OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-191-762-003

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that all medical treatment after June 8, 2022 (including all recommendations and referrals made by Dr. Kennan Vance and Dr. Benjamin Sears) constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted September 20, 2021 work injury?

Have Respondents demonstrated, by a preponderance of the evidence, that Claimant experienced an intervening event on June 8, 2022 or June 9, 2022 that was sufficient to sever Respondents' liability?

Has Claimant demonstrated, by a preponderance of the evidence, that on August 30, 2023 she suffered further injury while in the quasi-course of employment?

FINDINGS OF FACT

1. Claimant worked for Employer as a cashier and "self check-out host". On September 20, 2021 Claimant suffered an injury to her right shoulder while lifting a case of beer while working for Employer. Respondents have admitted liability for the September 20, 2021 work injury.

2. Following the September 20, 2021 injury, Claimant was diagnosed with a torn right rotator cuff. On December 22, 2021, Dr. Keenan Vance performed a repair of Claimant's torn rotator cuff. Specifically, the procedure included "diagnostic operative arthroscopy of the right shoulder with extensive intra articular debridement", and "repair of a massive retracted rotator cuff tear and subacromial decompression including acromioplasty".

3. Unfortunately, the initial surgery failed and on May 17, 2022, Dr. Vance performed a right reverse total shoulder arthroplasty. In the operative report, Dr. Vance noted "63-year-old female with osteoporosis that failed her rotator cuff repair. Intraoperatively on the rotator cuff repair we had difficulty with her anchors holding into the bone."

4. At the completion of the May 17, 2022 surgery, x-rays were performed and showed that the hardware from the reverse total shoulder arthroplasty was "intact and well seated".

5. Thereafter in June 2022, Claimant suffered two falls at home. Claimant testified that the first fall occurred on June 8, 2022, when she was exiting her vehicle, and she slipped and fell onto her right side.

6. Claimant further testified that she fell a second time on June 9, 2022. In this instance, Claimant was on her porch and placing a water bowl for her cat. As she returned to standing, she began to feel lightheaded and fell backwards onto her buttocks.

7. In a medical record dated June 22, 2022, Claimant was seen by her primary care provider (PCP) Dr. Daniel Sullivan regarding recent shortness of breath. At that appointment, Claimant reported to Dr. Sullivan that she had fallen twice at home. Dr. Sullivan recorded that the first fall occurred when "she was getting some bags out of the trunk and she landed on her side and knees." Dr Sullivan also noted that with this first fall she thought she had broken ribs on her right side. With regard to the second fall, Dr. Sullivan noted that it was "a porch fall as she began to black out due to not having her oxygen. She landed on her bottom".

8. On July 6, 2022, Claimant returned to Dr. Vance. In the medical record of that date, Dr. Vance noted Claimant's report that she had fallen at home "a couple of weeks ago". Claimant informed Dr. Vance that she "tried everything not to fall on her shoulder but she did break [four] ribs and she fell on her knee." Based upon Claimant's report of a fall, Dr. Vance ordered x-rays.

9. On that same date, x-rays of Claimant's right shoulder revealed a heme fracture of the glenoid with dislodgement of the glenoid component. Dr. Vance listed it as an active problem of an acute periprosthetic fracture around the prosthetic joint.

10. Dr. Vance advised Claimant that due to this fracture; another revision surgery would be necessary. Dr. Vance noted that such a revision surgery would require bone grafting and a new glenoid component. As a result, Dr. Vance referred Claimant to another surgeon with experience with such complex procedures. This referral was made to Dr. Benjamin Sears in Denver, Colorado.

11. On August 3, 2022, Claimant was seen by Dr. Sears. In reciting Claimant's history, Dr. Sears noted that after the reverse total shoulder arthroplasty, Claimant "had another fall about [six] weeks later". Dr. Sears noted that the fall resulted in loosening the surgical hardware that is now "completely dislodged". Dr. Sears recommended a two stage procedure and placement of a custom glenosphere. Prior to scheduling the procedure, Or. Sears also expressed concern about a possible infection and ordered a CT scan of Claimant's right shoulder. Dr. Sears also ordered nerve conduction studies.

12. On August 30, 2022, Claimant attended an independent medical examination (IME) with Dr. John McBride. In connection with the IME, Dr. McBride reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. McBride opined that Claimant's need for the initial rotator cuff repair and the reverse total arthroplasty were both related to the September 20, 2021 work injury. Dr. McBride also noted that both of those procedures were reasonable and necessary medical treatment. Dr. McBride further opined that Claimant's fall at home resulted in the fracture of Claimant's scapula and caused the glenosphere to become dislodged. Specifically, Dr. McBride noted that it was that fall

that was "the etiology for [Claimant's] need for revision of her reverse total shoulder replacement." Dr. McBride agreed that it would be wise to determine if there is an underlying infection in Claimant's shoulder. However, he further noted that if such testing was negative, then the trauma of the fall would be the cause of Claimant"s periprosthetic fracture, and therefore not related to the work injury.

13. Clamant resides in Grand Junction, Colorado and the IME with Dr. McBride was conducted in Denver. Respondents provided Claimant with air travel to attend the IME. On August 30, 2022, Claimant was at Denver International Airport (DIA) to take her flight back to Grand Junction. While at DIA, Claimant suffered another fall.

14. Claimant testified regarding her fall at DIA. Specifically, she testified that the fall occurred while she was on a moving sidewalk. While on that moving sidewalk, she moved to the side and "blacked out". When she was next conscious she discovered she had fallen face first with both of her hands extended in front of her. Claimant further testified that emergency services were called and she was transported to the hospital by ambulance. With regard to the reason for the loss of consciousness on this occasion, Claimant testified that Dr. Sullivan had diagnosed her with severe anemia.

15. The August 30, 2022 paramedic record states that when emergency services personnel arrived, Claimant was "prone at the end of a walkalator'. At that time, Claimant complained of pain in her right shoulder, and the shoulder was observed to be "grossly deformed". Claimant reported to emergency personnel that while on the moving sidewalk she turned her head and "her vision started to go black." Claimant further reported that she was unable to step off the moving sidewalk and "tripped at the threshold falling forward." At that time, Claimant denied losing consciousness.

16. Claimant was transported from DIA to the emergency department (ED) at University of Colorado Hospital. Claimant testified that she remained in the hospital for two days.

17. On September 7, 2022, x-rays of Claimant's right humerus showed an acute oblique fracture of the midshaft of the right humerus "at the tip of the humeral component of the reverse total shoulder arthroplasty".

18. On September 22, 2022, Dr. Sears authored a letter to Respondents' counsel. In that letter, Dr. Sears again noted his concern that there may be an underlying infection in Claimant's right shoulder. Dr. Sears also stated his opinion that Claimant's current need for revision surgery is related to her workers' compensation injury. In support of this opinion, Dr. Sears stated that "[t]he complication of a catastrophic base plate failure requiring revision arthroplasty would only occur as a secondary condition to her placement of a reverse shoulder arthroplasty which was due to a [workers' compensation] accident." Dr. Sears also noted that the most recent fall on August 30, 2022 resulted in "a relatively nondisplaced midshaft fracture distal to the stem of the implant." Dr. Sears noted the most recent fracture was being treated nonoperatively.

19. On October 10, 2022, an x-ray of Claimant's right humerus showed a prosthetic fracture of the right humerus.

20. On November 8, 2022, Dr. Sears performed revision surgery on Claimant's right shoulder. Specifically, the procedure included resection arthroplasty right reverse shoulder arthroplasty; placement of long intramedullary (IM) nail; placement of allograft at the humeral shaft fracture and at the glenoid; and placement of a cement spacer.

21. On January 13, 2023, Dr. McBride authored an addendum to his September 2022 IME report after reviewing additional medical records. In the addendum Dr. McBride reiterated his opinion that Claimant's falls at home resulted in the periprosthetic fracture. Dr. McBride also addressed Claimant's fall on August 30, 2022 at DIA. Dr. McBride opined that Claimant's falls that occurred after the successful reverse total shoulder arthroplasty are unrelated to the work injury.

22. Claimant testified that on April 25, 2023 she underwent the second revision surgery with Dr. Sears. Claimant testified that it is her understanding that in that second procedure Dr. Sears removed the IM nail from the humerus and performed a second replacement operation. Claimant testified she has improved since surgery and is now undergoing treatment with a bone clinic. Claimant testified that she is planning to undergo additional post-surgery physical therapy, as recommended by Dr. Sears.

23. Dr. McBride's testimony was consistent with his written reports. Dr. McBride testified that the procedures performed by Dr. Vance (the initial rotator cuff repair and the reverse total shoulder arthroplasty) were both reasonable, necessary, and related to Claimant's work injury. Dr. McBride noted that immediately following the reverse total shoulder procedure imaging showed that the hardware was intact and well seated. Dr. McBride testified that this indicates that the reverse total shoulder arthroplasty was successful. Dr. McBride further testified that the fall Claimant suffered that resulted in four broken ribs was a significant fall. Dr. McBride testified that he agrees with Dr. Vance that the periprosthetic fracture occurred secondary to that fall. With regard to Dr. Sears's concern related to infection, Dr. McBride testified that was a reasonable concern. Dr. McBride further testified that ultimately infection was ruled out in this case.

24. Prior to the June 8 and June 9, 2022 falls at her home, Claimant has a history of other falls. Medical records entered into evidence show that in October 2018, Claimant underwent x-rays following a "fall into tub back in August". On June 11, 2020, Claimant underwent a number of imaging studies (including x-rays of her right wrist and cervical spine, and a CT scan of her pelvis) after suffering a fall. This June 2020 fall is further addressed by Dr. Sullivan in a July 19, 2020 medical record. At that time, Dr. Sullivan noted that Claimant had suffered a sacral and pubic rami fracture in a fall.

25. The ALJ credits the medical records and the opinions of Drs. Vance and McBride. The ALJ finds that Claimant's fall at home on June 8, 2022 resulted in four broken ribs and the fracture to the reverse total shoulder hardware. That fall was not

related to the admitted work injury. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that medical treatment she received after the June 8, 2022 fall is related to the work injury. The ALJ also finds that Respondents have successfully demonstrated that it is more likely than not that the June 8, 2022 fall at home was an intervening event sufficient to sever Respondents' liability for the September 20, 2021 work injury.

26. With regard to specific medical treatment requested in this case, the ALJ finds that although the two revision surgeries performed by Dr. Sears were reasonable and necessary in treating Claimant's condition, those procedures are not related to Claimant's work injury.

27. Although the ALJ has determined that Respondents' liability in this matter was severed as a result of the June 8, 2022 fall at home, the ALJ must now turn to the August 30, 2022 fall at DIA. Specifically, the ALJ must determine whether the quasi-course of employment doctrine is applicable to that fall. Furthermore, if that fall did occur within the quasi-course of employment, the ALJ must consider Claimant's pre-existing condition of anemia and determine if there was any special hazard present at the time of the August 30, 2022 fall.

28. The ALJ finds that it is clear that on August 30, 2022, Claimant was within the quasi-course of employment as she was traveling home after the IME with Dr. McBride. However, the ALJ finds that Respondents have successfully demonstrated that Claimant's fall was precipitated by her pre-existing conditions of anemia and syncopal episodes. Her dizziness and resulting fall upon the moving sidewalk at DIA does not rise to the level of a "special hazard". The ALJ finds that the surface upon which Claimant fell is immaterial. Due to her pre-exisitlng tendency to fall, whether Claimant had fallen upon the walkway at DIA or on any other sidewalk, floor, or ubiquitous hard surface, the end result would have been the same.

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. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that medical treatment after June 8, 2022 is related to the admitted September 20, 2021 work injury. As found, the medical records and the opinions of Drs. Vance and McBride are credible and persuasive on this issue.

6. If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant's condition is severed. *See* Post *Printing* & *Publishing* Co. *v. Erickson,* 94 Colo. 382, 384, 30 P.2d 327, 328 (1934). Respondents are only liable for subsequent injuries which "flow proximately and naturally" from the compensable injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

7. As found, Respondents have demonstrated, by a preponderance of the evidence, that on June 8, 2022, Claimant suffered an intervening event that was sufficient to sever Respondents' liability related to the admitted work injury. As found, the medical records and the opinions of Drs. Vance and McBride are credible and persuasive on this issue.

8. Under the quasi-course of employment doctrine injuries sustained while undergoing or traveling to and from authorized medical treatment are compensable, even though they occur outside the ordinary time and place limitations of normal employment. *Excel Corp. v. Industrial Claim Appeals Office,* 860 P.2d 1393 (Colo. App. 1998); *Schreiber v. Brown* & *Root, Inc.,* 888 P.2d 274 (Colo. App. 1993). The rationale for this principle is that because an employer is required to provide medical treatment, and because the claimant is required to submit to treatment in order to receive benefits, travel to receive authorized treatment is an "implied part of the employment contract." *Turner v. Industrial Claim Appeals Office,* 111 P.3d 534 (Colo. App. 2004).

9. If the precipitating cause of an injury is a preexisting health condition that is personal to the claimant, the injury does not arise out of the employment unless a "special hazard" of the employment combines with the preexisting condition to contribute to the accident or the injuries sustained. *National Health Laboratories v. Industrial Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Rice v. Dayton Hudson Corp.,* W.C. No. 4-386-678 (ICAO July 29, 1999); *Stanley Alexander v. Emergency Courier Services,* W.C. No. 4-917-156-01 (ICAO Oct. 14, 2014). This rule is based upon the rationale that, unless a special hazard of the employment increases the risk or extent of injury, an injury due to the claimant's preexisting condition lacks
sufficient causal relationship to the employment to meet the arising out of employment test. *Ramsdell v. Hom,* 781 P.2d 150 (Colo. App. 1989); *Stanley Alexander v. Emergency Courier Services, supra.* In order for a condition of employment to qualify as a "special hazard" it must not be a "ubiquitous condition" generally encountered outside the workplace. *Ramsdell v. Horn, supra; Joan Briggs v. Safeway,* Inc. W.C. No. 4-950-808-01 (I.C.A.O July 8, 2015). Conversely, if the precipitating cause of the injury involves conditions or circumstances of the employment, there is no need to prove a "special hazard" in order for the injury to arise out of the employment. *Cabe/a v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *H&H Warehouse v. Vicory,* 805 P.2d 1167 {Colo. App. 1990).

10. As found, the August 30, 2022 fall, while within the quasi-course of employment, occurred due to Claimant's preexisting conditions and no special hazard was present. Therefore, the injuries sustained on August 30, 2022 are not compensable. As found, the medical records and Dr. McBride's opinions are credible and persuasive on this issue.

ORDER

It is therefore ordered that Claimant's request for medical treatment after June 8, 2022 is denied and dismissed.

Dated July 5, 2023.

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

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

ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **In addition, It is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-212-813-001

ISSUES

1. Whether Claimant sustained a compensable injury on May 4, 2022.

2. Whether Claimant is entitled to medical benefits arising from a May 4, 2022 injury.

3. Whether Claimant is entitled to temporary disability benefits arising from a May 4, 2022 injury.

FINDINGS OF FACT

1. Claimant is an employee of [Redacted, hereinafter WC] who alleges a May 4, 2022 low-back injury. Claimant was loosening an oil filter on a road grader, and, when it broke loose, Claimant jolted forward and felt a warm, tingling sensation in his mid and left low back.

2. Prior to the incident, Claimant had a significant history of low back symptoms and treatment.

3. In 1991, Claimant had low back surgery to his L5-S1 level. Then, in 1996, Claimant had a laminectomy performed at the L4-L5 level.

4. Records from as early as March 23, 2013, documented that Claimant had a history of low back pain. Every few months during 2013 and 2014, records documented low back pain, and left anterior thigh numbness.

5. Records from 2017 through the date of injury documented consistent low back pain, including a number of instances where Claimant experienced temporary flare-ups in low back pain resulting from physical exertion. For example, a record from January 16, 2017, documented that Claimant threw out his mid back while lifting bins of mail. A month later, in February 2017, Claimant reported that his back when out when he jolted in response to somebody pretending to throw something heavy toward him. In October of that year, Claimant reported his low back went out as a result of having to sleep sitting up. He reported that his symptoms were so bad that he was almost unable to walk. In March 2019, Claimant reported that his back had gone out a couple weeks earlier. He again reported throwing his back out on the morning of October 8, 2019. On August 13, 2020, Claimant reported having "jammed" his back the night before while trying to scale a fence. On August 20, 2021, Claimant reported throwing his back out while rolling over in bed that morning. On April 28, 2022, Claimant reported that his back popped and started hurting while he was pulling out a post.

6. The Court finds that each of the instances of increased pain consisted of temporary flare-ups, and that none of these prior instances aggravated or accelerated the course of Claimant's degenerative low back condition.

7. On May 4, 2022, Claimant was attempting to remove an oil filter from the road grader at work as part of his work duties. When the filter came loose, Claimant jolted and experienced a pop and immediate low back pain. Claimant attempted to report the incident to his supervisor, but the shop was noisy, and Claimant's supervisor did not hear Claimant report the incident. Claimant finished working the rest of the day.

8. On May 6, 2022, Claimant saw his chiropractor, Dr. Blach. Claimant reported his "[h]ips out again." The May 6, 2022 record does not specifically document any complaints of low back symptoms and does not specifically mention the May 4, incident. The Court finds that Claimant did not complain of low back pain at the May 6, 2022 appointment.

9. Claimant again saw his chiropractor, Dr. Blach, on May 12, 2022, and reported that he "got bucked" in his road maintainer and instantly experienced low back pain radiating to his hip. Claimant also saw his primary care physician on May 12, 2022, at UC Health, for an annual follow-up. The record documents discussions regarding his medications, blood pressure, inhaler, diet, exercise, and other bodily functions. The May 12, 2022 record does not document a discussion regarding Claimant's low back symptoms. The Court finds that Claimant did not report low back pain at the May 12, 2022 annual follow-up with UC Health.

10. On May 19, 2022, Claimant saw his chiropractor, Dr. Blach. Claimant reported that he had felt good for three days then "felt it slip out while sleeping." He reported that his entire left side hurt, including his knee and ankle.

11. On May 27, 2022, Claimant saw Dr. Blach and reported that he was still experiencing pain radiating into his left leg. He reported that it possibly happened when he was working on his road grader a month earlier when he felt something go out. He reported that it troubled him ever since.

12. On August 4, 2022, Claimant completed a written report of injury, describing the oil filter incident as having occurred on May 25, 2022. Claimant reported, "I continued to work, but the injury has progressively grown worse."

13. On August 5, 2022, Claimant underwent a lumbar spine MRI. The radiologist noted multilevel disc herniations, including:

> "This started at T10-11, was also present at T1 1-12. There was a large disc herniation at L2-3 which displaced the left L2 nerve root with mild to moderate central spinal stenosis at that level. A large herniation at L3-4

displaced and compressed multiple nerve roots of the cauda equina and produced moderate to severe central spinal stenosis and moderate to severe bilateral lateral recess stenosis. There was also mild stenosis at L4-5 with moderate to severe bilateral lateral recess stenosis at that level. There was a medium to large right paracentral disc osteophyte complex at L5-S1 which displaced the right S1 nerve roots without central stenos is. There was normal cord signal and no compression fracture on MRI."

14. Claimant reported to the radiologist that his pain was "manageable most of the time" and that he was taking over-the-counter analgesics only as needed.

15. At an August 10, 2022 visit to Yuma District Hospital, Claimant reported that his pain had increased progressively such that he was experiencing new difficulties performing work duties in a timely manner and pain extending down into his toe consistent with an L5 dermatome.

16. On January 9, 2023, Claimant reported that he was finally getting some improvement and able to stand for ten to fifteen minutes up until about two weeks ago when something was falling out of the door of his truck and he quickly reached down to grab it, causing his symptoms to worsen again.

17. The Court finds the above-referenced medical records to have accurately documented Claimant's subjective complaints at those appointments.

18. Claimant underwent an independent medical examination (IME) with Dr. Douglas Scott at Respondents' request on October 12, 2022. Dr. Scott issued a report consistent with the IME. Dr. Scott recounted Claimant's medical history, including Claimant's 1991 L5-S1 discectomy and 1996 L4-L5 laminectomy, as well as Claimant's treatment from 2013 through the date of the report. Ultimately, Dr. Scott opined that Claimant's reported history of the injury was inconsistent with the medical records, pointing out the May 12, 2022 medical report that did not document a low back injury. He opined that Claimant "has a spinal problem at multiple levels which are probably daily aggravated by his obesity, diabetes and general deconditioning." The Court finds Dr. Scott's opinions in his IME to be credible.

19. At hearing, Claimant testified on his own behalf. Claimant testified that he injured his low back on May 4, 2022, as described above. Claimant testified that he reported his alleged injury to his supervisor, [Redacted, hereinafter JL], that same day, but that he did not believe JL[Redacted] heard him over the engine noise in the shop. Claimant testified that he saw his chiropractor on May 6, 2022, and reported his symptoms. Claimant testified that he made it through the weekend, and that by Monday it was not so bad, that he "[d]idn't think about it," and he returned to work. Though, Claimant reported increased difficulty spending time standing up.

20. Claimant also testified that on May 10, 2022, he again experienced low back pain that did not go away after an incident in which he was operating his road grader and the road grader downshifted, causing Claimant to be thrown forward and then back again. Claimant testified that after August 2, 2022, Claimant has not returned to work.

21. On cross examination, Claimant testified that he would still experience pain of 6 out of 10 on a daily basis, that he would experience numbness in his leg only when standing, and that he did not know how much he could lift, but he suspected up to one hundred pounds. Claimant testified that he could do his job without weight restrictions, but would likely need an accommodation in order to avoid further injury.

22. Respondent called JL[Redacted] to testify as well. JL[Redacted] testified that he did not recall Claimant reporting an injury on May 4, 2022. The Court finds this testimony credible.

23. Respondents also called Dr. Scott to testify at hearing. Dr. Scott testified consistently with his IME report. He clarified that Claimant's low back symptoms would be expected to worsen over time given Claimant's history. He observed that Claimant's prior surgeries predisposed adjacent disc levels to degenerate and collapse, causing increased chronic low back pain. He also noted that Claimant's diabetes would cause microvascular narrowing of the blood vessels that provide blood to the lumbar discs, resulting in acceleration of his disc structure degeneration. Regarding Claimant's periodic flare-ups, Dr. Scott testified that these could occur in the absence of trauma and do not result in a worsening of Claimant's low back condition.

24. The Court finds Dr. Scott's testimony credible.

25. The Court finds Claimant's testimony credible, except insofar as he testified: that he sustained an injury on May 4, 2022; that his symptoms or level of function deteriorated as a result of the May 4, 2022 incident; that his symptoms did not improve between May 4, and May 10, 2023. To the extent that Claimant's testimony conflicts with medical records, the Court finds the medical records more credible.

26. The Court finds that the May 4, 2022 incident, just like those of January 2017, February 2017, October 2017, March 2019, October 2019, August 2020, August 2021, April 2022, May 19, 2022, and January 9, 2023, merely elicited pain symptoms without aggravating or accelerating Claimant's degenerative low back condition so as to require additional medical treatment or cause a disability.

27. Claimant likely experienced symptoms at the time of the May 4, 2022 incident, and those symptoms likely endured for several days. However, the Court finds that it

is more likely than not that Claimant did not require any medical treatment nor sustain any disability as a result of the May 4, 2022 incident.

28. Claimant did continue to see his chiropractor after the May 4, 2022 incident, but those early visits, including the May 6 and May 12 visits do not document a May 4, 2022 injury while removing an oil filter. The Court finds that Claimant did not mention the incident at those appointments because it was not apparent to him at that time that the May 4, 2022 incident was related to his ongoing low back pain. From this, the Court infers that the May 4, 2022 incident was not significant enough to aggravate or accelerate Claimant's pre-existing low back pain.

29. The Court finds it most likely that Claimant's low back condition did eventually deteriorate with time, necessitating greater medical intervention, but that the deterioration was more likely the result of a natural progression of his pre-existing condition rather than an aggravation or acceleration resulting from the May 4, 2022 incident.

CONCLUSIONS OF LAW

Generally

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

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

Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

Compensability

An injury must “arise out of and occur in the course of” employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. Section 8-41-301, C.R.S.; *see also*, *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999).

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. Industrial Commission*, 210 P.2d 448 (Colo.1949); *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990) *cf. Valdez v. United Parcel Service*, 728 P.2d 340 (Colo. App. 1986).

As found, the May 4, 2022 incident, just like those of January 2017, February 2017, October 2017, March 2019, October 2019, August 2020, August 2021, April 2022, and January 9, 2023, most likely elicited pain symptoms without aggravating or accelerating Claimant’s degenerative low back condition so as to require additional medical treatment or cause a disability. The Court finds it most likely that Claimant’s low back condition did eventually deteriorate with time, requiring greater medical intervention, but that the deterioration was not causally related to the May 4, 2022 incident.

Therefore, because the Court finds that Claimant’s May 4, 2022 incident neither aggravated nor accelerated his pre-existing low back condition so as to cause a need for

medical treatment or disability, the Court concludes that Claimant has not proven that it is more likely than not that he sustained a compensable injury on May 4, 2022, while working for Employer.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation for the alleged May 4, 2022 injury is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 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: July 6, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-207-183-001

ISSUES

- Did Claimant prove she suffered a compensable injury to her right shoulder?
- If Claimant proved a compensable injury, the following issues will be addressed:
- Was treatment provided by Dr. Benjamin Kam, including a right shoulder surgery on June 9, 2022 reasonably needed to cure and relieve the effects of the injury?
- Was treatment provided by and on referral from Dr. Kam authorized?
- Is Claimant entitled to TTD commencing June 9, 2022?
- The parties stipulated to an average weekly wage of $924.14.

FINDINGS OF FACT

1. Claimant works for Employer as a baker, preparing items such as bread, croissants, and pastries a large-scale commercial kitchen. The kitchen produces thousands of items daily for consumption around the resort. Claimant is one of approximately 20 bakers working at the property.

2. Claimant performs a variety of tasks during a typical shift, including lifting and carrying bags of ingredients, mixing doughs and batters, moving baking trays, and pushing wheeled racks of bread and pastries.

3. Most of the work is performed below chest height. However, a few tasks such as loading baking trays on the top shelves of the rolling racks or accessing higher shelves in the walk-in cooler require reaching at or above shoulder level. Claimant estimated she performs these tasks up to 45 times per shift.

4. In early January 2022, Claimant experienced the gradual onset of pain in her right shoulder. There was no specific injury or other inciting event. Claimant noticed symptoms at work but also while performing various tasks at home.

5. Claimant told her supervisor, [Redacted, hereinafter MH], that her shoulder was bothering her in min-January 2022. She did not state the symptoms were related to her work.

6. Claimant saw Dr. Benjamin Kam, an orthopedic surgeon, on January 19, 2022. Claimant knew Dr. Kam because he had previously worked with her husband. Claimant reported the onset of "spontaneous right shoulder pain approximately 2 weeks ago." Claimant did not mention work activities as a cause of the symptoms. Hawkins, Neer, and empty can tests were positive, suggesting rotator cuff pathology and

impingement. O'Brien's test was positive, consistent with a SLAP lesion. Dr. Kam opined, "Given her history of no trauma and her underlying ligamentous laxity, I do think her current issues relate to the mild multidirectional instability causing her pain." He prescribed NSAIDs and referred Claimant to physical therapy.

7. Claimant continued working her regular job, although she self-modified her duties by asking co-workers to perform whisking tasks.

8. Claimant's started PT on January 24, 2022. She described "acute insidious onset R shoulder pain" in early January. She said her pain was aggravated by routine activities such as sleeping, washing her hair, putting on a seatbelt, and dressing. She could not stir items at work. The therapist opined Claimants symptoms and clinical findings were consistent with a partial rotator cuff tear, labral instability, and subacromial impingement. Claimant attended PT for approximately three months.

9. Claimant followed up with Dr. Kam on May 4, 2022. He noted the PT was initially helpful, but she had recently "hit a standstill and began to digress." Dr. Kam recommended an MR arthrogram. At hearing, Claimant could identify no specific trigger or cause for the worsening of her shoulder symptoms.

10. The MR arthrogram was completed on May 12, 2022. It showed a probable SLAP tear and large paralabral cyst in the spinoglenoid notch. Dr. Kam recommended surgery.

11. Claimant returned to Dr. Kam on June 1 to discuss the etiology of her shoulder issues. Dr. Kam opined, "while she did not sustain an injury at work—she did not fall or get hit with a blow on her shoulder—her shoulder has definitely been aggravated by her regular work duties. These have included lifting, pushing, pulling heavy objects sometimes overhead, mixing batters and baking items in the kitchen, and rolling and pressing baked goods."

12. Also on June 1, 2022, Claimant reported her shoulder problems to Employer as a work-related injury. She ascribed the injury to "repetitive motion." Employer gave Claimant a designated provider list from which she chose Concentra.

13. Claimant saw Mendy Peterson, PA at Concentra on June 2, 2022. She described "spontaneous onset" of symptoms with no specific incident. She denied any recent changes to her work duties or ergonomics. Ms. Peterson opined the symptoms were neither caused nor aggravated by Claimant's work. She noted no temporal relationship between Claimant's work and the onset of symptoms, and no risk factors associated with her work. Dr. George Johnson reviewed Ms. Peterson's report and agreed with the conclusions. He put Claimant at MMI with no impairment and released her to work with no restrictions.

14. Dr. Kam performed arthroscopic right shoulder surgery on June 9, 2022. He repaired an unstable Type 2 SLAP tear, debrided a partial-thickness rotator cuff tear, and performed a biceps tenodesis.

15. Dr. Wallace Larson performed an IME for Respondents. Dr. Larson opined Claimant did not suffer a work-related occupational disease involving her shoulder. Dr. Larson explained that SLAP tears are not typically associated with repetitive activities, except for cases involving repetitive forceful overhead use such as pitching. Although Claimant's job requires heavy lifting, pushing, and pulling, she performs only occasional overhead activities. As a result, her work does not involve sufficient repetition, force, or positions to cause a SLAP tear or rotator cuff tears. The spinoglenoid cyst was probably incidental to the SLAP tear. Additionally, Dr. Larson concluded Claimant's work did not aggravate or accelerate her underlying, nonwork-related shoulder pathology. Dr. Larson emphasized the distinction between correlation and causation, and opined the mere fact Claimant felt pain while working did not establish a work-related condition absent any established risk factors or other medically plausible causal link.

16. Dr. Larson and Dr. Johnson's opinions are credible and more persuasive than any contrary opinions in the record.

17. Claimant failed to prove a compensable injury to her right shoulder.

CONCLUSIONS OF LAW

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

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*.

A pre-existing condition does not disqualify a claim for compensation where the industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). An injury need not cause any identifiable structural change to a claimant's underlying anatomy to cause a compensable aggravation. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment they would not otherwise have required. *Id*. However, the mere fact that an employee experiences symptoms while working does not compel an inference the work caused the condition or the need for treatment. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008). The claimant must prove by a preponderance of the evidence that their work proximately caused the need for treatment.

As found, Claimant failed to prove a compensable injury to her right shoulder. Dr. Larson and Dr. Johnson's opinions are credible and more persuasive than any contrary opinions in the record. There is no persuasive evidence Claimant's work caused the SLAP tear, spinoglenoid cyst, or any other pathology shown on the MRI or during surgery. Even though Claimant's job required heavy lifting and frequent pushing and pulling, most of the tasks are performed below chest height. The occasional overhead activities did not entail sufficient force or repetition to cause the SLAP tear.

Nor did Claimant prove her work aggravated, accelerated, or combined with the nonwork-related shoulder pathology to cause disability or a need for treatment. The fact that certain work tasks elicited symptoms does not establish a causal nexus between the work and the treatment Claimant received. Claimant had an unstable Type 2 SLAP tear, which reasonably required treatment irrespective of her work. The persuasive evidence fails to establish that Claimant's job triggered or accelerated the need for treatment, or otherwise altered the course of her condition.

ORDER

It is therefore ordered that:

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

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email

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

DATED: July 7, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-229-971-001; 5-236-519-001

STIPULATIONS

At the commencement of the hearing, the parties agreed that at the time of his death, [Redacted, hereinafter MB] had an average weekly wage (AWW) of no less than $1,420.00, which equates to a weekly death benefit of $946.66. Questions regarding the amount of MB's[Redacted] overtime earnings and its effect on his AWW were outstanding at the time of hearing. Thus, the parties requested additional time to obtain supplementary wage records and recalculate the decedent's AWW and death benefit to reflect his overtime income if applicable. Assuming that they may be unable to obtain the aforementioned overtime records prior to the deadline for issuance of an order, the parties requested that the ALJ issue an order apportioning the minimum death benefit of $946.66 among MB's[Redacted] dependents per § 8-42-121 of the Workers' Compensation Act. However, on June 28, 2023, after review of MB's[Redacted] overtime wages, Respondents filed an unopposed motion for approval of a stipulation increasing MB's[Redacted] AWW to $1,610.47 which corresponds to a death benefit rate of $1,073.54. The parties also agreed to reserve all statutory offsets. The parties' June 28, 2023 stipulations were approved by order of the undersigned on June 29, 2023.

REMAINING ISSUE

I. Apportionment of the stipulated death benefit of $1,073.54 between MB's[Redacted] dependents per C.R.S. § 8-42-121.

FINDINGS OF FACT

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

1. The above captioned claim numbers were consolidated for hearing pursuant to WCRP 9-6 (A) by order of Pre-hearing Administrative Law Judge (PALJ) John Sandberg on April 28, 2023. (Resp. Ex. K).

2. Decedent worked as a police officer for the [Redacted, hereinafter FD]. On February 2, 2023, while pursuing a fleeing suspect, MB[Redacted] fell from a bridge landing on the hard surface below and sustaining multiple blunt force injuries. (Resp. Ex. C, p. 29). MB[Redacted] succumbed to his injuries 9 days later, on February 11, 2023. *Id.*

3. MB[Redacted] is survived by his widow [Redacted, hereinafter KA]. He is also survived by two dependent children, [Redacted, hereinafter IB], born April 15, 2014, to [Redacted, hereinafter VB], decedent's former wife, and [Redacted, hereinafter MA], born September 19, 2021, to MA[Redacted]. (Resp. Ex. D and E). No disputes

surround the dependency of MA[Redacted], IB[Redacted] or MA[Redacted]. Indeed, the evidence presented supports a finding that each of these individuals are presumed to be wholly dependent persons pursuant to C.R.S. § 8-41-501(1) (a) & (b) and no party presented evidence sufficient to rebut this presumption.

4. As decedent and VB[Redacted] were divorced, they shared custody of their minor daughter, IB[Redacted], prior to his death. KA[Redacted] testified that prior to MB's[Redacted] passing, custody of IB[Redacted] was divided 50 percent to MB[Redacted] and 50 percent to IB[Redacted] or roughly 3½ days/week each. Since MB's[Redacted] death, KA[Redacted] testified that the 50/50 custody split has ended and she has not seen IB[Redacted] since MB's[Redacted] funeral.

5. At the time of his death, MB[Redacted] was subject to a court order requiring him to pay child support in the amount of $372.53/month to VB[Redacted] for the care and support of IB[Redacted]. (Resp. Ex. B, pp. 27-28). This child support payment ended with MB's[Redacted] untimely death.

6. KA[Redacted] testified that in addition to MB's[Redacted] child support payments, she and MB[Redacted] would also pay for IB's[Redacted] living expenses while she stayed with them to include food, clothing, school supplies and the costs of incidentals such as the fees associated with her sports activities. No evidence regarding the precise cost of these additional living expenses was presented. Based upon the evidence presented, the ALJ finds that IB[Redacted] is presently residing exclusively with her mother and the costs associated with her care and support now rest solely with VB[Redacted].

7. MB's[Redacted] untimely death has garnered significant community attention and KA[Redacted] has received considerable financial support from the public. KA[Redacted] testified that a "Go Fund Me" account has been established in her name and that between this account, community donations and public fundraisers, approximately $130,000.00 has been raised for her and the children. She testified that donations are still coming in and she plans to establish a trust fund with the assistance of her attorney for both IB[Redacted] and MA[Redacted] from some of these donations. According to KA[Redacted], she, with the assistance of her attorney, will set the terms of the trust, including the percentage of funds to be directed into the trust for IB[Redacted] and MA[Redacted]. She testified that she will place an equal amount of funds from the charitable accounts into the trust funds for IB[Redacted] and MA[Redacted]. KA[Redacted] also testified that IB[Redacted], akin to she and MA[Redacted], will also receive a share of MB's[Redacted] Fire & Police Pension Association (FPPA) survivor's benefit.

8. KA[Redacted] testified further that she was aware that specific fundraising has been carried out especially for IB's[Redacted] benefit, but no details concerning these efforts or the amounts raised were presented and KA[Redacted] acknowledged that she had no understanding of VB's[Redacted] financial situation.

9. Neither IB[Redacted] nor MA[Redacted] have other sources of income.

10. KA[Redacted] testified further that she received a "great gift" when the mortgage on the home she owned jointly with MB[Redacted] was paid off by Tunnels to Towers, an organization dedicated to lessening the financial burden/stress on families of fallen law enforcement officers.

11. Prior to MB's[Redacted] passing, KA[Redacted] worked as a registered hospice nurse. As a hospice nurse, KA[Redacted] indicated that she earned approximately $70,000.00 annually. KA[Redacted] testified credibly that she has been unable to return to work as a hospice nurse as she continues to adjust to the sudden and tragic passing of KA[Redacted]. Nonetheless, KA[Redacted] stated that she plans to return to work at some point in the future.

12. KA[Redacted] testified that with the passing of MB[Redacted] his entire income and support into their household has been lost. Moreover, she testified that with MB's[Redacted] absence in the home, the cost of day care for MA[Redacted] will increase. Accordingly, she proposed that MB's[Redacted] death benefit be allocated equally among herself and the two minor children. Given the financial benefits that KA[Redacted] has received, including the various charitable accounts and the payoff of her outstanding mortgage, Mr. Werner proposed that MB's[Redacted] death benefit be allocated 40% to IB[Redacted] and 60% to KA[Redacted] and MA[Redacted].

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. C.R.S. § 8-40-102(1). In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. C.R.S. § 8-43-201.

B. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo.App. 2002). 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).

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).

Apportionment of Death Benefits

D. The Workers' Compensation Act provides that spouses and the minor children (under the age of 18) of an injured worker who succumbs to his/her injuries are presumed to be wholly dependent and entitled to death benefits. C.R.S. § 8-41-501(1) (a) and (b). Section 8-41-503(1), C.R.S., provides: "Dependents and the extent of their dependency shall be determined as of the date of the injury to the injured employee, and the right to death benefits shall become fixed as of said date irrespective of any subsequent change in conditions except as provided in section 8-41-501(1) (c). Death benefits shall be directly payable to the dependents entitled thereto or to such person legally entitled thereto as the director may designate." As noted above, there is no dispute regarding the dependency of the various claimants in this case. Moreover, the parties have stipulated to the amount of MB's[Redacted] average weekly wage (AWW) and the corresponding death benefit representing sixty-six and two-thirds percent of this AWW. Nonetheless, because there are multiple claimants in this case, including a dependent child who now resides separately from KA[Redacted] along with various financial considerations to account for, the parties have requested an apportionment of the death benefit among the interested parties.

E. Pursuant to § 8-42-121, C.R.S. 2022, "[d]eath benefits shall be paid to such one of more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director, who may apportion the benefits among such dependents in such manner as the director may deem just and equitable". This statutory provision does not require that all persons deemed to be wholly dependent be treated on an equal basis. (*Spoo v. Spoo*, 142 Colo. 268, 358 P.2d 870 (Colo. 1961). Rather, it is well settled that the ALJ may consider the relative incomes and the unique financial circumstances of the claimants when determining a "just and equitable" apportionment of the death benefit in any particular case. *Spoo v. Spoo supra*; See also, *Randall Ward v. Apex Heating and Air*

Conditioning, W.C. 4-129-484 (ICAO February 8, 2001). Simply stated, a "just and equitable" distribution will turn on the unique facts of each case.

F. In this case, the evidence presented supports a conclusion that MB's[Redacted] child support payment to VB's[Redacted] for IB's[Redacted] care/support terminated with his passing. Moreover, the ALJ is convinced that both MB[Redacted] and KA[Redacted] were contributing, as a family unit, to IB's[Redacted] care and support at a level above the formal child support payment while she resided with them as part of the custody arrangement between the MB and VB[Redacted] following their divorce. Because the shared custody arrangement ended with MB's[Redacted] untimely death and IB[Redacted] is now living exclusively with VB[Redacted] this additional support has also come to an end. While the ALJ applauds VB's[Redacted] sagacity and foresight to protect both MA[Redacted] and IB's[Redacted] future needs through the establishment of a trust fund, IB[Redacted] is entitled to and presently needs financial support. Without MB's[Redacted] child support payment and the extra maintenance he and KA[Redacted] were providing, IB[Redacted] will undoubtedly experience a substantially different standard of living than the one she enjoyed while MB[Redacted] was living.

G. Although the financial and emotional impact of MB's[Redacted] death to all of the claimant's in this case cannot be overstated, the ALJ is convinced that IB[Redacted] is at particular risk currently and in need of increased support. At 9 years of age, IB[Redacted] is capable of understanding that her father's absence in her life is permanent. Moreover, she is now estranged from her half-brother and stepmother, whom the ALJ is convinced played a significant role in her life. Accordingly, the ALJ is persuaded that the opportunity for IB[Redacted] to continue her sports and other activities are of particular importance to provide her with an outlet and a distraction from external issues caused by the loss of her father. Based upon the evidence presented, the ALJ is also convinced that the current costs of caring for and supporting IB[Redacted] are higher than those associated with nurturing MA[Redacted].

H. While the ALJ is convinced that KA[Redacted] and MA[Redacted] have and will face future challenges connected to the loss of MB[Redacted] and his income, KA[Redacted] is highly educated and this education, combined with her proven skills as a hospice nurse, affords her the prospect of returning to a profession where she has earned upwards of $70,000.00 in the past. Nothing in the evidence presented supports a conclusion that KA[Redacted] cannot return to her prior employment in order to support MA[Redacted] and herself. Indeed, KA[Redacted] testified that she plans to return to work at some point as the trauma caused by MB's[Redacted] premature death subsides. In this case, the ALJ finds the time that KA[Redacted] has taken away from work in order to recover from and adjust to the life altering events forced upon her reasonable. Nonetheless, she no longer bears any of the costs associated with IB's[Redacted] upbringing and IB[Redacted] needs the financial support that MB[Redacted] and by extension, she (KA[Redacted]) was providing.

I. Given IB's[Redacted] current need for additional support combined with

the fact that KA's[Redacted] financial circumstances have been aided by the generosity of her community, including the payoff of her outstanding mortgage[1], the ALJ is convinced that an even split of the death benefit between the claimant's in this case will disadvantage IB[Redacted]. After considering the individual circumstances of the claimants to this case and the foreseeable economic benefit that will inure to KA[Redacted] and MA[Redacted] when she returns to work, the ALJ is persuaded that an even split of MB's[Redacted] death benefit will leave IB[Redacted] with insufficient support. Given the totality of the evidence presented, the ALJ concludes that a "just and equitable" division of MB's[Redacted] stipulated death benefit weighs in favor of apportioning a slightly higher share to IB[Redacted] than KA[Redacted] and MA[Redacted].

ORDER

It is therefore ordered that:

1. MB's[Redacted] stipulated $1,073.54 death benefit is apportioned to the claimant's as follows: 37%, ($397.21) to IB[Redacted], 33% ($354.27) to KA[Redacted] and 30% ($322.06) to MA[Redacted]

2. Per the parties approved stipulation, all statutory offsets are reserved for future determination.

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

DATED: July 7, 2023

/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

[1] The ALJ finds KA[Redacted] genuinely thankful for the financial assistance extended to the family by Tunnels to Towers in paying off the household mortgage.

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: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-215-787-002

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable work injury on August 17, 2022.
II. Whether Claimant is entitled to medical benefits.
III. Claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. Claimant is a twenty-five-year-old[1] manufacturing engineer who worked for Respondent-Employer on August 17, 2022. Claimant's work was generally not physical and his duties primarily included desk work. At the time of injury, Claimant was earning a yearly salary of $70,000.00, plus bonuses.

2. On Wednesday, August 17, 2022, near the end of the workday, Claimant assisted some coworkers with lifting a 400-pound machine out of a track to help prevent it from rusting overnight. While going from a low squat to a more upright position, Claimant felt a sudden flash or tingling sensation in his low back.

3. Claimant finished out the workday. He felt something was a little off in his back, but it was nothing worth complaining about. When he went home that day, he felt a tension in his low back, but no pain. The sensation continued on that Thursday and Friday, as he finished out his work week. Up through that Friday, Claimant did not have any lost time or require any medical treatment. Claimant was also able to perform his normal activities of daily living and his work duties without difficulty during this period.

4. On Saturday, August 20, 2022, Claimant was at home doing laundry. He bent over to pick up laundry detergent and felt a shooting sensation and overwhelming pain in his low back. The pain began before Claimant was even able to touch the detergent.

5. Claimant had difficulty getting out of bed the next day, Sunday. He called the Kaiser Permanente advice line to report his symptoms. The record generated by Kaiser Permanente noted: "pt was bending over yesterday and developed a sharp pain in his back… works at a machine shop and 3 days prior to injury was lifting several heaving things at work but no other issues." The Court finds the meaning of "no other issues" to mean no issues other than those low back symptoms Claimant complained of to Kaiser Permanente.

6. Claimant returned to work on Monday, August 22, 2022, and reported the injury to his supervisor, [Redacted, hereinafter MI].

[1] Claimant was 25 years old at the time of injury, not at the time of this Order.

7. Claimant treated with a chiropractor, Dr. Fox, for his low back pain. Dr. Fox recommended three sessions of chiropractic care per week with the frequency dropping off over the next twelve weeks. Dr. Fox advised Claimant that the total episode of care would cost $1,560.00 if paid in full.

8. Claimant reported the injury to his employer on Thursday, August 25, 2022. Respondents filed an Employer's First Report of Injury that same day and a Notice of Contest on September 26, 2022.

9. Claimant provided a recorded statement to Respondents on August 30, 2022. Claimant told Respondents that he did not think anything was potentially wrong with his back on the date of injury, that he did not have any pain initially, and that he was able to work August 17 through August 19.

10. Claimant received a designated provider list. However, the list was for medical providers in the Colorado Springs area, which did not correspond with where Claimant lived. Claimant obtained a list of providers in the lunchroom at his Employer and sought treatment at Concentra.

11. On September 15, 2022, Claimant's treater, William Hazell, PA-C, at Kaiser Permanente, authored a letter on behalf of Claimant which stated in relevant part:

> Based on my recollection of the clinic exam and the patient is presentation in my opinion the heavy lifting at work several days prior to the significant exacerbation of the pain while lifting laundry detergent could have been a contributing factor to muscle spasms. While expressed to him that I feel it could have been a contributing factor I also expressed to him that I could not state for certain that it actually was a contributing factor.

12. Claimant obtained treatment with Dr. Gordon Arnott at Concentra beginning on August 31, 2022. Dr. Arnott noted that "the history stated that he works at a machine shop and that three days prior he was lifting several heavy things at work but at no time was there any pain or any symptoms at that time… NONE.. noted by record." Nevertheless, Dr. Arnott opined that the objective findings were consistent with a work-related mechanism of injury.

13. Respondents obtained a record review by Dr. John Burris on December 16, 2022. Dr. Burris authored a report in which he opined in relevant part:

> The provided records do not support the reported workplace lifting event on 8/17/2022 resulted in an injury. . . . Due to the 3-day delay in onset of low back pain, the low back pain he first experienced on 8/20/2022 cannot be causally related to the reported 8/17/2022 workplace event. . . . Based on the information provided, Mr. Hanson's report of experiencing low back pain beginning on 8/20/2022 appears independent and unrelated to the reported 8/17/2022 workplace event.

14. The Court does not find Dr. Burris's opinions in his report to be credible.

15. Dr. Burris testified at hearing based on his record review. Dr. Burris testified that patients are not necessarily always correct about the mechanism of injury. Dr. Burris testified that typically a patient will experience pain within hours of a muscle strain with inflammation that would have progressed within one hour to one day. And, although picking up detergent is a relatively trivial event, Dr. Burris testified that trivial events can cause injuries, such as disc herniations from sneezing. Dr. Burris felt that the onset of symptoms was most telling. Dr. Burris conceded on cross-examination that bending over is a pretty benign action and would not be highly likely to injure somebody.

16. The Court finds Dr. Burris's testimony generally credible, except insofar as he opined that the August 17, 2022, event was not a significant causal factor in Claimant's onset of symptoms on August 20, 2022.

17. Claimant obtained an independent medical examination (IME) with Dr. John Hughes on March 23, 2023. Dr. Hughes reviewed Claimant's medical history and opined that Claimant's account of events was consistent with medical records. Dr. Hughes noted that Claimant had no prior history of low back problems. He diagnosed Claimant with lumbosacral sprain or strain with right-sided sacroiliac joint dysfunction. He felt Claimant was injured at work on August 17, 2022. The Court finds Dr. Hughes' opinions credible.

18. Claimant testified at hearing as follows. On the date of injury, Claimant was lifting a four-hundred-pound machine out of a track to help prevent it from rusting overnight. While going from a low squat to a more upright position, he felt a sudden flash or tingling sensation in his low back. He went on to work the rest of the day. Claimant went home and felt tension in his back, but no pain. The symptoms persisted, but Claimant did not experience any pain in his back until Saturday, August 20, 2022. That Saturday, Claimant was bending over to pick up laundry detergent when he experienced pain in his low back. He experienced the pain before he was even able to touch the detergent. Claimant returned to work that following Monday. By that time, the pain was tolerable, but by Monday night, the pain had worsened. Claimant was unable to return to work that Tuesday and Wednesday due to pain.

19. Claimant also testified that upon Claimant's reporting of the injury, the Employer provided Claimant with a designated provider list. However, the list was for providers in Colorado Springs, which did not correspond with where Claimant lived. Claimant obtained a list of providers in the lunchroom at his Employer and sought treatment at Concentra, one of the designed providers.

20. Claimant also testified that he earned $70,000.00 per year as of his date of injury. He also testified that he received annual bonuses that varied between $3,000.00 and $5,000.00. Claimant testified that he also received a retention bonus of $3,393.00 shortly before his injury.

21. The Court finds Claimant's testimony credible. Claimant's wage records show that Claimant typically earned a biweekly salary of $2,692.31 at the time of his injury, which corresponds roughly with an annual salary of $70,000.00. The wage records also show that Claimant received a $3,000.00 annual bonus several months after his injury, which is consistent with his testimony.

22. The Court finds Claimant has proved that it is more likely than not that he sustained a compensable injury on August 17, 2022, arising out of and in the course of his employment with Employer, and that the condition became disabling and required medical treatment on August 20, 2022. The Court finds that the injury most likely left Claimant's low back in a weakened condition, which in turn proximately contributed to Claimant's worsening on August 20, 2022, while bending over at home to pick up laundry detergent. Thus, the Court finds that the August 17, 2022 incident caused the need for medical treatment.

23. The Court finds that Claimant proved that medical treatment is reasonably necessary to cure and relieve him of the effects of his industrial injury.

24. The Court also finds that an AWW of $1,346.15 most fairly represents Claimant's wage-earning capacity as of the date of injury. The Court finds that while Claimant proved that a reasonable, present-day, cash-equivalent value could be placed upon those bonuses—as those bonuses were real and definite—Claimant failed to prove that he potentially had reasonable access on a day-to-day basis to bonuses or an immediate interest in receiving a bonus under appropriate, reasonable circumstances. Therefore, the Court finds that it was a fringe benefit not included among those enumerated under § 8-40-201(19)(b), C.R.S. (2022), and are therefore not "wages" as defined by the Workers' Compensation Act.

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*, 592 P.2d 792 (Colo. 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. 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. 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 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. Commission,* 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. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo.App.2000).

Compensability

Section 8-41-301(1)(c), C.R.S. (2022), 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.

