noted seated work only.

13. On May 7, 2024 Claimant visited Scott Resig, M.D. at Orthopedic Centers of Colorado for an examination. Dr. Resig recounted that Claimant fell through a hole in a floor at work and injured his right knee and ankle on April 19, 2024. He noted Claimant's right knee MRI demonstrated full-thickness tears of the PCL and ACL, posteromedial corner strain with meniscal capsular injury, what appeared to be a complete MCL sprain, and moderate posterolateral corner sprain. After conducting a physical examination, Dr. Resig assessed Claimant with injuries to multiple structures of the right knee and a right ankle sprain.

14. On May 10, 2024 Claimant visited Justin Newman, M.D. at Orthopedic Centers of Colorado for an examination. Dr. Newman recounted that Claimant injured his right knee at work. Claimant fell through the floor and suffered a "significant rotational" right knee injury. Dr. Newman reviewed the April 26, 2024, right knee MRI as well as the MRI of the same knee two years earlier. The prior MRI only showed increased signal within the medial meniscus, but no change to cartilage about patellofemoral reticulation. Dr. Newman recommended right knee surgery in the form of a right knee medial collateral reconstruction with allograft, double bundle posterior cruciate ligament reconstruction with allograft, and anterior cruciate ligament reconstruction allograft with possible meniscal repair.

15. On June 4, 2024 Physician Advisor Michael S. Hewitt, M.D. provided a medical opinion regarding Dr. Newman's request for surgery. He recounted that on April 19, 2024 while

Claimant was at work, he was in a kitchen and went to inspect a closet. Claimant's right leg fell through an open crawlspace and his left leg remained on the floor. Dr. Hewitt determined Claimant sustained a well-documented acute injury to the right knee at work on April 19, 2024. An MRI reflected a three-ligament injury to the knee. Dr. Hewitt noted that Dr. Newman had reviewed a right knee MRI from two years earlier that revealed no change in cartilage status or previous ligament injuries. He recommended approval of the surgery suggested by orthopedic surgeon Dr. Newman.

16. On October 23, 2024 Claimant underwent an Independent Medical Examination (IME) with Elizabeth Wilcox, M.D. Dr. Wilcox had previously evaluated Claimant on October 27, 2023 in a prior, overlapping claim. She also testified at the hearing in this matter. Dr. Wilcox reviewed medical records and performed a physical examination. In order to be clear regarding the mechanism of injury, Dr. Wilcox stood on the examination table and carefully went over the described mechanism with Claimant. She reasoned it is not plausible that the pathology in Claimant's right knee could have occurred on April 19, 2024. None of Claimant's descriptions would have caused an acute, full-thickness complete rupture of the distal PCL and high grade partial full thickness ACL tear. Dr. Wilcox explained the physics and momentum of how Claimant would be moving as he walked forward into the closet. Claimant simply would not have fallen straight down the hole. Dr. Wilcox noted Claimant most likely would have put his hands up and stopped himself because the walls were only inches away. Dr. Wilcox noted that, if Claimant had injured his right knee on April 19, 2024 as demonstrated on the MRI, there would have been significant swelling and an inability to move the knee. An acute injury of the type seen on the MRI is a tearing of fibers, and would cause very pronounced swelling as a protective measure.

17. On October 29, 2024 Claimant underwent an IME with orthopedic surgeon John Schwappach, M.D. He reviewed Claimant's medical records and performed a physical examination. Dr. Schwappach determined Claimant sustained acute right knee and ankle injuries when he stepped into an access hole and twisted his right knee. He reasoned that Claimant was unable to bear weight on his right leg and needed assistance to ambulate following his fall. Moreover, Claimant had acute right knee effusions at his initial evaluation on April 19, 2024. Finally, the April 26, 2024, right knee MRI reflected edema in the femur and tibial that was indicative of a recent traumatic event. Dr. Schwappach summarized Claimant sustained full thickness tears of the ACL and PCL, a posterior medial corner strain, MCL and LCL strains, and posterior lateral corner strains as a result of the April 19, 2024 incident.

18. Claimant has established it is more probably true than not that he suffered compensable right leg injuries during the course and scope of employment with Employer on April 19, 2024. Initially, Claimant testified that on April 19, 2024 he was inspecting a new home for drywall repairs that needed to be completed. He found a small closet that required repairs. As he opened the closet door, he took a step inside with his left leg and fell into a crawlspace hole. Claimant explained that he twisted his right knee when he fell into the crawlspace. He immediately contacted his supervisor KV, who asked general contractor JO to check on Claimant. JO remarked that Claimant was lying on the ground outside the closet when he arrived. Claimant told him one of his feet went down the hole and he injured his right knee. JO noticed the cover over the hole was pushed down, and it looked as if Claimant had stepped on the lid. He commented that, because the cover was pushed down, Claimant's "leg must have

gone through the front side of where the access is." When KV arrived, Claimant reported that he looked inside the closet for drywall touchups and stepped into the open crawlspace. One leg was inside the closet while the other leg remained on top of the floor. Notably, KV explained that the crawlspace access cover was off the hole. He detailed that the access cover was not over the hole because, if an inspector came and it is not open, the inspection will not occur. Notably, the house was getting ready for a final inspection because it was ready to be occupied.

19. On April 19, 2024 Claimant visited Care Now Urgent Care for his right leg injury. Claimant recounted that he was opening and inspecting a closet that had a crawlspace. The crawlspace was uncovered. As he took a step, he fell through the hole up to his right knee while his left leg remained at floor level. In an employee incident report from April 19, 2024 Claimant recorded that, as he was going into a closet, he fell into an access hole to the basement, while his right knee remained outside. In an April 23, 2024 visit to Care Now PA Nichols recorded in the "interval history" that, when Claimant was working on April 19, 2024, he stepped with his left foot into a hole in the closet of a jobsite. He fell through the hole with his left lower extremity. Claimant's right knee was wedged against the door frame of the closet with his leg bent and ankle against the ground.

20. The preceding accounts from both witness testimony and the medical records reveal conflicts and inconsistencies in the details surrounding Claimant's fall into a crawlspace on April 19, 2024. Notably, whether Claimant stepped into the hole with his left or right leg and the extent of the fall into the crawlspace raise concerns. However, the testimony of both JO and KV reveals that the cover was not completely over the crawlspace hole because inspections were in progress on the property. Notably, JO commented that, because the cover was pushed down, Claimant's "leg must have gone through the front side of where the access is." Although Claimant's account lacks consistent details, the record demonstrates that he likely stepped into a crawlspace hole with his left leg while his right leg twisted and remained at ground level. He thus required medical treatment to assess his right leg symptoms.

21. Importantly, the bulk of the medical opinions also reveal that Claimant likely suffered a right lower extremity injury while working for Employer on April 19, 2024. Initially, an April 26, 2024 MRI reflected injuries to multiple structures within the right knee. Dr. Resig recounted that Claimant fell through a hole in a floor at work and injured his right knee and ankle on April 19, 2024. After reviewing Claimant's right knee MRI and performing a physical examination, Dr. Resig assessed Claimant with injuries to multiple structures of the right knee and a right ankle sprain. Similarly, Dr. Newman remarked that Claimant fell through the floor and suffered a "significant rotational" right knee injury. He reviewed the April 26, 2024 right knee MRI as well as the MRI of the same knee two years earlier. The prior MRI only showed increased signal within the medial meniscus, but no change to cartilage about the patellofemoral reticulation. Dr. Newman thus recommended right knee surgery. Furthermore, Dr. Hewitt provided a medical opinion regarding Dr. Newman's request for surgery. He determined Claimant sustained a well-documented acute injury to the right knee at work on April 19, 2024. An MRI reflected a three-ligament injury to the knee. Dr. Hewitt noted that Dr. Newman had reviewed a right knee MRI from two years earlier that revealed no change in cartilage status or previous ligament injuries. He thus recommended approval of the surgery recommended by orthopedic surgeon Dr. Newman.

22. In contrast, Dr. Wilcox reasoned it is not plausible that the pathology in Claimant's right knee could have occurred on April 19, 2024. None of Claimant's descriptions would have caused an acute, full-thickness complete rupture of the distal PCL and high grade partial full-thickness ACL tear. Dr. Wilcox explained the physics and momentum of how Claimant would be moving as he walked forward into the closet. Claimant simply would not have fallen straight down the hole. Dr. Wilcox noted Claimant most likely would have put his hands up and stopped himself because the walls were only inches away. Dr. Wilcox's analysis is predicated on the various inconsistencies and discrepancies in Claimant's account of the mechanism of injury on April 19, 2024. Although Claimant's provided various accounts of the accident, the persuasive medical records reflect that he injured his right lower extremity when he fell into a crawlspace at work. Importantly, Dr. Schwappach determined Claimant sustained acute right knee and ankle injuries when he stepped into an access hole and twisted his right knee. He reasoned that Claimant was unable to bear weight on his right leg and needed assistance to ambulate following his fall. Moreover, Claimant had acute right knee effusions at his initial evaluation on April 19, 2024. Finally, the April 26, 2024 right knee MRI reflected edema in the femur and tibial areas that was indicative of a recent traumatic event. Dr. Schwappach summarized Claimant sustained full-thickness tears of the ACL and PCL, a posterior medial corner strain, MCL and LCL strains, and posterior lateral corner strains as a result of the April 19, 2024 incident.

23. A review of the record demonstrates that Claimant suffered right lower extremity injuries during the course and scope of his employment with Employer on April 19, 2024. Although there are various inconsistencies in Claimant's account of the precise mechanism of injury, the evidence demonstrates that he injured his right knee. Claimant's work activities on April 19, 2024 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered right lower extremity injuries during the course and scope of his employment with Employer on April 19, 2024.

24. Claimant has demonstrated it is more probably true than not that he is entitled to receive reasonable and necessary medical benefits that are causally related to his April 19, 2024 lower extremity injuries. Following Claimant's accident on April 19, 2024, he immediately reported the incident to his supervisor and received medical treatment through authorized providers Care Now Urgent Care and Orthopedic Centers of Colorado. He was diagnosed with injuries to multiple structures within the right knee. Because of his April 19, 2024 right lower extremity injuries, Claimant received medical treatment including imaging, physical therapy, medications, and work restrictions.

25. Dr. Newman recommended surgery in the form of a right knee medial collateral reconstruction with allograft, double bundle posterior cruciate ligament reconstruction with allograft, and anterior cruciate ligament reconstruction allograft with possible meniscal repair. Dr. Hewitt determined Claimant sustained a well-documented acute injury to the right knee at work on April 19, 2024. He suggested approval of the surgery recommended by orthopedic surgeon Dr. Newman. The record thus demonstrates that Claimant's medical treatment, including the surgery recommended by Dr. Newman, is reasonable, necessary and causally related to his April 19, 2024 industrial lower extremity injuries. Claimant is also entitled to receive additional reasonable, necessary and causally related medical care for his industrial injuries.

26. Claimant has demonstrated it is more probably true than not that he is entitled to TTD benefits beginning April 30, 2024. Claimant's testimony and the medical records demonstrate that he was either unable to work or under restrictions that rendered him unable to perform his job duties and impaired his earning capacity. Notably, the record reveals that medical providers assigned work restrictions that rendered Claimant unable to perform his job duties. Claimant continued to work for Employer in a restricted capacity until April 29, 2024. He explained that he ceased employment because it was very difficult for him to continue working with his injury. On May 1, 2024 Dr. Leitl assigned work restrictions of no crawling, kneeling, squatting or climbing. Dr. Leitl also noted seated work only. Claimant continues to receive medical care and has not yet reached Maximum Medical Improvement (MMI). The record thus reflects that Claimant's industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Accordingly, Claimant has proven that that he is entitled to receive TTD benefits from April 30, 2024 until terminated by statute.

27. However, on cross-examination Claimant acknowledged that he has occasionally worked drywall jobs for friends since the date of injury, He summarized that he completed a total of about four jobs. He earned $170.00 from the first job and $250.00 from the second job, but could not recall the amounts he earned from the other projects. Claimant is thus not entitled to receive TTD benefits, but only Temporary partial Disability (TPD) benefits, during periods of private employment.

CONCLUSIONS OF LAW

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

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

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

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within

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

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

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

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician may provide diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms, there is no mandate that the claimant suffered a compensable injury. *Fay v. East Penn Manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has established by a preponderance of the evidence that he suffered compensable right leg injuries during the course and scope of employment with Employer on April 19, 2024. Initially, Claimant testified that on April 19, 2024 he was inspecting

a new home for drywall repairs that needed to be completed. He found a small closet that required repairs. As he opened the closet door, he took a step inside with his left leg and fell into a crawlspace hole. Claimant explained that he twisted his right knee when he fell into the crawlspace. He immediately contacted his supervisor KV, who asked general contractor JO to check on Claimant. JO remarked that Claimant was lying on the ground outside the closet when he arrived. Claimant told him one of his feet went down the hole and he injured his right knee. JO noticed the cover over the hole was pushed down, and it looked as if Claimant had stepped on the lid. He commented that, because the cover was pushed down, Claimant's "leg must have gone through the front side of where the access is." When KV arrived, Claimant reported that he looked inside the closet for drywall touchups and stepped into the open crawlspace. One leg was inside the closet while the other leg remained on top of the floor. Notably, KV explained that the crawlspace access cover was off the hole. He detailed that the access cover was not over the hole because, if an inspector came and it is not open, the inspection will not occur. Notably, the house was getting ready for a final inspection because it was ready to be occupied.

9. As found, on April 19, 2024 Claimant visited Care Now Urgent Care for his right leg injury. Claimant recounted that he was opening and inspecting a closet that had a crawlspace. The crawlspace was uncovered. As he took a step, he fell through the hole up to his right knee while his left leg remained at floor level. In an employee incident report from April 19, 2024 Claimant recorded that, as he was going into a closet, he fell into an access hole to the basement, while his right knee remained outside. In an April 23, 2024 visit to Care Now PA Nichols recorded in the "interval history" that, when Claimant was working on April 19, 2024, he stepped with his left foot into a hole in the closet of a jobsite. He fell through the hole with his left lower extremity. Claimant's right knee was wedged against the door frame of the closet with his leg bent and ankle against the ground.

10. As found, the preceding accounts from both witness testimony and the medical records reveal conflicts and inconsistencies in the details surrounding Claimant's fall into a crawlspace on April 19, 2024. Notably, whether Claimant stepped into the hole with his left or right leg and the extent of the fall into the crawlspace raise concerns. However, the testimony of both JO and KV reveals that the cover was not completely over the crawlspace hole because inspections were in progress on the property. Notably, JO commented that, because the cover was pushed down, Claimant's "leg must have gone through the front side of where the access is." Although Claimant's account lacks consistent details, the record demonstrates that he likely stepped into a crawlspace hole with his left leg while his right leg twisted and remained at ground level. He thus required medical treatment to assess his right leg symptoms.

11. As found, importantly, the bulk of the medical opinions also reveal that Claimant likely suffered a right lower extremity injury while working for Employer on April 19, 2024. Initially, an April 26, 2024 MRI reflected injuries to multiple structures within the right knee. Dr. Resig recounted that Claimant fell through a hole in a floor at work and injured his right knee and ankle on April 19, 2024. After reviewing Claimant's right knee MRI and performing a physical examination, Dr. Resig assessed Claimant with injuries to multiple structures of the right knee and a right ankle sprain. Similarly, Dr. Newman remarked that Claimant fell through the floor and suffered a "significant rotational" right knee injury. He reviewed the April 26, 2024 right knee MRI as well as the MRI of the same knee two years earlier. The prior MRI only

showed increased signal within the medial meniscus, but no change to cartilage about the patellofemoral reticulation. Dr. Newman thus recommended right knee surgery. Furthermore, Dr. Hewitt provided a medical opinion regarding Dr. Newman's request for surgery. He determined Claimant sustained a well-documented acute injury to the right knee at work on April 19, 2024. An MRI reflected a three-ligament injury to the knee. Dr. Hewitt noted that Dr. Newman had reviewed a right knee MRI from two years earlier that revealed no change in cartilage status or previous ligament injuries. He thus recommended approval of the surgery recommended by orthopedic surgeon Dr. Newman.

