OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-262-678-002

ISSUES

- Did Claimant prove she suffered a compensable injury on January 12, 2022?
- Did Respondents prove the claim is barred by the two-year statute of limitations?
- Did Claimant prove medical treatment provided by NextCare Urgent care on Februa 3, 2024 and UCHealth on February 20, 2024 was authorized?

FINDINGS OF FACT

1. Claimant worked for Employer as an assembly technician. On January 12, 2022, she developed pain in her left shoulder while unpacking a large box from a pallet. Claimant reported the injury to Employer and was referred to Workwell.

2. Claimant was diagnosed with a shoulder strain and attended physical therapy for approximately three months.

3. There is no persuasive evidence Claimant had any work restrictions or missed work because of the injury.

4. On April 28, 2022, Dr. Robert Dupper put Claimant at MMI with no impairment, no permanent restrictions, and no need for maintenance care. Claimant reported "mild persisting" symptoms, but Dr. Dupper expected they would resolve shortly without additional treatment.

5. Claimant sought no further treatment for the shoulder for approximately two years.

6. Claimant started feeling pain in her left shoulder in approximately December 2023 or January 2024. She contacted Insurer and asked if she could return to the ATP. Claimant was told that no additional treatment would be authorized because more than two years had passed since the injury.

7. On January 30, 2024, Claimant filed a Workers' Claim for Compensation form with the Division.

8. Claimant went to NextCare Urgent Care on February 3, 2024, and was subsequently seen at UCHealth on February 20, 2024. No corresponding medical records from either visit were offered at the hearing. Although Claimant submitted medical bills, they contain no information about her symptoms, history, diagnosis, or what, if any, treatment was recommended.

9. Respondents filed a Notice of Contest on February 9, 2024. [Redacted, hereinafter PR] credibly testified Respondents had not previously filed an admission or denial because the claim was "medical only" and Claimant lost no time from work.

10. Claimant's testimony regarding the January 12, 2022 accident and injury-related treatment she received through Workwell is credible and persuasive.

11. Claimant proved she suffered a work-related injury on January 12, 2022 that reasonably required medical evaluations and therapy.

12. Respondents failed to prove Claimant's claim is barred by the two-year statute of limitations. There is no persuasive evidence Claimant was disabled or suffered a wage loss more than two years before she filed the claim on January 31, 2024.

13. Claimant failed to prove treatment at NextCare and UCHealth on February 3 and February 20, respectively, was causally related to the January 12, 2022 work injury. Dr. Dupper opined in April 2022 that Claimant's minor residual symptoms would resolve without additional treatment. Thereafter, Claimant sought no further care for the left shoulder for almost two years. Claimant testified that her shoulder "started" hurting again in December 2023 or January 2024, which prompted her to contact the physical therapy facility and Insurer. There is no persuasive evidence that the recurrence of shoulder pain was causally related to the shoulder strain in January 2022 that reached MMI after approximately three months of therapy.

CONCLUSIONS OF LAW

A. Statute of Limitations

Section 8-43-103(2) provides that the right to workers' compensation benefits "shall be barred unless, within two years after the injury . . . a notice claiming compensation is filed with the division." The statute of limitations is an affirmative defense, that respondents must prove by a preponderance of the evidence. *Mestas v. Denver Fire Department*, W.C. No. 5-112-788-001 (ICAO, January 11, 2021). The time to file a claim is governed by the "discovery rule." The two-year period begins to run when the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). The term "injury" as used in § 8-43-103(2) refers to a "compensable injury," which in this context has been interpreted as a disabling injury that creates entitlement to "compensation" in the form of disability indemnity benefits. *E.g., Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Taylor v. Summit County*, W.C. No. 4-897-476-01 (March 18, 2014). As a result, the two-year limitation does not apply to a so-called "medical only" claim, where the employee continued to work and received regular wages. *Id*.

As found, Respondents failed to prove Claimant's claim is barred by the two-year statute of limitations. There is no persuasive evidence the injury disabled Claimant from her regular job, caused her to miss more than three shifts, or caused a wage loss. PR[Redacted] agreed that this was a "medical only" claim with "no lost time."

The facts in Claimant's case are not meaningfully different from those in *Taylor v. Summit County*, W.C. No. 4-897-476-01 (March 18, 2014). In *Taylor*, the claimant fell and injured her right hip. The employer sent her to a doctor, who referred the claimant for imaging, therapy, chiropractic treatment, and acupuncture. The claimant was given no work restrictions and missed no time from work. The claimant later filed a claim with the Division more than two years after the original date of injury. However, the Panel held that the claim was not barred by the two-year statute of limitations because the claimant had missed no work and there was no evidence she was entitled to "payment of compensation benefits" more than two years before she filed the claim. The analysis and conclusions in *Taylor* apply equally to Claimant's case.

B. Compensability, more generally

As discussed above, *Romero v. Industrial Commission*, *supra*, defined a "compensable" injury for statute of limitations purposes as an injury for which disability indemnity benefits are payable. However, the terms "compensable" and "compensability" are frequently used more broadly, to include claims involving medical benefits only. *E.g., Gianzero v. Wal-Mart Stores*, W.C. No. 4-669-749 (ICAO, July 14, 2009); *Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App. 2003) (employer retains the right to contest "compensability," reasonableness, or necessity of medical benefits after MMI); *Rodriguez v. Pueblo County*, W.C. No. 4-911-673-01 (ICAO, January 21, 2016) ("compensable" injury where claimant was only seeking medical benefits).

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). Even a minor "strain" can be a sufficient basis for a compensable claim if it caused the claimant to seek medical treatment. *E.g*., *Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (ICAO, April 17, 1996). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to benefits by a preponderance of the evidence.

As found, Claimant proved she suffered a compensable injury on January 12, 2022 that required medical treatment. However, Respondents covered all treatment from authorized providers until Claimant was put at MMI with no impairment on April 28, 2022.

C. Payment of bills from NextCare and UCHealth

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must

prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant failed to prove treatment at NextCare and UCHealth on February 3 and February 20, respectively, was causally related to the January 12, 2022 work injury. Dr. Dupper opined in April 2022 that Claimant's minor residual symptoms would resolve without additional treatment. Thereafter, Claimant sought no further care for the left shoulder for almost two years. Claimant testified that her shoulder "started" hurting again in December 2023 or January 2024, which prompted her to contact the physical therapy facility and Insurer. There is no persuasive evidence that the recurrence of shoulder pain was causally related to the shoulder strain in January 2022 that reached MMI after approximately three months of therapy.

ORDER

It is therefore ordered that:

1. Claimant's injury of January 12, 2022 is compensable.

2. Respondents' statute of limitations defense is denied and dismissed.

3. Claimant's request for medical benefits related to treatment provided by NextCare Urgent care on Februa 3, 2024 and UCHealth on February 20, 2024 is denied and dismissed.

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

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

DATED: July 1, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that his average weekly wage should be increased for wages earned for concurrent employment.

FINDINGS OF FACT

1. Claimant began working for Employer on April 21, 2023, and sustained an admitted work-related injury on July 11, 2023. As a result of his injuries, Claimant has not worked since July 11, 2023. Respondents filed a General Admission of Liability on August 2, 2023, admitting for an average weekly wage of $1,022.53. (Ex. 4).

2. Since May 2021, Claimant operated his a residential and commercial cleaning company – [Redacted, hereinafter JN] – organized as a limited liability company. Claimant is the owner and sole employee of JN[Redacted] and he performed all work for the entity before July 11, 2023. Claimant testified that he began working full-time for Employer on April 21, 2023, and that he continued to operate JN[Redacted] by working some weekday nights and weekends even though he was also working full-time for Employer. He testified he last performed work for JN[Redacted] on July 9 or 10, 2023, but was not certain. Claimant does not know how many different clients JN[Redacted] had in the six months prior to his injury, or the amounts charged to each client, because the amount differed depending on the services provided.

3. With the exception of bank records and tax returns, Claimant maintained no records documenting JN[Redacted] revenues or expenses. JN[Redacted] maintains a bank account into which Claimant deposited money generated by the entity. (Ex. 8, 9 & 10). Claimant testified, credibly, that some of JN[Redacted] clients paid in cash and others paid by check, and that he deposited checks into JN[Redacted] bank account during the month they were earned. Claimant further testified that money not deposited was used to pay family and business expenses. From October 2021 until April 2023, Claimant made monthly deposits in the JN[Redacted] bank account of varying amounts, but typically between $480 and $820 per month. With the exception of $900 in deposits in August 2023, no funds were deposited into the JN[Redacted] bank account after April 2023. (Ex. 8, 9, and 10).

4. Claimant reported JN[Redacted] business income on his Federal Income Tax Returns for the years 2022 and 2023.[1] In 2022, Claimant reported business profits from JN[Redacted] totaling $36,897.00. (Ex. 6). In 2023, Claimant reported business profits from JN[Redacted] in the amount of $17,243.00. (Ex. 7). The ALJ finds the amounts Claimant reported on his tax returns more likely than not reflect the profits generated by

[1] The ALJ infers that because JN[Redacted] is organized as a limited liability company, JN[Redacted] did not file corporate tax returns.

JN[Redacted] during the designated years, but not the wages earned by Claimant because they do not account for the funds deposited in JN[Redacted] account but not disbursed to Claimant..[2]

5. During 2023, Claimant deposited $3,720 into JN[Redacted] bank account, with the last deposit of $240 being made on April 28, 2023. (Ex. 10). The bank records show no withdrawals were made on the account, instead, the deposited funds were retained by the entity and not disbursed to Claimant. Accounting for the funds retained by JN[Redacted], during 2023, Claimant earned $13,523.00[3] from his work with JN[Redacted][4] Claimant presented no credible evidence of the amounts JN[Redacted] earned between the date Claimant started working for Employer and the date of his injury, nor of the amounts he received as wages from JN[Redacted]. Because Claimant maintained no records, and did not testify as to the amounts he received through JN[Redacted] after beginning work for Employer, the evidence is insufficient to determine Claimant's JN[Redacted]-generated wages at the time of his July 11, 2023 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.

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[2] Section 8-42-102 (1), C.R.S. provides: "The average weekly wage of an injured employee shall be taken as the basis upon which to compute compensation payments." 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." The term "recompense" is not defined in the Act, but means "[a] reward or payment for services, remuneration paid for goods or other property." 1272 BLACK'S LAW DICTIONARY (6th ed. 1990). The does not include undisbursed corporate revenue. Accordingly, money retained in JN[Redacted] accounts, and not disbursed to Claimant were not "recompensed," and remained JN[Redacted] property. Although Claimant is the sole member of JN[Redacted], in general "a corporation is treated as a legal entity separate from its shareholders, officers, and directors." *McCallum Family L.L.C. v. Winger*, 221 P.3d 69, 73 (Colo. App. 2009). Respondents have cited no legal authority for the proposition that Employer's revenues constitute Claimant's wages under the Act.

[3] $17,243.00 - $3,720.00 = $13,523.00

[4] The JN[Redacted] bank account shows deposits in August 2023 totaling $900, which Claimant testified were the result of work performed by his wife and daughter. However, because these deposits were not disbursed to Claimant, they do not constitute Claimant's "wages" under the Act.

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).

Average Weekly Wage

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. Section 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). "This discretionary authority permits the ALJ to calculate the average weekly wage based on earnings from concurrent employment which the claimant held at the time of the injury." *Contreras v. Chimr*, W.C. No. 4-399-293 (ICAO Jun. 20, 2007). However, there is no *ipso facto* rule requiring the inclusion of wages from concurrent employment. *Id*.

The objective of wage calculation is to determine a fair approximation of a claimant's wage loss and diminished earning capacity. *Avalanche Indus., Inc. v. Indus. Claim Appeals Office,* 166 P.3d 147, 153 (Colo. App. 2007), *aff'd sub nom. Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008), as modified on denial of reh'g (Jan. 20, 2009). Thus, wages from current employment may be included in the calculation of AWW where the injury impairs earning capacity from such employment. *Broadmoor Hotel & Cont'l Ins. Co. v. Indus. Claim Appeals Off. of State of Colo.*, 939 P.2d 460, 462 (Colo. App. 1996); *Jefferson County Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

Claimant has failed to establish by a preponderance of the evidence that his AWW should be increased to include his earnings from JN[Redacted]. Under the Act, AWW is to be determined based on the Claimant's wages at the time of injury. Claimant earned $13,523 in wages from JN[Redacted] during 2023. After April 2023, Claimant was working full-time for Employer, his work for JN[Redacted] was limited to some weekday nights and

weekends, and no further money was deposited in JN[Redacted] account. Considering the time limitations and lack of deposits, it is more likely than not that Claimant earned significantly less from JN[Redacted] after beginning employment with Employer. However, Claimant offered no credible evidence from which the ALJ can make a reasonable calculation of his wages from JN[Redacted] during the period of concurrent employment. Although one $240 deposit was made after April 21, 2023, those funds are not Claimant's wages, because they were not disbursed to Claimant. Claimant offered no other credible evidence of the amounts he earned from JN[Redacted] after April 21, 2023.

Because Claimant maintained no records of work performed or payments received, could not identify the JN[Redacted] customers for whom he worked after starting employment with Claimant, could not state the amounts charged to those customers, and did not offer credible evidence of the amounts he earned while concurrently employed, the evidence is insufficient to determine the Claimant's wages from JN[Redacted] as of the date of his work-related injury. Consequently, Claimant has failed to meet his burden of proof to establish that his AWW should be increased.

ORDER

It is therefore ordered that:

1. Claimant's request to increase his average weekly wage is denied and dismissed.

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

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

DATED: July 2, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-225-948-001

ISSUES

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

- If Claimant failed to overcome the DIME, did he prove entitlement to a general award of medical care after MMI by a preponderance of the evidence?

FINDINGS OF FACT

1. Claimant works for Employer as a correctional officer. The job is physically demanding, requiring substantial standing and walking, in addition to subduing inmates. He is also required to complete defensive tactics training exercises on a regular basis.

2. Claimant suffered an admitted injury to his left knee on December 21, 2022, while participating in a taser training exercise. Claimant was running when he heard a loud pop and felt severe pain in his knee. He completed the training despite the pain and limping. After he finished the training, he told his supervisor, "I really messed up my knee."

3. Claimant has a history of left knee problems many years ago. He dislocated his patella in 1974 while playing football in high school, and then two other times in his 20s while skiing and playing basketball. Claimant underwent arthroscopic surgery in the 1980s for patellar cartilage damage. He recovered well and had no further symptoms or knee-related limitations until the work accident in December 2022.

4. Claimant was sent to Specialty Urgent Care for the work injury and saw Megan Southward, PA-C. Claimant was observed to walk with a significant limp. Examination showed a joint effusion and swelling. The knee was painful to palpation and range of motion was limited. Claimant was diagnosed with a knee effusion and instability.

5. An MRI on December 29, 2022 showed severe patellofemoral degenerative changes.

6. Claimant saw Dr. Matthew Simonich, an orthopedic surgeon, on January 13, 2023. His pain had subsided somewhat, but he was still having difficulty with ambulation and stairs. Claimant told Dr. Simonich about his remote history of left knee issues but that he had no trouble with his knee for years "and was able to do all his duties" at work. Dr. Simonich administered a cortisone injection and opined if the knee did not improve he would consider a total knee arthroplasty ("TKA") given the severe osteoarthritis.

7. Claimant returned to Dr. Simonich on March 14, 2023. The cortisone injection had helped. Claimant was working light duty and his pain was approximately 75% improved since the accident. However, he was still having difficulty ascending and

descending stairs and running. Dr. Simonich again noted, "prior to his work-related injury, he was able to perform these activities and all his occupational duties without problems." Claimant was interested in pursuing surgery so he could get back to his regular work. Dr. Simonich recommended a left TKA.

8. Dr. Philip Stull, an orthopedic surgeon, performed an IME for Respondent on May 2, 2023. Dr. Stull noted the severe osteoarthritis in Claimant's left knee was pre-existing and probably related to the prior injuries in the 1970s and 1980s. He stated the work accident "possibly" aggravated Claimant's symptoms, but caused no objective acute structural changes to Claimant's left knee. As a result, Dr. Stull concluded that the work accident caused only a "temporary exacerbation" of Claimant's severe degenerative joint disease, for which Claimant "should currently be at his baseline or pre-injury state." Dr. Stull opined Claimant reached MMI approximately 4-6 weeks after the accident, and any further treatment is "more related to his pre-existing left knee degenerative changes than the injury in question." He further opined Claimant had no impairment and no need for maintenance treatment.

9. Claimant followed up with PA-C Steven Quakenbush at Specialty Urgent Care on May 22, 2023. After reviewing Dr. Stull's IME report, Mr. Quakenbush put Claimant at MMI with no impairment. Mr. Quakenbush opined that Claimant's "acute findings" are consistent with the history and mechanism of injury, but "the patient has been treated back to baseline with regard to his chronic degenerative joint disease." He released Claimant from care and advised him to follow up with his personal physicians further treatment of the "nonwork related degenerative joint disease."

10. Respondent filed a Final Admission of Liability (FAL) based on Mr. Quakenbush's report. Claimant timely objected and requested a DIME.

11. Claimant saw Dr. Martin Kalevik for a DIME on December 5, 2023. Dr. Kalevik agreed with Dr. Stull that Claimant is at MMI because no additional treatment is causally related to the work injury. Specifically, Dr. Kalevik opined:

> I concur with Dr. Stull, the IME physician. This is pre-existing and was not caused by the incident. He has had prior injuries and surgery to this knee and issues with his weight. He aggravated his left knee while running at work. Any activities involving running, jumping, stair climbing, kneeling, squatting, skiing or even prolonged walking at work or outside of work could cause flareups with this underlying condition. There are no acute findings on diagnostics to support permanent impairment from this occurrence. The patient received appropriate treatment for an aggravation; however, the need for further care, regarding the 12/21/2021 injury, including a total knee replacement, as stated by Dr. Stull, should be covered under his private care for his significant underlying condition.

12. Dr. Miguel Castrejon performed an IME for Claimant on March 25, 2024. Dr. Castrejon agreed that Claimant's severe osteoarthritis preexisted the work injury. However, Dr. Castrejon believes the most important factor regarding causation is the

substantial symptomatic and functional change in Claimant's knee after the accident. He noted Dr. Kalevik's report is internally inconsistent, because he conceded Claimant "aggravated his left knee while running at work," but then concluded the recommended TKA is not work-related. Dr. Castrejon pointed out that Claimant fully recovered from his previous left knee surgery "nearly 41 years ago," and thereafter regularly participated in activities such as skiing, hiking, and cycling "without limitation and without any other injuries or need for medical treatment until the event of December 21, 2022." Dr. Castrejon emphasized that Claimant's left knee was asymptomatic and caused no limitations before the admitted injury, despite several years working full time in a physically demanding job as a correctional officer. Although Claimant "could have" aggravated his knee in numerous nonwork-related settings, the actual trigger here was Claimant's participation in training exercises at work. Claimant's knee has never returned to its preinjury state, leading Dr. Castrejon to conclude that the work accident caused "a permanent aggravation of the claimant's pre-existing previously asymptomatic degenerative condition." Therefore, Dr. Castrejon opined that Dr. Kalevik clearly erred by finding the recommended TKA to be unrelated to the work accident.

13. Claimant's testimony regarding the symptomatic and functional changes in his knee since the work accident are credible. Claimant's knee was asymptomatic before the work accident and caused no functional limitations or need for medical treatment.

14. Dr. Castrejon's analysis and conclusions are credible and persuasive.

15. Claimant overcame the DIME's determination of MMI by clear and convincing evidence. A finding of MMI is premature when there remains additional treatment with a reasonably likely to improve the injury-related condition. No one has persuasively argued that the TKA recommended by Dr. Simonich is not reasonably needed, and the primary disagreement here relates to causation. There is no doubt that Claimant had severe degenerative changes in the left knee before the work accident. But there is also no doubt the knee was asymptomatic and nondisabling despite working a physically demanding job and participating in recreational activities such as skiing, hiking, and cycling. As a result, a TKA was not reasonably needed immediately before the work accident, regardless of osteoarthritis. Dr. Kalevik agreed that the accident "aggravated" Claimant's pre-existing osteoarthritis, but clearly erred by finding the aggravation was only temporary. The argument advanced by Dr. Stull and accepted by Dr. Kalevik that Claimant's knee returned to "baseline" is clearly incorrect. Claimant's preinjury baseline was an asymptomatic knee that caused no functional limitations or need for treatment. By contrast, the knee has been continuously symptomatic since the work accident and impedes his ability to work and engage in other activities. Claimant proved that the left TKA is causally related to his work accident by clear and convincing evidence. Therefore, he is not at MMI.

CONCLUSIONS OF LAW

A DIME's determination of whether a claimant has reached MMI is binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(c). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt."

Leming v. Industrial Claim Appeals Office, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the DIME is incorrect. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Proof that the DIME's conclusions are inconsistent with controlling legal standards can support a finding that the DIME has been overcome. *E.g*., *McLane Western, Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *Lopez v. Redi Services*, W.C. No. 5-118-981 & 5-135-641 (ICAO, October 27, 2021).

MMI is defined as the point "when no further treatment is reasonably expected to improve the [injury-related] condition." Section 8-40-201(11.5). The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of the industrial injury. Section 8-42-101. The DIME's opinion regarding the cause of a claimant's condition is an "inherent" part of the diagnostic assessment that comprises the DIME process of determining MMI and rating permanent impairment. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). Therefore, the DIME's finding that a particular condition is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Id*.

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravated, accelerated, or combined with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment is proximately caused by 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).

The claimant need not prove that the work injury is the sole cause of the need for treatment. Rather, it is sufficient to show that the injury is a "significant" cause in that there is a direct relationship between the precipitating event and the need for treatment. *E.g*., *Reynolds v. U.S. Airways, Inc*., W.C. No. 4-352-256, 4-391-859, 4-521-484 (ICAO, May 20, 2003). To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. Rather, a purely symptomatic aggravation is a sufficient basis for an award of medical benefits if it caused the claimant to need treatment they otherwise would not have required but for the accident. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (ICAO, May 7, 2019). Thus, if pain triggers the claimant's need for medical treatment, the treatment is compensable. *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (ICAO, September 9, 2016).

As found, Claimant overcame the DIME's determination of MMI by clear and convincing evidence. A finding of MMI is premature when there remains additional treatment with a reasonably likely to improve the injury-related condition. No one has persuasively argued that the TKA recommended by Dr. Simonich is not reasonably needed, and the primary disagreement here is about causation. There is no doubt that Claimant had severe degenerative changes in the left knee before the work accident. But

there is also no doubt the knee was asymptomatic and nondisabling despite working a physically demanding job and participating in recreational activities such as skiing, hiking, and cycling. As a result, a TKA was not reasonably needed immediately before the work accident, regardless of the underlying osteoarthritis. Dr. Kalevik agreed that the accident "aggravated" Claimant's pre-existing osteoarthritis, but clearly erred by finding the aggravation was only temporary. The argument that Claimant's knee has returned to "baseline" is clearly incorrect. Claimant's preinjury baseline was an asymptomatic knee that caused no functional limitations or need for treatment. By contrast, his knee has been continuously symptomatic since the work accident and impedes his ability to work and engage in other activities. The persuasive evidence leaves no serious or substantial doubt that the work injury is a "substantial factor" in Claimant's current need for a TKA. Therefore, he is not at MMI, and the DIME has been overcome.

ORDER

It is therefore ordered that:

1. Claimant overcame the DIME regarding MMI by clear and convincing evidence.

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

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

DATED: July 8, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-252-631-001

PROCEDURAL AND PRELIMINARY ISSUES

- Claimant did not appear for the hearing scheduled on April 30, 2024. The Court gave Claimant's counsel the choice to take a post-hearing deposition of his client, or alternatively, offered Claimant's counsel the opportunity to have additional hearing time on another day that would permit Claimant's testimony to be given live on the record. Ultimately, Claimant elected not to have his deposition taken, nor did he choose to testify at a subsequent hearing.

ISSUES

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

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

III. Whether Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits.

IV. Average weekly wage.

FINDINGS OF FACT

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

1. Claimant worked as a farm laborer for the Employer. (Respondent's Exhibit A, Bates 003). His job consisted of working in the field harvesting onions and then packaging onions inside the warehouse. (Id).

2. On September 27, 2023, Claimant alleges that he injured his low back while lifting boxes. (Respondent's Exhibit A, Bates 004).

3. On September 28, 2023, claimant showed up to work in the morning behaving erratically. According to multiple co-workers, claimant was kicking and throwing boxes of onions, swearing at co-workers, and damaging company product. (See Respondent's Exhibit F, 48, 49, 50).

4. Several co-workers provided witness statements that were entered into evidence. (Respondent's Exhibit F). In relevant part, [Redacted, hereinafter MO] statement provided: "He [Claimant] was my partner for that day. He was throwing the boxes at my feet! He was kicking the boxes as well. He was cussing at us and saying he doesn't care…..I think he was on drugs because of his behavior." (Respondent's Exhibit F, Bates 050). Similarly, [Redacted, hereinafter NG] witness statement provided: "He started to break the boxes. I got close to him and

I noticed that he smelled like alcohol, he started to put his hands in the machine where he isn't supposed to. He was kicking the boxes when the boxes were full and breaking them he wasn't doing a good job at all that day; that's when I decided to call [Redacted, hereinafter JY] and let him know what was going on….No he did not say anything about being injured" (Id., at Bates 048); (see also witness statement from [Redacted, hereinafter RS]: "the onion kept falling and he wasn't doing his work….while he was kicking them, the boxes were breaking.") (Id., at Bates 049).

5. As the above statement from NG[Redacted] documents, after witnessing this behavior by the Claimant she went to go get a supervisor, JY[Redacted]. (Id., at 048).

6. JY[Redacted] credibly testified at the hearing. Based on his testimony, the ALJ finds that:

   a.) He is a supervisor for the Employer;

   b.) On September 28, 2023, he was notified by a co-worker (NG[Redacted]) that Claimant was acting erratically, swearing, and breaking things;

   c.) He personally came over to the station where Claimant was working and observed him for several minutes;

   d.) He confirmed Claimant was acting erratically and behaving unprofessionally;

   e.) He told Claimant he was terminated on September 28, 2023 and had to leave the facility immediately.

   f.) Claimant never reported a work-related injury on September 28, 2023 nor or the previous day, September 27, 2023;

   g.) Claimant did not appear injured on September 27, 2023 and finished his entire shift without incident.