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 Office*, 131 P.3d 1224 (Colo.App.2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). Thus, if an industrial injury leaves the body in a weakened condition and the weakened condition proximately causes a new injury, the new injury is a compensable consequence of the original industrial injury. *Price Mine Service, Inc. v. Indus. Claim Appeals Office*, 64 P.3d 936 (Colo. App. 2003); *Lanuto v. Amerigas Propane, Inc.*, W.C. No. 4-818-912, (July 20, 2011). The preceding principle constitutes the "chain of causation analysis" and provides that a subsequent injury is compensable if the "weakened condition played a causative role in the subsequent injury." *Fessler v. United Airlines*, W.C. No. 4-654-034 (Dec. 19, 2007). *See Martinez v. City of Colorado Springs*, W.C. No. 5-073-295 (Sept. 12, 2019) (an infection that resulted from claimant's weakened condition was compensable because it was a natural, although not necessarily a direct, result of the work-related injury).

As found above, Claimant has proved by a preponderance of the evidence that he sustained a compensable injury on August 17, 2022, arising out of and in the course of his employment with Employer, and that the condition worsened on August 20, 2022, so as to require medical treatment. But for the August 17, 2022 workplace injury, Claimant would not have experienced the onset of pain on August 20, 2022, and subsequently required medical treatment.

Medical Benefits

The Colorado Workers' Compensation Act ("the Act") provides that an employer must provide medical care "as may reasonably be needed . . . to cure and relieve the employee from the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2022). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found above, medical treatment is reasonably necessary to cure and relieve Claimant of the effects of his August 17, 2022 injury. Thus, the Court finds and concludes that Claimant established by a preponderance of the evidence the need for medical treatment.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo.App.1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82.

As found above, Claimant's annual salary was $70,000.00, which corresponds with an AWW of $1,346.15. However, the parties dispute whether Claimant's annual and retention bonuses should be included in the AWW calculation.

Section 8-40-201(19)(a), C.R.S., defines "wages" as "the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." Subsection (b) clarifies that "fringe benefits" are specifically excluded from the definition of "wages" unless the fringe benefit is among those enumerated therein.

To determine if Claimant's bonuses were indeed an included wage and not an excluded fringe benefit, the Court must consider "whether a reasonable, present-day, cash equivalent value can be placed upon [the bonuses] and whether Claimant has reasonable access on a day-to-day basis, either actually or potentially, to [the bonuses], or an immediate expectation interest in receiving [the bonuses] under appropriate, reasonable circumstances." *Meeker v. Provenant Health Partners*, 929 P.2d 26, 28 (Colo.App.1996).

As found above, Claimant proved that a reasonable, present-day, cash-equivalent value could be placed upon those bonuses, as the bonuses he had received were definite. However, Claimant failed to prove that he potentially had reasonable access on a day-to-day basis to bonuses or an immediate interest in receiving a bonus under appropriate, reasonable circumstances. Therefore, the bonuses were a fringe benefit not included among those enumerated under § 8-40-201(19)(b), C.R.S. (2022), and are therefore not "wages" as defined by the Workers' Compensation Act. As such, the Court declines to include the bonuses in calculating Claimant's AWW.

Therefore, Claimant's AWW is $1,346.15.

ORDER

1. Claimant proved that it is more likely than not that he sustained a compensable injury on August 17, 2022. Respondents shall file an admission consistent with an August 17, 2022 injury.

2. Respondents shall authorize and pay for reasonable and necessary medical treatment.

3. Respondents shall admit for an AWW of $1,346.15.

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

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

DATED: July 10, 2023

/s/ Stephen J. Abbott
Stephen J. Abbott
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 5-225-347-001

ISSUES

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

- If Claimant has proven he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable, necessary and related to his work injury?

- At the commencement of the hearing, the parties agreed that if Claimant has proven a compensable injury arising out of and in the course and scope of his employment with Employer that Claimant was entitled to an award to temporary total disability ("TTD") benefits beginning December 9, 2022, but the parties reserved the issues of average weekly wage ("AWW") and offsets.

FINDINGS OF FACT

1. Claimant was employed by Employer as lineman apprentice. Claimant testified he was hired on June 17, 2017 and was completing Employer's apprenticeship program which is a four year program involving two tests per year (eight tests total) in order to become a journeyman lineman. Claimant testified that he worked out of Employer's Rifle office and the area covered by the Rifle office included from Carbondale to Debeque, Colroado.

2. Claimant testified his job duties included providing construction and maintenance to power lines and help to get power lines up and running if there is a power outage. Claimant testified he would use trucks provided by Employer to travel to the job sites. Claimant testified that in order to arrive to work he would usually carpool with his boss or use his personal vehicle.

3. Claimant testified that in December 2022 he had one final break out test to complete in order to become a Journeyman Lineman. Claimant testified that the final test was performed at Employer's testing facility located near Brighton, Colorado. Claimant testified that the final test would take 40 hours to complete.

4. Claimant testified he was scheduled to begin his test on Monday December 12, 2022. Claimant testified that he had advised his supervisor that he was scheduled to take the test the week of December 12, 2022. Claimant testified that his supervisor authorized Claimant to obtain a rental car for travel to the testifying facility. Claimant testified that Employer allowed Claimant to obtain the rental car during the week of December 5, 2022. Claimant testified that he was authorized to rent the vehicle

on Wednesday of that week, but did not rent the vehicle until Thursday, December 8, 2022[1], when he obtained a ride from his co-worker to the Grand Junction airport and rented the vehicle. Claimant then drove the vehicle back to the Rifle office where he organized all of his tools needed for the breakout test and left the tools by his desk. Claimant testified he completed his work and then went home and packed for his trip to Denver.

5. According to the rental agreement entered into evidence at hearing, the rental car was leased to Claimant with a return date of December 16, 2022 on Employer's account.

6. Claimant's supervisor, [Redacted, hereinafter JD], confirmed in his testimony that Claimant was authorized to obtain a rental car on the Wednesday of the week prior to Claimant's testing taking place. JD[Redacted] testified that the reason for allowing employees to rent a vehicle several days prior to a planned trip was that Employer has experienced difficulty in having rental vehicles available if they are not picked up prior to when the vehicle is needed. JD[Redacted] testified that Claimant rented the vehicle pursuant to JD's[Redacted] instructions on Thursday, but JD[Redacted] testified that Claimant was not authorized to take the rental vehicle to Claimant's home after work. JD[Redacted] testified that Claimant should have left the rental vehicle at the service center.

7. Claimant testified that he had been in contact with two other employees who lived in the Denver area prior to his trip to Denver who had been in the Apprenticeship program with Claimant and had made plans to travel to Denver on Friday, December 9, 2022 and spend the weekend training with his two co-employees. Claimant testified that one of the co-employees, [Redacted, hereinafter SS], would be taking the breakout test with Claimant the week of December 12, 2022. Claimant testified that other co-employee, AP[Redacted], had already taken the test and was willing to help Claimant and SS[Redacted] study the weekend before the test. Claimant testified he was friends with SS[Redacted] and AP[Redacted] in addition to being co-workers.

8. AP[Redacted] and SS[Redacted] testified at hearing on behalf of Claimant. Both AP[Redacted] and SS[Redacted] confirmed that arrangements had been made for Claimant to travel to Denver early to study in preparation for the upcoming test.

9. Claimant testified he had made arrangements with his mother to have her watch his two children the weekend before the test as he was not going to be in town for the weekend. Claimant also had made arrangements for his mother to watch his dog and had left the dog at her house the weekend prior. Claimant's mother testified consistent with Claimant in this regard.

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[1] The ALJ notes that Respondents stated in their proposed Findings of Fact, Conclusions of Law and Order that it is undisputed that the vehicle that Claimant was in at the time of the accident was rented on Wednesday, December 8, 2022." The ALJ agrees that the parties agreed that the vehicle was rented on December 8, 2022, the day before the accident, but takes judicial notice that December 8, 2022 was a Thursday.

10. Claimant testified that he had planned to stay with friends over the weekend while doing the studying and had made arrangements with his mother to take care of his children that weekend while he was out of town. Claimant testified he has joint custody of his children with their mother. Claimant's mother testified at hearing and confirmed that Claimant had requested that she watch his kids the weekend of December 10th and 11th.

11. Claimant testified that on December 9, 2022 he woke up and headed to work to turn in his evaluations that were due the next week. Claimant testified that he intended to turn in the evaluations and pick the equipment he needed from work to complete the breakout test, including his helmet, climbing boots, climbing belt, rubber gloves, high voltage tester, etc. Claimant testified his intention was to stop by the Rifle facility and then continue on to Denver. Claimant testified that he would normally be wearing fire resistant clothing if he was going to work but since he was planning on continuing on to Denver, he was wearing jeans and camouflage clothes.

12. JD[Redacted] testified that if Claimant had indicated to him prior to December 9, 2022 that he intended to travel to Denver on Friday, JD[Redacted] would not have had an issue with Claimant making the drive to Denver on Friday. Claimant and JD[Redacted] both acknowledged that Claimant had not communicated his intention to travel to Denver prior to December 9, 2022.

13. Claimant was involved in a motor vehicle accident ("MVA") while driving in the rental car between his house and the Rifle facility. Claimant testified he took the West Rifle exit from the interstate and came cross a herd of elk crossing the road, which caused Claimant to stop the vehicle. Claimant was rear ended by a vehicle traveling at a high rate of speed while stopped in his vehicle.

14. Claimant was taken by ambulance to the Grand River Medical Center Emergency Room ("ER") following the MVA. Claimant complained of headache, neck pain, and a four-centimeter scalp laceration upon being admitted to the ER. The emergency room noted no thoracic or abdominal trauma on initial or secondary survey. Claimant's neck as noted to have full range of motion, and thoracic and lumbar spine were normal. Claimant underwent a cervical spine computed tomography ("CT") scan which showed no acute findings. Claimant also underwent a CT scan of the head which showed a small posterior right parietal scalp hematoma but no acute intracranial abnormality. Claimant was diagnosed with a concussion and head laceration which was repaired with staples. Claimant's concussion symptoms were noted to be improving on discharge.

15. Claimant was evaluated by Dr. Steven Brown at Work Partners Occupational Health on December 21, 2022. Dr. Brown noted Claimant presented with complaints of head, neck, upper and lower back pain, hip and right leg pain, right shoulder pain, vision problems, and bilateral numbness of his hands and feet. Dr. Brown noted that Claimant had a prior work injury to his neck, right shoulder, and back in 2013-2014. Dr. Brown diagnosed Claimant with sprain of joints and ligaments of other parts of the neck, a concussion with loss of consciousness of 30 minutes or less,

pain the right shoulder, pain in the left hip, headache, dizziness and giddiness and an abrasion of the right lower leg. Dr. Brown noted that Claimant had a laceration to the scalp overlying the occiput which was repaired with staples that had already been removed. Claimant was instructed to discontinue the Flexeril he had been given in the ER as this could also cause dizziness. Dr. Brown noted Claimant appeared to have some global tenderness throughout the spine that Dr. Brown surmised was more myofascial and consistent with the mechanism of being rear-ended at a high speed. Dr. Brown referred Claimant for six chiropractic treatments with Dr. Chris Angello, and released Claimant to modified duty work.

16. Claimant returned to Dr. Brown on December 28, 2022. Dr. Brown noted Claimant continued to complain of pain in the head and neck which he described as sharp and achy and severe. Claimant also reported headache, light sensitivity, lightheadedness, nausea and dizziness. Claimant also reported additional issues with his left hip, right shin and right shoulder blade. Claimant was referred for additional chiropractic treatment and six vestibular therapy sessions with Karri Mullany to address vestibular hypofunction as a result of concussion.

17. On January 11, 2023, Claimant returned to Dr. Brown, who noted that Claimant reported some numbness in his frontal forehead along with headaches that cause nausea, light sensitivity and vision changes. Claimant reported he was still unable to drive and experienced dizziness when he stood up. Claimant reported left hip and low back pain were at level 0, but noted he still had some mild aching depending on the activity level. Claimant also noted that his right calf and shin pain were barely noticeable. Claimant continued to complain of right shoulder pain. Dr. Brown recommended meclizine for vertigo.

18. Claimant returned to Dr. Brown on February 1, 2023, and continued to complain of concussion symptoms that were described by Claimant as severe. Claimant continued to report horrible nausea along with continued issues with his neck and head. Claimant reported his low back and hip issues were much better after he was able to get in for chiropractic visits. With regard to his right shoulder issues, Claimant reported he continued to have tight stiff symptoms that he reported were mild. Dr. Brown noted Claimant was scheduled to start vestibular therapy later this week.

19. Claimant testified he stopped receiving medical treatment after insurance denied his claim for workers' compensation benefits. Claimant testified he additionally received glasses based on the fact that he could not see properly after the accident. Claimant testified he did not wear glasses prior to the work injury.

20. Respondents referred Claimant for an Independent Medical Examination ("IME") with Dr. Tashof Bernton, on March 14, 2023. Dr. Bernton reviewed some of Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. According to the report, at the time of the examination, Dr. Bernton had the medical records from Work Partners through December 28, 2022 (in his cover letter, Dr. Bernton indicated that he only had records through December 21, 2022, but the report references the December 28, 2022

evaluation at Work Partners). Dr. Bernton testified that at hearing that he subsequently was able to review the additional medical records related to Claimant's MVA, including the treatment with Work Partners through February 1, 2023 and the chiropractic treatment along with the ER records and the ambulance report.

21. Dr. Bernton noted in his report that Claimant was involved in an MVA and reported a loss of consciousness. Dr. Bernton noted Claimant's examination revealed increased tone in the right rhomboid area with tender trigger points along some increased tone of the paraspinous musculature in the cervical region with associated tender trigger points. Dr. Bernton noted in his report that based on his limited information available, Claimant was three months out from an injury which involved a quite significant concussion with loss of consciousness and has persistent post- concussive deficits including some cognitive and memory deficits, visual difficulties and some balance difficulties as well as musculoskeletal symptoms which Dr. Bernton opined to be residual myofascial symptoms, and associated headache that was either myofascial or posttraumatic. Dr. Bernton opined that Claimant would likely be at maximum medical improvement ("MMI") as a result of the injury approximately six months post injury.

22. Dr. Bernton noted in his testimony at hearing that it was almost six months from the date of injury, and Claimant exhibited that he is cognitively intact and could potentially return to deskwork, potentially with restrictions. Dr. Bemton noted that while Claimant presented at the IME with the persistence of dizziness, double vision and some difficulty with tandem gait and word finding, Dr. Bernton noted Claimant did not appear to have difficulty with word finding during Claimant's testimony.

23. Dr. Bernton testified that a visual evaluation (5-6 more visits), prism glasses and transition out of them, 6 to 15 physical/vestibular therapy visits, and 5 to 10 chiropractic treatments would be reasonable and necessary medical treatment related to the MVA Dr. Bemton opined that Claimant's musculoskeletal complaints were diffuse strains that would resolve with time, and did not require additional medical care.

24. After JD[Redacted] picked up Clamant at the ER following the MVA, JD[Redacted] took Claimant to the rental vehicle that was in the salvage yard where it had been towed. JD[Redacted] testified that Claimant obtained a back pack, books, paperwork and a hat out of the rental car. JD[Redacted] testified that Claimant did not retrieve a suitcase out of the rental car. JD[Redacted] testified he did see items at Claimant's desk including his hard hat, boots, climbing gear, fire resistant clothing and additional books.

25. While JD[Redacted]testified that Claimant was not allowed to drive the rental vehicle home, Claimant presented the testimony of [Redacted, hereinafter MB], an employee for Employer who was the IBW president for six months for Employer, who testified at hearing that he would take the rental vehicles to his home when he was provided with a vehicle by Employer. MB[Redacted] testified at hearing that travel time would be considered compensated when an employee would travel to Denver. In this regard, MB[Redacted] testified that he would always charge at least five hours for his travel time for

trips to Denver, but if the trip took additional time, he would charge the additional travel time as well.[2]

26. Notably, there is insufficient evidence to establish that with regard to the car rental on December 8, 2022 that Claimant was under any instruction from Employer to not take the vehicle home. While there was some testimony from Claimant and JD[Redacted] that there was a discussion regarding a previously rented vehicle that Claimant was to leave at the Employer's premises, Claimant's testimony at hearing was that he was not instructed by Employer that he was no allowed to take the rental vehicle to his residence after it was rented on December 8, 2022. Moreover, MB[Redacted] testified that there was no company policy that would prohibit an employee from having a vehicle rented by Employer for travel at their home overnight. The AlJ finds Claimant's testimony credible in this regard.

27. The MVA in this case occurred while Claimant was traveling from his home to the Employer's premises. Claimant testified his intention was to pick up his gear from the office and continue to Denver for the planned weekend trip. JD[Redacted] testified that leaving on Friday for the planned trip to Denver would have been allowed by Employer. The AlJ finds Claimant's testimony with regard to his intentions to travel to Denver on Friday, December 9, 2022 after dropping his paperwork off at the office and picking up his work gear to be credible.

28. The parties agree that Claimant's travel to Denver was a necessary part of his employment and was authorized by Employer as evidenced by the fact that Employer arranged for Claimant's rental vehicle. The parties simply disagree as to whether Claimant was in travel status at the time of the MVA due to the fact that Claimant had not informed Employer of his intentions to leave on December 9, 2022 for the travel to Denver. However, as testified to by JD[Redacted], Employer would have allowed Claimant to leave early for Denver if he had requested this permission prior to December 9, 2022.

29. While the MVA occurred at approximately 6:39 a.m. and prior to Claimant's usual start time of 7:00 a.m., Claimant was traveling in a rental vehicle that was provided by Employer. Because Employer provided Claimant with the rental vehicle, and because the AlJ finds Claimant's testimony that his intention was to pick up his gear from the Employer's premises and continue on to Denver, the AlJ finds that Claimant has established that it is more probable than not that he was in travel status at the time of his injury. The AlJ finds, based on the testimony of Claimant at hearing, that Claimant's travel in this case was at the express or implied request of the Employer as Claimant's travel to Denver was necessary for Claimant to complete his testing to become a journeyman electrician. The mere fact that Claimant was intending to stop by the Employer's office on his way to Denver in order to study with co-workers does not

[2] The ALJ notes that MB[Redacted] was working in Employer's office in Grand Junction while Claimant was working in the office in Rifle and recognizes that the travel time "charged" by MB[Redacted] may not equally apply to Claimant's travel time. The relevance of MB's[Redacted] testimony is simply that travel time by employees for trips to Denver is compensated by Employer.

take Claimant out of travel status where the credible evidence establishes Claimant's intentions were to continue on to Denver after dropping off his paperwork.

30. The ALJ credits the testimony of Claimant at hearing along with the supporting medical records and finds that Claimant has established that the medical treatment he received from the ER and Work Partners represents reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the injury.

31. The ALJ notes that the parties agreed that Claimant would be entitled to temporary disability benefits, but reserved the issue involving offsets to the disability benefits based on Claimant's receipt of disability benefits from other sources.

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.

2. 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., 2022. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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). 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).

4. In general, claimants injured while going to or coming from work fail to qualify for recovery because such travel is not considered performance of services arising out of and in the course of employment. *Berry's Coffee Shop, Inc. v. Palomba,* 161 Colo. 369, 423 P.2d 2 (1967); *Madden v. Mountain West Fabricators,* 977 P.2d 864 (Colo. 1999). However, a travel status exception applies when the employer requires the Claimant to travel. The essence of the travel status exception is that when the employer requires the Claimant to travel beyond a fixed location established for the performance of his or her duties, the risks of such travel become the risks of employment. *Staff Administrators, Inc. v. Industrial Appeals Claims Office,* 958 P.2d 509 (Colo. App. 1997) *citing Martin K. Eby Construction Co. v. Industrial Commission,* 151 Colo. 320, 377 P.2d 745 (1963).

5. Colorado courts recognize exceptions to this general rule where circumstances create a causal connection between the employment and an injury occurring under special circumstances while an employee is going to or coming from work, such as:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Madden v. Mountain West Fabricators, id. Travel may be contemplated by the employment contract when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work. *See Electric Mutual Liability Insurance Co. v. Industrial Commission,* 154 Colo. 491,391 P.2d 677 (1964).

6. In addressing the third variable, the *Madden* court determined the travel would be contemplated by the employment contract in the following examples (1) when a particular journey is assigned by the employer; (2) when the employee's travel is at the employer's expense or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work; or (3) when travel is singled out for special treatment as an inducement to employment. *Madden, supra.*

7. In this case, Claimant was required to travel to Denver to complete his testing to become a journeyman electrician. In order to accommodate Claimant's travel to Denver, Employer made arrangements to have Claimant obtain a rental vehicle on Thursday, December 8, 2022, including having a co-employee provide Claimant with a ride to the rental vehicle facility and allow the vehicle to be rented under the Employer's account.

8. The ALJ credits the testimony of the Claimant at hearing that he was intending to drop off paperwork with Employer on the morning of December 9, 2022 and then continue on to Denver for his final test at the time he was involved in the MVA. The ALJ finds that Claimant has proven by a preponderance of the evidence that he was engaged in travel that was contemplated by the employment contract when he was involved in the MVA on December 9, 2022 as he was effectively engaged in travel to Denver as contemplated by his employment with Employer.

9. 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). 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, 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).

10. As found, Claimant's medical treatment with the ER at Grand River Medical Center and his medical treatment with Work Partners was reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the industrial injury.

ORDER

It is therefore ordered that:

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

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of his industrial injury, including the medical treatment provided by Grand River Medical Center and Work Partners.

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

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

DATED: July 11, 2023.

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. 5-199-502-001

ISSUES

I. Whether [Redacted, hereinafter DM], [Redacted, hereinafter SH], and [Redacted, hereinafter EH] are dependents of the decedent and entitled to death benefits.

II. Apportionment of death benefits among the dependents.

III. Average Weekly Wage.

IV. Payment of funeral benefits.

V. Appointment of a guardian ad-litem.

STIPULATIONS

- The decedent, [Redacted, hereinafter EG], was employed by the respondent [Redacted, hereinafter IG] d/b/a [Redacted, hereinafter SG], , on the date of the accident and subsequent death. His death arose out of and occurred within the course and scope of his employment.
- SG[Redacted], was an uninsured subcontractor of [Redacted, hereinafter AR] on the date of the accident and subsequent death.
- AR[Redacted] is the statutory employer of the decedent and is insured by [Redacted, hereinafter PA].
- EH[Redacted] waived his right to claim any dependent benefits.
- DM[Redacted] and SH[Redacted], stipulated to have dependent benefits apportioned 50/50 – if each is entitled to dependent death benefits.

FINDINGS OF FACT

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

Accident- Statutory Employer

1. EG[Redacted], the decedent, was a 47-year-old gutter installer for IG[Redacted], d/b/a SG[Redacted].
2. On January 13, 2022, EG[Redacted] fell from a ladder while in the course and scope of his employment with SG[Redacted]. He suffered multiple injuries and died at the scene of the accident.
3. SG[Redacted] was uninsured and AR[Redacted] is the statutory employer of the decedent and is insured by PA[Redacted].

Wife and Children

4. On December 13, 1996, DM[Redacted], then age 21, and decedent, EG[Redacted], age 25, were married in Ciudad Valles, San Luis Potosi, Mexico.

5. DM[Redacted] and EG[Redacted] had two children while in Mexico:

   a. SH[Redacted], born on April 18, 2005. SH[Redacted] was 16 years old on the date of the decedent's death.

   b. EH[Redacted], born on November 10, 2000. EH[Redacted] was 21 years old on the decedent's date of death.

6. The decedent and his wife kept living together, with their children, in Mexico, until March 2014.

7. In March 2014, the decedent traveled to Colorado to work. While working in Colorado, the decedent rented a room in the house of [Redacted, hereinafter RH], his sister-in-law.

8. In 2015, the decedent returned to Mexico and stayed with his family for a few months. He then returned to Colorado where he kept working and continued renting a room in his sister-in-law's house.

9. After 2015, the decedent did not return to Mexico to stay with his family. The decedent did, however, remain married to his wife, DM[Redacted], and provided financial support to his wife and children on a consistent basis up until his death.

10. DM[Redacted] testified at the hearing and her testimony is found to be credible. Based on her testimony, the ALJ finds:

    - At the time his death, she and EG[Redacted] were married, and she resided in Mexico while EG[Redacted] was living and working in the United States to support his family.
    - She was married to EG[Redacted] on a continual basis since December 13, 1996.
    - Although they remained separated by geography, they remained married up until his death.
    - On a regular basis EG[Redacted] would contact her and send money to her for household expenses, including tuition for their children, food, utilities, and other family requirements. These payments were sent and documented by wire transfer.
    - Although he did not return back to Mexico after 2015 and stay with his family, he regularly communicated with her and his two children by phone.
    - She has not remarried since his death, and she has not been married to anyone else at any time.
    - She had two sons with the decedent. SH[Redacted] and EH[Redacted]. SH[Redacted] still lives with her at home in Mexico. He remains in preparatory school for which she continues to pay tuition and related expenses. EH[Redacted] is no longer in school and has a job.
    - Before EG[Redacted] death she remained dependent on the money that he would send to her in Mexico.

- She is unaware of any prior or subsequent marriages of EG[Redacted].
- She is unaware of any other children that EG[Redacted] may have ever had other than SH[Redacted] and EH[Redacted].

11. RH[Redacted] also testified at the hearing. Based on her testimony, which the ALJ credits, the ALJ finds:
    - She is the sister-in-law of EG[Redacted] and the sister of DM[Redacted].
    - The decedent rented a room from her in her house while he worked in Colorado.
    - Her sister, DM[Redacted], was married to EG[Redacted] at the time he died on January 13, 2022.
    - The decedent would call his wife and children almost every day.
    - The decedent would discuss with RH[Redacted] that he was sending money to his wife, DM[Redacted], in Mexico, on a regular basis.
    - DM[Redacted] would also discuss with RH[Redacted] that she was receiving money from the decedent on a regular basis.
12. Based on the testimony of DM[Redacted] and RH[Redacted], it is found that at the time of the decedent's death, DM[Redacted] and EG[Redacted] were married and were not legally separated, and DM[Redacted] and their children were being supported by the decedent.

Money Paid by IG[Redacted], d/b/a SG[Redacted].

13. Based on the testimony of IG[Redacted] and RH[Redacted], the ALJ finds that after the death of EG[Redacted], IG[Redacted], owner of SG[Redacted], paid various amounts of money to RH[Redacted], to provide to DM[Redacted] for living expenses and to pay funeral expenses-which she did. The amounts paid are as follows:
    - $1,600 for funeral benefits in Mexico.
    - $5,000 for the funeral costs in Colorado.
    - $500 per month from January 2022 through February 2023, to help support the family.
14. It is unclear from the record whether DM[Redacted] paid any funeral expenses in excess of the $6,600 dollars paid by IG[Redacted]. While DM[Redacted] testified as to the amount of funeral expenses that were incurred, she testified as to the amounts paid in pesos. Thus, the court cannot determine whether any funeral remain unpaid and whether DM[Redacted], or anyone else, paid funeral expenses in excess of the $6,600 paid by IG[Redacted].

Testimony of SH[Redacted]

15. SH[Redacted] is the son of the decedent and DM[Redacted] and he testified at the hearing. Based on his testimony, which the ALJ credits, the ALJ finds the following:
    - He is the son of the decedent.

- The decedent called him regularly.
- His parents were still married at the time of the accident and the death of the decedent.
- The decedent sent his mother money for the family on a regular basis.
- He was living with his mother at the time of the death of the decedent.
- He was depended on his father for his support at the time of his father's death.

16. SH[Redacted] also testified about the allocation of death benefits. He testified that the dependent benefits should be apportioned 50/50 between he and his mother.

Testimony of EH[Redacted]

17. EH[Redacted], who was 21 at the time of the decedent's death, also testified at the hearing. He testified that he is not claiming any dependent benefits. This testimony is consistent with the statements of his attorney, who said he was waiving any right to claim any dependent benefits.

Additional Testimony of IG[Redacted]

18. IG[Redacted] d/b/a SG[Redacted], also testified about the wages and bonuses he paid the decedent as well as the money he paid to the decedent's family after the accident. Based on his testimony, which the ALJ credits, the ALJ finds that:
    - The claimant was paid a fixed wage of $200 per day and was paid by check.
    - The decedent did not work every day. The decedent would work fewer days during the winter months since they could not work when the temperature was below 40 degrees.
    - He gave the decedent cash bonuses throughout the year and the cash bonuses averaged about $1,500 to $2,000 during 2021.

Average Weekly Wage

19. Based on the checks issued to claimant, the ALJ finds that the claimant earned $26,670 during the last six months, or 26 weeks of 2021. The ALJ finds that using the last six months of 2021 considers the variation of the claimant's working hours during the summer and winter months of 2021 and just before his accident. Dividing $26,670 by 26 weeks results in an average weekly wage of $1,025.77 and a death benefit rate of $683.85 per week.

20. Based on the testimony of IG[Redacted], it is found that the decedent was paid a bonus on a number of occasions throughout 2021 and that the total amount of the bonuses equaled approximately $1,500 to $2,000. However, it was not established that the bonuses paid to the decedent were guaranteed, that the decedent had access to a particular amount of a bonus during the year, or had an immediate interest in receiving a particular bonus at the time of his death. For example, the decedent did not get a set bonus based on the number of hours he worked each day, week, or month. Instead, each bonus was discretionary, sporadic, and provided whenever IG[Redacted] felt like giving the claimant a bonus. In other words, whether the claimant would have received similar

bonuses in 2022 was speculative. Thus, the court has not included any potential bonus in the determining the decedent's average weekly wage.

Continued to be Married and not Voluntarily Separated

21. Since being married in 1996, the decedent and DM[Redacted], remained married, and were married at the time of the accident.

22. There was no credible evidence submitted at hearing indicating the decedent and DM[Redacted] got divorced at any time.

23. Since 2015, the decedent did not travel back from Colorado to see his wife and children in Mexico. But despite the decedent not going back to Mexico to visit his wife and children since 2015, he talked to his wife and children on the telephone almost every day and supported them financially on a regular basis-by sending money via wire almost every week.

24. There was no credible evidence submitted at the hearing establishing that there was a pending divorce proceeding, or legal separation, or estrangement between the decedent and DM[Redacted] at the time of the decedent's death. Thus, the ALJ finds that there was no pending divorce proceeding, legal separation, or estrangement between the decedent and DM[Redacted] at the time of the decedent's death.

25. At the time of the decedent's death, the decedent was merely living and working in Colorado to support his wife and children who were living in Mexico.

Support of Wife

26. As found above, while the decedent was working and living in Colorado, he regularly sent money to his wife in Mexico to support her and their two children. In order to get money to his wife, he would have the money wired to his wife, DM[Redacted], in Mexico.

27. The decedent's wife, DM[Redacted], was not working in Mexico at the time of the decedent's death. She stayed at home, raised their children, and was financially supported by the decedent and therefore financially dependent on the decedent at the time of his death.

28. At the time of the decedent's death, his son, SH[Redacted], was also dependent upon the money the decedent sent to his mother for their support.

29. At the time of the decedent's death, both DM[Redacted] and SH[Redacted] were dependents of the decedent.

Guardian ad litem

30. At the time of the first two hearings regarding dependent benefits, the minor child, SH[Redacted], was 17 years old and represented by counsel.

31. At the time of the third hearing regarding this matter, SH[Redacted] was 18 years old, and still represented by counsel.

32. At no time during this matter has his mother, DM[Redacted], or the son, SH[Redacted], sought more than ½ of the dependent benefits and at no time did it appear that DM[Redacted] and SH[Redacted] were at odds regarding the apportionment of benefits and that a guardian ad litem had to be appointed to protect the interests of SH[Redacted].

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether DM[Redacted], S[Redacted], and EH[Redacted] are dependents of the decedent and entitled to death benefits.

a. DM[Redacted].

Section 8-42-114, C.R.S., provides for the payment of death benefits to dependents of a deceased worker. According to § 8-41-503, C.R.S., dependency shall be determined as of the date of the industrial injury and under § 8-41-501(1)(a), C.R.S. a widow is presumed to be wholly dependent unless it is shown that she was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support.

As found, DM[Redacted] and the decedent were legally married and remained married. They never divorced. As further found, she was wholly dependent upon the decedent for support at the time of his death. Moreover, at the time of death, she and the decedent were not estranged, legally separated, or divorced. The decedent was merely working in Colorado and sending money to his wife, who was living in Mexico at the family house, to support his family.

The respondents failed to overcome the presumption that DM[Redacted] was not wholly dependent upon the decedent. As a result, she is entitled to dependent death benefits.

b. SH[Redacted].

According to § 8-41-501(1)(b), C.R.S., minor children of the deceased under the age of eighteen years are presumed to be wholly dependent.

As found, SH[Redacted] is the minor child of the decedent and was 16 years old on the date of the decedent's death. As further found, SH[Redacted] was wholly dependent upon the decedent for his support. There was no credible evidence submitted demonstrating that he was not wholly dependent upon the decedent. As a result, he is entitled to dependent death benefits.

c. EH[Redacted].

EH[Redacted] was 21 years old on the date of the decedent's death. He has waived his right to claim any dependent benefits. As a result, he is not entitled to any dependent benefits.

II. Apportionment of death benefits among the dependents.

Section 8-42-121, C.R.S. provides that death benefits shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director, who may apportion the benefits among such dependents in such manner as the director may deem just and equitable. A just and equitable distribution will depend upon the facts of each case, and the ALJ may consider the "actual dependence" of the claimants as well as the relative incomes and circumstances of the claimants. *Spoo v. Spoo*, 145 Colo. 268, 358 P. 2d 870 (1961).

The ALJ finds and concludes that apportioning the decedent's death benefits equally (50/50) between each of the decedent's dependents who are claiming dependent benefits represents a just and equitable allocation of the benefits under the facts and

circumstances of this case. As a result, the dependent death benefits will be apportioned 50% to each dependent, i.e., DM[Redacted] and SH[Redacted].

III. **Average Weekly Wage.**

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's average weekly wage on his or her earnings at the time of injury. The ALJ must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. Indus. Claim Appeals Off.*, 18 P.3d 867, 869 (Colo. App. 2001). The preceding method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777, 780 (Colo. 2010). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Id*.

Under §8-40-201(19)(a), C.R.S., the term "wage" is defined as "the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury…" When the Workers' Compensation Act was enacted in 1919, "wages" included "the reasonable value of board, rent, housing, lodging or any other similar advantage received from the employer." Colo. Sess. Laws 1919, ch. 210, 47 at 716. *See, Ganser v. Mountain Energy, Inc.*, WC 5-128-084-002 (ICAO, June 4, 2021). In 1989 the General Assembly narrowed the definition of "wages." It still included board, rent, housing and lodging, specifically added gratuities and certain costs of continuing or converting health insurance, but for the first time excluded "any similar advantage or fringe benefit not specifically enumerated." Colo. Sess. Laws 1989, ch. 67, 8-47-101(2) at 411*; Ganser v. Mountain Energy, Inc.*, WC 5-128-084-002 (ICAO, June 4, 2021). The preceding provision remains essentially unchanged. See §8-40-201(19)(b), C.R.S.

In *Meeker v. Provenant Health Partners*, 929 P.2d 26 (Colo. App. 1996), the court of appeals reviewed the addition to the AWW of the claimant's accrual of paid time off. Specifically, the employer credited the claimant with 9.5 hours of paid leave for each pay period. The Court of Appeals applied the terms of §8-40-201(19)(a) and (b). Section 8-40-201(19)(a) defined 'wages' "to mean the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." Subparagraph (b), however, limited the definition to exclude "any similar advantage or fringe benefit not specifically enumerated in this subsection (19)." To determine if the claimant's accrued time off constituted an included "wage" or an excluded "fringe benefit," the decision applied criteria inquiring "whether a reasonable, present-day, cash equivalent value can be placed upon it and whether the employee has reasonable access on a day-to-day basis, either actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances." *Meeker*, 929 P.2d at 28.

The *Meeker* Court determined the claimant's accrued time off qualified as "wages" to be included in the AWW. The hours credited to the claimant had an easily discernable,

immediate cash value derived by multiplying each hour accrued by the claimant's hourly rate of pay. Moreover, once earned, the time off was never forfeited and the claimant had reasonable access to the benefit. Notably, the claimant's weekly wage rate was increased by the hourly value of the number of time-off hours earned each week. *See, Burd v. Builder Services Group, Inc*., WC 5-058-572-001 (ICAO, July 9, 2019). Conversely, in *City of Lamar v. Koehn*, 968 P.2d 164 (Colo. App. 1998), the Court of Appeals affirmed the application of the *Meeker* test and concluded that vacation and sick leave earned by the claimant did not constitute "cash equivalents" for purposes of §8-40-201(19)(a) because the benefits were subject to forfeiture if the claimant accrued a specified maximum number of leave days.

In *Orrell v. Coors Porcelain*, WC 4-251-934 (ICAO, May 22, 1997) and *Yex v. ABC Supply Co*., WC 4-910-373-01 (ICAO, May 16, 2014), the Panel considered the addition of bonuses paid from employers' profit-sharing plans to a wage calculation. In both cases the prior receipt of the bonuses was excluded as fringe benefits rather than included as wages. Applying the *Meeker* test, the bonus was deemed contingent and without a present-day cash equivalent value. Importantly, the size of the bonus could be established only at the conclusion of the year or quarter. The claimant also had no access to the bonus on a day-to-day basis and had no immediate expectation of receiving the bonus.

As found, based on the checks issued to claimant, the ALJ finds that the claimant earned $26,670 during the last six months, or 26 weeks of 2021. The ALJ finds that using the last six months of the claimant's earnings of 2021 takes into consideration the variation of the claimant's working hours during the summer and winter months of 2021 and just before his accident and such calculation is a fair and reasonable manner to determine his average weekly wage under the facts and circumstances of this case. As a result, dividing $26,670 by 26 weeks results in an average weekly wage of $1,025.77 and a death benefit rate of $683.85 per week.

Based on the testimony of IG[Redacted], it is found that the decedent was paid a bonus on a number of occasions throughout 2021 and that the total amount of the bonuses equaled approximately $1,500 to $2,000. However, it was not established that the bonuses paid to the decedent were guaranteed, that the decedent had access to a particular amount of a possible bonus during the year, or had an immediate interest in receiving a particular bonus at the time of his death. For example, the decedent did not get a set bonus based on the number of hours he worked each day, week, or month. Instead, each bonus was discretionary, sporadic, and provided whenever IG[Redacted] felt like giving the claimant a bonus. In this matter, the bonuses were so speculative that even IG[Redacted] could not calculate the exact amount, or what those bonuses were based on. In other words, whether the claimant would have received similar bonuses in 2021 was speculative. Plus, it was an unenumerated, and speculative, fringe benefit. Thus, the court has not included any potential bonus in determining the decedents average weekly wage.

Therefore, the ALJ finds and concludes that the decedent's average weekly wage is $1,025.77, which equates to a death benefit rate of $683.85 per week.

IV. Payment of funeral benefits.

Based on the evidence presented at the hearing, the record was not fully developed regarding funeral benefits. For example, DM[Redacted] testified regarding the funeral expenses in pesos and not in American dollars. Moreover, IG[Redacted] paid $6,600 for funeral expenses, but it is not clear whether that covered all the funeral benefits, or whether there were additional funeral expenses that were either paid by someone else or remain outstanding. Therefore, the court specifically reserves the issue of funeral benefits.

V. **Appointment of a Guardian Ad-Litem.**

Counsel for the dependents requested that the court appoint DM[Redacted] as the guardian ad-litem of her son, SH[Redacted]. Section 8-43-207(1)(l), C.R.S. allows an ALJ to appoint guardian ad litem.

However, a guardian ad litem focuses specifically on representing the best interests of the individual during a legal proceeding, providing recommendations, and advocating for their well-being but without assuming full guardianship. *See Young v. C.A.H.* (*In re J.C.T.*), 176 P.3d 726, 734-35 (Colo. 2007). Thus, a guardian ad litem represents the legal interests of the individual during a hearing, but not after. In other words, a guardian ad litem is not appointed to manage the funds paid to or on behalf of a dependent minor child after a hearing as a conservator would.

In this case, all of the dependents were represented by the same attorney and the court did not find that their interests were adverse to one another based on the facts and circumstances of this case and their stipulations. Plus, at the time of the last hearing, SH[Redacted] was 18 years old. Therefore, the ALJ did not find that it was necessary to appoint a guardian ad litem in order for the case to proceed to an order. As a result, the request for a guardian ad litem is denied.

ORDER

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

1. Both DM[Redacted] and SH[Redacted] are dependents of the decedent and entitled to death benefits.
2. The death benefits shall be apportioned 50/50 between DM[Redacted] and SH[Redacted].
3. The death benefits shall be payable to each dependent until modified or terminated by law.
4. The death benefits shall be based on an average weekly wage of $1,025.77 and payable at a death benefit rate of $683.85 per week.
5. The issue of funeral benefits is reserved for future determination.
6. The request for a guardian ad litem to be appointed is denied.
7. All other issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: July 13, 2023.

/s/ Glen Goldman

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

ISSUES

- Did Claimant prove she suffered a compensable injury on March 31, 2021?
- If Claimant proved a compensable injury, was treatment for her lumbar spine after March 31, 2021 reasonably needed and causally related to the injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a Freight Associate on the night shift. Her duties included unloading trucks and stocking product.

2. Claimant has a long history of psychogenic nonepileptic seizures. Claimant referred to them as "stress seizures" and testified they are typically triggered by emotional or physical stress.

3. Claimant previously underwent extensive workup for the seizure disorder, including EEG testing. She saw a neurologist who ultimately determined the seizures were non-epileptic and referred her to a psychiatrist for further treatment. No records from Claimant's psychiatrist were offered at hearing.

4. On March 31, 2021, Claimant was at work when a co-worker, [Redacted, hereinafter VI], flashed a barcode scanner at her eyes.[1] Shortly thereafter, Claimant developed vertigo, which is a common precursor to a seizure episode. Claimant texted her manager, [Redacted, hereinafter MS], that she was about to have a seizure. MS[Redacted] went to Claimant's location, arriving just as the seizure started. MS[Redacted] caught Claimant as she started to fall and laid her on the floor. He then called Claimant's husband, consistent with Claimant's established "seizure plan."

5. While Claimant was on the floor, another co-worker, [Redacted, hereinafter JH], approached the scene. MS[Redacted] told JH[Redacted] not to touch Claimant, per her seizure plan. However, JH[Redacted] ignored the instruction and turned Claimant onto her side. Claimant testified that she cannot control her movements during a seizure but remains aware of what is going on around her. Claimant testified JH[Redacted] moved her upper and lower halves at different times, which "twisted" her spine.

6. Claimant's husband arrived at the store after the seizure and took her home.

7. Claimant sought no immediate treatment. She testified that she typically feels lingering aftereffects for a day or two, and she assumed that would be the case after

[1] VI[Redacted] was apparently engaging in horseplay and had flashed the eyes of another co-worker before pointing the barcode scanner at Claimant. However, there is no persuasive indication Claimant invited or participated in the horseplay.

the seizure on March 31. However, she continued to experience vertigo and vomiting, so she went to the St. Francis Medical Center emergency department on April 3, 2021.

8. Claimant was evaluated by Dr. Tracy Maceachern in the emergency room. Claimant and her husband related the history of "stress-induced" non-epileptic seizures. They described the episode at work on March 31. Dr. Maceachern documented, "[Claimant's] boss reported that she did not incur any trauma and was laid on the floor." She had continued to experience worsening vertigo since that time. She was also feeling very weak and having difficulty moving around the house. Claimant reported tingling in her legs and a headache. There was no mention of a back injury or any symptoms involving her low back. Physical examination showed global weakness but no focal deficits. A head CT was normal. Claimant was given valium and Toradol in the ER, and by the end of the visit was feeling "entirely improved." Dr. Maceachern concluded, "given her reassuring exam and negative work-up for emergent abnormality, low suspicion for emergent cause of patient's symptoms, although exact etiology is unclear." Claimant was discharged with instructions to follow up with her personal physician.

9. Claimant saw her PCP, Dr. Philip Caterbone, on April 5, 2021. She reported ongoing lethargy and weakness. She also complained of acute low back pain and stated, "she was injured when lying prone during the seizure." Her pain was localized to the lumbar area with no radiating or radicular symptoms. On examination, strength was normal and SLR was negative. Claimant reported tenderness to palpation around the lumbar area, but Dr. Caterbone appreciated no spasm. Dr. Caterbone referred Claimant to neurology for the seizures and ordered x-rays of the lumbar spine.

10. Claimant followed up with Dr. Caterbone on April 12, 2021. Her fatigue and lethargy had resolved but she still complained of low back pain. Dr. Caterbone noted the lumbar x-rays were normal and referred Claimant to physical therapy.

11. A subsequent lumbar MRI showed post-surgical changes from a childhood procedure, and mild to moderate neuroforaminal narrowing, but no acute pathology.

12. PT was not helpful, so Dr. Caterbone referred Claimant to pain management. She ultimately underwent extensive treatment for her low back, including a lumbar ESI, medial branch blocks, and a spinal cord stimulator trial. She developed complications from the stimulator trial and had emergency surgery on April 5, 2022 to remove a hematoma. Claimant did not pursue a permanent stimulator implant because she became pregnant. Claimant reported no significant benefit from any treatment.

13. Dr. Allison Fall performed an IME for Respondents. Dr. Fall opined that Claimant's seizures are nonepileptic and instead are psychogenic in nature. She explained that psychogenic seizures are not associated with brain abnormalities and are therefore treated with psychotherapy rather than antiepileptic medications. Because Claimant's seizures are nonepileptic, the March 31, 2021 seizure was not physiologically caused by the flashing lights. Rather, it was the result of Claimant's personal subjective reaction to what she perceived as a stressful situation. Dr. Fall concluded Claimant's alleged injury is "like a mental stress claim."

14. Regarding the low back, Dr. Fall opined the "twisting" incident was no more impactful than simply rolling over in bed and would not reasonably cause a lumbar spine injury. Dr. Fall could identify no physiologic basis for Claimant's reported symptoms. The MRI showed no structural abnormality to account for Claimant's reported low back and leg symptoms, and physical examination showed no evidence of neurological or radicular issues. Dr. Fall also noted "nonorganic" findings such as giveway weakness and 4/5 positive Waddell's signs. Dr. Fall concluded Claimant suffered no low back injury from the March 31, 2021 incident.

15. Dr. Fall's opinions and conclusions are credible and persuasive.

16. Claimant's claim for workers' compensation benefits related to the seizure on March 31, 2021 is subject to the requirements of the "mental impairment statute."

17. Claimant failed to satisfy the statutory requirement to support her claim stress-induced seizures with evidence from a licensed psychiatrist or psychologist.

18. Claimant failed to prove she suffered a compensable back injury arising out of her employment. The alleged "assault" by JH[Redacted] was entirely personal to Claimant with no connection to the conditions and obligations of employment beyond the mere fact that it happened while she was at work. As such, any injury she may have suffered did not arise out of her employment. But even if the incident were deemed a "neutral" injurious force, Dr. Fall is persuasive that Claimant suffered no physical injury to her low back.

CONCLUSIONS OF LAW

A. Compensability of the seizure

To establish a compensable claim, a claimant must prove they suffered an injury while "performing service arising out of and in the course of his employment." Section 8-41-301(1)(b). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). There is no presumption that an injury occurring at work during work hours necessarily arises out of employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). The claimant must prove a causal nexus between the injury and their employment by a preponderance of the evidence. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

The Workers' Compensation Act imposes additional conditions for compensability of a claim for "mental impairment." Among those conditions is a requirement that the claim

be "supported by the testimony of a licensed psychiatrist or psychologist." Section 8-41-301(2)(a).[2]

The term "mental impairment" means a disability resulting from an accidental injury "when the accidental injury involves no physical injury and consists of a psychologically traumatic event." Section 8-41-301(3)(a). The General Assembly adopted the mental impairment statute because it believed claims based purely on mental causes "are less subject to direct proof and more susceptible to being frivolous." *Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918, 920 (Colo. App. 1996). To that end, the physical injury requirement "differentiate[s] between cases in which physical injury causes mental impairment ('mental-physical') and those where mental impairment follows solely an emotional stimulus ('mental-mental')." The fact that a claimant's psychological response is accompanied by physical symptoms does not remove the claim from the aegis of the mental impairment statute. *E.g.*, *Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000) (panic attack caused elevated blood pressure, arm numbness, and severe chest pains mimicking a heart attack); *Tomsha v. City of Colorado Springs*, 856 P.2d 13 (Colo. App. 1992) (job stress caused TMJ dysfunction).

Claimant's case is analogous to the situation in *Nordman v. Lockheed Martin Corporation*, W.C. No. 4-889-647-005; 4-944-807-002 (March 29, 2021). In *Nordman*, the claimant became very upset and angry after an argument with her employer, which triggered a stroke. The Panel held that the mental impairment statute applied to the claim because "the cause for the claimant's stroke is . . . an 'emotional trauma' and not [] a physical injury."

Thus, Claimant must satisfy the requirements of the mental impairment statute to the extent she seeks compensation as a natural and proximate result of the seizure. As found, Claimant failed to prove a compensable mental impairment because the claim is not supported by evidence from a licensed psychiatrist or psychologist.

B. Compensability of the low back

Because the seizure is not compensable, the alleged back injury cannot be covered as a downstream consequence of the seizure. However, the question remains whether the alleged back injury is compensable in its own right as a separate injury.

Claimant characterizes her co-worker's actions in turning her onto her side as an "assault," and references a criminal statute that references "knowingly or recklessly" causing harm to another. Section 18-3-204. Although there is insufficient evidence to show intent or recklessness on the part of Claimant's co-worker, the law governing workplace assaults provides a useful framework to evaluate compensability in this case.

[2] The Court of Appeals invalidated the requirement to present sworn "testimony" as a violation of equal protection and held that medical reports are sufficient. *Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000). Nevertheless, the claim must be supported by evidence from a psychiatrist or psychologist.

Case law has identified three categories of workplace assaults for purposes of compensability. *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001).[3] The first category covers assaults that have "an inherent connection with employment and emanate from the duties of the job." These include arguments over things such as work performance, work equipment, job tasks, delivery of a paycheck, or termination. But not all offensive or injurious interactions between co-workers are inherently related to employment merely because they happen at work. Otherwise, the causal nexus requirement "is eroded where the test is improperly framed as 'but for the bare existence of the employment' rather than 'but for the conditions and obligations of the employment." *Id*. at 476.

The second category encompasses inherently private assaults. Such conflicts originate in the private affairs of the claimant or the assailant and are unrelated to their work-related functions. These cases typically involve disputes over love interests or other purely private matters. But the category of private assaults also includes cases where the victim was specifically targeted or chosen, with the most common examples being sexual assaults or sexual harassment. *Id*. Injuries falling within this category are generally not compensable unless an exception applies, such as a "special hazard." *City of Brighton v. Rodriguez*, 318 P.2d 496 (Colo. 2014).

The third category of assaults are those related to a "neutral" source. This refers to "neutral and unexplained forces and are neither personal to either party nor distinctly associated with the employment." *Id.* at 477. Neutral forces include stray bullets, roving lunatics, drunks, lightning strikes. This type of assault is compensable if it is triggered by a neutral source not specifically targeted at the employee and "would not have occurred but for the fact that the conditions and obligations of employment placed [the] claimant in the position where he [or she] was injured." *City of Brighton, supra*, at 504.

Claimant argues the "assault" by JH[Redacted] falls in the category of neutral risks. But I agree with Respondents that the incident was inherently private, and therefore did not arise out of Claimant's employment. JH[Redacted] specifically "targeted" Claimant in an attempt to aid her because of her inherently private seizure condition. There was no connection to the conditions or obligations of Claimant's employment beyond the mere fact that she happened to be at work when the seizure occurred, and JH[Redacted] happened to be a co-worker. As such, the only nexus to Claimant's job is "the bare existence of the employment," which is insufficient per *Horodyskyj*.

Furthermore, even if the alleged assault were considered a neutral force, Claimant failed to prove the incident proximately caused an injury to her low back. Dr. Fall's opinions are credible and persuasive. The incident was not reasonably likely to cause a lumbar spine injury based on the positions, movements, and forces involved. The emergency room records contain no mention of low back pain or a back injury. Although Claimant reported back pain to Dr. Caterbone on April 5, the examination showed no spasm or other persuasive findings to substantiate an injury. Claimant thereafter received extensive treatment with no persuasively identified pain generator, and ultimately no

[3] These broad categories are consistent with the more generalized classification of employment risks outlined in *City of Brighton v. Rodriguez*, 318 P.2d 496 (Colo. 2014).

sustained benefit. As Dr. Fall explained, considering the minimal forces involved and the absence of any objective structural pathology, if Claimant had suffered an injury, she should have improved with time and treatment. The persuasive evidence fails to show Claimant's reported symptoms were proximately caused by the incident at work.