12. As found, in contrast, Dr. Wilcox reasoned it is not plausible that the pathology in Claimant's right knee could have occurred on April 19, 2024. None of Claimant's descriptions would have caused an acute, full-thickness complete rupture of the distal PCL and high grade partial full-thickness ACL tear. Dr. Wilcox explained the physics and momentum of how Claimant would be moving as he walked forward into the closet. Claimant simply would not have fallen straight down the hole. Dr. Wilcox noted Claimant most likely would have put his hands up and stopped himself because the walls were only inches away. Dr. Wilcox's analysis is predicated on the various inconsistencies and discrepancies in Claimant's account of the mechanism of injury on April 19, 2024. Although Claimant's provided various accounts of the accident, the persuasive medical records reflect that he injured his right lower extremity when he fell into a crawlspace at work. Importantly, Dr. Schwappach determined Claimant sustained acute right knee and ankle injuries when he stepped into an access hole and twisted his right knee. He reasoned that Claimant was unable to bear weight on his right leg and needed assistance to ambulate following his fall. Moreover, Claimant had acute right knee effusions at his initial evaluation on April 19, 2024. Finally, the April 26, 2024 right knee MRI reflected edema in the femur and tibial areas that was indicative of a recent traumatic event. Dr. Schwappach summarized Claimant sustained full-thickness tears of the ACL and PCL, a posterior medial corner strain, MCL and LCL strains, and posterior lateral corner strains as a result of the April 19, 2024 incident.

13. As found, a review of the record demonstrates that Claimant suffered right lower extremity injuries during the course and scope of his employment with Employer on April 19, 2024. Although there are various inconsistencies in Claimant's account of the precise mechanism of injury, the evidence demonstrates that he injured his right knee. Claimant's work activities on April 19, 2024 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered right lower extremity injuries during the course and scope of his employment with Employer on April 19, 2024.

Medical Benefits

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

Park Care Center v. Indus. Claim Appeals Off., 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

15. 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).

16. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable and necessary medical benefits that are causally related to his April 19, 2024 lower extremity injuries. Following Claimant's accident on April 19, 2024, he immediately reported the incident to his supervisor and received medical treatment through authorized providers Care Now Urgent Care and Orthopedic Centers of Colorado. He was diagnosed with injuries to multiple structures within the right knee. Because of his April 19, 2024 right lower extremity injuries, Claimant received medical treatment including imaging, physical therapy, medications, and work restrictions.

17. As found, Dr. Newman recommended surgery in the form of a right knee medial collateral reconstruction with allograft, double bundle posterior cruciate ligament reconstruction with allograft, and anterior cruciate ligament reconstruction allograft with possible meniscal repair. Dr. Hewitt determined Claimant sustained a well-documented acute injury to the right knee at work on April 19, 2024. He suggested approval of the surgery recommended by orthopedic surgeon Dr. Newman. The record thus demonstrates that Claimant's medical treatment, including the surgery recommended by Dr. Newman, is reasonable, necessary and causally related to his April 19, 2024 industrial lower extremity injuries. Claimant is also entitled to receive additional reasonable, necessary and causally related medical care for his industrial injuries.

Temporary Total Disability Benefits

18. To prove entitlement to TTD benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by the claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to effectively and properly perform his or her regular employment. *Ortiz v. Charles J. Murphy &*

Co., 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Off.*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

19. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to TTD benefits beginning April 30, 2024. Claimant's testimony and the medical records demonstrate that he was either unable to work or under restrictions that rendered him unable to perform his job duties and impaired his earning capacity. Notably, the record reveals that medical providers assigned work restrictions that rendered Claimant unable to perform his job duties. Claimant continued to work for Employer in a restricted capacity until April 29, 2024. He explained that he ceased employment because it was very difficult for him to continue working with his injury. On May 1, 2024 Dr. Leitl assigned work restrictions of no crawling, kneeling, squatting or climbing. Dr. Leitl also noted seated work only. Claimant continues to receive medical care and has not yet reached Maximum Medical Improvement (MMI). The record thus reflects that Claimant's industrial injuries caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. Accordingly, Claimant has proven that that he is entitled to receive TTD benefits from April 30, 2024 until terminated by statute.

20. As found, however, on cross-examination Claimant acknowledged that he has occasionally worked drywall jobs for friends since the date of injury, He summarized that he completed a total of about four jobs. He earned $170.00 from the first job and $250.00 from the second job, but could not recall the amounts he earned from the other projects. Claimant is thus not entitled to receive TTD benefits, but only Temporary partial Disability (TPD) benefits, during periods of private employment.

ORDER

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

1. Claimant suffered compensable right lower extremity injuries while working for Employer on April 19, 2024.

2. Claimant's medical treatment, including the surgery recommended by Dr. Newman, is reasonable, necessary and causally related to his April 19, 2024 industrial lower extremity injuries. Claimant is entitled to receive additional reasonable, necessary and causally related medical care for his industrial injuries.

3. Claimant shall receive TTD benefits from April 30, 2024 until terminated by statute. However, Claimant is not entitled to receive TTD benefits, but only TPD benefits, during periods of private employment.

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

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

DATED: January 24, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he was an employee of Respondent on July 16, 2022.

2. Whether Claimant sustained a compensable injury arising out of and in the course of his employment with Respondent on July 16, 2022.

3. The amount of Claimant's average weekly wage.

4. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits arising out of his July 16, 2022 injury.

5. Whether Claimant is entitled to medical benefits reasonably necessary to cure and relieve him of the effects of his July 16, 2022 injury.

6. Who is Claimant's authorized provider.

7. Whether Claimant is entitled to a change of authorized provider.

FINDINGS OF FACT

1. On July 16, 2022, Claimant was performing framing work for Respondent in Keystone, Colorado, when he fell about seven feet from a ladder to the ground, which consisted of a stone surface. Claimant injured his right elbow, shoulder, and wrist.

2. At the time of his injury, Claimant was working full time for Respondent earning $22 per hour and working nine to ten hours a day for six days a week.

3. Claimant sought treatment initially at St. Anthony Summit Hospital Emergency Department where he underwent X-rays of his wrist, elbow, and shoulder. The X-ray of the right wrist showed a broken radius bone near the wrist joint with multiple fragments, slight misalignment, a small break in the ulna's base, and some swelling in the surrounding tissues. Claimant's elbow and shoulder X-rays did not show any fractures. The attending physician assistant, Michelle Carey, PA-C, reduced Claimant's wrist fracture and advised that Claimant would likely need surgical intervention for his wrist. Nevertheless, Claimant was discharged that same day.

4. On September 2, 2022, Claimant saw Dr. Charles Lackey at Summit Community Care Clinic. Dr. Lackey noted that Claimant's fracture was healing in a bad position and that Claimant had some muscular atrophy in the forearm. Claimant underwent

an X-ray, which documented that Claimant's alignment of the fracture was worse than it was post-reduction on July 16, 2022, and appeared more consistent with the imaging from prior to the reduction. Dr. Lackey indicated that he would consult with an orthopedic surgeon to determine whether corrective surgery would be possible. In the meantime, Dr. Lackey recommended Claimant keep his splint on and take anti-inflammatory medications as needed.

5. On September 16, 2022, Claimant received a medical bill in the amount of $3,865.79, which documented that it was the amount owed after $500.00 had already been paid.

6. On May 8, 2023, Summit Community Care Clinic sent Claimant a letter advising that he owed overdue medical payments in the amount of $306.00.

7. Claimant has not been able to work as a framer since July 16, 2022, due to his right-hand injury and the need to use both hands to do his work as a framer. Claimant's job as a framer required him to lift objects weighing up to 200 kilograms.

8. Since his injury, Claimant has moved back to Nicaragua due to the lower cost of living. However, as of Claimant's testimony, Claimant had not returned to work due to his inability to engage in heavy lifting and the absence of available employment where he resides in Nicaragua.

9. Claimant testified at hearing that he did not own his own company at the time of hearing and that Respondent would once every week or two write him a check personally for the work he performed. Claimant also testified that he did not recall having his own general liability insurance policy at the time of his injury and he denied signing any documentation for Respondent declaring himself to be an independent contractor, and Claimant denied working for anybody else at that time.

10. Claimant testified that Respondent's husband, Evert Antonio Chavarria Rizo, was the foreman for Respondent. Claimant testified that Mr. Chavarria would tell Claimant where to work, when to report to work, when he could take breaks, and when he could leave a job site. Claimant testified that he and the other workers for Respondent would all take a thirty-to-forty-minute break every day at noon when Mr. Chavarria was present, and that Mr. Chavarria would tell the workers when to go home. If Claimant was late for work, Respondent or Mr. Chavarria would complain.

11. In Respondent's January 2, 2025 Position Statement, Respondent argued, "The Defendant 4EverBuild LLC maintains that it provided proper training and safety equipment *to all employees*, once a month for one full year at the start of *employment including the Plaintiff* [redacted] and that the accident was not a result of any company negligence." (Emphasis added.)

12. Claimant employed his son to assist him with his work for Respondent. However, Respondent would oversee Claimant's work through the foreman, Mr. Chavarria, provide safety training to Claimant and other framers, dictate the time and performance of the work, and would write checks for work completed directly to Claimant individually, and would compensate Claimant at an hourly rate of $22 per hour. Furthermore, Claimant did not maintain his own liability insurance, and Respondent would instead insure him under their policy. Additionally, the Court considers that Respondent hired a number of other framers on the same project who worked alongside Claimant.

13. Based on the totality of the evidence, the Court finds that Claimant was an employee of Respondent on the date of injury, not an independent contractor.

14. Respondent issued to Claimant an IRS form 1099-NEC for Claimant's earnings from Respondent in the calendar year 2022. The amount reported on the form 1099 was $27,662.50.

15. Given that Claimant stopped working for Respondent following his date of injury, Claimant worked for Respondent for 28 and 1/7 weeks in 2022. Therefore, Claimant's earnings in 2022 averaged $982.93 per week. Given that Claimant testified that he did not work for any other employer at that time, the Court finds this to be a fair approximation of Claimant's wage-earning capacity as of the date of injury.

16. Claimant testified that following the accident, he experienced immediate pain in his right elbow and shoulder. He went to St. Anthony's Summit Emergency Room on the date of injury and had X-rays of his wrist, elbow, and shoulder. He testified that he paid $500 to the hospital on that day but still owes money for the visit and has not received bills from the radiologist.

17. Claimant testified that after seeing Dr. Lackey, he consulted a surgeon in the United States who recommended surgery on his right wrist, but the Claimant did not recall the doctor's name. Claimant testified that while Ms. Reyes Duran initially promised to pay for the surgery, he declined her offer, explaining that it only came after he decided to hire an attorney. Claimant testified that he continues to believe surgery is necessary.

18. Claimant testified that he returned to his native Nicaragua two years ago due to financial constraints and does not plan to return to the United States soon. Claimant testified that he is not currently working because his injury prevents him from performing construction work, and job opportunities in his town of Quilalí, Nicaragua, which has about sixty houses, are limited.

19. Regarding his employment at the time of injury, Claimant testified that he was working full-time for the Respondent, earning $22 per hour. His work included framing and occasionally cleaning tasks. During the summer, he would typically

work nine to ten hours a day, six days a week. Claimant clarified that he did not have an independent contractor agreement and was not working for any other employer during his employment with Respondent. He also denied operating his own company in July 2022.

20. Claimant explained that Evert hired him, although contracts with workers were managed by Ms. Reyes Duran, who paid him biweekly. Claimant testified that Evert directed the workers, setting their start times, assigning job sites, and reviewing the quality of their work. Workers were not allowed to come and go as they pleased; if they were late, Evert or Ms. Reyes Duran would complain. Breaks were typically taken at noon and lasted thirty to forty minutes, but with no consequences for exceeding this time. The workers could decide when to finish for the day if Evert was absent, though Evert was usually present on-site.

21. Claimant testified that he was aware of orthopedists in Estelí, Nicaragua, but does not know how to access their services. Estelí is the nearest town to Claimant big enough to have an orthopedist, and it is located almost three hours by car from Claimant's town of Quilalí.

22. On cross-examination, Claimant stated that Respondent initially refused to pay for any medical care following the accident but later changed their position. He reiterated that he could not work after his injury and denied working for any other employers while employed by the Respondent.

23. The Court finds Claimant's testimony credible.

24. Ms. Reyes Duran testified at the hearing that she is the owner of Respondent 4EverBuilds and resides in Silverton, Colorado. She stated that she is married to Evert Antonio Chavarria, who serves as a foreman for the company but has no ownership interest. As a foreman, Mr. Chavarria oversaw work and held safety meetings, and he was responsible for communicating with workers upon their arrival at the worksite. Ms. Reyes Duran testified that Mr. Chavarria was the individual who hired the Claimant.

25. According to Ms. Reyes Duran, the Claimant worked for Respondent as a framer. She acknowledged that the Claimant was injured on July 16, 2022, and stated that she even visited him at the hospital following the incident.

26. Ms. Reyes Duran testified that Respondent did not have workers' compensation insurance on the date of the injury and that the company employed no workers, only independent contractors. She stated that the Claimant worked alongside six other framers for Respondent on the date of injury, all of whom were classified as independent contractors.

27. She provided several reasons for considering the Claimant an independent contractor. First, she stated that the Claimant signed a document affirming his independent contractor status. Second, she noted that the Claimant worked for other entities when work was slow with Respondent. Third, Respondent issued a 1099 form to the Claimant for the year 2022. Fourth, the contractors were to provide the materials, though Respondent indicated that they had a single contractor that would provide the materials. Fifth, Respondent did not provide Claimant with any apparel.

28. Ms. Reyes Duran also testified that Mr. Chavarria did not dictate when workers should take breaks or leave the jobsite, and that workers were free to leave when they wanted. She added that she wrote a single check to the Claimant for the work performed by both the Claimant and his son.

29. Finally, Ms. Reyes Duran acknowledged that she paid the Claimant approximately every two weeks, with the checks made out to him personally, as she was unaware of him operating under any company name.

30. The Court finds Ms. Reyes Duran's testimony credible. However, to the extent that her testimony conflicts with Claimant's regarding whether the workers were free to come and go from the jobsite at their discretion rather than with Mr. Chavarria's permission, the Court finds that the workers exercised some discretion in this regard but that Mr. Chavarria also retained authority over the workers' work hours when he was present. Also, to the extent that Ms. Reyes Duran and Claimant's testimony differed as to whether Claimant worked for other employers while working for Respondent, the Court finds Claimant's testimony more credible.

31. Ms. Reyes Duran acknowledged in her own testimony that Claimant was in fact injured on the job on July 16, 2022. Furthermore, in Respondent's January 2, 2025 position statement, Respondent does not contest that Claimant was injured on that day while on the job, but argues merely that Claimant's negligence caused the injury, not Respondent's.

32. The Court finds that Claimant's treatment with St. Anthony Summit Hospital, Summit Community Care Clinic, and Dr. Lackey were reasonably necessary to cure and relieve Claimant of the effects of his July 16, 2022 injury.

33. The Court finds that Respondent did not provide Claimant with a designated provider list upon learning of Claimant's work injury. The right of selection passed to Claimant. Claimant consequently selected Dr. Lackey as his authorized treating physician through his conduct.

34. Although Claimant requests a change of authorized provider to a physician in Estelí, Claimant did not present any evidence that he has selected a specific medical provider in Estelí, nor that there has been any referral by his current

authorized treating physician, Dr. Lackey, to a physician in Estelí. The Court finds that because Claimant has not identified a specific medical provider whom he wishes to see in Estelí and who is willing to treat Claimant, Claimant has not made a proper showing, in the Court's opinion, for change of authorized provider.

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).

Employee or Independent Contractor

Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document that complies with the statute. *See* §8-40-202(2)(b), C.R.S.

If the evidence establishes that Claimant was performing services for pay, and there is no written document establishing Claimant's independent contractor status, the burden of proof rests upon the Respondents to rebut the presumption that Claimant was an employee. *Baker v. BV Properties, LLC,* W.C. No. 4-618-214 (Aug. 25, 2006). The question of whether Respondents have overcome the presumption and established that Claimant was an independent contractor is one of fact for the ALJ. *Nelson v. Industrial Claim Appeals Off. of Colo.,* 981 P.2d 210 (Colo.App.1998)

Section 8-40-202(2)(b)(II), C.R.S., enumerates nine factors to be considered in evaluating whether an individual is deemed an employee or independent contractor. However, the test considered by the Colorado Supreme Court in the unemployment insurance case of *Indus. Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014), concerning whether a worker is an employee or an independent contractor applies to workers' compensation claims. The test requires the analysis of not only the nine factors enumerated in §8-40-202(2)(b)(II), C.R.S. but also the nature of the working relationship and any other relevant factors. *Pella Windows & Doors, Inc. v. Industrial Claim Appeals Off.*, 458 P.3d 128 (Colo.App.2020). The *Softrock* decision noted indicia that would normally accompany the performance of an ongoing separate business in the field and included whether: the worker used an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance. *Softrock Geological Services*, 325 P.3d 565.

The nine factors in § 8-40-202(2)(b)(II), C.R.S. are:

1. Require the worker to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document.

2. Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed.

3. Pay a salary or at an hourly rate instead of at a fixed or contract rate.

4. Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract.

5. Provide more than minimal training for the individual.

6. Provide tools or benefits to the individual; except that materials and equipment may be supplied.

7. Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established.