7. [Redacted, hereinafter KG] testified at the hearing. KG[Redacted] is the Compliance and Marketing manager for the Employer. The ALJ finds her testimony to be credible and persuasive. Based on her testimony, the ALJ finds that:

   a.) She handles the workers' compensation claims for the Employer;

   b.) Claimant was terminated from his employment with Employer on September 28, 2023, for the above referenced unprofessional behavior. (*see* Respondent's Exhibit F).

   c.) She personally reviewed all the video footage from the Employer on September 27, 2023, and September 28, 2023 (*see* Respondent's Exhibit G);

   d.) At no time on September 27, 2023, can Claimant be seen injuring his back;

   e.) Claimant was not lifting boxes at 2 p.m. on September 27, 2023 when he

says he was injured; rather, he was performing cleaning duties at that time; (*cf* Respondent's Exhibit Respondent's Exhibit E, Bates 40).

f.) Claimant moved freely about the premises on September 27, 2023;

g.) Claimant did come to work on September 28, 2023; he was seen on the video at work that morning when he was terminated for acting unprofessionally. (Respondent's Exhibit G);

h.) Claimant saying he did not work on September 28, 2023, is inaccurate.

i.) Claimant finished his entire shift on September 27, 2023; and that Claimant's statement in his interrogatory responses that he left early, is inaccurate. (*see* Respondent's Exhibit E, Bates 041, "Claimant was unable to finish his shift on September 27 and was unable to work on September 28, 2023 because of severe pain.").

j.) Employees, including Claimant, are made aware of how to report work-related injuries, and they have meetings and training for employees on how to report injuries at work;

k.) Employees are not discouraged from reporting injuries at work and in the past they have had their 'fair share' of injuries by other co-workers on the farm;

l.) Claimant never reported any injury on September 27, 2023, and that she only became aware of Claimant's alleged injury a week or so later when she received a call from a medical provider questioning the claim;

m.) Once she learned Claimant was alleging an injury the day before he was terminated, she conducted an investigation into the alleged event. This consisted of reviewing videos of the premises (Respondent's Exhibit G), talking to the supervisor who was on hand that day (JY[Redacted]), and taking witness statements. (Respondent's Exhibit F);

n.) Not one person at the Employer witnessed or heard Claimant mentioned hurting his back on September 27, 2023, and nobody saw him acting injured or showing any pain mannerisms.

8. On September 30, 2023, Claimant went to the UC Health Emergency Department at Greeley Hospital for back and tailbone pain. Claimant said that he injured his back a few days ago while lifting boxes at work, but that he had had back problems in the past. At no point did the emergency room physician try to determine whether Claimant's contention that he injured his back at work was true. Based on his symptoms, x-rays were taken of his back and reviewed. They merely showed degenerative changes without any acute findings. After evaluating Claimant, and reviewing the x-rays, the doctor concluded that Claimant's neurological exam was within normal limits, that there was no focal midline tenderness to palpation, and that there was no dangerous cause of the pain. Thus, Claimant was told to follow up with his primary care physician.

9. Dr. Bisgard testified at the hearing and testified consistent with her report. Based on her credible and persuasive testimony, the ALJ finds the following:

a.) She personally examined Claimant, took a history from Claimant, and reviewed all the medical records, employment records, video footage, and witness statements;

b.) Claimant struggled to identify the date of the alleged injury;

c.) Claimant struggled to identify the co-worker/s he was around when the alleged injury occurred;

d.) Claimant told her, incorrectly, that he did not work on September 28, 2023;

e.) Claimant did not appear injured on the video from September 27, 2023;

f.) Her exam failed to show any objective injury to his low back;

g.) Claimant was not a reliable historian.

10. Dr. Bisgard also credibly and persuasively testified how Emergency Room (ER) medical providers usually do not perform a causation assessment. She testified that ER providers do not perform causation analysis, and rely on the patients to provide accurate information. For example, the ER does not have the benefit of having all the information to make a causation assessment; for instance, the ER did not have the video footage, the witness statements, etc.; and that it is not part of their job to independently verify the veracity or consistency of a patient's statements. Thus, the medical providers who saw claimant tend to simply write down what they were told by the patient and focus on trying to address the complaints;

11. She also credibly and persuasively concluded that in her medical opinion, Claimant did not sustain a low back injury at work on September 27, 2023, and that Claimant is not a reliable historian regarding his alleged injury.

12. Claimant's signed and notarized interrogatories were admitted into evidence. (Respondent's Exhibit E). In relevant part, Claimant stated:

a.) His alleged injury occurred at around 2pm. (Id., at Bates 040);

b.) He was unable to finish his shift on September 27, 2023 because of severe pain (Id., at Bates 041);

c.) That he did not work on September 28, 2023 because of severe pain. (Id.)

13. As found above, KG[Redacted] explicitly refuted the statements in Claimant's discovery responses. She credibly and persuasively testified that: a.) Claimant wasn't even lifting boxes at 2 p.m. on September 27, 2023; rather, he was cleaning with other co-workers; b.) Claimant did finish his entire shift on September 27, 2023 without incident and this is confirmed on the Employer video (Respondent's Exhibit G); and C.) Claimant did in fact come to work on September 28, 2023 – this is the day he was terminated.

14. In his discovery responses, Claimant was asked about prior physical injuries, whether or not work-related. (Respondent's Exhibit E, Bates 043). Claimant responded only that he had lacerated his left hand, and omitted the fact that he had back problems in the past including a fall from the year before. (see

Respondent's Exhibit B, Bates 018 ["He has had back problems in the past."]; see also Respondent's Exhibit, Bates 022 [Patient states he had a prior injury from a fall last year."). Similarly, claimant failed to disclose his history of low back pain to Dr. Bisgard when she performed her IME. (see Respondent's Exhibit A, Bates 006 ["He denied ever having an injury to or treatment to his back."]).

15. The testimony of Dr. Bisgard is found credible and persuasive.

16. The testimony of KG[Redacted] and JY[Redacted] is found credible and persuasive.

17. Claimant's contention that he injured himself at work is not found to be credible.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

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

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

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

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Off.,* 12 P.3d 844 (Colo. App. 2000).

In this case, Claimant did establish that he worked on September 27, 2023. But Claimant failed to establish that he suffered a compensable injury. As credibly testified to by KG[Redacted] and JY[Redacted], not one person at the Employer witnessed or heard Claimant mentioned hurting his back on September 27, 2023. Nor did Claimant

report hurting his back on that day. Moreover, no one saw him acting injured or showing any pain mannerisms. Plus, the following day, September 28th, Claimant came into work and appeared intoxicated. Upon arriving at work, Claimant did not report an injury. Instead, Claimant started acting erratically. He was throwing and breaking boxes. He was also yelling and cussing at co-workers. As a result, Claimant was terminated that day.

While Claimant did state that he injured his back at work when he went to the emergency room, the ALJ does not find his statements to the providers at the emergency room regarding the cause of his back pain to be credible in light of the conflicting evidence.

Moreover, Dr. Bisgard credibly and persuasively concluded that Claimant did not suffer an injury at work.

Therefore, based on the totality of the evidence, the ALJ finds and concludes that Claimant failed to establish by a preponderance of the evidence that he suffered a compensable injury at work.

ORDER

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

1. Claimant's claim 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 9, 2024

/s/ Glen Goldman

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

Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-178-713-001

ISSUES

1. Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Anjmun Sharma, M.D. that she reached Maximum Medical Improvement (MMI) on May 3, 2023 for her June 16, 2021 injuries.

2. Whether Claimant has proven by a preponderance of the evidence that a total right knee replacement constitutes reasonable, necessary and causally related medical treatment to cure and relieve the effects of her June 16, 2021 injuries.

FINDINGS OF FACT

1. Claimant is a 54-year old female who worked for Employer as a Donations Coordinator. On June 16, 2021 Claimant used a restroom located outside of her building. Because of the conditions of the facility, Claimant became nauseated and ran from the bathroom. As she was running, she tripped on a hose and fell. Claimant suffered admitted industrial injuries after landing on her bilateral knees, left elbow, left wrist and face.

2. Claimant initially received conservative treatment for her injuries including medications and physical therapy. She also underwent diagnostic imaging of the right wrist, left elbow, lumbar spine, left wrist and ribs.

3. On October 21, 2021 a right knee MRI revealed the following: "1. Medial meniscal tear with large flipped meniscal fragment into the medial gutter. 2. Anterior horn lateral meniscal tear with para meniscal cyst. 3. Moderate medial femorotibial compartment cartilage loss. 4. Small knee joint effusion."

4. On November 10, 2021 Claimant visited Garrett Micah Snyder, M.D. for an evaluation. Dr. Snyder recommended a right knee arthroscopy with partial medial meniscectomy to address Claimant's medial meniscus tear and osteoarthritis.

5. On November 17, 2021 Insurer's Physician Advisor Jon M. Erickson, M.D. performed a records review to consider Dr. Snyder's surgical request. He determined the requested surgery was reasonable for the work-related flap tear of Claimant's meniscus. Dr. Erickson also noted that, after an appropriate period of time for a post-operative rehabilitation program, if Claimant's symptoms failed to resolve, they were likely secondary to pre-existing arthritis and further treatment would need to be done under her private health insurance.

6. On January 14, 2022 Dr. Snyder performed a right knee partial medial meniscectomy. An April 9, 2022 right knee MRI revealed grade 3-4 chondral fissuring but no tear.

7. By September 6, 2022 Claimant reported a worsening of right knee and back pain. Authorized Treating Physician (ATP) Mark Krisburg, M.D. prescribed chiropractic care for the lumbar spine secondary to an altered gait from the right knee injury.

8. On October 12, 2022 Kelly Ralph Sanderford, M.D. provided a second surgical opinion. He recommended a repeat arthroscopy to address the lateral meniscus tear he identified on diagnostic imaging.

9. On November 16, 2022 Insurer denied authorization for a repeat arthroscopy. Dr. Erickson recommended review of the repeat MRI to confirm whether Claimant required the procedure. On November 26, 2022, following the MRI review, Dr. Erickson determined there was no evidence of a recurrent lateral meniscus tear.

10. A third surgical opinion was obtained from Matthew A. Javernick, M.D. Dr. Javernick reasoned that, if Claimant's symptoms persisted, she would require a total knee replacement at some point in the future. At the examination with Dr. Javernick, Claimant chose to proceed with Viscosupplementation to treat her right knee condition.

11. On January 25, 2023 Dr. Erickson considered Claimant's request for Viscosupplementation. He determined the request should be denied because the treatment was directed toward Claimant's pre-existing, non-work related osteoarthritis and not her June 16, 2021 industrial injury.

12. On May 3, 2023 Dr. Krisburg determined Claimant had reached Maximum Medical Improvement (MMI). He assigned an 18% whole person impairment rating. Dr. Krisburg specifically assigned a 4% scheduled rating for Claimant's left wrist and a 5% scheduled impairment for her left elbow for a combined 9% upper extremity impairment. He also designated a 35% lower extremity rating that converted to a 14% whole person rating for Claimant's right knee. Combining the ratings yields a total 18% whole person impairment for Claimant's June 16, 2021 injuries. Dr. Krisburg also provided permanent work restrictions and recommended maintenance medical care.

13. Claimant challenged Dr. Krisburg's MMI and impairment determinations and sought a Division Independent Medical examination (DIME). On November 10, 2023 Claimant underwent a DIME with Anjmun Sharma, M.D. Dr. Sharma reviewed Claimant's medical records and performed a physical examination. He agreed that Claimant reached MMI on May 3, 2023. However, he assigned a higher 25% whole person rating. Dr. Sharma did not recommend maintenance care, but provided permanent work restrictions. On December 15, 2023 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Sharma's MMI and impairment determinations.

14. On January 10, 2024 Dr. Snyder's office notified Insurer that Claimant sought to proceed with total right knee replacement surgery and inquired whether the procedure would be covered under Workers' Compensation. The accompanying medical record from Dr. Snyder stated he had performed a right knee arthroscopy with partial medial meniscectomy in January 2022. However, Claimant complained of worsening pain in the knee for the last year and the

symptoms had significantly worsened over the last couple of weeks. Claimant denied any specific injury but radiographs "show interval progression of osteoarthritis in the medial compartment of the knee. [Claimant] now appears to be bone-on-bone." Dr. Snyder administered a right knee epidural steroid injection.

15. On January 16, 2024 James Ferrari, M.D. issued a Physician Advisor report regarding the proposed right knee arthroplasty. He remarked that Dr. Snyder described Claimant's right knee as "bone on bone." Dr. Ferrari reasoned that Claimant's osteoarthritis constituted a pre-existing condition, "and it is inevitable that she undergo a total knee replacement based on the findings on her initial MRI." He commented that the meniscus tear was the result of Claimant's work-related injury. However, "the arthritis was clearly pre-existing and she would end up having a knee replacement eventually regardless of the work-related injury." Dr. Ferrari summarized that the need for the knee replacement was thus not work-related and should be covered by Claimant's private insurance.

16. On January 18, 2024 Insurer denied Dr. Snyder's request for prior authorization of a right knee arthroplasty. The denial was predicated on Dr. Ferrari's January 16, 2024 report.

17. On April 3, 2024 Dr. Erickson conducted an Independent Medical Examination (IME) of Claimant. He reviewed Claimant's medical records and performed a physical examination. Dr. Erickson commented that Claimant underwent a right knee arthroscopy to address the work-related medial meniscal tear. However, there was gradual symptomatic worsening and radiographic documentation of non-work related progression of pre-existing osteoarthropathy.

18. On May 13, 2024 the parties conducted the pre-hearing evidentiary deposition of Dr. Ferrari. He maintained that Claimant's meniscal tear was work-related, but her arthritis was clearly pre-existing. While he agreed that Claimant is a candidate for a total knee replacement, the need for the procedure was not causally related to her June 16, 2021 work injuries. Dr. Ferrari summarized that the need for a right knee arthroplasty constitutes the natural progression of pre-existing arthritis. He explained that Claimant suffers from end-stage, bone-on-bone changes in both the patellofemoral compartment and median compartment of her right knee and thus requires a total knee replacement. Dr. Ferrari agreed with Dr. Erickson that Claimant's work activities were not causally related to her need for a right knee arthroplasty.

19. On June 13, 2024 the parties conducted the post-hearing evidentiary deposition of Dr. Erickson. He maintained that Claimant's need for a total right knee replacement was not causally related to her June 16, 2021 work accident. Dr. Erickson testified that Dr. Sharma complied with Level II accredited teachings and there were no errors or mistakes in his DIME determination that Claimant reached MMI on May 3, 2023. In addressing the request for a total knee replacement, Dr. Erickson explained that "if you take care of the work-related issue, which in this case is the meniscus tear, and yet the patient continues to have persistent worsening symptoms even though the meniscus tear has been adequately treated, that's the progressive arthritis, which is a preexisting condition." It was "pretty clear" to Dr. Erickson that any increase in Claimant's right knee symptoms originated from the pre-existing osteoarthritis and not her work injuries. Assuming Claimant was asymptomatic prior to the work accident, it was "medically

probable" that she would need a right total knee replacement due to increased symptoms from the natural progression of her pre-existing arthritic condition. Moreover, Dr. Erickson commented there was no physician who determined it was medically probable the work injury aggravated or accelerated the need for a total knee replacement.

20. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Sharma that she reached MMI on May 3, 2023 for her June 16, 2021 injuries. On June 16, 2021 Claimant suffered multiple injuries after she tripped over a hose at work. She initially received conservative treatment, but subsequently underwent a right knee partial medial meniscectomy. Although Claimant reported worsening right knee symptoms, on May 3, 2023 ATP Dr. Krisburg determined Claimant had reached MMI. He assigned an 18% whole person impairment rating. The rating included a 35% lower extremity rating that converted to a 14% whole person impairment for Claimant's right knee.

21. Claimant challenged Dr. Krisburg's MMI and impairment determinations and sought a DIME. On November 10, 2023 DIME Dr. Sharma reviewed Claimant's medical records and performed a physical examination. He agreed that Claimant reached MMI on May 3, 2023 and assigned a higher 25% whole person rating. Dr. Sharma did not recommend maintenance care, but provided permanent work restrictions. Although Claimant contends that Dr. Sharma's MMI determination was clearly erroneous, no physician has explained that Dr. Sharma's MMI determination was incorrect, contrary to the substantial medical evidence or inconsistent with Level II standards. Importantly, Dr. Erickson testified that Dr. Sharma complied with Level II accredited teachings and there were no errors or mistakes in his determination that Claimant reached MMI on May 3, 2023.

22. Notably, ATP Dr. Krisburg placed Claimant at MMI on May 3, 2023 knowing she suffered from asymptomatic, pre-existing right knee osteoarthritis that did not impact her level of functioning. Six months later, Dr. Sharma concurred that Claimant had reached MMI on May 3, 2023. He had reviewed medical records, including Dr. Krisburg's comment that Claimant's right knee had been asymptomatic prior to her work injury and Dr. Javernick's January 10, 2023 report that Claimant might need a right total knee replacement "down the line." Knee surgeons Drs. Erickson and Ferrari also agreed that Claimant reached MMI on May 3, 2023. Finally, even Dr. Snyder, who agreed to perform a right total knee replacement, did not mention Claimant had been improperly placed at MMI.

23. Claimant has failed to demonstrate that it is highly probable that Dr. Sharma's May 3, 2023 MMI determination is incorrect. Dr. Sharma's reasoning that Claimant reached MMI is supported by ATP Krisburg's identical determination. The record is devoid of persuasive contrary medical evidence and is consistent with Level II standards. Notably, multiple physicians have also agreed that Claimant reached MMI on May 3, 2023. Claimant has simply failed to identify unmistakable evidence free from serious or substantial doubt that Dr. Sharma's MMI determination was clearly erroneous. Accordingly, Claimant reached MMI on May 3, 2023 for her June 16, 2021 work injuries.

24. Claimant has failed to prove it is more probably true than not that a total right knee replacement constitutes reasonable, necessary and causally related medical treatment to cure

and relieve the effects of her June 16, 2021 injuries. Claimant initially received conservative treatment for her May 3, 2023 work injuries, but subsequently underwent a right knee partial medial meniscectomy. On January 10, 2024 Dr. Snyder's office notified Insurer that Claimant sought to proceed with total right knee replacement surgery and inquired whether the procedure would be covered under Workers' Compensation. Claimant had complained of increasing pain in the knee for the last year and the symptoms had significantly worsened over the last couple of weeks. Despite Claimant's request for a right total knee replacement, the record demonstrates that the need for the procedure is related to the non-work related natural progression of her pre-existing arthritic condition.

25. Notably, Dr. Ferrari persuasively maintained that Claimant's meniscal tear was work-related, but her arthritis was clearly pre-existing. While he agreed that Claimant is a candidate for a total knee replacement, the need for the procedure is not causally related to her June 16, 20212 work injuries. Dr. Ferrari summarized that the need for a total knee replacement constitutes the natural progression of pre-existing arthritis. He explained that Claimant suffers from end-stage, bone-on-bone changes in both the patellofemoral compartment and median compartment of her right knee. Similarly, Dr. Erickson explained it was "pretty clear" that any increase in Claimant's right knee symptoms originated from her pre-existing, progressive osteoarthritis and not her work injuries. Assuming Claimant was asymptomatic prior to the work accident, it was "medically probable" that she would need a right total knee replacement due to increased pain from the natural progression of her pre-existing arthritic condition. Moreover, Dr. Erickson commented there was no physician who determined it was medically probable the work injury aggravated or accelerated the need for a total knee replacement. Finally, surgeon Dr. Javernick also noted in his January 10, 2023 report that Claimant may need a right total knee replacement at some point in the future.

26. As the preceding persuasive medical opinions reveal, Claimant's need for a right total knee replacement is related to the non-work related natural progression of her pre-existing arthritic condition and was not caused by her June 16, 2021 work accident. Claimant has thus failed to demonstrate that her work activities aggravated, accelerated or combined with her pre-existing arthritic condition to produce the need for a right knee arthroplasty. Accordingly, Claimant's request for a total right knee replacement is denied and dismissed.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. 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 includes 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'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).

6. "Clear and convincing evidence" is evidence that demonstrates it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc.,* 961 P.2d at 592. In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

7. "Maximum medical improvement" means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and no further treatment is reasonably expected to improve the condition. §8-40-201(11.5), C.R.S. MMI represents the optimal point at which the permanency of a disability can be discerned and the

extent of any resulting impairment can be measured. *Paint Connection Pul v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010). MMI exists when the underlying condition causing the disability has become stable and no additional treatment will improve the condition. *Golden Age Manor v. Indus. Comm'n*, 716 P.2d 153 (Colo.App.1985).

8. A determination that a claimant needs additional medical treatment, including surgery, to improve his condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Indus. Claim Appeals Off.*, 62 P.3d 1001 (Colo. App. 2002); *Sotelo v. Nat's By-Products, Inc.*, W.C. No. 4-320-606 (ICAO Mar. 2, 2000). Similarly, additional diagnostic procedures that offer a reasonable prospect for defining a claimant's condition or suggesting further treatment are consistent with a determination that a claimant has not reached MMI. *Hatch v. John H. Harland Co.*, W.C. No. 4-368-712 (ICAO Aug. 11, 2000).

9. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Sharma that she reached MMI on May 3, 2023 for her June 16, 2021 injuries. On June 16, 2021 Claimant suffered multiple injuries after she tripped over a hose at work. She initially received conservative treatment, but subsequently underwent a right knee partial medial meniscectomy. Although Claimant reported worsening right knee symptoms, on May 3, 2023 ATP Dr. Krisburg determined Claimant had reached MMI. He assigned an 18% whole person impairment rating. The rating included a 35% lower extremity rating that converted to a 14% whole person impairment for Claimant's right knee.

10. As found, Claimant challenged Dr. Krisburg's MMI and impairment determinations and sought a DIME. On November 10, 2023 DIME Dr. Sharma reviewed Claimant's medical records and performed a physical examination. He agreed that Claimant reached MMI on May 3, 2023 and assigned a higher 25% whole person rating. Dr. Sharma did not recommend maintenance care, but provided permanent work restrictions. Although Claimant contends that Dr. Sharma's MMI determination was clearly erroneous, no physician has explained that Dr. Sharma's MMI determination was incorrect, contrary to the substantial medical evidence or inconsistent with Level II standards. Importantly, Dr. Erickson testified that Dr. Sharma complied with Level II accredited teachings and there were no errors or mistakes in his determination that Claimant reached MMI on May 3, 2023.

11. As found, notably, ATP Dr. Krisburg placed Claimant at MMI on May 3, 2023 knowing she suffered from asymptomatic, pre-existing right knee osteoarthritis that did not impact her level of functioning. Six months later, Dr. Sharma concurred that Claimant had reached MMI on May 3, 2023. He had reviewed medical records, including Dr. Krisburg's comment that Claimant's right knee had been asymptomatic prior to her work injury and Dr. Javernick's January 10, 2023 report that Claimant might need a right total knee replacement "down the line." Knee surgeons Drs. Erickson and Ferrari also agreed that Claimant reached MMI on May 3, 2023. Finally, even Dr. Snyder, who agreed to perform a right total knee replacement, did not mention Claimant had been improperly placed at MMI.

12. As found, Claimant has failed to demonstrate that it is highly probable that Dr. Sharma's May 3, 2023 MMI determination is incorrect. Dr. Sharma's reasoning that Claimant reached MMI is supported by ATP Krisburg's identical determination. The record is devoid of persuasive contrary medical evidence and is consistent with Level II standards. Notably, multiple

physicians have also agreed that Claimant reached MMI on May 3, 2023. Claimant has simply failed to identify unmistakable evidence free from serious or substantial doubt that Dr. Sharma's MMI determination was clearly erroneous. Accordingly, Claimant reached MMI on May 3, 2023 for her June 16, 2021 work injuries.

Surgical Intervention

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

14. 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).

15. As found, Claimant has failed to prove by a preponderance of the evidence that a total right knee replacement constitutes reasonable, necessary and causally related medical treatment to cure and relieve the effects of her June 16, 2021 injuries. Claimant initially received conservative treatment for her May 3, 2023 work injuries, but subsequently underwent a right knee partial medial meniscectomy. On January 10, 2024 Dr. Snyder's office notified Insurer that Claimant sought to proceed with total right knee replacement surgery and inquired whether the procedure would be covered under Workers' Compensation. Claimant had complained of increasing pain in the knee for the last year and the symptoms had significantly worsened over the last couple of weeks. Despite Claimant's request for a right total knee replacement, the record demonstrates that the need for the procedure is related to the non-work related natural progression of her pre-existing arthritic condition.

16. As found, notably, Dr. Ferrari persuasively maintained that Claimant's meniscal tear was work-related, but her arthritis was clearly pre-existing. While he agreed that Claimant is a candidate for a total knee replacement, the need for the procedure is not causally related to her June 16, 20212 work injuries. Dr. Ferrari summarized that the need for a total knee replacement constitutes the natural progression of pre-existing arthritis. He explained that Claimant suffers from end-stage, bone-on-bone changes in both the patellofemoral compartment and median compartment of her right knee. Similarly, Dr. Erickson explained it was "pretty clear"

that any increase in Claimant's right knee symptoms originated from her pre-existing, progressive osteoarthritis and not her work injuries. Assuming Claimant was asymptomatic prior to the work accident, it was "medically probable" that she would need a right total knee replacement due to increased pain from the natural progression of her pre-existing arthritic condition. Moreover, Dr. Erickson commented there was no physician who determined it was medically probable the work injury aggravated or accelerated the need for a total knee replacement. Finally, surgeon Dr. Javernick also noted in his January 10, 2023 report that Claimant may need a right total knee replacement at some point in the future.

17. As found, as the preceding persuasive medical opinions reveal, Claimant's need for a right total knee replacement is related to the non-work related natural progression of her pre-existing arthritic condition and was not caused by her June 16, 2021 work accident. Claimant has thus failed to demonstrate that her work activities aggravated, accelerated or combined with her pre-existing arthritic condition to produce the need for a right knee arthroplasty. Accordingly, Claimant's request for a total right knee replacement is denied and dismissed.

ORDER

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

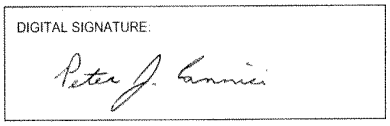
1. Claimant reached MMI on May 3, 2023 for her June 16, 2021 work injuries.

2. Claimant's request for a total right knee replacement is denied and dismissed.

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

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

DATED: July 9, 2024.



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

ISSUES

The issues to be determined by this decision include compensability of an alleged work related injury and Claimant's entitlement to medical benefits. The specific questions answered are:

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury that arose out of, and in the course and scope of, his employment duties on November 10, 2023.

II. If Claimant's injuries are compensable, whether he demonstrated, by a preponderance of the evidence, that he is entitled to reasonable and necessary medical treatment benefits.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Ramaswamy, the ALJ enters the following findings of fact:

1. Claimant is employed by Respondent as a firefighter/paramedic. On November 10, 2023, Claimant's crew was dispatched to the scene of a single car accident near some railroad tracks north of Pueblo, Colorado. Upon arrival, Claimant located a large, approximately 300 pound unconscious male victim lying partially beneath his vehicle. According to Claimant, the victim's head was on the railroad track and he was not moving. An ambulance was summoned and Claimant set about attending to the victim. Because he could not find a pulse, Claimant began connecting the victim to a heart monitor. As Claimant was attaching the leads to the victim, a fellow crew member yelled that a train was coming. Claimant then noticed that a train was approaching from his left so he promptly removed the leads and worked swiftly to extricate the victim from underneath the car by pulling/dragging him from the railway and the oncoming train. The victim was quickly placed onto a backboard and hastily carried by Claimant and two of his crew members to a waiting ambulance approximately 50 yards away.