ORDER

It is therefore ordered that:

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

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

DATED: July 13, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-209-733-003

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on July 2, 2022.

2. Whether Claimant established by a preponderance of the evidence an entitlement to medical benefits, and specifically trigger point injections.

3. Whether Claimant established an entitlement to temporary total disability benefits for the period of July 3, 2022 to July 15, 2022.

STIPULATIONS

The parties stipulated that Claimant's average weekly wage at the time of injury was $543.62. The parties also stipulated that if Claimant is entitled to temporary total disability benefits, such benefits would be for the period of July 3, 2022 to July 15, 2022.

FINDINGS OF FACT

1. Claimant is a 48-year-old woman who is employed in Employer's restaurant. Claimant's job duties included cleaning, helping in the kitchen, and performing various other tasks. On July 2, 2022, while working for Employer Claimant was retrieving ice from an ice machine, when a metal panel above the ice machine door became dislodged, striking the ice machine door, which struck claimant on the back of her head. (See photos, Ex. M) One of Claimant's co-workers witnessed the incident and indicated Claimant was incoherent and in a daze after being struck. (Ex. 10).

2. Claimant has a history of chronic, non-intractable migraine headaches, and seizure disorder. Since 2018, Claimant was seen at Denver health twice for treatment of migraine headaches, including complaints of fatigue, nausea, vomiting, and photophobia, phonophobia. (Ex. K). Claimant's last documented headache treatment prior to July 2, 2022 was on June 4, 2020, when she was seen at Denver Health. At that time, Claimant reported dizziness and finger numbness upon waking, in addition to the above-listed symptoms. Claimant attributed her symptoms to chronic migraine headaches. (Ex. K).

3. On October 19, 2021, Claimant was seen at Presbyterian/St. Lukes for a right shoulder injury she sustained in a fall. (Ex. J). Claimant continued to receive treatment for her right shoulder at Denver Health through January 20, 2022. (Ex. K).

4. Claimant reported her injury on July 2, 2022, and Employer sent Claimant for evaluation to AFC Urgent Care that day. Claimant reported blurry vision and photophobia, but denied additional symptoms including loss of consciousness, headaches, dizziness, nausea, vomiting, and other symptoms. Examination of Claimant's neck was normal, as

was a neurological examination. Claimant was diagnosed with a head injury, and given a total work restriction until July 4, 2022. (Ex. 1).

5. Later that evening, Claimant attended a gathering at a friend's home. Respondents' Exhibit T is a video of that gathering and shows Claimant sitting at a table with others, in no apparent distress. (Ex. T).

6. Claimant returned to AFC Urgent Care on July 4, 2022, reporting constant headaches, nausea, dizziness, and pain radiating down her neck. Claimant was referred for a head CT scan and to a neurologist. (Ex. 1). The CT scan, performed on July 6, 2022 was negative. (Ex. 3).

7. Claimant returned to AFC Urgent care on July 8, 2022, and was seen by Zeeshan Ahmed, M.D. On examination he noted mild paracervical tenderness, and diagnosed Claimant with a concussion without loss of consciousness, muscle spasm, and neck sprain. In addition, Dr. Ahmed extended Claimant's work restriction until July 16, 2022, advising that she should not return to work until then. (Ex. 1).

8. On July 21, 2022, Claimant saw Kate Kraus, NP, at Advanced Neurology, and reported experiencing daily headaches since July 2, 2022, with photophobia and nausea. Claimant also reported dizziness with changes in position, and denied neck pain. Claimant reported no prior history of migraine headaches. Ms. Kraus diagnosed Claimant with post-traumatic headache and cervicalgia. She recommended a brain MRI and VNG testing to assess dizziness. (Ex. 2).

9. On July 22, 2022, Claimant was referred from AFC Urgent Care to Dr. Yusuke Wakeshima, M.D., to assume Claimant's care. At that point, Dr. Wakeshima became Claimant's authorized treating physician (ATP). Claimant first saw Dr. Wakeshima on August 2, 2022, reporting headaches, neck pain, upper back pain, and mild cognitive issues, with pain at 10/10. Claimant denied any pre-existing conditions or similar prior symptoms, and specifically denied pre-existing migraine headaches. On examination, Claimant reported pain and tenderness with palpation in the upper trapezius and levator scapula, and pain with range of motion. Dr. Wakeshima recommended a brain MRI and cervical MRI, and noted that post-concussive symptoms typically resolve in 4-6 weeks without treatment. Dr. Wakeshima also prescribed an e-stim unit for Claimant's neck and upper back pain. (Ex. 3).

10. Claimant returned to Ms. Kraus on August 18, 2022, reporting improvement in her headaches, and neck pain, but continued dizziness. She was prescribed migraine medication. (Ex. 2).

11. On August 22, 2022, Claimant had cervical and brain MRIs. The cervical MRI showed very mild degenerative changes and a small disc bulge, without herniation or stenosis. Claimant's brain MRI was interpreted as showing calcifications in the medial left frontal lobe and left parietal lobe, which were later determined not to be related to her injury. (Ex. 4 and 6).

12. On August 24, 2022, Claimant returned to Dr. Wakeshima reporting pain down her left arm to her hand and fingers, in addition to headaches and neck pain. Dr. Wakeshima noted that Claimant's cervical MRI was not concerning and that he would consider cervical facet injections and an occipital nerve block for Claimant's reported headaches, and recommended an EMG study to evaluate Claimant's reports of left arm pain. (Ex. F).

13. Dr. Wakeshima performed the EMG testing on September 13, 2022, and indicated that the test was normal, with no evidence of neuropathy, radiculopathy, or other left-sided symptoms. On September 13, 2022, Claimant reported her pain at a level of 6/10. (Ex. F).

14. On October 18, 2022, Claimant saw Haley Burke, M.D., a neurologist on referral from Dr. Wakeshima. Dr. Burke reviewed Claimant's brain MRI and indicated that the findings were not related to her injury, and that there was no evidence of a hemorrhagic injury or diffuse axonal injury. She found Claimant's cervical range of motion minimally limited and a positive test on the left with facet joint loading. She diagnosed Claimant with cervical cranial syndrome, myofascial muscle pain, post-traumatic headache, and cervical facet joint syndrome. Claimant reported her pain level as 7/10 at best. Dr. Burke referred Claimant for physical therapy and requested authorization for cervical facet joint injections. (Ex. 6).

15. On November 9, 2022, Claimant saw Dr. Wakeshima with reports of right sided neck pain, right upper back pain, right clavicle pain and shoulder pain, and a pain level of 9/10. He ordered right shoulder and clavicle x-rays which were negative. Dr. Wakeshima offered no explanation as to how Claimant's shoulder and clavicle symptoms were related to the July 2, 2022 incident. (Ex. F).

16. On November 17, 2022, Claimant saw Dr. Burke, reporting her symptoms were unchanged, with a pain level of 9/10. Claimant reported her right shoulder pain began two weeks prior, and that she had not been able to start physical therapy. Dr. Burke indicated that Claimant appeared to have post-traumatic headaches with likely cervicocranial etiology, and that her history was consistent with an upper cervical spine sprain with mild head trauma, and was suggestive of the facet joints as the source of both her head and neck issues. She indicated that the request for facet joint injections was denied, and she again requested authorization for those injections. (Ex. D).

17. On November 26, 2022, Dr. Wakeshima authored a letter to Respondents' counsel regarding Claimant's treatment after being provided with Claimant's pre-July 2, 2022 records documenting her prior treatment for headaches and right shoulder complaints. Dr. Wakeshima reviewed Claimant's medical records and opined that as the result of the July 2, 2022 work incident, Claimant had diagnoses including neck and upper back pain, most likely myofascial with potential facetogenic components, cervicogenic headaches, and post-concussive syndrome. He indicated that while Claimant had a history of migraine headaches, the mechanism of injury could cause potential neck injury issues, and cervicogenic headaches. He indicated that any migraine headaches were not work related, but cervicogenic headaches were work-related. He also indicated Claimant was not at maximum medical improvement (MMI), and recommended 6-12 chiropractic

sessions with dry needling, and physical therapy to address myofascial pain. If those sessions did not adequately address her myofascial pain, then four sessions of trigger point injections, followed by myofascial release massage therapy would be appropriate. He indicated if Claimant's pain generator was facetogenic, he would recommend facet joint injections, as requested by Dr. Burke. Dr. Wakeshima indicated that myofascial pain nor facetogenic neck pain may not demonstrate as abnormalities on radiological tests. However, he offered no explanation as to how it would be determined that Claimant's pain complaints were facetogenic in origin. (Ex. F).

18. Dr. Wakeshima also recommended a neuropsychological evaluation to assess Claimant's post-concussive symptoms, and indicated he would refer Claimant for that evaluation with a Dr. Aylesworth. He indicated if there was no post-concussive syndrome and no associated depression issues, then no further treatment would be indicated. He further opined that Claimant would likely reach MMI upon completion of the recommended treatments, which he anticipated would take 2-3 months. (Ex. F).

19. On December 1, 2022, Claimant began chiropractic treatment with Jennifer Walker, D.C. Claimant attended 15 chiropractic visits and was discharged on February 28, 2023. Dr. Walker indicated Claimant's reported pain decreases with treatment, but the pain returned after treatment. Dr. Walker's records indicate that she found "clinical evidence" of trigger points in at least 13 different cervical muscles, the majority of which were documented to have "reproduced Claimant's hand symptoms." (No other provider documented the presence of trigger points in Claimant's cervical spine). She opined that Claimant would benefit from trigger point injections and additional chiropractic care. Over the course of her care, Dr. Walker performed dry needling of trigger points in the neck and upper shoulder/back, and massage therapy. She noted that Claimant reported less pain and more range of motion of the cervical spine with this treatment. Dr. Walker's records indicate that Claimant's initial pain levels were reported as 9/10 on December 1, 2022, and had decreased to 7/10 by February 29, 2023. (Ex. C).

20. Claimant returned to Dr. Burke on December 13, 2022 with reports of continued headaches rating 9/10 for pain. Claimant indicated that her headaches were more frequent since her last visit. Dr. Burke reiterated her recommendations for trigger point injections and an occipital nerve block. She again returned to Dr. Burke on January 10, 2023 with no reported change in symptoms. (Ex. D).

21. On January 25, 2023, Claimant had an IME with Allison Fall, M.D., at Respondent's request. At her visit with Dr. Fall, Claimant reported pain levels of 9/10. Based on her examination and review, Dr. Fall opined that Claimant sustained an uncomplicated head contusion that did not require medical treatment. She noted that imaging and electrodiagnostic studies performed were all negative and did not demonstrate objective evidence of injury. She noted that there have been no objective findings consistent with Claimant's symptoms, and that her subjective complaints are "greatly out of proportion" to her presentation. (Ex. A).

22. On February 6, 2023, Claimant returned to Dr. Burke's clinic and saw Rosalind Daninger, NP, APN. Claimant continued to report neck pain and right shoulder pain. On

examination of Claimant's cervical spine, she was noted to have decreased cervical flexion and extension with pain, and tenderness to palpation of the bilateral cervical paraspinal muscles. She also noted Claimant was able to rotate and laterally bend her neck without pain. The presence of trigger points was not documented. Claimant indicated she continued to see physical therapy twice per week, and that it was helpful. The record further notes that Insurer denied requests for cervical facet injections, trigger point injections, and occipital nerve blocks. Claimant was prescribed medication for cervical facet joint syndrome. (Ex. 6)

23. Claimant returned to Dr. Wakeshima on February 16, 2023, with right-sided neck pain, and right sided upper back pain. On examination, Dr. Wakeshima noted tenderness of the right cervical paraspinal musculature, right upper trapezius, and right levator scapula, with painful cervical flexion, extension, and side bending. Dr. Wakeshima did not document the presence of trigger points, although he noted that Claimant had benefited from dry needling during her chiropractic care with Dr. Walker. Dr. Wakeshima indicated that unless Dr. Burke had further intervention planned, he anticipated Claimant would be a maximum medical improvement within six to eight weeks. (Ex. 3).

24. On March 7, 2023, Claimant returned to Dr. Burke's office and saw Ms. Daninger. Claimant reported pain at a level of 8/10, and located at the top of her head, neck midline and right shoulder. On examination, Ms. Daninger noted decreased cervical range of motion with pain in flexion, extension, rotation, and lateral bending, with tenderness to palpation in the cervical paraspinal muscles. The presence of trigger points was not documented. (Ex. 6).

25. On April 6, 2023, Claimant saw Dr. Wakeshima. He noted that Claimant had completed chiropractic care, and continued to use an e-stim unit with some benefit. However, Claimant continued to report her pain at a level of 7/10. Dr. Wakeshima's cervical evaluation was similar to his February 16, 2023 visit, and did not document the presence of trigger points. Dr. Wakeshima indicated that because Claimant had not been able to see Dr. Burke he would request authorization to perform trigger point injections himself. He indicated that he was requesting 4 sessions of trigger point injections, followed by massage therapy through Dr. Walker's clinic. (Ex. 3).

26. Dr. Fall testified through a pre-hearing deposition and was admitted as an expert in physical medicine and rehabilitation. Dr. Fall characterized Claimant's initial examination on July 2, 2022 as normal, and testified that there had not been any diagnostic testing which would explain Claimant's reported symptoms. Dr. Fall testified, credibly, that except in unique situations, a physician cannot typically objectively measure headaches. Dr. Fall noted that Claimant's records do not document any noticeable external signs of trauma to her head after the incident, and that it was "very highly unlikely" that the incident on July 2, 2022 was continuing to cause Claimant's complaints. Dr. Fall opined that Claimant sustained a contusion on her head on July 2, 2022 that did not require medical treatment or any disability. She opined that Claimant likely did not have a concussion, although a concussion would not necessarily be visible on imaging studies. She also acknowledged that a neck injury can result from something falling on a person's

head, and that a neck strain would usually not appear on imaging studies. Although, Dr. Fall does not believe Claimant sustained an injury to her neck.

27. Dr. Fall testified that trigger point injections were not reasonable or necessary. Trigger points are nodules with "hyperintense focus with a twitch response and referred pain," and without those being present trigger point injections are not indicated. In support of this opinion, she noted that Dr. Wakeshima had not documented the presence of trigger points, and that Dr. Fall did not detect trigger points in her examination of Claimant.

28. Claimant testified that when she was struck on the back of her head, she "blacked out" momentarily. She testified that she was off work for two weeks, and returned to work on July 16, 2022. She indicated that following her injury she experienced pain in her neck and head, nausea, dizziness, and vomiting. She testified that she would like to have trigger point injections because her neck "gets inflamed" and because her physicians have recommended them.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The claimant must prove his injury arose out of the course and scope of 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).

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

The claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182 (Colo. App. 1990); *Jorgensen v. Air Serve Corp.,* W.C. No. 4-894-311-03, (ICAO Apr. 9, 2014).

Claimant has established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer on July 2, 2022. Specifically, Claimant sustained a neck strain and has experienced cervicogenic headaches. Although none of the diagnostic tests performed documented objective evidence of injury, the ALJ finds persuasive Dr. Wakeshima's opinion that Claimant likely sustained a myofascial neck injury and cervicogenic headaches. Claimant's complaints of right shoulder pain, clavicle pain, and left arm symptoms, are not causally related to her July 2, 2022 injury. Further, the ALJ finds that Claimant, more likely than not, did not sustain a concussion or closed head injury arising out of the course of her employment.

The ALJ does not find persuasive Dr. Fall's opinion that Claimant sustained only a minor head contusion that did not require medical treatment.

Medical Benefits (General & Specific)

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* 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 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).

As found, Claimant has established that she sustained compensable injuries consisting of a neck strain and cervicogenic headaches. Respondents shall pay for all authorized treatment that is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. Treatment for Claimant's right shoulder, clavicle, and reported left arm radicular symptoms is not causally related to Claimant's industrial injury.

Claimant has failed to establish that trigger point injections are reasonable and necessary to cure or relieve the effects of her injuries. Neither Dr. Wakeshima, Dr. Burke, nor Ms. Daninger documented the presence of trigger points in Claimant's neck or upper back. Dr. Burke's recommendation for trigger point injections was apparently made only after authorization for facet joint injections was denied, without explanation of the medical reasonableness or necessity of trigger point injections. The ALJ finds credible Dr. Fall's opinion that in the absence of evidence of trigger points, such treatment is not reasonable or necessary. Although Dr. Walker documented "clinical evidence" or trigger points throughout Claimant's neck and upper back, the ALJ does not find this to be persuasive evidence, given that no other provider documented similar findings, which would be expected if trigger points to the extent documented by Dr. Walker were present. Moreover, Dr. Walker did perform trigger point dry needling over approximately three months, which only moderately decreased Claimant's subjective reports of pain. Claimant's request for authorization of trigger point injections is denied and dismissed.

Entitlement To TTD Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(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). 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.

As found, Claimant's ATP AFC Urgent Care provided Claimant with work restrictions for the period of July 3, 2022 through July 15, 2022. Claimant returned to work on July 16, 2022, and continued to work after that date. The ALJ finds that Claimant sustained a temporary disability for the period of July 3, 2022 through July 15, 2022, resulting in an actual wage loss for that period. Respondents' shall pay Claimant TTD benefits for the period of July 3, 2022 through July 15, 2022, based on the stipulated average weekly wage of $543.62.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable neck strain and cervicogenic headaches arising out of the course of her employment with Employer on July 2, 2022.

2. Respondents shall pay for all authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's compensable industrial injury.

3. Claimant's request for authorization of trigger point injections is denied and dismissed.

4. Respondents shall pay Claimant temporary total disability benefits for the period of July 3, 2022 to July 15, 2022.

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: July 13, 2023

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 5-196-773-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that right wrist surgery recommended by Joseph Noce, M.D., is reasonable and necessary to cure or relieve the effects of Claimant's December 7, 2021 industrial injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as a car wash manager. On December 7, 2021, while working for Employer, Claimant sustained an admitted injury when he fell into a three-foot-deep floor drain that was left uncovered. When Claimant fell, he landed on his right hip and shoulder with his arm outstretched. (Ex. 1) Claimant did not initially seek medical treatment, and returned to work the following day. Because his right shoulder pain had not resolved, he then sought medical treatment.

2. Claimant initially sought medical treatment at Banner Urgent Care on December 8, 2021, where he reported right shoulder pain and tingling in his right hand. Claimant had positive testing for shoulder impingement and decreased shoulder range of motion. Examination of Claimant's elbow and wrist was "unremarkable." Claimant was assessed with shoulder pain and advised to follow up with workers' compensation for a physical therapy referral. (Ex. 1)

3. On December 14, 2021, Claimant saw Jacqueline House, PA-C, at Banner Occ Health Clinic, and reported falling on his right shoulder and hip. Claimant reported right shoulder pain, aching, and tingling into his hand, right knee pain, and hip pain. He was diagnosed with right shoulder pain and contusions of the right hip and knee. PA. House referred Claimant to physical therapy. (Ex. 2).

4. Claimant attended physical therapy at North Colorado Medical Center from December 21, 2021 to January 10, 2022. During his initial session, Claimant reported that when he fell he felt immediate burning pain in his upper arm, forearm, hand, and fingers. He also reported paresthesia in the dorsal and palmar aspect of his right hand that occurred intermittently, but did not report these symptoms at later appointments. Claimant's physical therapy was focused on his right shoulder. (Ex. L).

5. On December 30, 2021, Ms. House noted Claimant had no new right-hand numbness or tingling, but noted Claimant was right hand dominant and primarily using his right hand. Because Claimant's right shoulder was not sufficiently improved, she ordered a right shoulder MRI. (Ex. 2). The right shoulder MRI performed on January 17, 2022 demonstrated a full-thickness tear of Claimant's rotator cuff. (Ex. 30).

6. On January 25, 2022, Claimant saw Inderjote Kathuria, M.D., at Banner Occ Health, reporting no improvement in his shoulder pain. Claimant did not report symptoms

in his right hand or wrist. After reviewing Claimant's MRI report, Dr. Kathuria referred Claimant for an orthopedic evaluation, and recommended no use of his right arm. (Ex. 4).

7. On February 1, 2022, Claimant saw orthopedist Daniel Heaston, M.D. Dr. Heaston diagnosed Claimant with a complete tear of the rotator cuff and recommended surgery. Claimant did not report issues with his right hand or wrist. (Ex. 5).

8. On March 3, 2022, Dr. Heaston performed an open rotator cuff repair surgery with biceps tenodesis. Claimant's post-surgical instructions included strict non-weightbearing of his right arm and being in a sling for six weeks. After surgery, Claimant continued to see Dr. Heaston and others in his clinic for follow-up, and did not report hand or wrist symptoms to them until July 2022. Claimant was initially placed in a sling for six weeks. (Ex. 2, 6, 5 and P).

9. Claimant started post-surgical physical therapy at Select PT on April 19, 2022. On May 10, 2022, Claimant reported swelling and issues with making a fist and bending his fingers of his right hand. Over the course of approximately five months of physical therapy, Claimant periodically reported symptoms in his right hand and forearm, and received treatment for his right hand and forearm, including massage, dry needling, and a wrist splint. At Claimant's final physical therapy visit on September 9, 2022, Claimant reported little to no progress on his hand/forearm discomfort. (Ex. 9).

10. On July 5, 2022, Claimant saw Dr. Heaston and reported that he continued to have some hand swelling and tightness, Dr. Heaston opined that Claimant's hand swelling and tightness should improve as his post-surgical motion improved. (Ex. 5).

11. On August 23, 2022, Claimant saw PA House, and reported continuing pain in his hands. (Ex. 2).

12. On September 13, 2022, Claimant saw PA House again, reporting continuing pain in his right hand and decreased grip strength. Claimant indicated he had attempted to tighten some bolts on his wife's car and the next day could barely move his hands. Claimant reported he did not have hand pain prior to surgery, and it had been present since surgery. House added a new diagnosis of pain in right hand, and referred Claimant for an evaluation with an orthopedic hand physician. (Ex. 2).

13. On September 22, 2022, Claimant saw Nicholas Noce, M.D., on referral from PA House. Claimant reported to Dr. Noce that when he initially fell, he landed on his right hand, but most of the pain was in the shoulder. Claimant reported developing pain in the dorsum of his hand after being in a sling following surgery, and that he continued to have pain and swelling in right hand and wrist, extending into the middle and ring finger. On examination, Dr. Noce noted that Claimant was tender over the scapholunate interval, although he could not determine if there was instability. He noted no obvious bony abnormality. Dr. Noce indicated that he was "not entirely certain what is causing his pain. I cannot think of anything that could have been done during surgery that would have caused him to have this amount of pain, swelling and stiffness in his hand and wrist. However, he could have had an injury during original fall onto his right upper extremity

that was initially missed due to the distracting pain in his shoulder and upper arm." He noted that Claimant's pain was centered around the scapholunate interval and his wrist, and the x-ray was "a little concerning" for possible scapholunate widening. Dr. Noce recommended an MRI of the wrist. (Ex. 8).

14. On September 29, 2022, Respondents submitted Dr. Noce's request for a wrist MRI for utilization review, and the reviewer determined that the MRI was medically necessary. (Ex. O).

15. Claimant then underwent a right wrist MRI on October 13, 2022, although no report of the MRI interpretation is contained in the record, on October 25, 2022, PA House included the following description of the MRI findings in her treatment note:

> "MRI of right wrist without contrast
>
> Impression:
>
> 1. Differential tearing of the scapholunate ligament as above with full-thickness tearing of the dorsal band and findings of dorsal intercalated segmental instability and early findings of scapholunate advanced collapse.
>
> 2. Mild tendinosis of the extensor carpal ulnar is without tearing.
>
> 3. Mild enlargement of the median nerve proximal to the flexor retinaculum. This is nonspecific but can be seen in the setting of carpal tunnel syndrome.
>
> 4. Mild triscaphe degenerative joint disease." (Ex. 2).

16. On October 25, 2022, Dr. Noce reviewed the MRI which he indicated showed a scapholunate ligament injury with small amount of widening and some extension of the lunate consistent with DISI (dorsal intercalated segment instability) deformity, and findings of wrist arthritis consistent with SLAC (scapholunate advanced collapse) wrist. Dr. Noce identified several treatment options, including a potential ligament reconstruction, which he indicated would not likely be successful. He also offered treatment with steroid injections, which could be repeated 2-3 times per year. He noted that if steroid injections stopped providing relief, he could consider salvage procedures such as a PRC (proximal row carpectomy) or scaphoidectomy and midcarpal fusion. Dr. Noce performed a steroid injection in Claimant's wrist on October 25, 2022. His records, however, do not document Claimant's response to the steroid injection. (Ex. 8).

17. On November 29, 2022, Dr. Noce's office submitted a request for authorization of surgery for Claimant's right wrist. Specifically, he requested authorization for a right scaphoidectomy and midcarpal fusion, and right carpal tunnel release, for a diagnosis of SLAC wrist. (Ex. 2). The ALJ infers that Dr. Noce saw Claimant on or about November 29, 2022, although no treatment note from that visit was offered or admitted into evidence.

18. On December 6, 2022, Respondents submitted Dr. Noce's request for authorization of surgery for utilization review. The reviewer recommended against

authorization, indicating Claimant's medical documentation did not contain objective findings to support carpal tunnel syndrome, or 6 months of conservative treatment for Claimant's right wrist. (Ex. O).

19. On January 12, 2023, Claimant saw Mark Paz, M.D., for an independent medical examination (IME) at Respondents' request. Dr. Paz issued a report dated February 7, 2023, and was admitted as an expert in internal medicine. Dr. Paz testified by deposition in lieu of live testimony. Dr. Paz opined that the treatment recommended by Dr. Noce is reasonable and necessary, but not causally related to Claimant's December 7, 2021 work injury. He testified that Claimant has pre-existing right wrist osteoarthritis that was not caused by or aggravated by Claimant's December 7, 2021 injury. Dr. Paz stated that Claimant's medical records did not contain any reports of right wrist pain until August 23, 2022. Instead, Dr. Paz testified that Claimant's right wrist issues were, more likely than not, related to the incident where Claimant tightened bolts on his wife's car. He further opined that if Claimant sustained an injury to his right wrist on December 7, 2021, it would have been addressed earlier by his physicians.

20. Claimant testified at hearing immediately following the December 7, 2021 incident at work, he felt a burning and numb sensation in his right shoulder extending to his fingertips. Claimant testified that the steroid injection Dr. Noce performed, and the dry needling performed by physical therapy did not relieve his symptoms. He testified that he had not had issues with or treatment for his right wrist, and had no physical work limitations from his wrist prior to the December 7, 2021 work injury.

CONCLUSIONS OF LAW

Generally

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

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

MEDICAL BENEFITS (Right Wrist Surgery)

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). Whether the need for treatment is causally-related to an industrial injury is a question of fact for the ALJ. *Putnam v. Putnam and Assoc.*, W.C. No. 4-120-307 (Aug. 14, 2003), citing *Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251 (Colo. App. 1999). 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).

Consistent with Dr. Paz's testimony, Respondents do not contend the surgery recommended by Dr. Noce is not reasonable and necessary. The issue before the ALJ is whether the proposed surgery is causally-related to Claimant's December 7, 2021 work injury. The ALJ concludes Claimant has established by a preponderance of the evidence that the right wrist surgery recommended by Dr. Noce is causally-related to his December 7, 2021, work injury.

No credible evidence was admitted demonstrating Claimant had complained of or sought treatment for his right hand or wrist prior to his December 8, 2021 work injury. Although Claimant indicated to some providers that he had no wrist pain prior to his March 2022 shoulder surgery, Claimant's reported symptoms in his right hand to Banner Urgent Care on December 8, 2021, to Ms. House on December 14, 2021, and while in physical therapy at North Colorado Medical Center. During this time, Claimant was primarily using his non-dominant left hand, and his treatment was focused on his right shoulder. Following surgery, Claimant was placed in a sling for six weeks and had limited use of his right arm. After beginning physical therapy and increasing the use of his right arm through therapy, Claimant began reporting additional right wrist symptoms, including swelling and

issues with making a fist beginning on May 10, 2022 in physical therapy. Claimant continued to have these issues over the following months, and received therapy from Select PT for his wrist and arm, in addition to his shoulder. Claimant also reported to Dr. Heaston hand swelling, tightness, and pain on July 5, 2022 and August 23, 2022. No medical record or other credible evidence was admitted indicating Claimant experienced right hand or wrist symptoms prior to the December 7, 2021 work injury. Given that Claimant reported symptoms over a period of months following his injury, the ALJ does not find persuasive Dr. Paz's opinion that Claimant's wrist condition is more likely related to Claimant tightening bolts on his wife's car than his work injury. Considering the evidence in its totality, including the mechanism of injury (*i.e.*, falling on his right side with his arm outstretched), the lack of prior right hand or wrist issues, and Claimant's contemporaneous reports of symptoms in his right hand and wrist, the ALJ finds it more likely than not that Claimant's right wrist condition is causally related to his December 7, 2021 industrial injury. Claimant's request for authorization of the wrist/arm surgery recommended by Dr. Noce is granted.

ORDER

It is therefore ordered that:

1. The right wrist/arm surgery recommended and requested by Dr. Noce is reasonable and necessary to cure or relieve the effects of Claimant's December 7, 2021 industrial injury.

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

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

DATED: July 13, 2023

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. 5-213-543-001

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered an arm injury while performing delivery services for Employer on July 11, 2022.

2. Whether Respondent has established by a preponderance of the evidence that Claimant was an independent contractor pursuant to §8-40-202(2) C.R.S. while performing delivery services for Employer on July 11, 2022.

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

4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period July 11, 2022 until terminated by statute.

FINDINGS OF FACT

1. Employer is a furniture delivery service. [Redacted, hereinafter JR] is the owner of Employer.

2. Claimant explained that on July 11, 2022 he was working at Employer's facility. While stepping between loading docks he fell and injured his arm. Claimant contacted Employer to report the injury and then visited an emergency room. On July 18, 2022 he underwent surgery to repair his separated triceps tendon.

3. Respondent did not dispute that Claimant injured his arm on July 11, 2022. However, Respondent contends that Claimant worked as an independent contractor and is thus not entitled to Workers' Compensation benefits.

4. JR[Redacted] remarked that he hired Claimant as an independent contractor to deliver furniture. He commented that Claimant operated his own business as an independent contractor for moving services. Notably, JR[Redacted] paid Claimant's business known as [Redacted, hereinafter ED] for moving services. He specifically issued a 1099-Form for Claimant to report non-employment income to the Internal Revenue Service (IRS). The record also includes a 1099-Form describing "non-employee compensation" issued by Employer to ED[Redacted] for the tax year 2022.

5. Although there was an expected schedule of work days, JR[Redacted] asked Claimant the days on which he was available. He explained that Claimant had the option of accepting or rejecting moving jobs. Specifically, Claimant could decide when and how long he worked. JR[Redacted] noted that, although Claimant used Employer's trucks, Claimant provided his own tools to perform furniture delivery jobs.

6. In contrast, Claimant testified that he does not have his own independent business and worked exclusively for Employer. He explained that he did not have discretion to choose furniture delivery jobs, but was required to accept work as dictated by Employer. Claimant remarked that Employer provided all tools and equipment necessary to complete his job duties. He summarized that the services he provided were integral to Employer's business.

7. Although Claimant contends he did not have an independent business and worked exclusively for Employer, the record belies his claim. The record includes a Form W-9 titled "Request for Taxpayer Identification Number and Certification" provided by the IRS. The purpose of IRS Form W-9 "is to report on an information return the amount paid to you, or other amount reportable on an information return." Examples of information returns include "Form 1099 Misc (various types of income, prizes, awards, or gross proceeds)."

8. Claimant listed his name on Form W-9, specified his business name ED[Redacted] and noted that the entity was an "individual/sole proprietor or single member LLC." Under Part I of the Form labelled "Taxpayer Identification Number (TIN)," Claimant provided his Employer Identification Number (EIN) of ED[Redacted]. He then certified that the information was correct by signing the Form. The date of filing was December 10, 2021 or approximately seven months prior to Claimant's July 11, 2022 arm injury.

9. Claimant has demonstrated it is more probably true than not that he suffered an arm injury while performing delivery services for Employer on July 11, 2022. He explained that on July 11, 2022, while working at Employer's facility, he stepped between loading docks, fell, and injured his arm. Claimant contacted Employer to report the injury and then visited an emergency room. On July 18, 2022 he underwent surgery to repair a separated triceps tendon. Respondent did not dispute that Claimant injured his arm on July 11, 2022.

10. Respondent has demonstrated it is more probably true than not that Claimant was an independent contractor while performing furniture delivery services on July 11, 2022. Applying the tests of §8-40-202(2) C.R.S. and *Softrock* in ascertaining whether Claimant was free from direction and control in the performance of services and was in fact customarily engaged in an independent business related to the services performed, the record reveals that Claimant was an independent contractor. Accordingly, Claimant is not entitled to receive Workers' Compensation benefits for the arm injury he sustained on July 11, 2022.

11. Initially, Claimant explained that he does not have his own independent business and worked exclusively for Employer. He commented that he lacked the discretion to choose furniture delivery jobs, but was required to accept work as dictated by Employer. Claimant remarked that Employer provided all tools and equipment necessary for him to complete his job duties. However, the evidence includes a Form W-9 in which Claimant listed his name, specified the business name ED[Redacted] and noted that the entity was an "individual/sole proprietor or single member LLC." Under Part

I of the Form Claimant provided his EIN of ED[Redacted]. He then certified that the information was correct by signing the Form. The date of filing was December 10, 2021 or approximately seven months prior to Claimant's July 11, 2022 arm injury.

12. The existence of Claimant's business entity ED[Redacted] undermines his credibility and is more consistent with the testimony of JR[Redacted]. JR[Redacted] remarked that he hired Claimant as an independent contractor. He commented that Claimant operated his own business as an independent contractor for moving services. JR[Redacted] paid ED[Redacted] under the EIN ED[Redacted]. Notably, he specifically issued a 1099-Form for Claimant to report non-employment income to the IRS. The preceding testimony is consistent with Claimant's operation of a business entity beginning about seven months prior to his arm injury. Significantly, Claimant did not simply create ED[Redacted] to work exclusively for Employer, but had an operating business when hired to perform moving services. The record thus demonstrates that it is more likely than not that Claimant was customarily engaged in an independent business related to the services performed when he was injured on July 11, 2022.

13. An employer may also establish that a worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. There is a balancing test to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The record reflects a significant conflict between Claimant and Employer regarding the nine factors and is devoid of evidence regarding some of the criteria. Nevertheless, on balance the factors suggest that Claimant was likely an independent contractor performing services for Employer.

14. Importantly, Claimant was not paid personally for his services while working for Employer. Instead, Employer paid ED[Redacted] under the EIN ED[Redacted] for delivery services. Employer also issued a 1099-Form for Claimant to report non-employment income to the IRS. In fact, the record includes a 1099-Form describing "non-employee compensation" issued by Employer to ED[Redacted] for the tax year 2022. Moreover, although there is some dispute about whether Claimant had the opportunity to decline moving jobs, the credible testimony of JR[Redacted] reflects that Claimant could choose moving jobs to accept and Claimant was not required to work exclusively for Employer. Specifically, JR[Redacted] remarked that Claimant could decide when and how long he worked. Although Employer provided Claimant with a truck for delivery services, the record is mixed about who supplied other tools to complete moving jobs. Finally, the record is devoid of evidence that Employer combined its business with ED[Redacted].

15. The balance of the totality of the circumstances and the nature of Claimant's working relationship with Employer suggests that he was not an employee. The record reveals that it is likely Claimant was engaged in an independent business and free from control and direction in the performance of his services for Employer. Accordingly, Claimant was an independent contractor when he suffered an arm injury while performing delivery services on July 11, 2022.

CONCLUSIONS OF LAW

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

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

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

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). 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). 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 compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014). Respondents

are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(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).

6. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered an arm injury while performing delivery services for Employer on July 11, 2022. He explained that on July 11, 2022, while working at Employer's facility, he stepped between loading docks, fell, and injured his arm. Claimant contacted Employer to report the injury and then visited an emergency room. On July 18, 2022 he underwent surgery to repair a separated triceps tendon. Respondent did not dispute that Claimant injured his arm on July 11, 2022.

Independent Contractor

7. 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.

8. A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAO, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAO, Jan. 25, 2011).

9. The "employer" may also establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAO, June 23, 2006). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-

202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

10. Section 8-40-202(2)(b)(IV), C.R.S. provides that if the parties use a written document specifying the existence of the nine factors referenced in §8-40-202 (2)(b)(II), C.R.S. the document can create a rebuttable presumption of an independent contractor relationship. The document must advise in larger or bold type that the individual is not entitled to Workers' Compensation benefits and must pay his own federal and state income tax on any moneys earned.

11. In *Indus. Claim Appeals Off. v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014), the Colorado Supreme Court expanded the analysis for determining whether a worker is an employee or an independent contractor beyond the factors enumerated in §8-70-115(1)(c), C.R.S. The *Softrock* decision addressed the evidence necessary to establish that a worker is customarily engaged in an independent trade or business in the context of unemployment insurance benefits. The Court reasoned that the nine factors listed both in §8-70-115(1)(c) and (2), C.R.S. (involving unemployment benefits) and §8-40-202(2)(a) and (b), C.R.S. (pertaining to Workers' Compensation), were relevant to the assessment of the maintenance of an independent business. However, the Court also determined none of the preceding criteria, by themselves, were exhaustive of the inquiry. The Court noted that the status of the claimant must include consideration of the totality of the circumstances and examination of "the nature of the working relationship." *Id*. at 565. The decision pointed to indicia that would normally accompany the performance of an ongoing separate business in the field. Considerations 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. *Id*.

12. The question whether *Softrock* applied in the Workers' Compensation context was open until the Colorado Court of Appeals decision in *Pella Windows & Doors, Inc. v. Indus. Claim Appeals Off.*, 458 P.3d 128 (Colo. App. Div. 2 2020). In *Pella Windows* the court concluded that the factors articulated in *Softrock* also apply to Workers' Compensation cases. *See Id.* at 136 ("We therefore conclude that the [p]anel did not err when it determined that [the administrative law judge] . . . should have considered the *Softrock* factors in weighing whether claimant's business was independent of Pella.").

13. As found, Respondent has demonstrated by a preponderance of the evidence that Claimant was an independent contractor while performing furniture delivery services on July 11, 2022. Applying the tests of §8-40-202(2) C.R.S. and *Softrock* in ascertaining whether Claimant was free from direction and control in the performance of services and was in fact customarily engaged in an independent business related to the services performed, the record reveals that Claimant was an independent contractor. Accordingly, Claimant is not entitled to receive Workers' Compensation benefits for the arm injury he sustained on July 11, 2022.

14. As found, initially, Claimant explained that he does not have his own independent business and worked exclusively for Employer. He commented that he lacked the discretion to choose furniture delivery jobs, but was required to accept work as dictated by Employer. Claimant remarked that Employer provided all tools and equipment necessary for him to complete his job duties. However, the evidence includes a Form W-9 in which Claimant listed his name, specified the business name ED[Redacted]and noted that the entity was an "individual/sole proprietor or single member LLC." Under Part I of the Form Claimant provided his EIN of ED[Redacted]. He then certified that the information was correct by signing the Form. The date of filing was December 10, 2021 or approximately seven months prior to Claimant's July 11, 2022 arm injury.

15. As found, the existence of Claimant's business entity ED[Redacted] undermines his credibility and is more consistent with the testimony of Mr. Reyes. Mr. Reyes remarked that he hired Claimant as an independent contractor. He commented that Claimant operated his own business as an independent contractor for moving services. Mr. Reyes paid ED[Redacted] under the EIN ED[Redacted]. Notably, he specifically issued a 1099-Form for Claimant to report non-employment income to the IRS. The preceding testimony is consistent with Claimant's operation of a business entity beginning about seven months prior to his arm injury. Significantly, Claimant did not simply create ED[Redacted] to work exclusively for Employer, but had an operating business when hired to perform moving services. The record thus demonstrates that it is more likely than not that Claimant was customarily engaged in an independent business related to the services performed when he was injured on July 11, 2022.

16. As found, an employer may also establish that a worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. There is a balancing test to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The record reflects a significant conflict between Claimant and Employer regarding the nine factors and is devoid of evidence regarding some of the criteria. Nevertheless, on balance the factors suggest that Claimant was likely an independent contractor performing services for Employer.

17. As found, importantly, Claimant was not paid personally for his services while working for Employer. Instead, Employer paid ED[Redacted] under the EIN ED[Redacted] for delivery services. Employer also issued a 1099-Form for Claimant to report non-employment income to the IRS. In fact, the record includes a 1099-Form describing "non-employee compensation" issued by Employer to ED[Redacted] for the tax year 2022. Moreover, although there is some dispute about whether Claimant had the opportunity to decline moving jobs, the credible testimony of Mr. Reyes reflects that Claimant could choose moving jobs to accept and Claimant was not required to work exclusively for Employer. Specifically, Mr. Reyes remarked that Claimant could decide when and how long he worked. Although Employer provided Claimant with a truck for delivery services, the record is mixed about who supplied other tools to complete moving jobs. Finally, the record is devoid of evidence that Employer combined its business with ED[Redacted].

18. As found, the balance of the totality of the circumstances and the nature of Claimant's working relationship with Employer suggests that he was not an employee. The record reveals that it is likely Claimant was engaged in an independent business and free from control and direction in the performance of his services for Employer. Accordingly, Claimant was an independent contractor when he suffered an arm injury while performing delivery services on July 11, 2022.

ORDER

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

1. Because Claimant was an independent contractor while performing services for Employer on July 11, 2022, his request for Workers' Compensation 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 http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: July 17, 2023.

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. 5-182-925-002

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she is entitled to a general award of maintenance medical treatment to relieve the ongoing effects of her August 27, 2021 industrial injury and/or to prevent deterioration of the her present condition.

FINDINGS OF FACT

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

1. Claimant is a long time employee of the [Redacted, hereinafter DC] having worked for DC[Redacted] for approximately 18 years. She currently works as a Correctional Trade Supervisor in the laundry department at [Redacted, hereinafter LV].

2. Claimant's position requires her to collect the penitentiary's dirty laundry from various locations spread about the prison grounds. Collection of the soiled laundry involves the use of a box truck that Claimant drives to designated sites where she must load large carts full of wash into the back of the truck for return to the prison's laundry. The truck is equipped with a tri-fold mechanical lift to aid in the process. While the lifting mechanism on the truck is automated, the operator must manually unfold two base sections on the device to use it effectively. Heavy items are then placed on this platform and lifted by the motorized system, with the push of a button, to the height of the truck bed.

3. At the collection sites, Claimant would lower the lift to the ground by use of the pushbutton system. She would then unfold the lift platform and place the large wheeled carts full of dirty laundry onto the deck so they could be raised up to the back of the truck bed. Once the carts were lifted, Claimant would push them into the truck and secure them for transport. After the carts were safely in place, Claimant would reverse the lift process by collapsing the base sections onto one another. She would then fold these two sections onto the lift frame before pushing the system button to move the lift back into its fixed storage position. Claimant would then move to the next pick up site.

4. On August 27, 2021, at around 6:30 a.m., Claimant was injured while collecting dirty laundry. She had finished loading some laundry carts and was lifting the combined weight of the two sections of the lift deck in an effort to finish the folding process when she felt pain and a sharp pulling in her abdomen.

5. Claimant returned to Respondent-Employer's laundry facilities where she reported her injury. She continued to work in pain in the hopes that her condition would improve on its own. When her pain did not resolve by that afternoon, Claimant elected to participate in a telemedicine visit with Dr. Mariam Hasan. (CHE 7, pp. 60-63).

6. During her August 27, 2021 telemedicine visit, Claimant reported moderate abdominal aching/pain that was not improving. (CHE 7, p. 61). Dr. Hasan prescribed 500 milligram tablets of acetaminophen and instructed Claimant to take 2 capsules four times per day. Sixty tablets were dispensed. *Id*. at p. 60. Dr. Hasan also ordered imaging, to include an abdominal x-ray and ultrasound. *Id*.

7. An x-ray of the abdomen obtained September 7, 2021 was unremarkable; however, a focused ultrasound of the anterior abdominal wall revealed a 1.2 cm. fascial defect and umbilical hernia. (CHE 7, pp 70-71).

8. Claimant was referred to Dr. Frank Chae for a surgical consultation by Nurse Practitioner (NP) Brendon Madrid of Concentra Medical Centers (Concentra) on September 21, 2021. (CHE 7, p. 85). Claimant was familiar with Dr. Chae as he had previously performed a laparoscopic vertical sleeve gastrectomy with repair of a large diaphragm hernia on her on April 27, 2021. *Id*. at p. 84; See also CHE 5, p. 34.

9. Before Claimant was evaluated by Dr. Chae, she experienced severe and incessant abdominal pain prompting her visit to an emergency room (ER) on September 21, 2021. (CHE 5, pp. 33-34). Upon presentation to the ER, it was discovered that Claimant's hernia had become incarcerated. (CHE 8, p. 144). Reduction required "light" sedation. *Id.*

10. Claimant presented to Dr. Chae's office on October 13, 2021 with continued complaints of pain and abdominal bulging. (CHE 8, p. 144). Dr. Chae diagnosed Claimant with an "incisional hernia with obstruction but no gangrene (following incarceration). *Id*. at p. 146. Dr. Chae recommended surgical repair with mesh. *Id.*

11. Claimant was taken to the operating room on December 6, 2021, where Dr. Chae performed an "open" repair of Claimant's incisional hernia with placement of dual layered surgical mesh. (CHE 9, pp. 158-159).

12. Claimant experienced substantial post-surgical nausea/vomiting and dehydration. She presented to the ER at Saint Mary Corwin Medical Center on December 9, 2021, where she was treated with 2 liters of IV fluids for dehydration and Phenergan to control her nausea. (CHE 10).

13. Claimant returned to Concentra on December 15, 2021 where she was evaluated by NP Madrid. (CHE 7, p. 97). During this appointment, NP Madrid documented that Claimant was taking Tylenol for continued pain because she was unable to take NSAIDS secondary to her prior bariatric surgery. *Id.*

14. Claimant returned for a follow-up appointment with NP Madrid on April 5, 2022. During this appointment, Claimant reported continued sensitivity at the umbilicus. (CHE 7, p. 126). Nonetheless, it was noted that Dr. Chae had released Claimant to full duty work with a caveat that she was at increased risk for re-injury based upon her job demands. *Id.*; See also, CHE, 8, p. 155.

15. Claimant was evaluated by Dr. Daniel Peterson at Concentra on May 25, 2022. During this encounter, Claimant reported persistent sensitivity and bulging at the location of her incision. (CHE 7, p. 137). She also reported continued pain when turning fast. *Id.* Dr. Peterson placed Claimant at MMI without impairment and no need for permanent work restrictions (PWR) or maintenance medical treatment needs. *Id.* at p. 137,140.

16. Claimant underwent a Division Independent Medical Examination (DIME) with Dr. Brain Mathwich on November 14, 2022. During this encounter, Claimant reported minor pain and internal pulling/straining with lifting, pushing or pulling. (CHE 5, p. 36). She also reported pain when wearing jeans or leaning over the laundry carts to retrieve items as this activity caused pressure over the area surrounding her hernia. *Id.* Claimant reported that her job duties required her to push/pull laundry carts, and load and unload washers/dryers. Moreover, as described above, Claimant was required to pick up and deliver laundry to various locations around the prison. *Id*. at p. 33. Because Claimant's job duties require considerable amounts of lifting, pushing and pulling, the ALJ finds it reasonable to infer that Claimant probably experiences some level of daily pain, especially when she is engaged in her work activities.

17. Dr. Mathwich concurred with Dr. Peterson that Claimant had reached MMI on May 25, 2022, that she had no impairment and did not have maintenance treatment needs. (CHE 5, p. 37-38).

18. Respondent-Employer filed a Final Admission of Liability consistent with Dr. Mathwich's DIME opinions regarding MMI, impairment and maintenance medical treatment on December 22, 2022. (CHE 1). Claimant objected to the FAL and requested a hearing in an effort to overcome the DIME opinions of Dr. Mathwich regarding MMI and impairment. She also requested a determination regarding her entitlement to maintenance medical care. (CHE 2, 3). Claimant subsequently withdrew all hearing issues expect her request for maintenance medical benefits.

19. Claimant testified that there is a persistent bulge over the area surrounding the location of the hernia and that her surgical incision site remains sensitive. She reported that the labor intensive nature of her job, including her need to push and pull laundry carts weighing upwards of a 100 pounds, causes abdominal pain and pulling sensations. Bending into the laundry carts and lifting the facilities laundry also causes pain and an abnormal feeling in the abdomen. Claimant attributes these symptoms to the implanted surgical mesh used to remediate and strengthen the fascial defect in her abdominal wall. Claimant testified that she is apprehensive and fearful she

will suffer further injury given her condition. Accordingly, she testified that she is very cautious when performing her work duties. She takes Tylenol for pain.

20. Claimant denied that her persistent symptoms are related to her prior bariatric surgery. She also testified that Dr. Chae has not recommended additional treatment, including prescription medications to address her ongoing symptoms. Indeed, outside of over the counter Tylenol for pain, Claimant is not otherwise actively treating her hernia. Accordingly, Respondent argues that Claimant's request for maintenance treatment must be denied and dismissed.

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. The ALJ, as fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo.App. 1990). 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); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

Claimant's Entitlement to Maintenance Medical Treatment

D. It is well settled that the need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to relieve the effects of the work related injury or prevent deterioration of his/her condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988). Indeed, in *Milco Construction v. Cowan,* 860 P.2d 539 (Colo.App. 1992), the Court of Appeals established the now recognized two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission, supra.* In announcing its decision in *Grover*, the Colorado Supreme Court stated that "before an order for future medical benefits may be entered, there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease." Subsequent courts have indicated that ongoing medical treatment can be ordered if a claimant's condition can be expected to deteriorate so that greater disability results in the absence of such care. *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo.App. 1995). In *Milco,* the Court of Appeals refined the test for awarding maintenance medical benefits by noting that irrespective of its nature, maintenance treatment "must be looked upon as treatment designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." *Milco Construction v. Cowan, supra*; *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo.App. 1995). If the claimant reaches this threshold, the ALJ should then, as a second step, enter a "general order similar to that described in Grover." *Milco Construction v. Cowan, supra.*

E. While a claimant does not have to prove the need for a specific medical benefit, he/she must prove the probable need for some treatment after MMI due to the work injury. *Milco Construction v. Cowan*, *supra*. The question of whether the claimant met the burden of proof to establish his/her entitlement to ongoing medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial* Claim Appeals Office, 992 P.2d 701 (Colo.App. 1999); *Renzelman v. Falcon School District,* W. C. No. 4-508-925 (August 4, 2003). In this case, the evidence presented persuades the ALJ that the persistent abdominal pain/pulling Claimant is experiencing, especially when she is engaged in work activities, is likely causally related to some residual consequence of her August 27, 2021, hernia and subsequent surgery, perhaps the surgical mesh used to treat the fascial defect and strengthen the abdominal wall. Accordingly, the ALJ is persuaded that the Claimant has proven that there is a casual

connection between her industrial injury and her continued need for Tylenol, whether that be over the counter or not.

F. The ALJ credits Claimant's testimony that she is still taking Tylenol to relieve this ongoing pain. Claimant's use of Tylenol to alleviate the pain associated with her injury and subsequent surgery in not new. Indeed, while she is evidently using over the counter Tylenol currently, the evidence presented supports a conclusion that she was previously prescribed 500 mg Tylenol tablets for pain control. Moreover, the evidence presented supports a conclusion that Claimant's options to treat the pain connected to her work-related hernia are limited because of her previous bariatric surgery. She cannot take NSAIDS and the more potent pain killer, oxycodone makes her sick. (CHE 7, p. 97). Consequently, Claimant takes Tylenol for the persistent pain caused by her work-related hernia. Without continued access to over the counter Tylenol, the ALJ is persuaded that Claimant will likely suffer from persistent and possibly functionally altering pain that will probably result in a deterioration of her physical abilities and current condition. Contrary to Respondent's suggestion, the evidence presented supports a conclusion that Claimant needs some ongoing medical treatment to relieve the effects of her injury. Even if that "treatment" is in the form of an over the counter analgesic. Consequently, the ALJ concludes that Claimant has proven, by a preponderance of the evidence, that a general award of maintenance medical care is warranted in this case. Nonetheless, Respondents retain the right to dispute whether the need for specific future medical treatment was caused by the compensable injury or whether it is reasonable and necessary.[1] *See Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003) (a general award of future medical benefits is subject to the employer's right to contest compensability, reasonableness, or necessity).