8. Pay the service provider personally instead of making checks payable to the trade or business name of such service provider.

9. Combine the business operations of the person from whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

The existence of any one of these factors is not conclusive evidence that the individual is an employee. § 8-40-202 (2)(b)(III). Likewise, it is not necessary that all the elements be met in order for the Court to find that Claimant is not an employee. *See Nelson v. Industrial Claim Appeals Off.*, 981 P.2d 210 (Colo.App.1998). Section 8-40-202(a), C.R.S., notes, "For purposes of this section, the degree of control exercised by the person for whom the service is performed over the performance of the service or over the individual performing the service shall not be considered if such control is exercised pursuant to the requirements of any state or federal statute or regulation."

As found, Claimant did employ his son to assist him with his work for Respondent. However, also as found, Respondent would oversee Claimant's work through the foreman, Mr. Chavarria, provide safety training to Claimant and other framers, dictate the time and performance of the work, and would write checks for work completed directly to Claimant individually, and would compensate Claimant at an hourly rate of $22 per hour. Furthermore, Claimant did not maintain his own liability insurance, and Respondent would instead insure him under their policy. Additionally, the Court considers that Respondent hired a number of other framers on the same project who worked alongside Claimant.

Based on the totality of the evidence, the Court finds and concludes that Claimant was most likely an employee of Respondent on the date of injury, not an independent contractor.

Compensability

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

Here, as found, Ms. Reyes Duran acknowledged in her own testimony that Claimant was in fact injured on the job on July 16, 2022. Furthermore, in Respondent's January 2, 2025 position statement, Respondent does not contest that Claimant was injured on that day while on the job, but argues merely that Claimant's negligence caused the injury, not Respondent's.

The Court therefore finds and concludes that Claimant sustained an injury arising out of and in the course of his employment with Respondent on July 16, 2022.

Average Weekly Wage

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corporation*, 867 P.2d 77, 82 (Colo. App. 1993); *Loofbourrow v. Indus. Claims Office of State*, 321 P.3d 548, 555 (Colo. App. 2011) *aff'd sub nom Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327; *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury.

Where the prescribed methods will not result in a fair calculation of a claimant's AWW in the particular circumstances, section C.R.S. § 8-42-102(3) grants an ALJ discretion to determine AWW "in such other manner and by such other method as will, in the opinion of the director *based upon the facts presented*, fairly determine such employee's average weekly wage." Section 8-42-102(3), C.R.S. (emphasis added).

As found above, the Court concludes that Claimant's average weekly wage on his date of injury was $982.93.

Temporary Disability Benefits

Temporary total disability (TTD) benefits are designed to compensate an injured worker for wage loss while employee is recovering from work-related injury. *Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson*, 938 P.2d 504 (Colo. 1997). Claimant bears the burden of establishing three conditions before qualifying for TTD benefits: (1) that the industrial injury caused the disability; (2) that Claimant left work because of the injury; and (3) that the disability is total and last more than three working days. *City of Colorado Springs v. Indus. Claim Appeals Office*, 954 P.2d 637 (Colo.App.1997).

As found, Claimant has not worked since his date of injury and continues to remain off work due to the lack of work available in Quilalí, Nicaragua, and his continuing inability to do heavy lifting. The Court therefore concludes that Claimant is entitled to temporary total disability benefits at a rate of $655.29 per week from his date of injury until Claimant reaches maximum medical improvement, returns to full wages, is released by his authorized treating provider to full duty, or any other basis exists for termination of temporary total disability benefits pursuant to § 8-42-105, C.R.S., or Rule 6, WCRP.

Medical Benefits

Employer is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo.App.1990). A claimant must establish the causal connection between the compensable event and the need for medical care with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Authorization refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo.App.1997). Section 8-43-404(5), C.R.S. (2011), gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005).

The Court concludes, as found above, that the treatment Claimant received from St. Anthony Summit Hospital, Summit Community Care Clinic, and Dr. Lackey was reasonably necessary to cure and relieve Claimant of the effects of his July 16, 2022 injury.

Authorized Treating Physician

"Authorization" refers to the physician's legal authority to treat and is distinct from whether treatment is "reasonable and necessary" within the meaning of § 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (Jan. 3, 2008).

Pursuant to Section 8-43-404(5), C.R.S., respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, a claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

A copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven business days following the date the employer has notice of the injury. Rule 8-2(A)(1), W.C.R.P. A physician or corporate medical provider is presumed willing to treat injured workers unless the employer is specifically informed by the physician or corporate medical provider to the contrary. Rule 8-2(D), W.C.R.P. If the employer fails to supply the required designated provider list in accordance with the rules, the injured worker may select an authorized treating physician or chiropractor of their choosing. Rule 8-2(E), W.C.R.P.

As found, the Court concludes that Respondent did not provide Claimant with a designated provider list upon learning of Claimant's work injury. The right of selection passed to Claimant.

In situations where the claimant has signified "by words or conduct that he has chosen a physician to treat the industrial injury," they have made a physician "selection." *Murphy-Tafoya v. Safeway*, W.C. No. 5-153-600-001 (September 1, 2021).

As found, the Court concludes that Claimant selected Dr. Lackey as his authorized treating physician through his conduct.

Claimant has also requested that the Court grant him permission to select a treating physician of his choosing in Nicaragua.

A claimant may make a written request for permission to authorize a physician of his or her choice to treat the workers' compensation injury. Section 8-43-404(5)(a)(VI), C.R.S.; Rule 8-7, W.C.R.P. The claimant may at any time seek permission from the Division of Workers' Compensation to authorize a physician of the claimant's choosing upon a "proper showing to the Division." Section 8-43-404(5)(a)(VI), C.R.S.

Because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretionary authority to determine whether the circumstances justify a change of physician. *Loza v. Ken's Welding*, W.C. No. 4- 712-246 (Jan. 7, 2009). Here, as found, Claimant has not identified a specific medical provider whom he wishes to see in Estelí and who is willing to treat Claimant. Nor has Claimant provided any evidence as to whether he has sought a referral from his current authorized providers to a specific medical provider in Estelí. Given Claimant's failure to identify such a provider in Estelí, the Court finds Claimant has failed to make a proper showing, and the Court declines to grant Claimant the discretion to select any treating medical provider in Estelí without first identifying the provider.

ORDER

It is therefore ordered that:

1. Claimant proved by a preponderance of the evidence that he was an employee of Respondent on July 16, 2022.

2. Claimant proved by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment for Respondent.

3. Respondent shall pay for all medical treatment reasonably necessary to cure and relieve Claimant of the effects of his July 16, 2022 injury, including the treatment summarized above which he received with St. Anthony Summit Hospital, Summit Community Care Clinic, and Dr. Lackey.

4. Claimant's average weekly wage on his date of injury was $982.93.

5. Claimant is entitled to temporary total disability benefits at a rate of $655.29 per week from his date of injury until Claimant reaches maximum medical improvement, returns to full wages, is released by his authorized treating provider to full duty, or any other basis exists for termination of temporary total disability benefits pursuant to § 8-42-105, C.R.S., or Rule 6, WCRP.

6. Dr. Lackey is Claimant's authorized treating physician.

7. Claimant has not made a proper showing for a change of authorized provider.

8. 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: January 24, 2025.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-263-944-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the periods December 26-27, 2023 and January 8, 2024 until July 6, 2024, except for May 28-31, 2024.

2. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant was responsible for his January 6, 2024 termination from employment under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period July 7, 2024 until terminated by operation of law.

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to recover penalties under §8-43-203(2)(a), C.R.S. and WCRP 5-2(C) for Respondents' failure to file a Notice of Contest within 20 days of the First Report of Injury.

5. Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' violation of §8-43-203(4), C.R.S. by failing to timely produce the claim file.

STIPULATION

The parties agreed that between December 12, 2023 and January 31, 2024 Claimant's Average Weekly (AWW) was $1,755.76. After February 1, 2024, due to Claimant's COBRA eligibility, his AWW increased to $1,937.77.

FINDINGS OF FACT

1. Employer provides fracturing ("fracking"), hydraulic fracturing, and wire line services in the oil and gas industry.

2. On December 12, 2023, the last day of a two-week shift, Claimant sustained an admitted injury while in the course and scope of his employment with Employer. Specifically, a fracking boom backed into him and pressed him up against a chemical tote.

3. On December 13, 2023 Employer filed a First Report of Injury (FROI). Insurer received the FROI on December 13, 2023 at 11:47:47.

4. Claimant worked for two weeks on and two weeks off. He was not scheduled to work again until December 26, 2023. Upon his return, Claimant would be scheduled to work from 4:00 pm to 4:00 am for the ensuing two-week period.

5. On December 26, 2023 Claimant communicated with multiple supervisors, including Michael Shankweiler, Benjamin Whitehouse, and Luke Welty, to tell them he was not going to be able to make it into work. Notably, his back was still hurting from his work injury.

6. Mr. Welty testified at hearing in his capacity as a service leader who generally supervised crew leader Mr. Whitehouse. Mr. Welty confirmed that he had approximately 11 years of experience with Employer, and was familiar with the attendance policy.

7. On December 27, 2023 Claimant reported to Mr. Whitehouse and Mr. Welty in a text message that he would not be able to work following a physical therapy appointment because his back was still painful.

8. On December 28, 2023 Claimant reported to work for a brief period but had to leave early. He did not assert that he needed to leave work due to his work injury. Instead, Claimant explained he had to take his fiancée, Marissa Marquez, to the hospital because she was experiencing breathing issues. Direct supervisor, Mr. Whitehouse, gave him permission to leave on the condition that he obtain a doctor's note. In a text message, Mr. Whitehouse confirmed that Claimant needed to obtain a doctor's note for his visit to the hospital.

9. On December 29, 2023 Claimant sent a text message with a photograph of a doctor's note to Mr. Whitehouse that confirmed Claimant had accompanied his fiancée to the emergency room. Claimant remarked that Ms. Marquez had contracted influenza A.

10. Claimant subsequently returned to work in a modified capacity from December 29, 2024 through January 1, 2024. In his modified role, Claimant was "running sand," which involved standing in a box and pushing buttons without any lifting requirements. Claimant's schedule remained the same and he was not required to do any pushing, pulling, repetitive twisting or bending.

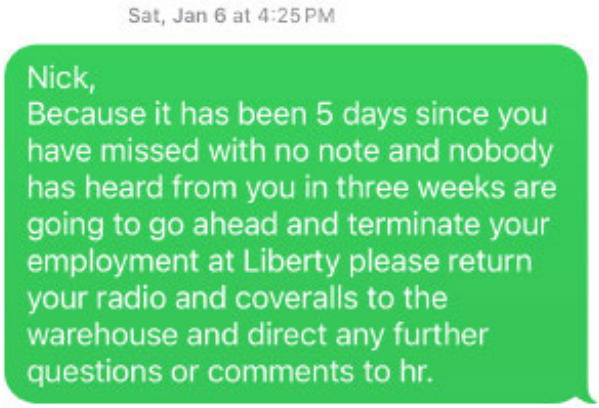
11. On January 2, 2024 at approximately1:40 pm, Claimant reported to Mr. Whitehouse and Mr. Welty that he believed he had contracted influenza from his fiancée. Mr. Whitehouse reiterated Claimant's need to obtain a doctor's note to excuse the absence. Mr. Welty also commented that Claimant needed to see urgent care and submit a doctor's note as well. Claimant replied with the word "Copy," which suggested he understood the need to visit urgent care and provide a note for his illness.

12. On January 3, 2024 Mr. Welty reached out to Claimant to reiterate the need for a doctor's note to excuse his absence from the prior day. He also requested a note for

Claimant's missed doctor's appointment on the preceding day. Claimant responded that "I didn't miss I called to reschedule because I couldn't get out of bed and they said that it's a good idea. When my wife went they told her it was highly contagious. I'll get one to you when I go."

13. Mr. Welty testified that he did not interpret Claimant's text message to mean that Claimant would also be missing January 4, 2024. Claimant then did not come to work on January 5, 2024. Mr. Welty summarized that Claimant failed to communicate with him or anyone at Employer that he would be missing his regularly scheduled work shifts on January 4-5, 2024.

14. On January 6, 2024, at around 4:25 pm, after the 4:00 pm start time of his shift that day, Mr. Welty advised Claimant he had been terminated in the following text message.



At the hearing, Mr. Welty clarified that he intended to write "three days" instead of "three weeks" in the preceding message.

15. Claimant did not supply Mr. Welty with any reason for why he had not communicated with Employer since January 3, 2024. He also never provided Employer with a doctor's note to justify his missed shift. Instead, Claimant remarked at hearing that he had simply stayed in bed from January 2, 2023, through January 6, 2023, when he received the preceding message from Mr. Welty. Claimant acknowledged that he did not provide a doctor's note for his illness or communicate again with Mr. Welty or anyone else after January 3, 2023.

16. Claimant testified that he had communicated with Mr. Welty two days earlier and his condition had not changed. He explained that he did not know what to say on January 4-5, 2024 because he was still lying in bed sick and unable to breathe. Claimant reasoned that Employer was already aware that, like his fiancée, he was suffering from highly contagious influenza. He was simply unaware of a continuing obligation to correspond with Employer because his condition had not changed. Claimant was thus surprised when he received the termination text message on January 6, 2024.

17. During cross-examination, Claimant acknowledged that he was familiar with Employer's attendance policy and always communicated if there was any reason he would miss a shift. Notably, for each of Claimant's absences prior to the missed shifts on January 4-6, 2024, Claimant notified his supervisors that he would not be at work. Moreover, Claimant agreed he had received Employer's Handbook when he was hired and also certified his acknowledgement. By signing that document, Claimant expressly "Agree[d] to follow the policies and procedures outlined in the employee handbook and any future amendments to it."

18. Employer's Handbook contained an attendance policy that stated, in relevant part, as follows:

> If an employee cannot come to work or will be late for any reason, he/she must contact his/her direct supervisor as soon as possible. It is not acceptable to leave a message on your supervisor's voice mail. Follow up calls must be made until supervisor is reached. If you are accustomed to communicating with your supervisor via text message and have not received a response, you must call until you reach him or her. Absenteeism or tardiness, that is excessive in the judgment of the Company, will not be tolerated. Employees who are absent for two consecutive working days, without notifying their supervisor, will be terminated. Rotational employees who miss (unexcused) two days of work, consecutive or not, during any scheduled work period, will be terminated.

The Handbook further clarified, "If an employee misses two or more days during the scheduled rotational work period, consecutive or not, due to unforeseen illness, he/she will be required to provide a doctor's note excusing the missed days and permitting the employee to return to work with no restrictions."

19. Mr. Welty testified that Claimant was terminated for violating Employer's attendance policy. He explained that the attendance policy is uniformly applied to all employees and he had previously terminated employees for failing to communicate absences. Mr. Welty remarked that Claimant's work injury had nothing to do with his termination.

20. Johnny Ramos also testified on behalf of Employer as an 11-year employee who worked as the frack manager. He managed the frack crews and supervised both Mr. Welty and Mr. Whitehouse. Mr. Ramos confirmed that Claimant was terminated for failing to provide a doctor's note for his illness to justify his absences. He also corroborated Mr. Welty's testimony that employees have previously been terminated for a lack of communication for two consecutive days without providing a doctor's note.

21. On January 8, 2024, after Claimant was terminated, he attended the rescheduled medical appointment with Dr. Young. The medical record states, "of note he does report missing his last physical therapy session as well as his last appointment

with me secondary to being ill with an upper respiratory infection." In addition, Dr. Young assigned Claimant temporary work restrictions of no lifting, repetitive lifting, carrying or pushing/pulling in excess of 10 pounds. He also directed Claimant not to engage in any bending/twisting.

22. Following his termination on January 6, 2024, Claimant retained his attorney. On January 26, 2024 Claimant's counsel sent a letter of representation to Insurer. In that correspondence, Claimant's counsel requested a complete copy of the claim file under §8-43-203(4), C.R.S.

23. On February 14, 2024 Respondents filed a Notice of Contest (NOC). The reason listed for the denial was "[f]urther Investigation for Medical Records."

24. On approximately February 20, 2024 Jennifer Flower, a senior resolution manager for Gallagher Bassett, was assigned Claimant's Workers' Compensation claim. Ms. Flower testified that she was aware of WCRP 5-2(C) that requires either an admission or a NOC to be filed within 20 days of the filing of the FROI. Ms. Flower agreed that, even though the FROI was filed on December 13, 2023, the NOC was not filed until February 14, 2024. She remarked that the NOC was filed almost three months before Claimant filed his application for hearing on May 7, 2024 asserting penalties.

25. Ms. Flower also testified that she is familiar with the requirements to produce claim files when requested in Colorado claims. She acknowledged that Claimant's attorney's introduction letter made a request to produce the claim file on January 26, 2024.