2. As the victim was loaded into the ambulance, Claimant noticed he was out of breath and did not feel well. While he sat in the back of the ambulance working to place an IV line in the victim, Claimant became lightheaded and nauseous. He was sweating profusely and felt something was wrong.

3. Claimant rode in the ambulance with the victim to the emergency department (ED). During the ride to the ER, Claimant developed pressure on the left side of his chest. Once the victim was off loaded at the hospital, Claimant returned to the back of the ambulance to check his heart rate, which was reportedly elevated to 130-140 beats per minute. Rather than getting evaluated in the ED, Claimant returned to his

stationhouse. At the stationhouse, Claimant's lightheadedness and nausea persisted. He developed random palpations, i.e. skipped heartbeats and generally did not feel well. He self-administered an EKG, which was reportedly abnormal. Accordingly, Claimant was directed to the ED for further evaluation.

4. Claimant presented to the ED at Parkview Medical Center at 11:37 p.m. on November 10, 2023. (Resp. Hrg. Ex. G). Upon his arrival, Registered Nurse (RN), Misty Swancutt obtained the following history: "Pt. arrives to ED c/o feeling dizziness, nausea, heart racing. Pt. reports left sided CP, non-radiating. Pt. is a fire fighter and had an intense call when the pain started". *Id*. Claimant was noted to be anxious and his blood pressure was elevated to 158/107. *Id*. A 12 lead EKG, a D-Dimer to exclude pulmonary embolism (PE) and a Troponin cardiac enzyme test to exclude a heart attack were ordered and completed promptly. *Id.*

5. Claimant was subsequently evaluated by Dr. Mary Christine Whitney. Dr. Whitney documented the following history: "27 year old male who comes in with a chief complaint of chest pressure. He is a firefighter and was out on a call and while they were trying to move the patient away from the train tracks started getting severe palpitations. He states that he felt some chest heaviness and was quite sweaty at that time. He was able to complete the call and about 10 minutes later checked his heart rate, [which] at that time was 130. . . . He hooked himself up to an EKG and noted it to have some abnormalities so he came here to be checked out". (Resp. Hrg. Ex. G).

6. Claimant's D-Dimer and Troponin testing results were negative for PE or an acute heart attack; however, his EKG evidenced changes within the inferior wall at the bottom of the heart that could represent an infarct of indeterminate age and the potential for right ventricular hypertrophy. (Resp. Hrg. Ex. G). Regarding Claimant's cardiac testing, Dr. Whitney noted: "So far your cardiac work-up does appear normal however you do have some abnormalities on your EKG that while it does not show an acute heart attack I would like you to see cardiology regarding them". *Id.* Regarding Claimant's clinical presentation, Dr. Whitney noted: "Right now I am not finding any evidence of a dangerous medical condition. I do think that there is a possibility that this could have been an episode of SVT[1] earlier which is why he had the symptoms he did which is currently resolved although there is no way of proving that. He felt back to normal here and due to the presumed changes on his EKG from previous [I] will refer [him] to cardiology for further work-up as an outpatient although I do not think that he needs inpatient testing at this time." *Id*. Claimant was subsequently discharged from the ED.

7. Claimant followed-up with Concentra on November 11, 2023, where he was evaluated by Dr. Tanya L. Hrabal. (Resp. Hrg. Ex. H). As part of this encounter, Dr. Hrabal documented the following history:

> Pt got sweaty, nauseous, racing heart. Noted to have heart beating at 130 beats per minutes (sic) 30 minutes later. Chest pain began 30 minutes later and pt still has chest discomfort 13 hours later 4/10. Does not know cholesterol level.

[1] Supraventricular tachycardia. (See Depo. Tr. Dr. Ramaswamy, p. 35, l. 25, p. 36, ll. 1-13).

> Pt went to the ER at Parkview last night. Told he had an abnormal EKG. Right heart hypertrophy and possibly of (sic) old infarct and to see a cardiologist.

(Resp. Hrg. Ex. H). Other than a cursory statement that Claimant was "on a call and afterwards had chest discomfort" there is no indication of what physical activity Claimant engaged in during the call or the physical demands of that activity included in Dr. Hrabal's medical record.

8. Claimant's blood pressure was 128/84 and he was noted to have a normal heart rate and rhythm. (Resp. Hrg. Ex. H). Dr. Hrabal referred Claimant to a cardiologist "ASAP" for additional workup; however, she noted that she not believe this was a work related injury and she tried to explain the same to Claimant. *Id*. Although her report indicates that she tried to explain to Claimant that his cardiac episode/response was not work related, Dr. Hrabal did not include any rationale for her opinion or a statement regarding causality in her medical report and she did not testify at hearing.

9. Claimant was evaluated by Nurse Practitioner (NP) Jennifer Livingston on November 13, 2023. (Resp. Hrg. Ex. J). In her medical report from this date of visit, NP Livingston notes that she had a "long discussion" with Claimant that his cardiac "issue", which NP Livingston assessed as chest pain – unspecified type, was not work related. *Id*. Similar to the November 11, 2023 report of Dr. Hrabal, NP Livingston's 11/13/2023 report is devoid of any specifics regarding causality or the basis for her opinion that Claimant's cardiac "issue" was not related to his work duties. Claimant was subsequently placed at maximum medical improvement (MMI) and released from care by Dr. Daniel Peterson. *Id*.

10. Respondent filed a "Notice of Contest" denying liability for the claimed injury on the basis that the injury/illness was not work-related on November 20, 2023. (Resp. Hrg. Ex. L).

11. Claimant was evaluated by cardiologist, Dr. Alexander Ross at the UC Health Heart Clinic on November 24, 2023. (Clmt's Hrg. Ex. 1, pp. 33-48). Dr. Ross noted non-specific abnormalities on Claimant's 11/10/2023 ECG, including "borderline right axis with prominent early precordial R waves (consider RVH)[2]" and "nonspecific inferior T wave abnormalities." *Id.* at 35. Dr. Ross recommended a stress echocardiogram to exclude significant ischemia and structural abnormalities and an event monitor to exclude arrhythmia. *Id*. He also noted that Claimant's blood pressure was elevated and opined that antihypertensive therapy (medication) should be considered if there was no improvement in Claimant's blood pressure in the next 3-6 months. *Id*.

12. Claimant completed his stress echocardiogram testing on November 29, 2023. (Clmt's Hrg. Ex. 1, p. 14). Dr. Ross opined that the stress portion of the examination was normal. *Id*. at 21. Indeed, Claimant was noted to have "[n]ormal stress

[2] Right ventricular hypertrophy. See Resp. Hrg. Ex. G.

wall motion and augmentation of systolic function". *Id*. at 15. There was no evidence of ischemia and Claimant had "good exercise tolerance at 11.2 METS. *Id*. However, the right ventricle was mildly to moderately enlarged and Claimant demonstrated a hypertensive blood pressure response to stress, leading Dr. Ross to note: "[Claimant] did have relatively high blood pressure during the stress test" and the "right side of [Claimant's] heart appears enlarged although it would be better characterized by an MRI"[3]. *Id*. at 21.

13. Respondent sought the opinions of Dr. Annu Ramaswamy, a physician specializing in occupational medicine. Dr. Ramaswamy completed an independent medical examination (IME) on March 13, 2024. He subsequently issued a written report outlining his opinions on March 25, 2024. (Resp. Hrg. Ex. A). After taking a history and completing a comprehensive records review, Dr. Ramaswamy noted that because all of Claimant's cardiac testing was negative, a cardiac diagnosis was "never put forth". Resp. Hrg. Ex. A, p. 9). He opined that Claimant's symptoms probably represented a "catecholamine response" that was related to the incident, i.e. the events surrounding the emergent call Claimant and his team responded to on November 10, 2023. *Id*. Indeed, Dr. Ramaswamy noted:

> As we know, firefighters in general can be exposed to quite a bit of physical stress, given the nature of their job. The literature does support the fact that firefighters can present with elevated blood pressure and heart rate levels in response to the demands of their job. The elevated catecholamine response is quite typical given the scenario and, therefore, firefighters can present with tachycardia and hypertension quite commonly. This is part of a firefighter's job, and this response is not surprising.

(Resp. Hrg. Ex. A, p. 9).

14. Dr. Ramaswamy opined further:

> Regarding causality, causality is always based on diagnosis. At the moment, we do not have evidence for a cardiac diagnosis. Instead, we have evidence for a catecholamine response that correlated with the work-related incident, and that response did resolve over time.
>
> In the end, fortunately a cardiac diagnosis was never put forth. I would have to opine that a true work-related injury did not occur, given that [Claimant] did not present with a cardiac condition in the end. Given that a formal cardiac diagnosis was not put forth, I would agree with Concentra Medical Center that a work-related diagnosis was not present.

[3] The MRI was completed on December 15, 2023 and reportedly demonstrated a normal sized right ventricle. See IME report of Dr. Ramaswamy, p. 5 at Resp. Hrg. Ex. A.

(Resp. Hrg. Ex. A, p. 9).

15. Dr. Ramaswamy testified by deposition as a Level II accredited expert in internal and occupational medicine on May 1, 2024. He testified that Claimant's reported symptoms did not support the assignment of a cardiac diagnosis and reiterated his belief that Claimant's symptoms were caused by a catecholamine response to a stressful situation. (Depo. Tr. Dr. Ramaswamy, pp. 23-25, ll. 1-15).

16. According to Dr. Ramaswamy, a catecholamine response is a physiologic phenomenon where the adrenal glands release chemicals (catecholamine) such as epinephrine into the bloodstream in response to physical or emotional stress. This triggers the so-called fight-or-flight response by increasing blood pressure and elevating the heart rate. (Depo. Tr. Dr. Ramaswamy, p. 24, ll. 19-25, p. 25, ll. 1-15).

17. Dr. Ramaswamy testified that a catecholamine response can be triggered by any stressful situation, whether work-related or not and not everyone will experience such a response to stress, but some people do "respond in that way". (Depo. Tr. Dr. Ramaswamy, p. 25, ll. 19-23).

18. Dr. Ramaswamy testified that Claimant experiences a significant increase in his blood pressure as a physiologic reaction to the increased catecholamine in his system due to physical[4] or emotional stress and that this physiologic reaction is what occurred during the stressful call Claimant responded to on November 10, 2023. (Depo. Tr. Dr. Ramaswamy, p. 27, ll. 10-25). Nonetheless, Dr. Ramaswamy testified that this physiologic reaction resolved without "any type of long-lasting condition or permanent damage". *Id*. at 28, ll. 1-12. Because Claimant did not suffer a secondary medical condition, i.e. a heart attack or other cardiac diagnosis related to his catecholamine response, Dr. Ramaswamy agreed with the providers at Concentra that no work-related injury occurred. *Id*.[5]

19. On cross-examination, Dr. Ramaswamy conceded that it was prudent for Claimant to present to the ED based upon his reported symptoms. (Depo. Tr. Dr. Ramaswamy, pp. 30-31, ll. 1-13). Dr. Ramaswamy also testified that Claimant's reported symptoms appeared to be related to the stressful events surrounding Claimant's November 10, 2023 call and that he would have recommended that Claimant seek medical attention for those described symptoms. *Id*. at 31, ll. 14-22.

20. Claimant testified that his symptoms persisted for several weeks following the November 10, 2023 incident and that he had never experienced similar symptoms previously.

21. Based upon the evidence presented, the ALJ is persuaded that Claimant did not experience a heart attack nor is Claimant asserting that he suffered one; therefore,

[4] See the results of Claimant's stress testing at Claimant's Hearing Exhibit 1.
[5] See also, Resp. Hrg. Ex. A, p. 9.

the provisions of C.R.S. § 8-41-302(2) are not applicable to the compensability determination in this case.[6]

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), §§ 8-40-101, *et seq*., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving by a preponderance of the evidence that he/she is a covered employee who suffered an "injury" arising out of and in the course of employment. Section 8-43-301(1), C.R.S.*; Faulker v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000)*; City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985)*; Pacesetter Corp. v. Collett,* 33 P.3d 1230 (Colo. App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents. Section 8-43-201, C.R.S. A workers' compensation claim is decided on its merits. Section 8-43-201, *supra.*

B. In 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).

Compensability

C. A "compensable injury" is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v.*

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[6] Section 8-41-302(2), C.R.S. provides that a heart attack is not compensable "unless it is shown by competent evidence that such heart attack was proximately caused by an unusual exertion arising out of and within the course of employment." The statute establishes a two-prong test of compensability. The claimant must not only show that he experienced "unusual exertion arising out of and within the course of the employment" but also prove that the heart attack was caused by the unusual exertion. *See Kinninger v. Industrial Claim Appeals Office*, 759 P.2d 766 (Colo. App. 1988); *Vialpando v. Industrial Claim Appeals Office*, 757 P.2d 1152 (Colo. App. 1988).

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 his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(l)(b), C.R.S.*

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). Conversely, the "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). In this case, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment and during an activity related to Claimant's job duties as a paramedic for the Pueblo Fire Department, namely attending to and moving/carrying a very heavy patient to an ambulance for transport to the hospital. Nonetheless, Respondents contend that the persuasive evidence demonstrates that Claimant failed to prove that he suffered a compensable injury because "[he] was never given a formal (cardiac) diagnosis" and "sustained no permanent injuries from the incident". The ALJ is not convinced.

E. The determination of whether there is a sufficient "nexus" or causal relationship between the Claimant's employment related duties and the alleged 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). Here, Respondents assert that the lack of a "formal" cardiac diagnosis makes it difficult to attribute Claimant's symptoms to the November 10, 2023 incident. Accordingly, Respondents maintain that Claimant has failed to establish that his alleged injury arose out of his work-related functions. While there is no requirement that a claimant present medical evidence to prove the cause of an injury (*Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997)), to the extent that expert medical testimony is presented, it is the ALJ's responsibility to assess its weight and sufficiency. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). In this case, Dr. Ramaswamy provides the most compelling analysis for the cause of Claimant's symptoms. While it is true that Claimant was not provided a formal cardiac diagnosis, Dr. Ramaswamy provided an assessment, i.e. diagnosis of a catecholamine response to the stressful situation

occurring November 10, 2023. Moreover, Dr. Ramaswamy's report and subsequent testimony persuades the ALJ that there is a sufficient nexus between Claimant's employment related duties and the medical condition causing his need to seek medical treatment. Indeed, Dr. Ramaswamy correlated the physically demanding and emotionally stressful call for service to the aforementioned catecholamine response causing Claimant's symptoms and his need for treatment. Contrary to Respondents suggestion, there is no requirement that Claimant prove that he suffered a specific cardiac diagnosis or a permanent injury for his claimed medical condition to be compensable. Rather, it is sufficient if Claimant established, in addition to proving that his condition occurred in the course and scope of his employment, that his medical condition had its origins in his work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer and that this condition required medical treatment. The record contains substantial evidence in this regard. Simply put, the evidence presented persuades the ALJ that Claimant's has established a causal relationship between his stressful work duties as a paramedic and his catecholamine response prompting his need for treatment in the ED on November 10, 2023. Based upon a totality of the evidence presented, the ALJ is convinced that not only did Claimant's catecholamine response occur in the course and scope of his employment, but it "arose out" of his work duties and compelled his need for treatment. Accordingly, the claim injury is compensable.

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

ORDER

It is therefore ordered:

1. Claimant has established, by a preponderance of the evidence, that he

suffered a compensable injury involving a severe catecholamine reaction to the physically demanding and emotionally stressful call for service on November 10, 2023.

2. Respondent-Employer shall pay all reasonable necessary and related medical expenses associated with this compensable injury, including but not limited to the costs of Claimant's emergency treatment, the costs of Claimant's treatment at Concentra Medical Centers and the costs of the testing and treatment ordered and rendered by Dr. Ross.

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

DATED: __July 9, 2024_____

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

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 PRESENTED

- Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable Coronavirus (Covid-19) infection arising out of her work duties for Employer on or about November 27, 2020.

- If Claimant established that she suffered a compensable Covid-19 infection, whether she also demonstrated, by a preponderance of the evidence, that she was temporarily disabled from November 27, 2020 and ongoing.

- What is Claimant's Average Weekly Wage (AWW)?

FINDINGS OF FACT

Based upon the evidence presented at hearing and post-hearingt, the ALJ enters the following findings of fact:

Generally

1. Employer in this action operates nursing facility. Claimant was employed by the facility as a Certified Occupational Therapist.

2. Claimant provided occupational therapy to residents at the nursing home. Claimant's duties included direct patient contact, occupational therapy evaluations, developing treatment plans, implementation of treatment plans, and supervising her assistants.

3. Claimant's history of care consisted of hypertension, hyperlipidemia, hypothyroidism, tricuspid valve regurgitation, depression, anxiety, sleep apnea, etc. The records span from 2011 to November 12, 2020, and document the patient's visits with various providers for management of these conditions. Key events include a 2019 echocardiogram showing mild tricuspid regurgitation. Claimant's treatment focused on medication management, further testing like echocardiograms and lifestyle modifications. The preexisting medical condition did not interfere with Claimant's normal work duties. The notes span multiple visits with Claimant reporting the medication regimen as effective with no significant side effects.

4. The wage records from August 30, 2020, to November 21, 2020 show that Claimant worked her normal work duties with no restrictions and that she averaged $2,507.36 every two weeks from August 30, 2020, to November 21, 2020.

5. On November 21, 2020, the first known case at Springs Village Care Center occurred and a COVID outbreak ensued. Dr. Oginsky testified that at this time, the Colorado Department of Public Health and Environment ("CDPHE"), collected data from two different reporting mechanisms. One mechanism reported 85 cases in residents and 66 in staff. Another reporting mechanism documented 76 cases in residents and 67 staff.[1] Despite the slight discrepancy, the attack rate among the residents at Springs Village Care Center remained 90%.

The Testimony of Dr. Lawrence Lesnak

6. Dr. Lesnak testified as a board certified expert in the field of physical medicine and rehabilitation and pain management and is level II accredited. He evaluated the Claimant at the request of Respondents. Essentially, it was his opinion that because Claimant had been to multiple retail outlets, including [Redacted, hereinafter WG], [Redacted, hereinafter DI], [Redacted, hereinafter WM] and [Redacted, hereinafter KS] it was not likely that Claimant contracted COVID at the workplace.[2] He testified that prior to the diagnosis of COVID, the Claimant experienced fatigue that could be causally related to multiple preexisting diagnoses and also could be causally related to the medications use to treat them.

The Testimony of Dr. Marcus Oginsky

7. Dr. Marcus Oginsky testified as a board certified expert in the fields of internal medicine and healthcare quality management, which is a field of medicine that pertains to the analysis of data that describes the quality standards of medicine.

8. Dr. Oginsky is the chief quality officer at Midtown Inpatient Medicine. His job is to analyze data that is generated in the course of the clinical practice and using that data to both describe the quality and efficiencies of the practice. Dr. Oginsky has direct training in the analysis of probability and statistics.

9. Dr. Oginsky was asked to review Claimant's treatment history and available records and opine as to where she most likely contracted her Covid-19 infection. He also completed a telephone interview with Claimant on September 28, 2022. Dr. Oginsky authored a report dated October 2, 2022, in which he discussed the characteristics of COVID, the differences between community transmission, household transmission and workplace transmission. (Ex. HL-109 to HL-111).

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[1] Although Claimant's expert, Dr. Oginsky could not account for the discrepancy he ultimately concluded that the numbers were essentially the same for his probability analysis.

[2] Dr. Lesnak also offered opinions as to whether Claimant's symptoms were due to COVID or were preexisting. However, based on the issues identified at the beginning of the hearing, these opinions are not considered on the issue of compensability. They do have some relevance to the issue of temporary disability and are considered for that purpose. (Hearing Transcript pp. 2 -3).

10. Dr. Oginsky discussed the unique characteristics of the Covid-19 virus in his October 2, 2022 report, noting that the virus is spread by inhaling aerosolized virus particles that are "buoyant in the air and can travel in the air directly into a person's airways and lungs". (Ex. 27, p. 109). He noted further that the infectivity of a virus is based upon its "attack rate", which is defined as the "percentage of individuals who become infected after an exposure". According to Dr. Oginsky, the attack rates for the original circulating Alpha variant of Covid-19 at the time Claimant was infected was different for different environments. Dr. Oginsky ruled out home exposure since Claimant lived alone.

11. Based on the information available including case data and community testing, Dr. Oginsky noted that the probability of contracting COVID-19 while moving about the community, including stores, public transportation and religious services would be low. At the time in question, the contagious prevalence in the El Paso County was a rate of .06%. In his report, he states "Statistically speaking, it is a low probability event to encounter a contagious person among chance interaction with strangers". Since the home environment was ruled out, the only two environments to be considered were the general community and the Claimant's workplace. It was Dr. Oginsky's opinion that the Claimant's workplace had a significant prevalence of contagious individuals and demonstration of ongoing transmission in the work place.

12. Concerning the likelihood that Claimant contracted Covid-19 from her work environment, Dr. Oginsky testified that the public reporting databases, including the data reported by Colorado Department of Public Health and Environment (CDPHE), confirmed there was an outbreak at the employer's facility.

13. Dr. Oginsky testified that the Covid-19 attack rate for Claimant's work environment was approximately 90%.

14. Based upon the evidence presented, the ALJ is convinced that the Claimant's infection emanated from the work-place and was not based on community exposure, as argued by Respondents.

15. On January 12, 2021, Claimant was evaluated by her PCP, Alexios-Clark Christou Constantinides, D.O. Dr. Constantinides noted Claimant's confirmed COVID infection and reported her complaint of ongoing fatigue. In light of this, Dr. Constantinides noted decreased work hours given her post COVID fatigue. (Ex. HL-056)

16. Claimant had a telemedicine visit with Nicola Adams, N.P. at Dynamic Healthcare Team on January 28, 2021, where Claimant reported her biggest concern of pretty severe fatigue since having COVID at the end of November. Claimant reported she got 10 hours of sleep every night; however, she still felt very fatigued. Nicola Adams, N.P.'s objective was to establish care for Claimant's COVID-related fatigue so

he adjusted her medications and encouraged her to make an in-clinic appointment to discuss her ongoing fatigue and possibly order additional labs. (Ex. HL-207 to HL-208)

17. On February 2, 2021, Claimant returned to Dynamic Healthcare Team with Mr. Adams to transition her care to them. Claimant continued to be severely fatigued and felt that she could not work more than about 4 hours a day. Mr. Adams noted that Claimant's previous clinician wrote her a note to work 4-6 hours a day which she felt was a little longer than she was capable at that time. Claimant advised Mr. Adams that she was supposed to get her COVID vaccine this day; however, her employer refused because she was too early.

18. On February 27, 2023, March 24, 2023, and April 21, 2023, Claimant underwent sessions to complete her neuropsychological evaluation due to her providers' concerns with severe fatigue and memory loss after contracting COVID and undergoing neuroimaging, optometry and speech evaluation and psychotherapy, transcranial magnetic stimulation (TMS) and neurofeedback treatments. Stephanie Spies-Uptoh, Ph.D. and Lisa Hains Barker, Ph.D. stated that Claimant's cognitive and emotional functioning was significantly affected by her COVID diagnosis and in their opinion, prevents her from working full or part time. They also opined that Claimant's preexisting psychological issues were exacerbated by COVID and that she needs intensive treatment and support. (Ex. HL-115 to HL-131)

19. Claimant credibly testified that her job ended on September 22, 2022. (Tr. 41:1-3).

20. Claimant worked in a limited capacity from November 2020 to September 22, 2022. Claimant has not returned to work since September 22, 2022. I find that Claimant has been disabled from working since her date of injury and she is entitled to temporary disability benefits throughout that time.

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. The weight and credibility to be assigned expert testimony is also 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). In this case, the undersigned ALJ concludes that the expert medical opinions of Dr. Oginsky are supported by the medical record, the available medical literature and public databases. Dr. Oginsky has extensive prior experience treating Covid-19 patients, establishing Covid-19 safety protocols and had the opportunity to draw conclusions after reviewing the entire medical record and available databases concerning the facility involved in this case. Accordingly, the ALJ concludes that Dr. Oginsky's opinions are credible and more convincing than the opinions of Dr. Lesnak.

D. 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).

Compensability

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for an injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, the evidence presented persuades the ALJ that Claimant's Covid-19 exposure and subsequent infection occurred within the Employer's facility during her working hours as she performed her duties as an occupational therapist. Although Claimant believes that her exposure was based on contact with a specific client, such belief may or may not be accurate. Nevertheless, Dr. Oginsky's opinion that the workplace exposure was the likely cause of her infection is very persuasive and credible.

F. 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); *Madden v. Mountain West Fabricators, 977 P.2d 861* (Colo. 1993). Specifically, the term "arising out of" calls for an examination of the causal connection or nexus between the conditions and obligations of employment and the alleged injury. *Horodysky v. Karanian, supra*. The determination of whether there is a sufficient "nexus" or causal relationship between a claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo.App. 1996). As referenced above, proof by a preponderance of the evidence requires the proponent to establish the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark, supra.* Whether Claimant sustained her burden of proof is a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo.App. 1997). Here, Claimant alleges that she was exposed to and infected with the Covid-19 virus while discharging her duties as an occupational therapist for Respondent-Employer. According to Claimant, this exposure led to a positive Covid-19 test result.

G. Based upon the evidence presented, the ALJ concludes that Claimant's claims are rooted in the legal principals surrounding the manifestation of an occupational disease rather than an accidental injury. An accidental injury is traceable to a particular time, place and cause. *Colorado Fuel & Iron Corp. v. Industrial Commission*, 154 Colo. 240, 392 P.2d 174 (1964); *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo.App. 1993). In contrast, an occupational disease arises not from an

accident, but from a prolonged exposure occasioned by the nature of the employment. *Colorado Mental Health Institute v. Austill*, 940 P.2d 1125 (Colo.App. 1997). The criteria for proving an occupational disease is set forth in C.R.S. § 8-40-201(14). An occupational disease is defined 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.

H. Thus, in practice an occupational disease is an injury that results directly from the employment or conditions under which work was performed and can be seen to have followed as a natural incident of that work. Section 8-40-201(14), C.R.S.; *Climax Molybdenum Co. v. Walter*, 812 P.2d 1168 (Colo. 1991); *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo.App. 1993). Evidence in a workers compensation claim regarding an occupational disease must establish a reasonable causal connection between the work and an occupational disease but need not establish it with "medical certainty." *Beaudoin Construction, Co. v. Industrial Commission*, 626 P.2d 711 (Colo. App. 1980). Expert opinion is neither necessary nor conclusive in proving causation of an occupational disease claim. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo.App. 1990); *In re the of Death of Talbert*, 694 P2d 864 (Colo.App. 1984); *Meza v. ICAO*, 2013 COA 71, 303 P.3d 158 (Colo.App. 2013). In this case, Respondents contend that Claimant's community exposure was the more likely cause of the infection. However, this contention is not persuasive in light of Dr. Oginsky's opinions as to causation from the work place.