ORDER

It is therefore ordered that:

1. Respondents shall authorize and pay for reasonably necessary and related post-MMI medical treatment to relieve Claimant from the ongoing effects of her August 27, 2021 industrial injury and/or prevent deterioration of her current condition.

2. Respondents retain the right to challenge specific requests for maintenance treatment on the grounds that such care is not reasonable, necessary or related to Claimant's August 27, 2021 industrial injury. *See generally*, *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo.App. 1995); *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo.App. 2003).

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

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[1] The question of whether Claimant's continued use of Tylenol is reasonable or necessary was not presented during the June 27, 2023 hearing. Rather, the sole question for determination at the June 27, 2023 hearing was whether Claimant established the probable need for some treatment after MMI due to her August 27, 2021 industrial injury.

DATED: July 17, 2023

/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

1. Whether Claimant established by a preponderance of the evidence that arthroscopic rotator cuff repair surgery recommended by Michael Hewitt, M.D., is reasonable, necessary, and causally-related to Claimant's November 24, 2021 work injury.

FINDINGS OF FACT

1. On November 24, 2021, Claimant sustained an admitted injury to her right shoulder arising out of the course of her employment with Employer. The injury occurred while Claimant was taking down a display unit. In the process, Claimant testified that her right arm gave out causing immediate pain to her shoulder.

2. Claimant has a history of right shoulder pain dating to an ATV accident in June 2017. Although Claimant testified that she did not sustain a right shoulder injury at that time, Claimant was evaluated and treated for right shoulder pain on several occasions following the ATV accident. Claimant was initially seen on June 25, 2017 noting pain in her both shoulders. X-rays were negative and the shoulder examination was negative. (Ex. F & H).

3. Claimant was then seen at Salud Health Clinic on June 29, 2017, and September 12, 2017. Claimant reported she had right shoulder pain that kept her awake at night. Provocative testing of the right shoulder was negative. The treating physician opined the origin of Claimant's right shoulder pain was likely muscle spasms, and not related to her right rotator cuff. (Ex. E). Claimant was referred to physical therapy, although no records of that treatment were offered or admitted into evidence.

4. Claimant's next documented medical treatment for her right shoulder was on October 15, 2018, when she returned to Salud. Claimant reported problems with her right hand and arm, and that she felt her right arm giving out when she was carrying trays in her job in a restaurant. She was diagnosed with a trigger point of the right shoulder region. (Ex. E). Claimant testified that she had no medical care to her right arm after October 2018.

5. Following her November 24, 2021 injury, Claimant was initially evaluated at AUC Brighton on November 27, 2021. She reported pain in her right arm, shoulder and neck, and tenderness on palpation of the bicipital groove. Claimant was diagnosed with a strain of the right shoulder and advised to follow up with her primary care provider in 7 days. (Ex. D).

6. Claimant was then seen by Scott Richardson, M.D., at Concentra on December 3, 2021. Dr. Richardson is an authorized treating physician (ATP). Claimant reported a

burning sensation in her right shoulder with associated right arm numbness and tingling. Dr. Richardson diagnosed Claimant with a right shoulder, neck, and forearm strain, and referred her for physical therapy. (Ex. C).

7. Claimant attended physical therapy at Concentra Physical Therapy for seven visits between December 3, 2021 and December 30, 2021. At discharge, Claimant continued to report constant pain in the right shoulder and arm. (Ex. 6).

8. On December 7, 2021, Claimant saw Brittany Lain, NP, at Concentra. Claimant's examination was positive for tenderness in the right shoulder musculature, but not the AC joint, and rotator cuff testing was negative. Claimant reported pain with gripping, lifting above shoulder level, and laying on her right side. Ms. Lain ordered an MRI of the cervical spine. (Ex. 6).

9. On December 15, 2021, Claimant saw Ruth Vanderkooi, M.D., at Concentra, reporting continued pain and burning in the right arm, and difficulty lifting overhead. Dr. Vanderkooi noted that Claimant's cervical MRI had not been completed, and that she would consider a shoulder MRI if Claimant did not improve. (Ex. 6).

10. Claimant's cervical MRI was completed on December 27, 2021. The MRI showed mild cervical spondyloses and neuroforaminal narrowing at C5-6, but no high-grade canal stenosis. (Ex. H).

11. On December 28, 2021, Dr. Vanderkooi referred Claimant to physiatrist, Nicholas Olsen, D.O. (Ex. 6). She saw Dr. Olsen on January 4, 2022. Dr. Olsen recommended a transforaminal epidural steroid injection (TESI) for Claimant's neck symptoms. (Ex. 8).

12. Claimant saw Dr. Vanderkooi again on January 26, 2021, reporting difficulty using her right arm, including weakness, and dropping things. Dr. Vanderkooi noted that Claimant's right arm pain was likely radicular pain from C6, and that a right shoulder MRI would be appropriate to rule out pathology which could be contributing to Claimant's right arm pain. (Ex. 6).

13. On February 17, 2022, Claimant had a right shoulder MRI. The MRI was interpreted as demonstrating a focal full-thickness or near full-thickness tear of the posterior supraspinatus tendon. (Ex. 7). Claimant was then referred to orthopedic surgeon, Mark Failinger, M.D. (Ex. 6).

14. On February 22, 2022, Dr. Olsen performed a right C5-6 TESI, which provided Claimant temporary relief of Claimant's axial neck pain and radiation to Claimant's right shoulder girdle. (Ex. 8).

15. Claimant saw Dr. Failinger on March 3, 2022, for evaluation. Dr. Failinger reviewed Claimant's MRI films, and opined that the MRI showed partial tearing of the biceps tendon, irregularity in the posterior supraspinatus and anterior infraspinatus, with tendinosis, and mild AC joint arthritis. He indicated that Claimant had multiple areas of pain and discomfort, and that not all of Claimant's pain was generated from the shoulder. He recommended a diagnostic/therapeutic injection of the subacromial space to determine if

pain was generated from the rotator cuff. He performed the injection and noted that it helped with Claimant's anterior discomfort, and improved her strength on abduction, although Claimant continued to experience neck pain, which he noted should be treated by others. (Ex. 9).

16. Claimant returned to Dr. Failinger on March 17, 2022, reporting that the injection provided significant relief for a few hours, and continued to provide pain relief for a few days. Claimant's pain had, however, returned to its previous levels. Dr. Failinger recommended that Claimant return to Dr. Olsen for consultation and treatment of her cervical pain, after which Dr. Failinger would consider a decompression of the right shoulder and possible biceps tenolysis. Based on his review of the MRI, he opined it was unlikely he would perform rotator cuff repair surgery due to the size of the tear. (Ex. 9).

17. Claimant returned to Dr. Olsen on March 30, 2022. He instructed Claimant on home exercises and therapy for her neck and shoulder, and recommended an EMG study to evaluate Claimant's reports of right arm radiculopathy. (Ex. 8)

18. On April 14, 2022, Claimant saw Dr. Failinger. He noted that he was waiting on clearance from Dr. Olsen for any neurologic pathology that could interfere with surgery prior to proceeding with surgery. He disagreed with the initial radiology reading of Claimant's right shoulder MRI, and opined that the MRI did not show a full-thickness tear of the rotator cuff, but the MRI did show high-grade degeneration of the supraspinatus, that could possibly be causing some of the pain in her shoulder, but not causing pain in the neck or pain down her arm. He did not recommend further injections in Claimant's shoulder. Dr. Failinger planned to see Claimant again after completion of an EMG study. (Ex. 9).

19. On April 25, 2022, Dr. Olsen performed the EMG study of Claimant's right upper extremity which was negative. He indicated that there were no signs of cervical radiculopathy, plexopathy or peripheral nerve entrapment. Thus, he opined that Claimant was cleared for shoulder surgery. He also noted that Claimant's previous C5-6 TESI, although initially deemed non-diagnostic, actually relieved Claimant's neck pain. (Ex. 8).

20. Claimant returned to Dr. Failinger on May 12, 2022 to discuss surgery. Dr. Failinger recommended a right shoulder arthroscopy to include shoulder decompression, possible rotator cuff repair, possible biceps tenolysis, and possible clavicle resection. Dr. Failinger opined there was little else to be done for Claimant's right shoulder other than proceed with surgery. On May 23, 2022, Dr. Failinger requested authorization for the recommended shoulder surgery. (Ex. 9)

21. On May 21, 2022, William Ciccone, M.D., performed a record review at Respondents' request. Based on his review of records, Dr. Ciccone opined that Claimant did not sustain a work-related injury to her right shoulder. He opined that Claimant's report of a sudden onset of pain following her injury was not reflective of an injury, only the occurrence of pain. He opined that her physical examinations were not reflective of a shoulder injury, and he disagreed with Dr. Failinger's assessment that surgery was the

only available treatment option. He opined that the requested surgery was not reasonable, necessary, or work-related. (Ex. A).

22. Ultimately, Claimant's ATP at Concentra referred her to orthopedic surgeon, Michael Hewitt, M.D. for a second opinion regarding her shoulder. (Ex. 6). Claimant saw Dr. Hewitt on March 8, 2023. Dr. Hewitt reviewed x-rays of Claimant's shoulder (but not her MRI) and indicated they were inconsistent with a chronic rotator cuff tear, but she did have a clinical examination consistent with rotator cuff weakness. He offered several potential treatment options including observation, activity modifications, medications, therapy, and potential surgery. He did not recommend additional shoulder injections. (Ex. 10).

23. Claimant returned to Dr. Hewitt on March 16, 2023, and he was able to review Claimant's MRI films. Dr. Hewitt interpreted Claimant's MRI as demonstrating a focal full-thickness, non-retracted, central supraspinatus tear, with moderate biceps tendinopathy. He noted that Claimant had only minimal improvement over the previous 18 months, and that surgery would be medically reasonable. He recommended an arthroscopic rotator cuff repair with subacromial decompression. (Ex. 10)..

24. On April 17, 2023, Dr. Ciccone performed a second record review. Again, Dr. Ciccone opined that Claimant did not sustain any work-related injury, and his previous opinion remained unchanged. He noted the differing interpretations of Claimant's right shoulder MRI and indicated "[e]ven if there is rotator cuff pathology noted on the MRI, it is likely that the findings are related to the ATV accident on 6/25/27 and not the work event." (Ex. A). Dr. Ciccone testified by deposition and was admitted as an expert in orthopedic surgery. He opined that the surgery recommended by Dr. Hewitt was reasonable and necessary to address the Claimant's right shoulder pathology, but he opined that the need for surgery was not related to Claimant's work injury. Dr. Ciccone's opinion that Claimant did not sustain a work-related injury to her right shoulder is not persuasive.

CONCLUSIONS OF LAW

Generally

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

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

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

AUTHORIZATION OF SPECIFIC MEDICAL BENEFITS (Surgery)

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colo. Springs School Dist.,* 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 Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Hewitt is reasonable and necessary to cure or relieve the effects of her work injury of November 24, 2021. The credible evidence establishes that Claimant has pathology in her right shoulder that requires surgery. While Claimant's testimony that she did not have right shoulder issues following her ATV accident in 2017 was not supported by her medical records, no credible evidence was admitted indicating Claimant had symptoms in, or treatment for, her right shoulder for more than three years before her November 24, 2021 work injury. When evaluated in 2017, Claimant did not exhibit signs of a rotator cuff injury, and the treating physician opined that Claimant's right

shoulder symptoms were more likely the result of muscle spasms than rotator cuff pathology.

Following her November 24, 2021 injury, Claimant consistently reported right shoulder pain. Claimant's providers initially investigated her cervical spine as the cause of symptoms in her right arm. That, however, does not exclude an injury to Claimant's right shoulder. Dr. Failinger's opinion that Claimant's right shoulder pathology did not explain all of her symptoms indicates that Claimant's cervical symptoms may have a different source. In fact, it was ultimately determined that Claimant sustained a right rotator cuff tear. The ALJ credits Dr. Hewitt's interpretation of Claimant's MRI over Dr. Failinger's interpretation because Dr. Hewitt's is consistent with the reading radiologist. Moreover, although Dr. Failinger indicated that a rotator cuff repair was unlikely, he did request authorization for the procedure, which indicates that he did not definitively rule out rotator cuff pathology that may be amenable to surgery.

The ALJ does not find credible or persuasive Dr. Ciccone's opinions that Claimant sustained no injury and that her pain complaints are due to a 2017 ATV accident. Dr. Ciccone's opinion that an acute onset of sudden pain is not consistent with an injury is not credible. The ALJ finds and concludes that Claimant has established by a preponderance of the evidence that her right shoulder pathology is causally related to her November 24, 2021 work injury.

Claimant has also established that the surgery recommended by Dr. Hewitt is reasonable and necessary to treat her industrial injury. Two different orthopedic surgeons have recommended right shoulder surgery, and Dr. Ciccone agreed the surgery proposed by Dr. Hewitt is reasonable and necessary. Moreover, Claimant underwent a reasonable course of conservative treatment for her right shoulder which did not resolve her shoulder complaints. Claimant's request for authorization of the surgery recommended by Dr. Hewitt is granted.

ORDER

It is therefore ordered that:

1. The right shoulder surgery recommended by Michael Hewitt, M.D., is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. Claimant's request for authorization of the recommended right shoulder surgery is granted.

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: July 17, 2023

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. 5-148-399-004

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he was injured in the course and scope of his employment with Employer on August 27, 2020.

IF THE CLAIM IS FOUND COMPENSABLE, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to medical benefits that are authorized, reasonably necessary and related to the alleged injury of August 27, 2020.

III. Whether Claimant has proven what his average weekly wage is at the time of the incident in question.

IV. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 28, 2020 and continuing until terminated by law.

V. Whether Respondents have proven by a preponderance of the evidence that Clamant was terminated for cause.

STIPULATIONS OF THE PARTIES

The parties stipulated that, if the claim was deemed compensable, Clinica Family Health was the authorized treating provider with regard to the claim and that Claimant's average weekly wage was $103.85. The stipulations of the parties are approved and incorporated into this order.

FINDINGS OF FACT

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

1. Claimant was 74 years old at the time of the hearing. He worked for Employer as a dishwasher, one day a week, working the 2 p.m. to 9:30 p.m. shift. He would wash pots, pans, receptacles, platters, plastic containers that would be reused and other utensils. He had started working for Employer in approximately June 2020.

2. On August 27, 2020 Claimant injured himself at work while lifting a 10 lb. pot three quarters full of water and food debris, which weighed close to 50 lbs. total with contents. He lifted it up from the floor to the counter sink, and hurt his back in the process, though he was able to lift it all the way into the sink. Claimant continued working until the end of his shift, when he advised his supervisor and shift manager, M.M., who did not respond. Claimant left the restaurant and went home.

3. The following Monday he went to Clinica Campesina or Clinica Family Health to seek treatment. Claimant was advised that they were too busy with patients due to the COVID-19 pandemic. They instructed him to leave and return at a later time.

4. Claimant was due to return to work on Thursday, September 4, 2020. However, on September 1, 2020 Claimant received a call from Employer's representative, F.M. who terminated his employment.

5. Claimant returned to Employer's premises on September 4, 2020 in order to ask Ms. F.M. to send him to a doctor because of his back pain. He parked at the restaurant right next to Ms. F.M.'s car. He got out of his car and at that moment Ms. F.M. was coming out of the restaurant and got in her car. He tried to get her attention and she rolled up her car windows and did not respond to him, driving out of the parking lot.

6. Claimant returned to Clinica Family Health again on September 4, 2020. They could not see him again. However, on this occasions they provided him an appointment for September 16, 2020. He was attended at that time and provided prescriptions for medications. They gave him steroids, muscle relaxants, anti-inflammatories, Tylenol as well as injections into the back, which helped. But the pain would come back. He was also, eventually given work restrictions of 10 lbs. lifting. He explained that the doctors were in the process scheduling more injections.

7. At one point his back pain was very intense and he went to Clinica for medical care but they sent him on to the emergency room at Avista Adventist Hospital, where they charged him $9,800, which continued to remain unpaid. He noted that approximately two months before the hearing he had received his last injection into his back and was provided with continued 10 lbs. restrictions.

8. Claimant filed a Workers' Claim for Compensation on September 10, 2020 stating that he was lifting a few pan/pots on August 27, 2020 at approximately 5 p.m. and felt a pop and sharp pain in his back. He noted that he had numbness in his legs. He reported the incident to M.M.

9. On September 16, 2020 Claimant was evaluated at Clinica Family Health related to a reported August 27, 2020 incident where Claimant was lifting a heavy pot and strained his back, causing mid back, low back pain, hip pain, and bilateral leg pain. Nurse Practitioner Jennifer Manchester noted Claimant continued with symptoms that radiated to both legs causing difficulty ambulating and had an onset of urinary hesitancy.

10. On September 18, 2020 Nurse Manchester restricted Claimant from work as of his date of injury and continuing, though stated he could return to work as of October 2, 2020 with a 20 lbs. restrictions. She recommended an MRI and referral to an orthopedic spine specialist, which Claimant declined as he did not have insurance or means to pay for them.

11. Dr. Upasana Mohapatra at Clinica also evaluated Claimant on September 23, 2020 and continued Claimant off work. He noted that Claimant's pain persisted in the middle and low back as well as the bilateral legs, specifically radiating to the left and right thighs. He diagnosed acute midline thoracic back pain. He noted that Claimant previously had reported tenderness to palpation over the lumbar spine but it was most pronounced over the thoracic spine with a positive straight leg test. He prescribed oxycodone and

cyclobenzaprine, an antidepressant. He ordered a thoracic x-ray and continued to recommend further diagnostic testing, which Claimant declined due to the cost.

12. On October 23, 2020 Dr. Mohapatra stated that Claimant continued to be unable to work. He noted that Claimant had pain in the middle back, low back and gluteal area with pain radiating down the left thigh and calf. Dr. Mohapatra continued to keep Claimant off work on November 23, 2020 noting that Claimant continued to have low back pain with radiculopathy affecting the lower extremity. His work status continued on December 13, 2021. In January 2021 his Clinica providers noted Claimant now had depressed mood related to his inability to provide for his family due to his ongoing chronic low back pain. In February 2021 Claimant was noted to have continued chronic low back pain with continued urinary hesitancy. This patterned continued with assessments of lumbar back pain with radiculopathy affecting the lower extremity, continued medications for both pain and depression related to the trauma.

13. On April 13, 2021 Claimant was evaluated by physiatrist Greg Reichhardt, M.D. for an Independent Medical Evaluation (IME) at the request of Claimant's counsel. On exam Dr. Reichhardt noted tenderness to palpation from T8 to the S1 area with most tenderness at the L1 to L3 level. Claimant had moderate lumbar paraspinal muscle spasm from L1 to L5. Straight leg raising was positive for back and leg pain. Patrick's maneuver was positive. Iliac compression test was positive. Dr. Reichhardt diagnosed thoracolumbar pain with bilateral lower extremity pain from lifting a pot at work on August 27, 2020 while-working as a dishwasher. He assessed that Claimant's exam was concerning for possible radiculopathy or myelopathy. He also noted Claimant had depression, which was multi-factorial, and only partly related to his work-related injury, and partially to the stresses of COVID, with possible adjustment disorder. Dr. Reichhardt opined that based on the history provided by Claimant, as well as the medical records available, to a reasonable degree of medical probability, Claimant current thoracolumbar pain and lower extremity symptoms were related to his August 27, 2020 work-related injury.

14. Dr. Reichhardt recommended Claimant undergo thoracic and lumbar MRIs to evaluate for potential nerve root or spinal cord compression leading to myelopathy or radiculopathy. After the MRIs, it would be appropriate for him to undergo physical therapy, progressing to an independent active exercise program. Depending on the results of the MRIs there might be consideration for selective spine injections or surgical intervention. He further stated that appropriate restrictions for Claimant were 10 pound lifting, pushing, pulling and carrying, with limited standing and walking to 30 minutes at a time with a five minute rest break, no climbing at unprotected heights, and no bending or twisting at the waist.

15. Claimant received trigger point injections on January 19, 2022 at Clinica Family Health. On January 27, 2022, Claimant returned for a follow up with Dr. Mohapatra when Claimant reported improvement with trigger point injections and muscle relaxants.

16. Claimant was seen on April 14, 2022 by Dr. Alejandro Stella at Avista Adventist Hospital for low back and right lower extremity pain. He was diagnosed with back pain and lower extremity pain. The triage nurse noted that Claimant presented with a history of low back injury of approximately one and one half years now experiencing

right buttock pain that radiated down the right leg and left foot numbness that extended up to the left knee. Dr. Stella ordered an MRI, which was conducted on April 14, 2022. The radiologist, Kevin Woolley, M.D. reported Claimant had lumbar spine degenerative changes with grade 1 anterolisthesis at L4-5 level to the basis of facet arthropathy, spinal stenosis noted at L4-L5 with bilateral foraminal impingement on the basis of degenerative change and listhesis, and bilateral foraminal impingement at L5- S1 with no disc herniation. They also performed a lower extremity ultrasound to rule out DVT.[1] Claimant was released to follow up with his primary care provider.

17. On April 25, 2022, Claimant returned to Clinica Family Health. Claimant reported previous trigger point injection helped for about two months. He received a second trigger point injection at this time. On a follow up with Clinica on May 10, 2022, Claimant reported improvement with trigger point injections, steroid burst, cyclobenzaprine, and gabapentin. On August 10, 2022, Claimant returned to Clinica for more trigger point injections. Dr. Mohapatra noted Claimant reported a reduction in pain previously. Four trigger points were injected. Claimant reported mild improvement after the procedure.

18. Claimant was seen for an IME by Dr. Lloyd Thurston on August 19, 2022, at Respondents' request. Dr. Thurston questioned Claimant on the weight of the pot at the time of the alleged injury. He informed him that 10-15 gallons weighs 80-120 pounds without a pot. Claimant stated that he believed he could not lift more than 60 pounds. Claimant stated he lifted the pot from the ground tipped it over and poured the water out, and then cleaned it with a spatula. He then put the pot away overhead. It was Dr. Thurston's opinion claimant exaggerated the mechanism of injury. He noted that if Claimant incurred an injury, it was a minor myofascial strain and resolved within 4-6 weeks of the date of injury. He opined there were no radicular symptoms. He explained that the continued subjective complaints were not consistent with a physical injury. He opined that Claimant significantly embellished and exaggerated the mechanism of injury to Dr. Reichhardt.

19. On October 10, 2022, Claimant received his last round of trigger point injections. On the last recorded visit to Clinica Family Health before the hearing, on October 20, 2022, it is noted Claimant received numerous treatments and most helpful were ibuprofen 600mg tablets taken twice a day, acetaminophen 500mg twice a day, lidocaine patches, and Cyclobenzaprine, trigger point injections and steroid bursts.

20. Since his back injury of August 27, 2020 Claimant has not returned to work due to ongoing back pain related to the work injury.

21. Ms. F.M. stated that Claimant was initially hired without a position but was doing dishwashing one day a week. The restaurant was slower around 2 p.m. when Claimant started, and then would pick up around 5 p.m. She stated that several of the pots, one for chili and one for beans were used for cooking which would be filled to about four inches below the top of the pans. The deep square pans were used to serve food and were placed on steamers by the wait staff. Claimant would wash them when they

[1] Deep vein thrombosis.

were empty. The pots full of chili or beans are taken out to the platers to put the food and then brought back with some residue and food at the bottom of the pots.

22. Mr. T.M. is also a Respondent representative. He stated the chili and bean pans weighed approximately 5 lbs. empty, that the pots are given to the dishwasher after all the food is scraped out and put into smaller containers, and that there was only residue in the pots. He stated that the diner rush lasted about one hour from 5:30 to 6:30 p.m. and that most of the cooking had been done by the time Claimant was there at 2 p.m. It was not until after the rush the steam pans from were given to the dishwasher. What was not explained by any Employer witnesses was what was Claimant doing from 2 p.m. to 6:30 p.m. when the dinner crowd was done and Claimant had to start washing the trays.

23. The photographs showed a cooking pot (chili pot) that seems to be a 40 quart stock pot which is normally 12 to 14 inches wide at the mouth and approximately 15 inches tall. This ALJ deduces that it likely could hold up to 10 gallons of water. The second pot, behind the first, is a smaller, potentially a 32 quart stock pot (beans pot). Further in photograph 3 it shows Ms. F.M. rinsing the smaller pot (beans pot) by lifting it with one hand and using a hose. The pan already appeared to have been scrubbed and washed. Lastly, Ms. F.M. stated that they would wash the chili pot by submerging it in water then rinsing it as shown in the photo. Photograph 2 showed pans on the ground that appear to be the stated dimensions that Ms. F.M. testified of 12 by 14 inches. In the sink can also be seen a plastic container, which Ms. F.M. denied they reused.

24. Ms. F.M. stated that she had a conversation with Claimant by phone on September 1, 2020 to see if she could make arrangements with Claimant to change his schedule because the staff had complained he was taking too long to finish his job. She disclosed that Claimant became very upset. She denied that she terminated Claimant. However, in the responses to discovery she indicated she would testify that “when she informed him [Claimant] of his termination, he became quite agitated and threatened to call their corporate office and speak to individuals there who did not have connection with his termination.” This is also confirmed by discovery responses by Mr. T.M. Discovery responses also stated that Claimant was terminated for cause as he had been previously counseled that he worked very slow, and needed to improve the quality and speed of his work.

25. Dr. Thurston testified at the end of hearing and his testimony was concluded via deposition. He explained that the x-ray and MRI did not show an acute injury, and that this is corroborated by Dr. Mohapatra and Dr. Stella. He disagreed with the diagnosis of radiculopathy. He explained that Dr. Reichhardt’s conclusions were based on incorrect information. He opined that while a possible myofascial injury may have occurred, that it was not probable that it was a work injury.

26. While the clocked-in time shows seven or less hours worked per day, this does not count the time that Claimant was at the job site, including his breaks, which may be what Claimant was referencing and that is consistent with his testimony that he was at work seven to eight hours a day. The argument that co-workers were complaining and that he was not finishing on time is inconsistent with the time clock which has Claimant clocking out between 9:00 p.m. and 9:30 p.m. at the latest each night. Unless the clock

was not accurate or changed, Ms. F.M.'s testimony is found to be not credible or persuasive.

27. As found, Claimant has shown he was injured in the course and scope of his employment for Employer on August 27, 2020 injuring his back and causing radicular symptoms down his legs as well as urinary hesitancy and aggravation of his depression due to the chronic back pain. The opinions of providers at Clinica Family Health and Dr. Reichhardt are more credible and persuasive than the contrary opinions of Dr. Raschbacher.

28. Claimant has shown he was unable to work after his August 27, 2020 work injury and has shown he is entitled to temporary disability benefits. The records fail to show that Claimant has been placed at maximum medical improvement through the date of the hearing of April 12, 2023.

29. Respondents have failed to show that Claimant was terminated for cause. Claimant reported the injury to his supervisor. Further, Ms. F.M.'s testimony was unpersuasive as her discovery responses indicated she terminated Claimant.

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

CONCLUSIONS OF LAW

A. Generally

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

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

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

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).

Claimant has proven that it was more likely than not he was injured in the course and scope of his employment with Employer on August 27, 2020 when lifted a pot with water and food debris off the floor and strained his thoracolumbar spine. He subsequently developed lower extremity radicular symptoms and depression related to the chronic low back and radicular pain and numbness. Claimant's claim is determined to be compensable.

Respondents argue that Claimant's version of events was illogical and there was no reason for anyone to take the empty pot, fill it with water and then place it on the ground to be cleaned as it did not make sense. However, this ALJ concludes that it makes a lot of sense. It is clear that dirty pans do get placed on the floor waiting to be washed as seen in the photos taken by Respondents. It is evident from the photos that there is limited area to place dirty items as the space was needed to take items from the sink onto the small counter in order to wash them. Claimant's testimony that the pot he lifted was full of water and food debris was credible. A pot that has been used to cook may have

had food stuck and water was placed in the pot in order to assist with cleaning the pot later. And while Claimant's assessment of weight may be imperfect, it does not change the fact that Claimant lifted items that he considered heavy, and at one of those events, injured his thoracolumbar spine. This is supported by the records from Clinica Family Health and Dr. Reichhardt as well as Claimant's testimony, which are found credible. This ALJ does not consider Claimant's being a poor historian, which was documented in various records, as being untruthful but a contribution of multiple factors, including use of interpreters instead of direct communication, his clear lack of education demonstrated by Claimant's word usage and patterns of speech at hearing, his demeanor and difficulty understanding simple questions, in addition to his age, memory, and documented depression. Claimant has shown that he was injured in the course and scope of his employment with Employer on August 27, 2020.

C. 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). Here, the parties stipulated that Clinica Family Health were authorized treating providers for the work related conditions and the provider is accepted.

Claimant has shown he is entitled to medical benefits that are reasonably necessary and related. Following Claimant's lifting incident on August 27, 2022, Claimant immediately contacted his primary care provider at Clinica Family Health. Claimant has proven by a preponderance of the evidence that Claimant's medical care through Clinica and Avista Adventist was authorized, reasonably necessary medical treatment causally related to the August 27, 2020 accident.

23. Only those expenses related to Claimant's August 27, 2020 work related injuries for his mid and low back, bilateral radicular symptoms, urinary urgency and depression are related and not any hypertension or other unrelated medical care.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The parties stipulated to an average weekly wage of $103.85 which provides a temporary total disability rate of $69.23. This stipulation is accepted.

E. Temporary Total Disability Benefits and Interest

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant 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).

Claimant's testimony and the medical records from Clinica Family Health show that Claimant was either unable to work or under restrictions from the day of his injury of August 27, 2020. Claimant continues to be under medical care and has not been placed at maximum medical improvement pursuant to the records submitted by the parties. Claimant has shown that he is entitled to temporary disability benefits from August 28, 2020 until terminated by law.

Claimant is also due interest on all benefits which were not paid when due pursuant to statute in the amount of 8% per annum. Temporary total disability benefits and interest through the date of the hearing were calculated as follows:

[Redacted, hereinafter RA's Time Sheet Calculations]

F. Termination for Cause

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide 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." The respondents must prove that a claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Here, it is clear that Claimant was terminated by Employer's representative before his next scheduled day of work, on September 1, 2020 as shown by the discovery responses and Claimant's credible testimony. Claimant persuasively testified that he was unable to work after his injury. Further, this is supported by the credible medical records from Clinica Family Health providers who stated Claimant could not work or was under restrictions. Any testimony or evidence to the contrary is specifically found not credible or persuasive. Respondents have failed to show that Claimant was terminated for cause.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's August 27, 2020 work related injury is compensable, including his mid and low back injuries, his radicular symptoms, urinary urgency and the sequelae of depression related to the ongoing chronic pain.

2. Respondents shall pay the authorized, reasonably necessary and related medical benefits including his providers from Clinica Family Health and Avista Adventist Hospital for his hospitalization of April 14, 2022. Any non-related conditions are not Respondents' responsibility. All medical bills shall be paid in accordance with the Colorado Fee Schedule.

3. The stipulation of the parties regarding average weekly wage of $103.85 is accepted and incorporated as part of this order.

4. Respondents shall pay temporary disability benefits from August 28, 2020 through the present until terminated by law. TTD benefits at the rate of $69.23 per week through the date of the hearing of April 12, 2023 is $9,475.30.

5. Respondents shall pay interest at 8% per annum on all benefits not paid when due, for a total of $10,525.63 through the date of the hearing including temporary total disability benefits. Interests shall continue to be paid until indemnity benefits are paid pursuant to this order.

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

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

DATED this 19th day of July, 2023.

Digital Signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-230-803-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he injured his left shoulder in the course and scope of his employment with Employer on November 17, 2022.

II. If Claimant sustained a compensable work injury on November 17, 2022, then whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonably necessary, authorized and related medical benefits.

FINDINGS OF FACT

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

1. Claimant had been employed by Employer for approximately 12 years and worked the night production shift, operating equipment, pulling orders, cases, and bottles, all to be loaded for distribution, which involved a fair amount of lifting. Claimant had been on vacation but returned on November 14, 2022 and was able to perform is job without problems through the November 16, 2022 shift.

2. On November 17, 2022 Claimant arrived at Employers' parking lot at approximately 6:45 to 6:50 p.m. for the 7 p.m. shift. He parked his vehicle in the designated area where he had parked for the twelve years of his tenure with Employer. He exited his vehicle, lost his balance after closing the door and walking away from his vehicle, in the ice and snow covered parking lot, slipping and falling, attempting to catch himself with an extended left upper extremity, which could not hold him and was hyperextended. Claimant injured his left shoulder.

3. Claimant advised his manager J.G. that he had fallen in the parking lot and injured his shoulder. He requested pain blockers, which he was provided. His manager did not provide Claimant with any incident report form or a designated medical provider list.

4. Claimant had experienced a prior work-related injury with this employer in 2016. At that time, when he initially reported the injury, his manager instructed Claimant to file a report and provided a referral to a medical provider. This time his manager made no comments and did not give instructions to Claimant on how to proceed.

5. Claimant, incorrectly, assumed that, since his manager did not direct him to contact anyone or send him to the Employer's medical provider, the parking lot incident was not a covered accident.

6. Claimant proceeded to file for disability benefits under Family Medical Leave (FML).

7. Claimant obtained a medical evaluation at Advanced Urgent Care on Saturday, November 19, 2022, with Kristin Kruszewski, PA-C. He was diagnosed with left shoulder pain for an unspecified injury of the left shoulder. He was provided restrictions of return to work with right-handed duty only and no use of the left arm until evaluated and cleared by orthopedics.

8. A text message was sent by Claimant on an indeterminate date that stated "What do you need me doing?" with a response by his manager stating "Go ahead do returns thanks."

9. Then, on November 20, 2022, Claimant stated "Tried to start a claim with [Redacted, hereinafter HD] for leave but was unable to complete it online. I'll have to call them tomorrow…" The response was "OK just keep us posted and get better." This ALJ infers from this conversation that Employer knew Claimant was injured when he slipped and fell in the parking lot.

10. On November 21, 2022 the conversation continued as follows:

> Q-Did you get it all taken care off (sic.) and you ok
> A-I did get everything done with HD[Redacted]. I have to see an Ortho on Monday…
> Q-Nice hope everything goes okay
> A-Yeah, me too

11. Also on the same day, the Human Resources (HR) Director, R.M., sent an email to the Night Warehouse Manager, J.G., who no longer worked for Employer, asking whether Claimant went on leave as of November 20, 2022, with a last day worked on November 17, 2022. She further asked whether the leave was for personal medical reasons. Mr. J.G. responded, "Yes that is correct." It is presumed that Mr. J.G. was answering both questions in the affirmative.

12. There is an undated letter or email stating that HD[Redacted] had created a Short-Term Disability Claim and Leave of Absence claim for Claimant on November 21, 2022.

13. On November 22, 2022 the Corporate Leave Administrator advised the HR Director that Claimant had been placed on STD/FML status effective November 20, 2022 and had entered PTO for period November 20-22, 2022.

14. On November 28, 2022 Claimant was evaluated by Dr. Michael Hewitt of Orthopedic Centers of Colorado, the orthopedist that had seen Claimant previously for his 2016 work related injury. Dr. Hewitt documented as follows:

> [Claimant] is a 47-year-old left-hand-dominant male presenting for evaluation of his left shoulder. Patient is well-known to this office after undergoing left shoulder subacromial decompression in 2016. He return (sic.) to full activities without restriction.
>
> He was injured on 11/17/2022 exiting his vehicle at work. He slipped on ice in a parking lot and fell onto an outstretched left upper extremity. His arm went overhead, he noted sudden pain but did not feel his shoulder dislocate. Patient did not strike his head or lose consciousness. Treatment has included rest, activity modification, ice, heat and anti-inflammatories. He is having difficulty sleeping.

> Pain is felt in the posterior and lateral shoulder as well as scapula. He currently has minimal neck pain and denies radicular symptoms or numbness.

15. Dr. Hewitt examined Claimant finding mild to moderate glenohumeral arthritis and a current history and exam consistent with rotator cuff tendon injury. Dr. Hewitt proceeded with injecting the left shoulder with steroids and further discussed the possibility of proceeding with imaging if the left shoulder symptoms did not resolve with ice, NSAIDs, therapy and rest.

16. Claimant filed a Workers' Claim for Compensation on February 26, 2023. Claimant stated that he injured his left shoulder on November 17, 2022 at approximately 6:45 p.m. Claimant reported to his supervisor J.G. He specifically reported that:

> After arriving to the office for work during a snow storm I slipped on the ice that was underneath the snow after exiting my vehicle and turning to close the vehicle door. While falling I attempted to catch myself with my left arm when my hand touched the ice it slid out as well, injuring my shoulder.

17. Respondents filed an Employer's First Report of Injury on March 2, 2023. The Safety and Asset Protection Specialist, G.F., completed the report specifically stating that Claimant, after just arriving to work before his shift, and exiting his personal vehicle, slipped and fell injuring his left shoulder. No medical provider was identified.

18. A Notice of Contest was filed on March 7, 2023.

19. Claimant filed an Application for Expedited Hearing on March 20, 2023 on the issues of compensability and medical benefits.

20. Respondents filed a Response to Application for Hearing on March 21, 2023.

21. Claimant testified that after the November 17, 2022 slip and fall, injuring his left shoulder, he was unable to perform his job.

22. Review of the video showed that it was speeded up, was very low resolution and pixilated, distorted and overall poor quality. However, an individual's form could be seen leaving a vehicle, slipping and falling and immediately getting up and walking away from the vehicle. The individual's face could not be seen clearly, however, Claimant believed that he was the individual in the video. This ALJ deduces and infers that the individual seen on the video is Claimant.

23. Mr. G.F., the Safety Specialist, testified that employees were instructed to go to their manager to report injuries. Mr. J.G. was Claimant's manager. Mr. G.F. stated that he heavily relied on the supervisors (managers) to make the reports of injury and complete the written forms, but if the supervisor did not encourage it, there would be no report.

24. This ALJ took administrative notice that the CDLE posters do not specifically indicated that accidents in the parking lots were potentially work related pursuant to the request of the parties.

25. Ms. R.M., the HR Director for Employer in Colorado, testified she was advised by HD[Redacted] that Claimant had filed a short term disability claim on November 21, 2022.

26. Mr. J.G., the night shift manager, testified that he did not know that work place injuries extended to the company parking lots, and further stated that many people asked him for ibuprofen each day but he did not specifically recall if Claimant did on November 17, 2022. Mr. J.G. specifically stated that he did not receive any specific training on if someone slipped and fell in the parking lot, whether or not to report that as short-term disability or as a worker's compensation claim. Any other testimony offered by this witness was neither found persuasive nor credible.

27. As found, Claimant has proven he was injured in the course and scope of his employment with Employer when he slipped and fell in the Employer's parking lot while reporting to work on November 17, 2022, injuring his left shoulder.

28. As found, Employer failed to provide any designation of medical provider either when Claimant reported the accident to his manager, or after Claimant filed a Workers' Claim for Compensation in February, 2023.

29. As found, Employer never referred Claimant to a medical provider to treat the injuries. Accordingly, the right of selection passed to Claimant.

30. As found, Claimant has established 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.

31. As found, Claimant was entitled to select his own medical provider and he selected Dr. Michael Hewitt, who had been his prior authorized workers' compensation physician for his 2016 work injury. As found, Claimant's authorized treating physician in this matter is Dr. Hewitt.

32. As found, Claimant has established that his left shoulder injury was directly and proximately caused by the November 17, 2022 slip and fall accident at work. This is support by Claimant's credible testimony. It is further supported by Dr. Hewitt's November 28, 2022 report stating that Claimant injured his shoulder when he slipped and fell at work. Claimant has proven he is entitled to medical benefits to cure and relieve the left shoulder injury sustained on November 17, 2022.

33. Testimony and evidence inconsistent with the above findings is determined to be not relevant, not credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

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

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

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

The claimant is required to prove by a preponderance of the evidence that, at the time of the injury, both he and the employer were subject to the provisions of the Act, he was performing a service arising out of, and in the course of, his employment and the

injury was proximately caused by the performance of such service. Sec. 8-41-301(1)(a)-(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The claimant must also prove by a preponderance of the evidence that the injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office*, 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). Accidents on employer premises or parking lots are compensable. See *State Compensation Ins. Fund v. Walter*, 354 P.2d 591 (Colo. 19600; *Woodruff World Travel, Inc. v. Industrial Commission*, 38 Colo. App. 92, 554 P.2d 705 (1976); *Azaltovic V. Crop Production Services*, ICAO, WC No. 4-846-566 (January 31, 2012)

Based on the totality of the evidence, including hearing testimony and a full review of the exhibits presented at hearing, it is found that Claimant was injured in the course and scope of his employment with Employer on November 17 2022. As found, Claimant slipped and fell in Employer's parking lot, while reporting for his regular shift, and injured his left shoulder. He reported the accident and injury to his manager. Claimant is found credible.

As found, Claimant has established that his left shoulder injury was directly and proximately caused by the November 17, 2022 slip and fall accident at work. This is supported by Claimant's credible testimony. It is further supported by Dr. Hewitt's November 28, 2022 report stating that Claimant injured his shoulder when he slipped and fell at work. The video footage provided was grainy, significantly sped up, and not very clear. Despite this, it showed a man that had just closed his car door, turned and slipped and fell, quickly getting up and continuing to walk. Claimant has proven he was within the course and scope of his employment when he was injured and is entitled to medical benefits to cure and relieve the left shoulder injury sustained on November 17, 2022.

C. Authorized Reasonably Necessary and Related Medical Benefits

Respondents are liable for authorized medical treatment that is 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).

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Indus. Claim Appeals Off.,* 914 P.2d 501 (Colo. App. 1995). Section 8-43-404(5)(a)(I)(A), C.R.S. allows the employer to choose the claimant's treating physician "in the first instance." If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774- 720 (January 12, 2010). As found, Claimant was seen as an emergency on Saturday, November 19, 2022, by Advanced Urgent Care and they are authorized as an emergent care facility for the one time evaluation.

An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381*,* 383 (Colo. App. 2006). As found, Claimant reported to his manager/supervisor that he had a slip and fall injury in Employer's parking lot. As further found, from the text conversation between Claimant and his manager, Employer knew Claimant was injured when he slipped and fell in the parking lot on November 17, 2022, by no later than November 20, 2022. As found, Claimant's manager knew or should have known that Claimant's report of the slip and fall on company property, as well as the complaints of left shoulder pain, which triggered the request and supply of ibuprofen, was sufficient to connect the facts and to acknowledge that the accident should be classified as a potential workers' compensation injury and made the appropriate referrals.

As found, Employer failed to provide any designation of medical provider either when Claimant reported the accident to his manager, or after Claimant filed a Workers' Claim for Compensation in February, 2023. As found, Employer never referred Claimant to a medical provider to treat the injuries. Accordingly, the right of selection passed to Claimant. As found, Claimant has established 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 Sec. 8-43-404(5), C.R.S. and WCRP Rule 8-2. *Tidwell v. Spencer Technologies*, WC 4-917-514 (ICAO, Mar. 2, 2015). As found, Claimant was entitled to select his own medical provider and he selected Dr. Michael Hewitt, who had been his prior authorized workers' compensation physician for his 2016 work injury. As found, Claimant's authorized treating physician in this matter is Dr. Hewitt.

Lastly, as found, Claimant requires medical treatment for the compensable left shoulder injury as recommended by Dr. Hewitt. Claimant has shown that it was more

likely than not that Claimant requires medical benefits that are reasonably necessary to treat the work injuries sustained on November 17, 2022.

ORDER

IT IS THEREFORE ORDERED:

A. Claimant has proven by a preponderance of the evidence that he was injured in the course and scope of his employment on November 17, 2022.

B. Respondents shall pay for all authorized, reasonably necessary and related medical benefits under the care of Dr. Michael Hewitt and his referrals for the left shoulder injury. Respondents shall also pay for the emergency care Claimant received at Advanced Urgent Care. All medical care shall be paid pursuant to the Colorado Medical Fee Schedule.

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

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

DATED this 19th day of July, 2023.

Digital Signature

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

STIPULATIONS

At the commencement of hearing, the parties reached the following stipulations:

1. Claimant's Average Weekly Wage ("AWW") is 927.78.

2. The right of selection passed to Claimant, who selected her primary care provider, Sherri Turner-Lloyd, P.A., with Centura, to be her Authorized Treating Provider ("ATP").

3. In the event the claim is found compensable and the surgery determined to be reasonably necessary and related, Respondents have agreed to pay all wage loss benefits owed to Claimant. However, if the surgery is found to be not reasonably necessary and/or related, Respondents challenge Claimant's entitlement to wage loss benefits beginning once Claimant started missing work for her January 25, 2023 surgery. Temporary Total Disability (TTD) dates extend from November 15, 2022 to March 31, 2023.

These stipulations are approved.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable injury to her right shoulder while engaged in her work duties as a medical tech/phlebotomist for Employer on November 10, 2022?

II. Whether Claimant established, by a preponderance of the evidence, that her need for right shoulder surgery was causally related to her alleged November 10, 2022 work injury?

III. If the answer to questions 1 and 2 is yes, did Claimant also prove that the right shoulder surgery performed by Dr. Sean Kelly on January 15, 2023 was reasonably necessary to cure and relieve her from the effects of her November 10, 2022 industrial injury?

IV. If the answer to question 1 is yes, did Claimant prove that she suffered a wage loss as a direct and proximate result of the November 10, 2022 industrial injury?

FINDINGS OF FACT

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

1. Claimant works as a medical tech/phlebotomist for Employer. In addition to her customary work for Employer, Claimant is frequently assigned by Employer to work as a contract employee at [Redacted, hereinafter VH] medical facilities to draw blood from patients in their care.

2. Claimant testified that she was attempting to draw a patient's blood on November 10, 2022, when she injured her right shoulder. Claimant explained that the patient's veins were difficult to see and feel making the draw particularly challenging. (Hrg. Trans., p. 19, ll. 9-11). Because no veins were "popping" up despite the use of a tourniquet on the upper arm, the patient suggested that Claimant place a hot pack on her hand and try to take the blood sample from there. *Id*. at ll. 18-19. Accordingly, the tourniquet was moved to the patient's wrist and Claimant got up from her work station to retrieve the hot pack. (Hrg. Trans., p. 19, ll. 21-22; p. 20, ll. 5-6).

3. Upon returning to her work station, Claimant placed the hot pack toward her right side on the desk directly in front of her. She then sat down and turned slightly to her left to face the patient. While taking to her patient, Claimant flexed her right elbow and raised her arm up and outward from her body in preparation of striking the hot pack to activate it. (Hrg. Trans., p. 34, ll. 13-25 – p. 37, ll.1-9). Based upon Claimant's testimony and her in-court demonstration, the ALJ finds that her right shoulder was only marginally abducted away from the body during the incident in question. Nonetheless, the shoulder was flexed sufficiently to place her right hand/fist at about the level of her chin.[1] (Hrg. Trans., p. 39, ll. 6-22).

4. With her arm raised, Claimant made a fist with her right hand and forcefully[2] brought her arm straight down, striking the hot pack with a "hammer punch" to initiate the chemical reaction between the substances inside. (Hrg. Trans., p. 21, ll. 21-25). Claimant testified that after striking the pack, she "felt a sharp pain and heard a pop". (Hrg. Trans., p. 22, ll. 1-3). She described the initial pain feeling like a "tetanus shot" on the side of the arm, which subsequently gave way to soreness "inside" the shoulder joint with tingling down the arm. *Id*. at p. 22, ll. 4-23. Claimant testified that she was initially unable to rate her pain on a scale of 1 to 10 because it "surprised" her and she was absorbed in patient care. *Id*. at p. 22, ll. 24-25; p. 23, ll. 1-3.

5. Claimant has a remote history of injury to the right shoulder as a consequence of a motor vehicle accident (MVA) occurring approximately 10-15 years

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[1] During her demonstration Claimant was only able to raise (flex) the arm to the level of the shoulder because it was "still sore" following surgery. (Hrg. Trans., p. 39, ll. 6-12).

[2] Dr. Miguel Castrejon estimated that a moderate amount of force was involved in striking the hot pack based upon the amount of noise elicited by Claimant when she "thump[ed]" the examination table when demonstrating how hard she hit the hot pack. (Claimant's Hearing Exhibit (CHE) 13, p. 127).

ago. (Respondents' Hearing Exhibit (RHE) I, p. 35).[3] Following this MVA, Claimant developed shoulder pain necessitating physical therapy and injections. *Id.* Conservative care failed to relieve her pain. Consequently, Claimant was taken to the operating room where she reported that a "spur" was removed by Dr. Jenkins. *Id.* Claimant did well postoperatively with physical therapy. *Id.* Indeed, Claimant reportedly made a full recovery following this injury. (CHE 13, p. 129). She testified that she had no physical restrictions following her 2005 injury and was not experiencing any pain/dysfunction in her right arm/shoulder until the alleged November 10, 2022 incident. (Hrg. Trans., p. 17, ll. 3-10).

6. Claimant attempted to draw the patients' blood two times. She missed the vein each time and failed on both attempts. Pursuant to company policy, she was not allowed to make a third attempt. Consequently, the patient had to wait for different technician draw to her blood. The second tech, ([Redacted, hereinafter LE]) arrived between 1:00 and 1:30 p.m. to finish the draw. Claimant reported the incident and her injury to LE [Redacted] at that time. Despite her alleged injury, Claimant was able to complete her shift at 4:00pm that day. She returned home and notified her supervisor, "[Redacted, hereinafter HK]," via email that evening that she "hurt [her] shoulder and [she] needed to know what he wanted [her] to do". (Hrg. Trans., p. 23, ll. 4-25, p. 24, ll. 1-25).

7. Claimant testified that HK[Redacted] gave her a phone number for "Occupational Health" and instructed her to call the clinic for treatment. Claimant testified that she called the clinic "immediately" to make an appointment. Claimant's attempt to schedule an appointment failed as she was unable to reach anyone at the designated phone number. Accordingly, she left a voice mail message with the clinic and emailed HK[Redacted] advising him of the same. HK[Redacted] acknowledged the email by indicating that he hoped she heard back from the clinic soon. (Hrg. Trans., p. 25, ll. 1-7).

8. After a day off for the Veteran's Day Holiday on Friday, November 11, 2022, Claimant worked her entire shift on Saturday, November 12, 2022. (Hrg. Trans., p. 25, ll. 8-16). She testified that she was able to complete her November 12th work shift in pain at a reduced work pace. *Id*. at ll. 22-24. Claimant does not work Sundays and was thus off work on November 13, 2022. (Hrg. Trans., p. 26, ll. 5-10).

9. Because the Occupational Health Clinic had not called Claimant back as of Monday morning, November 14, 2022, she testified that she approached her supervisor at VH[Redacted], "[Redacted, hereinafter ME]" and informed her that her shoulder was getting worse. (Hrg. Trans. p. 26, ll. 11-19). Claimant also informed "ME[Redacted]" that she had still not heard back from the clinic. *Id*. at ll. 19-20. Claimant's was later able to get in touch with HK[Redacted] and after speaking with him, her work shift was cut short so she could attend a medical appointment at

[3] Both Dr. Mark Kelly and Dr. Castrejon acknowledge a history of prior injury and surgery to the right shoulder in 2005 due to an MVA wherein Claimant was rear-ended by a drunk driver. (RHE G, p. 24; CHE 13, p. 129).

VH[Redacted] in Denver. (Hrg. Trans., p. 27, ll. 4-10). Although she did not know who, Claimant testified that either HK[Redacted] or ME[Redacted] was able to set the appointment to have her shoulder evaluated at the VH[Redacted] Hospital in Denver. *Id*. at ll. 11-13.

10. Claimant proceeded to VH[Redacted] in Denver where she saw a provider identified as C.L. Reiminis, whose medical qualifications are unclear. (RHE B, p. 7; CHE 9, p. 67). The "Report of Employee's Emergency Treatment" completed during this encounter documents that Claimant was there for an "on the job injury occurring November 10, 2022. *Id.* Claimant was instructed to return to modified duty (limited mobility) with restrictions of no lifting greater than two pounds with her right arm on November 17, 2022. *Id.* Claimant has not returned to work since starting her shift on November 14, 2022.