26. Ms. Flower recognized that Claimant's attorney sent a second letter on February 15, 2024 to Gallagher Bassett adjuster, Rene LaBossiere, stating the following:

> We requested this claim file from you on January 26, 2024. Please see attached letter. The required claims file was due on February 10, 2024 under 8-43-203(4). Please produce the claim file immediately, this is a penalty situation. Because of the failure to provide any privilege log, any claim of privilege has been waived.

27. Respondents proceeded to produce a copy of the complete claim file with redactions and a privilege log on February 23, 2024.

28. On March 29, 2024 Respondents filed a General Admission of Liability (GAL). The document acknowledged medical benefits only because Respondents maintained that Claimant had not lost any wages as a result of his injury and was terminated for cause on January 6, 2024.

29. Claimant testified that following his admitted work injury on December 12, 2023, he has remained under work restrictions. His restrictions have loosened over time. Claimant has not asserted that worsening restrictions have caused his wage loss.

30. Claimant confirmed he is not seeking temporary disability benefits during a period when he worked a job laying tile with his fiancée Ms. Marquez from May 28-31, 2024. They split the $5,000 they earned from the project.

31. On July 7, 2024 Claimant started training for a new job as a driver with Big Horn Trucking. He is still employed by Big Horn Trucking and continues to work within his assigned restrictions.

32. The record reflects Claimant's earnings while working for Big Horn Trucking. From July 7, 2024 through July 13, 2024 Claimant's gross pay was $800.00. From July 18, 2024 through July 20, 2024 Claimant earned $910.40. From July 23, 2024 through July 27, 2024 Claimant's gross pay was $944.05. Finally, from July 30, 2024 through August 3, 2024, Claimant earned $1,365.44.

33. Claimant has failed to establish it is more probably true than not that he is entitled to receive TTD benefits for the period prior to his January 6, 2024 termination from employment. Claimant has been on restrictions from his regular duties as a result of his compensable work injury. Following his injury, Claimant was not scheduled to work for another two weeks from December 13, 2023 through December 25, 2023. During the period from December 26, 2023 through January 5, 2023, Claimant missed December 26 and 27, 2023 as a result of his disability. However, he then missed December 28, 2023 due to his fiancée's illness after he had reported to work for modified duty. Claimant presented no evidence that he missed December 28, 2024 as a result of his disability. As such, even though Claimant missed two shifts as a result of his work injury, he failed to establish the requirement of missing three shifts under §8-42-105, C.R.S. to warrant TTD benefits. Indeed, the third shift that he did not work had no relationship to his work injury and only occurred due to his fiancée's illness after he appeared at work ready to perform modified duty.

34. Claimant then returned to work from December 29, 2023, through January 1, 2024, for modified duty in which he performed a job known as running sand. Claimant's schedule remained the same and he was not required to do any pushing, pulling, or repetitive twisting or bending. During the period he thus did not suffer any wage loss. For the period January 2-6, 2024 Claimant did not miss work as a result of his disability. Rather, Claimant only presented evidence that he was unable to work during the period as a result of a non-work-related illness that he believed he contracted from his fiancée. The record thus reveals that Claimant only missed work on December 26-27, 2023 as a result of his industrial injury. He did not suffer a disability lasting more than three work shifts as required by §8-42-105, C.R.S. to establish an entitlement to TTD benefits. Accordingly, his request for TTD benefits prior to his January 6, 2024 termination from employment is denied and dismissed. However, whether Claimant may receive TTD benefits after January 6, 2024 is contingent upon whether he was responsible for his termination of employment as addressed in the following section of this order.

35. Claimant was terminated solely for violating Employer's attendance policy. He specifically missed consecutive working days from January 4-6, 2024 without notifying his supervisors. Notably, Claimant acknowledged his agreement and understanding of

the attendance policy when he was hired and received Employer's Handbook. Claimant's testimony that he did not know about the attendance policy or the requirements of Employer regarding absences from work lacks credibility. His actions and statements prior to his termination directly contradict his representations. Notably, Claimant testified that he was familiar with Employers' attendance policy and he always kept in communication if there was any reason he would miss a shift. Additionally, for each of Claimant's absences prior to the missed shifts from January 4-6, 2024 he communicated with his supervisors that he would not be at work. Finally, when Claimant last communicated with Mr. Welty on January 3, 2024 and Mr. Welty informed him that he needed to see urgent care and submit a doctor's note, Claimant acknowledged his understanding of the actions he should take when he responded, "[c]opy."

36. Following January 3, 2024, Claimant provided no explanation or excuse for his lack of communication through a text message or phone call. He also did not provide a doctor's note prior to termination. Instead, Claimant only suggested he was sick and in bed. Mr. Welty had no understanding as to why Claimant was failing to communicate and did not interpret Claimant's messages on January 2-3, 2024, to apply to January 4-6, 2024. He reasonably interpreted Claimant's text messages and expected Claimant either to report for work on January 4-6, 2024, or communicate about his condition.

37. It is important to recognize that Claimant's termination was not predicated on his inability to perform his job duties because of his work injuries. He was working modified employment without difficulties. However, when he failed to apprise his supervisors of his condition or produce a doctor's note during January 4-6, 2024, his actions clearly contravened Employer's attendance policy. The record thus reveals that Claimant was responsible for his termination. Additionally, Claimant voluntarily chose not to proceed to urgent care and obtain a doctor's note as instructed by Mr. Welty. His termination was predicated on a failure to obtain a doctor's note rather than absences related to his admitted work injury.

38. The record reveals that Claimant agreed to Employer's attendance policy when he acknowledged receipt of the Handbook that included a provision stating "[e]mployees who are absent for two consecutive working days, without notifying their supervisor, will be terminated." Additionally, he further agreed that "[r]otational employees who miss (unexcused) two days of work, consecutive or not, during any scheduled work period, will be terminated." Claimant thus had complete control over the circumstances that led to his termination and voluntarily violated both of the preceding requirements. He specifically failed to notify his supervisors and did not provide a doctor's note for missing three consecutive work shifts on January 4-6, 2024. Claimant would thus have reasonably expected to be terminated based on a direct contradiction of Employer's policies and his own prior actions. Therefore, under the totality of the circumstances, Claimant committed a volitional act or exercised some control over his termination from employment. Because Claimant was responsible for his termination, he is not entitled to receive TTD benefits subsequent to January 6, 2024.

39. Claimant has established it is more probably true than not that he is entitled to receive TPD benefits from July 7, 2024 until terminated by operation of law. Initially,

Claimant began working in his modified duty position for Employer on December 28, 2023. However, Claimant was subsequently terminated from his modified employment on January 6, 2024. Nevertheless, consistent with the Panel's prior determinations, application of §§8-42-103(1)(g) and 8-42-105(4)(a), C.R.S., does not prevent Claimant from receiving an award of TPD benefits after his termination for cause. Had Claimant not been terminated for cause on January 6, 2024, he still would have sustained a wage loss due to the industrial injury, Specifically, the wage loss still would have "resulted" regardless of Claimant's termination and remained attributable to the industrial injury. Thus, although Claimant was terminated for cause from his modified duty job, he is entitled to TPD benefits to compensate for that portion of his wage loss that continued to result from his December 12, 2023 industrial injury.

40. The record reflects Claimant's earnings while working for Big Horn Trucking. From July 7, 2024 through July 13, 2024 Claimant's gross pay was $800.00. From July 18, 2024 through July 20, 2024 Claimant earned $910.40. From July 23, 2024 through July 27, 2024 Claimant's gross pay was $944.05. Finally, from July 30, 2024 through August 3, 2024, Claimant earned $1,365.44. The parties agreed that after February 1, 2024, due to Claimant's COBRA eligibility, his AWW increased to $1,937.77. Claimant is thus entitled to receive the difference between his stipulated AWW and earnings during the continuance of the disability. Claimant shall specifically receive 66.66% of the difference between his AWW of $1,937.77 and his earnings while his partial disability continues.

41. Claimant has proven it is more probably true than not that he is entitled to recover penalties under §8-43-203(2)(a), C.R.S. and WCRP 5-2(C) for Respondents' failure to file a NOC within 20 days of the FROI. Initially, on December 13, 2023 Employer filed the FROI. Insurer received the FROI on December 13, 2023 at 11:47:47. On February 14, 2024 Respondents filed a NOC. The reason listed for the denial was "[f]urther Investigation for Medical Records." Adjuster Ms. Flower testified that she was aware of WCRP 5-2(C) that requires either an admission or NOC to be filed within 20 days of the filing of the FROI. Ms. Flower agreed that, even though the FROI was filed on December 13, 2023, the NOC was not filed until February 14, 2024. She explained that the NOC was filed almost three months before Claimant filed his application for hearing on May 7, 2024 asserting penalties.

42. Because the NOC was not timely filed in the present matter, Respondents violated a statute and Rule. Insurer may thus be liable to Claimant for up to one day's compensation for each failure to so notify. The record reveals that Insurer was aware there was a statutory requirement to file a NOC within 20 days as delineated in §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). Respondents did not offer a persuasive explanation justifying the late filing of the NOC. It can thus be presumed that Respondents' actions were objectively unreasonable. Although Insurer filed the NOC almost three months before Claimant filed his application for hearing, there is no cure provision delineated in §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). Moreover, the only reasonable inference from the record is that Respondents knew or should have known that their failure timely to admit or deny liability violated the statute and Rule. Accordingly, Claimant has produced clear and convincing evidence that Insurer knew or should have known of the violation.

43. Claimant is entitled to penalties for the violation of §8-43-203(2)(a), C.R.S. and WCRP 5-2(C) from January 3, 2024 (20 days after the FROI) until February 14, 2024 when the NOC was finally filed. The delayed filing totals 42 days. Although Insurer failed to timely file the NOC the record is devoid of reprehensible conduct or significant prejudice to Claimant. Moreover, Insurer's motivation for the violation is uncertain, but may have simply constituted a missed deadline. Claimant is thus awarded penalties of $20.00 per day or a total of $840.00 for failing to timely file the NOC pursuant to §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). The penalty is designed to enforce the statute and Rule as well as deter future misconduct. Pursuant to §8-43-203(2)(a), C.R.S. fifty percent of the penalty shall be paid to the subsequent injury fund, created in §8-46-101, and fifty percent to Claimant.

44. On January 26, 2024 Claimant's counsel sent a letter to Insurer explicitly requesting a copy of the claim file and asserting the authority of §8-43-203(4), C.R.S. Ms. Flower acknowledged that Claimant's attorney's introduction letter made a request to produce the claim file on January 26, 2024. She testified that she is familiar with the requirements to produce claim files when requested in Colorado claims. On February 15, 2024 Claimant's counsel sent a second letter to Gallagher Bassett adjuster Ms. LaBossiere reiterating that he had requested the claim file on January 26, 2024 and it was due on February 10, 2024 pursuant to §8-43-203(4), C.R.S.

45. The record reflects that Insurer was aware there was a statutory requirement to copy the claim file and transmit it within the time period included in the statute. Insurer is in the business of adjusting claims and §8-43-203(4), C.R.S. is a statute concerning the adjustment of claims. Although the claim file was due on February 10, 2024, it was not produced until February 23, 2024.The only reasonable inference from the record is that Respondents knew or should have known that their failure to timely produce the claim file would violate the statute. It can thus be presumed that Respondents' actions were objectively unreasonable.

46. Similarly, the defense Insurer pursued involving a cure of the violation pursuant to §8-43-304(4), C.R.S. has not been established. The section requires that, if the violation is cured by a respondent within 20 days of the filing of an application for hearing, then the respondent cannot be fined unless it is shown by clear and convincing evidence the respondent "knew or reasonably should have known such person was in violation." The cure provision retains a negligence standard when referring to a violator who "reasonably" should have known of its transgression. The same documentary evidence that established the violation, the letters of January 16, 2024 and February 15, 2024, constitute clear and convincing evidence that Insurer knew of its responsibility to exchange a copy of the claim file as provided by §8-43-203(4), C.R.S. Insurer's failure to produce the claim file until February 23, 2024 when it was due on February 10, 2024 thus mandates penalties.

47. Considering the extent of harm to Claimant, the duration and type of violation, Insurer's motivation for the violation, Insurer's mitigation, and whether the misconduct is part of a pattern, suggests a minimal penalty. **Notably, §8-43-304(1), C.R.S. provides that penalties shall not exceed $1,000 per day.** Accordingly, an

appropriate penalty in regard to the violation is $20.00 per day for 13 days or a total of $260.00. Fifty percent of any penalty shall be paid to the Colorado uninsured employer fund created in §8-67-105, C.R.S. and fifty percent to Claimant.

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).

Temporary Total Disability Benefits

4. To prove entitlement to TTD benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), 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 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.

5. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to receive TTD benefits for the period prior to his January 6, 2024 termination from employment. Claimant has been on restrictions from his regular duties as a result of his compensable work injury. Following his injury, Claimant was not scheduled to work for another two weeks from December 13, 2023 through December 25, 2023. During the period from December 26, 2023 through January 5, 2023, Claimant missed December 26 and 27, 2023 as a result of his disability. However, he then missed December 28, 2023 due to his fiancée's illness after he had reported to work for modified duty. Claimant presented no evidence that he missed December 28, 2024 as a result of his disability. As such, even though Claimant missed two shifts as a result of his work injury, he failed to establish the requirement of missing three shifts under §8-42-105, C.R.S. to warrant TTD benefits. Indeed, the third shift that he did not work had no relationship to his work injury and only occurred due to his fiancée's illness after he appeared at work ready to perform modified duty.

6. As found, Claimant then returned to work from December 29, 2023, through January 1, 2024, for modified duty in which he performed a job known as running sand. Claimant's schedule remained the same and he was not required to do any pushing, pulling, or repetitive twisting or bending. During the period he thus did not suffer any wage loss. For the period January 2-6, 2024 Claimant did not miss work as a result of his disability. Rather, Claimant only presented evidence that he was unable to work during the period as a result of a non-work-related illness that he believed he contracted from his fiancée. The record thus reveals that Claimant only missed work on December 26-27, 2023 as a result of his industrial injury. He did not suffer a disability lasting more than three work shifts as required by §8-42-105, C.R.S. to establish an entitlement to TTD benefits. Accordingly, his request for TTD benefits prior to his January 6, 2024 termination from employment is denied and dismissed. However, whether Claimant may receive TTD benefits after January 6, 2024 is contingent upon whether he was responsible for his termination of employment as addressed in the following section of this order.

Termination for Cause

7. Claimant seeks TTD benefits after his termination for the period January 8, 2024 through July 6, 2024, except for May 28-31, 2024, because of his earnings from a tiling project. However, Respondents have demonstrated by a preponderance of the evidence that Claimant was responsible for his January 6, 2024 termination from

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

8. As found, Claimant was terminated solely for violating Employer's attendance policy. He specifically missed consecutive working days from January 4-6, 2024 without notifying his supervisors. Notably, Claimant acknowledged his agreement and understanding of the attendance policy when he was hired and received Employer's Handbook. Claimant's testimony that he did not know about the attendance policy or the requirements of Employer regarding absences from work lacks credibility. His actions and statements prior to his termination directly contradict his representations. Notably, Claimant testified that he was familiar with Employers' attendance policy and he always kept in communication if there was any reason he would miss a shift. Additionally, for each of Claimant's absences prior to the missed shifts from January 4-6, 2024 he communicated with his supervisors that he would not be at work. Finally, when Claimant last communicated with Mr. Welty on January 3, 2024 and Mr. Welty informed him that he needed to see urgent care and submit a doctor's note, Claimant acknowledged his understanding of the actions he should take when he responded, "[c]opy."

9. As found, following January 3, 2024, Claimant provided no explanation or excuse for his lack of communication through a text message or phone call. He also did not provide a doctor's note prior to termination. Instead, Claimant only suggested he was sick and in bed. Mr. Welty had no understanding as to why Claimant was failing to communicate and did not interpret Claimant's messages on January 2-3, 2024, to apply to January 4-6, 2024. He reasonably interpreted Claimant's text messages and expected Claimant either to report for work on January 4-6, 2024, or communicate about his condition.

10. As found, it is important to recognize that Claimant's termination was not predicated on his inability to perform his job duties because of his work injuries. He was

working modified employment without difficulties. However, when he failed to apprise his supervisors of his condition or produce a doctor's note during January 4-6, 2024, his actions clearly contravened Employer's attendance policy. The record thus reveals that Claimant was responsible for his termination. Additionally, Claimant voluntarily chose not to proceed to urgent care and obtain a doctor's note as instructed by Mr. Welty. His termination was predicated on a failure to obtain a doctor's note rather than absences related to his admitted work injury. *Compare Morales v. Walmart*, W.C. No 4-770-910 (ICAO Sept. 21, 2009) (where claimant was terminated for excessive absenteeism, but missed some work due to medical appointments and pain related to her work injury, respondents did not meet burden of responsible for termination); *Pace v. Commercial Design Engineering,* W.C. No. 4-451-277 (ICAO May 15, 2001) (claimant not responsible for termination when fired for excessive absenteeism, but missed work because of symptoms caused by the work injury).