I. Based upon the airborne transmission vector and the statistical opinions expressed by Dr. Oginsky, the ALJ is convinced that Claimant's Covid-19 infection is, more probably than not, directly related to her presence in Employer's facility to discharge her work duties as an occupation therapist.

Claimant's Entitlement to Temporary Disability Benefits

J. Claimant has proven by a preponderance of the evidence that she has been disabled since contracting COVID and is entitled to temporary disability benefits from the date of injury and ongoing.

ORDER

It is therefore ordered that:

1. Claimant has established, by a preponderance of the evidence, that she contracted a compensable Covid-19 infection arising out of and in the course and scope of her employment with the employer on or about November 27, 2020.

2. Claimant has established, by a preponderance of the evidence, that Claimant was temporarily totally disabled from November 27, 2020 and ongoing.

3. Claimant has established, by a preponderance of the evidence, that her AWW is $1,253.68.

4. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein, including medical benefits, are reserved for future determination.

DATED: July 10, 2024

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-232-450-001

ISSUES

- Did Claimant prove he suffered a compensable injury on December 31, 2022?
- Did Claimant prove a C6-7 anterior discectomy and fusion performed by Dr. Micael Drewek on April 10, 2023, was reasonably needed and causally related to the work injury?
- Temporary disability benefits.

STIPULATIONS

If the claim is compensable, the parties stipulated as follows:

1. Claimant's AWW is $920.20, with a corresponding TTD rate of $613.47,
2. Claimant is entitled to temporary disability benefits in the amount of $20,410.88, plus statutory interest,
3. Denver Health is the primary Authorized Treating Provider.
4. Panorama Orthopedics is authorized.
5. Upon receipt of appropriate documentation, Respondents shall reimburse Claimant for copays, deductibles, mileage, and other out-of-pocket expenses causally related and reasonably necessary medical treatment.
6. Respondents shall be responsible for repayment/resolution of any related liens for causally related and reasonably necessary medical treatment paid for by Claimant's private health insurance.

FINDINGS OF FACT

1. Claimant works as a ski patroller at [Redacted, hereinafter WP]. The job requires Claimant to provide first aid, mountain safety, mountain maintenance, night search, and assist with special events. The job is physically demanding and requires significant standing, walking, and lifting, in addition to skiing a wide variety of terrain.

2. On December 31, 2022, Claimant was retrieving his skis from a ski stand, when he stepped on a pair of skis that was lying on the ground, covered in snow. This caused Claimant to slip and fall onto his back. The back of Claimant's head hit the snow in a "whiplash" motion.

3. Claimant felt immediate severe pain in his head, neck, arms, and legs. After laying on the ground for a few moments, Claimant got up and went into the patrol headquarters office. He told the dispatcher he had just fallen. Claimant rested in the office for an hour with an ice pack on his neck. The pain subsided somewhat, and he attempted to resume working. However, he was unable to continue skiing because of the pain.

4. Claimant reported the injury to his supervisor the following day, January 1, 2023. The supervisor offered to send Claimant to a doctor, but he declined. Claimant was already scheduled off work the next three days and assumed he would feel better after a few days' rest.

5. Claimant returned to work after his days off and managed to perform his regular duties despite lingering symptoms. Over the next few weeks, Claimant self-modified his duties, for instance working dispatch more than usual or other tasks that did not require skiing. Claimant continued this pattern through January, but his symptoms were worsening rather than resolving. He was experiencing progressive leg pain and weakness, balance problems, and tripping on rugs and stairs. He was also having severe headaches. Eventually he realized, "I've got to give up; I can't do this," and sought treatment from Employer's designated provider, Denver Health.

6. Claimant's case is complicated by an extensive history of cervical spine issues, including a C5-C6 disc replacement in April 2016 and a C3-C7 decompression in August 2019. Although Claimant's symptoms improved after the surgeries, he continued to experience residual chronic pain and received pain management, primarily in the form of oxycodone and gabapentin.

7. Claimant was discharged by his pain management physician in December 2022 for violating his pain contract. He had run out of oxycodone and took some hydrocodone he had left over from a dental procedure. The hydrocodone was detected by a routine urine screen a few days later.

8. Claimant started seeing a new pain specialist on January 9, 2023. They discussed his prior pain management treatment after the neck surgery. Claimant reported he was "stable on oxycodone 3x/day for over 2 years." Examination of Claimant's neck showed multiple trigger points and limited range of motion, but no neurological deficits. His lower extremities were not examined. The report contains no mention of the December 31, 2022 work accident.

9. Claimant was seen at the Middle Park Hospital emergency department on January 25, 2023, for symptoms of facial flushing, tongue swelling, and elevated heart rate. He was diagnosed with an allergic reaction. He also described an incident at work two weeks prior where he slipped on skis and fell onto his back and neck. Claimant had reported the injury to Employer and was going to see the designated provider at Denver Health. No evaluation or treatment was provided related to the work injury, probably because Claimant understood he was "required" to receive injury-related treatment only through Denver Health.

10. Claimant saw Dr. David Ziegler at Denver Health on January 30, 2023, for "acute on chronic neck pain." Claimant reported worsening pain over the past month after a slip and fall accident at work. Dr. Zigler noted Claimant's "complex" medical history, with previous cervical spine surgery and ongoing pain management. Dr. Zigler diagnosed cervical radiculopathy and referred Claimant to PT and an orthopedic evaluation. Claimant was put on work restrictions of no skiing for two weeks.

11. A February 1, 2023 report from Claimant's pain management specialist documents that Claimant's neck pain worsened after the fall at work, and he felt as though the hardware in his neck had "shifted."

12. Claimant returned to Denver Health on February 13, 2023. The report documents, "Pt here for work comp F/U. Pt reports having bilateral upper extremity [?] and heaviness to bilateral outer thighs, expressed concern for tripping when walking."

13. Claimant saw Dr. Michael Drewek, a spine surgeon, on February 15, 2023. Claimant reported progressive neck pain, upper extremity numbness and tingling, and mobility issues since the work accident. Dr. Drewek was concerned about spinal cord compression (myelopathy) and recommended a CT scan and MRI.

14. The imaging was completed on March 2, 2023. The MRI showed a large C6-7 disc herniation contacting and deforming the spinal cord and causing severe spinal stenosis. The disc herniation and stenosis were worse compared to a prior MRI from August 2021. The CT confirmed the large disc herniation.

15. Claimant followed up with Dr. Drewek on March 2, to review the imaging results. He reported worsening neck pain and bilateral upper extremity symptoms. Dr. Drewek noted the large disc herniation at C6-7 had worsened since the prior study and was now causing "fairly significant cord compression [and] left sided nerve root compression." Dr. Drewek recommended an C6-7 anterior cervical discectomy and fusion (ACDF).

16. Respondents filed a Notice of Contest on March 7, 2023.

17. Dr. Drewek performed the C6-7 ACDF on April 10, 2023. Dr. Drewek testified in his deposition that the need for surgery, although not "emergent," was "urgent" due to the myelopathy. Because the workers' compensation claim was denied, the surgery was performed under Claimant's health insurance.

18. Even if the claim is found compensable, the Respondents deny that the surgery performed by Dr. Drewek was proximately caused by to the work accident.

19. Claimant received regular pain management after his second cervical surgery in 2019. The medical records show Claimant's pain was generally well-managed with medication. For example, in January 2021, Claimant reported he was "doing well" and had skied multiple times that season. He stated "the oxycodone works well for him and allows him to ski as well as work. He would like to continue the same dose through

the end of the ski season." Overall, Claimant appeared to function well, including working a physically demanding job and maintaining an active lifestyle despite his chronic pain.

20. Nevertheless, a third surgery was contemplated by at least one provider before the work accident. Claimant started seeing a new PCP in June 2020. As part of the care plan, he was recommended to see a spine surgeon "just to establish" a treatment relationship. Claimant complied with that suggestion and made an appointment at Boulder Neurosurgical and Spine Associates.

21. Although no records from Boulder Neurosurgical are in evidence, a summary of the appointment is documented records from Claimant's pain management specialist. A September 14, 2021 report notes that Claimant saw an orthopedic PA at Boulder Neurosurgical who thought the cervical spine was stable and did not recommend surgery. However, Dr. Alan Villavicencio reviewed the imaging later and called Claimant to recommend a C6-7 disc replacement. Claimant had reported increased radicular pain and weakness, and Dr. Villavicencio felt there was spinal compression at C6-7. Claimant was surprised by the call from Dr. Villavicencio but accepted his advice.

22. A November 11, 2021 pain management report indicates Claimant was scheduled for surgery the next day, but his health insurer had denied authorization. The carrier determined the surgery was unnecessary based on the imaging. Claimant explained he had been "nervous" about the surgery anyway and felt "the circumstances in which the surgery was recommended were odd." Claimant decided to seek a second opinion.

23. Claimant saw Dr. Clint Devin, a spine surgeon, on November 29, 2021. Claimant explained he had a C5-6 cervical disc replacement in 2016 for myelopathic symptoms, and a laminoplasty and decompression in 2019 for residual symptoms. Both procedures were helpful. He reported upper extremity paresthesias in a C7 distribution, which had gotten "a bit worse over the last couple of years." He denied any significant dexterity problems or gait abnormalities. Physical examination showed no significant neurological deficits suggesting progressive myelopathy. After reviewing x-rays and an August 21, 2021 cervical MRI, Dr. Devin opined Claimant was "fairly stable from a myelopathic standpoint," although he likely had some chronic myelomalacia. Dr. Devin recommended a C7-T1 epidural steroid injection(ESI) and a CT myelogram of the cervical spine.

24. Claimant had a surgical consult with Dr. Andrew Castro on December 6, 2021. Claimant said his previous surgeries were "very successful in resolving his original complaints, which included significant changes in balance." His then-current symptoms included intermittent numbness and tingling in his hands, but no significant neck pain. Claimant said his symptoms had not worsened over the previous year. Physical examination showed good upper extremity strength and function, normal reflexes, and normal sensation. A myopathic exam showed no notable abnormalities. Dr. Castro reviewed an August 24, 2021 cervical MRI, which showed a C6-7 disc protrusion contacting and slightly flattening the left side of the spinal cord, with no appreciable cord

edema. This finding was unchanged compared to a previous cervical MRI in November 2020. Dr. Castro concluded Claimant did not need surgery. He explained his rationale as,

> I do not believe [Claimant's] condition has progressed since his last MRI. Clinically, his symptoms have not progressed over the past year, suggesting limited indication for an additional operation. [He] is neurologically intact. He denies any acute neck pain or other upper extremity radiculopathy complaints.

25. Thereafter, Claimant received no additional aggressive interventions and simply continued with pain management. When asked why he did not pursue the surgery, Claimant testified, "I didn't feel I needed it." Claimant was regularly participating in activities such as golfing, cycling, and skiing without difficulty. After consulting with two surgeons who did not recommend additional surgery, he saw no reason to have the procedure.

26. Dr. Mark Paz performed an IME for Respondents on July 10, 2023. Dr. Paz opined that Claimant's condition changed clinically after the work accident. However, he pointed to some inconsistencies in the medical records that he believed called the accuracy of Claimant's reported history into question. Regardless, Dr. Paz opined that the C6-7 ACDF performed by Dr. Drewek on April 10, 2023 was not causally related to the work accident. Rather, he opined the surgery was necessitated by Claimant's longstanding, pre-existing cervical disc disease and cervical, which was neither aggravated nor accelerated by the work accident.

27. Dr. Drewek testified via deposition on July 20, 2023. He opined that the work accident "clearly aggravated" Claimant's pre-existing condition and caused the need for a fusion in 2023. He personally reviewed the March 2, 2023 MRI and it was "pretty obvious" that the pathology at C6-7 was objectively worse than shown on the previous MRI in August 2021. He also noted Claimant's clinical condition "clearly" worsened after the work accident. Dr. Drewek opined the work accident described by Claimant was consistent with the objective worsening shown on MRI and described by Claimant, and he was aware of no other inciting incident or potential cause. Dr. Drewek further explained he found no calcification of the disc fragments removed during surgery, which supports a recent, acute injury, rather than a chronic process. Dr. Drewek testified he might have recommended surgery based on the August 2021 MRI findings, but probably would not have done so based Claimant's clinical condition at the time. In any event, he believed that Claimant's worrisome neurological deficits after the work accident, particularly difficulties with balance and coordination, were consistent with a progressive cervical myelopathy and warranted immediate surgery.

28. Dr. Drewek's testimony is credible and more persuasive than the opinions of Dr. Paz.

29. Claimant's testimony is generally credible, notwithstanding some minor inconsistencies regarding dates and details of his lengthy medical history.

30. Claimant proved he suffered a compensable injury on December 31, 2022.

31. Claimant proved the evaluations from Denver Health and Dr. Drewek, including imaging, were reasonably needed to investigate his injury-related condition and define a course of treatment.

32. Claimant proved the C6-7 ACDF performed by Dr. Drewek on April 10, 2023 was reasonably needed and causally related to the compensable work injury.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must prove entitlement to benefits by a preponderance of the evidence.

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1), C.R.S. In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (ICAO, August 17, 2016).

As found, Claimant proved he suffered a compensable injury on December 31, 2022. Claimant's testimony regarding the accident is credible. Claimant reported the accident to a co-worker immediately and to his supervisor the next day. He subsequently described the accident in a consistent manner to multiple providers. Claimant did not pursue treatment for several weeks because he hoped the injury would improve on its own with relative rest and activity modification. However, that proved not to be the case, so he requested treatment from Employer. Admittedly, Claimant did not mention the accident to his pain management provider in January 2023. But this is probably because he understood he was "required" to obtain injury-related treatment only through Employer's designated provider, and did not expect that Respondents would or should cover routine pain management for his pre-existing conditions.

B. Medical benefits

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Claimant proved the evaluations from Denver Health and Dr. Drewek, including imaging, were reasonably needed to investigate his injury-related condition and define a course of treatment. The more challenging question is causation of the C6-7 ACDF.

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravated, accelerated, or combined with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment is proximately caused by 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). The claimant need not prove that the work injury is the sole cause of the need for treatment. Rather, it is sufficient to show that the injury is a "significant" cause in that there is a direct relationship between the precipitating event and the need for treatment. *E.g.*, *Reynolds v. U.S. Airways, Inc.*, W.C. No. 4-352-256, 4-391-859, 4-521-484 (ICAO, May 20, 2003).

As found, Claimant proved the C6-7 ACDF performed by Dr. Drewek on April 10, 2023 was reasonably needed and causally related to the compensable injury. It is undisputed that Claimant had significant pre-existing cervical pathology, including a C6-7 disc protrusion and cervical stenosis. But he generally functioned well with medication management, worked a physically demanding job, and maintained an active outdoor-oriented lifestyle. Admittedly, Dr. Villavicencio thought surgery was needed in 2021, but two other surgeons disagreed, as did Dr. Villavicencio's PA. It is also notable that Dr. Villavicencio recommended a C6-7 disc replacement, whereas Dr. Drewek determined a fusion was needed based on the pathology as it existed in 2023. Claimant did not perceive his condition in 2021 and 2022 to be severe enough to warrant surgery, and there is no persuasive reason to think he would have decided to pursue surgery in April 2023 had the work injury not occurred. Claimant's testimony regarding the change in his symptoms and function after the work accident is credible. Dr. Drewek is persuasive that the accident probably aggravated the underlying pathology at C6-7, leading to progressive myelopathy that required surgery. The 2023 MRI findings were objectively worse than the prior 2021 MRI. The appearance of the disc fragments Dr. Drewek removed during surgery lends further support to the conclusion that Claimant suffered an acute aggravation, rather than simply a natural progression of the pre-existing condition.

ORDER

It is therefore ordered that:

1. Claimant's claim for an injury on December 31, 2022 is compensable.

2. Claimant's average weekly wage is $920.20, with a corresponding TTD rate of $613.47.

3. Insurer shall pay Claimant temporary disability benefits in the amount of $20,410.88, plus statutory interest of 8% per annum, as stipulated.

4. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of the compensable injury, including but not limited to the April 10, 2023 anterior cervical discectomy and fusion performed by Dr. Drewek.

5. Upon receipt of appropriate documentation, Insurer shall reimburse Claimant for copays, deductibles, mileage, and other out-of-pocket expenses for causally related and reasonably necessary medical treatment. Insurer is responsible for repayment/resolution of any related liens for causally related and reasonably necessary medical treatment paid for by Claimant's private health insurance.

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

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

DATED: July 10, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-212-369-002

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury on June 5, 2022.

II. Whether Claimant established by a preponderance of the evidence that the treatment he received, including numerous surgeries, was reasonable, necessary, and related to his June 5, 2022, injury.

FINDINGS OF FACT

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

1. Claimant has been employed by the [Redacted, hereinafter CW] Fire Department as a firefighter since 2004.
2. In 2019, Claimant underwent a routine colonoscopy to screen for colorectal cancer. He was found to have diverticulosis in the sigmoid colon and descending colon. No treatment was recommended. The doctor merely advised Claimant to eat a high fiber diet and repeat the colonoscopy in 10 years.
3. As a firefighter, Claimant was required to work out at least one hour per shift to maintain his fitness level. Within a month of the June 5, 2022, incident, Claimant passed the JSPA testing and two months before that he passed his annual pack test. Thus, before the June 5, 2022, incident, Claimant was able to complete all of his regular job duties with no issues.
4. As a firefighter, Claimant is required to be able to put on his firefighting gear in under one minute. Claimant's firefighting gear includes his bunker pants, which weigh approximately 15 pounds. Claimant also has additional gear attached to his bunker pants. This gear includes things like a large bailout, a figure 8, carabineers, rope, and other tools. Thus, with the added gear, his bunker pants and attached gear weigh approximately 20-25 pounds.
5. On June 5, 2022, Claimant arrived for his shift at the firehouse around 6:30 a.m. Claimant and his other firefighters completed their morning job duties and then went to the firehouse gym to workout. While working out, they received an emergency call.
6. After receiving the emergency call, Claimant hurried to put on his firefighting gear. Claimant was in an awkward position outside the firehouse on uneven ground near a sticker bush when he was getting into his bunker pants. After stepping into his bunker pants and then bending at the waist to grab the pants, Claimant then went to pull up his bunker pants. While pulling up his bunker pants, Claimant felt an immediate, sharp pain

in his abdomen. Claimant testified at hearing that he knew something was wrong right away.

7. Claimant went on the emergency call despite the fact he was in immense pain and was feeling nauseous. While on the call, other firefighters on his team visibly noticed he was in pain and asked him if he was feeling okay. Claimant continued to try to work as they received additional back-to-back calls. As time went on that day, his pain got so intense that he could not get out of the firetruck, and he could not even stand the pressure from the seatbelt. Claimant eventually returned to the fire station and called his girlfriend, who took him to the emergency department.

8. On June 5, 2022, Claimant presented to Avista Adventist Hospital and reported the sudden onset of severe lower abdominal pain with nausea. He told the doctors that he had never experienced this kind of pain before. Geoffrey Geer, M.D., ordered an abdominal CT scan. The CT scan revealed diverticulitis of the sigmoid colon and small amount of pneumoperitoneum- which was indicative of a perforation of the sigmoid colon. Claimant was then admitted to the hospital and referred to a surgeon.

9. On June 6, 2022, general surgeon, Christopher Robert Pohlman, M.D., met with Claimant to discuss the need for immediate surgery. Dr. Pohlman determined the perforation of the sigmoid colon was relatively contained at the moment and that Claimant did not need emergency surgery. Dr. Pohlman discussed ongoing treatment options with Claimant, including the potential of a sigmoidectomy, i.e. surgery. If Claimant's symptoms improved while Claimant was in the hospital, Dr. Pohlman recommended Claimant consider undergoing the elective, i.e., non-emergent, sigmoidectomy in 2-3 months. The ALJ finds that the recommendation for elective surgery by Dr. Pohlman was to treat the perforation on a non-emergent basis.

10. During his hospital stay, Claimant also saw Stefan Cristian Pop, M.D., who noted Claimant's need to follow-up after discharge to discuss the sigmoid resection surgery to prevent a recurrence. The ALJ finds that the recurrence Dr. Pop was concerned about is the recurrence of the same perforation.

11. On June 6, 2022, Claimant also completed a Workers' Compensation Injury Report. Claimant noted in the report that the injury occurred due to twisting, overexertion, lifting, pushing, and pulling. In the report, Claimant also stated that:

> While preparing to respond to an emergency call, I was getting my PPE gear on next to the firetruck on uneven ground. After bending down to pull on my bunker pants. I suddenly became nauseas and had severe abdominal pain. The pain and nausea proceeded to get worse over the next several calls. Ultimately, pain was severe enough I knew something was wrong; so I left shift and went to the emergency room.

12. On June 9, 2022, Claimant was discharged from the hospital. At the hearing, Claimant testified he stayed an extra day at the hospital because he was in so much pain and was not healing as anticipated.

13. Upon discharge, Claimant was prescribed various antibiotics, pain medication, and anti-inflammatory medications. These medications made his nausea and other symptoms worse. According to Claimant, the doctors "were trying to get things settled down for the

repair" surgery and the various medications were intended to decrease the inflammation. He credibly testified that the surgery got pushed out a few different times because the doctors did not want to operate until the pain and inflammation subsided. Claimant also credibly testified that he continued to have significant pain, which the doctors related to continued inflammation, and prescribed him another round of anti-inflammatory medication and antibiotics before proceeding with the surgery. Claimant also testified that during the initial hospitalization he discussed with the doctors the need for this surgery so that this would not happen again, especially considering the nature of his work. Claimant also said that his doctors told him the surgery would be a quick fix, needed to happen, and that he would be released to go back to work full duty three to four days after surgery. Claimant said that following his initial discharge from the hospital and until his first surgery, he was completely off work and could barely even stand, walk, or twist, etc. Claimant said that the considerable improvement noted in his medical records was overstated. He was in less pain than when he was initially taken to the hospital, but his improvement was, for example, upgraded from eating soda crackers to cottage cheese. He was nowhere near his baseline diet, baseline bowel movements, or baseline physical health. He remained in significant pain until the first surgery. The ALJ finds Claimant's testimony to be credible and persuasive regarding his condition after the initial injury and up until his surgery. Therefore, the ALJ finds that Claimant's condition did not improve considerably after he was discharged from the hospital and before his surgery and that he was symptomatic up until his first surgery.

14. On June 28, 2022, Claimant returned to Dr. Pohlman to discuss his treatment options. Dr. Pohlman diagnosed Claimant with "perforation of the sigmoid colon due to diverticulitis." Dr. Pohlman described the risks and benefits of a robotic sigmoid colectomy, as well as the risks and concerns if Claimant chose not to operate. Dr. Pohlman and Claimant agreed to proceed with the surgery.

15. Based on the diagnosis of a perforated sigmoid colon, the Claimant's ongoing symptoms, and the possibility of a recurrence of the perforation, the surgery which was ultimately preformed on July 19, 2022 – a sigmoid colectomy - is found to be reasonable, necessary, and related to the June 5, 2022, perforation.

16. On July 19, 2022, Dr. Pohlman performed a robotic sigmoid colectomy. The surgery was noted to be "elective," i.e., non-emergent. The preoperative diagnosis was "diverticulitis of large intestine with perforation and abscess without bleeding." The indication for surgery was "diverticulitis with perforation." The postoperative diagnosis was the same as the preoperative diagnosis. Thus, the reason for performing the surgery was not to treat just the Claimant's underlying diverticulitis, but to treat and manage the underlying perforation.

17. Unfortunately, during the surgery to treat and manage the Claimant's perforation, the robotic tool nicked Claimant's small intestine and caused a septic infection. Claimant underwent additional surgeries to address the infection and remained hospitalized for about 44 days.

18. Respondents retained Dr. Tashoff Bernton to perform an independent medical examination (IME) to assess the cause of the Claimant's condition and need for

treatment. Dr. Burton issued two reports – one record review and one IME. He also testified at hearing. His testimony was consistent with his reports.

19. At hearing, Dr. Bernton was qualified as an expert in internal medicine and occupational medicine. Dr. Bernton explained that internal medicine involves the assessment, diagnosis, and treatment in the subspecialties of rheumatology, gastroenterology, cardiology, pulmonary, and neurology. Dr. Bernton also explained that occupational medicine involved, among other things, the assessment of causation of conditions in the workplace. But he did admit that he has not treated a patient with a perforated bowel since about 1992.

20. Dr. Bernton explained during his testimony that the AMA Guides, Third Edition Revised provides a guide to assess causation and three things were needed to establish medical causation. The three factors were: (1) a temporal relationship, (2) an understanding the basic physiology of the condition, and (3) the magnitude of force. Dr. Bernton explained that the temporal sequence of the onset of symptoms when performing an activity is not sufficient to establish that the activity was the cause of the symptoms.

21. Furthermore, during his testimony, Dr. Bernton explained the three relevant conditions of diverticulosis, diverticulitis, and perforated diverticulum. He said that diverticulosis is the presence of outpouchings of the bowel covered by the bowel wall, and they do not cause problems simply by being present. Dr. Bernton testified that diverticulosis is usually incidentally noted and does not cause any symptoms. Diverticulitis is when the diverticulum becomes inflamed from a combination of three factors which include an obstruction, bacterial overgrowth, and decreased blood flow to the area. Dr. Bernton testified that it was possible to have diverticulitis with no symptoms. The final condition, a perforated diverticulum, is a discrete event when the bowel wall becomes thin and ultimately ruptures because of (1) the pressure within, (2) the bacterial overgrowth, and (3) the vascular factors. Dr. Bernton testified that a diverticulum perforation is an emergent situation and, in the past, would be routinely treated with surgery but now it can be treated with antibiotics and bowel rest, as it was in this case.

22. In his IME report, Dr. Bernton noted that the analysis for work relatedness was different for the two separate hospitalizations. Dr. Bernton also explained that the first hospitalization on June 5, 2022, was for treatment of an acute episode of diverticulitis and a perforated diverticulum, but the hospitalization on July 19, 2022, was for elective definitive treatment of diverticulitis and not treatment for any specific acute episode.

23. Dr. Bernton explained that the condition for which Claimant was hospitalized on June 5, 2022, was a perforated diverticulum. Dr. Bernton stated that “generally” diverticulitis with diverticular perforation is not the result of trauma. He also stated that “in general”, an obstruction of the diverticulum occurs which results in damage of the mucosa of the diverticulum which causes edema and the proliferation of bacteria and toxin accumulation which thins and perforates the mucosa. Dr. Bernton concluded that the main causes of acute diverticulitis and perforation involve some combination of inflammation, decreased blood flow, or internal obstruction, none of which involve external trauma. But Dr. Bernton also testified that once a perforation occurs, the pain is immediate.