11. Because Claimant's alleged November 10, 2022 injury occurred in one of the VH's[Redacted] medical treatment facilities[4], there was confusion surrounding her ability to treat through the VH[Redacted] system. Claimant testified that while she was in the waiting room at the VH[Redacted] Hospital in Denver on November 14, 2022, she was provided with a pamphlet containing information about the federal workers' compensation system. Claimant was instructed to call the telephone number provided in the pamphlet. (Hrg. Trans., p. 27, ll. 16-24). She did so while waiting to be seen. As part of this telephone call, Claimant confirmed that she was not a federal employee. She then advised the clinic staff at the hospital that because she was not a federal employee, treatment through the VH[Redacted] system was not valid for her. *Id*. Claimant testified that she was then advised to contact her primary care provider (PCP) for treatment.

12. Claimant made an appointment with her PCP, Sherri Turner-Lloyd for November 15, 2022 from the waiting room at the VH[Redacted] Hospital. Ms. Turner-Lloyd is a Physician Assistant (PA) working for the Centura Health System.

13. Claimant's November 15, 2022 appointment was "conducted using two-way real time video conferencing between [PA Turner-Lloyd's] location and [Claimant's] location. (RHE C, p. 8; CHE 10, p. 68). PA Turner-Lloyd obtained the following history from Claimant:

> [Claimant] presents via telemed video for shoulder pain. [Claimant] works at the lab at VH[Redacted]. She went to get a warm pack and slammed the ice (sic) pack with her R (right) hand and felt a pop and burning sensation in her shoulder. . . . She can't raise her shoulder or internally rotate without pain. She did get a call from Reiminis at VH[Redacted], the PA there. She was seen by them and had x-rays done. Her x-ray was negative. The VH[Redacted]

[4] According to the Employer's First Report of Injury, the injury occurred at the [Redacted, hereinafter PC]. (CHE 5, p. 12).

> referred her to her PCP. She was started on Ibuprofen 800 mg 3x a day and capsaicin cream TID prn.
>
> The pain is in the posterior shoulder and to lateral outer shoulder. She is having more pain in the posterior upper arm and proximal bicep. Very limited internal rotation and no pain with adduction. Pain with extension and abduction. Some tinging in her fingers, 1st 3 digits.

(RHE C, p. 9). PA Turner-Lloyd suspected internal derangement of the right shoulder. Id. at p. 8. She ordered an MRI. *Id.*

14. Claimant returned to PA Turner-Lloyd for an in-person examination on November 18, 2022. (RHE D, p. 11). The note from this encounter details that Claimant was "dismissed/released" from care through VH[Redacted] and that she "does not have [a] Workmen's Comp. provider available to her". *Id.* It was further noted that Claimant was scheduled for an MRI the following week and that paperwork was completed keeping Claimant out of work until her MRI was complete, a diagnostic impression was made and treatment completed. *Id.* (See also, RHE D, pp. 14-15). However, a note from seemingly the same date stated that Claimant could first return from leave on April 1, 2023. *Id.* at pp. 16-17. Regardless, the evidence presented supports a finding that Claimant was restricted from working in any capacity by her PCP beginning November 18, 2022, through at least April 1, 2023. *Id.* Finally, PA Turner-Lloyd's November 18, 2022 report indicates that she referred Claimant to an orthopedist for further evaluation. (RHE D, p. 11).

15. The aforementioned MRI was performed on November 26, 2022, 16 days after the alleged injury. (RHE E, pp. 18-19). MR imaging demonstrated the following findings:

- A Type II curved acromial morphology.
- Smooth acromial undersurface scalloping consistent with previous acromioplasty.
- An anterior acromial spur at the coracoacrominal ligament attachment.
- Mild hypertrophic osteoarthritic changes within the right AC joint with inferiorly directed spurring and effusion.
- A small volume of fluid within the subacromial-subdeltoid bursa.
- Age related tendinosis and delamination within the supraspinatus tendon.
- Mild bursal surface relation within the proximal supraspinatus tendon below the lateral acromion.
- No evidence of full or partial thickness tearing.
- Normal appearing infraspinatus, teres minor and subscapularis tendons.
- Normal rotator cuff muscle belly volume and signal.

- A physiologic volume of fluid within the glenohumeral joint.
- Normal appearing glenohumeral articular cartilage.
- No evidence of synovitis.
- Intact biceps anchor and superior labrum.
- Probable chronic attritional changes within a diminutive posterior labrum.
- A probable small spur along the inferior aspect of the posterior glenoid.

(RHE E, p. 18). The above referenced findings were interpreted by radiologist, Dr. John Campbell. *Id*. at p. 19. Upon review of the above referenced findings, Dr. Campbell reached the following impressions:

- Probable postoperative changes of previous acromioplasty within the right shoulder. Mild osteoarthritic changes within the right AC joint with inferiorly directed spurring.
- Trace fluid within the subacrominal bursa which can be a source of pain.
- Negative for partial or full thickness tear within the rotator cuff tendons. Normal muscle belly volume.
- The posterior labrum is diminutive likely reflecting chronic attritional changes. The findings can be seen in association with repetitive overhead abduction activities related to occupational or recreational activities. Small spur is also seen along the inferior aspect of the posterior glenoid.

Id.

16. Claimant returned for a follow-up visit with PA Turner-Lloyd on December 1, 2022. PA Turner-Lloyd commented on the results of Claimant's November 26, 2022 MRI as follows: "MRI did confirm labral degeneration but no acute tear. No partial or full thickness rotator cuff tear. Did note some mild bursitis. Follow-up with orthopedics as planned". (RHE F, p.21). PA Turner-Lloyd "suspected" that Claimant "triggered an inflammatory response at work". *Id*. PA Turner-Lloyd continued Claimant's "out of work" status until she could be seen by orthopedics and further treatment recommendations outlined. *Id*.

17. Claimant underwent evaluation with orthopedist, Dr. Sean Kelly, on December 5, 2022. (RHE. Ex. G). Dr. Kelly documented the following history of injury: "[Claimant] states that she was trying to break a heating pad with her fist and felt pain". *Id*. at p. 24. Dr. Kelly disagreed with the reading of Claimant's right shoulder MRI reporting that it showed "some partial bursal-sided tearing". *Id*. Dr. Kelly ordered a set of x-rays which did not show any "focal bony abnormalities or obvious osseous defects, but did demonstrate "[m]oderate AC Joint arthrosis . . ." Id at pp. 28-29. Following his physical examination, Dr. Kelly opined that Claimant had a right rotator cuff tear. (RHE G, p. 24). He was unsure of the extent of tearing or whether the tear was traumatic in

nature. *Id.* He also felt that Claimant was suffering from right biceps tendinitis, adhesive capsulitis and arthrosis of the right AC joint. *Id*. He recommended surgical intervention as the "next step". *Id.* In the interim, Dr. Kelly "initiated" a physician guided physical therapy (PT) program as of the date of this appointment. *Id*. He then scheduled Claimant's surgery for Wednesday, January 25, 2023. (RHE G, p. 30).

18. Claimant returned for an appointment with PA Turner-Lloyd on December 23, 2022. PA Tuner-Lloyd noted that Claimant had been seen by orthopedics and surgery was recommended for what PA Turner-Lloyd noted was a "labral tear of the right shoulder confirmed by orthopedics and MRI". (RHE H, p. 31). PA Turner-Lloyd noted that injections and PT were discussed as well. *Id.* Finally, PA Turner-Lloyd indicated that Claimant was to "remain out of work until surgery and for an additional 4 to 6 weeks after surgery for recovery" and that "paperwork" was completed for Claimant's "tentative return to work on April 1". *Id.*

19. Claimant underwent an Independent Medical Examination (IME) with Dr. Mark Failinger at the request of Respondents on January 16, 2023. (RHE I, pp. 34-42). Dr. Failing documented the following history of present illness:

> [Claimant] states that when she hit the heating pad with some force, she felt a sharp pain that went 'up my arm' and she heard a pop. She was not able to tell where the pop occurred. She states that she noted pain in her right hand that radiated all the way up her arm to her shoulder. She describes the pain as aching and discomfort, and initially rated the pain as only being mild".

(RHE I, p. 35).

20. Claimant also reported that despite a prior injury and surgery to the right shoulder, she was not having "subsequent problems (with the shoulder) until the incident of November 10, 2022". (RHE I, p. 35). Physical examination, including strength and provocative maneuver (Hawkins, O'Brien's, and Speed's) testing was limited due to pain behaviors.[5] *Id.* at p. 38. Following his physical examination and records review, Dr. Failinger answered the one question posed to him, specifically whether Claimant's described mechanism of injury (MOI) could cause labral degeneration with no acute tearing noted. *Id*. at p. 41.

21. Dr. Failinger opined that the MOI could not have caused labral degeneration and would not reasonably cause any acute labral tear. He found Claimant's report of pain in the shoulder after striking the hot pack with mild to moderate force "most unusual", opining that "[t]he development of such pain would not reasonably be due to any pathology created in the shoulder by hitting a heat pack". (RHE I, p. 41). He concluded that the "forces of activating a heat pack, unless the pack was hit by a fist with tremendous force, could not create any pathology in the shoulder of any

[5] PA Turner-Lloyd was also unable to perform provocative maneuver testing secondary to complaints of pain when evaluating Claimant on November 18, 2022. (RHE D, p. 12).

significance". *Id.* Given that Claimant's reported pain levels were "so out of proportion to any pathology that could have . . . remotely been created", Dr. Failinger raised concern for the presence of non-organic factors. *Id*.

22. Dr. Failinger opined that Claimant's MRI findings failed to support a conclusion that she sustained an acute injury to the right shoulder. (RHE I, p. 41). Moreover, he concluded that the findings on the November 26, 2022 MRI did not "reasonably explain [Claimant's] severe symptoms". *Id.* Dr. Failinger found Dr. Kelly's interpretation of the November 26, 2022 MRI and his decision to proceed with surgery in a patient whose pain complaints were so out of proportion to the MOI and MRI findings "puzzling". *Id*. Given the possible neurologic symptoms, e.g. numbness/tingling Claimant was reporting, Dr. Failinger noted that it would not be advisable to proceed with surgery without first determining whether Claimant's symptoms were emanating from her shoulder or her neck, especially in a case where the reported pain levels were "dramatically" out of proportion to the findings on MRI. *Id* at p. 42.

23. Claimant returned to Dr. Kelly the day after her IME with Dr. Failinger. (RHE J, pp. 43-48). Dr. Kelly again noted that he disagreed with the findings of the radiologist, because he could "appreciate some partial bursal sided tearing of the supraspinatus. *Id.* at 44. He also noted that Claimant had "failed conservative treatment with physical therapy and injections". *Id.* Accordingly, he asserted that Claimant wanted to proceed with surgery. *Id.*

24. Claimant testified that Dr. Kelly's indication that she failed conservative care with physical therapy and injections as written in his January 17, 2023 report was inaccurate since she did not undergo any conservative treatment prior to surgery. (Hrg. Trans., p. 42, ll. 17-25, p. 43, ll. 1-17).

25. Claimant underwent a right arthroscopic rotator cuff repair with a BioInductive Implant, a right arthroscopic biceps tenodesis, a right distal clavicle resection, and extensive debridement of the right shoulder, including the labrum with Dr. Kelly at the Audubon Surgery Center on January 26, 2023. (RHE K, pp. 49-50). Pictures of Claimant's arthroscopy were obtained during the procedure and included in the exhibits admitted into evidence. (CHE 10, pp. 103).

26. Claimant underwent an IME with Dr. Miguel Castrejon on April 26, 2023 at the request of Claimant's counsel. (CHE 13, pp. 126-136). Dr. Castrejon took a detailed history from Claimant, including a description of her pre-injury job duties. *Id.* at 126. He noted this particular job required occasional lifting of up to 50 pounds. *Id.* As referenced above, Claimant demonstrated the MOI for Dr. Castrejon, which he concluded directed moderate force to the right shoulder. *Id.* at 127.

27. Dr. Castrejon reviewed the November 26, 2022 MRI report. He concluded that the degenerative changes and pathologic findings explained in the report pre-existed Claimant's alleged November 10, 2022 injury. *Id.* at p. 131. Nonetheless, he opined that the MOI described by Claimant "aggravated" these pre-existing changes

and “led to the development of impingement and rotator cuff pathology that required treatment at the time of surgery”. *Id.* Dr. Castrejon restated his commitment to this opinion later in his IME report as evidenced by his remark that when the moderate force associated with the MOI in this case was directed to a shoulder with preexisting surgery and degenerative changes, Claimant’s underlying preexisting condition was, in all medical probability, aggravated and this MOI caused the rotator cuff tear that was found and repaired by Dr. Kelly at the time of surgery. *Id.* at p. 133. In support of his opinion, Dr. Castrejon notes that during the approximate seven year period that Claimant worked as a medical assistant prior to November 10, 2022, “there is no documentation available that would support any ongoing shoulder symptoms, need for medical treatment or limitation in work or non-work activities as a result of the 2005 shoulder surgery”. *Id.*

28. Dr. Failinger testified at hearing as a Board Certified, Level II accredited orthopedic and sports medicine surgeon. (Hrg. Trans., p. 47, ll. 16-25, p. 47, ll. 14-18). He has extensive experience in treating disorders of the shoulder having examined between 50,000 to 60,000 patients for shoulder problems over the course of his career. *Id.* at p. 47, ll. 5-7.

29. Dr. Failinger testified that when he examined Claimant, she complained of pain so diffuse that he was unable to “localize an area that was probably the source of [her] pain” nor could Claimant identify the primary location of her pain. (Hrg. Trans., p. 49, ll. 18-25). Dr. Failinger testified that the MOI Claimant described could not have caused tearing of the supraspinatus. Id. at p. 53, ll. 17-20. Dr. Failinger explained that the rotator cuff consists of a collection of four muscles and their tendons that work together, as a unit to raise, lower and rotate the arm about the shoulder joint. *Id*. at p. 54, ll. 19-25. These muscles include the supraspinatus, infraspinatus, teres minor and the subscapularis. *Id.* Dr. Failinger testified that the supraspinatus is the upper most muscle of the four on top of the shoulder and when it is firing (contracting) it helps raise the arm up and away from the body. *Id.* at p. 57, ll. 6-19. Conversely, there are muscles that assist in lowering the arm from a raised position. These “humeral depressors” and include the latissimus and the pectoralis major primarily. *Id*. at p. 55, ll. 20-25, p. 56, ll. 1-4. In order to lower the arm in a striking motion, the supraspinatus must relax as the humeral depressors fire to bring the arm downwards with force. If the supraspinatus does not relax, the arm can come down. *Id*. at p. 57, ll. 6-14. Dr. Failinger testified that it would be “impossible” for the supraspinatus tendon to be contracted during the act of striking the hot pack. *Id.* at p. 57, ll. 20-21. Because the supraspinatus muscle is not activated in the downward motion of striking the hot pack as described by Claimant, Dr. Failinger implied that no forces were transferred to the muscle tendon. Therefore, Dr. Failinger testified that the MOI is not one which would cause tearing or an aggravation of a pre-existing tear in the supraspinatus tendon. *Id.* at p. 57, ll. 20-25, pp. 58-59, ll. 1-7, p. 63, ll. 1-14. Dr. Failinger testified that Dr. Kelly’s surgical report supports a conclusion that the small tearing (fraying) in the supraspinatus was probably the result of the tendon rubbing against the bone spurring visualized during surgery as Claimant raised and lowered her arm. *Id*. at p. 68, ll. 9-22.

30. Dr. Failinger testified that there was no evidence on the MRI or in Dr. Kelly's surgical report of biceps pathology. (Hrg. Trans., p. 61, ll. 1-3). Accordingly, he testified that there was no explanation for the surgery directed to the biceps. *Id.* at ll. 3-4.

31. Dr. Failinger testified the surgery was not reasonable, necessary, and related, to the alleged incident nor did it follow the medical treatment guidelines. (Hrg. Trans., p. 76, ll. 15-25, p. 77, 1-8, p. 80, ll. 9-25, p. 81, ll. 1-15).

32. WCRP, Rule 17, Exhibit 4: Shoulder Injury Medical Treatment Guidelines provide the following regarding the surgical indications for bicipital tendon disorders and rotator cuff syndrome:

> Bicipital Tendinitis: Conservative care prior to potential surgery must address flexibility and strength imbalances. Surgery may be considered when functional deficits interfere with activities of daily living and/or job duties after 12 weeks of active patient participation in non-operative therapy. (See, WCRP Rule 17, Exhibit 4 (E) (3)).
>
> Rotator Cuff Tear:
>
> Rule 17, Exhibit 4 (E) (10) (e) (i-vi): Non-operative Treatment Procedures:
>
> > i. Medications, such as nonsteroidal anti-inflammatories and analgesics, may be indicated. Acute rotator cuff tear may indicate the need for limited opioids use.
> >
> > ii. There is some evidence that intra-articular triamcinolone provides pain relief for up to 3 months in elderly patients with full thickness rotator cuff tears, and that a single injection is likely to be as beneficial as two injections.
> >
> > iii. There is some evidence that in the setting of supraspinatus tendinosis or partial thickness tears less than 1 cm in size, either dry needling or an injection of 3 ml of platelet-rich plasma (PRP) have clinical benefits lasting up to 6 months, and that the benefits of PRP appear to be greater than those for dry needling. Dry needling has not been proven to be an efficacious therapy for supraspinatus tendinitis. There is good evidence that in the setting of rotator cuff tendinopathy, a single dose of PRP provides no additional benefit over saline injection when the patients are enrolled in a program of active physical therapy. There is strong evidence that platelet rich therapy does not show a clinically important treatment effect for shoulder pain or function when given as an adjunct to arthroscopic rotator cuff repair. However, at present, there is also a lack of standardization of platelet

preparation methods, which precludes clear conclusions about the effect of platelet-rich therapies for musculoskeletal soft tissue injuries. Therefore, PRP is not generally recommended except under specific circumstances. Refer to Section F. 4, b., Platelet-Rich Plasma.

iv. Relative rest initially and procedures outlined in Section F. Therapeutic Procedures - Non-operative. Therapeutic rehabilitation interventions may include ROM and use of a home exercise program and passive modalities for pain control. Therapy should progress to strengthening and independent home exercise programs targeted to ongoing ROM and neuromuscular re-education of shoulder girdle musculature. Maladaptive compensatory strain patterns should always be addressed. There is some evidence that in patients over 55 with nontraumatic small tears of the supraspinatus tendon, an intervention of home exercise supervised by a shoulder-trained physiotherapist, may be as beneficial at one year as the same physiotherapy program initiated after acromioplasty or acromioplasty with repair of the rotator cuff.

v. Return to work with appropriate restrictions should be considered early in the course of treatment. Refer to Section F.13. Return to Work. The injured worker should adhere to the written work restrictions not only in the workplace, but at home and for 24 hours per day.

vi. Other therapies outlined in Section F. Therapeutic Procedures - Non-operative, may be employed in individual cases.

f. Surgical Indications:

Goals of surgical intervention are to restore functional anatomy by re-establishing continuity of the rotator cuff, addressing associated pathology and reducing the potential for repeated impingement. If no increase in function for a partial tear is observed after 6 to 12 weeks, a surgical consultation is indicated. For full-thickness tears, it is thought that early surgical intervention produces better surgical outcome due to healthier tissues and often less limitation of movement prior to and after surgery. Patients may need pre-operative therapy to increase ROM.

33. Based upon the evidence presented, the ALJ finds that Dr. Kelly failed to follow the non-operative treatment guidelines before recommending and proceeding with surgical intervention on January 26, 2023.

34. During cross-examination, Dr. Failinger testified that he was unaware of what caused Claimant to develop pain because her pain was so diffuse. (Hrg. Trans., P. 90, ll. 17-19. He also testified that it was reasonable to infer that a muscle in the lower rotator cuff (infraspinatus) or the pectoralis or latissimus or even the distal triceps could have been strained resulting in symptoms. *Id*. at p. 91, ll. 10-20.

CONCLUSIONS OF LAW

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

Generally

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

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

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). In this case, there is little question that Claimant has established that her alleged right shoulder injury occurred within the time and place limits of her employment and during an activity connected to her job-related duties as a phlebotomist for Employer. Nonetheless, the question of whether Claimant's alleged shoulder injury arose out of the alleged MOI on November 10, 2022, must also be answered affirmatively before the claimed injury can be determined to be compensable.

E. The existence of a causal relationship between Claimant's MOI and her right shoulder/arm condition is a question of fact. *F.R. Orr Construction v. Rinta, 717 P.2d 965 (Colo. App. 1985).* The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). In this case, the evidence presented fails to convince the ALJ that Claimant has established a causal relationship between her November 10, 2022 work duties and her right supraspinatus tearing, biceps tendinitis, adhesive capsulitis and/or right AC joint arthrosis. Based upon the evidence presented, the ALJ is not persuaded that Claimant's right shoulder symptoms and need for surgery are related to the November 10, 2022 incident involving the hot pack. Here, the evidence presented supports a finding that Claimant's right shoulder rotator cuff tear, AC joint arthrosis and labral tearing were pre-existing and chronic in nature. With respect to Claimant's right shoulder symptoms and need for treatment, the ALJ credits the testimony of Dr. Failinger to find that record does not describe any activity, which would likely result in an acute injury to or aggravation of a pre-existing condition involving the upper rotator cuff, specifically the supraspinatus, the biceps, or the labrum giving rise to Claimant's symptoms. While it is possible that Claimant's right shoulder symptoms could be caused by strain of the lower potions of the rotator cuff, i.e. the infraspinatus or the pectoralis or latissimus, Claimant failed to establish with a reasonable degree of medical probability that any of these anatomical structures were injured and therefore, are the probable source of her pain. Rather, the evidence presented supports a conclusion that Claimant's right shoulder symptoms probably represent the natural progression of the underlying pre-existing pathology revealed on her MRI.

F. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d

999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or combines with" a pre-existing infirmity or disease to produce disability or the need for treatment for which workers' compensation is sought. *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by employment related activities and not an underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

G. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, as eluded to by Respondents, the occurrence of symptoms following an incident at work may represent the natural progression of a pre-existing condition that is unrelated to Claimant's employment related duties. *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). As found here, the ALJ credits the opinions of Dr. Failinger to conclude that Claimant's right shoulder symptoms and need for treatment, including surgery, is probably related to and emanating from the natural progression of her pre-existing right shoulder condition, i.e. supraspinatus fraying, bicipital tendonitis AC joint arthrosis and labral tearing/degeneration rather than an acute injury/or aggravation experiencing while activating a hot pack. While Claimant's belief that her right shoulder symptoms were caused by the incident involving the hot pack is sincere, there simply is insufficient forensic evidence to connect her MOI to her current right shoulder symptoms and need for surgical intervention. Consequently, the ALJ concludes that Claimant has failed to prove, to a reasonable degree of medical probability, that her alleged right shoulder injury arose out of the November 10, 2022 incident involving the activation of a hot pack. Because Claimant has failed to establish the requisite causal connection between her employment and her alleged injury, her claims for benefits, including medical treatment and lost wages, must be denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove, by a preponderance of the evidence, that she sustained compensable injuries to her right shoulder as a consequence of her November 10, 2022 work duties. Accordingly, Claimant's claim for medical benefits, including the January 26, 2023, right shoulder surgery performed by Dr. Kelly is denied and dismissed.

2. Claimant's request for TTD benefits is denied and dismissed.

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

DATED: July 31, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-199-142-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that the situs of claimant's left upper extremity's functional impairment causally related to this claim's injury is above claimant's left arm at the shoulder, and that claimant's impairment rating should be converted from the scheduled 25% impairment of the left arm at the shoulder as found by the ATP to 15% of claimant's whole-person.

2. Whether Claimant, as a result of his July 13, 2022 injury, has been seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view, so as to entitle him to a disfigurement award.

FINDINGS OF FACT

1. Claimant was a rocker framer for Respondent-Employer who injured his left shoulder on January 13, 2022, when he tripped on a raised concrete curb and landed on his left shoulder.

2. Claimant sought treatment at Midtown Occupational Health Services with Dr. Kirk Holmboe, on January 26, 2022. Dr. Holmboe referred Claimant for a left shoulder MRI.

3. On February 4, 2022, Claimant underwent an MRI of his left shoulder. The MRI showed "full-thickness partial supraspinatus and infraspinatus tendon tearing with medial retraction of the tendons," among other pathologies. Based on the results of the MRI, Claimant was referred to Dr. Douglas Foulk at Panorama Orthopedics and Spine Center.

4. Dr. Foulk recommended a left shoulder arthroscopy with rotator cuff repair, subacromial decompression, and debridement, which Claimant underwent with Dr. Foulk on March 3, 2022.

5. Claimant began physical therapy for his left shoulder on April 7, 2022, at Midtown. At that appointment, Claimant reported pain in the anterior shoulder and in the distal biceps. Claimant also complained of pain with palpitation on the anterior deltoid, pectoralis minor, and upper trapezius. On cervical side-bending and rotation, Claimant exhibited tightness. The therapist also noted that Claimant exhibited poor eccentric control of the scapula, a tight pectoralis minor, and a tight subscapularis. The therapist performed soft tissue mobilization of the upper trapezius, the levator scapulae, pectoralis minor, and biceps. Claimant also

performed stretches of the upper trapezius and levator scapulae as well as "scap squeezes."

6. Throughout Claimant's treatment, Claimant's complaints included left elbow tingling and numbness and weakness in his fingers and hand. Claimant also continued to receive treatment for his pectoralis, upper trapezius, and scapula over the course of his physical therapy.

7. On August 26, 2022, Claimant underwent electrodiagnostic testing of the left arm. The results were "[e]ssentially normal."

8. At Claimant's September 16, 2022 visit with Dr. Lon Noel at Midtown, Dr. Noel observed limited range of motion of Claimant's cervical spine. Dr. Noel also found tenderness to palpitation on the midline of Claimant's cervical spine, as well as tenderness and tightness of his left sided paracervical musculature extending into his trapezius ridge area. Dr. Noel again noted limited range of motion with tenderness to palpitation in the midline and tightness in the left trapezius area at the September 26, 2022 appointment.

9. On November 22, 2022, Dr. Noel determined Claimant had reached maximum medical improvement with a 25% upper extremity impairment rating. The impairment consisted of 21% for loss of active range of motion at the shoulder and 5% for acromial coplaning. He noted that the scheduled rating, if converted to a whole-person impairment rating, would be 15% of the whole person. Dr. Noel also recommended some maintenance medical care and provided Claimant with permanent work restrictions of no lifting or carrying more than ten pounds and no overhead work.

10. Respondents filed a Final Admission of Liability (FAL) on December 7, 2022, consistent with Dr. Noel's MMI determination, impairment rating, and maintenance recommendation. Claimant filed an AFH requesting conversion of the scheduled impairment rating to a whole-person rating.

11. Dr. John Burris performed an independent medical examination (IME) and issued a report on April 25, 2023, at Respondents' request. Claimant described his mechanism of injury and history of treatment to Dr. Burris. Claimant reported to Dr. Burris that he would primarily use his right hand for routine household chores and that he had some difficulty showering and dressing due to pain in his left shoulder with reaching. Claimant also reported to Dr. Burris that as of the date of the IME Claimant was experiencing pain diffusely from the left side of his neck, through the left posterior shoulder and shoulder blade, and along the left side of his spine to his left low back region. Claimant rated the pain at seven out of ten. The Court finds that Claimant's statements made to Dr. Burris were credible, as was Dr. Burris's account of Claimant's statements.

12. In his report, Dr. Burris opined that Claimant's functional impairment was "limited to at or below the left arm at the shoulder." Dr. Burris reasoned that "objective diagnostic testing, including a cervical spine MRI and left upper extremity EMG do not identify any work-related pathology proximal to the left shoulder." This was despite the MRI showing rotator cuff tears. Dr. Burris also felt that Claimant exhibited a nonphysiologic presentation, opining that Claimant's pain complaints were "out of proportion to the nature of his . . . condition and the documentation in the records." He felt that the examination was impeded by "extreme somatic focus, pain behaviors, and numerous inconsistencies." Based on this, Dr. Burris felt that Claimant's subjective complaints were unreliable. Having excluded subjective complaints, Dr. Burris opined that the objective testing did not reveal any functional impairment of the shoulder proximal to the arm. Based on the totality of the evidence, the Court does not find Dr. Burris's opinions credible or persuasive.

13. At hearing, Claimant credibly testified his shoulder caused pain that ran up his neck, the side of his head, and down to the scapula, and that his injury affects his ability to sleep, do grocery shopping, clothe himself, and clean himself. He also credibly testified that his inability to work overhead prevents him from working as a carpenter like he had prior to the injury. The Court finds that Claimant's functional impairment manifests in inhibiting Claimant's ability to meet some of his personal needs and to pursue the profession as a carpenter.

14. Claimant also revealed at hearing that he had been working a new job for his brother's towing business since the fall of 2022. As part of the job, Claimant would drive a flatbed tow truck that he kept parked at his home and he would tow disabled vehicles. Claimant would respond to calls at all hours and would sometimes work alone.

15. Claimant also testified at hearing that he had a shoulder slump as a result of the injury, which he showed to the Court. The Court observed a left shoulder slump of about one inch. Claimant also showed the Court four arthroscopic scars on the left shoulder. The top one was about 0.5 x 0.25 inches and somewhat discolored. Another scar was 0.5 x 0.25 inches, and another on the back of the shoulder was 0.25x 0.25 inches. On top of the shoulder was a very light scar that was 0.625 x 0.25 inches.

16. The Court finds Claimant's testimony credible.

17. Dr. Burris also testified at hearing. Dr. Burris testified that Claimant's range of motion and responses to palpation were vastly different and inconsistent when Claimant's was actively being examined and when he was not being formerly examined by Dr. Burris. He explained during his hearing testimony that Claimant would flex his neck to look down at Dr. Burris who was seated below Claimant without difficulty or limitation and he would fluidly and easily turn his head to the left and right when talking with Dr. Burris and the interpreter during the examination. However, Dr. Burris testified that during formal range of motion

testing, Claimant would not flex his cervical spine downwards, and his right and left turning motion were markedly reduced as compared to his movements when talking with the interpreter and Dr. Burris.

18. In response to Claimant's testimony about his new job operating a tow truck, Dr. Burris testified that Claimant did not disclose that job to him at the IME. Dr. Burris felt that Claimant would not be able to perform the tasks associated with that work if Claimant's limitations, symptoms, and complaints voiced at the IME were true.

19. The Court does not find Dr. Burris's testimony or opinions expressed in his IME report credible.

20. Because of his work injury, Claimant has functional impairment that is not fully enumerated on the schedule of injuries involving the loss of an arm at the shoulder. Claimant proved by a preponderance of the evidence that he suffered functional impairment to his left shoulder not listed on the schedule of disabilities.

21. Based on Claimant's testimony and the records submitted at hearing, Claimant underwent surgery to his left shoulder. That surgery caused visible disfigurement to his body consisting of four arthroscopic portal scars as described above. Claimant also has a disfigurement consisting of a one-inch left shoulder slump arising from his 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).

Whole-person Conversion

The ALJ is the finder of fact on the question of whether the Claimant sustained a "loss of an arm" within the meaning of schedule of disabilities in § 8-42-107(2)(a), C.R.S., or a whole person rating under § 8-42-107(8)(c), C.R.S. *Strauch v. PSL Swedish Healthcare System,* 917 P. 2d 366, 369 (Colo.App.1996). In resolving this question, the ALJ must determine the situs of the Claimant's "functional impairment," and the situs of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp*., 937 P.2d 883, 884 (Colo.App.1996)*; Strauch* at 368-369.

Injury is the manifestation in part or parts of the body which been impaired or disabled as a result of the industrial accident. *Mountain City Meat v. ICAO,* 904 P.2d 1333 (Colo. App. 1995). The part of the body that sustains the ultimate loss is not necessarily the particular part of the body where the injury occurred. *McKinley v. Bronco Billy's,* 903 P.2d 1239, 1242 (Colo.App.1995). When evaluating functional impairment the ALJ shall look at the alteration of the claimant's functional abilities by medical means and by non-medical means, as well as the claimant's capacity to meet personal, social, and occupational demands. *Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333, 1337 (Colo. 1996).

In this case, Claimant's situs of impairment is proximal to the glenohumeral joint or on the body. As found above, even early in his treatment, Claimant exhibited tenderness in his cervical spine and left trapezius. Claimant received treatment for his injury directed at his pectoralis, upper trapezius, and scapula over the course of his physical therapy, all parts of the body not contained within the schedule of disabilities set forth at § 8-42-107(2)(a), C.R.S. Furthermore, part of Claimant's permanent impairment rating is 5% for acromial coplaning. That is, a portion of Claimant's rating was based upon surgery Claimant received to his acromion, a portion of the scapula, which lies proximal to the shoulder joint and is not part of the arm.

Aside from the anatomy of Claimant's symptoms, treatment, and impairment rating, Claimant's functional ability to meet his personal and occupational demands has been substantially altered. Claimant credibly testified that his injury affects his ability to sleep, do grocery shopping, clothe himself, and clean himself. This is consistent with Claimant's permanent work restrictions of no lifting or carrying more than ten pounds and no working overhead.

Although Respondents presented the testimony and opinions of Dr. Burris that Claimant's function working his new job driving a tow truck would exceed Claimant's demonstrated level of function at the IME with Dr. Burris, the Court does not find Dr. Burris's testimony credible or persuasive when considering the totality of the evidence. Even if the Court were to find that Claimant exhibited symptom magnification, the quality of Claimant's symptoms and functional impairment, as found by the Court, are such that they are not limited to Claimant's arm at the shoulder.

Claimant has therefore met his burden of proving by a preponderance of the evidence that his functional impairment is not contained within the schedule set forth at § 8-42-107(2)(a), C.R.S., and that the scheduled impairment rating Claimant received should more appropriately be a whole-person impairment rating.

Disfigurement

Section 8-42-108(1), C.R.S. permits an ALJ to award disfigurement benefits up to a maximum of $4,000 if the claimant is "seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view. . . ." The ALJ may award up to $8,000 for "extensive body scars" and other conditions expressly provided for in § 8-42-108(2), C.R.S. These awards are subject to annual adjustment by the Director of the Division of Workers' Compensation pursuant to §8-42-108(3), C.R.S.

Based on Claimant's testimony and the records submitted at hearing, the surgery Claimant underwent caused visible disfigurement to his body consisting of four arthroscopic surgical port scars on his left shoulder of varying pigmentation, as well as a shoulder slump on the left.

As a result, Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation pursuant to § 8-42-108(1), C.R.S. As a result, the ALJ awards Claimant $1,157.00 in disfigurement benefits.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant permanent partial disability benefits based on a 15% whole-person impairment rating, subject to any applicable cap, credits, or offsets.

2. Respondents shall pay Claimant $1,157.00 in disfigurement benefits.

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: July 19, 2023

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are reasonably necessary and related to the admitted May 12, 2018 injury, including physical therapy, massage therapy, chiropractic treatment and injections for the right knee and the left shoulder.

FINDINGS OF FACT

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

Generally

1. Claimant sustained admitted work related injuries to her right knee, left hip, left shoulder, cervical spine, and lumbar spine in the course and scope of her employment with Employer on May 12, 2018 in a motor vehicle accident (MVA) when driving between two of Employer's locations.

Pertinent Medical Records

2. Over a thousand pages of records were submitted in this matter. This ALJ only summarizes those records that were pertinent to the decision in this matter and disregarded the multiple duplicate records submitted by both parties.

3. On June 18, 2019 Dr. Russell Swann of Advanced Orthopedic recommended a medial unicompartmental arthroplasty of the right knee (UKA) as she had exhausted all conservative care options. He opined that the MVA impact caused a loose osteochondral fragment which had progressed over the year to full thickness cartilage loss. He diagnosed osteonecrosis of the right femur, chondromalacia of the right knee, and osteoarthritis of the knee. He sent a Surgery Request Form on June 20, 2019. Peer review on June 29, 2019 stated that the surgery was reasonably necessary. Surgery took place on November 4, 2019.[1] Dr. Swann's PA, Mr. Jennings, referred Claimant to physical therapy on November 19, 2019.

4. The MRI of the right knee on July 29, 2020 showed mild edema in the soleus muscle and hemiarthroplasty hardware in the medial aspect of the knee with small knee joint effusion and a small amount of subchondral bone marrow edema in the lateral patella, as read by Dr. Brian Cox.

5. On August 26, 2020 Claimant's MRI of the lumbar spine showed L1-2, L2-3 mild disk bulge, mild bilateral L3-4 neuroforaminal narrowing without spinal canal

[1] It is not clear from the record why the significant delay.

stenosis, L4-5 diffuse disk bulge with mild facet arthropathy resulting in moderate bilateral neuroforaminal narrowing without spinal canal stenosis and L5-S1 mild-to-moderate bilateral facet arthropathy.

6. Claimant was seen by a second opinion physician regarding the right knee and possible total knee arthroplasty. On December 4, 2020 Dr. Jared Michalson opined that the UKA was stable without clinical or radiographic abnormality at the site of her prior surgery, other than swelling of the right knee and medial joint line and anserine bursal area exquisite tenderness. He did recommend an anserine bursal corticosteroid injection and recommended that Claimant be seen by one of the physiatrist on his team regarding the findings on the most recent MRI.

7. Respondents had Claimant examined by independent medical examiner (IME) Dr. John Raschbacher on January 8, 2021. He took a history from Claimant and reviewed medical records as well as examined Claimant. At that time he opined that Claimant was at MMI as of March 13, 2020 with regard to all work related injuries, including the cervical spine, thoracic spine, lumbar spine, right knee and left shoulder. He opined that all massage, chiropractic and other therapies were no longer needed and only should continue with her home exercise program (HEP), orthopedic annual exam per protocol, and maintenance medications.

8. On July 12, 2021 Dr. Brian Shea, the designated Division of Workers' Compensation Independent Medical Examination (DIME) physician, issued a report regarding Claimant noting that he opined that Claimant was not at maximum medical improvement regarding the left shoulder, as Claimant required further evaluation to determine if she was a surgical candidate. He also recommended Claimant have a follow up surgical evaluation for the right knee. Dr. Shea made a causation determination that the cervical spine, lumbar spine, the right knee, the left shoulder were injuries related to the May 12, 2018 MVA. He also opined that everything except for the left shoulder was at MMI. Dr. Shea reviewed the medical records including Dr. Raschbacher's evaluation, which stated that Claimant was at MMI as of March 13, 2020 for the right knee injury approximately six months after the knee surgery. He noted that Dr. Raschbacher declined to rate the left shoulder, cervical spine or lumbar spine problems. Dr. Shea provided preliminary impairment ratings for all four areas.

9. In a review of systems, Dr. Shea noted that Claimant walked with a mild limp favoring her right knee. Claimant reported that the knee popped and was swollen on occasion, but hurt every day as did the low back, the left shoulder and the cervical spine. Claimant reported to Dr. Shea that the nerve block performed by Dr. Sasha gave her significant relief and would be open to another set of injections. On exam he noted mild edema around the knee and distally, loss of range of motion of the knee and tenderness on the medial joint aspect. He also documented loss of range of motion (ROM) of the left shoulder, a positive Neer's and Hawkins', giveaway strength on resistance, and tenderness over the left AC joint. He noted loss of ROM of the cervical spine, hypertonicity of the trapezius, rhomboid and levator scapula muscles, left greater than right. He also documented loss of ROM of the lumbar spine.

10. On July 29, 2021 Dr. Shea issued an Addendum report in response to a letter from Division on an Incomplete Notice. He corrected his preliminary impairment rating at that time.

11. Dr. Shea provided a Second Addendum on August 8, 2021 in response to further notice from Division. He corrected his prior report pursuant to Division's definition of MMI. He noted that "[Per the letter, it is stated that a patient reaches MMI when all areas being treated as a result of a work-related injury are stable. The patient is considered not to be at MMI until all areas being treated are stable." Dr. Shea then opined that Claimant was not at MMI.

12. On August 26, 2021 Claimant followed up with Dr. Mark Failinger regarding her left shoulder. Dr. Failinger recommended a new MRI as the prior one was dated. Claimant requested consideration of further surgery. Dr. Failinger stated that following MRI results he would determine if there was any further pathology present and would consider if either further injections or surgery were appropriate. On the same day, Kelsie McManus of Concentra ordered the MRI.

13. The MRI conducted on September 14, 2021 of the left shoulder showed moderately severe tendinosis, an interstitial type tear of the distal supraspinatus tendon, mild subscapularis tendinosis, mild degeneration intraarticular segment with fluid within the biceps tendon sheath suggesting tenosynovitis, degenerated posterior and superior labrum, though no full thickness tear was identified, moderately severe degenerative changes of the acromioclavicular joint, small distal acromial and clavicular spurs and extrinsic compression of the supraspinatus complex compatible with the presence of impingement. There was also fluid in the glenohumeral joint.

14. On September 16, 2021 MA Illiana Garcia of Concentra ordered physical therapy and massage therapy as well as follow up with Dr. Failinger and Dr. Sacha. Dr. Failinger noted that proceeding with surgery had to be delayed until Claimant recovered from a left ankle surgery.

15. On December 30, 2021 Dr. Failinger attended Claimant with regard to her left shoulder. Claimant inquired about the possibility of proceeding with surgery. On examination Dr. Failinger noted mild levator scapulae and trapezial discomfort with palpation. There was significant tenderness in the greater tuberosity and some mild-to-moderate biceps tenderness. There was loss of range of motion (ROM), positive Hawkins, positive Speed and positive O' Brien tests. Dr. Failinger stated that they went over the risks, alternatives and benefits and the 4-6 month recovery time. They discussed that there were no guarantees but that she had lived with this for so long and she had focal identifiers of pain and therefore it was reasonable to proceed with the surgery. He stated he would see if the surgery was approved.

16. On January 26, 2022 Dr. Failinger sent a Surgery Authorization request form regarding a left shoulder scope, decompression, distal clavicle resection and possible biceps tenolysis.

17. On March 22, 2022 Dr. Robert L. Messenbaugh issued an opinion and responded to inquiries by Respondents. At that time, Dr. Messenbaugh opined that the treatment recommended by Dr. Failinger for authorization to treat the left shoulder with a

scope, decompression, distal clavicle resection and possible biceps tenolysis was reasonable necessary and related to the injury she sustained on May 12, 2018. He also opined that it would be reasonable to proceed with injections into the left shoulder.

18. On May 18, 2022 Respondents filed a General Admission of Liability pursuant to the Division Independent Medical Examination physician's opinion that Claimant had not reached maximum medical improvement.[2]

19. Dr. Failinger noted on May 23, 2022 that the surgery he proposed had originally been denied by Respondent and Claimant's case closed. He further stated that now the claim had been reopened and the surgery authorized.

20. On May 27, 2022 Brittany Lain, NP, of Concentra, indicated that the left shoulder surgery was approved. She documented that Claimant had ongoing chronic pain in the left shoulder that was achy and dull, described as constant and increased with movement. The pain was worsened by overhead movements, internal rotation, and symptoms were associated with decreased ROM and occasional tingling.

21. On June 14, 2022 Ms. Lain noted that the left shoulder surgery was delayed due to a heart murmur and was awaiting cardiology clearance to proceed with the rescheduled surgery.

22. Claimant was examined by Dr. Nicholas Olson, a pain management physician, on June 28, 2022, for opioid review post-surgery. Dr. Olson reviewed the chart noting that Claimant had genicular nerve blocks on two occasions, which provided good relief and a diagnostic response to the procedure.

23. On July 12, 2022 Claimant proceeded with a left shoulder examination under anesthesia, left biceps tenolysis, subacromial decompression, distal clavicle resection, and os acromiale shell resection. He diagnosed her with a left shoulder os acromiale, biceps tendinosis and left shoulder impingement. During surgery he noted that the os acromiale was unstable. Dr. Failinger prescribed physical therapy before the surgery for 18 visits on June 6, 2022 and again for an additional 12 weeks post-surgery.

24. On July 18, 2022 Bradley Schoonveld, P.T. performed an initial physical therapy evaluation noting significant pain complaints following surgery. He recommended starting with pendulum exercises and range of motion. By July 27, 2022 he noted that Claimant was progressing well but slowly due to stiffness and soreness related to the surgery. She had passive ROM (PROM) of 130° flexion and abduction, and 30-40° for external rotation (ER) and internal rotation (IR). On August 3, 2022 he stated that Claimant was progressing and doing well with PT and had started on table slides in both flexion and abduction as well as stretching behind the back. On August 10, 2022 Mr. Schoonveld indicated that, while Claimant had some additional soreness related to the PT, she had demonstrated a PROM of flexion to 160-170°, 180° abduction, and about 60° of IR/ER, which was increased from prior measurements.[3]

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[2] Neither party offered an explanation as to why it took over nine months to file the GAL pursuant to the DIME physician's report. This ALJ infers from the evidence that the delay was caused by Claimant's left ankle fracture and that Respondents were awaiting Dr. Messenbaugh's report.

[3] This ALJ determined that a change from 130° to 180° PROM flexion is a significant functional gain.

25. Dr. Darla Draper of Concentra issued a report on August 8, 2022 documenting Claimant's medical history since 2018. She noted that an injection performed by Dr. Failinger on October 4, 2018 helped Claimant's symptoms in the right knee. She also noted that chiropractic and massage treatments had been helping. She noted that the note of January 20, 2020 documented that the steroid injection into the left shoulder also helped. She noted that on March 13, 2020 Claimant was using a cane and that it was making her left shoulder worse but that the massage treatment was helping. Dr. Draper documented that on September 18, 2020 Claimant was receiving benefit from chiropractic and massage therapy for the back and neck. She noted that the records from October 16, 2020 and December 18, 2020 showed Claimant was benefiting from physical therapy and dry needling as well as massage therapy and chiropractic care for her back, left shoulder and right leg. She documented that the right knee genicular injection performed by Dr. Sacha on January 7, 2021 also helped a lot.

26. On August 23, 2022 Claimant was seen by Dr. Nicholas Olsen who documented increased knee pain. He noted that Claimant had a previously radiofrequency neurotomy by Dr. Sacha with a report of 8 months of relief following the procedure. Claimant was interested in the possibility of repeating the procedure. To determine if Claimant was candidate for radiofrequency neurotomy, repeat genicular nerve block was required. Dr. Olsen indicated he would request for bilateral femoral genicular nerve block and a medial tibial genicular nerve block for the right knee.

27. On August 23, 2022 Dr. Olsen sent a referral prescription to insurance for bilateral femoral genicular nerve block.

28. Mr. Schoonveld specified on August 24, 2022 that Claimant's left shoulder stiffness continued to improve, that she had good ROM with full elevation and IR. By August 31, 2022 Claimant started rotator cuff (RC) strengthening, including stretches with pulleys and wall slides.

29. On August 30, 2022 Dr. Olsen sent an authorization request to the insurance for right knee genicular block at Belmar ASC.[4]

30. On September 6, 2022 Dr. Draper referred Claimant for massage therapy and chiropractic care for her low back and neck and refilled medication. She noted Claimant was awaiting authorization for the genicular injection for the right knee with Dr. Olsen and a steroid injection for the left shoulder with Dr. Failinger.

31. On September 9, 2022 Dr. Olsen sent a second request for authorization to the insurance for right knee genicular block at Belmar ASC

32. Dr. Olsen noted on October 5, 2022 that the genicular nerve injection had been denied by Respondent and that they had requested a RIME with Dr. Raschbacher.

33. Dr. Raschbacher performed a follow-up Independent Medical Evaluation on October 7, 2022. Dr. Raschbacher stated that Claimant had very good results from the knee surgery and that there was no clear objective basis or psychological reason for Claimant's continued complaints of the degree of discomfort Claimant had at the knee. Dr. Raschbacher opined that Claimant was at MMI for all body parts except for her

[4] This ALJ infers that ASC means "Ambulatory Surgery Center."

shoulder due to her surgery and that MMI for Claimant's shoulder was expected 4-6 months from the date of the surgery.

34. While Claimant continued to have pain and difficulties with the left shoulder, on October 17, 2022 Mr. Schoonveld point out that Claimant should request a steroid injection so that she could get past the shoulder pain and further progress with strengthening therapy.

35. Dr. Draper attended Claimant on October 21, 2022 noting the denial of the genicular injections for the right knee. She also noted that Dr. Failinger ordered 3-4 weeks of physical therapy for the left shoulder and that he was considering another steroid injection. She also noted that chiropractic treatment and massage therapy for the back and neck had been denied. She noted that Claimant was approximately 25% of the way towards meeting the physical requirements of her job. She continued to diagnose contusion of the left shoulder, internal impingement of the left shoulder, lumbosacral strain, contusion of the right knee and cervical strain. She recommended continued therapy and noted that Claimant was not at MMI but she anticipated MMI approximately 6-9 months post op.

36. On November 7, 2022, Dr. Failinger found on exam that Claimant had loss of ROM of the left shoulder, a positive impingement test. Dr. Failinger administered a cortisone injection into Claimant's left shoulder. Claimant had been participating in physical therapy and was recommended to continue this treatment.

37. On November 15, 2022 Dr. Olsen continued to recommend the genicular nerve block for the right knee.

38. Mr. Schoonveld documented on November 22, 2022, December 5, 2022 and December 12, 2022 that Claimant continued to progress with her strengthening.

39. On December 29, 2022 Dr. Patrick Antonio of Concentra documented that Claimant had been attending physical therapy at Colorado Rehabilitation but had not gone for two weeks and needed a new referral for continued care. He noted that the October left shoulder steroid injection by Dr. Failinger helped the left shoulder but did continue with stiffness and problems with overhead reach. He noted that he would order further physical therapy to improve strength and ROM.

40. On February 6, 2023, Dr. Failinger again found that Claimant had a positive impingement test and administered another cortisone injection into Claimant's left shoulder.

41. On February 8, 2023 Dr. Viola-Lewis noted that Claimant was still not at MMI. Dr. Viola-Lewis noted that Claimant was 75% of the way towards meeting the physical requirements of her job. She made a referral to Dr. Failinger to evaluate the right knee. She referred Claimant for physiatry evaluation of the back, left shoulder and right knee. She also made another referral for physical therapy. She continued to state that Claimant was not at MMI.

42. Dr. Viola-Lewis noted on March 17, 2023 as follows:

> She has seen Dr. Failinger who wants her to get another opinion from a joint specialist about her knee. He feels she would benefit from injection but cannot get one approved, and she has not had sufficient improvement with PT. She has also had issues getting PT

> approved through WC. There is significant psychosocial impact on her with the left shoulder dysfunction as well as the knee pain and dysfunction. She has not been back to PT despite it being ordered as it was not approved. Will order it again with the goal of returning her left shoulder to full ROM within 4 weeks, and improving strength in her knee within the same timeframe. She will be seeing Dr. Mikalson (sic.) next week. Will have her follow up a few days after that so that we can discuss the results. The delay in getting tests and treatments approved is delaying her care significantly and contributing to a backslide of physical function. She is not at MMI at this time.

43. On exam, Dr. Viola-Lewis noted Claimant had limited range of motion of the left shoulder with pain in all planes. She also noted edema in the medial aspect of the right knee consistent with lymphedema and a slight limp. Claimant continued to be only 75% towards meeting the physical requirements of her job. At that time she ordered chiropractic care for her lower and upper (thoracic) back and physical therapy for another 4 weeks, 3 times a week, for her left shoulder, lower back and left knee, which she stated were medically necessary to address objective impairment and functional loss and to expedite return to full activity. She continued to state that Claimant was not at MMI.

44. Dr. Michelle Viola-Lewis noted on April 6, 2023 as follows:

> This has been a very prolonged case and there has been efforts to continue appropriate care for this patient. She did see Dr. Mikalson (sic.) and got an injection in her knee, and sees Dr. Failinger in his private office again next week for her shoulder. She continues to have pain in her left shoulder, but the right knee is better following the injection. She has been going to the gym and doing her HEP on her own. At this point there has been no further therapies approved through WC…

45. On exam, Dr. Viola-Lewis noted that Claimant had limited ROM in all planes of the left shoulder with pain, but she could extend it to just above shoulder height. Her tone and strength were normal. She noted right knee edema distal to the medial aspect of the knee consistent with lymphedema. The surgical scar was well healed, but Claimant had a slight limp on the right. Dr. Viola-Lewis stated that Claimant was not at MMI but was anticipated to be at MMI in 6-9 months post-op. She continued to provide work restrictions, and Claimant was to return for consult in two weeks.

46. Claimant was attended by authorized treating provider, Dr. Jared Michalson on April 11, 2023. Dr. Michalson noted that it was a telemedicine visit to discuss laboratory results after evaluation of a painful previously performed partial knee arthroplasty of the medial compartment. He recommended claimant follow up for an intra-articular right knee corticosteroidal injection for both diagnostic and therapeutic purposes. He noted that, if Claimant obtained benefit from the injection, then he would proceed with a conversion from partial knee arthroplasty to a total knee arthroplasty.