11. As found, the record reveals that Claimant agreed to Employer's attendance policy when he acknowledged receipt of the Handbook that included a provision stating "[e]mployees who are absent for two consecutive working days, without notifying their supervisor, will be terminated." Additionally, he further agreed that "[r]otational employees who miss (unexcused) two days of work, consecutive or not, during any scheduled work period, will be terminated." Claimant thus had complete control over the circumstances that led to his termination and voluntarily violated both of the preceding requirements. He specifically failed to notify his supervisors and did not provide a doctor's note for missing three consecutive work shifts on January 4-6, 2024. Claimant would thus have reasonably expected to be terminated based on a direct contradiction of Employer's policies and his own prior actions. Therefore, under the totality of the circumstances, Claimant committed a volitional act or exercised some control over his termination from employment. Because Claimant was responsible for his termination, he is not entitled to receive TTD benefits subsequent to January 6, 2024.

Temporary Partial Disability Benefits

12. Section 8-42-106(1), C.R.S. provides for an award of TPD benefits based on the difference between a claimant's AWW at the time of injury and earnings during the continuance of the disability. Specifically, an employee shall receive 66.66% of the difference between his wages at the time of his injury and during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (TPD benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). 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). Section 8-42-106(2), C.R.S. provides that TPD benefits shall continue until either of the following occurs: "(a) The employee reaches maximum medical improvement; or (b)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee

fails to begin such employment." *See Evans v. Wal-Mart*, WC 4-825-475 (ICAO, May 4, 2012).

13. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive TPD benefits from July 7, 2024 until terminated by operation of law. Initially, Claimant began working in his modified duty position for Employer on December 28, 2023. However, Claimant was subsequently terminated from his modified employment on January 6, 2024. Nevertheless, consistent with the Panel's prior determinations, application of §§8-42-103(1)(g) and 8-42-105(4)(a), C.R.S., does not prevent Claimant from receiving an award of TPD benefits after his termination for cause. Had Claimant not been terminated for cause on January 6, 2024, he still would have sustained a wage loss due to the industrial injury, Specifically, the wage loss still would have "resulted" regardless of Claimant's termination and remained attributable to the industrial injury. Thus, although Claimant was terminated for cause from his modified duty job, he is entitled to TPD benefits to compensate for that portion of his wage loss that continued to result from his December 12, 2023 industrial injury. *See Lucero v. City of Durango,* WC 5-195-588 (ICAO Mar. 21, 2024) (concluding that, even though the claimant retired from his modified duty job, he was still entitled to TPD benefits to compensate for that portion of his wage loss that continued to result from his industrial injury).

14. As found, the record reflects Claimant's earnings while working for Big Horn Trucking. From July 7, 2024 through July 13, 2024 Claimant's gross pay was $800.00. From July 18, 2024 through July 20, 2024 Claimant earned $910.40. From July 23, 2024 through July 27, 2024 Claimant's gross pay was $944.05. Finally, from July 30, 2024 through August 3, 2024, Claimant earned $1,365.44. The parties agreed that after February 1, 2024, due to Claimant's COBRA eligibility, his AWW increased to $1,937.77. Claimant is thus entitled to receive the difference between his stipulated AWW and earnings during the continuance of the disability. Claimant shall specifically receive 66.66% of the difference between his AWW of $1,937.77 and his earnings while his partial disability continues.

Penalties

15. Section 8-43-304(1), C.R.S. authorizes the imposition of penalties not to exceed $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. *See* §8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Indus. Claim Appeals Off.,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), C.R.S. even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

16. The cure provision of §8-43-304(4), C.R.S., provides that,

> After the date of mailing of [any application for hearing for any penalty pursuant to subsection (1)], an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking the 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….

17. Whether statutory penalties may be imposed under §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). 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 Pant 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).

18. 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).

Penalties Related to Filing Late Notice of Contest

19. Section 8-43-203(1)(a) C.R.S. provides that the employer or, if insured, the employer's insurance carrier shall notify the Division and the injured employee in writing within 20 days, after the first report of injury is filed with the Division, whether liability is admitted or contested. Similarly, Rule 5-2(C) provides: "[t]he insurer shall state whether liability is admitted or contested within 20 days after the date the employer's First Report of Injury is filed with the Division."

20. Section 8-43-203(2)(a), C.R.S. specifies that, if such notice is not filed, "the employer, or if insured, the employer's insurance carrier, may become liable to the claimant, if successful on the claim for compensation, for up to one day's compensation

for each failure to so notify." Fifty percent of any penalty shall be paid to the subsequent injury fund, created in §8-46-101, and fifty percent to the claimant. §8-43-203(2)(a), C.R.S. The claimant bears the burden of proof to establish the circumstances justifying the imposition of the penalty. *See Pioneer Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005).

21. As found, Claimant has proven by a preponderance of the evidence that he is entitled to recover penalties under §8-43-203(2)(a), C.R.S. and WCRP 5-2(C) for Respondents' failure to file a NOC within 20 days of the FROI. Initially, on December 13, 2023 Employer filed the FROI. Insurer received the FROI on December 13, 2023 at 11:47:47. On February 14, 2024 Respondents filed a NOC. The reason listed for the denial was "[f]urther Investigation for Medical Records." Adjuster Ms. Flower testified that she was aware of WCRP 5-2(C) that requires either an admission or NOC to be filed within 20 days of the filing of the FROI. Ms. Flower agreed that, even though the FROI was filed on December 13, 2023, the NOC was not filed until February 14, 2024. She explained that the NOC was filed almost three months before Claimant filed his application for hearing on May 7, 2024 asserting penalties.

22. As found, because the NOC was not timely filed in the present matter, Respondents violated a statute and Rule. Insurer may thus be liable to Claimant for up to one day's compensation for each failure to so notify. The record reveals that Insurer was aware there was a statutory requirement to file a NOC within 20 days as delineated in §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). Respondents did not offer a persuasive explanation justifying the late filing of the NOC. It can thus be presumed that Respondents' actions were objectively unreasonable. Although Insurer filed the NOC almost three months before Claimant filed his application for hearing, there is no cure provision delineated in §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). Moreover, the only reasonable inference from the record is that Respondents knew or should have known that their failure timely to admit or deny liability violated the statute and Rule. Accordingly, Claimant has produced clear and convincing evidence that Insurer knew or should have known of the violation.

23. As found, Claimant is entitled to penalties for the violation of §8-43-203(2)(a), C.R.S. and WCRP 5-2(C) from January 3, 2024 (20 days after the FROI) until February 14, 2024 when the NOC was finally filed. The delayed filing totals 42 days. Although Insurer failed to timely file the NOC the record is devoid of reprehensible conduct or significant prejudice to Claimant. Moreover, Insurer's motivation for the violation is uncertain, but may have simply constituted a missed deadline. Claimant is thus awarded penalties of $20.00 per day or a total of $840.00 for failing to timely file the NOC pursuant to §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). The penalty is designed to enforce the statute and Rule as well as deter future misconduct. Pursuant to §8-43-203(2)(a), C.R.S. fifty percent of the penalty shall be paid to the subsequent injury fund, created in §8-46-101, and fifty percent to Claimant.

Penalties Related to Claimant's Request for Claim File under §8-43-203(4), C.R.S.

24. Section 8-43-203(4), C.R.S. provides that,

Within fifteen days after the mailing of a written request for a copy of the claim file, the employer, or if insured, the employer's insurance carrier or third-part administrator shall provide to the claimant or his or her representative a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of the injury and thereafter, regardless of the format. If a privilege or other protection is claimed for any materials, the materials must be detailed in an accompanying privilege log.

25. As found, on January 26, 2024 Claimant's counsel sent a letter to Insurer explicitly requesting a copy of the claim file and asserting the authority of §8-43-203(4), C.R.S. Ms. Flower acknowledged that Claimant's attorney's introduction letter made a request to produce the claim file on January 26, 2024. She testified that she is familiar with the requirements to produce claim files when requested in Colorado claims. On February 15, 2024 Claimant's counsel sent a second letter to Gallagher Bassett adjuster Ms. LaBossiere reiterating that he had requested the claim file on January 26, 2024 and it was due on February 10, 2024 pursuant to §8-43-203(4), C.R.S.

26. As found, the record reflects that Insurer was aware there was a statutory requirement to copy the claim file and transmit it within the time period included in the statute. Insurer is in the business of adjusting claims and §8-43-203(4), C.R.S. is a statute concerning the adjustment of claims. Although the claim file was due on February 10, 2024, it was not produced until February 23, 2024.The only reasonable inference from the record is that Respondents knew or should have known that their failure to timely produce the claim file would violate the statute. It can thus be presumed that Respondents' actions were objectively unreasonable.

27. As found, similarly, the defense Insurer pursued involving a cure of the violation pursuant to §8-43-304(4), C.R.S. has not been established. The section requires that, if the violation is cured by a respondent within 20 days of the filing of an application for hearing, then the respondent cannot be fined unless it is shown by clear and convincing evidence the respondent "knew or reasonably should have known such person was in violation." The cure provision retains a negligence standard when referring to a violator who "reasonably" should have known of its transgression. *See Kerr v. Costco Wholesale Inc*, W.C. No. 5-076-601-002 (June 1, 2021); *Tadlock v. Gold Mine Casino*, W.C. No. 4-200-716 (May 16, 2007). The same documentary evidence that established the violation, the letters of January 16, 2024 and February 15, 2024, constitute clear and convincing evidence that Insurer knew of its responsibility to exchange a copy of the claim file as provided by §8-43-203(4), C.R.S. Insurer's failure to produce the claim file until February 23, 2024 when it was due on February 10, 2024 thus mandates penalties.

28. As found, considering the extent of harm to Claimant, the duration and type of violation, Insurer's motivation for the violation, Insurer's mitigation, and whether the

misconduct is part of a pattern, suggests a minimal penalty. **Notably, §8-43-304(1), C.R.S. provides that penalties shall not exceed $1,000 per day.** Accordingly, an appropriate penalty in regard to the violation is $20.00 per day for 13 days or a total of $260.00. Fifty percent of any penalty shall be paid to the Colorado uninsured employer fund created in §8-67-105, C.R.S. and fifty percent to Claimant.

ORDER

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

1. Claimant's request for TTD benefits is denied and dismissed. He did not suffer a disability lasting more than three work shifts as a result of his admitted work injury prior to when he was responsible for his termination on January 6, 2024.

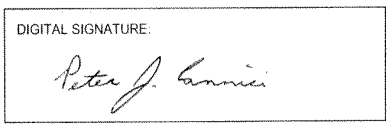
2. Claimant shall receive TPD benefits for the period July 7, 2024 based on the difference between his stipulated AWW of $1,937.77 and his earnings during the continuance of his disability.

3. Respondents are financially responsible for penalties of $20.00 per day or a total of $840.00 for failing to timely file the NOC pursuant to §8-43-203(2)(a), C.R.S. and WCRP 5-2(C). Pursuant to §8-43-203(2)(a), C.R.S. fifty percent of the penalty shall be paid to the subsequent injury fund, created in §8-46-101, C.R.S. and fifty percent to Claimant.

4. Respondents shall pay penalties of $20.00 per day for 13 days or a total of $260.00 under §8-43-304(1), C.R.S. for failing to timely produce the claim file pursuant to §8-43-203(4), C.R.S. Pursuant to §8-43-304(1), C.R.S. fifty percent of the penalty shall be paid to the Colorado uninsured employer fund created in §8-67-105, C.R.S., and fifty percent to Claimant.

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

DATED: January 28, 2025.



Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-219-483-002

ISSUE

Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' failure to file a Final Admission of Liability (FAL) within 30 days after the date of mailing or delivery of an impairment determination by an authorized Level II accredited physician.

FINDINGS OF FACT

1. On April 20, 2022 Claimant worked for Employer. He sustained an admitted, work-related left knee injury.

2. Claimant obtained treatment with Authorized Treating Physician (ATP) Lon Noel, M.D. at Midtown Occupational Health Services. Claimant underwent an MRI that revealed ACL and lateral meniscus tears to his left knee. On June 21, 2022 he underwent a left knee arthroscopically assisted ACL reconstruction, partial meniscectomy, and lateral tibial articular meniscectomy to repair his left knee.

3. On January 17, 2023 Dr. Noel released Claimant to Maximum Medical Improvement (MMI). On January 24, 2023 he assigned Claimant a 16% lower extremity impairment rating. The report and accompanying information were mailed by Midtown Occupational Services to Insurer on January 26, 2023.

4. The record reflects that Respondents received a copy of Dr. Noel's report and corresponding work sheets on February 1, 2023. The delivery stamp on the bottom of the report and work sheet specifically reveal that they were received on February 1, 2023.

5. Claimant was terminated from employment shortly after he reached MMI. Claimant remained off work until nine months prior to the commencement of the present hearing. He remained off work for approximately eight months, during which time he did not receive any benefits.

6. On February 27, 2024 Respondents filed a FAL. The FAL included Dr. Noel's MMI report and impairment worksheets, but the documents did not include stamps reflecting a receipt date. The impairment worksheet only reveals a stamp noting that it was FAXed on February 14, 2024. The FAL acknowledged Dr. Noel's 16% scheduled impairment rating with a value of $12,103.93. The FAL was not copied to Claimant's attorney.

7. On April 6, 2024 Respondents filed a second FAL that was copied to Claimant's counsel. The second FAL also included Dr. Noel's report and worksheets. The

attached impairment report and worksheet included the delivery stamp on the bottom of the page revealing Respondents received the documentation on February 1, 2023.

8. Claimant has established it is more probably true than not that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' failure to file a FAL within 30 days after the date of mailing or delivery of an impairment determination by an authorized Level II accredited physician. Initially, on January 17, 2023 Dr. Noel released Claimant to MMI. On January 24, 2023 he assigned Claimant a 16% lower extremity impairment rating. The report and accompanying information were mailed by Midtown Occupational Services to Insurer on January 26, 2023. The record reflects that Respondents received a copy of Dr. Noel's report and accompanying work sheets on February 1, 2023. Notably, the delivery stamp on the bottom of the report and work sheet specifically reveal that they were received on February 1, 2023.

9. Respondents acknowledge that they received Dr. Noel's impairment report on February 1, 2023. However, they assert that the range of motion worksheets were not included with the report. Respondents contend that they were unable to file a valid FAL under Rule 5-5(A) because they could not include both the narrative report and range of motion worksheets with the FAL. The range of motion worksheet was not FAXed until February 14, 2024.

10. Despite Respondents' contention, the record reveals that they received both the impairment report and the range of motion worksheet on February 1, 2023. Respondents' assertion, based on a FAXed stamp on the range of motion worksheet attached to the February 27, 2024 FAL, is unreasonable and not consistent with the bulk of the record evidence. Importantly, Midtown Occupational Services mailed the impairment report and rating worksheet to Insurer on January 26, 2023 and the delivery stamp on the bottom of the report and work sheet specifically reveal that they were received on February 1, 2023.

11. Respondents had 30 days from delivery of the report to either file a FAL or request a DIME. The 30 days would have expired on March 4, 2023. Respondents did no0t request a DIME. Moreover, Respondents did not file an FAL until February 27, 2024. The FAL was thus not filed until 360 days after the time permitted under Worker's Compensation Rule of Procedure 5-5 (E)(1). Respondents' failure to file FAL before March 4, 2023 thus constituted a violation of Rule 5-5(E)(1).

12. Respondents' conduct in failing to file an FAL until 360 days after it was due under Rule 5-5(E) was objectively unreasonable. Respondents have only asserted that they did not receive Dr. Noel's impairment worksheets until February 27, 2024 without offering any rationale for the delayed filing of the FAL. Because Respondents failed to offer a reasonable factual or legal explanation for its actions, it is reasonable to infer that Claimant sustained his burden to prove the violation was objectively unreasonable. Respondents' argument is simply not based in rational argument in law or fact. Accordingly, Respondents conduct in filing the FAL 360 days late was objectively unreasonable and warrants penalties.

13. Although Insurer failed to timely file the FAL the record is devoid of reprehensible conduct. Moreover, Insurer's motivation for the violation is uncertain, but may have simply constituted a missed deadline. However, Claimant was prejudiced by Respondents' actions because he remained off work for approximately eight months and did not receive any benefits in the absence of an FAL. Therefore, penalties of $50.00 per day for a total of $18,000 are warranted based on Respondents' failure to timely file an FAL pursuant to Rule 5-5(E). The penalty is designed to enforce the Rule as well as deter future misconduct. Pursuant to §8-43-203(2)(a), C.R.S. fifty percent of the penalty shall be paid to the subsequent injury fund, created in §8-46-101, and fifty percent to Claimant.