24. Dr. Bernton noted that his review of the medical literature did include some isolated reports of external trauma resulting in diverticular perforation, but they were rare and

involved significant trauma. In addition, Dr. Bernton explained that there were no reports of diverticular perforation involving the sigmoid colon, as was the case in this claim. Furthermore, Dr. Bernton concluded that the magnitude of trauma from bending over and pulling on protective gear was not anywhere near the level of trauma noted in the few cases in the medical literature of traumatic perforation. Dr. Bernton testified that he had Claimant demonstrate the movement of putting on his bunker pants and there was nothing about the motion that would reasonably relate to a rupture of a diverticulum. Thus, Dr. Bernton concluded that it was not medically probable that pulling on bunker pants was the precipitant of Claimant's diverticular perforation. Dr. Bernton stated that the diverticular perforation was simply an event which happened while Claimant was at work but there was no indication that the activity he performed at the onset of symptoms was causal rather than coincidental. Dr. Bernton testified that it was not medically reasonable to regard the perforation of the diverticulum as a work- related event. Additionally, Dr. Bernton testified that Claimant continuing to work after the diverticular perforation did not accelerate or aggravate his condition.

25. Dr. Bernton explained that the goal of the surgery recommended by Dr. Pohlman was to prevent recurrent attacks of diverticulitis which was a risk for Claimant given the structural condition of the diverticula in his colon. Dr. Bernton also concluded that the second hospitalization for elective colectomy was a non-work-related hospitalization and therefore the complications because of the surgery were also non-work-related. Dr. Bernton stated that it was clear that Claimant's diverticulosis was not caused by putting on bunker pants at work and no matter how many times someone puts on pants, it is not one of the underlying causes of diverticulitis. Since diverticulitis is not work-related, Dr. Bernton concluded the second hospitalization for definitive treatment of the underlying condition including a colectomy was not work-related.

26. Claimant's testimony is consistent with the documentary evidence submitted at hearing. For example, the Workers' Compensation Injury Report Claimant completed the day after the incident is consistent with his testimony regarding how the injury occurred. Plus, the immediate onset of symptoms while putting on his bunker pants is consistent with Dr. Bernton's testimony, which indicates the occurrence of a perforation, as occurred in this case, would cause the immediate onset of pain, as described by Claimant. As a result, the ALJ finds Claimant's testimony, statements to medical providers, and the information he provided in the Workers' Compensation Injury Report to be credible and reliable.

27. The ALJ credits some of Dr. Bernton's opinions. For example, the ALJ, in general, finds Dr. Bernton's explanation regarding the progression of a diverticulum, to diverticulitis, to a diverticulum perforation to be credible and persuasive. According to Dr. Bernton, the diverticulum becomes inflamed and then the wall of the diverticulum becomes thin which then results in the perforation of the mucosa-which the ALJ infers is the part of the colon or intestinal wall that becomes perforated. Thus, the ALJ finds that the thinning of the intestinal wall results in the intestinal wall being in a weakened condition. The ALJ also credits that portion of Dr. Bernton's opinion where he indicates that bending over may increase the intra-abdominal pressure – although he is not sure as to how much. The ALJ also credits his opinion that the perforation results in immediate pain.

28. On the other hand, the ALJ does not credit and find persuasive his ultimate conclusions – that the perforation is unrelated to Claimant's job duties – for several reasons. First,

while Dr. Bernton has some training in gastroenterology-that is not his specialty. In fact, he has not treated someone with a perforated bowel or colon since before 1992. Second, since he does not specialize gastroenterology and treat patients with a condition like Claimant's on a regular basis, he does not have substantial and longitudinal experience evaluating and treating intestinal perforations in patients – whose conditions might have occurred while performing various activities, such as lifting. In other words, he does not have personal experience assessing the cause of a bowel or intestinal perforation by treating patients with such conditions over many years. All he can do is look at the research – and is stuck with the extent of the research he conducts as well as the extent of research done by others regarding the exact same issue – which might be minimal.

29. Third, since he is not a gastroenterologist, it is unlikely he keeps current with the literature regarding the cause, management, and treatment of intestinal perforations and the cause of such. Fourth, the research that he did perform to determine causation seems subpar. For example, in conducting his research, he found 4 abstracts that he included in his report. His takeaway from reviewing the abstracts, but not the underlying articles, was that it requires a significant amount of trauma to cause a perforation. But Dr. Bernton did not review the actual articles, just the abstract for each article. He also indicated that he researched trauma – and yet this case does not involve external trauma – such as an automobile accident or getting hit by a soccer ball as described in some abstracts. Instead, this case involves the amount of intra-abdominal pressure that is created when someone quickly bends over and lifts about 25 pounds. Plus, this case also involves someone who has diverticulitis, which Dr. Bernton said causes thinning of the diverticulum or intestinal wall. Thus, it would appear that the thinning of the diverticulum or intestinal wall, due to his preexisting diverticulitis, would have put Claimant in a weakened condition, and more susceptible to the perforation due to an increase in intra-abdominal pressure.

30. Based on the totality of the evidence, the ALJ finds that the June 5, 2022, work activities of bending over and pulling up his 20–25-pound bunker pants proximately caused the perforation and caused the need for medical treatment. In reaching this decision, the ALJ finds the temporal relationship to be highly persuasive. The ALJ is mindful that correlation does not equal causation, but yet in this case, the timing of Claimant' symptoms with his work activities is found to be highly persuasive that putting on his bunker pants at work in order to respond to a call caused the perforation and need for medical treatment.

31. The ALJ also does not find Dr. Bernton's opinion that the July 19, 2022, surgery was not reasonable, necessary, and related to the June 5, 2022, incident to be persuasive for a number of reasons. First, when Claimant was evaluated by Dr. Pohlman in the hospital right after the incident, Dr. Pohlman evaluated him to determine whether he needed surgery immediately. At that time, Dr. Pohlman determined the perforation was relatively contained at the moment and that Claimant did not need emergency surgery, but should consider having surgery in 2-3 months. Second, during his initial hospital stay after the incident at work, Claimant also saw Stefan Cristian Pop, M.D., who noted Claimant's need to follow-up after discharge to discuss the sigmoid resection surgery in order to prevent recurrences. Thus, the ALJ finds that the doctors did not think Claimant needed surgery immediately to treat the perforation, but that he should consider surgery in 2-3 months to prevent a recurrence of the perforation that was proximately caused by the June 5, 2022,

incident at work. And undergoing surgery to prevent a recurrence of the perforation, was reasonable and necessary. Thus, the ALJ finds that the July 19, 2022, surgery was reasonable, necessary, and related to the June 5, 2022, incident.

32. The ALJ further finds that during the surgery to correct the perforation, Claimant's small intestine was nicked. The nicked intestine caused him to develop a septic infection and required additional medical treatment. Thus, the ALJ finds that the medical treatment Claimant underwent to treat the nicked intestine, and the consequences of the nicked intestine, is related to Claimant's work injury.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury on June 5, 2022.

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

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

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

In this case, when considering the cause of Claimant's perforation, the temporal relationship of lifting and putting on his bunker pants becomes a crucial and persuasive piece of evidence. The immediate or near-immediate occurrence of pain, due to the perforation, following Claimant's lifting activity of putting on his heavy bunker pants to go on an emergency call strongly suggests a causal connection between the Claimant's work activities and the perforation and need for medical treatment.

Dr. Bernton indicated that bending over may increase intrabdominal pressure–but yet not enough to cause the perforation. But, regardless of his opinion, the ALJ finds that the stress or pressure of bending over, combined with lifting and putting on 25 pound bunker pants while getting ready to go on a call, more likely than not, caused the perforation and need for medical treatment. In this case, the ALJ finds and concludes the temporal proximity of the perforation of the bending and lifting activity underscores the direct impact the bending and lifting had in causing the perforation. As a result, the ALJ finds and concludes that the temporal relationship in this case assumes heightened significance, and provides a compelling basis for attributing causation to the bending and lifting activity.

The ALJ is mindful of the logical fallacy of mistaking temporal proximity for a causal relationship and that correlation is not causation if there merely exists a coincidental correlation. But in this case, the ALJ finds that the temporal proximity of the immediate onset of symptoms while bending, lifting, and pulling on his bunker pants leads this ALJ

to find and conclude that Claimant putting on his bunker pants was the proximate cause of the perforation and need for medical treatment.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that putting on his bunker pants-while dressing to respond to an emergency call-was the proximate cause of the perforation and need for medical treatment.

II. Whether Claimant established by a preponderance of the evidence that the treatment he received, including numerous surgeries, was reasonable, necessary, and related to his June 5, 2022, 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 the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Off.,* 53 P.3d 1192 (Colo. App. 2002).

In this case, Claimant suffered a perforated colon due to his work activities of putting on his bunker pants on June 5, 2022. The same day, Claimant presented to the emergency room for treatment and was admitted into the hospital. Once admitted into the hospital, and diagnosed with a perforated colon, he was evaluated for surgery by Dr. Pohlman. Dr. Pohlman met with Claimant to discuss the need for immediate surgery. Dr. Pohlman determined the perforation was relatively contained at the moment and that Claimant did not need emergency surgery.

Dr. Pohlman did, however, discuss ongoing treatment options with Claimant, including the potential of a sigmoidectomy, i.e. surgery. Dr. Pohlman stated that if Claimant's symptoms improved while he was in the hospital, then Claimant should consider undergoing the elective, i.e., non-emergent, sigmoidectomy in 2-3 months. The ALJ finds that the recommendation for elective surgery by Dr. Pohlman was to treat the perforation that occurred on June 5, 2022, due to Claimant's work activities, on a non-emergent basis.

In addition, during his hospital stay, Claimant also saw Stefan Cristian Pop, M.D. Dr. Pop noted Claimant's need to follow-up after discharge to discuss the sigmoid resection surgery in order to prevent a recurrence. The ALJ finds and concludes that the recurrence Dr. Pop was concerned about was the recurrence of the perforation for which Claimant was treated for due to his work injury on June 5, 2022.

On June 28, 2022, Claimant returned to Dr. Pohlman to discuss his treatment options. Dr. Pohlman diagnosed Claimant with "perforation of the sigmoid colon due to diverticulitis." Dr. Pohlman described the risks and benefits of a robotic sigmoid colectomy, as well as the risks and concerns if Claimant chose not to operate. Dr. Pohlman and Claimant agreed to proceed with the surgery.

Based on the perforated colon, the Claimant's ongoing symptoms, and the possibility of a recurrence of the perforation, and the decision of Dr. Pohlman to proceed

with surgery, the ALJ finds and concludes Claimant established by a preponderance of the evidence that the surgery performed by Dr. Pohlman on July 19, 2022, to be reasonable, necessary, and related to the June 5, 2022, perforation.

During the July 19, 2022, surgery, Claimant's small intestine was nicked, which caused a septic infection. This resulted in complications that caused the need for additional surgeries and a long hospital stay. Because the complications arose out of the work related surgery, the treatment for the complications, and associated hospitalization, is also found to be reasonable, necessary, and related to Claimant's work injury.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that the July 19, 2022, surgery, and treatment of the resulting complications were reasonable, necessary, and related to the June 5, 2022, work injury.

ORDER

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

1. Claimant suffered a compensable injury on June 5, 2022.
2. Respondents shall pay for all reasonable and necessary medical treatment to cure and relieve Claimant from the effects of the perforation. This includes the initial hospitalization on June 5, 2022, as well as the July 19, 2022, surgery and subsequent surgeries and hospitalization to treat Claimant from the complications of the July 19, 2022, surgery.
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 regarding the requirements for filing a Petition to Review a supplemental order, see section 8-43-301(6), 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 11, 2024

s/ Glen Goldman

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer on May 15, 2023?

- If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of July 15, 2023 until June 2, 2024?

- If Claimant has proven a compensable injury, whether Respondents have proven by a preponderance of the evidence that Claimant is subject to a penalty for failing to report his injury in a timely manner in violation of Section 8-43-102(1)(a)(I)?

- If Claimant has proven a compensable injury, whether Respondents have proven by a preponderance of the evidence that Claimant committed a volitional act that led to his termination of employment?

FINDINGS OF FACT

1. Claimant was employed by Employer as a construction worker. Claimant testified he began working for Employer in 2022. Claimant testified that on May 15, 2023 he was coming down a ladder with equipment while working for Employer when he fell approximately four (4) feet and landed on his feet. Claimant testified that after the fall from the ladder, his back started hurting.

2. Claimant testified that he notified his supervisor, [Redacted, hereinafter IO], of the fall and continued on with his life. Claimant testified that after reporting his injury to IO[Redacted], IO[Redacted] told Claimant he could go home early. Claimant testified he left work approximately one (1) hour early and returned to work the next day.

3. Claimant testified he had a prior back injury in 2020[1] that resulted from Claimant picking up a rock for which Claimant received medical treatment and filed a workers' compensation claim. Claimant testified he was diagnosed with a herniated disk in his back and there was a recommendation for surgery. Claimant testified he did not get the surgery and settled his workers' compensation claim before going to work for Employer.

4. Claimant testified that after his work injury for Employer, he was not referred to a medical provider for treatment. Claimant testified he continued to work for Employer until July 15, 2023. Claimant testified that he stopped working for Employer

[1] While Claimant testified that the prior injury occurred in 2020, the medical records document the injury from lifting a rock as occurring on May 14, 2021.

because the owner, [Redacted, hereinafter AO], told Claimant that they didn't need him anymore. Claimant testified he didn't work for any other employer after July 15, 2023 until he returned to work for a new employer on June 3, 2024.

5. [Redacted, hereinafter BE] testified at hearing in this matter. BE[Redacted] testified he hired Claimant as an employee. BE[Redacted] testified that Claimant did not ever report to him that he had injured his back at work until he got notice of the injury from a letter from the Division of Workers' Compensation. BE[Redacted] testified that he spoke to IO[Redacted] regarding the ladder incident after receiving the letter. BE[Redacted] confirmed in his testimony that IO[Redacted] was aware of the incident with the ladder.

6. BE[Redacted] testified Claimant continued working for him until September 8, 2023. BE[Redacted] testified he eventually fired Claimant due to Claimant's drug addiction and BE[Redacted] staling items from job sites, including tools and tablets. BE[Redacted] testified he was aware that Claimant had back pain when he was working for him and provided Claimant with work that involved mostly hand tools and did not require Claimant to lift over 20 pounds. BE[Redacted] testified that Claimant at no time reported a new injury to BE[Redacted] from his work with Employer.

7. A significant number of medical records were entered into evidence in this case regarding Claimant's prior back injury. However, for the most part, these records document Claimant receiving medical treatment for a prior back injury from 2021 up through 2022. The last records of Claimant seeking medical treatment prior to his work injury involve treatment Claimant received on August 1, 2022 and August 25, 2022 at Grand River Medical Center for his low back pain. Claimant reported on August 1, 2022 that his symptoms started yesterday when he tried moving a window air conditioning unit. Claimant complained of pain radiating down the back of his left leg and described the pain as similar to his prior episode of back pain that occurred a couple of years ago. Nurse practitioner ("NP") Murphy recommended conservative care with ibuprofen, ice/heat, topical lidocaine patches and to avoid heavy lifting.

8. When Claimant returned to Grand River on August 25, 2022 he was evaluated by Dr. Walsh. Dr. Walsh noted Claimant's prior treatment to his low back with complaints of pain that radiates down his right leg while lifting heavy things around his house. Dr. Walsh noted that Claimant reported that physical therapy had been helpful for his low back pain earlier, and Dr. Walsh recommended Claimant undergo a new course of physical therapy for his low back complaints.

9. Following Claimant's reported May 15, 2023 injury, Claimant sought medical treatment at Grand River Medical Center on May 26, 2023, eleven days after his ladder incident. Claimant reported with he was installing an air conditioner that morning when he cut his cheek on the window. Claimant was treated for a laceration on his face and discharged. Claimant did not mention any issues with regard to his low back.

10. Claimant next sought medical treatment on August 3, 2023 at Grand River Medical Center. Claimant reported to Dr. Walsh that he had persistent lower back pain with sciatica since May 2022. Claimant reported that he had sciatic pain last year, but his low back pain was getting worse occasionally. Claimant denied any radicular symptoms. Dr. Walsh noted that Claimant had been referred to physical therapy the previous year, but only attended twice, on September 15, 2022 and October 19, 2022. Dr. Walsh noted Claimant had a magnetic resonance image ("MRI") more than a year ago and it was recommended that Claimant undergo surgery, but he did not ever undergo surgery. Dr. Walsh noted that when Claimant was evaluated in 2022, he was complaining of radicular symptoms involving his low back, but those had since resolved. Dr. Walsh recommended Claimant begin taking nonsteroidal anti-inflammatory drugs and begin a course of physical therapy.

11. Respondents obtained a records review independent medical examination ("IME") on April 9, 2024 with Dr. Raschbacher. Dr. Raschbacher reviewed Claimant's medical records, including his records from his prior workers compensation injury, dating back to May 14, 2021. Dr. Raschbacher noted that there was no clear description of an acute change in Claimant's condition on or around May 15, 2023. Dr. Raschbacher opined that there was no clear indication of an additional injury or additional pathology associated with any new injury and noted that Claimant's low back symptoms had improved when he was evaluated in August 2023 from his condition in August 2022 insofar as Claimant was no longer experiencing radicular symptoms.

12. Dr. Raschbacher testified at hearing consistent with his IME report.

13. The ALJ credits the medical reports from Grand River Medical Center along with the opinions expressed by Dr.Raschbacher and finds that Claimant has failed to establish that it is more probable than not that he sustained a work injury to his low back on May 15, 2023. While Claimant testified at hearing that the ladder incident on May 15, 2023 resulted in Claimant's low back condition worsening including his pain being more sharp, difficulty going to the bathroom and pain in a different place, this testimony is not supported by the medical records.

14. Specifically, when Claimant was examined on May 26, 2023 he did not complain or pain in his low back and was capable of lifting an moving an air conditioning unit which resulted in his facial laceration. When Claimant sought medical treatment in August 2023, he reported his condition related to an onset of back pain from over a year earlier. These reports to the medical providers are inconsistent with a new injury occurring on May 15, 2023.

15. Because Claimant's testimony regarding the injury in this case is found to be not credible, Claimant has failed to establish that it is more probable than not that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2013 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. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

4. As found, Claimant's testimony regarding his physical condition following the ladder incident is not credible. As found, the ALJ relies on the medical reports following May 15, 2023 where Claimant received treatment for a face laceration after lifting an air conditioning unit and did not report symptoms of back pain as being more credible evidence that Claimant's low back condition did not experience and injury or additional pathology in the May 15, 2023 incident.

5. As found, the opinions expressed by Dr. Rashbacher are found to be credible and persuasive regarding whether Claimant sustained an injury or additional pathology to his lumbar spine following the incident on May 15, 2023. As found, the ALJ credits the medical records from Grand River Medical Center in August 2023 where Claimant relates the condition of his low back to an issue that developed in 2022 and finds that Claimant has failed to prove by a preponderance of the evidence that the incident on May 15, 2023 aggravated, accelerated or combined with Claimant's preexisting condition to cause the need for medical treatment.

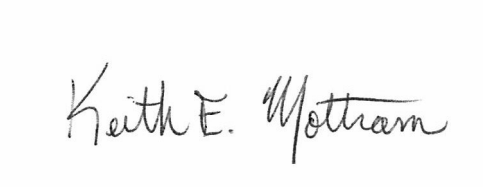
ORDER

It is therefore ordered that:

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

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 email at oac-ptr@state.co.us, or at oac-dvr@state.co.us. 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 27, 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, 2024



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. 5-256-973-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable injury at work on November 2, 2023.

2. If Claimant sustained a compensable injury, whether she proved by a preponderance of the evidence that she is entitled to reasonably necessary and related medical benefits for such injury.

FINDINGS OF FACT

1. Claimant is a 24-year-old female who worked as an in-home health care associate, also known as a caregiver. Her job involved providing various forms of home care to clients. She would typically work thirty-six to forty hours per week, from Tuesday through Sunday, and would work independently in clients' homes.

2. Claimant alleges a low back injury on or about November 2, 2023, which she alleges was due to her work activities. Specifically, Claimant alleges that she injured her low back while lifting the leg of a supine client to provide him with a leg bath.

Post-injury Treatment and Reporting

3. On November 3, 2023, Claimant saw her personal medical provider at Mile High Family Medicine. Claimant complained of low back pain for the past several weeks, suspecting a UTI and reporting a foul odor in her urine. Claimant reported that her pelvic symptoms had resolved with treatment for the UTI but that her back pain never improved. Claimant was noted to be obese. The attending physician assistant observed that Claimant had tenderness in her lumbosacral spine and bilateral tenderness on her sacroiliac joints. The physician's assistant referred Claimant for lumbar spine imaging. The record did not document Claimant reporting a work injury.

4. On November 10, 2023, Claimant was attended at Select Physical Therapy. Claimant reported to the therapist that she had been off work for a week due to back pain when she was unable to make it through a shift. Claimant reported that she had treated her UTI believing it to be the source of her back pain, but that the back pain persisted. Claimant reported that prior to her UTI, she had had back soreness but no significant pain. The record for the appointment did not document a work injury, instead noting "severe low back pain with insidious onset." Claimant later testified at hearing that she had reported her work injury to the therapist but that the therapist did not include it in the report.

5. Claimant reported the alleged injury to the employer on November 21, 2023. Claimant reported that she was unsure where exactly the injury occurred or what she was doing when the injury occurred. Respondent-Employer filed an Employer's First Report of Injury that same day and Claimant signed it.

6. On November 22, 2023, Claimant saw Dr. Mark James Montano at CareNow Urgent Care. Claimant reported mild low back pain beginning on November 2. Claimant reported that she had felt a pinch in her low back after bending over to help the client into bed or while providing the client with a bed bath. Claimant was diagnosed with a lumbar sprain and prescribed pain reliever medications.

7. Claimant also provided on November 22, 2023 a written statement regarding her injury. Claimant stated that the injury occurred while attending to client [Redacted, hereinafter CZ]. Claimant reported that she was leaning over to reach a part of the client's body when she felt sudden heat and pain in her low back and had to step out of the room to compose herself.

8. Claimant underwent a lumbar MRI on January 8, 2024. The MRI showed some foraminal narrowing resulting in abutment of the left and right nerve roots at L4 and multilevel lumbar spine degenerative changes without significant spinal stenosis.

9. On March 14, 2024, Claimant underwent an IME at Respondents' request with Dr. Brian Mathwich. Claimant reported that on the date of injury she had been leaning over and lifting a client's leg to wash when she felt a pinch and pop with warmness in her right mid-back with no radiation. Claimant reported that she finished her work but noticed soreness while going up and down the stairs. Claimant told Dr. Mathwich that she reported her injury to her employer on November 4, 2023, two days after the injury, but that because the reporting happened two days after the injury, there was some confusion resulting in her claim being denied.

10. Dr. Mathwich issued a report documenting his findings and his medical opinions regarding causation. Dr. Mathwich felt that the mechanism of injury as described by Claimant was insufficient to cause a low back injury. Furthermore, he noted that Claimant had nearly full range of motion, no pain on extension or rotation, and negative supine straight leg raise and seated slump tests, indicating no radiculopathy or nerve impingement. Based on this, he felt that the MRI findings were incidental and not consistent with Claimant's pain complaints. Ultimately, he felt that Claimant's pain complaints were instead a continuation and natural progression of her pre-existing back issue which had been ongoing due to her body habitus.

Prior Treatment

11. On January 5, 2021, Claimant saw her primary care provider at Mile High Family Medicine complaining of several injuries resulting from an assault, including soreness in her low back.

12. Claimant returned to Mile High Family Medicine on December 21, 2021, with complaints of abdominal pain as well as the back of her lower ribs being sore, which she attributed to lifting elderly people for work.

13. Two days later, Claimant returned to her doctor reporting increased pain and pressure in her pelvis and low back. An MRI was ordered to examine Claimant's liver for an apparent lesion seen on an ultrasound.

14. Claimant obtained urgent care treatment on March 28, 2022, for low back pain and was found to have a UTI. Claimant was started on antibiotics and provided naproxen.

15. Claimant returned to her primary doctor on March 29, 2022, at Mile High Family Medicine. Claimant reported that her back pain had improved somewhat since taking medications. Claimant reported that her low back pain was worse with bending and with palpation.

16. Claimant was seen at AFC Urgent Care on September 12, 2022, with complaints of various symptoms, including low back pain and abdominal pain.

17. Claimant once again returned to AFC Urgent Care on January 10, 2023, with complaints of flank pain and a cough, resulting in low back pain. Claimant was prescribed antibiotics for a suspected infection.

18. On August 30, 2023, Claimant returned to Mile High Family Medicine with complaints of low back pain arising from a urinary tract infection. Claimant reported that her low back pain had been on and off for the past month while working as a caregiver, sometimes lifting patients. Claimant reported that the pain tended to radiate to her right buttocks and hip.

19. Claimant returned to Mile High Family Medicine on October 21, 2023, with suspicion of another UTI or kidney infection. Claimant primarily complained of abdominal pain and fever-like symptoms. However, the record also documented that Claimant "has lower back pain."

Testimony

20. Claimant testified at hearing on her own behalf. She testified that her job involved her going to a particular client based on what was indicated in an app on her phone.

Claimant worked full time five or six days a week with no breaks during a twelve-hour shift.

21. Claimant testified that on the date of the alleged injury, she lifted a client's leg to give him a sponge bath. Claimant testified that she felt a popping sensation in her low back and a spreading warmth that made her think that she had urinated herself. She denied having experienced any immediate pain, though she testified that the pain gradually worsened during the course of her shift. Claimant also denied that there were any jerking motions involved in the injury, as the client was relaxed at that time.

22. That night, after returning home, Claimant only took her dog out and laid down to sleep. The next morning, Claimant woke up for her shift. She also called to schedule an appointment for that afternoon with her primary care provider at Mile High Medicine. Claimant testified that when she saw the provider that day, she asked the provider whether the back pain would be related to a UTI, and the provider responded that it would not, due to the location of the pain. Claimant testified that she was prescribed muscle relaxers and anti-inflammatory medications.

23. Claimant testified that the following day, November 4, she showed up for work and had a chance to sit and relax before the client woke up. However, she was in a lot of pain and was in tears. Claimant testified that the pain was in her low back and buttocks area, primarily on the right side, but wrapping around her lower section. Claimant called her supervisor and mentioned that she was in a lot of pain and needed to end her shift. Claimant testified that she did not mention to her employer at that time that she had a work injury because she did not want confusion about which client's house the injury occurred at and was confused about what the employer was asking. Claimant testified that she told her employer that she was not injured at that particular client's house. Claimant also testified that she at some point communicated with her employer via e-mail and conveyed that she believed she had been injured while treating the client she had been attending on November 2, 2023.

24. Claimant denied that she ever had a prior back injury. However, Claimant acknowledged on cross examination that she had some low back soreness in 2021 resulting from a domestic violence incident. She testified that she had polycystic ovary syndrome (PCOS) prior to the date of injury, and that the condition resulted in bad cramps and tenderness in the front of her abdomen. She testified that she would also have back pain from UTIs that would be in the middle of her back near her liver. Claimant denied experiencing any back pain during the month leading up to the injury.

25. Claimant testified that the low back pain she experienced after her injury was different from the back pain she would experience with the UTIs. Claimant

explained that the onset of pain from the accident was immediate, which contrasted with her prior UTI-related back pain that had a gradual onset.

26. Regarding the November 21 meeting with her employer, Claimant testified that it was a scheduled "sit-down" meeting where she tried to clearly convey that she was in fact injured despite her prior answer of "no." However, Claimant testified that her employer told her that there was not much they could do for her.