47. Dr. Raschbacher issued an addendum report on April 19, 2023, opining that Claimant was at functional standstill for her left shoulder and therefore at MMI. Dr. Raschbacher made comments regarding his record review of the rehabilitation notes which stated “She had continued achiness. She is seen through December 12, 2022. On December 12, 2022, the shoulder was felt to be doing well, and she had progressed with her strengthening. However, it continued to ache all the time.” Nothing in this review is persuasive that Dr. Raschbacher pointed to specifics in the record that might indicate that Claimant was not continuing to obtaining functional benefits from the prescribed physical therapy.

48. From the records provided, none stated that Claimant had completed the recommended treatment, nor did an authorized treating provider place Claimant at MMI. Nor was there a follow up DIME report placing Claimant at MMI.

Claimant's testimony

49. Claimant stated that after she underwent the left shoulder surgery by Dr. Mark Failinger on July 12, 2022, she was prescribed physical therapy, which continued through December 23, 2022, at which time no further therapy for the left shoulder was approved. She had undergone approximately 23 sessions of therapy and she was advised that she was only approximately 50% of where she should be.

50. Claimant stated that the surgery was not initially helpful but was in physical therapy, which was helpful and provided significant benefit, including easier movement, less sharp shooting pains or numbness and performing activities of daily living such as grooming and getting dressed. Since the therapy was stopped, Dr. Failinger provided multiple injections to assist with the pain. Further, Claimant had decreased range of motion and strength since stopping the physical therapy. She stated that both her authorized providers at Concentra as well as Dr. Failinger recommended ongoing physical therapy for her left shoulder.

51. Claimant also stated that Dr. Draper of Concentra had recommended ongoing massage therapy and chiropractic treatment for her neck and low back in August of 2022, which was not approved. Claimant had recently attended a chiropractic and massage visit on her own because she was having difficulty walking, which she paid out of her own pocket. She received significant benefit for her neck and low back from the chiropractic treatment. The treatment loosened up the scar tissue and allowed for more range of motion, including for the left shoulder. The massage also helped with the pain in her left knee. Her level of function improved with better movement overall. Claimant would like to continue with the chiropractic and massage for her neck and low back, as well as the prescribed physical therapy for the left shoulder and right knee.

52. Claimant had a partial knee arthroplasty on November 4, 2019. Following which she had a genicular block and ablation procedure. She was under the care of Dr. Nicholas Olsen after that procedure. The first procedure took place approximately nine months following her knee surgery because she was unable to mobilize her knee. Within a week of the procedure, she was able to rotate the knee on a bike compared to being almost immobilized before. Dr. Olson has recommended another genicular block as a diagnostic tool to determine if another ablation would be beneficial. The procedure was also denied by Respondent. Claimant would like to continue to pursue this injection.

Dr. Failinger's testimony

53. Dr. Mark Failinger, an ATP, was called by Claimant as an expert and was accepted as an expert in orthopedics, specializing in knees and shoulders, and as a Level II accredited physician by the Division of Workers' Compensation. He stated that he performed the surgery of July 2022 and he had seen Claimant as recently as April 2023, noting that Claimant was still struggling, having problems at that point in time. He explained that Claimant had a very unique problem called oseo acromelia in the left

shoulder, which caused her to have immobility of the limb, and is a very difficult problem. He also explained that Claimant continued to have knee problems, which is load bearing joints, and take priority over non-weight bearing joints like a shoulder.

54. Dr. Failinger opined that it was inappropriate to close out Claimant's case at this time. She requires an MRI to determine the status of the shoulder joint and determine what are the next steps for Claimant. He recommended a follow up evaluation to reevaluate her home program and the repeat MRI to determine Claimant's current status. He explained that significant pain is inhibiting her progress and he needed to figure out what factors are causing that and address the pain before there can be any further functional improvement. He did state that Claimant would benefit from physical therapy for strengthening of her shoulder.

55. Dr. Failinger also stated that since the genicular block had been beneficial in the past, that it was reasonable for her to have the procedure to eliminate pain that is not amenable to other measures and were shown to be more beneficial than cortisone injections. Dr. Failinger explained that surgery, such as the arthroplasty in this case, does not resolve the problems with the patient's pain, genicular nerve blocks can provide significant relief from that pain. The genicular nerves are the nerves that surround the knee and there are superior, inferior, medial and lateral to the knee. The block acts to block the nerve signals to the brain so that the patient can increase function.

56. While Dr. Failinger explained that he had not been the primary provider to treat Claimant's knee condition for several years. However, he does know what complaints Claimant has as those are discussed when he sees her. He treated her for her knee in 2018 and after that until he made a referral to Dr. Michalson and she later had the arthroplasty with Dr. Russell Swann. He explained that the genicular block is similar to the medial branch block as it is used as a diagnostic tool to determine if an ablation would be reasonably necessary.

57. Dr. Failinger continued to recommend physical therapy for the shoulder but acknowledged that she had slow progress and limited results with therapy as she continues with significant pain.

Dr. Raschbacher's testimony

58. Dr. John Raschbacher was called by Respondent as an expert in occupational medicine and as a Level II accredited physician. He performed an independent medical evaluation in 2021 and again on October 7, 2022. He opined in both evaluations that Claimant had reached maximum medical improvement for all body parts, except with the left shoulder. He stated that it was unlikely that further application of the medical resources was going to change Claimant's subjective reports and that there was nothing objective that is new or different to treat.

59. Dr. Raschbacher noted that the Medical Treatment Guidelines' General Guidelines Principles espouse that if there is no positive response to treatment, then the patient is at MMI. He explained that by December 29, 2022 Claimant was no longer showing positive objective response to therapy and she was 5 months post-surgery, effectively noting that Claimant's left shoulder condition had plateaued. He explained that

normally, people with pathology like rotator cuff tears, usually by six months, barring some type of complication, they are at MMI and can transition to a home exercise program.

Ultimate Findings of Fact

60. As found, Claimant has shown that the chiropractic treatment for the low back and neck is reasonably necessary to treat Claimant's work related injuries of May 12, 2018. Claimant has been deemed to be not at MMI and her authorized treating providers, Drs. Viola-Lewis and other Concentra providers have continued to prescribed the treatment to cure and relieve Claimant from the effects of the injuries. The Concentra providers have stated that the treatment is medically necessary to address objective impairment and functional loss and to expedite return to full activity. To the contrary, Dr. Raschbacher has been stating that Claimant has been at MMI since March 13, 2020. However, the DIME physician on August 8, 2021 stated that Claimant was not at MMI. Respondents have failed to show that Claimant is, in fact, at MMI or overcome the DIME's opinion to that effect. This is confirmed by the opinion of Dr. Draper that noted that Claimant had improvement and benefit from the prescribed treatments. The Concentra providers are more persuasive than contrary opinions of Dr. Raschbacher. Claimant has proven by a preponderance of the evidence that she is entitled to the chiropractic and massage therapy for the work related lumbar spine and cervical spine conditions.

61. As found, Claimant has shown that the Claimant requires further physical therapy, injections and further diagnostic testing for the left shoulder. Contrary to the opinions of Dr. Raschbacher, Claimant did not have a simple rotator cuff repair that should have healed normally within the six month period that he predicted. Clearly, Claimant's left shoulder condition is more complex. Dr. Failinger clearly explained that Claimant continues to have pathology that requires further treatment for her range of motion and strengthening. Dr. Failinger's opinion in this regard are more credible and persuasive than the contrary opinions of Dr. Raschbacher. Further, Dr. Raschbacher's opinion that Claimant plateaued in physical therapy is not credible. The physical therapy notes indicated to the last documented therapy on December 12, 2022 that Claimant continued to progress with strengthening. Further, Claimant's testimony as well as Dr. Viola-Lewis' opinion that Claimant's function has slid back due to lack of continuing therapy is credible and persuasive. Dr. Failinger also persuasively stated that a new MRI was required to determine how Claimant's shoulder is progressing following the complicated July 2022 surgery. Dr. Failinger opined that the shoulder steroid injections have helped with Claimant's function as well, which is credible and persuasive. Claimant has proven by a preponderance of the evidence that Claimant requires continuing physical therapy for the left shoulder, an MRI, further orthopedic evaluation as well as injections.

62. As found, Claimant has shown that she requires further evaluation and treatment for the right knee injury caused by the May 12, 2018 work related injury. Dr. Failinger opined that the genicular nerve block given by Dr. Sacha helped significantly in the past, providing approximately 8 months of relief. He credibly opined that this would be a good course of treatment for Claimant so that she may progress with further range of motion and in her function. He also credibly opined that steroid injections and or further orthopedic evaluation was appropriate in this matter. Dr. Michalson has requested further diagnostic testing to determine if a revision of the UKA to a TKA would be appropriate.

He credibly noted that the block may assist in that determination. Claimant has proven by a preponderance of the evidence, that it is more likely than not, she requires further treatment for her right knee, including the genicular nerve block as prescribed by Dr. Olsen, physical therapy as prescribed by Dr. Viola-Lewis, and further orthopedic evaluations with Dr. Michalson.

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

CONCLUSIONS OF LAW

A. Generally

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay

witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Sec. 8-41-301(1)(c), C.R.S.; *Faulkner v. Industrial Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000).

Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). 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. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

Where the relatedness, reasonableness, or necessity 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).

However, before applying the facts to address whether any particular medical benefit requested was reasonably necessary and related to the injury, in this case the issue of maximum medical improvement should be discussed. MMI is defined as that point in time when any medically determinable physical or medical impairment resulting from an injury has become stable and when no further treatment is reasonably expected to improve the condition. Sec. 8-40-201(11.5), C.R.S.; *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001, 1005 (Colo.App.2002). It represents the optimal point at which the permanency of a disability can be discerned and the extent of any resulting impairment can be measured. *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo.App.1998). It also marks the point when permanent disability benefits become available and temporary disability benefits become unavailable. *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246, 254 n. 1 (Colo.1996); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637, 639 (Colo.App.1997) (once a claimant reaches MMI, any temporary wage loss ceases and the continuing wage loss becomes permanent and is to be compensated by permanent benefits under Section 8-42-107, C.R.S., not by the continued payment of temporary benefits).

In *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010) the Court of Appeal relied on the Nebraska Supreme Court opinion in *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232, 238 (2005). They addressed the issue of whether MMI was to be determined by reference to the date of healing for each injury resulting from an accident, or by reference to the date on which all of the claimant's injuries from the accident have reached maximum recovery. The court observed that a given condition cannot be both temporary and permanent at the same time and that allowing partial MMI creates the possibility of simultaneous permanent and temporary disability awards for the same accident, a result inconsistent with the workers' compensation scheme and established precedent. *Rodriguez,* 707 N.W.2d at 238. The court concluded that, even if the medical evidence establishes that a claimant's different injuries have different dates of maximum medical recovery, the legally significant date, that is, the date of MMI for purposes of ending a claimant's temporary disability, is the date upon which the claimant has attained maximum medical recovery from all of the injuries sustained in a particular compensable accident. Rodriguez, 707 N.W.2d at 239, as cited in *Paint Connection Plus, supra.*

The Court in *Paint Connection Plus* agreed with the reasoning in *Rodriguez* and found it consistent with various Panel decisions holding that MMI is not “divisible and cannot be parceled out among the various components of a multi-faceted industrial injury.” *Parra v. Haake Farms,* W.C. No. 4-396-744 (ICAO Mar. 8, 2001*); Bernard v. Current, Inc.*, W.C. No. 4-213-664 (ICAO Oct. 6, 1997); *Carrillo v. Farmington PM Group,* W.C. No. 3-111-178 (ICAO Aug. 26, 1997); *Powell v. L & D Electric*, W.C. No. 4-150-716 (ICAO Mar. 21, 1997). The Colorado Workers' Compensation Act contains no provision for “partial maximum medical improvement” either. *Bernard v. Current, Inc., supra*; *Carrillo v. Farmington PM Group, supra*; *Powell v. L and D Electric*, *supra*. The rationale for these decisions is that calculation of permanent disability benefits is contingent on the

attainment of MMI. Thus, a gap in benefits could occur if the claimant's temporary benefits were terminated but entitlement to permanent benefits could not be determined since the claimant is not at MMI for all aspects of the injury. Thus, where a single industrial injury has multiple components, the claimant's entitlement to temporary disability benefits is not terminated by operation of Sec. 8-42-105(3)(a) until the claimant has reached MMI for all components of the injury. *Paint Connection Plus v. I.C.A.O., supra* at 433.

Respondents have a remedy. They may have been able to utilize the procedure of Sec. 8-42-107(8)(b)(II), C.R.S., which permits an employer or insurer to request an independent medical examination (IME) if no MMI determination has been made and at least twenty four months have passed since the date of the injury." *Paint Connection Plus v. Indus. Claim Appeals Office, supra.* And while in this matter, a DIME has already happened, a follow-up DIME may be requested pursuant to W.C.R.P. Rule 11-7(A).

Under Sec. 8-42-107(8)(b)(I), C.R.S., the initial determination of MMI is to be made by an authorized treating physician, and neither party may dispute the accuracy of the treating physician's MMI determination in the absence of a Division-sponsored independent medical examination (DIME). *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996); *Aren Design, Inc. v. Becerra*, 897 P.2d 902 (Colo. App. 1995). However, a physician has not determined MMI unless the physician opines that all compensable components of the injury are stable. Here, the evidence presented at hearing including exhibits and testimony, fails to show that any authorized treating physician has placed Claimant at MMI for all injuries and the DIME physician found Claimant not at MMI on August 8, 2021, following correcting his report pursuant to an inquiry from Division. Therefore, as found, Claimant has not been determined to be at MMI for her May 12, 2018 work related injury as of the date of the hearing.

As found, Claimant has established that she is entitled to further medical benefits to cure and relieve her of the work related injuries from her May 12, 2018 MVA. Those benefits are found to be, more likely than not, reasonably necessary and related to the injury, including the chiropractic, massage and physical therapy treatment recommended by Dr. Viola-Lewis, the MRI of the left shoulder and steroid injections recommended by Dr. Failinger; and the genicular nerve blocks recommended by both Dr. Olsen and Dr. Failinger. Further, Claimant has proven by a preponderance of the evidence that the treatment that is found to be reasonably necessary is also causally related to the original work related injuries. Dr. Shea' opinion that the cervical spine, lumbar spine, left shoulder and right knee injuries are causally related to the May 12, 2018 work related MVA was credible and persuasive over the contrary opinions of Dr. Raschbacher. Claimant has proven that Claimant is entitled to these benefits.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall pay for the reasonably necessary and related medical benefits including:

a. The physical therapy for the left shoulder and right knee as prescribed by Dr. Viola-Lewis;

b. The steroid injections for the left shoulder as prescribed by Dr. Failinger;

c. The chiropractic treatment and massage therapy treatment for the cervical spine and the lumbar spine as prescribed by Dr. Viola-Lewis;

d. The left shoulder MRI recommended by Dr. Failinger, followed by a follow up evaluation with Dr. Failinger for reevaluation of the status of the left shoulder;

e. The genicular nerve block for the right knee prescribed by Dr. Olsen and recommended Dr. Failinger;

f. The follow up orthopedic evaluation for the right knee prescribed by Dr. Failinger and Dr. Nichalson for consideration of the revision and TKA;

2. All payments of medical benefits are subject to the Colorado Fee Schedule.

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

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

DATED this 21st day of July, 2023.

Digital Signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-217-323-001

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $834.59.

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a lower back injury during the course and scope of his employment with Employer on September 20, 2022.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his September 20, 2022 industrial injury.

3. 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.

4. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant chose the Concentra Medical Centers clinic at Chambers Road and I-70 as his ATP.

5. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period November 3, 2022 through December 19, 2022.

6. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his November 2, 2022 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 is a warehouse distribution chain. Claimant worked for Employer as a forklift operator.

2. Claimant testified that on September 20, 2022 he sustained an injury to his lower back while at work breaking down freight. He was specifically transferring product from one pallet to another when he felt a pop in his lower back. Claimant also experienced a sharp pain when bending. He verbally reported the injury to his supervisor [Redacted, hereinafter EE] and spoke to two managers about his injury.

3. On September 21, 2022 Employer completed an "Incident Reporting System" form. Employer filed a First Report of Injury on the same date.

4. On September 21, 2022 Claimant spoke to Employer's Operations Manager [Redacted, hereinafter MM] about seeking medical attention. Claimant remarked that MM[Redacted] pulled up the Concentra Medical Centers clinic at Chambers Road and I-70 on his telephone and told Claimant to go there because the facility was close. Claimant understood that he was being directed to a specific Concentra clinic. The record reveals that Claimant did not receive a list of at least four designated medical providers.

5. On September 21, 2022 Claimant first visited the Concentra at Chambers Road and I-70 for an evaluation. Claimant reported he was lifting boxes when he injured his lower back. He noted sharp pain with movements and constant pressure/compression. Nurse Practitioner Susan Bradshaw determined her objective findings were consistent with a work-related mechanism of injury. She mentioned tenderness in the entire left paraspinal and left sacroiliac joint, left-sided muscle spasms, and limited range of motion. NP Bradshaw assessed Claimant with a lumbar strain.

6. After receiving work restrictions from Concentra, Employer offered Claimant modified duty employment. Claimant had been working eight-hour shifts prior to his injury, but Employer reduced Claimant's schedule to four-hour shifts.

7. From September 21, 2022 through April 3, 2023, Claimant regularly received treatment with Eric Chau, M.D. at the Concentra Medical Center, Denver-Aurora North facility, at Chambers Road and I-70. Claimant did not express any concerns about his treatment. He acknowledged he did not have any issues about the way Dr. Chau treated him.

8. Concentra providers continued to note that their objective findings were consistent with a work-related mechanism of injury on September 23, October 6, and October 21, 2022. Providers referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy.

9. On October 7, 2022 Dr. Chau added an addendum to Claimant's medical records. He stated "Unable to tolerate mod duties. WR updated." Dr. Chau specifically decreased Claimant's maximum lifting restriction from 20 to 15 pounds, decreased his pushing and pulling ability from 30 to 20 pounds, and limited him to sitting 50% of the time. His restrictions also included limited bending at the waist and frequently changing positions. There was no provision about only working four hours per day.

10. On October 11, 2022 MM[Redacted] authored an e-mail regarding the status of Claimant's case. He recounted that on October 6, 2022 Claimant provided him with a doctor's note regarding work restrictions. MM[Redacted] explained that Claimant could return to full duty work and his only restrictions were no lifting in excess of 20 pounds and no pushing/pulling in excess of 30 pounds. Claimant responded that his physician would send an updated note stating that he could not work more than four hours per day. Although MM[Redacted] commented that medical providers did not limit Claimant

to working four hours per day, Claimant responded that it was not about the medical note, but about how his body was feeling. MM[Redacted] concluded that he would await an updated doctor's note.

11. On October 21, 2022 Concentra Nurse Practitioner Maryna Halushka decreased Claimant's lifting maximum to 15 pounds. She also noted that Claimant could not bend at the waist.

12. On October 28, 2022 Employer had a meeting with Claimant. Employer notified Claimant they would abide by his work restrictions of no lifting in excess of 15 pounds and no bending at the waist. Effective Monday October 31, 2022, Claimant would be required to work eight hours each day. Employer noted they would work with Claimant as best as possible to enable breaks when necessary. Claimant was to continue his housekeeping duties for four hours per day but would engage in other tasks if housekeeping was not needed for the rest of his shift.

13. Claimant did not respond positively to returning to an eight-hour shift by stating he was treated like "trash." He never communicated to Employer that Dr. Chau limited him to a four-hour shift or was uncomfortable performing housekeeping tasks within a 15-pound lifting restriction with no bending at the waist.

14. Claimant testified at hearing he did not feel safe working full duty and/or eight-hour shifts. When asked directly whether Dr. Chau limited him to work only four-hour shifts, Claimant responded that he could not recall.

15. The medical records from Dr. Chau never documented a four-hour work restriction. Claimant was cleared to work an eight-hour shift throughout his medical treatment. The four-hour limitation was an added accommodation provided by Employer.

16. MM[Redacted] testified that he believed the last day of accommodating four-hour shifts for Claimant was October 28, 2022. Claimant then worked four-hour days on October 31, 2022 and November 1, 2022. He received his final occurrence point for failing to adhere to the work schedule on November 1, 2022 because he did not inform a manager he was leaving work after four hours. Claimant was thus terminated from employment on November 2, 2022.

17. MM[Redacted] explained that Employer used an occurrence point system to track Claimant's disciplinary violations. He testified the point system provided that failing to call-in or show-up for work was worth six points, a call-out with insufficient time to cover the absence cost two points, tardiness over six minutes was valued at one point, and failing to adhere to the schedule was worth one point.

18. Claimant accumulated 10 occurrence points prior to his September 20, 2022 date of injury. MM[Redacted] detailed that Claimant specifically accrued two points on July 12, 2022, August 11, 2022, August 16, 2022, August 25, of 2022 and September 19, of 2022 for a total of 10 points. He remarked that Claimant was informed of his point total on the day of his lower back injury or September 20, 2022.

19. Claimant obtained his eleventh occurrence point on October 19, 2022 for tardiness of eight minutes. His final point accrued on November 1, 2022 for failure to adhere to the eight hours per day work schedule. After accumulating 12 occurrence points, Claimant was aware that he could be terminated. Claimant was then released by Employer on November 2, 2022.

20. Claimant has been unable to return to any employment since November 2, 2022. He remarked that he continues to suffer from dull lower back pain. His mobility and functionally remain limited.

21. Claimant continued to receive treatment with Concentra through the spring of 2023. Concentra referred him for a lumbar MRI on March 24, 2023.

22. On March 4, 2023 Claimant underwent an independent medical examination with Alicia Feldman, M.D. Claimant recounted that on September 20, 2022 he was picking up a product at work, felt a pop in his lower back and had the acute onset of back pain. Dr. Feldman reviewed Claimant's medical records and conducted a physical examination. She determined "[i]t appears that [Claimant] sustained a lumbar sprain/strain injury while at work on September 20, 2022." Dr. Feldman reasoned that the natural history of his injury is that it should resolve within weeks to months. She attributed "100%" of Claimant's care between September and December 2022 to his September 20, 2022 industrial injury. However, Dr. Feldman explained that Claimant's lower back symptoms as of the date of the independent medical examination were not related to his work injury on September 20, 2022. She reasoned that Claimant had reached Maximum Medical Improvement (MMI) at his December 19, 2022 follow-up appointment with Dr. Chau.

23. On April 10, 2023 Dr. Chau reviewed Dr. Feldman's independent medical examination. Based upon the report, Dr. Chau back-dated Claimant's MMI date to December 19, 2022. Nevertheless, Claimant commented he would like additional medical care, but does not want to return to Concentra. He would like to visit a doctor in Aurora, Colorado and is requesting a change of physician to David Reinhardt, M.D.

24. Claimant has established it is more probably true than not that he suffered a lower back injury during the course and scope of his employment with Employer on September 20, 2022. Claimant's testimony and the persuasive medical records reveal that Claimant injured his lower back while at work. Initially, Claimant credibly testified that he was transferring product from one pallet to another when he felt a pop in his lower back. Claimant also experienced a sharp pain when bending. He verbally reported the injury to his supervisor EE[Redacted] and spoke to two managers about his injury. On September 21, 2022 Employer completed an "Incident Reporting System" form and filed a First Report of Injury.

25. On September 21, 2022 Claimant first visited the Concentra at Chambers Road and I-70 for an evaluation. Claimant reported he was lifting boxes when he injured his lower back. NP Bradshaw determined her objective findings were consistent with a work-related mechanism of injury. She assessed Claimant with a lumbar strain.

Concentra providers continued to note their objective findings were consistent with a work-related mechanism of injury on September 23, October 6, and October 21, 2022. Providers referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy.

26. Independent medical examination physician Dr. Feldman reviewed Claimant's medical records and conducted a physical examination. Claimant recounted that on September 20, 2022 he was picking up a product at work, felt a pop in his lower back and had the acute onset of pain. Dr. Feldman determined "[i]t appears that [Claimant] sustained a lumbar sprain/strain injury while at work on September 20, 2022.

27. Based on Claimant's credible testimony and a review of the medical records, Claimant suffered a lower back injury that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing to produce a need for medical treatment. Accordingly, Claimant suffered a compensable lower back injury on September 20, 2022.

28. Claimant has demonstrated it is more probably true than not that he is entitled to reasonable, necessary and causally related medical benefits for his September 20, 2022 industrial injury. Claimant obtained authorized medical treatment for his injury through Concentra. Providers continually noted that their objective findings were consistent with a work-related mechanism of injury. They referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy. Moreover, independent medical examination physician Dr. Feldman attributed "100%" of Claimant's care between September and December 2022 to his September 20, 2022 industrial injury. Accordingly, the record reveals that Claimant's employment activities on September 20, 2022 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

29. Claimant has proven it is more probably true than not that the right to select an ATP passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. The record reflects that Claimant did not receive a list of at least four designated medical providers. Respondents have not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him.

30. Because the right of selection passed to Claimant, the central issue is whether he demonstrated by his words or conduct that he chose the Chambers Road Concentra location for treatment. Respondents have demonstrated it is more probably true than not that Claimant chose the Chambers Road Concentra facility as his ATP through his conduct. Initially, Claimant remarked that on September 21, 2022 MM[Redacted] pulled up the Concentra clinic at Chambers Road and I-70 on his telephone and told Claimant to go there because the facility was close. Claimant

understood that he was being directed to a specific Concentra clinic. On September 21, 2022 Claimant first visited the Concentra at Chambers Road and I-70 for an evaluation with NP Bradshaw.

31. From September 21, 2022 through the date of MMI on December 19, 2022 and afterwards through April 3, 2023, Claimant regularly followed-up with Dr. Chau at the Concentra Medical Center, Denver-Aurora North facility, at Chambers Road and I-70. Providers referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy. Claimant acknowledged that he did not have any issues about the way Dr. Chau treated him. He scheduled his own appointments, provided transportation and voluntarily presented for care. Claimant did not express any dissatisfaction with his care, raise any concerns with the designation or request a change of physician.

32. In contradiction to Claimant's position, even after he endorsed the issue of change of physician in his Application for Hearing filed on January 5, 2023, he nevertheless continued to treat with Dr. Chau. Although Claimant testified he requested David Reinhard, M.D. as his new physician, he never provided the request to Respondents. He did not schedule an initial consultation with Dr. Reinhardt or receive treatment with him through the date of this Order.

33. In the days after the September 20, 2022 work accident Claimant signified through his conduct that he selected Concentra at Chambers Road and I-70 for treatment. Claimant obtained a variety of medical treatment through Concentra on numerous occasions between September 21, 2022 through the date of MMI on December 19, 2022, and afterwards through April 3, 2023. Accordingly, by continuing to obtain treatment for several months at the Chambers Road and I-70 Concentra facility without concerns, Claimant exercised his right of selection and chose his ATP.

34. Respondents have proven 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 November 2, 2022 Claimant was terminated from employment after accumulating 12 occurrence points. He specifically received his final occurrence point for failing to adhere to the work schedule on November 1, 2022 because he did not inform a manager he was leaving work after four hours.

35. On October 28, 2022 Employer notified Claimant they would abide by his work restrictions of not lifting more than 15 pounds and no bending at the waist. Effective Monday October 31, 2022, Claimant would be required to work eight hours a day. MM[Redacted] testified that he believed the last day of accommodating four-hour shifts for Claimant was October 28, 2022. The medical records from Dr. Chau never documented a four-hour work restriction. Claimant was cleared to work an eight-hour shift throughout his medical treatment. The four-hour limitation was an added accommodation provided by Employer. The record reveals that, although Employer offered to work with Claimant to provide necessary breaks, he had a negative reaction

about returning to an eight-hour modified shift.

36. MM[Redacted] credibly explained that Employer used an occurrence point system to track Claimant's disciplinary violations. He testified the point system provided that failing to call-in or show-up for work was worth six points, a call-out with insufficient time to cover the absence cost two points, tardiness over six minutes was valued at one point, and failing to adhere to the schedule was worth one point. Claimant accrued 10 occurrence points prior to his September 20, 2022 date of injury. MM[Redacted] detailed that Claimant specifically accrued two points on July 12, 2022, August 11, 2022, August 16, 2022, August 25, of 2022 and September 19, 2022 for a total of 10 points. He remarked that Claimant was informed of his point total on the day of his lower back injury or September 20, 2022. Claimant obtained his eleventh occurrence point on October 19, 2022 for tardiness.

37. Despite knowledge that he had accumulated 11 occurrence points, Claimant nevertheless decided to work four-hour shifts on October 31, 2022 and November 1, 2022 in defiance of Employer's request. Claimant worked four hour days on October 31, 2022 and November 1, 2022, but failed to inform a manager before departing. On November 1, 2022, due to the volitional acts of failing to work an eight-hour shift and not checking with a manager before his shift ended, Claimant accrued his twelfth occurrence point and became eligible for termination.

38. Claimant failed to complete his scheduled shifts on October 31, 2022 and November 1, 2022. The record reflects that he was aware termination could result. To the extent Claimant argues that his attendance issues were related to his work injury, his contention is not credible. The weight of the evidence establishes that Claimant simply violated known and well-communicated attendance policies. He thus precipitated his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, 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 for the period November 3, 2022 through his date of MMI on December 19, 2022.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

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

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

7. As found, Claimant has established by a preponderance of the evidence that he suffered a lower back injury during the course and scope of his employment with

Employer on September 20, 2022. Claimant's testimony and the persuasive medical records reveal that Claimant injured his lower back while at work. Initially, Claimant credibly testified that he was transferring product from one pallet to another when he felt a pop in his lower back. Claimant also experienced a sharp pain when bending. He verbally reported the injury to his supervisor EE[Redacted] and spoke to two managers about his injury. On September 21, 2022 Employer completed an "Incident Reporting System" form and filed a First Report of Injury.

8. As found, on September 21, 2022 Claimant first visited the Concentra at Chambers Road and I-70 for an evaluation. Claimant reported he was lifting boxes when he injured his lower back. NP Bradshaw determined her objective findings were consistent with a work-related mechanism of injury. She assessed Claimant with a lumbar strain. Concentra providers continued to note their objective findings were consistent with a work-related mechanism of injury on September 23, October 6, and October 21, 2022. Providers referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy.

9. As found, independent medical examination physician Dr. Feldman reviewed Claimant's medical records and conducted a physical examination. Claimant recounted that on September 20, 2022 he was picking up a product at work, felt a pop in his lower back and had the acute onset of pain. Dr. Feldman determined "[i]t appears that [Claimant] sustained a lumbar sprain/strain injury while at work on September 20, 2022."

10. As found, based on Claimant's credible testimony and a review of the medical records, Claimant suffered a lower back injury that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant's work activities aggravated, accelerated or combined with his pre-existing to produce a need for medical treatment. Accordingly, Claimant suffered a compensable lower back injury on September 20, 2022.

Medical Benefits

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

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

13. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical benefits for his September 20, 2022 industrial injury. Claimant obtained authorized medical treatment for his injury through Concentra. Providers continually noted that their objective findings were consistent with a work-related mechanism of injury. They referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy. Moreover, independent medical examination physician Dr. Feldman attributed "100%" of Claimant's care between September and December 2022 to his September 20, 2022 industrial injury. Accordingly, the record reveals that Claimant's employment activities on September 20, 2022 aggravated, accelerated, or combined with his pre-existing condition to produce a need for medical treatment.

Right of Selection

14. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck,* 996 P.2d at 229. However, the Colorado Workers' Compensation Act requires respondents to provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

15. The term "select," is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives." *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." *Williams v. Halliburton Energy Services,* WC 4-995-888-01 (ICAO,

Oct. 28, 2016); *Loy v. Dillon Companies*, W.C. No. 4-972-625 (Feb. 19, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000).

16. As found, Claimant has proven by a preponderance of the evidence that the right to select an ATP passed to him through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2. The record reflects that Claimant did not receive a list of at least four designated medical providers. Respondents have not met the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to him.

17. As found, because the right of selection passed to Claimant, the central issue is whether he demonstrated by his words or conduct that he chose the Chambers Road Concentra location for treatment. Respondents have demonstrated by a preponderance of the evidence that Claimant chose the Chambers Road Concentra facility as his ATP through his conduct. Initially, Claimant remarked that on September 21, 2022 MM[Redacted] pulled up the Concentra clinic at Chambers Road and I-70 on his telephone and told Claimant to go there because the facility was close. Claimant understood that he was being directed to a specific Concentra clinic. On September 21, 2022 Claimant first visited the Concentra at Chambers Road and I-70 for an evaluation with NP Bradshaw.

18. As found, from September 21, 2022 through the date of MMI on December 19, 2022 and afterwards through April 3, 2023, Claimant regularly followed-up with Dr. Chau at the Concentra Medical Center, Denver-Aurora North facility, at Chambers Road and I-70. Providers referred Claimant for conservative treatment, including massage therapy, osteopathic manipulation and physical therapy. Claimant acknowledged that he did not have any issues about the way Dr. Chau treated him. He scheduled his own appointments, provided transportation and voluntarily presented for care. Claimant did not express any dissatisfaction with his care, raise any concerns with the designation or request a change of physician.

19. As found, in contradiction to Claimant's position, even after he endorsed the issue of change of physician in his Application for Hearing filed on January 5, 2023, he nevertheless continued to treat with Dr. Chau. Although Claimant testified he requested David Reinhard, M.D. as his new physician, he never provided the request to Respondents. He did not schedule an initial consultation with Dr. Reinhardt or receive treatment with him through the date of this Order.

20. As found, in the days after the September 20, 2022 work accident Claimant signified through his conduct that he selected Concentra at Chambers Road and I-70 for treatment. Claimant obtained a variety of medical treatment through Concentra on numerous occasions between September 21, 2022 through the date of MMI on December 19, 2022, and afterwards through April 3, 2023. Accordingly, by continuing to obtain

treatment for several months at the Chambers Road and I-70 Concentra facility without concerns, Claimant exercised his right of selection and chose his ATP. *See Murphy-Tafoya v. Safeway, Inc.*, WC 5-153-600 (ICAO, Sept. 1, 2021) (where right of selection passed to the claimant, six months of treatment with personal provider following her work injury demonstrated that the claimant had exercised her right of selection); *Rivas v. Cemex Inc*, WC 4-975-918 (ICAO, Mar. 15, 2016) (through his words and conduct in obtaining treatment from Workwell for five weeks the claimant selected Workwell as his authorized provider); *Pavelko v. Southwest Heating and Cooling*, WC 4-897-489 (ICAO, Sept. 4, 2015) (the claimant exercised his right of selection when he obtained treatment for two years from provider recommended by the employer); *Tidwell v. Spencer Technologies*, WC 4-917- 514 (ICAO, Mar. 2, 2015) (where the employer failed to designate an authorized medical provider and claimant obtained treatment from personal physician Kaiser for his industrial injury, the claimant selected Kaiser as his authorized treating physician through his words or conduct).

Temporary Total Disability Benefits/Responsible for Termination

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

22. 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 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).

23. As found, Respondents have proven 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 November 2, 2022 Claimant was terminated from employment after accumulating 12 occurrence points. He specifically received his final occurrence point for failing to adhere to the work schedule on November 1, 2022 because he did not inform a manager he was leaving work after four hours.

24. As found, on October 28, 2022 Employer notified Claimant they would abide by his work restrictions of not lifting more than 15 pounds and no bending at the waist. Effective Monday October 31, 2022, Claimant would be required to work eight hours a day. MM[Redacted] testified that he believed the last day of accommodating four-hour shifts for Claimant was October 28, 2022. The medical records from Dr. Chau never documented a four-hour work restriction. Claimant was cleared to work an eight-hour shift throughout his medical treatment. The four-hour limitation was an added accommodation provided by Employer. The record reveals that, although Employer offered to work with Claimant to provide necessary breaks, he had a negative reaction about returning to an eight-hour modified shift.

25. As found, MM[Redacted] credibly explained that Employer used an occurrence point system to track Claimant's disciplinary violations. He testified the point system provided that failing to call-in or show-up for work was worth six points, a call-out with insufficient time to cover the absence cost two points, tardiness over six minutes was valued at one point, and failing to adhere to the schedule was worth one point. Claimant accrued 10 occurrence points prior to his September 20, 2022 date of injury. MM[Redacted] detailed that Claimant specifically accrued two points on July 12, 2022, August 11, 2022, August 16, 2022, August 25, of 2022 and September 19, 2022 for a total of 10 points. He remarked that Claimant was informed of his point total on the day of his lower back injury or September 20, 2022. Claimant obtained his eleventh occurrence point on October 19, 2022 for tardiness.

26. As found, despite knowledge that he had accumulated 11 occurrence points, Claimant nevertheless decided to work four-hour shifts on October 31, 2022 and

November 1, 2022 in defiance of Employer's request. Claimant worked four hour days on October 31, 2022 and November 1, 2022, but failed to inform a manager before departing. On November 1, 2022, due to the volitional acts of failing to work an eight-hour shift and not checking with a manager before his shift ended, Claimant accrued his twelfth occurrence point and became eligible for termination.

27. As found, Claimant failed to complete his scheduled shifts on October 31, 2022 and November 1, 2022. The record reflects that he was aware termination could result. To the extent Claimant argues that his attendance issues were related to his work injury, his contention is not credible. The weight of the evidence establishes that Claimant simply violated known and well-communicated attendance policies. He thus precipitated his employment termination by a volitional act that he would have reasonably expected to cause the loss of employment. Accordingly, 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 for the period November 3, 2022 through his date of MMI on December 19, 2022.

ORDER

1. Claimant suffered a compensable lower back injury at work on September 20, 2022.during the course and scope of his employment with Employer.

2. Respondents are financially responsible for payment of Claimant's reasonable and necessary medical expenses for the treatment of his lower back injury.

3. The right to select an ATP passed to Claimant through Respondents' failure to provide a written list of at least four designated medical providers

4. Claimant selected the Chambers Road and I-70 Concentra facility as his ATP.

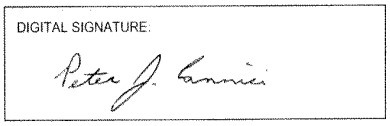
5. Claimant's request for TTD benefits for the period November 3, 2022 through his date of MMI on December 19, 2022 is denied and dismissed because he was responsible for his November 2, 2022 termination from employment.

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

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

further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.

DATED: July 25, 2023.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-177-827-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that his scheduled eye impairment should be converted to a whole-person impairment.

2. Whether Respondents are liable for penalties for filing the final admission of liability beyond the period set forth in § 8-42-107.2(4)(c), C.R.S.

3. Whether Claimant is entitled to a disfigurement award.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to his right eye on July 8, 2021, while he was re-treading a tire. A strap broke and struck his safety goggles, causing the safety goggles to strike his right eye, causing a full-thickness laceration of his cornea.

2. Claimant was taken to the emergency department at Denver Health that same day and underwent eye surgery, consisting of a peritomy and globe exploration of the right eye.

3. On October 11, 2021, Claimant underwent a second right eye surgery with Dr. Jesse Smith. The procedure was a "[c]omplex [p]hacoemulsification and cataract extraction with intraocular lens implantation, CTR, no kenalog."

4. On October 19, 2021, Claimant saw his authorized treating physician, Dr. Jay Reinsma at Concentra. Dr. Reinsma noted that Claimant had one more follow-up scheduled with a retinal specialist, at which point he anticipated Claimant would be released from care and returned to work at full duty. Dr. Reinsma referred Claimant for an impairment evaluation in anticipation of maximum medical improvement (MMI).

5. Claimant underwent an impairment rating evaluation[1] with Dr. Chester Roe on January 25, 2022. Dr. Roe opined that Claimant had reached MMI with a 99% impairment to his right eye based on Table 2, page 163 of the *AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised)*, which given the absence of impairment of the left eye, resulted in a total visual system impairment

[1] The record is ambiguous as to whether this evaluation was at the referral of Dr. Reinsma or whether it was an independent medical examination sponsored by Respondents pursuant to 8-43-404(3), C.R.S. The distinction does not affect the Court's analysis in this case, and so the Court does not make any findings in this regard.

of 25%. Dr. Roe noted that "one entirely blind eye with no visual field can only at worst be a 25% visual system impairment, if the other eye is normal, according to the Guides."

6. Dr. Roe later testified at hearing that Claimant would be legally blind if both eyes were as bad as his right eye. Regarding depth perception, Dr. Roe testified that stereo vision—or vision with two eyes—provides better depth perception than one eye alone. Regarding the impairment, Dr. Roe testified that the visual system chapter of the AMA Guides, the calculations were 99% vision impairment in the right eye, which is a 25% visual system impairment, or 24% whole-person impairment. He clarified that he chose not to assign a whole person impairment for cosmetic disfigurement because he could not perceive much of a pupil abnormality from several feet away. The Court finds Dr. Roe's testimony credible and persuasive.

7. Claimant obtained a Division independent medical examination (DIME) with Dr. James McLaughlin on August 2, 2022, a level II accredited physician under the Workers' Compensation Act.[2] Dr. McLaughlin examined Claimant and noted that Claimant was able to drive his seven-minute commute to work. However, Dr. McLaughlin noted that Claimant had difficulty getting in and out of the vehicle because he has to feel around for the handle, would have to hold onto the railing while ascending or descending stairs, and would sometimes miss his mouth while eating. The Court infers that these difficulties are related to his loss of depth perception resulting from his loss of vision in his right eye.

8. Dr. McLaughlin agreed that Claimant was at MMI, and he determined that date to be January 25, 2022. He assigned a 98% impairment to Claimant's right eye, and therefore a 25% visual impairment. Dr. McLaughlin clarified that this would convert to a whole-person impairment of 24%. Regarding permanent work restrictions, Dr. McLaughlin recommended Claimant not work at exposed heights and not operate heavy equipment, power tools, or sharp tools due to loss of depth perception and decreased stereo acuity.

9. The Court finds Dr. McLaughlin's opinion regarding permanent impairment to equate to total loss of use of the eye.

10. Claimant testified at hearing that he cannot see movement in his right eye and that he sees lots of rays of different colors. Claimant also reported left eye fatigue and headaches. In his testimony, Claimant also recounted his difficulties with depth perception, including difficulty putting paste on his dentures in the morning, difficulty preparing food, and difficulty driving.

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[2] Rule 11-1, W.C.R.P. (2022), requires that a DIME physician be level II accredited, have sufficient recency of experience treating patients, and be board-certified in Colorado. Because Dr. McLaughlin performed the DIME, the Court infers that he met these criteria.

11. The Court finds Claimant's testimony credible. The Court also finds that Claimant's left eye fatigue and headaches are the result of overuse of his left eye to compensate for his right eye's loss of vision. Therefore, those symptoms lead the Court to find that Claimant's right eye impairment is beyond that which is set forth on the schedule of injuries at § 8-42-107(2), C.R.S.

12. The Court finds, based on Dr. McLaughlin's DIME report, Dr. Roe's testimony, and Claimant's testimony, that Claimant's loss of vision in his right eye for which he received an impairment rating from DIME Dr. McLaughlin constitutes a total loss of use of his right eye.

13. Dr. McLaughlin sent a copy of his DIME report to the Division as well as to counsel for the parties at some point in time between August 2 and September 7, 2022. Claimant and Respondents had a copy of the report for review by September 7, 2022 at the latest.

14. On September 7, 2022, The Division of Workers' Compensation issued a notice to the parties that the DIME process had concluded. The notice was sent by e-mail, and a copy was sent to Respondents' counsel. Respondents had actual notice as of September 7, 2022, that the DIME process had concluded.

15. On October 4, 2022, the Division issued a notice to Respondent-Insurer that "[t]he period for filing an application for hearing [pursuant to § 8-42-107.2(4)(c), C.R.S.] has expired and a final admission of liability is required." The Court finds that Respondent-Insurer received a copy of this letter.[3]

16. That same day, [Redacted, hereinafter RO], a representative of Claimant's counsel's office, e-mailed Respondents' counsel advising that the DIME process had concluded on September 7, 2022, and asking whether Respondents would be filing a FAL.

17. Respondents' counsel contacted Claimant's counsel via e-mail on October 10, 2022, regarding the possibility of settlement. Claimant's counsel responded on October 14, stating:

    a. *I have discussed the possibility with the client, and there is a possibility of settlement. However, I would like to receive the FA before evaluating this with the Client. If I'm not mistaken, this was due by September 27, and remains outstanding. Please advise on its status*.

18. On Wednesday, October 19, 2022, [Redacted, hereinafter BS], claims management supervisor for the Division, sent an e-mail to [Redacted, hereinafter JH] of Respondent-Insurer indicating that a "DIME conclusion notice" was sent to Respondent-Insurer on September 7, and that a FAL was due on September 27,

[3] Respondents' counsel, however, did not receive a copy of the letter until October 19, 2022, after learning about the existence of the letter and requesting a copy from the Division.

2022. BS[Redacted] also made reference to the October 4, 2022 letter sent by [Redacted, hereinafter DC]. BS[Redacted] requested that a FAL be filed by that Friday.

19. Respondents filed a FAL on November 7, 2022, admitting for a 25% scheduled impairment rating of the eye based on DIME Dr. McLaughlin's report and corresponding PPD benefits in the amount of $9,456.20. Respondents reserved the right to credit an overpayment of $715.35 toward PPD. The FAL was filed 61 days after the notice of conclusion of the DIME process, and 41 days after the FAL was due pursuant to § 8-42-107.2(4)(c), C.R.S. Based on the multiple notices Respondents received regarding the need to file an FAL, there is clear and convincing evidence that Respondents should have known that an FAL was due by no later than September 27, 2022, and that they were in continuing violation of the Workers' Compensation Act. The Court finds that Respondents' delay in filing the FAL was unreasonable and was the result of negligence. The Court also finds that with each successive notice, the delay in filing of the FAL became more unreasonable.

20. Four days prior to filing the FAL, Respondents had voluntarily issued a lump sum PPD payment to Claimant without discount in the amount of $8,740.85, the value of the admitted PPD minus an asserted overpayment of $715.35. The Court finds this to be a mitigating factor with regard to the issue of penalties. Though, the Court does also observe that Claimant would have been entitled to the same lump sum upon request pursuant to Rule 5-10, W.C.R.P., and § 8-43-203(2)(b)(II).

21. On December 7, 2022, exactly thirty days after the FAL was filed, Claimant filed an Application for Hearing (AFH) to challenge the FAL on the issues of average weekly wage, disfigurement, temporary disability benefits, permanent disability benefits, and penalties. December 7, 2022, was the latest date Claimant could file an AFH challenging the FAL pursuant to § 8-43-203(2)(b)(II), C.R.S.

22. The Court finds that Claimant's choice to wait thirty days from the date of the FAL before filing an AFH, notwithstanding having a copy of the DIME report since at least September 7, 2022, is evidence that Claimant perceived minimal ongoing harm resulting from delay of resolution of the issues endorsed in Claimant's AFH. The Court finds that the harm Claimant sustained as a result of Respondents' late filing of the FAL consisted of a delay in receipt of PPD benefits and a delay in resolution of the hearing issues. The former was somewhat mitigated by Respondents' voluntary payment of a lump sum PPD award without discount. The latter was of little harm, as evidenced by Claimant's own lack of urgency in seeking to challenge the FAL.

23. The harm resulting from the late filing of the FAL was slightly greater than *de minimus*, and the delay resulted from the negligence of Respondents. However, with each successive notice that Respondents received regarding their late FAL, the degree of culpability increased. Therefore, the Court finds that the following

daily penalties during the 41-day delay in filing of the FAL would be fairest and within Respondents' ability to pay:

a. From September 27 through October 4, 2022, daily penalties of $8 per day;
b. From October 5 through October 10, 2022, daily penalties of $10 per day;
c. From October 11 through October 19, 2022, daily penalties of $15 per day; and
d. From October 20 through November 6, 2022, daily penalties of $20 per day.

24. At the time of hearing, Claimant allowed the Court to observe his right eye for a disfigurement award. The Court observed that Claimant's right eye was slightly more dilated than the left and slightly redder. The Court finds that the disparities in pupil dilation and eye redness are related to Claimant's July 8, 2021 injury, and that Claimant has proved by a preponderance of the evidence that he has been seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view, as described, so as to entitle him to a disfigurement award. While the disfigurements are not particularly stark, their location in Claimant's right eye contributes to their prominence. The Court finds that a $700 disfigurement award is appropriate.

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).

Whole-Person Conversion

The ALJ is the finder of fact on the question of whether the Claimant sustained a "loss of an arm" within the meaning of schedule of disabilities in § 8-42-107(2)(a), C.R.S., or a whole person rating under § 8-42-107(8)(c), C.R.S. *Strauch v. PSL Swedish Healthcare System,* 917 P. 2d 366, 369 (Colo.App.1996). In resolving this question, the ALJ must determine the situs of the Claimant's "functional impairment," and the situs of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp*., 937 P.2d 883, 884 (Colo.App.1996)*; Strauch* at 368-369.

Injury is the manifestation in part or parts of the body which been impaired or disabled as a result of the industrial accident. *Mountain City Meat v. ICAO,* 904 P.2d 1333 (Colo. App. 1995). The part of the body that sustains the ultimate loss is not necessarily the particular part of the body where the injury occurred. *McKinley v. Bronco Billy's,* 903 P.2d 1239, 1242 (Colo.App.1995). When evaluating functional impairment the ALJ shall look at the alteration of the claimant's functional abilities by medical means and by non-medical means, as well as the claimant's capacity to meet personal, social, and occupational demands. *Askew v. Industrial Claim Appeals Office,* 927 P.2d 1333, 1337 (Colo. 1996).

Section 8-42-107(1), C.R.S., provides that a claimant is limited to a scheduled disability award if the claimant suffers an "injury or injuries" described in subsection (2) of that provision. *Strauch*, 917 P.2d 366. The schedule of impairments includes "[t]otal blindness of one eye." § 8-42-107(2)(gg), C.R.S. However, the Act also provides that "[w]hen an injury results in the total loss or total loss of use of . . . an eye . . . the benefits for such loss shall be determined pursuant to this subsection (8),[4] except as provided in subsection (7)(b)(IV)[5] of this subsection." § 8-42-107(8)(c.5), C.R.S.

The only distinction between these two provisions appears to be between total blindness and total loss of use of an eye. Although the distinction is not obvious at first glance, the Colorado Court of Appeals clarified the distinction in *McKinley v. Bronco*

[4] Whole-person.
[5] Where it provides that you must admit for the scheduled rating if it results in greater compensation.

Billy's, 903 P.2d 1239 (Colo.App.1995). The court in *McKinley v. Bronco Billy's* held that "[i]f the loss of use was partial, then . . . the amount of compensation was to be the proportionate share of the amount stated in the schedule for the total loss of a member." However, if the loss was total, then the permanent partial disability award was to be calculated based on the scheme for whole-person impairments set forth at § 8-42-107(8), C.R.S.

Claimant points to the case of *Parra v. Spectrum Retirement Communities*, W.C. No. 5-052-120-005 (May 6, 2021), as a case analogous to the present one. The panel in *Parra* upheld the ALJ's finding that the claimant's impairment of the eye was not limited to the schedule. The claimant in *Parra* suffered a full-thickness corneal laceration. As a result, he did not have a cornea or lens in his right eye and experienced headaches. Nevertheless, he was able to distinguish between lightness and darkness with his injured eye, as well as perceive motion if within several inches of his eye. The DIME physician declined to assign the claimant a whole-person impairment rating because the claimant still had some vision and still had his eyeball. The ALJ concluded that the claimant sustained a total loss of use of the eye and converted the scheduled rating to a whole-person rating.

The respondents in *Parra* appealed, arguing in part that the ALJ's finding that the claimant had "total loss of use" of his affected eye was not supported by the evidence, and that the loss of use was only partial because the claimant could still distinguish between lightness and darkness and perceive some motion. The ICAO panel, however, upheld the ALJ's finding, citing *Employers' Mut. Ins. Co. v. Indus. Comm'n*, 199 P. 482 (1921), for the proposition that an award for total blindness is correct where the vision remaining is of no value for working. The panel further upheld the finding that the impairment was not contained on the schedule in light of the facts that the claimant's "entire life has been altered by this injury" and the claimant experienced "continual headaches."

Here, just as in *Parra*, Claimant has not sustained enucleation of his right eye. Claimant retains some vision, just like the claimant in *Parra*, but the vision is of no value for Claimant's work. He cannot see movement in his right eye, but can see rays of different colors. Claimant's loss of vision has also caused Claimant continual headaches and altered Claimant's activities of daily living in substantial ways.