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. Worker's Compensation Rule of Procedure 5-5(E)(1) provides, in pertinent part:

> For those injuries required to be filed with the Division with dates of injury on or after July 1, 1991:
>
> > (1) Within 30 days after the date of mailing or delivery of a determination of impairment by an authorized Level II accredited physician, or within 30 days after the date of mailing or delivery of a determination by the authorized

> treating physician providing primary care that there is no impairment, the insurer shall either:
>
> > (a) File an admission of liability consistent with the physician's opinion, or
> >
> > (b) Request a Division Independent Medical Examination (DIME) in accordance with Rule 11-3 and §8-42-107.2, C.R.S.,

Thus, Rule 5-5 (E)(1) requires an Insurer to file a FAL or request a Division Independent Medical Evaluation (DIME) within 30 days after the date of mailing or delivery of a determination of impairment by an authorized Level II accredited physician.

5. Section 8-43-304(1), C.R.S. authorizes the imposition of penalties not to exceed $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. *See* §8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Indus. Claim Appeals Off.,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), C.R.S. even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

6. The cure provision of §8-43-304(4), C.R.S., provides that,

> After the date of mailing of [any application for hearing for any penalty pursuant to subsection (1)], an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking the 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….

7. Whether statutory penalties may be imposed under §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). 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 Pant 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).

8. 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).

9. As found, Claimant has established by a preponderance of the evidence that he is entitled to recover penalties under §8-43-304(1), C.R.S. for Respondents' failure to file a FAL within 30 days after the date of mailing or delivery of an impairment determination by an authorized Level II accredited physician. Initially, on January 17, 2023 Dr. Noel released Claimant to MMI. On January 24, 2023 he assigned Claimant a 16% lower extremity impairment rating. The report and accompanying information were mailed by Midtown Occupational Services to Insurer on January 26, 2023. The record reflects that Respondents received a copy of Dr. Noel's report and accompanying work sheets on February 1, 2023. Notably, the delivery stamp on the bottom of the report and work sheet specifically reveal that they were received on February 1, 2023.

10. As found, Respondents acknowledge that they received Dr. Noel's impairment report on February 1, 2023. However, they assert that the range of motion worksheets were not included with the report. Respondents contend that they were unable to file a valid FAL under Rule 5-5(A) because they could not include both the narrative report and range of motion worksheets with the FAL. The range of motion worksheet was not FAXed until February 14, 2024.

11. As found, despite Respondents' contention, the record reveals that they received both the impairment report and the range of motion worksheet on February 1, 2023. Respondents' assertion, based on a FAXed stamp on the range of motion worksheet attached to the February 27, 2024 FAL, is unreasonable and not consistent with the bulk of the record evidence. Importantly, Midtown Occupational Services mailed the impairment report and rating worksheet to Insurer on January 26, 2023 and the delivery stamp on the bottom of the report and work sheet specifically reveal that they were received on February 1, 2023.

12. As found, Respondents had 30 days from delivery of the report to either file a FAL or request a DIME. The 30 days would have expired on March 4, 2023. Respondents did no0t request a DIME. Moreover, Respondents did not file an FAL until February 27, 2024. The FAL was thus not filed until 360 days after the time permitted

under Worker's Compensation Rule of Procedure 5-5 (E)(1). Respondents' failure to file FAL before March 4, 2023 thus constituted a violation of Rule 5-5(E)(1).

13. As found, Respondents' conduct in failing to file an FAL until 360 days after it was due under Rule 5-5(E) was objectively unreasonable. Respondents have only asserted that they did not receive Dr. Noel's impairment worksheets until February 27, 2024 without offering any rationale for the delayed filing of the FAL. Because Respondents failed to offer a reasonable factual or legal explanation for its actions, it is reasonable to infer that Claimant sustained his burden to prove the violation was objectively unreasonable. Respondents' argument is simply not based in rational argument in law or fact. Accordingly, Respondents conduct in filing the FAL 360 days late was objectively unreasonable and warrants penalties.

14. As found, although Insurer failed to timely file the FAL the record is devoid of reprehensible conduct. Moreover, Insurer's motivation for the violation is uncertain, but may have simply constituted a missed deadline. However, Claimant was prejudiced by Respondents' actions because he remained off work for approximately eight months and did not receive any benefits in the absence of an FAL. Therefore, penalties of $50.00 per day for a total of $18,000 are warranted based on Respondents' failure to timely file an FAL pursuant to Rule 5-5(E). The penalty is designed to enforce the Rule as well as deter future misconduct. Pursuant to §8-43-203(2)(a), C.R.S. fifty percent of the penalty shall be paid to the subsequent injury fund, created in §8-46-101, and fifty percent to Claimant.

ORDER

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

1. Claimant's request for penalties for Respondents' failure to timely file a FAL pursuant to Rule 5-5(E) is granted. Respondents are liable for penalties under §8-43-304(1) in the amount of $18,000. Pursuant to §8-43-203(2)(a), C.R.S. fifty percent of the penalty shall be paid to the subsequent injury fund, created in §8-46-101, and fifty percent to Claimant.

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

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

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 28, 2025.

DIGITAL SIGNATURE:

Peter J. Canicci

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-253-064-003

ISSUE

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

FINDINGS OF FACT

1. This claim involves an admitted injury to Claimant's right knee. Claimant worked as a material technician for Employer. On October 3, 2023 Claimant was loading argon tanks to bring up to the operating room. During the process, one of the tanks began to roll off a cart. As Claimant went to catch the tank, he tweaked his right knee and felt a sharp pain. He immediately informed Employer and went to urgent care.

2. In December 2023 Claimant's orthopedic surgeon requested authorization to perform right knee surgery. Respondents denied the surgical request. On February 9, 2024 Authorized Treating Physician (ATP) Christian Updike, M.D. placed Claimant at Maximum Medical Improvement (MMI) and released him to full duty.

3. On February 14, 2024 Claimant's Primary Care Physician (PCP) placed him back on work restrictions. Employer did not offer Claimant work within his restrictions. Claimant remained employed but off work for approximately six months.

4. On June 10, 2024 Claimant underwent a Division Independent Medical Examination (DIME) with Matthew Brodie, M.D. Dr. Brodie determined Claimant had not reached MMI and the recommended surgery was reasonable, necessary, and related to Claimant's work injury. Respondents thus reopened the claim.

5. On July 1, 2024 Claimant returned to Dr. Updike for an evaluation. Dr. Updike placed Claimant back on work restrictions. From early February 2024 through the end of July 2024 Employer maintained Claimant's employment but never offered Claimant work within his restrictions.

6. On July 30, 2024 Employer sent a Rule 6 modified duty job offer to Dr. Updike. Dr. Updike approved the modified offer on the same day. Prior to returning to modified duty, Claimant notified Employer that he had a pre-planned, nonrefundable family vacation to Puerto Rico scheduled from August 21-29, 2024.

7. On August 8, 2024 Employer issued Claimant a written warning for attendance issues that occurred between December 2023 and February 2024. This was Claimant's first day back at work since February 2024.

8. On September 5, 2024 Claimant underwent right knee surgery with Elise Hiza. M.D. Dr. Hiza explained to Claimant that he might not obtain any pain relief from the surgery. Claimant reported right calf pain after the surgery. No providers found evidence of a DVT or other cause for concern.

9. On September 13, 2024 Claimant presented to the emergency room for an emergency evaluation due to calf pain. The treating provider recommended imaging and medications. As a precaution, ATP Dr. Updike removed Claimant from work for the period September 16, 2024 through September 24, 2024 due to calf swelling and Claimant's evaluation at an emergency room.

10. On September 24, 2024 ATP Dr. Updike released Claimant to work eight hours per day with restrictions. Specific restrictions included sitting 95% of the time, no lifting in excess of five pounds, minimize the amount of walking between the parking lot and the work location as well as between departments, and no kneeling or squatting. The start date for the modified duty return was October 1, 2024.

11. Dr. Updike elected to terminate the physician-patient relationship with Claimant on September 24, 2024. Claimant's care was thus transferred to Elizabeth Wilcox, M.D.

12. Employer was able to accommodate Claimant's work restrictions and Claimant accepted the Rule 6 modified job offer. He reported to work on October 1, 2024. Brenden Smith is the procedural area supply chain supervisor for Employer. He oversees a team of technicians and coordinators who provide surgical rooms with supplies throughout the day. Mr. Smith was Claimant's supervisor on the date of injury and throughout the claim. He explained that Claimant was able to complete his job duties within his work restrictions. Claimant was in a chair with a push-cart checking updates in the surgical suites.

13. Mr. Smith testified that Claimant received a "Written Warning" for unexcused absences on August 3, 2023. The warning preceded Claimant's work injury. The August 3, 2023 written warning specified that Claimant had three or more unexcused absences in the past 90 days. A list of dates on which Claimant violated Employer's attendance policy was included in the August 3, 2023 written warning. Furthermore, Claimant was late for work on numerous occasions between May and July 2023. Claimant appealed the August 3, 2023 written warning, but the disciplinary action was upheld.

14. Employer has an attendance policy that has existed throughout Claimant's employment. All employees have access to the attendance policy through an Employee website. The policy outlines requests for time off work and what are considered excused or unexcused absences. The attendance policy also describes the corrective action process that is a guideline only for Employer supervisors.

15. Employer also has a corrective actions and appeal process policy. All employees are subject to the policy. This policy was in place during Claimant's employment. The corrective actions and appeal policy states that no corrective action tool is a prerequisite for any other discipline including termination, and the appropriate action to administer for a given situation depends on the seriousness of the violation. The policy also describes the appellate

process in which an employee may seek review of a corrective action that she believes is unjust or inequitable. Employees may only appeal written warnings, suspensions, involuntary demotions and a low overall annual performance review rating. The policy also defines "involuntary termination" as the removal of the employee from the workplace. Prior corrective action is not a prerequisite for involuntary termination. However, the supervisor must give the employee an opportunity to respond to the allegations supporting the termination.

16. Mr. Smith also explained that Claimant received another written warning due to attendance issues dated August 8, 2024. He commented this was the first opportunity he had to meet with Claimant in-person after his six-month absence because of his knee injury. A meeting on August 8, 2024 included Mr. Smith, Claimant, and manager JaNiece Wells to discuss the events listed in the August 8, 2024 written warning. The document listed eight unexcused absences from work during the period December 2023 through February 2024. Claimant admitted to the attendance issues documented in the August 8, 2024 warning and did not appeal the action.

17. On October 8, 2024 Claimant treated with his new ATP Dr. Wilcox. Regarding Claimant's work restrictions, she determined,

> I am concerned that he is not progressing with his range of motion. He is primarily on seated work which is causing his knee to be stiff after 2 hours. I have recommended that he go down to 4 hours of seated work and change positions after 1 hour of seated work.

18. Claimant contacted Dr. Wilcox on October 17, 2024 requesting to be taken off work. Dr. Wilcox denied the request and referred him to biofeedback for pain management. She noted Claimant's pain levels were unexplainable.

19. On October 31, 2024 Claimant was terminated for violating Employer's attendance policy. The termination letter includes a "synopsis of recent events." Specifically, the synopsis noted that on August 7, 2024 Claimant mentioned that he had scheduled a non-refundable trip to Puerto Rico from August 21-29, 2024. Claimant's leader advised him that he needed to request his time off in the time-keeping system Kronos to determine whether it would be approved. However, the time was not approved because Claimant did not have any PTO available. Moreover, Claimant was scheduled to return to modified employment on August 8, 2024. However, he had called out from work on August 8 and 12-14. Claimant also missed work as a result of the Puerto Rico trip from August 21-29, 2024. The termination letter mentioned that Claimant had eight call-outs during October 2024. Based on the available information, Claimant's employment was termination on October 31, 2024.

20. On October 31, 2024 there was also a meeting involving Mr. Smith, Claimant, supervisor Ms. Wells, and Jonnette Carter from Human Resources to discuss the events outlined in the October 31, 2024 termination letter. Mr. Smith detailed that the parties discussed a trip Claimant took to Puerto Rico from August 21-29, 2024. However, Claimant did not request time off work for the trip and notably did not have any paid time off available. Because Claimant did not work the scheduled shifts, they constituted unexcused absences. Claimant had additional unexcused absences on August 8, August 12-14, October 4, October

7-8, October 15-17, October 24, and October 30, 2024. Although on some of the preceding dates Claimant noted that he would not make it to work because of knee pain, no ATP excused Claimant from work on any of the dates. Furthermore, the bulk of the evidence reveals that Claimant provided myriad reasons for missing work that all constituted unexcused absences. Claimant received an opportunity to respond to the allegations. However, Employer moved forward with Claimant's termination of employment for violation of the attendance policy.

21. Employer's Human Resources Compliance Specialist Anna Hoag testified at the hearing in this matter. She manages the day-to-day activities of the Workers' Compensation administrative process. Ms. Hoag helped Dr. Updike prepare the Rule 6 letter sent out for his approval or response. She drafted and communicated the modified duty job offer to Claimant. Importantly, Ms. Hoag explained that Claimant was cleared to work by his ATP on the dates listed in the termination letter. She explained that authorized leave is time away from work that is certified by an ATP. Time off work that not certified constitutes an unexcused absence pursuant to Employer's work-related injury and illness reporting and follow-up policy.

22. Claimant received Temporary Total Disability (TTD) benefits and Temporary Partial Disability (TPD) benefits for various periods from October 4, 2023 through October 31, 2024. Respondents filed a Petition to Terminate compensation from November 6, 2024 and continuing because Claimant was responsible for his termination of employment pursuant to §8-42-103(1)(g) C.R.S. Respondents attached the termination notice for violation of Employer's attendance policy addressed to Claimant dated October 31, 2024. Claimant filed an Objection to the Petition to Terminate on November 6, 2024 disputing that he was terminated for cause.

23. On November 22, 2024 Respondents filed an Application for Expedited Hearing on the Petition to Terminate compensation. Claimant filed a Response to the Application for Expedited Hearing on November 26, 2024. Respondents are continuing to pay Claimant TTD benefits from October 31, 2024 and continuing.

24. Respondents have established it is more probably true than not that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on October 3, 2023 Claimant suffered an admitted right knee injury while working for Employer. Prior to his work-related injury, Claimant received a written warning for unexcused absences on or around August 3, 2023. The August 3, 2023 written warning states Claimant had three or more unexcused absences in the past 90 days. A list of dates Claimant violated the attendance policy was included in the August 3, 2023 Written Warning. Claimant's actions were in violation of Employer's attendance policy.

25. Claimant received another written warning due to attendance issues dated August 8, 2024. This was Claimant's first day back to work since February 2024. The document listed eight unexcused absences from work during the period December 2023 through February 2024. Claimant admitted to the attendance issues documented in the August 8, 2024 Warning.

26. On September 24, 2024 ATP Dr. Updike released Claimant to work eight hours per day with restrictions. Specific restrictions included sitting 95% of the time, no lifting in

excess of five pounds, minimize the amount of walking between the parking lot and the work location as well as between departments, and no kneeling or squatting. The start date for the modified duty return was October 1, 2024. Claimant reported for work on October 1, 2024 and was able to perform his modified job duties.

27. On October 31, 2024 Claimant was terminated for violating Employer's attendance policy. The termination letter noted that on August 7, 2024 Claimant mentioned he had scheduled a non-refundable trip to Puerto Rico from August 21-29, 2024. However, Claimant did not request time off work for the trip and notably did not have any paid time off available. Because Claimant did not work the scheduled shifts, they constituted unexcused absences. Claimant had additional unexcused absences on August 8, August 12-14, October 4, October 7-8, October 15-17, October 24, and October 30, 2024. Although on some of the preceding dates Claimant remarked he would not make it to work because of knee pain, no ATP excused Claimant from work on any of the dates. Moreover, Ms. Hoag explained that Claimant was cleared to work by his ATP on the dates listed in the termination letter. She explained that authorized leave is time away from work that is certified by an ATP. Time off work that not certified constitutes an unexcused absence. Moreover, based on Claimant's history of repeated violations of the attendance policy both before and after his work injury, his testimony about the reasons for missing work are not credible. The bulk of the evidence reveals that Claimant provided myriad reasons for missing work that all constituted unexcused absences. Based on the available information, Claimant's employment was terminated on October 31, 2024.