27. Respondents presented the testimonies of [Redacted, hereinafter DT] and Dr. Mathwich by deposition.

28. DT[Redacted] testified that she is the franchise owner of two franchises, including the one that employed Claimant. At the time of Claimant's alleged injury, DT[Redacted] was in charge of overseeing personnel and delivering nonmedical personal care to seniors in the Denver metro area. That nonmedical personal care would consist of companionship, light housekeeping, bathing, dressing, shopping, and transportation.

29. DT[Redacted] testified that on November 4, 2023, Claimant notified DT[Redacted] that her back was hurting and that she would like to be relieved from her shift early. Claimant did not tell DT[Redacted] that she was unable to work. DT[Redacted] asked Claimant if her back pain was work-related, to which Claimant responded that it was not. DT[Redacted] testified that Claimant did not seem at all confused about the question nor did Claimant ask for clarification. Claimant seemed cool and collected and did not sound like she was in pain.

30. DT[Redacted] testified that Claimant contacted DT[Redacted] on November 4 regarding the doctor's note. Claimant next reached out to DT[Redacted] on November 10 regarding return to work. Claimant did not mention anything to the witness about a work injury nor that she was injured while lifting a client's leg. The witness testified that Claimant did request an advance on her wages during that phone call due to financial hardship arising from her partner losing his job.

31. The next time DT[Redacted] spoke with Claimant, according to DT[Redacted] testimony, was on November 17, while DT[Redacted] was providing a presentation on workers' compensation, which Claimant attended. Although Claimant and DT[Redacted] spoke that day, Claimant did not mention to DT[Redacted] that she had sustained a work injury.

32. DT[Redacted] testified that it was not until 1:25 A.M. on Tuesday, November 21, that Claimant first mentioned to DT[Redacted] that she believed her low back condition may be a work injury. Claimant provided the notification by e-mail. DT[Redacted] testified that the following day, November 22, Claimant had a meeting with the human resources manager to discuss her alleged work injury.

33. DT[Redacted] testified that the employer did not learn of the specifics of the alleged injury until Claimant first saw her authorized treating physician.

34. In his deposition testimony, Dr. Mathwich testified that Claimant had a history of low back pain and treatment, detailing two distinct types of pain documented in the medical records. The first type was associated with UTIs, characterized by higher back pain more in the flanks. The second type involved musculoskeletal complaints located in the lower back and extending into the right gluteus and buttocks area.

35. Dr. Mathwich observed that Claimant's current complaints, as of the IME, involved low back pain radiating into the buttocks, more on the left than the right, with no radiation down the legs or up the back. He noted that records immediately following the date of injury showed pain on both sides, albeit slightly more on the right.

36. He also testified that Claimant had undergone physical therapy for her low back prior to the date of injury, which Dr. Mathwich emphasized would be intended for musculoskeletal complaints or injuries, not for UTIs.

37. Dr. Mathwich expressed skepticism about the mechanism of injury described by Claimant, as he felt it would not be sufficient to cause an injury. He also identified Claimant’s body habitus and deconditioning, specifically her obesity, as aggravating factors that placed her at a significantly higher risk for low back issues.

38. While acknowledging the possibility that Claimant could have injured herself as described, Dr. Mathwich testified that he did not consider it likely. He also noted that, had she injured herself, her low back pain would be expected to have resolved by the time of his testimony.

39. Dr. Mathwich testified that Claimant did not exhibit radiculopathy during the straight leg raise test during the IME, which led him to not diagnose her with radiculopathy. He noted that Claimant was taking methocarbamol (a muscle relaxer), tramadol, and Celebrex at the time of the IME, explaining that tramadol and Celebrex are analgesics, with Celebrex also having anti-inflammatory effects. He described the physical examination at the IME as “relatively benign,” with no pain on extension and only some discomfort with rotation, ruling out any facet joint pathology.

40. To support his assertion that Claimant had well-documented low back pain prior to the date of injury, Dr. Mathwich referenced in his testimony the August 30, 2023, record of low back pain persisting intermittently for a month and the October 21, 2023, which documented low back pain. Dr. Mathwich testified that Claimant is likely to experience intermittent back pain throughout her life as long as she remains obese.

41. For several reasons, the Court finds Claimant’s testimony less credible than that of Dr. Mathwich and DT[Redacted].

42. Claimant initially denied sustaining a work injury when first asked by DT[Redacted] on November 4, 2024, and did not express any confusion or equivocation. Claimant testified that she initially denied to her employer that she had sustained an injury because she wanted to avoid confusion regarding at which client's house the injury occurred, but the Court finds this explanation implausible, as there is no persuasive evidence that Claimant attempted to clarify at that time that she had been injured at client Chaves's home. Claimant also did not attempt to clarify with DT[Redacted] when the two spoke on November 17, 2023, after DT[Redacted] led a presentation on workers' compensation, a presentation that Claimant attended.

43. The medical records document that Claimant initially did not attribute her low back pain to a work-related incident during her medical visits on November 3 and November 10, 2023, instead associating her symptoms to a suspected UTI and describing the pain as having an insidious onset. Claimant later testified at hearing that she had reported her work injury to the therapist on November 10, but that the therapist did not include it in the report. While it is possible that a therapist might have left that information out, the presence of other contemporaneous medical and employer records and testimony documenting an absence of a reported work injury at that time make Claimant's testimony appear unlikely.

44. It was not until several days after the November 17 workers' compensation presentation, on November 21, 2023, that Claimant first mentioned by e-mail to DT[Redacted] that she believed her low back symptoms may have arisen from a work injury, though she was unsure where exactly the injury occurred or what she was doing when the injury occurred. Despite this uncertainty, Claimant's recollection of the injury appeared to crystallize into unequivocal detail the following day when she met with Dr. Montano, reporting details about when, where, and how the injury occurred. That same day, Claimant provided the same details in a written statement. Claimant's evolving recollection of the details of her injury from an initial absence of any mention to a sudden and decisive recollection several weeks later render her testimony unreliable.

45. In contrast, the testimonies of DT[Redacted] and Dr. Mathwich were largely consistent with the other evidence in the case, and the Court relies on their testimonies in its findings.

46. Ultimately, it is unclear whether Claimant in fact sustained a low back injury while lifting client CZ[Redacted] leg on November 2, 2023, or whether Claimant's low back pain arose from degenerative conditions resulting from causes other than the November 2, 2023 incident as described by Claimant. However, the Court finds that Claimant has not proved that it is more likely than not that she sustained an injury arising out of and in the course of her employment with Respondent-Employer on November 2, 2023.

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. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury "arises out of" the employment when it is sufficiently related to the conditions and circumstances under

which the employee usually performs his or her job functions to be considered part of the service provided to the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury is said to have arisen in the course of employment if the injury occurred while the employee was acting within the time, place, and circumstances of the employment. *Popovich*, 811 P.2d at 383.

As found above, and given the substantial inconsistencies in Claimant's account of the alleged November 2, 2023 injury, the Court finds and concludes that Claimant has not proved by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment with Respondent-Employer on November 2, 2023.

ORDER

It is therefore ordered that:

1. Claimant's claim for a November 2, 2023 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 11, 2024.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-215-608-004

ISSUES

- Did Respondents prove Claimant's claim is barred by the two-year statute of limitations?
- Did Claimant prove he suffered a compensable work-related injury?
- Did Claimant prove evaluations and treatment from Orthopaedic & Spine Center of the Rockies in March and April 2022, including a right knee MRI, were reasonably needed and causally related to a compensable injury?

FINDINGS OF FACT

1. Claimant worked for Employer as a drywall installer and finisher. On May 14, 2020, Claimant was working with scaffolding and slipped on paint dust. This caused him to twist or bend his right knee awkwardly, and his right knee struck the scaffold.

2. Claimant reported the incident to his supervisor and was referred to Employer's on-site medical clinic. The provider documented that Claimant slipped on paint but did not fall because he was holding onto the scaffolding. He complained of pain in the right knee. Physical examination showed full but painful range of motion and mild pain to palpation of the knee. No swelling was appreciated. The provider iced the knee, massaged it with Biofreeze, and wrapped it. Claimant was diagnosed with right knee pain. He was advised to apply ice for 20 minutes every hour, apply Biofreeze, take OTC medications as needed for pain, and call if the symptoms worsened. Claimant declined to seek treatment from an outside provider at that time. He was given no work restrictions.

3. Claimant returned to work the next day. Claimant testified Employer changed his duties to operating a forklift and finishing walls and ceilings. It is unclear from the testimony whether these changes were made because of the injury. Claimant told Respondents' IME he continued doing drywall installation after the accident. Regardless, Claimant continued to earn his regular pre-injury wage.

4. Claimant worked for Employer without restrictions until September 5, 2020, when he resigned. There is no persuasive evidence that Claimant left the job because of the work injury.

5. Claimant subsequently obtained a new job as a "handyman," installing items such as fixtures and pet doors. He also performed contacting work under his own company name, and helped his wife with janitorial work.

6. There is no persuasive evidence that Claimant suffered a wage loss proximately caused by the May 14, 2020 accident.

7. The first documented medical care other than the on-site treatment was on March 10, 2022, when Claimant saw Dr. Riley Hale at Orthopedic and Spine Center of the Rockies. Claimant told Dr. Hale he had slipped and hurt his knee at work. He said the pain improved over the next one or two weeks with rest, elevation, ibuprofen, and activity modification. However, he said he continued to have daily knee pain, particularly with activities such as going from squatting to standing. The knee swelled and popped occasionally. Claimant was observed to walk normally without a limp. Examination of the knee showed a mild effusion, tenderness to palpation at the medial joint line, and a positive McMurray test. Knee x-rays showed mild tricompartmental degenerative changes bilaterally. Dr. Hale diagnosed right knee pain with recurrent mechanical symptoms and ordered an to assess a possible meniscal tear.

8. The MRI was completed on March 17, 2022. The menisci and ligaments were normal. The MRI showed underlying patella alta and grade 2/3 patellar chondromalacia. There was also edema in the proximal aspect of the Hoffa's fat pad consistent with patellar maltracking.

9. Claimant saw Dr. Ryan Hartman at Orthopedic and Spine Center on April 14, 2022, to review the MRI findings. Dr. Hartman documented that his right knee had been painful since "he had a slip and fall at work over a year ago and landed on the knee." Examination showed a moderate J sign bilaterally, mild retropatellar crepitus in the right knee, pain with patellar compression, and positive Hoffa's impingement test. Dr. Hartman diagnosed right anterior knee pain aggravated after a slip and fall at work with patellar chondromalacia, lateral patellar compression syndrome, and Hoffa's pad inflammation or impingement. Dr. Hartman told Claimant that his treatment options were a cortisone injection and therapy or right knee arthroscopic surgery.

10. Claimant did not pursue further treatment for the knee because he lost his health insurance.

11. Claimant filed a Workers' Claim for Compensation with the Division on September 8, 2022. The claim form is dated August 26, 202**0**, but that is probably a mistake because the Division received the form on September 8, 202**2**.

12. Dr. Tashof Bernton performed an IME for Respondents on September 21, 2023. Claimant told Dr. Bernton his knee was gradually worsening. His right knee was the main problem, although he started having left knee pain about a year after the incident at work. Claimant was using ibuprofen 3-4 times per week. Physical exam showed a visible patella alta configuration bilaterally. On the right knee, Dr. Berton noted patellar instability, a positive patellar apprehension sign, and positive Hoffman's fat pad sign. There was some patellar instability on the left as well.

13. Dr. Bernton opined Claimant suffered a patellar contusion with no structural injury on May 14, 2020. However, his current symptoms are related to patella alta, a congenital condition that was neither caused nor aggravated by Claimant's work for Employer. The minor work-related injury was treated on site, and Claimant returned to a very vigorous job as a commercial drywall installer, which he continued through

September 2020. He then worked as a handyman and sought no documented treatment until 21 months after the accident. Dr. Bernton opined Claimant's current knee symptoms are not caused by the minor injury in May 2020. Rather, they are related to Claimant's pre-existing anatomical abnormalities, which would be present and symptomatic had the work-related injury not occurred. Although Dr. Bernton agreed that treatment outlined by Dr. Hartman is reasonable, it is not causally related to the May 2020 injury.

14. Dr. Bernton's opinions are credible and persuasive.

15. Claimant proved he suffered a compensable injury to his right knee on May 14, 2020 which reasonably required medical attention from the on-site provider.

16. Respondents failed to prove Claimant's claim is barred by the statute of limitations. There is no persuasive evidence Claimant was disabled or suffered a wage loss more than two years before he filed the claim on September 8, 2022.

17. Claimant failed to prove treatment by the Orthopaedic and Spine Center is causally related to the May 14, 2020 injury.

CONCLUSIONS OF LAW

A. Statute of Limitations

Section 8-43-103(2) provides that the right to workers' compensation benefits "shall be barred unless, within two years after the injury . . . a notice claiming compensation is filed with the division." The statute of limitations is an affirmative defense, that respondents must prove by a preponderance of the evidence. *Mestas v. Denver Fire Department*, W.C. No. 5-112-788-001 (ICAO, January 11, 2021). The time to file a claim is governed by the "discovery rule." The two-year period begins to run when the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of the injury. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). The term "injury" as used in § 8-43-103(2) refers to a "compensable injury," which in this context has been interpreted as an injury that entitles the claimant to "compensation" in the form of disability benefits. *E.g., Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Taylor v. Summit County*, W.C. No. 4-897-476-01 (March 18, 2014). As a result, the two-year limitation does not apply to a so-called "medical only" claim, where the employee continued to work and received regular wages. *Id*.

As found, Respondents failed to prove Claimant's claim is barred by the two-year statute of limitations. There is no persuasive evidence the injury disabled Claimant from his regular job, caused him to miss more than three shifts, or caused a wage loss.

B. Compensability generally

As discussed above, *Romero v. Industrial Commission*, *supra*, defined a "compensable" injury for statute of limitations purposes as an injury for which disability indemnity benefits are payable. However, the terms "compensable" and "compensability" are frequently used more broadly in other contexts, to include claims involving medical

benefits only. *E.g., Gianzero v. Wal-Mart Stores*, W.C. No. 4-669-749 (ICAO, July 14, 2009); *Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App. 2003) (employer retains the right to contest "compensability," reasonableness, or necessity of medical benefits after MMI); *Rodriguez v. Pueblo County*, W.C. No. 4-911-673-01 (ICAO, January 21, 2016) ("compensable" injury where claimant was only seeking medical benefits).

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 claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to benefits by a preponderance of the evidence.

Even a minor strain or brief exacerbation of a pre-existing condition can be a sufficient basis for a compensable claim if it caused the claimant to seek medical treatment. The ICAO's decision in *Garcia v. Express Personnel*, W.C. No. 4-587-458 (ICAO, August 24, 2004) is instructive regarding the minimal extent of an injury that can satisfy the basic threshold requirement of compensability. In *Garcia*, the claimant felt pain in her abdomen and hip while lifting a piece of glass at work. The employer referred the claimant to a physician who diagnosed a lumbar strain, but opined she had already reached MMI. The ALJ found that the claimant suffered a "minor back sprain," but also found the sprain had "resolved" within five days of the incident. The ALJ denied the claim on the theory that the claimant suffered no "injury." The ICAO reversed and held that the claimant had established a compensable injury as a matter of law:

> Where pain triggers the claimant's need for medical treatment, the claimant has established a compensable injury if the industrial injury is the cause of the pain. The term medical treatment includes diagnostic procedures required to ascertain the extent of the industrial injury.
>
> Here, the ALJ found there was an industrial accident which caused a minor lumbar strain. Further, the ALJ determined that when the injury was reported to the employer, the employer offered the claimant medical services from Dr. Caughfield, which the claimant accepted. Although Dr. Caughfield placed the claimant at MMI based upon his [ ] examination, the ALJ found with record support that Dr. Caughfield diagnosed a lumbar strain. Thus, the ALJ's findings compel the conclusion the claimant established a compensable injury which entitled her to an award of medical benefits. (Citations omitted).

Similarly, *Conry v. City of Aurora*, W.C. No. 4-195-130 (ICAO, April 17, 1996) involved a minor episode that was found to establish a compensable claim as a matter of law. In *Conry*, the claimant suffered from pre-existing asthma. One day she walked into work and encountered a "strong smell of ammonia." As a result, she "began wheezing and became short of breath." The claimant's supervisor advised that she go to the doctor. There is no indication in the decision that the claimant required any treatment other than

that single physician visit. The ALJ denied the claim because the ammonia exposure merely caused a "temporary exacerbation" of the claimant's pre-existing asthma. She had no ongoing sequela nor required any additional treatment. Therefore, the ALJ determined the claimant failed to prove that she suffered a compensable "injury." The ICAO reversed the ALJ and found the claimant had proven compensability as a matter of law. The Panel stated, "the claimant's industrial exposure to ammonia caused her to experience respiratory symptoms for which she needed and received medical treatment. . . . [T]hese findings compel a conclusion that the claimant suffered a compensable aggravation of her pre-existing condition [asthma]. Therefore, we reverse the ALJ's determination that the claimant did not suffer a compensable injury."

As found, Claimant proved he suffered a compensable injury on May 14, 2020. His knee twisted or bent awkwardly and struck a scaffold, which caused pain and a contusion. He reported the injury to his supervisor and was referred to the on-site provider for evaluation and treatment. The mere fact that Claimant did not see a physician does not negate the fact that he required some medical care proximately caused the accident. *E.g.*, *Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-875 (November 20, 2001) ("the fact [a] medication is available without a prescription does not vitiate its compensability"); *Mann v. Ridge Erection Company*, W.C. No. 4-225-122 (April 4, 1996) (no distinction between "over the counter" medications and prescribed medications for purposes of coverage). Thus, Claimant suffered a compensable injury.

C. Treatment from Orthopaedic & Spine Center

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. However, the mere occurrence of a compensable injury does automatically mean that all requested treatment is causally related to the injury. *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, July 2, 2010). Where the claimant's entitlement to medical benefits is disputed, the claimant must prove entitlement to the requested treatment by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

As found, Claimant failed to prove treatment at Orthopaedic & Spine Center was causally related to the May 14, 2020 work injury. Although Claimant had an injury while working, he received minor treatment and returned to work with no restrictions. The next documented evaluation related to the right knee was almost two years after the accident. The March 17, 2022 MRI showed no meniscal tear or other pathology caused by the work accident. Dr. Bernton's opinions are credible and persuasive. As Dr. Bernton explained, it is not medically probable that Claimant's current symptoms are related to a minor strain and contusion suffered over four years ago. Rather, Claimant's current knee symptoms are probably related to patella alta, which was neither caused nor aggravated by his work.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right knee injury on May 14, 2020 is compensable.

2. Respondents' statute of limitations defense is denied and dismissed.

3. Claimant's request for medical benefits related to evaluations and treatment provided by and through Orthopaedic & Spine Center of the Rockies, including the March 17, 2022 right knee MRI, is denied and dismissed.

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

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

DATED: July 12, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-230-585-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on January 3, 2023.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his January 3, 2023 lower back injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a Warehouse Associate. On January 3, 2023 Claimant was tasked with picking up a case of toilet seats weighing approximately 40-45 pounds and placing it on a pallet to move it to the loading dock area. When Claimant bent down to place the case on the pallet, he experienced immediate and intense pain in his back that brought him to his knees. He was unable to stand up. Claimant noted he had never previously had any problems lifting the 40-45 pound case of toilet seats.

2. Claimant was eventually able to stand up and went to the main desk where his supervisors were working. He advised both [Redacted, hereinafter HR] and [Redacted, hereinafter PE] about the incident and injury. They suggested he visit the breakroom to rest and see if his pain improved.

3. Because Claimant's pain was worsening by sitting in the breakroom, he left after about five minutes and went out to the supervisor's desk area. HR[Redacted] and PE[Redacted] suggested Claimant visit his personal doctor because he would not be able to finish his shift. Claimant testified none of his supervisors or anyone from Employer offered him an opportunity to visit a Workers Compensation provider. Respondents did not prepare a First Report of Injury until February 9, 2023.

4. Second Shift Manager PE[Redacted] testified that, about one month before January 3, 2023, Claimant hurt his back and went to see his personal doctor. He returned to work a couple of weeks later. PE[Redacted] commented that on January 3, 2023 Claimant advised him that he had injured his back while moving a package to a pallet. When Claimant put down the case and tried to stand up, his back popped and he felt immediate pain. PE[Redacted] did not report Claimant's January 3, 2023 injury because he believed it was related to Claimant's prior back condition.

5. HR[Redacted] testified that Claimant told Employer he had fallen off of a ladder at a previous job and injured his back. The injury caused him to wear a brace from time to time and occasionally take breaks. HR[Redacted] commented that on January 3, 2023 Claimant told him he had been injured when he grabbed a case of toilet seats, put the case on a pallet and

felt a pop in his back. He confirmed Claimant was no longer able to continue working and required medical treatment. HR[Redacted] did not report the accident as a Workers' Compensation claim because of Claimant's pre-existing back injury. However, he acknowledged that Claimant's pain "seemed a little more severe this time."

6. On January 4, 2023 Claimant saw personal medical provider Erin Bammann, M.D. at Denver Health. Claimant provided a consistent history of his injury and was diagnosed with acute back and left leg radiculopathy, chronic midline thoracic back pain, traumatic injury of the neck with midline tenderness, NSAID overdose, primary hypertension, and healthcare maintenance. Claimant reported taking 1600 mg of Ibuprofen on the previous day and 3200 mg on the morning before his medical appointment "because [he] only experiences pain relief at very high doses." Dr. Bammann authored a note restricting Claimant from work until his follow-up appointment on January 11, 2024.

7. On January 11, 2023 Claimant returned to Denver Health for an evaluation. Claimant was again diagnosed with acute lumbar pain and radiculopathy as a result of his injury on January 3, 2023. He was restricted from returning to work until at least January 30, 2023.

8. Claimant underwent a lumbar MRI on January 18, 2023. The MRI revealed moderate L4-L5 neural foraminal narrowing and a "left foraminal annular fissure at L4-L5 which can be a source of pain."

9. Claimant eventually received a list of designated providers from Employer and selected Concentra in Thornton, CO as his Authorized Treating Provider (ATP). Claimant first visited Concentra on May 17, 2023 and saw Wendy Carle, M.D. Dr. Carle noted a prior history of a Motor Vehicle Accident (MVA) in 2019 that caused pain in Claimant's neck, left shoulder and back, but improved over time. Although Claimant noted intermittent residual back pain, it had become much worse and localized to the lower back since his work injury on January 3, 2023. Dr. Carle referred Claimant to an orthopedic spine surgeon and prescribed medications for acute left-sided lower back pain with sciatica. She also noted there was a greater than 50% likelihood that Claimant had suffered a work-related condition notwithstanding his prior back injury. Dr. Carle permitted Claimant to return to work with restrictions of no lifting greater than 10 pounds and no more than two hours walking or standing per day.

10. On June 6, 2023 Claimant visited Michael Rauzzino, M.D. for a spinal surgery consultation. Dr. Rauzzino noted the MRI findings, including the annular fissure at L4-L5, but did not believe Claimant was a good surgical candidate. He instead recommended continued pain management. Dr. Rauzzino commented that his objective findings were consistent with the history and/or work-related mechanism of injury.

11. On July 7, 2023 Claimant visited Cynthia Rubio, M.D. at Concentra. Dr. Rubio prescribed physical therapy and a Medrol dose pack. She continued Dr. Carle's work restrictions. Dr. Rubio also determined that her objective findings were consistent with Claimant's history and/or work-related mechanism of injury.

12. Claimant visited Thomas Corson, M.D. at Concentra on July 26, 2023. Dr. Corson diagnosed Claimant with acute left-sided lower back pain with left-sided sciatica, and referred

him to a physiatrist. He also noted that his objective findings were consistent with Claimant's history and/or work-related mechanism of injury.

13. After undergoing additional physical therapy, Claimant visited physiatrist John Sacha, M.D. on August 7, 2023. Dr. Sacha recommended EMG nerve conduction studies as well as chiropractic treatment and possibly acupuncture.

14. On August 31, 2023 Claimant visited Qing-Min Chen, M.D. for an Independent Medical Examination (IME). Dr. Chen determined Claimant's work accident did not cause any injuries. He detailed that "[t]his was a pretty benign mechanism of injury. {Claimant} did not actually have pain when he was lifting. It was only when he set the weight down and just stood back up that he started feeling pain." Dr. Chen considered Claimant's symptoms to be the natural progression of his underlying, idiopathic disease process.

15. Dr. Chen also considered Claimant's MRI images. He specified that Claimant's lumbar spine MRI revealed chronic, degenerative changes without any evidence of a specific acute traumatic injury. Dr. Chen explained that Claimant's "severe facet arthritis as well as the ligamentum flavum thickening on top of these diffuse disc bulges" constituted chronic, degenerative, pre-existing conditions that predated any specific injury on January 3, 2023. He thus concluded that Claimant's "need for any interventions, treatments, etc., are 100% due to pre-existing conditions without any obvious contributions from this occupational disease or injury."

16. After several physical therapy visits, Claimant returned to Dr. Corson on November 10, 2023. Dr. Corson diagnosed Claimant with acute left-sided lower back pain, including left-sided sciatica, and a lumbar strain. He referred Claimant to physiatrist John Aschberger, M.D. Dr. Corson again remarked that his objective findings were consistent with Claimant's history and/or work-related mechanism of injury.

17. On November 16, 2023 Claimant visited Dr. Aschberger for an evaluation. Dr. Aschberger agreed with Dr. Sacha that Claimant should undergo chiropractic treatment and EMG/NCS testing. He commented that his objective findings were consistent with Claimant's history and/or work-related mechanism of injury.

18. On January 2, 2024 Claimant underwent EMG/NCS testing. The results did not reveal acute or chronic neuropathy. However, the testing demonstrated peripheral neuropathy that Dr. Sacha stated was not work-related. Dr. Sacha believed Claimant had likely reached Maximum Medical Improvement (MMI) and recommended an impairment rating. He also commented that his objective findings were consistent with Claimant's history and/or work-related mechanism of injury.

19. Claimant returned to Dr. Corson on January 19, 2024 and February 2, 2024. Dr. Corson determined Claimant had not reached MMI, reiterated Claimant's work restrictions, and continued to diagnose acute, left-sided lower back pain with sciatica.

20. Claimant testified about his prior back injury and treatment. He explained that, after the 2017 MVA, he received therapy and medication for his back complaints. However, he

recovered and was able to continue full duty employment until his accident at work on January 3, 2023. Claimant remarked that, just prior to his work accident, he lifted weights, walked, swam, and rode bikes. However, he is no longer able to perform the preceding activities.

21. On May 5, 2024 the parties conducted the post-hearing evidentiary deposition of Dr. Chen. He reviewed Claimant's medical records and performed a physical examination. Claimant's prior medical treatment for his lower back symptoms before January 3, 2023 included cortisone injections, pain medications, NSAIDS, and lidocaine patches. Claimant told Dr. Chen that he had lower back and neck pain after an MVA six years earlier. After receiving treatment, he had "negligible pain in his lower back" and would occasionally use a back brace. However, Dr. Chen explained that the medical records revealed chronic, left-sided lower back pain with left leg pain before January 3, 2023. In fact, a treatment note reflected that Claimant was a candidate for lumbar spine surgery.