Parra is sufficiently analogous to the facts in this case such that the Court concludes, based on *Parra*, that it has the discretion to convert the scheduled eye impairment rating if the Court finds that Claimant sustained a total loss of use of his eye for all practical purposes. *See Mut. Ins. Co.*, 199 P. 482.

As found above, Claimant's loss of vision in his right eye for which he received an impairment rating from DIME Dr. McLaughlin constitutes a total loss of use of his right eye. Additionally, given Claimant's decreased ability to meet his personal needs in his activities of daily living, the strain placed on his contralateral eye, and his recurring

headaches, the Court concludes that Claimant's impairment is beyond that which is set forth on the schedule at § 8-42-107(2), C.R.S.

Therefore, Claimant has proved by a preponderance of the evidence that he is entitled to a conversion of his right eye impairment to a whole-person impairment of 24%.

Penalties

Section 8-43-304(1), C.R.S., provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S., is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo.App.2005).

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 insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital*, 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

Section 8-42-107.2, C.R.S., provides that Respondents shall, within twenty days after the date of mailing of the Division's notice that hit has received the DIME report, either file a FAL or request a hearing to contest the DIME's findings. As found above, the Division issued its notice on September 7, 2022. Respondents had until September 27, 2022, to either file a FAL or request a hearing challenging the DIME. Respondents did neither. Respondents were therefore in violation of the Act.

The Court also considers whether Respondents' violation of § 8-42-107.2, C.R.S., was reasonable. As found above, it was not. Respondents had notice that they were to file a FAL or request a hearing by no later than September 27, 2022, yet did not.

Section 8-43-304(4), C.R.S. permits an alleged violator twenty days to cure the violation. If the violator cures the violation within the twenty-day period "and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed." The cure statute adds an element of proof to a claim for penalties in cases where a cure is proven. Typically, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. The party seeking penalties must only prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo.App.2003). Section 8-43-304(4), C.R.S., modifies the rule and adds an extra element of proof when a cure has been effected. Specifically, the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo.App.1997); *see Tadlock v. Gold Mine Casino*, W.C. No. 4-200-716 (May 16, 2007).

Respondents came into compliance with the Act upon filing the November 7, 2022 FAL. However, in so doing, Respondents did not cure the daily violations of the Act already accrued for the period between September 27 and November 6, 2022. Even had it done so, as found above, Claimant has proved by clear and convincing evidence that Respondents should have known they were in violation of the Act. Therefore, penalties are appropriate.

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hosp.*, W.C. No. 4-619-954 (May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo.App.2005); *Espinoza v. Baker Concrete Construction*, W.C. No. 5-066-313 (Jan. 31, 2020).

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 claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc.*, W.C. 4-981-806 (July 1, 2019).

As found above, the harm resulting from the late filing of the FAL was slightly greater than *de minimus*. Respondents took measures to mitigate the late filing of the FAL by promptly issuing a lump sum payment without discount of all PPD admitted. The mitigation is partial, as Claimant would have been entitled to the same lump sum upon request pursuant to Rule 5-10, W.C.R.P., and § 8-43-203(2)(b)(II).

As found above, the harm Claimant sustained as a result of Respondents' late filing of the FAL consisted of a delay in receipt of PPD benefits and a delay in resolution of the hearing issues. The former was somewhat mitigated by Respondents' voluntary payment of a lump sum PPD award without discount. The latter was of little harm, as evidenced by Claimant's own lack of urgency in seeking to challenge the FAL.

As for reprehensibility, as found above, Respondents' violation is the result of negligence. Nevertheless, the degree of culpability increased with each successive notice Respondents received that their FAL was untimely. Therefore, the Court concludes that daily penalties should be imposed proportional to the unreasonableness of Respondents' failure to file the FAL during each period during which Respondents had additional notice. Penalties should be imposed as follows:

- From September 27 through October 4, 2022, daily penalties of $8 per day;
- From October 5 through October 10, 2022, daily penalties of $10 per day;
- From October 11 through October 19, 2022, daily penalties of $15 per day; and
- From October 20 through November 6, 2022, daily penalties of $20 per day.

Based on the above findings, the penalties payments should be apportioned equally between Claimant and the Colorado Uninsured Employer Fund.

Disfigurement

Section 8-42-108(1), C.R.S. permits an ALJ to award disfigurement benefits up to a maximum of $4,000 if the claimant is "seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view. . . ." The ALJ may award up to $8,000 for "extensive body scars" and other conditions expressly provided for in § 8-42-108(2), C.R.S. These awards are subject to annual adjustment by the Director of the Division of Workers' Compensation pursuant to §8-42-108(3), C.R.S.

Based on Claimant's testimony and the records submitted at hearing, Claimant's injury caused a visible disfigurement to his body consisting of slight redness in the right eye and slightly more pupil dilation in the right eye than the left. Claimant has proved entitlement to a disfigurement award. As found above, and as the Court here concludes, a disfigurement award of $700.00 is most appropriate for a disfigurement that is not salient in appearance but located in the prominent location of Claimant's eye.

ORDER

It is therefore ordered that:

1. Respondents shall file an amended FAL admitting for a 24% whole-person impairment.

2. Respondents shall pay daily penalties as follow:

   a. From September 27 through October 4, 2022, daily penalties of $8 per day;
   b. From October 5 through October 10, 2022, daily penalties of $10 per day;
   c. From October 11 through October 19, 2022, daily penalties of $15 per day; and
   d. From October 20 through November 6, 2022, daily penalties of $20 per day.

   The penalties shall be paid 50% to Claimant and 50% to the Colorado Uninsured Employer Fund.

3. Respondents shall pay Claimant a disfigurement award of $700.00.

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

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

DATED: July 25, 2023

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

ISSUES

1. Did Claimant prove by a preponderance of the evidence that she sustained a compensable work injury?

2. If Claimant sustained a compensable work injury, is she entitled to medical benefits?

3. If Claimant sustained a compensable work injury, is Claimant entitled to temporary disability benefits?

FINDINGS OF FACT

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

1. Claimant is a 34 year-old woman who worked for Employer. She began working for Employer on December 16, 2019, as a container delivery driver. In February 2021, Claimant was a promoted to roll-off driver and drove a cabover truck. In January 2022, Claimant was assigned a newer model truck, an International. (Tr. 21:12-22:2). Claimant worked full-time, anywhere from 10-12 hours a day, Monday through Friday, and five to eight hours on Saturdays. (Tr. 24:19-23).

2. Claimant credibly testified that the seat in the new truck hung low to the left, and she would compensate the tilt as best she could by using her work gloves to lift the left side up. She estimated the tilt to be at an approximately 35 degree angle. (Tr. 22:14-23:15).

3. Claimant credibly testified that the seat was always uncomfortable and she noticed pain building in her right rear hip area. On or around March 15, 2022, the pain was sharp and she felt a pinching pressure, with random spasms in her right buttocks. Claimant credibly testified she told her supervisor, "Ricky", about the seat. (Tr. 26:12-26).

4. On March 21, 2022, Claimant wrote on the Driver's Daily Vehicle Inspection Report under the section entitled Defect Description, "Driver seat leans to left – causing sciatic pain." (Ex. 5). Claimant credibly testified that Employer replaced the seat cushion, but this did not help with the pain. (Tr. 30:16-20).

5. There is no contrary evidence in the record regarding the driver's seat in Claimant's truck. Claimant's testimony was credible, and the ALJ finds that the driver's seat in Claimant's assigned work truck was tilted, and hung to the left.

6. On April 11, 2022, Claimant went to the emergency room at North Suburban Medical Center. She reported sitting on a lopsided seat for several months, and having a significant increase in right hip pain over the last three weeks. The pain had been intolerable over the previous seven days. Claimant described the pain as a deep burning sensation and a feeling like there was a bubble inside her right hip that radiated down the side of her leg. The pain was substantially worse when sitting. The CT scan and MRI revealed Claimant had a disc extrusion at the L4-L5 level, among other findings. (Ex. 12).

7. On Thursday, April 14, 2022, Claimant emailed [Redacted, hereinafter MA], a regional HR business partner with Employer. Claimant reported that she started experiencing low back pain on March 15, 2022, and she wrote up her truck on March 21, 2022. Claimant explained that her seat was uneven, and she used her work gloves to elevate the left side of the seat, but the pain was becoming increasingly worse. Claimant told MA[Redacted] that she had a bulging disc in her L4-L5 vertebrae, and it was causing severe pain in her sciatic nerve, down to her foot. Claimant explained that she went to the Hospital on April 11, 2022, and they advised her to rest three days. Claimant noted this was her third day of rest, but she was still in "pretty bad shape." Claimant inquired if there was any light work for her to do while the doctors determined how to proceed with her spine. (Ex. 4).

8. MA[Redacted[testified that Claimant filled out paper work on April 14, 2022 regarding her alleged injury. According to MA[Redacted], Claimant wanted to see how she did at home over the weekend, and then she would let Employer know if she wanted to see an Authorized Treating Provider (ATP). On the following Tuesday, Claimant decided to see an ATP. (Tr. 85:15-86:6).

9. On April 19, 2022, Claimant saw, ATP, Nazia Javed M.D. Claimant reported experiencing low back pain that began on or about March 15, 2022. Claimant told Dr. Javed that her truck seat was uneven, and it started affecting her back. She reported the pain was worse with prolonged sitting or bending. Claimant had pain radiating down her right leg. She told Dr. Javed that about two years prior she went to a chiropractor who took x-rays of her spine, and told her she had lumbar degenerative discs. Dr. Javed diagnosed Claimant with lumbar discogenic pain, lumbar disc bulge and RLE radiculitis. (Ex. 9).

10. Dr. Javed referred Claimant to Joseph Fuller, M.D., at Mountain Spine and Pain Physicians. Dr. Fuller examined Claimant on April 21, 2023. Dr. Fuller performed epidural steroid injections on Claimant. (Ex. 8). On or about May 25, 2022, ATP, Dr. Javed, referred Claimant to Yusuke Wakeshima, M.D., for oral pain management since the trial of steroid injections was not successful. (Ex. 9).

11. On June 13, 2022, Claimant was evaluated by Dr. Wakeshima. He diagnosed Claimant with right-sided low back pain with right-sided sciatica, lumbar radiculopathy - right, lumbar degenerative disc disease, sacroiliac joint dysfunction of right side, piriformis syndrome of right side, and pain in right lower extremity. With respect to Claimant's lumbar radiculopathy, Dr. Wakeshima opined "[t]he patient's clinical presentation is also

consistent with sacroiliac joint dysfunction today, which would also be more consistent with her mechanism of injury of being [sic] an unbalanced seat." (Ex. 7).

12. Dr. Javed also referred Claimant to Andrew Castro, M.D., a spine surgeon, who evaluated Claimant on June 29, 2022. Dr. Castro's assessment was lumbar radiculopathy secondary to a disc herniation L4-5 right-sided. He opined that Claimant was reasonably indicated for a right-sided, L4-5 microdiscectomy, as Claimant failed conservative therapy. Surgery was scheduled for July 28, 2022. (Ex. 11)

13. Claimant had a pre-operative appointment with Dr. Castro's office on July 22, 2022. At the appointment, Claimant reported that she was "still having work comp issues and has a court date set for October 5. She did not want to wait until the court date and is planning surgery under her commercial insurance." (Ex. 11).

14. On July 28, 2022, Dr. Castro operated on Claimant and performed a partial laminectomy L4-5, and a lumbar decompression at L4-5. (Ex. 11). At her August 10, 2022, follow-up appointment, Claimant reported she was doing well and the record notes she "is much improved from surgery." Similarly, at her August 24, 2022 appointment, Claimant reported being "a lot better than she was preop." (Ex. C)

15. Claimant testified that the surgery temporarily alleviated her pain, but once the medication and epidural wore off, the pain came back about a month later. (Tr. 36:24-37:8 and 38:3-9).

16. On August 5, 2022, Claimant was evaluated by Dr. Wakeshima. Claimant reported that the surgery went extremely well, and she was not having any significant pain issues. (Ex. 7). She continued to follow-up with Dr. Wakeshima every few weeks. At her September 14, 2022 appointment, Claimant reported experiencing bilateral low back pain with intermittent severe muscle spasms bilaterally. Dr. Wakeshima saw Claimant again on September 23, 2022. He noted that she had "tenderness over the sacroiliac joint region and positive provocative maneuvers sacroiliac joint dysfunction including positive Patrick's, Yeoman's and Gaenslen's maneuvers." Dr. Wakeshima recommended fluoroscopically guided sacroiliac joint injections. (Ex. 7).

17. On October 26, 2022, Claimant was evaluated by Michael Shen, M.D., who took over her care due to the retirement of Dr. Castro. Claimant reported she still had some surgical lower back pain when rolling over in bed or getting out of chairs that did not last long. She was not having any radicular symptoms. (Ex. C).

18. Claimant saw Dr. Wakeshima later that day, on October 26, 2022. She reported that the surgery helped with her leg pain, but she still had pain in her low back region. Claimant's pain was 5 out of 10. Dr. Wakeshima specifically noted that driving a truck with a crooked seat may cause a pelvic obliquity situation and may potentially cause a strain to the sacroiliac joint. He opined that if her pain generator remained consistent with a SI joint dysfunction, he would submit a request for SI joint injections. (Ex. 7). There is no objective evidence in the record that Dr. Wakeshima submitted such a request.

19. Claimant testified that she is still experiencing pain in her right buttocks, but it is different that the pain she experienced previously. Claimant testified that it hurts when she lays down and it hurts to get up. (Tr. 54:19-55:4).

20. The ALJ finds, based on the totality of the evidence, that Claimant's July 28, 2022 surgery for her herniated discs, resolved her leg symptoms, but did not completely alleviate the pain in her back.

21. At the request of Respondents, John Burris, M.D., performed an Independent Medical Examination (IME) on Claimant on August 16, 2022. Dr. Burris reviewed Claimant's medical records and he examined Claimant. Claimant reported that her recent surgery was beneficial and decreased her low back pain, and resolved her leg symptoms. Dr. Burris opined that Claimant developed an atraumatic lumbar L4-5 disc herniation on or about March 15, 2022. He further opined that the vast majority of lumbar disc herniations are due to the natural degenerative process. He concluded that Claimant's "lumbar condition cannot, within a reasonable degree of medical probability, be causally related to the activity of riding in a crooked seat." He also concluded Claimant's herniated disc and July 28, 2022 surgery were not work-related conditions. Dr. Burris prepared a report outlining his opinions (Ex. A).

22. Dr. Wakeshima reviewed Dr. Burris's IME report. He agreed with Dr. Burris's opinion that sitting on a crooked seat would not cause the disc pathology appreciated on the MRI. He also agreed that Claimant's herniated disc and related surgery were not work-related. Dr. Wakeshima noted, however, that Dr. Burris did not specifically comment on whether the sacroiliac dysfunction was work related. He disagreed with Dr. Burris's opinion that that the disc pathology was the cause of Claimant's symptoms. Instead, Dr. Wakeshima opined that Claimant's symptoms were related to her SI joint dysfunction. He reiterated that he had previously suspected Claimant's problem was a SI joint dysfunction, but the patient had "opted to go forth with lumbar microdiscectomy at the L4-5 disc by Dr. Castro." (Exs. 6 and B).

23. Dr. Burris testified via a pre-hearing deposition on November 23, 2022. He credibly testified that Claimant's disc herniation was not causally related to mechanism of injury of riding in a crooked seat. (Dep. Tr. 7:11-24). Dr. Burris further testified that SI joint dysfunction is a soft tissue imbalance across the pelvis involving the sacroiliac joint, which is the joint between the sacrum and the iliac bone in the back of the pelvis. (Dep. Tr. 9:7-18). Dr. Burris disagreed with Dr. Wakeshima's opinion that Claimant's SI joint dysfunction was Claimant's pain generator. He felt that Claimant's disc herniation was the major pathology. (Dep. Tr. 11:1-19). Dr. Burris opined that there are many things that can cause a soft tissue imbalance, including a disc herniation, and in his opinion, Claimant had a "classic presentation of an evolving disc herniation." (Dep. Tr. 10:3-25). Dr. Burris credibly testified that Claimant's SI joint dysfunction could be related to the crooked seat, but it could also be related to the herniated disc. He testified that it was equally probable that Claimant's SI joint dysfunction was related to the crooked seat as it was to her herniated disc. Dr. Burris ultimately opined that he thought the herniated disc was more likely. (Dep. Tr. 15:4-13). He maintained his opinion that Claimant's overall

presentation was most consistent with an evolving disc herniation, which was not work-related. (Dep. Tr. at 11:1-19).

24. The ALJ finds the opinions of Drs. Wakeshima and Burris to be credible and persuasive. Both doctors agree that Claimant's herniated disc and related surgery are not work-related. The ALJ finds that Claimant's herniated disc and her related surgery are not work-related, and not compensable.

25. Dr. Wakeshima diagnosed Claimant with an SI joint dysfunction on June 13, 2022, and she continues to have this diagnosis. Dr. Wakeshima opined that Claimant's SI joint dysfunction is causally related to her alleged mechanism of injury – sitting in a crooked seat for multiple hours. Dr. Burris credibly testified while he thought Claimant's disc herniation caused the SI joint dysfunction, he credibly testified that it was equally probable that the crooked seat caused that SI joint dysfunction. While both physicians are credible and persuasive, the ALJ assigns more weight to Dr. Wakeshima's opinion, particularly since he treated Claimant for several months. Based on the totality of the evidence, the ALJ finds that Claimant's SI joint dysfunction is causally related to sitting on a crooked seat.

26. In October 2022, Dr. Wakeshima recommended that Claimant receive SI joint injections. The ALJ finds that in October 2022 this recommended treatment was reasonable, necessary and related, but there is no objective evidence in the record that SI joint injections are currently reasonable and necessary to treat Claimant's SI joint dysfunction.

Claimant's Work Restrictions

27. At Claimant's first appointment with her ATP on April 19, 2022, Dr. Javed gave Claimant restrictions with respect to lifting, pushing/pulling and specifically noted she was to avoid repetitive bending, and needed to alternate sitting and standing every 20 minutes to stretch her back. (Ex. E). Based on this restriction, Employer provided Claimant a "Return to Work" offer (RWO) that accommodated Claimant's work restrictions, which she accepted. (Ex. G). Dr. Javed continued to provide these same general restrictions from April 19, 2022 through May 26, 2022. Claimant accepted another RWO on May 2, 2022 that accommodated the work restrictions set forth by Dr. Javed. (Ex. G).

28. On June 1, 2022, Dr. Javed updated Claimant's work restrictions to include "no driving." At that appointment, Claimant told Dr. Javed that driving was difficult because her right leg felt weak and was in constant pain. (Ex. 9). Employer provided Claimant a new RWO on June 2, 2022 that specifically noted Claimant would be unable to drive herself to work and suggested that Claimant use [Redacted, hereinafter UR] or ask others for a ride. (Ex. G).

29. Claimant credibly testified that she informed Employer she lived 25 minutes away from work and did not have the funds for UR[Redacted], nor did she have anyone she could ask for a ride. (Tr. 62:1-25). On June 2, 2022, Claimant emailed MA[Redacted] and explained her inability to pay for UR[Redacted] or get a ride to work. Claimant also

stated she "tried to request that Dr. Javed allow me to remain out of work until I can get relief as the pain has only grown increasingly more severe as time passes. . . I have tried to express this to Dr. Javed but she wouldn't help me on that front but picked that I couldn't drive stating your employer won't pay for UR[Redacted] so you will have to go on leave." She also noted that Dr. Javed requested that Claimant file for FMLA. (Ex. G).

30. Claimant's June 1, 2022 medical records do not reflect a conversation between Claimant and Dr. Javed regarding FMLA. At hearing, Claimant testified she went on FMLA ***prior*** to June 2022, and went on leave to take care of her son who dislocated his knee. Claimant testified "I took FMLA specifically to care for him, after his surgery, and yes, this is when I was – in the same time that I was having my own physical pain." (Tr. 45:24-46:14). The record is unclear as to what specific dates Claimant was out on FMLA.

31. On June 16, 2022, Dr. Javed removed the "no driving" restriction from Claimant's work restrictions. Claimant continued to follow up with Dr. Javed through October 18, 2022. At each visit from June 16, 2022 through October 22, 2022, Dr. Javed noted that Claimant's work restrictions generally included avoiding bending, and alternating sitting and standing to stretch her back muscles. They also included varying restrictions with respect to lifting, pushing, and pulling. Other than the two week period between June 1, 2022 and June 16, 2022, Claimant was not restricted from driving.

32. MA[Redacted] testified that Claimant emailed her on August 8, 2022, and inquired about her eligibility for light duty.[1] MA[Redacted] replied "GFL has no modified duty available, based on your restrictions." (Tr. 105:15-22).

33. From April 19, 2022 through July 15, 2022 the work-related medical diagnoses on the WC 164 forms, supporting work restrictions, included lumbar discogenic pain, lumbar disc bulge, and RLE radiculitis.[2] From August 5, 2022 through October 18, 2022, the work-related medical diagnoses on the WC164 forms, supporting work instructions, included, lumbar disc bulge s/p microdisectomy, lumbar discogenic pain, and lower back pain. (Ex. E).

34. Based on the totality of the evidence, the ALJ finds that Claimant's work restrictions were related to her disc herniation, which is not work-related, and not her SI joint dysfunction.

35. The ALJ finds that Claimant failed to prove by a preponderance of the evidence, that she is entitled to temporary disability benefits.

CONCLUSIONS OF LAW

Generally

[1] The email was not offered into evidence, but was read into the record by MA[Redacted]. (Tr. 104:3-105:7).

[2] The diagnosis of RLE pain is added on June 1, 2022, but it does not carry over in subsequent WC 164 forms.

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

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S.; *see Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related

injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics,* WC 4-960-513-01, (ICAO, Oct. 2, 2015).

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test. The test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, WC 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The “rights and liabilities for occupational diseases are governed by the law in effect at the onset of disability.” *Henderson v. RSI, Inc.*, 824 P.2d 91, 96 (Colo. App. 1991). The standard for determining the onset of disability is when “the occupational disease impairs the claimant’s ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity.” *Colo. Springs v. Indus. Claim Appeals Office*, 89 P.3d 504,506 (Colo. App. 2004). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner,* 12 P.3d at 846. The mere occurrence of symptoms in the workplace does not mandate that the conditions of the employment caused the symptoms or the symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla,* WC 4-606-563 (ICAO Aug. 18, 2005).

As found, Claimant worked full-time as a driver anywhere from 50-60 hours during the week, and another five to eight hours on Saturday. (Findings of fact ¶ 1). Claimant credibly testified that the crooked seat in her truck was always uncomfortable, and she noticed pain building in her right hip area, but it was on or around March 15, 2022 that the pain was sharp with random spasms in her buttocks, so she notified her supervisor. (*Id.* at ¶ 3). While Claimant was diagnosed with a herniated disc, Dr. Wakeshima also diagnosed Claimant with SI joint dysfunction on June 28, 2022. Claimant's July 28, 2022 surgery helped alleviate the symptoms in Claimant's right leg, but her lower back pain continued. Dr. Wakeshima credibly and persuasively opined that Claimant's pain generator is her SI joint dysfunction, and this is causally related to her mechanism of injury. Dr. Burris credibly testified that he believed it was more likely that Claimant's SI joint dysfunction was caused by her disc herniation, but it was equally probable that it was caused by sitting in a crooked seat. Based on the totality of the evidence, the ALJ found Dr. Wakeshima's opinion to be more persuasive. As found, Claimant suffered an SI joint dysfunction from sitting on a crooked seat between January and April of 2022. Claimant proved by a preponderance of the evidence that she suffered a compensable injury.

Medical Benefits

For an insurer to be liable for the payment of medical bills, the employee must have suffered a compensable injury arising out of and in the course of employment. § 8-42-101, C.R.S. If the injury is compensable and the medical services are reasonable and necessary, then the insurer is responsible for the expenses incurred by the employee for the treatment of the injury. *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). Claimant proved by a preponderance of the evidence that a compensable injury occurred between January 2022 and April 2022. As found, there is no objective evidence in the record that the SI joint injections recommended by Dr. Wakeshima in October 2022 are still reasonable, necessary, and related. (Findings of fact ¶ 26). Claimant needs to be evaluated by an ATP, so recommendations can be made as to what medical benefits are reasonable and necessary to treat Claimant's SI joint dysfunction.

Temporary Disability Benefits

From April 20, 2022 thought October 18, 2022, Claimant's ATP placed her on modified duty with various work restrictions. As found, Claimant's work restrictions were related to her herniated disc, which is not a work-related injury. As found, Claimant's work restrictions were not related to her SI joint dysfunction. (Findings of fact ¶ 34). Claimant failed to prove by a preponderance of the evidence that she is entitled to temporary disability benefits.

ORDER

It is therefore ordered that:

1. Claimant suffered a compensable injury, while in the course and scope of her employment.

2. Claimant shall be evaluated by an ATP to determine what treatment is reasonable and necessary to treat Claimant's SI joint dysfunction.

3. Claimant is not entitled to TPD or TTD benefits.

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

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

DATED: July 27, 2023

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she was injured in the course and scope of her employment with Employer on September 14, 2021.

IF CLAIMANT HAS PROVEN COMPENSABILITY, THEN:

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are authorized, reasonably necessary and related to the injury of September 14, 2021.

III. Whether Claimant has proven what her average weekly wage is at the time of the incident in question.

IV. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from September 15, 2021 to October 22, 2021 and July 28, 2022 until September 13, 2022.

V. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary partial disability benefits from October 23, 2021 to July 27, 2022.

VI. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for her termination of employment with Employer.

STIPULATION

The parties stipulated to strike the testimony of Ms. N.A. as the testimony began during hearing but was not completed at hearing or by deposition.

FINDINGS OF FACT

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

A. Generally:

1. Claimant was hired by Employer on August 14, 2021 as a housekeeper for the hotel, to clean guest rooms. The rooms she was assigned were large suite type rooms.

2. On September 14, 2021 she was cleaning a room, making a bed when she felt a twinge in her low back. She paid no attention to it and completed the cleaning of that room. She then pushed her cart, which was very heavy, to the elevator. The cart contained sheets, bedding, towels, cleaning materials and supplies. The elevator was a

small one, and she had to lift the cart into the elevator. She then proceeded to the second floor room. She was in the process of making the bed, and while lifting the mattress to make the bed, she felt a very strong pain in her low back. She tried to move but it hurt too much. She attempted to continue cleaning but was unable to. She went to her cart to retrieve her telephone.

3. Claimant called J.G., a co-worker that worked in the laundry room. Earlier that morning, he had told Claimant that the supervisor, N.A., had advised that she would be cleaning rooms until 11:00 a.m. and requested not to be bothered or interrupted. J.G. reported to the room and saw Claimant. He attempted to call the supervisor, N.A., but she did not respond to the phone call. Mr. J.G. went to look for the supervisor and then assisted Claimant going downstairs, holding her up. They went to the laundry room. At that point she was in a lot of pain and crying from the symptoms. As they were getting out to the elevator, another co-worker, daughter of Respondents' Representative, L.P., a non-testifying advisory witness, asked what was going on. The daughter then advised Respondents' Representative what had happened.

4. Claimant then proceeded to the laundry room, where J.G. attempted to assist Claimant to sit but she was unable to do so due to the pain. Her supervisor, N.A., found her in the laundry room and asked what had happened. Claimant reported her injury to her supervisor, explaining that she had injured herself while making a bed, when she had to lift the mattress to tuck the sheet in. She explained everything in her native language as her supervisor spoke it as well.

5. Claimant did not fill out any paperwork on that day. Mr. J.G. offered her three pain pills to take while in the laundry room, but her supervisor, N.A., failed to offer to send her for medical care. Her husband went to pick her up to take her for medical care. Her supervisor was aware that she was going to seek medical attention at Rockies emergency in Loveland. She explained to the medical staff that she had been lifting a mattress to tuck in the sheet when she felt the severe low back pain.

6. On September 15, 2021 Employer's Representative completed an Employer's First Report of Injury noting that Claimant had an injury on September 14, 2021 while making a bed, injuring her lower back. The form specifically noted that Employer was notified on September 14, 2021 and that Claimant was earning $13.00 per hour at the time of her injury. It specified Claimant was not paid for the day of the injury. A second typed FROI was completed on September 17, 2021 which was substantially similar to the first.

B. Medical Records:

7. The M-164 form completed by UCHealth Medical Center of the Rockies - Loveland noted that Claimant injured her low back lifting a mattress on September 14, 2021. Dr. Danielle Mianzo prescribed lidocaine patches and Flexeril and referred her to her primary care provider.

8. Claimant followed up at Concentra on September 20, 2021. PA-C Douglas Drake noted that Claimant's chief complaint was that she was making a bed when she felt back pain. She had been lifting a mattress to make the bed and felt a very sharp pain.

She reported pain in the low back, radiating into the left buttocks, which was relieved by OTC medication and rest. She denied prior injuries to the low back just prior to the incident. On exam, PA Drake noted left sided muscle spasm upon palpation in the paraspinal muscles, with limited range of motion (ROM) and a positive straight leg test (SLT). PA Drake made a referral to a chiropractor and physical therapy, stating that it was medically necessary to address objective impairment and functional loss and to expedite return to work. He provided work restrictions of 5 lbs. maximum lifting, carrying, pushing and pulling, no crawling, kneeling, squatting, or climbing. He stated that objective findings were consistent with the history and work-related mechanism of injury.

9. Physical therapy with Concentra started on September 20, 2021. Claimant reported that she was making a bed, lifting a mattress to tuck in the sheet when she experienced immediate pain in her low back and then symptoms started referring down her lateral left thigh. Mr. Brian Busey, P.T. noted that Claimant had tenderness to palpation of the lower thoracic and lumbar spine. He documented loss of range of motion of both the thoracic and lumbar spine. In addition to instructing Claimant with regard to exercises, the therapist performed dry needling to the myofascial trigger points, as well as muscular and connective tissues massage on September 22, 2021. She was directed to continue with the McKenzie roll for sitting and driving throughout the day.

10. Claimant returned to consult on September 22, 2021 with reports of burning pain in the left calf while driving, with pain in the low back, left greater than right side, with pain radiating from the left buttocks and left thigh. The pain was a burning sensation with the intensity of the pain waxing and waning. Dr. Jeffrey Baker, on exam noted left sided muscle spasms and limited range of motion though no longer a positive SLT. He continued to recommend the same restrictions, and instructed Claimant to use Naproxen and provided Claimant with cold packs.

11. On September 30, 2021 Claimant reported to Dr. Baker that her lower back pain was still continuing, ran down her left leg, was constant and burning and was irritated with sitting. He noted on exam that she continued to have tenderness and left-sided spasms, limited range of motion with pain. He noted that Claimant did appear to be healing slowly, but unfortunately her employer would not allow her to work light duty. He continued the same restrictions.

12. On October 11, 2021 Mr. Busey noted that Claimant was not making progress in physical therapy and returned Claimant for consult with her treater.

13. Claimant reported a worsened condition by October 14, 2021. Dr. Baker noted Claimant had tenderness at the L4-5 level and in the bilateral sacroiliac joints, with left-sided muscle spasms of the paraspinal muscles, limited ROM, but otherwise, a normal exam. Claimant continued to complain of radiating pain down her left leg. Claimant was approximately 50% of the way toward meeting the physical requirements of her job related to her low back strain. He stated that objective findings were consistent with history and work-related mechanism of injury, continued the work restrictions and ordered an MRI of the lumbar spine.

14. Dr. John Raschbacher conducted an independent medical examination on March 29, 2022 at Respondents' request. Dr. Raschbacher noted that Claimant first had

symptoms when she started working at the hotel but then on September 14, 2021 the pain worsened. He noted that before this she had no symptoms. He noted Claimant was given larger rooms to clean than she had previously done when she worked for Employer in 2018.

15. Claimant reported that her symptoms were worsening, with complains of left low back pain, left buttock pain, and pain that goes to the left knee. She sometimes had pain on the right side, although that was rare. He opined that since there was no clear injury, he did not recommend accepting liability for the lumbar spine pain, strain or symptomology related to the September 14, 2021 work injury. He stated that even if a lumbar strain had occurred, at this point, about six months later and after treatment, one would not anticipate this degree of symptomatology or diminished range of motion.

C. Employment and other records:

16. Claimant's pay check stub from Employer dated September 3, 2021 showed she earned $14.00 per hour and earned $847.00 for the 60.5 hours worked for the period of beginning on August 16, 2021 and ending on August 31, 2021. The check dated September 20, 2021 showed a payment of $671.72, for pay period of September 1 through September 15, 2021. However, Claimant began work on September 14, 2021 at 8:54 a.m. and her injury occurred at approximately 10:00 a.m. She left immediately after the injury, and was not paid for her date of injury according to the FROI. Therefore, Claimant earned a total of $1,518.72 for the period of August 16, 2021 through September 13, 2021, which is a four week period. This provides an average weekly wage of $379.68.

17. Respondent Insurer conducted an investigation and produced a summary of the recorded statement of Claimant's interview on October 5, 2021, which noted that it was not a quote of the person interviewed. The summary indicated that Claimant was making a bed when she felt pain in her low back. Prior to this, she indicated that she was feeling well. She then pushed a heavy cart down the hall and into the small elevator, which was difficult. When she started making the bed in the next room, she could not continue due to the severe pain.

18. Respondents filed a Notice of Contest on October 6, 2021 noting that an investigation was ongoing.

D. Claimant's testimony:

19. On September 21, 2021 Claimant took the paperwork from the medical facility, which showed that Claimant had restrictions, to Employer. However, N.A., Claimant's supervisor, did not wish her to go back to work with those restrictions. Ms. N.A. took her statement and completed the paperwork on Claimant's behalf as she did not read or write in English. Ms. N.A. then asked Claimant to sign a document. She could not explain why Employer's Representative had completed the paperwork as Claimant had never spoken with her directly.

20. Claimant earned $14.00 per hour and worked approximately 35 hours per week while working for Employer. She did not return to work for Employer because her supervisor, N.A., did not give a job to go back to. She simply stopped sending her a schedule, which was the custom prior to her injury. When she saw her supervisor in

person she asked why that was and N.A. told her that she would no longer be working for Employer. She specifically asked if she could work in the laundry room and was advised that was not available but did not receive an explanation why.

21. While working for Employer she had a discussion with a co-worker, Ms. J.A., about the job and feeling back soreness. Ms. J.A. recommended she use a girdle belt the same way she did, to protect her back. She was not wearing the girdle the day she was injured.

22. Claimant stated that this was not the only time she had worked for Employer. She had worked for them previously in 2018 for approximately four months and had no problems with her back. It was a different job before, because she was not responsible for cleaning the suites or using the small elevator that caused her to lift the cart to force it into the elevator.

23. Claimant obtained another job at [Redacted, hereinafter SC], a restaurant, where she was working within her restrictions. She started on October 23, 2021 and worked there through December 3, 2021. She earned $13.50 per hour and worked 35 hours a week. She worked preparing beverages. She left this employer in order to look for a job that paid better.

24. She then went to work for another restaurant called [Redacted, hereinafter BH] on December 27, 2022. She worked there through July 27, 2022. She left BH[Redacted] because of her back injury as the work hurt her too much. She was earning $18.00 per hour working twenty five hours a week. She was working as a food prep in the kitchen. She would prepare salsas and sauces as well as preparing portions of food.

25. Before working for Employer, she worked for another restaurant called [Redacted, hereinafter PO]. She worked there from 2018 to 2021. She earned $16.00 per hour through March 20, 2021 and then started earning $16.50 per hour from March 21, 2021. She did not have any accidents or injuries while working for PO[Redacted].

26. The last time she was seen by a medical provider was September 14, 2022 because she was pregnant and was released from care due to her pregnancy.

27. Claimant explained that she had not had any injuries to her back prior to September 14, 2021 while working for Employer or any prior employers.

E. Co-Worker's testimony:

28. Ms. J.A. a co-worker also worked for Employer during the month of September 2021 but September 14, 2021 was her regularly scheduled day off. She stated that Claimant called Ms. J.A. at some point and told her that she had fallen and had told Mr. J.G. about the fall. Ms. J.A. stated that claimant had been taking pain pills and was using a girdle because of back pain. She was under the impression that Claimant had slipped and fallen while working at the PO[Redacted] restaurant, while carrying something. She believed Claimant was working as a dishwasher there. She was never asked to become involved with any claim against PO[Redacted].

29. Ms. J.A. stated that she was no longer friends with Claimant.

30. Ms. J.A. did not recall being interviewed by an investigator or that the conversation was recorded.

31. A copy of a recording was introduced and admitted as Claimant's Exhibit 6 and this ALJ recognized Ms. J.A.'s voice. The interviewer advised her that the interview was not going to be disclosed. She stated that she worked for Employer as a housekeeper. She stated that she had worked there for two years and her supervisor was N.A. She confirmed that she worked with Claimant for about a month. She knew Claimant before that time, for approximately seven years. She stated that she was not aware Claimant was hurt because she was not at work on the day she was hurt. She found out because Claimant called her the same day in the afternoon. Claimant told her that she hurt herself while making a bed and that she could not move. Claimant had already gone to the hospital by the time she spoke with J.A. and that she had been given medication for the pain.

32. Ms. J.A. had worked at PO[Redacted] and [Redacted, hereinafter CI] together with Claimant previously. She did not know why Claimant had left PO[Redacted] and did not know if Claimant had ever been hurt there. Ms. J.A stated that Claimant had told her she fell while working for Employer, she saw her wearing a brace and Claimant told her she had been taking pain pills. She was not aware of any other injuries that Claimant may have sustained in the seven years she had known her. As found, Ms. J.A. is not found credible as she contradicted her own testimony at multiple times, including that she worked for PO[Redacted] and then stated she did not, as well as stating first that Claimant had fallen and then that she was hurt lifting a mattress. She is also not found credible because of unsubstantiated reports that Claimant may have been injured at PO[Redacted].

F. Dr. Raschbacher's testimony:

33. Dr. John Raschbacher testified on behalf of Respondents. He stated he had performed an independent medical examination (IME) of Claimant on March 29, 2022. He took a history, including employment history, and reviewed the records. He stated that Claimant had reported a specific injury while working for Employer. Dr. Raschbacher opined that, even if there was an acute episode, it would be a strain and would have resolved. He stated that none of his opinions had changed since producing his IME report. In fact, he opined that there was no evidence that Claimant had sustained any injuries while working for Employer. However, he was not aware that Claimant had visited the emergency room (ER) on the date of the claimed injury and his opinion might have changed if he had reviewed the ER records.

34. He stated that it was possible that a worker could have injured their back if with bending, lifting and twisting. He agreed that a patient could have an acute on chronic injury. He based his opinion that Claimant had not incurred an acute episode on two different factors. The first being that Claimant had continued to worsen, though had not made a claim against her new employer. The second that Claimant was a younger individual and there was no indication that she had anything other than a sprain. Lastly, he stated that her range of motion and pain behavior were notable six and a half months after the incident.

G. Ultimate Findings:

35. As found, Claimant has shown that she was injured in the course and scope of her employment with Employer on September 14, 2021 when she was bent over to lift a mattress while making a bed and felt a severe pain in her back. While Claimant may have had some symptoms when she first started her employment with Employer, the traumatic event of September 14, 2021 caused Claimant injury. The injury caused immediate severe pain, triggering her need to go to the emergency. Claimant was found to be credible. Both the ER record and the Concentra records document the mechanism of injury. PA Drake and Dr. Baker specifically noted that objective findings were consistent with the history and work-related mechanism of injury and support the causation analysis and finding of compensability. While Claimant had some limited treatment between September 20, 2021 and October 11, 2021, the ultimate determination was that she was not getting better and required an MRI pursuant to Dr. Baker's opinion. Claimant consistently reported how she was injured to all of her providers. Respondents' IME failed to flesh out what the mechanism of injury was simply relying on the account that she had had some diffuse discomfort at the beginning of her employment with Employer. Claimant also reported the mechanism of injury to her employer, which was also consistent with her hearing testimony as well as her recorded statement. Even Dr. Raschbacher admitted that she could have suffered a minor back strain from making the bed. Over the contrary opinion of Dr. Raschbacher and the contradictory testimony by Ms. J.A., who is specifically found not credible, Claimant has proven that it was more likely than not that she had a specific incident causing injury to her low back as supported by Dr. Baker's opinion,

36. As found, Dr. Raschbacher's opinion and testimony are neither credible nor persuasive. It is clear from both his report and his testimony that he did not have all the information necessary to make a full and credible determination regarding Claimant's injury, including the Emergency Room report of September 14, 2021. Further, Dr. Raschbacher failed to obtain the facts of the incident that happened on September 14, 2021 when taking a history. Despite this, he did explain that a person could suffer an acute injury to the low back from lifting a mattress to make a bed.

37. As found, Claimant's treatment as provided by the emergency room and Concentra was reasonably necessary and related to the injury. Claimant was placed at MMI on September 14, 2022 due to her pregnancy based on the Claimant's testimony. As such, any further medical treatment may not be awarded until Claimant proceeds with the DIME process, unless her ATP provided recommendations for maintenance care.[1]

38. As found, Claimant credibly testified that she was advised by her supervisor that no work was available for her when she turned in her work restrictions. Further, Claimant asking whether she could work in the laundry room and her supervisor decline to provide her a job. Claimant has proven that she is entitled to temporary disability benefits.

[1] Medical records with a finding of MMI and maintenance medical care were not in evidence.

39. As found, Claimant started a light duty job on October 23, 2021 at SC[Redacted], and then moved to work with BH[Redacted] through July 27, 2022. Both jobs were light duty and within her work restrictions. Claimant was unable to continue her job at BH[Redacted] because of continuing low back pain despite the work restrictions. Claimant is owed temporary partial disability benefits from October 23, 2021 through July 27, 2022 and temporary total disability benefits from September 15, 2021 through October 22, 2021 and from July 28, 2022 until terminated by law. No payroll records were provided and exact payments cannot be calculated at this time.

40. Respondents failed to show that Claimant was terminated for cause. Claimant was credible in that she requested modified work and was advised by her supervisor that no work was available. No offer of employment was made by Employer and it was not Claimant's volitional act that caused loss of employment but Employer's acts in failing to offer a position within her work restrictions.

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

CONCLUSIONS OF LAW

A. Generally

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See

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

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S. (2022); *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). An injury is "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).

The claimant must also prove by a preponderance of the evidence that the injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co*., 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co., supra*, at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

A pre-existing condition does not preclude a claim for compensation and an injury is compensable if an industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms after an incident at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

A claimant's testimony, if credited, may alone constitute substantial evidence to support a determination concerning the cause of the claimant's condition. *See Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986) (claimant's testimony was substantial evidence that his employment caused his heart attack); *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); see also *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997) (lay testimony sufficient to establish disability). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*. Further, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

Claimant has proven that it was more likely than not she was injured in the course and scope of her employment with Employer on September 14, 2021 when she lifted a mattress while making a bed and strained her lumbar spine. Claimant was carrying out her duties as a housekeeper for Employer when she was injured. She subsequently developed lower extremity radicular symptoms, in the left lower extremity, as a consequence of the lumbar strain. Claimant was credible in her account that she did not have any symptoms prior to working for Employer and that she had no prior injuries, contrary to the testimony of Ms. J.A., who was specifically not found credible or persuasive. Claimant's mechanism of injury was documented in both the emergency room record immediately following the injury, as well as the Concentra records shortly after the injury. These medical records were persuasive that Claimant's account of the mechanism of injury was more likely than not the cause of Claimant's lumbar spine injury. Claimant has proven that the incident of September 14, 2021 was the proximate cause of her work related injury to her low back and radicular symptoms. While Claimant may have had some low back symptoms caused by working as a housekeeper for Employer, those symptoms were not of the caliber to require medical attention and no medical records were in evidence to establish that Claimant had a medical condition which required medical attention prior to her injury. The September 14, 2021 incident was the

proximate cause of Claimant's injury and need for medical treatment. Claimant has proven by a preponderance of the evidence that she was injured on September 14, 2021 while in Employer's employment as a housekeeper. Claimant's claim is determined to be compensable.

C. Authorized Medical Benefits

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

As found, Claimant has shown she was injured while working for Employer and required medical care as a consequence of that work related injury. Claimant persuasively explained that the pain was so intense that she required immediate attention at the emergency room, following which she was attended by the providers at Concentra Medical Center for her lumbar spine and radicular lower extremity injuries. Claimant was persuasive in her description of the symptoms. As found the medical care was reasonably necessary and related to the specific mechanism of injury caused by lifting the mattress at work. Claimant has proven by a preponderance of the evidence that she required medical care caused by the September 14, 2021 work related injury. As Claimant met her burden of establishing she sustained a compensable work related injury to her lumbar spine and lower extremity, Claimant is entitled to reasonably necessary treatment to cure and relieve her of the effects of her injury.

Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Indus. Claim Appeals Off.,* 148 P.3d 381, at 383 (Colo. App. 2006); *One Hour Cleaners v. Indus. Claim Appeals Off.,* 914 P.2d 501 (Colo. App. 1995). Section 8-43-404(5)(a)(I)(A), C.R.S. allows the employer to choose the claimant's treating physician "in the first instance." If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987); *see also* W.C.R.P. Rule 8-2. An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch, supra,* at 383. As found, Claimant reported to her supervisor that she had been injured while lifting a mattress in the course of making a bed. As further found, Employer conceded to having notice by completing the September 15, 2021 Employer's First Report of Injury, noting that they had notice of the injury on the day that it occurred. Further, Claimant advised her supervisor that she would have her husband take her for medical attention. The record is devoid of any designation of provider in this matter. As found, Claimant's supervisor knew or should have known that Claimant's report of the injury triggered a deadline to designate a provider. There was no designation, therefore, Claimant's choice of provider, Concentra, is authorized.

Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v.*

Industrial Claim Appeals Office, *supra*. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774- 720 (January 12, 2010). As found, Claimant was seen as an emergency on September 14, 2021 at UCHealth Medical Center of the Rockies-Loveland and they are authorized as an emergent care facility for the one time evaluation.

Based on the Claimant's testimony that she was released from care, medical benefits terminate as of the date of MMI, unless an authorized medical provider has recommended maintenance care after MMI. Any determination for future medical care is reserved for later determination as this ALJ has insufficient information with regard to what kind of release Claimant was provided.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). 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). 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 entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007); *Campbell v. IBM Corp*., *supra*.

Claimant was hired by Employer on August 14, 2021. Claimant's pay check stub from Employer dated September 3, 2021 showed she earned $14.00 per hour and earned $847.00 for the period of beginning on August 16, 2021 and ending on August 31, 2021. The year to date was the same as the wages so it is presumed that she started working on August 16 and not on August 14, 2021. The check dated September 20, 2021 showed a payment of $671.72, for pay period of September 1 through September 15, 2021. However, Claimant began work at 8:54 a.m. on September 14, 2021 and her injury occurred at approximately 10:00 a.m. She left immediately after the injury, and was not paid for her date of injury according to the FROI. Therefore, Claimant earned a total of $1,518.72 for the period of August 16, 2021 through September 13, 2021, which is 4 week period. While Claimant asserted that she earned $14.00 working approximately 35 hours per week, the payroll records are more reliable than Claimant's memory in this regard. Her earnings provide an average weekly wage of $379.68 and a temporary total disability rate of $253.12.

E. Temporary Disability Benefits

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

As found, Claimant has shown by a preponderance of the evidence that she was entitled to temporary disability benefits. Claimant was initially provided with work restrictions and she provided the paperwork to her supervisor the day following her back injury. Claimant was persuasive in the account that her supervisor, after being given the work restrictions, stated that Employer had no work for her. No offer of employment was provided to Claimant. Claimant has shown by a preponderance of the evidence that she was unable to return to her employment on September 15, 2021. As found, Claimant started a light duty job on October 23, 2021 at SC[Redacted], and then moved to work with BH[Redacted] through July 27, 2022. Both jobs were light duty and within her work restrictions. Claimant was unable to continue her job at BH[Redacted] because of continuing and persistent low back pain despite the work restrictions. Was persuasive that her disability caused her to have to leave her employment at BH[Redacted]. Claimant has shown she is owed temporary partial disability benefits from October 23, 2021 through July 27, 2022 and temporary total disability benefits from September 15, 2021 through October 22, 2021 and from July 28, 2022 until terminated by law.

F. Termination for cause

The termination statutes, Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. both provide 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." The respondents must prove that a claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the

termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Here, it is clear that Claimant was informed by her supervisor on September 15, 2021 that Employer had no employment for her within her work restrictions. The records submitted for hearing showed that Claimant continued with work restrictions after that date. Claimant credibly testified that she was unable continue working at BH[Redacted] due to her low back pain and disability. Respondents have failed to show that Claimant was terminated for cause or that her wage loss involved any volitional but was a caused by her inability to work due to her September 14, 2021 work related injury and subsequent disability.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant sustained a work-related injury to her low back with consequent radicular symptoms on September 14, 2021 in the course and scope of her employment.

2. Respondents shall pay for all authorized, reasonably necessary, and related medical benefits including but not limited to treatment at UCHealth Medical Center of the Rockies-Loveland and Concentra Medical Center as well as any other provider within the chain of referral to treat the lumbar spine injury and radicular lower extremity pain, and in accordance with the Colorado Medical Fee Schedule.

3. Claimant's average weekly wage is $379.68 and her temporary disability rate is $253.12.

4. Respondents shall pay temporary total disability benefits beginning September 15, 2021 through October 22, 2021 and from July 28, 2022 until terminated by law.

5. Respondents shall pay temporary partial disability benefits from October 23, 2021 through July 27, 2022.

6. Respondents failed to prove that Claimant's loss of employment was from any volitional act of Claimant but was caused by the Claimant's impairment and disabilities resulting from the September 14, 2021 work related injuries.

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

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

DATED this 28th day of July, 2023.

Digital Signature

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

I. Whether the blood pressure medications are reasonable, necessary, and causally related to the claimant's industrial injury.

II. Whether the ketamine infusions are reasonable, necessary, and causally related to the claimant's industrial injury.

FINDINGS OF FACT

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

1. This is an admitted claim and involves a November 17, 2020, injury to multiple body parts, including Claimant's neck and lower back. *See Claimant's Exhibit 1, page 1; Respondents' Exhibit 1, page 1*. That same day, Claimant treated at Concentra with Lori Long-Miller, M.D., and reported the nature of her injury. Dr. Long-Miller placed Claimant on work restrictions and recommended medications and physical therapy. *Claimant's Exhibit 4, pages 7-11*.

2. On February 17, 2021, Claimant started treating with Melinda Gehrs, M.D., who noted the nature of Claimant's injury and persistent pain/symptoms. Dr. Gehrs noted Claimant was not taking any medications other than those prescribed through her workers' compensation claim. *Claimant's Exhibit 5, pages 189-197*.

3. On July 14, 2021, Dr. Gehrs diagnosed Claimant with complex regional pain syndrome (CRPS). *Claimant's Exhibit 5, pages 209-213*.

4. On July 26, 2021, Dr. Long-Miller referred Claimant to Giancarlo Barolat, M.D., for her CRPS diagnosis. *Claimant's Exhibit 4, pages 105-113.*

5. On or about August 17, 2021, Dr. Gehrs prescribed Claimant a compound cream, which contained ketamine. *Claimant's Exhibit 5, pages 223-231.*

6. On August 25, 2021, Claimant treated with Dr. Barolat and reported the nature of her injury and persistent CRPS pain and other symptoms. Dr. Barolot concluded that Claimant should be treated with a spinal cord stimulator to treat her CRPS.

7. In order to determine whether Claimant was a good candidate for the spinal cord stimulator, Dr. Barolot referred Claimant to John Mark Disorbio, Ed. D, for a psychological evaluation. *Claimant's Exhibit 6, pages 239-243*.

8. On September 9, 2021, Claimant underwent a psychological evaluation with Dr. Disorbio. Dr. Disorbio concluded that the spinal cord stimulator was not contraindicated. Thus, he cleared Claimant, psychologically, for the spinal cord stimulator. *Claimant's Exhibit 8, pages 283-290*.