28. Claimant's actions in failing to adhere to Employer's attendance and time recording policies demonstrate that he exercised some control over his October 31, 2024 termination under the totality of the circumstances. The record is replete with evidence that Claimant had numerous unexcused absences in violation of Employer's attendance policy. The unexcused absences occurred both before his work injury and after his ATP permitted him to return to modified employment.. By regularly violating Employer's policy regarding unexcused absences, Claimant precipitated his employment termination by volitional acts that he would reasonably expect to cause the loss of employment. Accordingly, Claimant was responsible for his October 31, 2024 termination from employment.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on October 3, 2023 Claimant suffered an admitted right knee injury while working for Employer. Prior to his work-related injury, Claimant received a written warning for unexcused absences on or around August 3, 2023. The August 3, 2023 written warning states Claimant had three or more unexcused absences in the past 90 days. A list of dates Claimant violated the attendance policy was included in the August 3, 2023 Written Warning. Claimant's actions were in violation of Employer's attendance policy.

6. As found, Claimant received another written warning due to attendance issues dated August 8, 2024. This was Claimant's first day back to work since February 2024. The document listed eight unexcused absences from work during the period December 2023 through February 2024. Claimant admitted to the attendance issues documented in the August 8, 2024 Warning.

7. As found, on September 24, 2024 ATP Dr. Updike released Claimant to work eight hours per day with restrictions. Specific restrictions included sitting 95% of the time, no lifting in excess of five pounds, minimize the amount of walking between the parking lot and

the work location as well as between departments, and no kneeling or squatting. The start date for the modified duty return was October 1, 2024. Claimant reported for work on October 1, 2024 and was able to perform his modified job duties.

8. As found, on October 31, 2024 Claimant was terminated for violating Employer's attendance policy. The termination letter noted that on August 7, 2024 Claimant mentioned he had scheduled a non-refundable trip to Puerto Rico from August 21-29, 2024. However, Claimant did not request time off work for the trip and notably did not have any paid time off available. Because Claimant did not work the scheduled shifts, they constituted unexcused absences. Claimant had additional unexcused absences on August 8, August 12-14, October 4, October 7-8, October 15-17, October 24, and October 30, 2024. Although on some of the preceding dates Claimant remarked he would not make it to work because of knee pain, no ATP excused Claimant from work on any of the dates. Moreover, Ms. Hoag explained that Claimant was cleared to work by his ATP on the dates listed in the termination letter. She explained that authorized leave is time away from work that is certified by an ATP. Time off work that not certified constitutes an unexcused absence. Moreover, based on Claimant's history of repeated violations of the attendance policy both before and after his work injury, his testimony about the reasons for missing work are not credible. The bulk of the evidence reveals that Claimant provided myriad reasons for missing work that all constituted unexcused absences. Based on the available information, Claimant's employment was terminated on October 31, 2024.

9. As found, Claimant's actions in failing to adhere to Employer's attendance and time recording policies demonstrate that he exercised some control over his October 31, 2024 termination under the totality of the circumstances. The record is replete with evidence that Claimant had numerous unexcused absences in violation of Employer's attendance policy. The unexcused absences occurred both before his work injury and after his ATP permitted him to return to modified employment.. By regularly violating Employer's policy regarding unexcused absences, Claimant precipitated his employment termination by volitional acts that he would reasonably expect to cause the loss of employment. Accordingly, Claimant was responsible for his October 31, 2024 termination from employment.

ORDER

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

1. Claimant was responsible for his October 31, 2024 termination from employment.

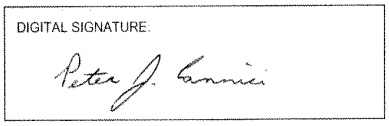
2. Respondents are entitled to terminate ongoing indemnity benefits as of November 6, 2024 and to an overpayment for all indemnity benefits paid since November 6, 2024 against any permanent partial disability benefits to which Claimant may be entitled.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor,

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

DATED: January 29, 2025.



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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that his right shoulder symptoms and need for an evaluation of his right shoulder are causally related to his November 11, 2023 compensable left shoulder injury.

II. Whether Respondents established, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment thereby precluding his entitlement to TTD after April 14, 2024, pursuant to C.R.S. §§ 8-42-103 (1) (g) and 8-42-105 (4) (a).

FINDINGS OF FACT

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

1. Employer operates a distribution warehouse. Claimant is a former warehouse order picker who injured his left arm on November 11, 2023. Claimant was pulling on a heavy metal cage that is used to fill orders with items from his pick list. As Claimant was pulling on the cage, he felt a pop and experienced immediate pain and weakness in his left arm.

2. Liability for Claimant's shoulder injury was admitted and he began treatment with Dr. Thomas Centi, as the authorized provider, on November 13, 2023 (RHE C). Claimant was initially diagnosed with a left shoulder strain and released to return to modified duty work with no use of his left arm pending the results of an MRI. An MRI was completed on November 28, 2023 and revealed a torn left rotator cuff. (RHE A, p. 5; Exhibit C, p. 167). Accordingly, Claimant was referred for an orthopedic consultation (RHE C, p. 167). Dr. Jennifer FitzPatrick performed a left shoulder arthroscopic rotator cuff repair on January 18, 2024. (RHE A, p. 5-6; Exhibit C, p. 190). Claimant was taken off work as a result of his January 18, 2024 surgery. (RHE C, p. 191).

3. Claimant has a prior history of a surgically involved work-related injury to his right shoulder occurring in 2022. He treated with Dr. Centi as the authorized provider for this injury from June 10, 2022 through March 24 2023. (RHE B).

4. Claimant was referred to post-surgical physical therapy on February 1, 2024. (RHE C, p. 195). He was also released to modified work duty work. *Id*. at 197. Physical restrictions included, "No use of the left arm. Must wear sling." *Id.*

5. On March 13, 2024, Claimant's physical therapy note documented the following: "Is working full time (3-12 hour shifts) on light duty. Is c/o R shoulder pain because of only being able to use the R arm when working. Pain started 2 weeks ago, informed nurse at work." (CHE 4, p 16). This reference to pain in the right shoulder is carried over verbatim in Claimant's March 15, 2024, physical therapy note. (CHE 4, p. 19). No new or different complaints of right shoulder pain are contained in this note.

6. Claimant's work restrictions were modified on March 21, 2024 to restrict him to no overhead lifting with the left arm and no lifting, carrying, pushing, or pulling greater than two pounds with the left the arm. (RHE C, p. 211). On April 4, 2024, Claimant's work restrictions were liberalized so that he could lift, carry, push or pull up to three pounds. (RHE C, p. 217). Based upon the evidence presented, Claimant's work was restricted to no use of the left arm for a total of 49 days, i.e. between February 1, 2024 and March 21, 2024.

7. Despite being able to use his left arm to lift, carry, push, pull up to three pounds as of April 4, 2024, Claimant voiced complaints of his right shoulder being overworked to Dr. FitzPatrick. Dr. FitzPatrick's note from April 10, 2024, reads as follows: "Doing 3 shifts for 12 hours per day. Having to use right arm for all activity at work so it is getting overworked, history of right shoulder rotator cuff surgery a few years ago that was much smaller in size." (CHE 5, p. 26).

8. Claimant continued working within his April 4, 2024, restrictions until his employment was terminated on April 14, 2024. Per Claimant, his modified duties at the time he was terminated included sweeping floors with a push broom, collecting light trash items and removing rubber bands from the warehouse floor.

9. Claimant was terminated on April 14, 2024. The reason given for his termination by Employer states: "TM over 90 days. Conduct—Unsafe Acts (Phone on Floor) - TM on 3 write ups not eligible for a fourth." (See RHE G, p. 339- where abbreviation TM stands for Team Member). Claimant has a history of engaging in unsafe employment practices. (RHE F). On April 23, 2023 and July 1, 2023, Claimant was driving powered equipment in the warehouse and failed to stop or honk when exiting a closed doorway placing himself and others at risk for harm. (RHE F, p. 333-334). On November 19, 2023, Claimant was observed to be laying on a pallet under some racking while on his cell phone, placing himself for potential injury. *Id*. at 335. Additionally,

Claimant was counseling on both his reliability and the quality of his work on November 14, 2023. *Id.* at 337. In the paperwork admitted into evidence regarding disciplinary counseling, Claimant acknowledged receipt of the documents outlining his unacceptable conduct and performance. (See RHE F).

10. Respondents requested an independent medical examination (IME) to evaluate Claimant's assertion that he developed pain in the right shoulder due to overuse because of the inability to use his left arm after the imposition of restrictions from February 1, 2024 to March 21, 2024. Dr. John Burris completed the requested IME on May 21, 2024. (RHE A). In his May 21, 2024 report, Dr. Burris opined that the only diagnosis that could be causally related to Claimant's November 11, 2023, workplace event was the left shoulder rotator cuff tear and the right rotator cuff injury which was the subject of an unrelated workers compensation claim was not related. *Id*. at 8. Dr. Burris also opined that Claimant's referenced neck pain was actually localized to the left trapezius musculature which was commonly associated with Claimant's type of shoulder injury. *Id.* He documented a benign cervical spine examination and full pain free active range of motion. *Id*. Claimant denied any right shoulder pain at the time of his evaluation with Dr. Burrs.

11. Dr. Burris testified via deposition on November 7, 2024. He explained that the evidence did not support involvement of the right shoulder in the original mechanism of injury and reiterated that Claimant denied right shoulder symptoms at the time of the May 21, 2024 evaluation. With respect to the alleged overuse injury to the right arm, Dr. Burris referenced a chapter in the AMA Guides to Causation (a different publication from the AMA Guides to the Evaluation of Permanent Impairment) devoted to alleged overuse injuries. Based upon the research cited in the AMA Guides to Causation, Dr. Burris explained that the notion of injuring the contralateral extremity as a result of overuse has been dispelled primarily because injured persons actually perform less activity overall so there is, in reality, less demand on the uninjured limb. (Depo. Dr. Burris, p. 8, ll. 23-25; p. 9, ll. 1-20). Accordingly, it's not likely that there is overload to the non-injured side. (Depo. Dr. Burris, p. 9, ll. 4-7). He explained that the physical restrictions imposed on Claimant were consistent with the type of activity modification discussed in the AMA Guides on Causation. (Deposition of Dr. Burris, pp. 10-11).

12. During cross examination, Dr. Burris explained that he performed a physical examination of Claimant and during that examination he asked Claimant to move his right arm during which Claimant expressed on pain complaints. (Depo. Dr. Burris, pp. 13 – 15).

13. Dr. Burris was asked on cross examination about records mentioning the right shoulder symptoms. He did not immediately recall reviewing any such records at the time of or prior to his IME but did acknowledge subsequently receiving those records on or around October 21, 2024 and reviewing those records prior to his deposition. He explained that the additional records, including Claimant's report to the therapist that his right arm was hurting did not alter his opinions because there was insufficient information regarding the specifics of the activities (Depo. Dr. Burris, p. 28).

14. Claimant testified at hearing. With respect to his right shoulder symptoms, Claimant testified to a gradual onset of pain after the work injury. He reported that while working, his right shoulder symptoms would worsen throughout the day but did not hurt at all on his four days off work. He also admitted that he had no pain in his arm while at rest and was not experiencing symptoms at the time of the IME with Dr. Burris. During cross examination, Claimant testified that while he was working modified duty, his right shoulder did not hurt at all on the days that he did not work and only bothered him while he was working. However, he further testified that since leaving Employer in April of 2024, his right shoulder started hurting without working and that his symptoms were ongoing.

15. Claimant admitted that he had received a corrective action on August 14, 2023 for unsafe conduct. As referenced at paragraph 9 above, Claimant was issued a second corrective action on November 14, 2023 for attendance/reliability and quality issues. The attendance issues concerned unexcused absences from work and leaving work before the end of his shift from March 5, 2023 through October 21, 2023. The work quality issues referred to actions that took place between August 7, 2023 and November 6, 2023. As noted, a third corrective action was issued on December 3, 2023, which documented the aforementioned events of November 19, 2023, at which time Claimant was observed laying on a pallet under racking using his cellphone while on the warehouse floor. Although the documents admitted into evidence reflect that Claimant received the corrective counseling documents, Claimant denied receiving any corrective action paperwork other than when he failed to stop/honk when exiting a closed bay with powered equipment as reflected in the corrective counseling paperwork dated August 14, 2023. (RHE F, p. 333). While he admitted that he received a correction action for failing to stop or honk before exiting a closed door while driving powered equipment, Claimant failed to take full responsibility for his conduct at hearing. Indeed, Claimant attempted to mitigate his conduct by testifying that he slowed down before exiting the bay and that his actions did not pose a danger to anyone. Furthermore, while he admitted that he was aware of Employer's rule prohibiting cell phone use while on the warehouse floor, Claimant professed that he was not using his phone while he was under the racks as referenced in the corrective action dated December 3, 2023. (RHE F, p. 335). Rather, he testified that he had simply taken it from his pocket and placed it on the pallet near the racks because

it was in his pocket and needed to be removed for comfort. He also testified that he was never written up for leaving early because he had permission to do so. He claimed he was unaware that he was scheduled to work on April 9, 2023 and August 5, 2023, which caused him to miss work on these days. Claimant denied ever receiving an explanation for his termination in April, suggesting instead that he was terminated because he suffered an injury while at work. Indeed Claimant testified that everyone who got hurt at work was fired.

16. Craig Courtemanche, testified as Employer's warehousing Operations Manager (OM). Mr. Courtemanche explained Employer's disciplinary process, testifying that he participates in disciplinary actions involving employees which include verbal conversations, corrective actions, final warnings, and terminations. He explained that Claimant was terminated for a "non-negotiable safety violation." Per Employer's policies, a non-negotiable safety violation is one which results in an immediate final written warning for the first violation for or employees who have passed the initial 90 day probationary period. Thereafter, a second violation within a rolling 12-month period results in termination. For employees who have not passed the 90-day probationary period a non-negotiable safety violation is grounds for immediate termination. According to Mr. Courtemanche, having a cellphone on the warehouse floor is considered a non-negotiable safety violation. Mr. Courtemanche testified that cell phones are distractive devices that raise safety concerns for workers on the warehouse floor. According to Mr. Courtemanche, the prohibition against having a cell phone out on the warehouse floor is consistently enforced and that everyone working on the floor is subject to the policy. Mr. Courtemanche testified that Claimant was observed with a cell phone out on the warehouse floor a second time on April 14, 2024. According to Mr. Courtemanche, Claimant admitted to pulling out his cellphone to check a message and then putting it back away.

17. Mr. Courtemanche testified that he spoke with Claimant in December 2023 and again on April 14, 2024 about his cell phone use and Employer's policy against their use while on the warehouse floor. Mr. Courtemanche testified that during both of these conversations, Claimant admitted that he had in fact had his cellphone out while on the warehouse floor. Only after verifying with Claimant that he had in fact had his phone out in violation of the safety rule in both December 2023 and April 2024 did Mr. Courtemanche recommend termination for the second non-negotiable safety violation. He explained that because of the prior three corrective actions, including the one prior corrective action for a non-negotiable safety violation of Employer's cell phone policy, Claimant was not eligible for further corrective action. Accordingly, he was terminated.

18. Mr. Courtemanche also explained how the reliability violations occurred. He testified that team members could leave work whenever they wanted but that doing so could result in accountable time computation, which could lead to a reliability conversation and a potential corrective action. Once the accountable time reached 60 hours, then a corrective action would be given. Accountable time is tracked in a daily report that Oms are able to reference when completing a corrective action. Finally, Mr. Courtemanche testified that he personally gave Claimant the November and December corrective actions as well as the termination documents. During his rebuttal, testimony, Claimant admitted to receiving the written notice of termination after previously stating he had not received any written notice of his termination.

19. The undersigned ALJ finds the medical causation opinions/conclusions expressed by Dr. Burris credible and more persuasive than the contrary inferences/suppositions advanced by Claimant. Because Claimant failed to establish a causal connection between his right shoulder symptoms and his November 11, 2023 work-related injury, his request for an examination by a physician under the current claim must be denied and dismissed.

20. The ALJ credits the testimony of Mr. Courtemanche to find that Claimant is responsible for the termination of his employment.

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), §§ 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 by a preponderance of the evidence that he is a covered employee who suffered an "injury" arising out of and in the course of employment. *Section 8-43-301(1), C.R.S.; Faulker 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 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. *Section 8-43-201, C.R.S*. A workers' compensation claim is decided on its merits. *Section 8-43-201, supra.*

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. 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 all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Burris are credible and more convincing that the contrary testimony of Claimant. While the ALJ is convinced that Claimant's sincerely believes that his right shoulder pain is related to overuse, the medical evidence, including the testimony of Dr. Burris persuades the undersigned that Claimant's right shoulder pain and request for an a medical evaluation is not related to his November 11, 2023 industrial injury.

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

The Relatedness of Claimant's Right Shoulder Condition to his November 11, 2023 Industrial Injury

D. To sustain his burden of proof concerning the compensable nature of his right shoulder pain and dysfunction, Claimant must establish that the condition for which he 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(l) (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 (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).