22. Dr. Chen testified the most important items he reviewed in assessing causation and relatedness were Claimant's lumbar spine MRI images taken January 18, 2023. Importantly, the images did not reveal "anything that was acutely traumatic that would be – would have been related to this accident." Dr. Chen explained the MRI did not show any acute injury. He did not see a left-sided fissure at the L4-L5 disc, and nothing in the images showed any inflammation consistent with an acute fissure. Instead, Dr. Chen noted facet arthritis, ligamentum flavum hypertrophy, and mild bilateral foraminal stenosis. The imaging also revealed very dark discs in Claimant's lumbar spine. The preceding constituted degenerative changes that took months or years to develop.

23. Claimant's MRI imaging and the medical records documenting his chronic lower back pain before January 3, 2023 was not the only evidence Dr. Chen considered in reaching his conclusion that Claimant did not sustain an injury on January 3, 2023. Claimant told Dr. Chen his injury occurred when he was lifting an approximately 40-pound package of toilet seats from waist height and set them down on a ground level pallet. After Claimant sat down, he went to bend his back and noticed a "searing, sharp pain in his lower back going down his left hip and into his left knee with some numbness going into his entire left foot." Dr. Chen reasoned that the preceding actions did not place stress on Claimant's spine or back. Instead, the mechanism of injury was a normal, benign movement that did not aggravate Claimant's pre-existing condition.

24. Dr. Chen concluded Claimant did not sustain an injury to his lower back or lumbar spine while working for Employer on January 3, 2023. He explained that there was simply a lack of objective data to support a work injury to Claimant's back. Dr. Chen reasoned that Claimant's symptoms constituted the natural progression of an underlying, degenerative process.

25. Claimant has established it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his employment with Employer on January 3, 2023. Initially, on January 3, 2023 Claimant was lifting a case of toilet seats weighing approximately 40-45 pounds. When he bent down to place the case on a pallet, he experienced immediate and intense pain in his lower back. Claimant immediately reported the incident to supervisors HR[Redacted] and PE[Redacted]. They confirmed that Claimant stated he injured his lower back when he grabbed a case of toilet seats, put the case on a pallet and felt a pop. However, they did not immediately report the accident as a Workers' Compensation

claim because of Claimant's pre-existing lower back condition.

26. On January 4, 2023 Claimant visited personal medical provider Dr. Bammann at Denver Health. Claimant provided a consistent history of his injury and diagnoses included acute back and left leg radiculopathy as well as chronic midline thoracic back pain. After Claimant received a list of designated medical providers from Employer and selected Concentra, he visited Dr. Carle. She noted a prior history of an MVA in 2019 that caused symptoms in Claimant's neck, left shoulder and back, but improved over time. Dr. Carle referred Claimant to an orthopedic spine surgeon and prescribed medications for acute left-sided lower back pain with sciatica. She also noted there was a greater than 50% likelihood that Claimant had suffered a work-related condition notwithstanding his prior back injury.

27. Multiple authorized medical providers also concluded that objective findings were consistent with the history and/or work-related mechanism of injury. Notably, Drs. Rauzzino, Rubio, Corson, Aschberger and Sacha attributed Claimant's acute left-sided lower back pain to his work activities on January 3, 2023. Despite Claimant's significant back symptoms after the 2007 MVA, the authorized providers recognized that Claimant suffered an industrial injury at work that warranted medical treatment, diagnostic testing and work restrictions. Notably, Claimant explained he recovered from his MVA and was able to continue full duty employment until his accident at work on January 3, 2023.

28. In contrast, Dr. Chen maintained that Claimant did not sustain an injury to his lower back or lumbar spine while working for Employer on January 3, 2023. Instead, Claimant suffered chronic, degenerative, pre-existing conditions that predated any specific work injury. He thus concluded that Claimant's "need for any interventions, treatments, etc., are 100% due to pre-existing conditions without any obvious contributions from this occupational disease or injury." Dr. Chen explained there was simply a lack of objective data to support a work injury to Claimant's back. He reasoned that Claimant's work activities on January 3, 2023 did not place stress on Claimant's spine or back. Instead, the mechanism of injury was a normal, benign movement that did not aggravate Claimant's pre-existing condition. Dr. Chen summarized that Claimant's symptoms constituted the natural progression of an underlying, degenerative process.

29. Despite Dr. Chen's opinion, the record reveals that Claimant's work activity of lifting a case of toilet seats combined with his pre-existing condition to produce a need for medical treatment. Although the record is replete with evidence that Claimant has a history of lower back symptoms, the January 3, 2023 incident caused him to immediately report the accident and seek medical care. Claimant also provided a consistent history of his injury to multiple authorized medical providers and they concluded that objective findings were consistent with a work-related mechanism of injury. The record thus reflects that Claimant's January 3, 2023 work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered a compensable lower back injury during the course and scope of his employment with Employer on January 3, 2023.

30. Claimant has demonstrated it is more probably true than not that he is entitled to receive reasonable, necessary and causally related medical benefits for his January 3, 2023 lower back injury. The record reveals that Claimant's work activities on January 3, 2023

combined with his pre-existing condition to produce a need for medical treatment of his lower back. Multiple providers diagnosed Claimant with acute left-sided lower back symptoms and assigned work restrictions. There was thus a direct causal relationship between the injury, his disability and need for treatment. Although Claimant's industrial injury may not have been the sole cause of his condition, it constituted a significant, direct, and consequential factor in the disability. Accordingly, Claimant is entitled to receive reasonable, necessary and causally related medical benefits for his January 3, 2023 lower back injury.

CONCLUSIONS OF LAW

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

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

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

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

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

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and 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 compensable lower back injury during the course and scope of his employment with Employer on January 3, 2023. Initially, on January 3, 2023 Claimant was lifting a case of toilet seats weighing approximately 40-45 pounds. When he bent down to place the case on a pallet, he experienced immediate and intense pain in his lower back. Claimant immediately reported the incident to supervisors HR[Redacted] and PE[Redacted]. They confirmed that Claimant stated he injured his lower back when he grabbed a case of toilet seats, put the case on a pallet and felt a pop. However, they did not immediately report the accident as a Workers' Compensation claim because of Claimant's pre-existing lower back condition.

8. As found, on January 4, 2023 Claimant visited personal medical provider Dr. Bammann at Denver Health. Claimant provided a consistent history of his injury and diagnoses included acute back and left leg radiculopathy as well as chronic midline thoracic back pain. After Claimant received a list of designated medical providers from Employer and selected Concentra, he visited Dr. Carle. She noted a prior history of an MVA in 2019 that caused symptoms in Claimant's neck, left shoulder and back, but improved over time. Dr. Carle referred Claimant to an orthopedic spine surgeon and prescribed medications for acute left-sided lower back pain with sciatica. She also noted there was a greater than 50% likelihood that Claimant had suffered a work-related condition notwithstanding his prior back injury.

9. As found, multiple authorized medical providers also concluded that objective findings were consistent with the history and/or work-related mechanism of injury. Notably, Drs. Rauzzino, Rubio, Corson, Aschberger and Sacha attributed Claimant's acute left-sided lower back pain to his work activities on January 3, 2023. Despite Claimant's significant back symptoms after the 2007 MVA, the authorized providers recognized that Claimant suffered an industrial injury at work that warranted medical treatment, diagnostic testing and work restrictions. Notably, Claimant explained he recovered from his MVA and was able to continue full duty employment until his accident at work on January 3, 2023.

10. As found, in contrast, Dr. Chen maintained that Claimant did not sustain an injury to his lower back or lumbar spine while working for Employer on January 3, 2023. Instead, Claimant suffered chronic, degenerative, pre-existing conditions that predated any specific work injury. He thus concluded that Claimant's "need for any interventions, treatments, etc., are 100% due to pre-existing conditions without any obvious contributions from this occupational

disease or injury." Dr. Chen explained there was simply a lack of objective data to support a work injury to Claimant's back. He reasoned that Claimant's work activities on January 3, 2023 did not place stress on Claimant's spine or back. Instead, the mechanism of injury was a normal, benign movement that did not aggravate Claimant's pre-existing condition. Dr. Chen summarized that Claimant's symptoms constituted the natural progression of an underlying, degenerative process.

11. As found, despite Dr. Chen's opinion, the record reveals that Claimant's work activity of lifting a case of toilet seats combined with his pre-existing condition to produce a need for medical treatment. Although the record is replete with evidence that Claimant has a history of lower back symptoms, the January 3, 2023 incident caused him to immediately report the accident and seek medical care. Claimant also provided a consistent history of his injury to multiple authorized medical providers and they concluded that objective findings were consistent with a work-related mechanism of injury. The record thus reflects that Claimant's January 3, 2023 work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered a compensable lower back injury during the course and scope of his employment with Employer on January 3, 2023.

Medical Benefits

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

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

14. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his January 3, 2023 lower back injury. The record reveals that Claimant's work activities on January 3, 2023 combined with his pre-existing condition to produce a need for medical treatment of his lower back. Multiple providers diagnosed Claimant with acute left-sided lower back symptoms

and assigned work restrictions. There was thus a direct causal relationship between the injury, his disability and need for treatment. Although Claimant's industrial injury may not have been the sole cause of his condition, it constituted a significant, direct, and consequential factor in the disability. Accordingly, Claimant is entitled to receive reasonable, necessary and causally related medical benefits for his January 3, 2023 lower back injury.

ORDER

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

1. Claimant suffered a compensable lower back injury during the course and scope of his employment with Employer on January 3, 2023.

2. Claimant shall receive reasonable, necessary and causally related medical benefits for his January 3, 2023 lower back injury.

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 12, 2024.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-210-389-001

ISSUES

1. Claimant's appeal of PALJ Zarlengo's February 13, 2024 Prehearing Order requiring Claimant to attend an IME and ATP appointment.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reinstatement of temporary total disability benefits effective June 13, 2023.

3. Whether Claimant established by a preponderance of the evidence that he was at MMI effective December 30, 2022.

4. Whether Claimant established by a preponderance of the evidence that Respondents are subject to penalties for allegedly violating § 8-42-403, C.R.S., W.C.R.P. 12, and W.C.R.P. 5-5 (E).

5. Whether Respondents established by a preponderance of the evidence that Claimant's TTD benefits are barred pursuant to § 8-43-404(3), for failure to attend an IME appointment.

FINDINGS OF FACT

1. Claimant sustained an admitted work-related injury on July 1, 2022, when he was driving a PIT vehicle that was struck by another vehicle inside Employer's warehouse. Claimant was initially seen at the Medical Center of Aurora, and discharged with medications. (Ex. 6.D.).

2. Claimant began treatment at Workwell on July 5, 2022, with Brian Matus, M.D.. Claimant reported pain in his neck, shoulder, chest, back, hips, with foot and leg numbness, and migraine-like headaches. Dr. Matus diagnosed Claimant with neck, lower back, shoulder, leg, hand and wrist strains, and episodic tension-type headaches. Claimant was referred for physical therapy, massage therapy and chiropractic care. (Ex. 6.D.). Dr. Matus referred Claimant for MRIs of his lumbar spine and right shoulder. The lumbar spine MRI was negative for acute issues. The right shoulder MRI showed modest tenon fraying without evidence of a labral tear, and moderate acromioclavicular degenerative joint disease.

3. Between July 7, 2022 and August 23, 2022 Claimant attended seven sessions of massage therapy, nine sessions of physical therapy, and six chiropractic sessions. (Ex. 6.E., 6.F., and 6.G).

4. Claimant saw various providers at Workwell for his work-related injuries, including Dr. Matus, Bruce Cazden, M.D., through August 31, 2022. After which, for reasons not

apparent in the record, Claimant's care was transferred to J. Bradley, M.D., at Colorado Occupational Medical Partners ("COMP"). (Ex. 6.A.).

5. Claimant began treatment with Dr. Bradley at COMP on September 8, 2022, and attended visits on September 8, 2022, September 15, 2022, and October 4, 2022. After September 8, 2022, Dr. Bradley served as Claimant's authorized treating physician (ATP). At these visits, Claimant saw either Dr. Bradley or physician assistant Tom Chau, PA-C. The providers prepared Physician's Reports of Workers' Compensation Injury (WC 164 Forms) for each of these visits. On each of the WC 164 Forms for these dates the providers indicated that Claimant was subject to temporary work restrictions by checking a box on the form. Additionally, under the heading "Maximum Medical Improvement (MMI) the providers checked the box indicating "Injured Worker is not at MMI, but is anticipated to be at MMI in/on" and inserted the date "12-09-2022." (Ex. 6.A., p. Claimant 113; Ex. 1, p. Claimant 010; Ex. 6.A., p. Claimant 123; Ex. 1, p. Claimant 007, and Ex. 6.A., p. Claimant 130). Similarly, under the heading "Permanent Medical Impairment (Required)," the providers checked the box indicating "Permanent Impairment (attached required worksheets and narrative)." However, no evidence was admitted indicating that the referenced worksheets or narratives were attached, or that Claimant was assigned any permanent impairment rating at these visits.

6. During the course of his treatment with Dr. Bradley, Claimant was referred to Eric Shoemaker, D.O, and Barry Ogin, M.D., for evaluation of his low back pain, Sean Griggs, M.D., for evaluation of his shoulder, additional physical therapy, and for an MRI of his left shoulder. Dr. Shoemaker recommended back injections which Claimant elected not to pursue. Dr. Griggs performed an injection of Claimant's right shoulder which provided relief for a few days. (Ex. 6.A.).

7. On October 21, 2022, Dr. Bradley saw Claimant. On examination he noted that Claimant had decreased range of motion of his neck, with increased tension in the paraspinal muscles, decreased lumbar range of motion, and decreased shoulder range of motion. He diagnosed Claimant with rotator cuff tear arthropathy of the right shoulder, injury of the left shoulder, protrusion of lumbar disc, cervical strain, low back strain, hip strain, and tension headaches. Dr. Bradley indicated that Claimant was able to work on modified duty from October 21, 2022 until November 18, 2022, with movement restrictions (*i.e.*, walking, standing, sitting, crawling, squatting), and a lifting restriction of 30 pounds. In his treatment note, under "Limitations/Restrictions" Dr. Bradley described these as "temporary restrictions." (Ex. 6.A, p. Claimant 135). Similarly, on the WC 164 Form Dr. Bradley completed for the October 21, 2022 visit, he characterized Claimant's work restrictions as "Temporary Restrictions." Also, on the WC 164 Form, Dr. Bradley indicated that Claimant was not at maximum medical improvement (MMI), and that his anticipated date of MMI was December 30, 2022. (Ex. 6.A., p. Claimant 137). As with the prior WC 164 Forms, Dr. Bradley checked the box for "Permanent Impairment" but did not attach permanent impairment worksheets or a narrative explaining any permanent impairment. Dr. Bradley also completed a "Healthcare Provider Request for Information (RFI) Form ("HP RFI Form"), apparently provided by Employer, on which he indicated that Claimant was able to safely return to work with restrictions from "10/21 to permanent." Ex. 6.J., p. Claimant 299).

8. The record also includes a second copy of the October 21, 2022 HP RFI, labeled as "* Amended *." (Hereinafter the "Amended HP RFI"). On the Amended HP RFI, the word "permanent" is stricken out with a line, and the end date of restrictions changed to "11/18/22." The change to the document is initialed with the letters "BN." (Ex. 6.J. p. Claimant 301). No credible evidence was admitted indicating the date the October 21, 2022 HP RFI was changed, the reason for the change, or the identity of the individual who made the change. (On review of the admitted exhibits, the ALJ did not identify any individual with the initials "BN").

9. On October 24, 2022, Claimant saw Dr. Shoemaker, who indicated that Claimant was likely at MMI for his lower back, although he indicated that the decision on MMI was deferred to the "primary team," which the ALJ infers is a reference to Dr. Bradley and PA Chau. He recommended maintenance care, to include follow up care with physiatry and consideration of bilateral lumbar facet injections. (Ex. 6.B.).

10. After October 24, 2022, Claimant attended four physical therapy visits at COMP. At each of these visits, it was noted that Claimant was "to continue per PT POC." The ALJ infers that this is a reference to a physical therapy plan of care. On November 10, 2022, Tom Chau, P.A., at COMP entered a "Transfer of Care Order," referring Claimant to an "Outside Facility," no reason was provided for the transfer order, nor is there any indication that Claimant was seen at COMP on November 10, 2022. (Ex. 6.A., p. Claimant 144). No credible evidence was admitted indicating that Claimant sought or received additional treatment at COMP after November 10, 2022.

11. No credible evidence was admitted demonstrating that Dr. Bradley placed Claimant at MMI, performed an impairment rating or referred Claimant to another provider for the performance of an impairment rating.

12. On February 8, 2023, [Redacted, hereinafter DS], a claims adjuster for [Redacted, hereinafter SK] (third-party administrator for Insurer), emailed Claimant indicating Claimant would need to follow up with another workers' compensation provider, and emailed Claimant a designated provider list to permit Claimant to select a new provider. (Ex. I).

13. In response, on February 11, 2023, Claimant emailed DS[Redacted] demanding to be provided the impairment rating performed by Dr. Bradley, and indicating that Claimant believed that the October 21, 2022 HP RPI constituted an MMI determination by Dr. Bradley. Claimant stated that he "adamantly reject the notion that I need another Provider to confirm the MMI Decision and the date indicated by Dr. J. Bradley which is October 21st 2022." (Ex. I).

14. On February 23, 2023, Respondents' counsel wrote to Claimant indicating that Claimant had not been placed at MMI, no permanent impairment rating had been issued by an authorized treating physician, and thus no impairment rating was available to provide him. Respondents' counsel further indicated COMP had declined to provide Claimant treatment, and that because Claimant had not selected a new provider from the

list provided by DS[Redacted], Respondents were designating Concentra as the provider. (Ex. H).

15. On March 1, 2023, Claimant filed a Notice and Proposal and Application for a Division Independent Medical Examination (DIME) with the Division, seeking a permanent impairment rating for his shoulders and hips. (Ex. 4). For reasons that are not apparent from the record, the DIME did not occur.

16. Also on March 1, 2023, Respondents' counsel wrote to Concentra indicating the facility had been designated as Claimant's ATP, and that a demand appointment had been scheduled for March 10, 2023. (Ex. G).

17. On March 23, 2023, Claimant was apparently seen at Concentra by Nneka Okoye, FNP. The medical record for the visit indicates that Claimant had transferred his care from COMP, and was trying to establish care and obtain medical rating." The record indicates that Concentra was unable to perform an impairment rating. Ms. Okoye indicated that Claimant was to be seen by a physician at his next visit on April 2, 2023. (Ex. 2, p. Claimant 033-039, p. Claimant 050-060). No credible evidence was admitted indicating Claimant returned to Concentra after March 23, 2023.

18. On May 16, 2023, Respondents' counsel wrote Claimant indicating that an independent medical examination (IME) had been scheduled for May 25, 2023 with Dr. Lloyd Thurston, and also that an appointment had been scheduled with Concentra immediately after the IME. (Ex. F).

19. On May 26, 2023, Exam Works authored a letter indicating that Claimant had attended the appointment with Dr. Thurston on Thursday May 25, 2023 at 11:00 a.m., and that documentation regarding the appointment would be sent. (Ex. 2, p. Claimant 062). No other credible evidence of this appointment was admitted.

20. On June 2, 2023, Respondents' counsel wrote Claimant indicating that an appointment had been scheduled for June 13, 2023, with Dr. Eric Chau at Concentra Aurora North, and that failure to attend the demand appointment may result in suspension of temporary disability benefits. (Ex. D).

21. Claimant did not attend the June 13, 2023 appointment. (Ex. 2, p. Claimant 32).

22. On June 28, 2023, Respondents filed a General Admission of Liability, admitting for medical benefits, and temporary total disability (TTD) benefits from January 18, 2023 until June 13, 2023. The GAL also indicates that TTD benefits were suspended as of June 13, 2023 per WCRP 6-1(A)(5).

23. On July 27, 2023, Respondents' counsel wrote to Claimant indicating that a demand appointment had been scheduled with Dr. Eric Chau at Concentra Aurora North for August 28, 2023, and that failure to attend the demand appointment may result in suspension of temporary disability benefits. (Ex. E). No credible evidence was admitted indicating Claimant attended the August 28, 2023 appointment with Dr. Chau.

24. On December 29, 2023, Respondents filed a Motion to Close Claim for Failure to Prosecute with the Division. Claimant responded to the Motion on January 2, 2023. On January 24, 2024, the Division Director denied Respondents' Motion. (Ex. 2).

25. At some point prior to February 13, 2024, Respondents filed a Motion with the Prehearing Unit to Compel Claimant to attend an IME and an appointment with Dr. Chau at Concentra to address the issues of MMI, work restrictions and permanent impairment. Claimant objected to the motion, arguing that Dr. Bradley's October 21, 2022 HP RFI placed him at MMI and indicated he suffered a permanent impairment, rendering the demand appointment and IME unnecessary. (Ex. A).

26. On February 13, 2024, PALJ Zarlengo Issued an Order granting Respondents' Motion (the "February 13, 2024 PHO") Order. The PALJ determined that Claimant's MMI was undetermined and there was no record that Dr. Bradley had assigned a permanent impairment rating. Thus, until Claimant underwent an impairment rating evaluation, the Respondents are unable to pay any additional benefits that may be due and owing. The PALJ found that that compelling Claimant to attend an appointment with Dr. Chua at Concentra is within his statutory authority under §8-43-207.5 (2)(b) as a necessary procedural matter to permit the parties to determine MMI and what, if any, permanent impairment is to be assigned. The PALJ then determined that § 8-43-404 (1)(a), C.R.S., which permits the Respondents to require Claimant to submit to physician examinations paid for by Respondents, constituted good cause for compelling the Claimant to attend an IME and ATP appointment with Dr. Chau. (Ex. A).

27. After considering the parties' positions, the PALJ granted Respondents' motion, and ordered Claimant to attend an appointment with Dr. Chau and an IME on March 14, 2024. At the time of the February 13, 2024 PHO, Claimant was residing in North Carolina, and had traveled to the Ivory Coast in Africa throughout the month of February 2023. The February 13, 2024 PHO required Respondents to pay for Claimant's domestic transportation, lodging, and meal reimbursement for the March 14, 2024 appointments. (Ex. A). Claimant did not attend either appointment. (See Ex. B).

28. At hearing, the parties stipulated that Claimant's date of MMI is December 30, 2022. Contrary to Claimant's statement in his position statement, the parties did not stipulate that Claimant was at "Permanent Impairment assignment status as of October 21st, 2022.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find

that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *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).

Claimant's Claims

In his Application for Hearing, Claimant has asserted multiple issues for determination, including appeal of the February 13, 2024 Prehearing Order, requesting reinstatement of temporary total disability benefits, and claims for penalties. Each of these are addressed in turn:

Appeal Of February 13, 2024 Prehearing Order

Claimant contends the PALJ erred in multiple respects when issuing the February 13, 2024 PHO requiring Claimant to attend an IME and appointment with an ATP, presumably to address MMI, work restrictions and conduct a permanent impairment evaluation. As found, in the February 13, 2024 PHO, the PALJ determined that the lack of an MMI determination and impairment rating precluded Respondents from paying Claimant any additional benefits that may be due. The PALJ properly found that compelling Claimant to attend an ATP appointment and IME is within his statutory authority under §8-43-207.5 (2)(b) as a procedural matter. The PALJ also properly determined that § 8-43-404 (1)(a), C.R.S., which permits the Respondents to require submit to physician examinations paid for by Respondents, constituted good cause for compelling the Claimant to attend an IME and ATP appointment with Dr. Chau.

Claimant asserts that the PALJ made multiple "errors" in fact or law in issuing the February 13, 2024 PHO. Claimant's arguments are primarily based on his position that

his ATP – Dr. Bradley – placed him at MMI effective December 30, 2022, and assigned a permanent impairment. In his Position Statement, Claimant states that "bedrock foundation" of his argument is that "a treating physician's determination as to MMI and medical impairment cannot be disputed in the absence of an IME within 30 days of the above determination." Thus, according to Claimant's reasoning, Respondents were obligated to file a final admission of liability (FAL) consistent with Dr. Bradley's opinion and pay him permanent disability benefits, or request a DIME before January 30, 2023. Claimant contends that because Respondents failed to take any of these actions, the PALJ lacked jurisdiction to order him to attend further medical appointments or an IME. For the reasons set forth below, Claimant has failed to establish that the PALJ erred in issuing the order compelling him to attend an IME or an ATP appointment.

Claimant's MMI and Permanent Impairment Status

The PALJ properly found that Claimant's MMI status was undetermined and that no permanent impairment rating had been assigned. Section 8-42-107 (b)(I) provides that an authorized treating physician shall make the determination as to when an injured employee reaches MMI. Once the date of MMI is determined, and the ATP determines an injured worker has sustained a permanent medical impairment, the ATP must determine the appropriate impairment rating under the AMA Guides. § 8-42-107(c), C.R.S. Under W.C.R.P. 5-5 (D), an ATP must determine the permanent impairment within 20 days after an MMI determination is made. Once a determination of impairment is made and delivered to the insurer, W.C.R.P 5-5 (E) requires insurers to either file an admission of liability within 30 days, or request a Division Independent Medical Examination (DIME) to challenge the ATP's MMI and impairment determinations. As correctly stated by PALJ Zarlengo in the February 13, 2022 PHO, "The assignment of permanent impairment is a legally necessary prerequisite to filing a Final Admission of Liability and payment of any permanent disability benefits that may be owed."

Thus, Respondents' obligation to file a final admission of liability (FAL) or request a DIME would only be triggered if Claimant were placed at MMI and the ATP provided the Respondents with an impairment rating. Because Claimant has failed to establish that Dr. Bradley placed Claimant at MMI, assigned a permanent impairment rating, or delivered an impairment rating to Insurer, his MMI and permanent impairment status remained undetermined. Consequently, the PALJ committed no error in this regard.

In reaching his decision, the PALJ reviewed the October 21, 2022 WC 164 Form, and found that Dr. Bradley's conclusions and opinions regarding MMI, and permanent impairment were "at best ambiguous." He noted that there was no other indication that an ATP had placed Claimant at MMI or assigned a permanent impairment, and that absent additional information to the contrary, it must be assumed a permanent impairment rating has not been completed. Although the PALJ reached his conclusion that Claimant had not been placed at MMI and no permanent impairment rating had been issued based on a review of the October 21, 2022 WC 164 Form, the complete record before the undersigned ALJ, demonstrates that the PALJ's determination was correct, and the PALJ did not error.