9. On September 13, 2021, Claimant was evaluated by Dr. Masri for treatment of her CRPS. At this appointment, Dr. Masri noted Claimant has bilateral CRPS of her upper extremities that is more intense on the on the left side than her right side. He also noted the progression of the CRPS from her left side to her right side during the last month. He was concerned about the rapid progression of her CRPS. As part of his evaluation, he also reviewed the medications Claimant was taking as well as medications she had not tried. Dr. Masri concluded that Claimant should have the spinal cord stimulator sooner rather than later. In addition to recommending the spinal cord stimulator, he also discussed with Claimant the use of ketamine infusions to help mitigate her CRPS symptoms. *Claimant's Exhibit 7, pages 262-267*.

10. On October 4, 2021, William Barreto, M.D., performed a utilization review for the request to refill Claimant's ketamine prescription. Dr. Barreto concluded that the request for the ketamine should be denied. He based his denial primarily on his contention that there was no documentation regarding the dosage and route of administration. In addition, he also concluded that there was no clear indication that the ketamine was improving Claimant's function. *Respondents' Exhibit G, pages 161-165*.

11. On October 7, 2021, Dr. Barolat requested authorization to perform a spinal cord stimulator trial. *Claimant's Exhibit 6, page 244*.

12. On October 27, 2021, Claimant followed up with Dr. Gehrs. At this appointment, it was noted that both of her hands were often turning blue and white, with the left side being worse than the right side. It was also noted that she had pain, which she described as pins and needles, throughout her entire left arm. Just about any activity bothered her left arm and aggravated it, so she tried not to use it for day-to-day activities and did not lift more than five pounds. It was further noted that Claimant had swelling in her left arm and also had left and right sided neck pain. Lastly, her left arm was hypersensitive to temperature and touch and cold aggravated everything. *Claimant's Exhibit 5, pages 231-234*.

13. At the October 27th visit, Claimant also went over her medications. At this time, she was using gabapentin three times a day, tramadol twice a day, cyclobenzaprine at night, baclofen three times a day and Percocet as needed. She also noted what did not work or appeared to cause her problems. She stated that she could not tolerate Topamax so she stopped using it and she also stopped using the Cymbalta since it made her tired. She also discussed a recent trial of a topical medicine that had ketamine in it, and that it caused her to wake up with a feeling of imminent doom. *Claimant's Exhibit 5, pages 231-234*.

14. On November 29, 2021, Claimant saw Dr. Gehrs, who noted that she was starting Claimant on a new topical compound cream that did not contain ketamine. *Claimant's Exhibit 5, pages 235-238*.

15. Although Claimant stopped using the ketamine cream due perceived side effects, she resumed using the cream after discussing the matter with Dr. Gehrs. And after she restarted using the ketamine cream, she did not have any recurrent side effects and the cream provided pain and symptom relief.

16. On January 4, 2022, Claimant underwent the spinal cord stimulator implantation with Drs. Basri and Barolat. During the procedure, she was administered ketamine. *Claimant's Exhibit 6, pages 245-247 and Exhibit 7, pages 270-274*.

17. On January 10, 2022, Claimant returned to Dr. Masri to determine the amount of pain relief she was obtaining from the spinal cord stimulator and the ketamine. Claimant had good relief from the placement of the spinal cord stimulator as well as the ketamine. Dr. Masri noted that:

> Patient has significant response for bilateral upper extremity complex regional pain syndrome and chronic neuropathic pain. She was pain free for approximately 2 days after her initial stimulator placement and this has subsided somewhat, but is still significantly better. She did receive intra-operative ketamine during stimulator closure. This indicates the ketamine most likely did provide additional relief. We have discussed ketamine infusions in an attempt to help manage her ongoing symptoms. She would like to consider these after stage 2 of her trial has been completed.

Claimant's Exhibit 7, page 273.

18. On January 11, 2022, and based on Claimant's positive response to the ketamine administered during the placement of her stimulator, Dr. Masri requested authorization to perform six ketamine infusions. He concluded that in his opinion, the ketamine infusions were medically necessary to treat Claimant's CRPS and chronic neuropathic pain. Lastly, he stated that the injections would be billed under the Colorado WC Fee Schedule at a cost of $1,050 per infusion. *Claimant's Exhibit 7, page 275*.

19. On January 18, 2022, the Claimant underwent the permanent spinal cord stimulator implementation. It is unclear whether Claimant was administered ketamine during this procedure – as was done during the trial placement of the stimulator. *Claimant's Exhibit 6, pages 258-259*.

20. Despite not knowing if ketamine was used during both procedures, Claimant credibly testified that when she did have the ketamine infusion, she did not have any CRPS pain/symptoms and that it was the first time she felt no CRPS symptoms since her diagnosis and that the ketamine infusion provided more pain/symptom relief than any other treatment.

21. On February 3, 2022, Claimant underwent an independent medical examination with Respondents' retained expert N. Neil Brown, M.D. Dr. Brown concluded that Claimant has CRPS, that the spinal cord stimulator was reasonable and necessary, that Claimant was not at MMI, that Claimant was unable to work, and that Claimant had a 72% whole person impairment rating. But, despite these findings, he concluded that the ketamine infusions are not reasonably necessary to treat Claimant from the effects of her work injury. Dr. Brown stated that the ketamine infusions were not reasonably necessary because even though Claimant said she got good relief from the ketamine used during the surgical procedure to install the spinal cord stimulator, there are merely anecdotal reports of significant success with the use of ketamine in chronic

pain patients and that there are no good quality scientific peer reviewed studies that demonstrate the efficacy of ketamine infusions. Thus, he considered the use of ketamine to be "investigational" and not acceptable treatment for CRPS. *Respondents' Exhibit C, pages 8-27*.

22. On March 9, 2022, Claimant was again evaluated by Dr. Barolat. Claimant was six weeks post the spinal cord stimulator implantation and she was doing extremely well. It was noted that a few days earlier, Claimant's pain came back to very high levels, but she realized that the stimulator had been turned off. Thus, this was further proof that the stimulator was working. But despite the stimulator working for her upper extremities, the CRPS had started spreading to Claimant's lower extremities in August of last year, but her symptoms in her lower extremities were definitely getting worse. As a result of the CRPS spreading to her lower extremities, Dr. Barolat concluded that either lumbar sympathetic blocks and/or ketamine infusions might be able to reverse the spread of the CRPS to her lower extremities. *Claimant's Exhibit 6, page 261*.

23. On March 15, 2022, Claimant was seen by Dr. Masri. At this appointment, it is noted that the stimulator was still providing Claimant good relief for her upper extremities. But it was also noted that she was developing signs and symptoms of CRPS in both of her lower extremities, predominately at the feet. Dr. Masri again recommended Claimant undergo ketamine infusions to aid with her overall neuropathic pain. He also noted that he went over with Claimant the potential risks, side effects, adverse reactions, and possible complications-and despite the possible risks-Claimant wanted to proceed with the ketamine infusions. *Claimant's Exhibit 7, pages 276-280*.

24. On March 20, 2022, Dr. Masri again requested authorization to perform six ketamine infusions. At this time, the infusions were noted to cost $1,200 for each infusion under the Colorado Workers' Compensation Fee Schedule. *Claimant's Exhibit 7, pages 281-282*.

25. On March 22, 2022, Dr. Brown issued a supplemental report. Dr. Brown maintained his opinion that the ketamine treatment is not reasonable, necessary, or related to Claimant's injury. Again, he stated that there are anecdotal reports of significant success using ketamine to treat chronic pain patients, but yet there were no good quality scientific peer reviewed studies that demonstrate the efficacy of ketamine infusions. *Respondents' Exhibit C, pages 28-29*.

26. On April 8, 2022, Claimant returned to see Dr. Long-Miller. During this visit, Claimant told the doctor that at the onset of her CRPS she developed HTN (hypertension). Dr. Long-Miller stated that Dr. Barolot stated that there is strong evidence that CRPS can cause hypertension. Dr. Long-Miller ultimately concluded that Claimant's hypertension was more than likely caused by her CRPS. Thus, Dr. Long-Miller prescribed Claimant Losartan Potassium and Hydrochlorothiazide for her hypertension. *Claimant's Exhibit 4, pages 170-182.*

27. On July 18, 2022, Dr. Brown issued a second supplemental report. *Respondents' Exhibit 6, pages 30-31*. Regarding Claimant's hypertension, Dr. Brown concluded that:

> CRPS may cause intermittent vasoconstriction due to sympathetic discharge not unlike the "fight or flight" response to stress which can cause systolic hypertension. It is not uncommon for people suffering from CRPS to have problems like orthostatic hypotension (low blood pressure on standing) or Postural Orthostatic Tachycardia Syndrome (POTS) (tachycardia on standing) can be caused by CRPS. The claimant has no evidence of any postural change of her blood pressure or her pulse rate with standing which would support CRPS as a contributor to her hypertension so this is most likely a pre-existing untreated condition related to her obesity and possibly genetic predisposition or essential hypertension.
>
> *Respondents' Exhibit 6, pages 30-31*.

28. On June 9, 2023, Dr. Brown testified by deposition. Dr. Brown testified as an expert in neurosurgery. *Dr. Brown's June 9, 2023, Deposition Transcript, page 7, lines 10-12; page 10, lines 16-18 (hereinafter Depo. Tr. 7:10-12; 10:16-18)*. Dr. Brown testified he does not treat patients for hypertension other than in the operating room. *Depo. Tr. 5:18-25; 6:1-12*. Dr. Brown also testified he is familiar with ketamine anecdotally in pain management. *Depo. Tr. 6:17-25; 7:1-9*. Dr. Brown testified ketamine may be helpful in pain management, but yet there are a lot of potential side effects. *Depo. Tr. 13:18-25; 14:1-7*. Dr. Brown testified that the Colorado Medical Treatment Guidelines do not recommend ketamine as treatment for CRPS. Dr. Brown testified CRPS is a rare disorder and something he has not treated or see in "some years." *Depo. Tr. 18:10-16*. Dr. Brown testified he recommended denying the ketamine treatment based on the [medical treatment] guidelines. *Depo. Tr. 18:19-23*. Dr. Brown testified that if Claimant was having functional improvement with the ketamine treatment, then he "could see why one would proceed forward." *Depo. Tr. 26: 4-10*. As for the blood pressure medications, Dr. Brown testified "it's certainly understandable…if people have severe pain that you're going to have episodic increase in your blood pressure." *Depo. Tr. 27: 13-16*. But, despite indicating that he does not treat patients for hypertension, other than during surgery, Dr. Brown relates Claimant's hypertension to her obesity or essential hypertension that is common in the population. *Depo. Tr. 28:5-8*.

29. On cross-examination, Dr. Brown testified Claimant was not taking blood pressure medications before her work injury. *Depo. Tr. 35:19-24*. Dr. Brown testified Claimant's workers' compensation treating providers prescribed the blood pressure medications in conjunction with her CRPS diagnosis. *Depo. Tr. 36:6-15*. Dr. Brown testified there's no indication Claimant had high blood pressure before her work injury or that the other potential causes for hypertension (obesity, essential hypertensions, etc.) caused Claimant's need for blood pressure medications. *Depo. Tr. 36:19-25*. Dr. Brown testified that if Claimant has no history of hypertension before her work injury and that the onset of her hypertension coincides with her CRPS diagnosis, then he would relate her hypertension to her CRPS diagnosis. *Depo. Tr. 37:15-22*.

30. As for the ketamine, Dr. Brown testified the Medial Treatment Guidelines are simply guidelines and a medical provider is not obligated or required to follow them. *Depo.*

Tr. 41:11-16; 42:2-9. Dr. Brown testified all patients are different and that medical providers are trying to tailor a treatment plan to decrease the patient's pain and increase the patient's function. *Depo. Tr. 42: 10-20*. Dr. Brown testified Drs. Barolat and Masri are following this same plan. *Depo. Tr. 42:21-25*.

31. Before her CRPS diagnosis (and her work injury), Claimant had never been diagnosed with hypertension and had never been prescribed or taken blood pressure medications.

32. Claimant credibly testified she has no history of hypertension and has never been prescribed blood pressure medications (nor have they been recommended). Claimant credibly testified she was not diagnosed with high blood pressure until after her work injury and CRPS diagnosis. Thus, the ALJ finds that Claimant had no history of hypertension and has never been prescribed blood pressure medications (nor have they been recommended) before her work injury. The ALJ further finds that Claimant was not diagnosed with hypertension until after her work injury and development of CRPS.

33. While Dr. Brown first recommended denying the blood pressure medications on the ground they are unrelated to her work injury, Dr. Brown concluded that if Claimant has no history of high blood pressure, then he would relate the onset of her high blood pressure (hypertension) to her work injury.

34. Based on the totality of the evidence, the ALJ finds that Claimant's high blood pressure was caused by her work injury and the development of her CRPS. Thus, the ALJ finds that the blood pressure medications Losartan Potassium and hydrochlorothiazide are reasonable, necessary, and related to her industrial injury.

35. Drs. Masri and Barolot have recommended ketamine infusions along with Claimant's permanent spinal cord stimulator. Previously, Claimant used a ketamine-based pain cream. After using the pain cream for the first time, Claimant awoke with a sense of doom, a known side-effect to ketamine. Claimant then stopped the ketamine cream. This is detailed in Dr. Gehr's October 2021 report. After discussing the ketamine cream again in detail with Dr. Gehrs, Claimant resumed using the cream and it and did not subsequently have any side effects. Dr. Gehrs refilled the ketamine cream prescription, but Respondents denied it. During the implementation of her spinal cord stimulator, Claimant received ketamine intravenously. This was the first time she had been pain/symptoms free since her injury. Based on the pain relief Claimant received from the ketamine, Drs. Masri and Barolot recommended ketamine infusions, which Respondents denied. Respondents denied the ketamine infusions on the ground the Colorado Medical Treatment Guidelines do not recommend ketamine.

36. The purpose of medical treatment is to decrease pain and increase function. Dr. Brown agrees. Additionally, Dr. Brown testified that this is what Claimant's treating providers, including Drs. Masri and Barolot, are trying to accomplish. The ketamine infusions further this objective.

37. Regardless of what the treatment guidelines contemplate, Claimant received pain/symptom relief and increased function following the intravenous ketamine infusion at the time of her spinal cord stimulator implementation.

38. Claimant's medical records document that she has discussed with her treating providers regarding the risks, side effects, etc. of ketamine treatment. Knowing these risks/side effects, Claimant wants to proceed with the recommended treatment to achieve decreased pain and increased function.

39. The ketamine infusions are reasonable and necessary to treat Claimant's CRPS, and associated symptoms, and are causally related to her industrial injury.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether the blood pressure medications are reasonable, necessary, and causally related to the claimant's industrial injury.

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 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).

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

A. Blood Pressure Medication

Claimant credibly testified she has no history of hypertension and has never been prescribed blood pressure medications (nor have they been recommended). Claimant credibly testified she was not diagnosed with high blood pressure until after her work injury and CRPS diagnosis. While Dr. Brown first recommended denying the blood pressure medications on the ground they are unrelated to her work injury, Dr. Brown concluded during his deposition that if Claimant has no history of high blood pressure, then he would relate the onset of her high blood pressure (hypertension) to her work injury. Moreover, Drs. Barolot and Long-Miller concluded that Claimant's hypertension was most likely caused by her CRPS-and the ALJ credits their opinions.

Thus, based on the totality of the evidence, the ALJ finds and concludes that Claimant proved by a preponderance of the evidence that her high blood pressure was caused by her CRPS - work injury - and that the blood pressure medications Losartan Potassium and hydrochlorothiazide are reasonable and necessary to treat her high blood pressure.

B. Ketamine Infusions

Claimant's treating providers, Drs. Masri and Barolot, have recommended ketamine infusions along with Claimant's permanent spinal cord stimulator. Claimant did use a ketamine-based pain cream and after using the pain cream for the first time, Claimant awoke with a sense of doom, a known side-effect to ketamine, and stopped the ketamine cream. However, after discussing using the ketamine cream again with Dr. Gehrs, Claimant resumed using the ketamine cream and did not subsequently have any side effects.

During the implementation of her spinal cord stimulator, Claimant received ketamine intravenously. Claimant credibly testified this was the first time she had been pain/symptoms free since her injury. Then Drs. Masri and Barolot recommended ketamine infusions. Respondents denied the ketamine infusions on the ground the Colorado Medical Treatment Guidelines do not recommend ketamine.

As found, the purpose of medical treatment is to decrease pain and increase function. Dr. Brown agrees. Additionally, Dr. Brown testified that this is what Claimant's treating providers, including Drs. Masri and Barolot, are trying to accomplish. The ketamine infusions further this objective.

Regardless of what the Medical Treatment Guidelines contemplate, Claimant received pain/symptom relief and increased function following the intravenous ketamine infusion at the time of her spinal cord stimulator implementation. Claimant discussed with her treating providers about the risks, side effects, etc. of ketamine treatment. Knowing these risks/side effects, Claimant wants to proceed with the recommended treatment to achieve decreased pain and increased function.

Thus, the ALJ finds and concludes that the Claimant proved by a preponderance of the evidence that the ketamine infusions are reasonable, necessary to treat her from the effects of her work injury. As a result, the infusions are also causally related to her industrial injury.

ORDER

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

1. The Respondents shall pay for the medication to treat Claimant's high blood pressure that was caused by her industrial injury.

2. The Respondents shall pay for the Claimant's ketamine infusions prescribed by her treating physician.

3. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: July 28, 2023

/s/ Glen Goldman

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

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Stanley Ginsburg, M.D. that Claimant is entitled to receive a 15% whole person permanent impairment rating for an episodic neurological disorder as a result of his April 22, 2020 admitted industrial injuries.

2. If Respondents failed to present clear and convincing evidence to overcome the DIME opinion, whether Dr. Ginsburg erred by failing to apportion Claimant's pre-existing seizure condition because it was independently disabling.

3. Whether Claimant has presented substantial evidence to support a determination that medical maintenance treatment will be reasonably necessary to relieve the effects of his April 22, 2020 admitted industrial injuries or prevent further deterioration of his condition.

FINDINGS OF FACT

1. On April 22, 2020 Claimant suffered admitted industrial injuries during the course and scope of his employment with Employer. Claimant's resulting medical treatment involved the cervical spine, right wrist, right knee and pre-existing epilepsy condition.

2. The record reveals that Claimant has suffered from epilepsy for a number of years prior to his April 22, 2020 industrial injuries. Specifically, Claimant had an extensive history of seizures related to epilepsy that began when he was an infant. As a result of his epilepsy and seizures, Claimant has experienced numerous falls, head injuries, headaches and neck pain throughout his life.

3. In November 2015, after it was determined that Claimant's response to several medications had failed, Claimant underwent a surgical procedure to Implant a vagal nerve stimulator (VNS) to control his seizures. Following the placement of the VNS, Claimant initially responded very positively. However, by June 30, 2016, Claimant reported having "nearly daily seizures" for a period of two weeks. He testified that the VNS helped control his seizures approximately fifty percent of the time and gave him the ability to anticipate oncoming seizures.

4. Claimant continued to receive treatment for his epilepsy from 2015 through 2019. He detailed the symptoms of his nocturnal and daytime seizures. Claimant stated his nocturnal seizures caused him to suffer dreams of seeing things, loss of awareness, falling out of bed, and tongue and cheek biting. He also described two types of typical daytime seizures. The first type would begin with an aura of dizziness followed by speech

arrest and loss of awareness. The second type would cause him to fall and suffer shaking of the extremities.

5. Medical records for the period 2015 through 2019 reflect discussion of a deep brain stimulator (DBS) as surgical treatment for Claimant's seizure disorder. At a neurology evaluation with Monica Petluru, M.D. on January 14, 2019 Claimant there was a tentative plan to complete the DBS surgery in February or March 2019 after surgical protocols had been addressed. However, Claimant ultimately pursued less aggressive treatments prior to his work injuries including the VNS device and medication management.

6. On January 3, 2020 Claimant was admitted to Kit Carson County Memorial Hospital for a cluster of seizures over the past three days. Specifically, he reported a total of 30 seizures over a 3-day period.

7. Claimant testified that in February 2020 he was placed on Epidiolex to control his seizures. Epidiolex is a pharmaceutical-grade CBD that is effective for patients who are refractory to treatments. In the four months leading up to the injury, Claimant stated treatment with Epidiolex had "completely stopped all my seizures . . . which no other medication had." Additionally, Claimant's treatment was effective to the point his "ability to work was actually really good" preceding his April 22, 2020 work accident because his seizure disorder was under control.

8. On March 19, 2020 Claimant applied to work with Employer. He began working for Employer on April 16, 2020.

9. On April 22, 2020 Claimant sustained admitted work injuries. A large pig slammed Claimant into a steel beam. He struck his head, lost consciousness and landed on his right knee and wrist.

10. Following his injuries, Claimant immediately presented to the Kit Carson Memorial Hospital Room on April 22, 2020. He reported a low-grade headache with low-grade neck muscle pain and tightness. Claimant denied any seizure activity. He was admitted overnight as a seizure precaution and was discharged home after an unremarkable night.

11. On April 28, 2020 Claimant visited Authorized Treating Physician (ATP) Sacramento Pimentel, M.D. for an evaluation. He reported no additional seizure activity. Claimant's concussion symptoms had resolved and he was released to work full duty.

12. Claimant explained that upon returning to work, he began having abnormal seizures that were more frequent and severe than the seizures he had experienced prior to the injury. Employer eventually asked Claimant to resign due to his worsening condition and inability to work.

13. On January 6, 2021 Claimant had a telephone encounter with neurological specialist Sarah Sparr, RN. Claimant reported he was suffering anywhere from three to twenty convulsive events per day. He was concerned his VNS was not working correctly following his industrial injury because he was no longer receiving transmissions from the device to detect oncoming auras preceding convulsions. Claimant was also suffering falls and additional injuries due to the increased frequency of seizures and lack of warning. He requested a helmet to protect his head during seizure activity and prevent further injuries.

14. On February 15, 2021 Claimant had a follow-up appointment with Dr. Pimental. Claimant was experiencing more daytime seizures despite previously suffering primarily nighttime seizures. He also had good seizure control since beginning Epidiolex prior to his work injury. The increased frequency in seizures rendered Claimant unable to work and affected his overall functioning. Dr. Pimental again documented Claimant's pre-existing seizure disorder, but noted the seizures had worsened since his April 22, 2020 work injury. He referred Claimant to neurosurgery.

15. On March 29, 2021 Claimant returned to Dr. Pimental for an evaluation. Claimant now had a helmet for protection from seizure injuries. Dr. Pimental commented that Claimant had been suffering almost daily seizures.

16. On May 3, 2021 Claimant had a follow-up appointment with Dr. Pimental. Dr. Pimental again noted Claimant's history of a severe seizure disorder. He remarked Claimant was no longer at his previous job but was actively looking for work. Dr. Pimental also commented that Claimant was unable to have the ideal follow-up plan during the preceding year due to the COVID pandemic.

17. On June 9, 2021 Claimant again visited Dr. Pimental for an examination. He believed Claimant had reached Maximum Medical Improvement (MMI) due to his plateau in progress. Dr. Pimental referred Claimant to a level two physician for an impairment rating.

18. On July 21, 2021 David L. Reinhard, M.D. determined that Claimant had reached MMI. He reviewed Claimant's medical records after the April 22, 2020 industrial injuries and conducted a physical examination. Although Dr. Reinhard discussed Claimant's lifelong seizure disorder under the "history" section in his report and was aware of Claimant's VNS, he did not specifically assign any permanent impairment for an aggravation of Claimant's epileptic condition. He instead found that Claimant's primary complaints were related to a concussion and cervical spine injury. Dr. Reinhard thus assigned an 18% whole person impairment for Claimant's cervical spine condition. He also assigned a 10% rating for Claimant's episodic neurologic disorder based on posttraumatic migraine headaches under Table 53 of the *Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*). Combining the ratings yields a 26% whole person impairment.

19. In December 2021 Claimant had a DBS placed. Adjustments were made on December 17, 2021, but Claimant continued to suffer seizures. By December 2022 Claimant had his DBS removed due to a central nervous system infection.

20. Respondents challenged Dr. Reinhard's impairment rating and sought a Division Independent Medical Examination (DIME). On February 17, 2022 Claimant underwent a DIME with neurologist Stanley H. Ginsburg, M.D. He reviewed Claimant's medical records subsequent to his April 22, 2020 industrial injuries and conducted a physical examination. He agreed that Claimant had reached MMI on July 21, 2021. Dr. Ginsburg assigned a 14% whole person rating for Claimant's cervical spine and a 15% whole person rating for an episodic neurological disorder pursuant to the *AMA Guides*. The ratings combined for a 29% whole person impairment. Regarding Claimant's pre-existing seizure disorder, Dr. Ginsburg stated, "there is some evidence that the injury aggravated this and played a role in the necessity of brain stimulation but this is not certain, although it is an important concept to consider." He remarked that although Claimant had "a convulsive disorder prior to the injury, there was evidence strongly suggestive of more problems with a convulsive disorder." Dr. Ginsburg noted that a 15% rating for an episodic neurological disorder was appropriate because this "was the most serious problem interfering with his life." He determined that apportionment was not appropriate. Dr. Ginsburg recommended medical maintenance care in the form of medications for seizures, under the care of an epileptologist, as well as physical therapy for the following year.

21. On July 25, 2022 Kathy F. McCranie, M.D. conducted a medical records review of Claimant's claim. Dr. McCranie explained that both Drs. Reinhard and Ginsburg erred in finding that Claimant's work injury caused permanent impairment for an episodic neurologic disorder because neither physician reviewed Claimant's medical records preceding his April 22, 2020 industrial injury. She emphasized that "[w]ithout a full review of the prior medical records, it is not possible to make a reasonable assessment of impairment."

22. Ultimately, based on her review of Claimant's medical records, Dr. McCranie determined there was no acceleration or permanent aggravation of Claimant's seizure activity or headaches. Therefore, a permanent impairment for an episodic neurologic disorder was not warranted. She explained that Drs. Reinhard and Ginsburg should have at least apportioned the rating based on Claimant's documented pre-existing independently disabling condition with work restrictions. Finally, regarding the cervical impairment rating, Dr. McCranie observed that a 4% impairment was more appropriate.

23. At the hearing on January 5, 2023 Dr. McCranie maintained that Claimant did not warrant an impairment rating for an episodic neurologic disorder. She reasoned that Dr. Ginsburg erred when he assigned an impairment rating for Claimant's seizure disorder because "[t]hey were not accelerated by the accident because there [are] substantial records after the accident to show that his seizures returned to baseline." Dr. McCranie believed Claimant reached baseline by November 2020 but at the latest prior to reaching MMI on July 21, 2021. By relying on just a few post-injury medical records and Claimant's subjective reports, Dr. Ginsburg committed error and could not fully appreciate the extent of Claimant's pre-existing seizure disorder. Dr. McCranie emphasized that Dr. Ginsburg would not have known the full severity of Claimant's condition. She determined that Claimant did not require any maintenance medical care

for an episodic neurologic disorder because the condition was not related to the work accident.

24. Finally, Dr. McCranie also determined that Dr. Ginsburg should have apportioned Claimant's pre-existing, independently disabling seizure condition. In particular, she noted that Claimant had a prior impairment as documented by his substantial pre-existing medical records and work restrictions related to his epilepsy. Essentially, due to Claimant's significant impairment before the accident, there should have been a 15% apportionment for Claimant's pre-existing seizure disorder. Claimant's impairment rating for an episodic neurologic disorder would thus be reduced to 0%.

25. Edward Maa, M.D., a board-certified neurologist specializing in epilepsy, testified at the hearing in this matter. He explained that he had been treating Claimant's epilepsy since at least 2007. Dr. Maa remarked that Claimant had a history of medically refractory epilepsy likely originating from a post-birth stroke in his left hemisphere. He explained that, although the VNS placed in 2015 did not stop all of Claimant's seizures, it dramatically improved daytime convulsions and benefitted Claimant continuing into 2020. Dr. Maa remarked that, from February 2020 until the April 22, 2020 work accident, Claimant's seizures stopped and he was able to work again following treatment with Epidiolex. He commented that, because Claimant was doing well with Epidiolex, he did not want to pursue more aggressive treatment prior to the industrial injury. Notably, Epidiolex was an effective treatment for patients who were refractory to existing epilepsy treatments. Dr. Maa emphasized that Epidiolex "was definitely controlling [Claimant's] seizure activity." However, Dr. Maa explained that a stretch injury to Claimant's vagus nerve from the trauma of the April 22, 2020 work accident likely impacted the functioning of the VNS within his body. He summarized that the traumatic work injury more likely than not caused, aggravated, or accelerated Claimant's seizure disorder and the medical necessity of DBS surgery.

26. Claimant testified at the hearing in this matter. He recounted that, prior to his work injury, 90% of his seizures were nocturnal and only 10% occurred during the daytime. He described how the VNS gave him the ability to swipe a magnet over the device upon feeling an aura. The device stimulated his brain to stop the seizure. Claimant commented the VNS allowed him "have more control of my seizures" and "helped me about fifty percent of the time." However, Claimant "was no longer feeling any stimulation into my brain" from the VNS following his industrial injury.

27. On June 3, 2023 Dr. McCranie testified through an evidentiary deposition in this matter. Dr. McCranie explained that reviewing the testimony of Claimant and Dr. Maa did not change her opinion. She maintained that Claimant did not warrant an impairment rating for an episodic neurologic disorder. Dr. McCranie specified that Dr. Maa only addressed a temporary increase in Claimant's condition and offered no opinion on permanent acceleration or aggravation. Further, she noted that the timing of the return of the seizures was not linked to Claimant's work injury because, between May 15, 2020 and July 24, 2020, there were no medical notes reflecting any seizures.

28. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Ginsburg that Claimant was entitled to receive a 15% whole person impairment rating for an episodic neurological disorder as a result of his April 22, 2020 admitted industrial injuries. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Ginsburg's 15% impairment determination for an episodic neurological disorder was incorrect. Initially, the record reveals that Claimant suffered from epilepsy for a number of years prior to his April 22, 2020 industrial injuries. Claimant had an extensive history of seizures related to epilepsy that began when he was an infant. In November 2015, after it was determined that Claimant's response to several medications had failed, he underwent a surgical procedure to Implant a VNS to control his seizures. Following the placement of the VNS, Claimant initially responded very positively. However, in the years between 2015 and 2019 Claimant continued to suffer repeated seizures. Medical records for the period 2015 through 2019 reflect discussion of a DBS as surgical treatment for Claimant's continuing disorder. However, Claimant ultimately pursued less aggressive treatments prior to his work injury and began taking Epidiolex to treat his symptoms. In the four months leading up to his work injury, Claimant stated treatment with Epidiolex had "completely stopped all my seizures . . . which no other medication had." Claimant explained that his treatment with Epidiolex was effective to the point his "ability to work was actually really good" preceding his April 22, 2020 industrial injury.

29. On April 22, 2022 Claimant suffered admitted industrial injuries. Claimant's resulting medical treatment involved the cervical spine, right wrist, right knee and pre-existing epilepsy condition. He received care from ATP Dr. Pimental for his work injuries. Claimant explained that, upon returning to work, he began having abnormal seizures that were more frequent and severe than the seizures he had previously experienced. When Claimant reached MMI on July 21, 2021 Dr. Reinhard assigned an 18% whole person impairment for Claimant's cervical spine condition. He also assigned a 10% rating for Claimant's episodic neurologic disorder based on posttraumatic migraine headaches. Combining the ratings yields a 26% whole person impairment.

30. On February 17, 2022 Claimant underwent a DIME with neurologist Dr. Ginsburg. He reviewed Claimant's medical records subsequent to his April 22, 2020 industrial injuries and conducted a physical examination. He agreed that Claimant had reached MMI on July 21, 2021. Dr. Ginsburg assigned a 14% whole person rating for Claimant's cervical spine and a 15% whole person rating for an episodic neurological disorder based on Claimant's seizures pursuant to the *AMA Guides*. The ratings combined for a 29% whole person impairment. Regarding Claimant's pre-existing seizure disorder, Dr. Ginsburg stated, "there is some evidence that the injury aggravated this and played a role in the necessity of brain stimulation but this is not certain, although it is an important concept to consider." He remarked that, although Claimant had "a convulsive disorder prior to the injury, there was evidence "strongly suggestive of more problems with a convulsive disorder." Dr. Ginsburg noted that a 15% rating for an episodic neurological disorder was appropriate because this "was the most serious problem interfering with his life."

31. Dr. McCranie performed a records review and testified at the hearing in this matter. She explained that both Drs. Reinhard and Ginsburg erred in finding that Claimant's work injury caused a permanent impairment for an episodic neurologic disorder. Initially, she noted that neither physician reviewed Claimant's medical records preceding his April 22, 2020 industrial injury. Dr. McCranie reasoned that Dr. Ginsburg erred when he assigned an impairment rating for Claimant's seizure disorder because "[t]hey were not accelerated by the accident because there [are] substantial records after the accident to show that his seizures returned to baseline." She explained that, by relying on just a few post-injury medical records and Claimant's subjective reports, Dr. Ginsburg committed error. Dr. McCranie emphasized that Dr. Ginsburg could not fully appreciate the extent of Claimant's pre-existing seizure disorder.

32. Despite Dr. McCranie's opinion, the record reflects that Dr. Ginsberg did not erroneously assign Claimant a 15% impairment rating for an episodic neurologic disorder. Dr. Ginsburg had knowledge from Claimant's history, a physical examination, review of medical reports subsequent to Claimant's work injury, and neurological expertise regarding the nature and severity of Claimant's seizure disorder. Specifically, Dr. Ginsburg emphasized that, although Claimant had a seizure disorder prior to his April 22, 2020 work injury, there was evidence "strongly suggestive" of an aggravation of the condition. Moreover, the persuasive opinion of Dr. Maa supports Dr. Ginsburg's DIME opinion. Dr. Maa has been treating Claimant's epilepsy since at least 2007. He explained that, although the VNS placed in 2015 did not stop all of Claimant's seizures, it dramatically improved daytime convulsions and was beneficial into 2020. Dr. Maa remarked that, from February 2020 until the April 22, 2020 work accident, Claimant's seizures stopped and he was able to work again following treatment with Epidiolex. He commented that, because Claimant was doing well with Epidiolex, he did not want to pursue more aggressive treatment prior to the industrial injury. Dr. Maa emphasized that Epidiolex "was definitely controlling [Claimant's] seizure activity." However, Dr. Maa explained that a stretch injury to Claimant's vagus nerve from the trauma of the April 22, 2020 work accident likely impacted the functioning of the VNS within his body. He summarized that the traumatic work injury more likely than not caused, aggravated, or accelerated Claimant's seizure disorder and the medical necessity of DBS surgery.

33. Dr. McCranie testified through an evidentiary deposition that her opinion had not changed after reviewing the testimony of Claimant and Dr. Maa. She maintained that Claimant did not warrant an impairment rating for an episodic neurologic disorder. Dr. McCranie specified that Dr. Maa only addressed a temporary increase in Claimant's symptoms and offered no opinion on a permanent acceleration or aggravation of Claimant's condition. Further, she noted that the timing of the return of the seizures was not linked to Claimant's work accident because, between May 15, 2020 and July 24, 2020, there were no medical notes indicating any seizures. However, Dr. McCranie's deposition testimony largely focused on Dr. Maa's opinion. Importantly, Dr. Maa has treated Claimant for his seizure disorder since 2007 as has significant experience with Claimant's condition. Dr. McCranie also did not detail the clearly erroneous nature of Dr. Ginsburg's opinion assigning Claimant a 15% whole person rating for an episodic neurological disorder.

34. Based on the medical records and persuasive opinion of Dr. Maa, Dr. Ginsburg correctly assigned an impairment rating for Claimant's episodic neurological disorder. The contrary determination of Dr. McCranie is a mere differences of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Ginsburg's DIME opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Ginsburg's determination assigning Claimant a 15% whole person impairment for an episodic neurological disorder was incorrect.

35. Respondents have failed to present clear and convincing evidence to overcome Dr. Ginsburg's DIME opinion not to apportion Claimant's pre-existing seizure condition. Relying on Dr. McCranie's opinion, Respondents assert that apportionment is appropriate because Claimant's seizure condition was independently disabling prior to his April 22, 2020 industrial injuries. Essentially, due to Claimant's significant impairment before the accident, there should have been a 15% apportionment for Claimant's pre-existing seizure disorder. Claimant's impairment rating for an episodic neurologic disorder would thus be reduced to 0%.

36. Despite Dr. McCranie's contrary opinion, the record reveals that Dr. Ginsburg's apportionment determination was not clearly erroneous. Claimant credibly testified that his seizure condition was under control at the time of his industrial injury. He was able to perform his full job duties without missing time from work due to his seizure for about 3-4 months prior to his work injury. Dr. Maa also explained that, from February 2020 until the April 22, 2020 work accident, Claimant's seizures stopped and he was able to work following treatment with Epidiolex. While Claimant had a pre-existing seizure disorder, the medical records reflect that his condition was under control with Epidiolex in the months preceding April 22, 2020. Respondents have not demonstrated that Claimant's seizure disorder was symptomatic and independently disabling at the time of his work injury. Respondents have thus failed to establish it is highly probable Dr. Ginsberg erred in not apportioning Claimant's permanent impairment rating as a result of his pre-existing seizure activity.

37. Claimant has presented substantial evidence to support a determination that medical maintenance treatment will be reasonably necessary to relieve the effects of his April 22, 2020 admitted industrial injuries or prevent further deterioration of his condition. Initially, Dr. Ginsburg recommended medical maintenance care in the form of medications for seizures under the care of an epileptologist, as well as physical therapy, for the following year. In contrast, Dr. McCranie determined that Claimant did not require any maintenance medical care for an episodic neurologic disorder because the condition was not related to the work accident. Despite Dr. McCranie's determination, the medical records and persuasive opinion of Dr. Ginsburg reflect that additional medical benefits are reasonable, necessary and causally related to Claimant's April 20, 2022 work accident. Accordingly, Claimant is entitled to receive medical maintenance benefits in the form of medications for seizures under the care of an epileptologist, as well as physical therapy, for the following year.

CONCLUSIONS OF LAW

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

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

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

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Indus. Claim Appeals Off.,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Indus. Claim Appeals Off.,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Off.,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S. *See Yeutter v. Indus. Claim Appeals Off.*, 487

P.3d 1007, 1012 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Off.*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on causation is also entitled to presumptive weight. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc.,* 961 P.2d at 592. In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Ginsburg that Claimant was entitled to receive a 15% whole person impairment rating for an episodic neurological disorder as a result of his April 22, 2020 admitted industrial injuries. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Ginsburg's 15% impairment determination for an episodic neurological disorder was incorrect. Initially, the record reveals that Claimant suffered from epilepsy for a number of years prior to his April 22, 2020 industrial injuries. Claimant had an extensive history of seizures related to epilepsy that began when he was an infant. In November 2015, after it was determined that Claimant's response to several medications had failed, he underwent a surgical procedure to Implant a VNS to control his seizures. Following the placement of the VNS, Claimant initially responded very positively. However, in the years between 2015 and 2019 Claimant continued to suffer repeated seizures. Medical records for the period 2015 through 2019 reflect discussion of a DBS as surgical treatment for Claimant's continuing disorder. However, Claimant ultimately pursued less aggressive treatments prior to his work injury and began taking Epidiolex to treat his symptoms. In the four months leading up to his work injury, Claimant stated treatment with Epidiolex had "completely stopped all my seizures . . . which no other medication had." Claimant explained that his treatment with Epidiolex was effective to the point his "ability to work was actually really good" preceding his April 22, 2020 industrial injury.

9. As found, on April 22, 2022 Claimant suffered admitted industrial injuries. Claimant's resulting medical treatment involved the cervical spine, right wrist, right knee and pre-existing epilepsy condition. He received care from ATP Dr. Pimental for his work injuries. Claimant explained that, upon returning to work, he began having abnormal

seizures that were more frequent and severe than the seizures he had previously experienced. When Claimant reached MMI on July 21, 2021 Dr. Reinhard assigned an 18% whole person impairment for Claimant's cervical spine condition. He also assigned a 10% rating for Claimant's episodic neurologic disorder based on posttraumatic migraine headaches. Combining the ratings yields a 26% whole person impairment.

10. As found, on February 17, 2022 Claimant underwent a DIME with neurologist Dr. Ginsburg. He reviewed Claimant's medical records subsequent to his April 22, 2020 industrial injuries and conducted a physical examination. He agreed that Claimant had reached MMI on July 21, 2021. Dr. Ginsburg assigned a 14% whole person rating for Claimant's cervical spine and a 15% whole person rating for an episodic neurological disorder based on Claimant's seizures pursuant to the *AMA Guides*. The ratings combined for a 29% whole person impairment. Regarding Claimant's pre-existing seizure disorder, Dr. Ginsburg stated, "there is some evidence that the injury aggravated this and played a role in the necessity of brain stimulation but this is not certain, although it is an important concept to consider." He remarked that, although Claimant had "a convulsive disorder prior to the injury, there was evidence "strongly suggestive of more problems with a convulsive disorder." Dr. Ginsburg noted that a 15% rating for an episodic neurological disorder was appropriate because this "was the most serious problem interfering with his life."

11. As found, Dr. McCranie performed a records review and testified at the hearing in this matter. She explained that both Drs. Reinhard and Ginsburg erred in finding that Claimant's work injury caused a permanent impairment for an episodic neurologic disorder. Initially, she noted that neither physician reviewed Claimant's medical records preceding his April 22, 2020 industrial injury. Dr. McCranie reasoned that Dr. Ginsburg erred when he assigned an impairment rating for Claimant's seizure disorder because "[t]hey were not accelerated by the accident because there [are] substantial records after the accident to show that his seizures returned to baseline." She explained that, by relying on just a few post-injury medical records and Claimant's subjective reports, Dr. Ginsburg committed error. Dr. McCranie emphasized that Dr. Ginsburg could not fully appreciate the extent of Claimant's pre-existing seizure disorder.

12. As found, despite Dr. McCranie's opinion, the record reflects that Dr. Ginsberg did not erroneously assign Claimant a 15% impairment rating for an episodic neurologic disorder. Dr. Ginsburg had knowledge from Claimant's history, a physical examination, review of medical reports subsequent to Claimant's work injury, and neurological expertise regarding the nature and severity of Claimant's seizure disorder. Specifically, Dr. Ginsburg emphasized that, although Claimant had a seizure disorder prior to his April 22, 2020 work injury, there was evidence "strongly suggestive" of an aggravation of the condition. Moreover, the persuasive opinion of Dr. Maa supports Dr. Ginsburg's DIME opinion. Dr. Maa has been treating Claimant's epilepsy since at least 2007. He explained that, although the VNS placed in 2015 did not stop all of Claimant's seizures, it dramatically improved daytime convulsions and was beneficial into 2020. Dr. Maa remarked that, from February 2020 until the April 22, 2020 work accident, Claimant's seizures stopped and he was able to work again following treatment with Epidiolex. He

commented that, because Claimant was doing well with Epidiolex, he did not want to pursue more aggressive treatment prior to the industrial injury. Dr. Maa emphasized that Epidiolex "was definitely controlling [Claimant's] seizure activity." However, Dr. Maa explained that a stretch injury to Claimant's vagus nerve from the trauma of the April 22, 2020 work accident likely impacted the functioning of the VNS within his body. He summarized that the traumatic work injury more likely than not caused, aggravated, or accelerated Claimant's seizure disorder and the medical necessity of DBS surgery.

13. As found, Dr. McCranie testified through an evidentiary deposition that her opinion had not changed after reviewing the testimony of Claimant and Dr. Maa. She maintained that Claimant did not warrant an impairment rating for an episodic neurologic disorder. Dr. McCranie specified that Dr. Maa only addressed a temporary increase in Claimant's symptoms and offered no opinion on a permanent acceleration or aggravation of Claimant's condition. Further, she noted that the timing of the return of the seizures was not linked to Claimant's work accident because, between May 15, 2020 and July 24, 2020, there were no medical notes indicating any seizures. However, Dr. McCranie's deposition testimony largely focused on Dr. Maa's opinion. Importantly, Dr. Maa has treated Claimant for his seizure disorder since 2007 as has significant experience with Claimant's condition. Dr. McCranie also did not detail the clearly erroneous nature of Dr. Ginsburg's opinion assigning Claimant a 15% whole person rating for an episodic neurological disorder.

14. As found, based on the medical records and persuasive opinion of Dr. Maa, Dr. Ginsburg correctly assigned an impairment rating for Claimant's episodic neurological disorder. The contrary determination of Dr. McCranie is a mere differences of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Ginsburg's DIME opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Ginsburg's determination assigning Claimant a 15% whole person impairment for an episodic neurological disorder was incorrect.

Apportionment

15. Respondents contend that Dr. Ginsburg erred by failing to apportion Claimant's pre-existing seizure condition because it was independently disabling. Section 8-42-104(5)(b), C.R.S. governs apportionment of medical impairment for a prior nonwork-related condition. The statute specifies that in cases of permanent medical impairment an employee's award shall not be reduced except:

> When an employee has a nonwork-related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury, is independently disabling. The percentage of the nonwork-related permanent medical impairment existing at the time of the subsequent injury to the same body part shall be deducted from the permanent medical impairment rating for the subsequent compensable injury.

Moreover, the Division of Workers' Compensation has adopted WCRP 12 to implement the statutory provisions for impairment rating determinations. WCRP 12-3(B) provides, in pertinent part:

> the Physician may provide an opinion on apportionment for any preexisting work related or nonwork-related permanent impairment to the same body part using the [*AMA Guides*] where medical records or other objective evidence substantiate a preexisting impairment. Any such apportionment shall be made by subtracting from the injured worker's impairment the preexisting impairment as it existed at the time of the subsequent injury or occupational disease. The Physician shall explain in their written report the basis of any apportionment. If there is insufficient information to measure the change accurately, the Physician shall not apportion. If the Physician apportions based on a prior nonwork-related impairment, the Physician must provide an opinion as to whether the previous medical impairment was identified, treated and independently disabling at the time of the work-related injury that is being rated.

16. Apportionment allows an injured worker's award or settlement to be reduced if the worker "has a non-work related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury, is independently disabling." §8-42-104(5)(b), C.R.S. Apportionment is not appropriate when the previous condition is asymptomatic and not disabling at the time of the subsequent injury. *Lambert & Sons, Inc. v. Indus. Claim Appeals Off.*, 984 P.2d 656, 659 (Colo. App. 1998); *see also Askew v. Indus. Claim Appeals Off.*, 927 P.2d 1333, 1338 (Colo. 1996). The goal of apportionment is to ensure both that employers are only liable for impairment resulting from the specific work injury and injured workers are not barred from recovery due to pre-existing injuries. *See Browne v. Indus. Claim Appeals Off.*, 495 P.3d 974, 980 (Colo. App. 2021).

17. As found, Respondents have failed to present clear and convincing evidence to overcome Dr. Ginsburg's DIME opinion not to apportion Claimant's pre-existing seizure condition. Relying on Dr. McCranie's opinion, Respondents assert that apportionment is appropriate because Claimant's seizure condition was independently disabling prior to his April 22, 2020 industrial injuries. Essentially, due to Claimant's significant impairment before the accident, there should have been a 15% apportionment for Claimant's pre-existing seizure disorder. Claimant's impairment rating for an episodic neurologic disorder would thus be reduced to 0%.

18. As found, despite Dr. McCranie's contrary opinion, the record reveals that Dr. Ginsburg's apportionment determination was not clearly erroneous. Claimant credibly testified that his seizure condition was under control at the time of his industrial injury. He was able to perform his full job duties without missing time from work due to his seizure for about 3-4 months prior to his work injury. Dr. Maa also explained that, from February 2020 until the April 22, 2020 work accident, Claimant's seizures stopped and he was able

to work following treatment with Epidiolex. While Claimant had a pre-existing seizure disorder, the medical records reflect that his condition was under control with Epidiolex in the months preceding April 22, 2020. Respondents have not demonstrated that Claimant's seizure disorder was symptomatic and independently disabling at the time of his work injury. Respondents have thus failed to establish it is highly probable Dr. Ginsberg erred in not apportioning Claimant's permanent impairment rating as a result of his pre-existing seizure activity.

Medical Maintenance Benefits

19. 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 preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). Generally, 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 her condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988).

20. As found, Claimant has presented substantial evidence to support a determination that medical maintenance treatment will be reasonably necessary to relieve the effects of his April 22, 2020 admitted industrial injuries or prevent further deterioration of his condition. Initially, Dr. Ginsburg recommended medical maintenance care in the form of medications for seizures under the care of an epileptologist, as well as physical therapy, for the following year. In contrast, Dr. McCranie determined that Claimant did not require any maintenance medical care for an episodic neurologic disorder because the condition was not related to the work accident. Despite Dr. McCranie's determination, the medical records and persuasive opinion of Dr. Ginsburg reflect that additional medical benefits are reasonable, necessary and causally related to Claimant's April 20, 2022 work accident. Accordingly, Claimant is entitled to receive medical maintenance benefits in the form of medications for seizures under the care of an epileptologist, as well as physical therapy, for the following year.

ORDER

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

1. Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Ginsburg's DIME determination assigning Claimant a 15% whole person impairment for an episodic neurological disorder was incorrect.

2. Respondents have failed to present clear and convincing evidence to overcome Dr. Ginsburg's DIME opinion not to apportion Claimant's pre-existing seizure condition.

3. Claimant shall receive medical maintenance benefits in the form of medications for seizures under the care of an epileptologist, as well as physical therapy, for the following year.

4. Any other 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: July 28, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

1. Whether Respondents established by a preponderance of the evidence grounds to reopen Claimant's claim to permit Respondents to file an amended Final Admission of Liability to correct errors in the original Final Admission of Liability.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury to her left shoulder on November 16, 2021.

2. On June 10, 2022, Claimant's authorized treating physician (ATP) James McLaughlin, M.D., placed Claimant at maximum medical improvement (MMI) and assigned Claimant a 6% upper extremity permanent impairment rating, which corresponds to a 4% whole person impairment. (Ex. A).

3. Claimant's 6% upper extremity rating entitled Claimant to $4,538.98 in permanent partial disability (PPD) benefits.

4. On July 8, 2022, Respondents filed a Final Admission of Liability (FAL), in which Respondents mistakenly admitted for a 6% *whole* person permanent impairment rating in the "permanent partial disability" section of the FAL instead of a 6% left upper extremity impairment. Respondents also admitted to $4,538.98 in PPD benefits. (Ex. D).

5. Respondents paid Claimant $4,538.98 in PPD benefits.

6. At hearing, Insurer's adjuster, [Redacted, hereinafter AD], credibly testified that Insurer's intent was to admit for a 6% upper extremity impairment rating, and not a 6% whole person impairment rating. AD[Redacted] testified that, due to an internal error on the part of Insurer, the FAL was not correctly completed, resulting in Respondents mistakenly admitting for a 6% whole person impairment.

7. Claimant testified at hearing that she received $4,538.98 in PPD benefits from Respondents, is not seeking additional PPD benefits, and agrees that it is appropriate to permit Respondents to correct the errors in the July 8, 2022 FAL.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits

by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *Univ. Park Care 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).

REOPENING TO CORRECT ERRORS IN THE FAL

Once a case has been closed by a final admission, section 8-43-303(1) C.R.S., allows an ALJ to reopen an award within six years of the date of injury on a several grounds, including error or mistake. *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). Reopening of a closed claim may be granted based on any mistake of fact that calls into question the propriety of a prior award. Section 8-43-303(1), C.R.S.; *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). Further, the party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO, Mar. 7, 2012).

When a party seeks to reopen based on mistake the ALJ must determine "whether a mistake was made, and if so, whether it was the type of mistake which justifies reopening." *Travelers Ins. Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo. App. 1981). The power to reopen is permissive, and is therefore committed to the ALJ's discretion.

Respondents have established grounds for reopening for the sole purpose of filing an Amended FAL to correct the clerical errors contained on the July 8, 2022 FAL. It is

undisputed that Claimant was assigned a scheduled upper extremity impairment of 6%. It is also undisputed that Claimant is entitled to, and has received, PPD benefits in the amount of $4,538.98 for her scheduled impairment rating. The FAL contains errors that do not reflect the appropriate impairment rating, and should be corrected to do so. Respondents shall file an Amended Final Admission of Liability which properly reflects Claimant's impairment rating and PPD benefits. Respondents have not established grounds for otherwise amending or altering the July 8, 2022 FAL.

ORDER

It is therefore ordered that:

1. Claimant's claim is reopened for the sole purpose of permitting Respondents to file an Amended FAL which properly reflects Claimant's admitted and agreed upon impairment rating and PPD benefits based upon a 6% schedule upper extremity permanent impairment rating. Respondents shall file an Amended FAL within thirty days of the date of this Order.

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: July 31, 2023

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