F. The "arising out of" element is narrower and in this case requires Claimant to show that his alleged right shoulder pain is causally related to his November 11, 2023 left shoulder injury. Specifically, the term "arising out of" calls for examination of the causal connection or nexus between the Claimant's November 11, 2023 industrial injury and his subsequent right shoulder pain. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's left shoulder injury and his subsequent right shoulder pain is one of fact, which the ALJ must determine, based on the totality of the circumstances. See for example, *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).

G. In this case, Claimant contends that his right shoulder condition is compensable because he experienced pain in the right shoulder from alleged overuse since the physical work restrictions imposed as part of his November 11, 2023 work injury precluded use of his left arm. The ALJ is not persuaded. In this case, Dr. Burris specifically addressed the issue of whether or not there had been a re-injury to the right shoulder. He opined that there was no injury to the right shoulder, including an overuse injury. His opinion was based on a variety of factors, including the fact that no right shoulder injury was documented throughout Claimant's post November 11, 2023 injury medical records, that Claimant reported no right shoulder symptoms during his (Dr. Burris') IME, including during the physical examination performed during that IME, and the evidence did not support an overuse of the right arm. Dr. Burris testified that he was aware of the causation principles surrounding the issue of overuse per the AMA Guides to Causation and explained that claims of injury from overuse or overcompensation had been studied and dispelled. He explained that claims of overuse are based on inaccurate and flawed presumptions by patients asserting such claims that they were engaging in the same type and level of activity pre and post injury. As explained by Dr. Burris, injured persons actually tend to engage in significantly less activity post injury, which naturally protects and prevents them from over working a non-injured body part. In keeping with

this, Dr. Burris noted that Claimant had the type of restrictions that would reduce his overall activity level thus precluding him from overcompensating with his right arm.

H. Here, Claimant testified that he was performing light duty activities with the right arm, to include retrieving rubber bands from the floor and when his restrictions were liberalized, collecting light trash and sweeping floors with a push broom. He conceded that the work was light and within his restrictions. He did not describe any unusual or strenuous activity which he was required to perform exclusively with his right arm/shoulder as a consequence of the injury to his left shoulder. In fact, Dr. Burris noted during his deposition that there were no specifics regarding what activities allegedly caused Claimant's right shoulder pain. (Depo. Dr. Burris, p. 28, ll. 6-23). Moreover, Dr. Burris testified that had Claimant suffered an overuse injury to his right shoulder, he would expect to see improvement in Claimant's symptoms after he stopped working on April 14, 2024. (Depo. Dr. Burris, p. 29, ll. 2-15). Based upon the medical records admitted into evidence, the ALJ finds that Claimant continued to complaint of right shoulder pain even after he stopped working. A coincidental correlation between a claimant's work and his symptoms does not mean there is a causal connection between his alleged injury and his work. *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008). As found, the ALJ credits the content of Claimant's medical records and the opinions of Dr. Burris to conclude that Claimant's right shoulder pain is unrelated to overuse caused by his November 11, 2023 work injury and the subsequent physical restrictions imposed on him by Dr. Centi. Because Claimant has failed to establish the requisite causal connection between his right shoulder pain and his November 11, 2023 work injury, he has failed to establish the compensable nature of his right shoulder symptoms. Accordingly, his request for a medical evaluation of the right shoulder under this claim must be denied and dismissed.

Claimant's Termination and Entitlement to Temporary Disability Benefits

I. Because Claimant's injury occurred after July 1, 1999, C.R.S. §§ 8-42-103 (1) (g) and 8-42-105 (4) (a), collectively referred to as the "termination statutes", apply to Respondents' assertions that he is responsible for his wage loss. These provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Under the termination statutes, a claimant who is responsible for the termination of modified or regular employment is not entitled to temporary disability benefits absent a worsening of condition, which reestablishes the causal connection between the injury and the wage loss. See *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004); see also *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Grisbaum v. Industrial Claim*

Appeals Office, 109 P.3d 1054 (Colo. App. 2005). As a result, the claimant loses the right to temporary disability benefits following the termination date. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo. App. 1994).

J. Since the termination statutes provide a defense to an otherwise valid claim for temporary disability benefits, Respondents shoulder the burden of proving, by a preponderance of the evidence, that Claimant was responsible for his termination and subsequent wage loss. *Colorado Compensation Insurance Authority v. Industrial Claims Appeals Office,* 20 P.3d 1209 (Colo. App. 2000). The dispositive question in these cases is whether the employee performed a volitional act or otherwise exercised a degree of control over the circumstances resulting in his/her discharge. See generally, *Keil v. Industrial Claim Appeals Office*, 847 P.2d 235 (Colo. App. 1993). Respondents do not have to prove that the claimant knew or should have known that his/her conduct would result in his/her termination. *Gonzales v. Industrial Commission*, 740 P.2d. 999 (Colo. 1987). Rather, it is only necessary for Respondents to establish that the claimant is "responsible" for his/her termination and subsequent wage loss through a volitional act or the exercise of some control over the circumstances surrounding the termination.

K. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. See, *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control of the circumstances surrounding the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996) (unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008). In other words, an employee is "responsible" for their termination if the employee precipitated the employment termination through a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety, supra.* A volitional act does not mean moral or ethical culpability. It simply means that the claimant performed an act, which led to his/her termination. *Gleason v. Southland Corp*., W.C. No. 4-149-631 (ICAO, June 13, 1994). Thus, as noted above, the fault determination depends upon whether a claimant performed some volitional act or otherwise exercised a degree of control over the circumstances resulting in termination. *See Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995). In this case, the evidence presented persuades the ALJ that although Claimant provided inconsistent testimony about whether or not he personally received the corrective actions, he did not deny the conduct outlined in the correction action paperwork. Instead, he claimed that his actions did not violate the rules. Indeed, Claimant admitted to the safety violation with the forklift but attempted to minimize his conduct, testifying that he slowed

down before exiting the closed bay before adding that this conduct did not endanger anyone. Moreover, Claimant admitted to missing work and leaving work early but claimed he was unaware of his work schedule and was given permission for every instance he left work early. He also admitted to pulling out his phone on the floor and being aware of the rule prohibiting that action but attempted to justify this conduct by stating he wasn't using it and that everybody, or at least everyone he knew, committed this same violation.

L. In contrast, Mr. Courtemanche testified, that he personally provided the corrective actions to claimant. On this point, Mr. Courtemanche's testimony is more credible than Claimant's. Although Claimant admitted to the repeated quality and reliability violations documented in the November 14, 2023 corrective action, he insisted he was never written up for any of these violations and posited that the write-ups were manufactured to justify terminating him for getting injured. However, the write-ups themselves refute this suggestion. The November 14, 2023, corrective action documents seven instances of claimant leaving work early, two unexcused absences, and eight instances in which Claimant failed to meet proper quality standards. The undersigned ALJ agrees with Respondents' counsel that if Employer was truly trying to fabricate a reason to terminate Claimant after his injury with sham corrective actions, then Employer could have "fabricated" multiple back-dated "fake" corrective actions based on the 17 occurrences documented in the November 14, 2023 corrective action. The ALJ is not convinced that Employer or more specifically Mr. Courtemanche fabricated any of the corrective actions. As Mr. Courtemanche persuasively explained, written corrective actions for performance-related issues are only issued after repeated occurrences that do not show improvement. The November 14, 2023 corrective action clearly documents negative trends in Claimant's work with respect to reliability and quality for which corrective action was ultimately taken by Mr. Courtemanche on November 14, 2023.

M. As presented, the evidence persuades the undersigned ALJ that Claimant committed a number of volitional acts and exercised a degree of control over the circumstances leading to his termination. Indeed, the evidence supports a conclusion that Claimant repeatedly violated Employer's cell phone policy despite being aware of the rule prohibiting employees from using or having their cell phone out while on the warehouse floor. Moreover, the ALJ is convinced that Claimant volitionally engaged in unsafe acts by failing to operate powered equipment in a safe manner on two separate occasions over a period of approximately 2 ½ months.

N. Claimant's volitional refusal to follow reasonable orders and established safety rules exhibits a significant degree of contempt for Employer. Based upon the evidence presented, it is not surprising that he was terminated. Indeed, the ALJ concludes that any employee acting in a similar fashion would reasonably expect such

behavior to result in the loss of employment. Claimant is found to be responsible for the termination of his employment. Pursuant to C.R.S. §§ 8-42-103 (1) (g) and 8-42-105 (4) (a)8-42-105(4) (a), any wage loss beginning April 15, 2024 and extending through December 18, 2024[1] is not attributable to Claimant's November 11, 2023 work-related left shoulder injury.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish, by a preponderance of the evidence, that his right shoulder condition is causally related to his November 11, 2023 work-related left shoulder injury. Accordingly, his request for a medical evaluation directed to the right shoulder is denied and dismissed.

2. Respondents have proven by a preponderance of the evidence that Claimant is responsible for the termination of his employment with Target Corporation. Accordingly, his claim for TTD benefits between April 15, 2024 and December 18, 2024 is denied and dismissed.

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

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

[1] After the hearing, claimant underwent a second procedure on December 19, 2024. Respondents voluntarily initiated TTD benefits as of that date.

You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: January 29, 2025

/s/ Richard M. Lamphere

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that he suffered a functional impairment not listed on the schedule?
- Should Claimant's impairment rating include 10% that the DIME doctor, Dr. Castrejon included in his extremity impairment rating?
- Was claimant overpaid disability benefits and if so, what is the overpayment?
- Disfigurement.

FINDINGS OF FACT

1. Claimant worked for the Colorado Department of Corrections. He sustained an admitted injury to his left shoulder on May 6, 2021. While he was escorting inmates, a heavy door on sliders closed on his shoulder and arm.

2. Claimant was treated conservatively with Concentra but eventually underwent shoulder surgery on October 21, 2021 with Dr. Simpson. This surgery included arthroscopic biceps tenodesis, arthroscopic rotator cuff repair and arthroscopic subacromial decompression. Following physical therapy, Claimant was placed at MMI on April 28, 2022 by Dr. Johnson. Dr. Johnson gave the Claimant a rating of 18% of the upper extremity, which converted to 11%.

3. Claimant underwent a DIME with Dr. Castrejon on two occasions. The first time was on January 4, 2023, wherein he determined that the Claimant was not at MMI. He opined that he would require surgery and rehabilitation following the surgery. He did give a provisional rating of 23% of the upper extremity, which converts to 14% of the whole person.

4. Dr. Pak did an additional surgery on December 12, 2023. Dr. Pak's surgery included manipulation under anesthesia, extensive debridement, capsular release, subacromial decompression, acromioplasty, and lysis of adhesions.

5. Claimant was provided with therapy following this second surgery, which improved his range of motion and strength.

6. Claimant returned to Castrejon for a second Division IME on May 21, 2024. Dr. Castrejon determined that the Claimant was at MMI at this evaluation. Claimant was given 15% impairment of the left upper extremity. This included 10% for the acromioplasty pursuant to DWC impairment rating tips. The upper extremity rating converted to 9% whole person impairment.

7. Based on Dr. Castrejon's report, Respondents filed a Final Admission of Liability (FAL) on June 20, 2024, admitting to a 15% scheduled impairment which equates to a PPD award of $10,517.83. Under the "Remarks and basis for permanent disability award" section of the FAL, Respondent asserted a credit of $11,079.31 for PPD that had allegedly been previously paid. According to this FAL, Claimant had been paid $25,078.58 in TTD and $1,413.74 in TPD. There was no assertion or calculation of any claimed overpayment. Respondents admitted to $0.00 for disfigurement.

8. Dr. Castrejon testified by evidentiary deposition on October 18, 2024. Dr. Castrejon testified as an expert in physical medicine and rehabilitation. According to Dr. Castrejon, as a result of his shoulder injury, Claimant has experienced symptoms of pain, tenderness and stiffness throughout the shoulder girdle to include the lateral and superior shoulder, the proximal biceps tendon, the left superior trapezius, rhomboid and acromioclavicular joint region. Dr. Castrejon further testified that these anatomical structures are above the glenohumeral joint and can cause issues with cervical, scapular and shoulder motion.

9. Claimant testified that the second surgery performed by Dr. Pak provided significant pain relief and increased his range of motion. However, Claimant related that he continues to experience symptoms with range of motion deficits in his trapezius down to the back of his shoulder. In addition, Claimant still experiences aching and throbbing from the back of his shoulder, over the top to the front of the shoulder, and down through the pectoral muscle. Claimant went on to explain that when sitting behind his desk at work for 30 minutes he feels an ache with stiffness from the biceps tendon across the top of the shoulder and up the trapezius toward the neck. In addition to his issues at work, Claimant testified that he has problems lifting overhead when he cleans or lifts weights. Notably, when Claimant drives, he must lean forward and turn to the left due to his neck being stiff. Claimant also said he has sleep issues due to his left shoulder hurting from the top of the shoulder up to the trapezius. Finally, Claimant went on to convey that he has good days and bad days insofar as his left shoulder is concerned and regularly uses a TENS unit, ibuprofen, and at times a heat pack and pain salve.

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

11. Respondent failed to overcome Dr. Castrejon's impairment rating of 9% whole person by clear and convincing evidence.

12. The FAL dated June 20, 2024, reflects an admission for $10,517.83 based upon the 15% scheduled impairment given by Dr. Castrejon. This same FAL reflects $25,078.58 paid in TTD and $1,413.74 in TPD. In addition, this FAL indicates that Respondent is taking credit for $11,079.31 previously paid. In reviewing the indemnity payment log it is unclear how Respondents calculated a payment of $11,079.31 for the PPD previously paid. Total PPD payments made, excluding the disfigurement payment of $4,000.00, equals $7,079.31. Claimant reached MMI on April 2, 2024, and received two additional TTD payments after MMI of $3,107.08, which would constitute an overpayment. There was also a PPD payment of $50.00 April 29, 2022, through May 12,

2022, which was after Claimant's first date of MMI. This would also constitute an overpayment. There was no further credible evidence which would explain any further overpayments. In addition, it is unclear from the evidence presented how Respondent calculated that it paid Claimant $11,079.31 in PPD as noted in the June 20, 2024 FAL.

13. Claimant demonstrated new visible disfigurement consisting of two straight scars that are approximately 1 ½ inches each and a depression that is ½ inch. This disfigurement affects parts of the body normally exposed to public view. The ALJ finds Claimant should be awarded $1,686.96 for disfigurement. This is in addition the disfigurement Claimant was previously awarded of $4,000 on August 1, 2022. The lower disfigurement cap for this date of injury is $5,686.96. Since these scars are not extensive, the upper cap does not apply.

CONCLUSIONS OF LAW

A. Generally

A DIME's determinations regarding MMI and whole person impairment are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The party challenging a DIME physician's conclusions 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).

B. Burdens of Proof regarding impairment

Claimant is requesting whole person benefits for his shoulder. Whether Claimant's shoulder impairment represents a scheduled or whole person impairment is a threshold question that must be answered before we can determine the weight to be accorded to the DIME's rating. Section 8-42-107 sets forth two methods of compensating permanent medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides a DIME process for whole person ratings. The DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Conversely, scheduled impairment is a question of fact for the ALJ based on a preponderance.

Whether a claimant sustained a scheduled or non-scheduled impairment is a question of fact for determination by the ALJ. The heightened burden of proof that attends a DIME rating applies only if the claimant establishes by a preponderance of the evidence that the industrial injury caused functional impairment not found on the schedule. Then, and only then, does either party face a clear and convincing evidence burden to overcome the DIME's rating. *Webb v. Circuit City Stores, Inc*. W.C. No. 4-467-005 (August 16,

2002). Although the DIME's opinions may be relevant to this determination, they are not entitled to any special weight on this threshold issue. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998) (DIME provisions do not apply to the scheduled ratings).

C. Claimant proved he suffered functional impairment not listed on the schedule

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

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

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

As found, Claimant proved he suffered functional impairment not listed on the schedule. Claimant's testimony regarding the impact the injury has had on his ability to perform various activities was credible. The preponderance of persuasive evidence shows Claimant has functional impairment to parts of his body beyond his "arm."

D. Disfigurement

Section 8-42-108(1) provides for additional compensation if a claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant suffered visible disfigurement to his right shoulder area. The ALJ concludes Claimant should be awarded $1,686.96 for disfigurement related to additional surgical scars following Dr. Pak's surgery.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD benefits based on the DIME's 9% whole person rating. Insurer may take credit for any PPD benefits previously paid to Claimant on this claim.

2. Respondent is entitled to an overpayment of $3,157.08 in TTD benefits.

3. Insurer shall pay Claimant $1,686.96 for additional disfigurement subsequent to the surgery performed by Dr. Pak.

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

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

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 this order is 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: January 30, 2025

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