The evidence demonstrates that Dr. Bradley did not place Claimant at MMI at any point. The record contains no indication that any physician conducted an impairment evaluation or assigned Claimant any specific impairment ratings for his work-related injuries. On the October 21, 2022 WC 164 Form Dr. Bradley checked the box next to the statement: "Injured worker is not at MMI, but is anticipated to be at MMI in/on" and wrote "12-30-22." (Ex. 6.A.). This statement clearly indicates Claimant had not reached MMI as of October 21, 2022. The statement that Claimant was "anticipated to be at MMI" by December 30, 2022, is a speculative statement reflecting Dr. Bradley's expectations, but does not constitute a determination that Claimant actually reached MMI on December 30, 2022. Furthermore, the narrative medical report for October 21, 2022 does not indicate Claimant had reached or would reach MMI at any certain date, and indicates under the "Plan" section that Claimant needed to follow up with Dr. Shoemaker and Dr. Griggs. (Ex. 6.A., p. Claimant 134-135).

The speculative nature of the statement that Claimant was "anticipated" to reach MMI on December 30, 2022, is further illustrated by the WC 164 Forms from Claimant's previous visits on September 4, 2022 , September 15, 2022 , and October 4, 2022. On each of these forms, the providers (Dr. Bradley, and PA Chau) checked the box next to the statement "Injured worker is not at MMI, but is anticipated to be at MMI in/on" and wrote "12-09-22." This indicate that statements regarding "anticipated" dates of MMI were subject to change, and mere estimates, rather than definitive determinations of MMI. Because Claimant did not return to COMP after October 21, 2023, the record contains no evidence that either Dr. Bradley or PA Chau further addressed his MMI or impairment status. Based on the admitted evidence, the ALJ finds that the PALJ correctly determined that Claimant's MMI status was undetermined.

Next, the credible evidence does not establish that Dr. Bradley determined that Claimant had a permanent medical impairment as of October 21, 2022. On the October 21, 2022 HP RFI Form, Dr. Bradley indicated that Claimant's work restrictions were to extend from October 21, 2022 to "permanent."[1] This statement conflicts with the information contained in Dr. Bradley's narrative report and the WC 164 Form from October 21, 2022. Dr. Bradley's narrative report, states "Able to return to modified duty until: 11-18-2022," and "Limitations/Restrictions : Temporary restrictions." (Ex. 6.A., p. Claimant 135). Similarly, under the heading "Limitations/Restrictions, on the WC 164 Form for October 21, 2022, Dr. Bradley checked the box for "Temporary Restrictions." Moreover, even assuming Dr. Bradley opined that Claimant would have permanent work restrictions, work restrictions and permanent impairment ratings are different concepts. Under § 8-42-101 (3.7), C.R.S., impairment ratings are based on the AMA Guides to the Evaluation of Permanent Impairment (3rd. Ed) ("AMA Guides"), and are used to calculate permanent partial disability benefits, and are determined after an injured worker reaches MMI. On the other hand, the imposition of work restrictions (whether permanent or

[1] The ALJ recognizes that an amended or altered version of the October 21, 2022 HP RFI exists. However, the evidence was insufficient to establish who made the changes to the document or when those changes were made. As such, the ALJ finds that the altered/amended version is of no evidentiary value in determining whether Dr. Bradley assigned Claimant a permanent impairment.

temporary) does not serve as the basis for an award of permanent impairment benefits, and is only evidence to be considered in determining whether an injured worker is entitled to temporary disability benefits under § 8-42-105 and/or § 8-43-106, C.R.S. In short, a physician's recommendation of work restrictions is not the same thing as a determination of permanent impairment.

Although Dr. Bradley checked the box next to "Permanent Impairment" on the October 21, 2022 WC 164 Form, no impairment worksheet or narrative explaining the impairment was attached. Moreover, given that the same box was checked on the three previous WC 164 Forms, including the form from Dr. Bradley's first date of evaluation (*i.e.*, September 8, 2022), the ALJ finds that no inference may be drawn from this information on the form. The lack of impairment worksheets or narratives explaining or describing Claimant's impairment rating leads the ALJ to the conclusion that, more likely than not, Dr. Bradley made no express determination of permanent impairment.

Considering the evidence as a whole, the ALJ finds that the PALJ's determination that Claimant had not been placed at MMI and no impairment rating had been performed was not an error. Consequently, the Respondents were not barred from requesting that Claimant attend an IME or an ATP appointment to determine Claimant's MMI and impairment status. Similarly, because MMI and permanent impairment must be determined in the first instance by an ATP, it is a necessary procedural matter for the Claimant to attend an examination with an ATP to facilitate an MMI finding and permanent impairment rating. Furthermore, § 8-43-404(1)(a), C.R.S., permits respondents to require an injured worker to submit to examinations with a physician at the respondents' expense. As procedural matters, these are within the PALJ's statutory authority as set forth in § 8-43-207.5 (2), C.R.S., which allows a PALJ to issue interlocutory orders regarding procedural matters. Accordingly, the Claimant has failed to establish that the PALJ erred in ordering him to attend the IME and ATP appointments.

Claimant's Other Arguments Regarding the PALJ Order

Claimant has also asserted other arguments and errors on the part of the PALJ which do not alter the ALJ's conclusion that the PALJ's order was properly granted.

First, Claimant argues that the PALJ failed to consider an allegedly falsified and altered medical record. Claimant asserts that the October 21, 2022 HP RFI was "falsified" when the word "permanent" was crossed-out and replaced with the date "11-18-22." (Ex. 6.J., p. Claimant 301-302). The issue before the PALJ was whether Claimant could be compelled to attend an IME and ATP appointment. Claimant offers no cogent explanation as to how consideration of the document would have compelled the PALJ to conclude that Claimant had been placed at MMI on December 30, 2022 or that he had been determined to have a permanent impairment. To the extent the Claimant asserts that the PALJ should have taken some other action based on the existence of the allegedly falsified document, no credible evidence was offered to indicate that issue was before the PALJ.

Next, Claimant contends that W.C.R.P. Rule 12-2(B), somehow renders Dr. Bradley's putative MMI and permanent impairment determinations binding. Given the PALJ's correctly found that Dr. Bradley had not placed Claimant at MMI or assigned an impairment rating, this argument is moot. Notwithstanding, the cited rule states "Any Level II accredited physician determining permanent impairment shall rate in accordance with their administrative, legal and medical roles as established by Level II accreditation." Claimant's argument that this makes his interpretation of Dr. Bradley's statements binding is a non sequitur. The cited provision merely requires rating physicians to follow Level II accreditation in determining permanent impairment, and is not legally relevant to the argument advanced by Claimant, or to the February 13, 2024 Prehearing Order.

The Claimant's argument that the Respondents engaged in alleged "dilatory tactics," by scheduling him for medical appointments, rests on the mistaken notion that Dr. Bradley had placed him at MMI and assigned permanent impairment. As discussed above, Claimant was not placed at MMI, and no permanent impairment was assigned. As such, the Respondents were within their rights under § 8-43-404(1)(a), C.R.S., to require Claimant to attend medical examinations. The ALJ concludes that Claimant has failed to establish grounds for overturning the February 13, 2024 PHO.

Reinstatement Of Temporary Total Disability Benefits

The evidence demonstrates that Respondents paid Claimant temporary total disability (TTD) benefits until June 13, 2023. As of that date, Respondents suspended Claimant's TTD benefits based on Claimant's refusal to attend a demand appointment with Concentra. Claimant seeks to reinstate these benefits. At hearing, the parties stipulated that Claimant's date of MMI is December 30, 2022. The parties' stipulation renders the issue of reinstatement of TTD benefits after June 12, 2023 moot.

An injured worker is entitled to TTD benefits when an industrial injury causes a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). 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.

One effect of this stipulation is to terminate Claimant's entitlement to TTD benefits on December 30, 2022, the date of MMI. Because Claimant is not entitled to TTD benefits after reaching MMI, the ALJ may not reinstate TTD benefits as of June 13, 2023. Claimant's request for reinstatement of TTD benefits after June 13, 2023 is denied.

Penalty Claims

Specificity Standard

The Act requires parties seeking a penalty state the grounds with specificity. Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." Claimant must allege a violation that would support a penalty pursuant to § 8-43-304, C.R.S. upon which relief may be granted. Claimant must therefore allege facts that violate the Act, a failure to perform a duty prescribed by the Director or the Panel, or a failure or refusal to obey any lawful order of the Director or the Panel. See *Fera v. Indus. Claim Appeals Office*, 169 P.3d 231, 234 (Colo. App. 2007), *as modified on denial of reh'g* (June 21, 2007). Penalties may only be awarded if proven by a preponderance of the evidence that a party violated a statute, rule, or order. *Taylor v. Backwood Video*, W.C. No. 4-501-466 (ICAO May 24, 2002); *Colorado Compensation Ins. Auth v. ICAO*, 907 P.2d 676 (Colo. App. 1995). In considering whether penalties should be imposed, an ALJ must look to the express duties and prohibitions imposed, and may not create implied duties or responsibilities. *Villa v. Wayne Gomez Demolition & Excavating, Inc*., W.C. No. 4-236-951 (ICAO Jan. 7, 1997). The failure to state the grounds for penalties with specificity may result in dismissal of the penalty claims. *In re Tidwell*, WC 4-917-514-03 (ICAO Mar. 2, 2015).

The purposes of the specificity requirement are to both: (1) provide notice of the basis of the alleged violation so the putative violator can have an opportunity to cure the violation and (2) provide notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense. *See Major Medical Ins. Fund v. Indus. Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Davis v. K Mart,* W.C. No. 4-493-641 (ICAO Apr. 28, 2004). The notice aspect of the specificity requirement is designed to protect the fundamental due process rights of the alleged violator to be "apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of" its position. *In re Tidwell*, W.C. No. 4-917-514-03 (ICAO Mar. 2, 2015). Nevertheless, the statute does not prescribe a precise form for pleading penalties and an ALJ may consider the circumstances of the individual case to ascertain whether the application for hearing was sufficiently precise to satisfy the statute. *See Davis v. K Mart*, W.C. No. 4-493-641 (ICAO Apr. 28, 2004).

Claimant's Specific Penalty Claims

In his application for hearing, Claimant asserts multiple claims characterized as "penalties." The Application identifies seven items listed as either "Errors in Facts" or "Errors In Facts and in Law." However, these seven items are assertions of error in the February 13, 2024 Pre-Hearing Order, and do not constitute penalty claims under the Act, and have been addressed above.

Claimant's Application for Hearing asserts a penalty claim for Respondents' alleged violation of W.C.R.P. 12. Although the precise basis for this allegation is unclear

from Claimant's Application, in his Position Statement Claimant appears to assert that Respondents violated § 8-43-402, which provides:

> If, for the purpose of obtaining any order, benefit, award, compensation, or payment under the provisions of articles 40 to 47 of this title, either for self-gain or for the benefit of another person, anyone willfully makes a false statement or representation material to the claim, such person commits a class 5 felony and shall be punished as provided in section 18-1.3-401, C.R.S., and shall forfeit all right to compensation under said articles upon conviction of such offense.

The alleged factual basis for this "penalty" claim appears to be Claimant's assertion that Respondents fabricated the October 21, 2022 HP RFI by striking out the word "permanent'." As found, no credible evidence was admitted indicating who made the changes to the October 21, 2022 HP RFI, the purpose of the changes, or when they were made. Claimant has failed to establish that Respondents played any part in the change, or that the change itself constitute a "false statement or representation." As such, Claimant's claim for penalties for violation of § 8-43-402 is denied.

At hearing, Claimant also asserted that Respondents violated W.C.R.P. Rule 5-5(E), which addresses when an insurer is obligated to file an FAL after an ATP delivers an determination of impairment. The ALJ presumes this claim is based on Claimant's position that Respondents were obligated to file and FAL or request a DIME within 30 days of Dr. Bradley's October 21, 2022 HP RFI. As previously found, there is no credible evidence to establish that Dr. Bradley assigned an impairment rating, or delivered a determination of impairment rating to Respondents that would trigger any obligation under Rule 5-5 (E). Accordingly, Claimant has failed to establish that Respondents violated the Rule. Claimant's claim for penalties for violation of W.C.R.P. 5-5 (E) is dismissed.

Claimant's Remaining Requests for Relief

In his Position Statement, Claimant makes several additional requests for relief, including compelling Respondents to "settle this case in a reasonable timeframe," declaring Respondents "guilty of dilatory tac-tics [sic] and no longer a part of the current proceedings with stringent deadline to settle the case;" a request for "at least $12 million in penalty from Defendants and damages to be paid to Claimant"; and a request that Respondents' counsel be banned for 10 years "during which his Law license should be withdrawn for weaponizing the Colorado Worker's Compensation System in addition to jail time as the Court deems fit."

"ALJs are not judges of general jurisdiction." *Muragara v. Sears Roebuck & Co.*, W.C. Nos. 4-726-134, 4-712-263 (ICAO, Sept. 8, 2015). Instead, "the administrative tribunals which adjudicate workers' compensation claims are created by statute, and the jurisdiction, powers, duties, and authority of these tribunals are limited to that provided by statute." *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905, 908 (Colo. App. 1995). Nothing in the Colorado Workers' Compensation Act confers authority on an ALJ to award

damages, require settlement, regulate, or discipline attorneys or impose jail sentences as suggested by Claimant. Accordingly, Claimant's remaining requests for relief are denied.

Respondents' Claim

Respondents have requested that Claimant's TTD benefits be suspended for his failure to comply with the February 13, 2024 Order. As with Claimant's request for reinstatement of TTD benefits, this issue is moot. The parties' stipulation that Claimant's date of MMI is December 30, 2022 terminated Claimant's right to TTD benefits pursuant to §8-42-105(3)(a), C.R.S. Because Claimant is not entitled to TTD benefits after December 30, 2022, Respondents are not obligated to pay TTD benefits, and there are no benefits to suspend.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that PALJ erred in issuing the February 13, 2024 PHO.

2. Claimant's request for reinstatement of TTD benefits after June 13, 2023 is DENIED as moot.

3. Claimant's request for penalties against Respondents for alleged violations of §8-42-403, W.C.R.P Rule 12, and W.C.R.P. Rule 5-5(E), are DENIED.

4. Respondents' request to terminate Claimant's TTD benefits for violation of the February 13, 2024 PHO is DENIED as moot.

5. Claimant's remaining requests for relief are DENIED.

6. 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 12, 2024

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

ISSUES

Have Respondents demonstrated, by a preponderance of the evidence, that temporary total disability (TTD) benefits should be terminated as of February 13, 2024, pursuant to Section 8-42-105(3)(d)(I), C.R.S. due to Claimant's alleged failure to accept modified employment?

FINDINGS OF FACT

1. On September 29, 2022, Claimant suffered a work injury.

2. Respondents filed a General Admission of Liability admitting to temporary total disability (TTD) beginning September 30, 2022, at the rate of $1,228.99 per week. Due to work restrictions from his authorized treating physician (ATP), Claimant has not returned to work. Respondents have continued to pay Claimant TTD benefits.

3. On April 14, 2023, Respondents attempted to offer modified duty to Claimant. In that April 14, 2023 offer, the position was identified as a "Remote Work-Work From Home" position as a transcriber for [Redacted, hereinafter BN] This offer was for 30 hours per week (five days a week, six hours per day). Claimant's ATP, Dr. Justin Tingey, approved the physical requirements of the offered position.

4. Information regarding wages for this offer was identified as "please refer to adjuster."

5. On January 22, 2024, Respondents sent Claimant a second offer of modified employment. That offer was for work at the [Redacted, hereinafter FB]. The hours of work were identified as Monday through Friday, from 9:00 a.m. to 4:00 p.m. Dr. Tingey approved some of the physical demands of the position, but opined that other activities would exceed Claimant's work restrictions.

6. Information regarding wages for the second offer stated "Defer to adjuster."

7. Upon receipt of the offers of modified duty described above, Claimant's counsel notified the transitional return to work specialist that it is Claimant's position that the offers were insufficient because no wages were identified.

8. Thereafter, Respondents revised the January 2024 offer of modified duty to reflect that in exchange for Claimant's work, he would continue to be paid TTD benefits.

9. Claimant has not accepted either offer of modified duty.

10. [Redacted, hereinafter MA], Vocational Consultant, testified that return to work programs, such as the one offered to Claimant in this case, are beneficial to injured workers. MA[Redacted] described these benefits as including improved recovery times, as well as mental health benefits.

11. Respondents argue that Claimant's TTD benefits should be terminated pursuant to Section 8-42-105(3)(d)(I), C.R.S. for Claimant's failure to accept the offer of modified duty.

12. Claimant argues that continued payment of TTD benefits does not constitute wages. Therefore, the offers of modified duty were invalid.

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 Htigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra.* A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

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

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

4. Section 8-42-105(3), C.R.S. provides:

> Temporary total disability benefits shall continue until the first occurrence of any one of the following: (a) The employee reaches maximum medical improvement; (b) The employee returns to regular or modified

employment; (c) The attending physician gives the employee a written release to return to regular employment; or **(d)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee** in **writing, and the employee fails to begin such employment.** (emphasis added).

5. In the present case, the ALJ must determine if Claimant's TTD benefits should be terminated pursuant to Section 8-42-105(3)(d)(I), C.R.S. In reaching this determination, the ALJ must determine whether continued payment of TTD benefits constitutes payment of wages as part of an offer for modified employment.

6. WCRP 6-1 provides guidance regarding the termination of TTD benefits. Specifically, TTD may be terminated, without a hearing, when:

> (4) A copy of a written offer delivered to the claimant with a signed certificate of service, containing both an offer of modified employment, setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions.
>
> (a) A written offer of modified duty may only be used to terminate benefits pursuant to this subsection if: i) A copy of the written inquiry to the treating physician is provided to the claimant by the insurer or employer at the time the authorized treating physician is asked to provide a statement on the claimant's capacity to perform the offered modified duty; and ii) The claimant is provided a period of 3 business days from the date of receipt of the offer to return to work in response to the offer. WCRP 6-1(4)

7. Section 8-4-101(14)(a), C.R.S., of the Colorado Wage Act, provides: that wages or compensation means:

> (1) All amounts for labor or service performed by employees, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculating the same or whether the labor or service is performed under contract, subcontract, partnership, sub partnership, station plan, or other agreement for the performance of labor or service if the labor or service to be paid for is performed personally by the person demanding payment. No amount is considered to be wages or compensation until such amount is earned, vested, and determinable, at which time such amount shall be payable to the employee pursuant to this article.

8. Under the Colorado Workers' Compensation Act, "wages" have been defined as means the money rate at which services rendered are recompensed under the contract of hire in force at the time of the injury. Section 8-40-201(19)(a), C.R.S.

(1995 Cum. Supp.); *Aspen Highlands Skiing Corp. v. Apostolou,* 854 P.2d 1357 (Colo. App.1992), affd, 866 P.2d 1384 (Colo.1994).

9. Temporary disability benefits[1] are designed to replace a portion of an injured worker-s wages while they are unable to work. Such benefits are not subject to federal or state income taxes; are also not subject to Social Security and Medicare taxes; and are paid by the workers' compensation insurance carrier, not the employer. Employers do not include temporary disability benefits in their payroll calculations.

10. If the amount of wages received while performing modified duty is less than a claimant's admitted average weekly wage **(AWW),** the claimant is also entitled to temporary partial disability benefits.

11. An insurance carrier cannot pay TTD benefits and temporary partial disability (TPD) benefits for the same period of time.

12. WCRP 1-7(A) provides an opportunity for employers to pay wages instead of temporary disability benefits. The rule specifically states "[a]n employer who wishes to pay salary or wages in lieu of temporary disability benefits may apply to the Director for authorization to proceed pursuant to [Section] 8-42-124(2), C.R.S." The ability of an employer to continue to pay an injured worker their normal wages, in lieu of temporary disability benefits, supports the conclusion that temporary disability benefits are distinguishable from wages.

13. The ALJ concludes that payment of TTD benefits are not wages. Rather TTD benefits are an entitlement under the Workers' Compensation Act.

14. The ALJ recognizes the definition of wages under Section 8-4-101(14)(a), C.R.S.. The ALJ also notes that statutory provision specifically provides that "[n]o amount is considered to be wages or compensation until such amount is earned, vested, and determinable."

15. In the present case, Respondents have offered to pay Claimant TTD benefits he is already entitled to receive. The ALJ concludes that Claimant cannot simultaneously be entitled to receive TTD benefits, while also being forced to work modified duty to "earn" those same continued TTD payments.

16. In addition, under Respondents' proposed scenario, Claimant would be entitled to be paid both the proposed "TTD benefits wages" and TPD benefits. TPD benefits would be the amount of the difference between Claimant's TTD benefits and his AWW. Clearly, such a dual payment of TTD and TPD benefits is contrary to the statutory framework for payment of temporary disability benefits.

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[1] In this order, the term "temporary disability benefits addresses both temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits.

17. The ALJ further concludes that the offers of modified employment extended to Claimant in this case were not valid, as Claimant was not offered actual wages. Therefore, Respondents have failed to demonstrate, by a preponderance of the evidence, that Claimant's TTD benefits should be terminated pursuant to Section 8-42-105(3)(d)(I), C.R.S.

ORDER

It is therefore ordered:

1. Respondents' request to terminate Claimant's temporary total disability (TTD) benefits pursuant to Section 8-42-105(3)(d)(I), C.R.S., is denied and dismissed.

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

Dated July 16, 2024.

Cassandra M. Sidanycz
Administrative Law Judge

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

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

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Respondent on May 4, 2023.

2. Whether Claimant established by a preponderance of the evidence an entitlement to a general award of medical benefits reasonable and necessary to cure or relieve the effects of an industrial injury.

3. Whether Claimant established by a preponderance of the evidence that right hip surgery recommended by Brian White, M.D., is reasonable and necessary to cure or relieve the effects of an industrial injury.

FINDINGS OF FACT

1. Claimant is employed by Respondent as a detective sergeant in the [Redacted, hereinafter DP], and has worked there for 25 years. On May 4, 2023, Claimant was leaving work and taking the elevator from the second floor to the "B2" parking level, three floors below. While the elevator was moving down, there was a malfunction. Claimant testified that the elevator came to a "really hard stop and it jolted and just jammed me." She described the incident as if hitting a cement wall.

2. After the incident, Claimant reported to her supervisor that she had sustained injuries including a headache, neck pain, and tooth pain. Her supervisor advised Claimant to call Employer's "OUCH" line. Claimant reported to the OUCH line attendant that the elevator had fallen four floors and knocked her off balance. (Ex. B).

3. Claimant went to the emergency department at Good Samaritan Hospital on May 4, 2023, where she reported that she was in an elevator that dropped four floors. Claimant reported right-sided neck pain, headache, low back pain, and jaw pain. Claimant was diagnosed with a neck strain, lumbar strain, and tooth pain, and discharged with medications. (Ex. E).

4. The admitted records contain two undated treatment notes from dentist J. Marquez, DMD. (Ex. G). Claimant testified that the dentist performed evaluations, but did not administer any treatment. Other than these two evaluations, Claimant did not receive further evaluation or treatment for her reported tooth or jaw pain, and Claimant was not diagnosed with any injury to her tooth or jaw. Claimant's tooth pain has resolved.

5. On May 9, 2023, Claimant began treatment through COSH, initially seeing Cynthia Kuehn, M.D., and later seeing Jennifer Pula, M.D. (who assumed the role of authorized treating physician (ATP)). Over the following six months, Claimant regularly saw Dr. Pula,

and attended physical therapy. During this time, she reported improvements in her neck and tooth, but continued to report mid and lower back pain. (Ex. F).

6. On May 12, 2023, Claimant reported to Dr. Pula that she remembered carrying "her heavy bag with all her police gear over her right shoulder and thinks that might be why her right side is worse." Dr. Pula assigned work restrictions including no wearing police equipment, changing positions frequently, and working no more than 4.5 hours per day. (Ex. F).

7. On May 26, 2023, Respondents filed Notice of Contest, indicating further investigation of Claimant's claim was necessary. (Ex. C).

8. On May 26, 2023, Claimant to Dr. Pula reported that she had begun lifting weights again, but noticed spams in the mid back with bench and shoulder presses. Dr. Pula removed Claimant's work-hour restriction, but continued to recommend no police equipment and frequent position changes. By June 27, 2023, Claimant reported that her back was better, and her only then existing complaint was muscle spasms in the right thoracic spine. Dr. Pula returned Claimant to full duty and recommended she continue physical therapy. (Ex. F).

9. On July 25, 2023, Claimant returned to Dr. Pula and reported that she had developed gluteal pain on the right. (Claimant's records prior to July 25, 2023 do not reflect reports of hip pain). Over the following months, Claimant continued to report pain in the lower right back, radiating into the hip and down the thigh, which continued to worsen with activities such as working out and wearing her police gear. After July 25, 2023, Claimant's treatment focused primarily on her right hip. Ultimately, Dr. Pula referred Claimant for a right hip MRI and for evaluations with Scott Primack, D.O. (for pain management), and Brian White, M.D, (for an orthopedic evaluation). (Ex. F).

10. The right hip MRI, performed on November 21, 2023, showed low grate partial thickness tearing at the right gluteus minimum tendon, a low-grade strain of the right gluteus minimum muscle, and tearing of the right acetabular labrum. (Ex. I).

11. Claimant saw Dr. Primack on December 14, 2023, and reported that the elevator fell three floors. Dr. Primack wrote that the elevator "landed quite hard and causing giant [omitted word] throughout her entire body." From which the ALJ infers that Dr. Primack intended to convey that Claimant reported the elevator had exerted significant force on her entire body. Based on his evaluation, and apparent review of the MRI, Dr. Primack presented several treatment options including no treatment, PRP injections, and corticosteroid injections. Claimant elected to undergo a PRP injection, which Dr. Primack performed on March 26, 2024. (Ex. J). Claimant continued to see Dr. Primack through at least May 1, 2024. (Ex. 12).

12. Claimant saw Dr. White on January 3, 2024, reporting that the elevator dropped three floors, causing a compression type impact. She indicated that she had issues with her right hip since the incident. Claimant reported that she had no hip pain or treatment prior to the elevator incident. Dr. White recommended a right hip arthroscopic labral

reconstruction, acetabular rim trimming, and greater trochanteric bursectomy. (Ex. K). After Insurer denied authorization for the surgery, Dr. White wrote an appeal letter in which he advocated for approval of the recommended surgery indicating that Claimant had immediate pain in her hip joint after the elevator incidence, and that Claimant's MRI demonstrate "a labral tear with no arthritis so this is a soft tissue injury from the compressive force of the elevator drawing." (Ex. 11). To date, Insurer has not authorized, and Claimant has not undergone the surgery recommended by Dr. White.

13. Claimant's last documented visit with Dr. Pula was on April 10, 2024, at which time Claimant was still recovering from the PRP injection performed by Dr. Primack. Dr. Pula opined that Claimant was not yet at MMI. (Ex. F).

14. On April 1, 2024, Claimant attended an independent medical examination (IME) performed by Alfred Lotman, M.D., at Respondents' request. Dr. Lotman testified at hearing and was admitted as an expert in orthopedics. In conjunction with the IME, Dr. Lotman reviewed Claimant's medical records and imaging reports, performed an examination, and reviewed the elevator video -- Ex. N. Dr. Lotman testified that Claimant's imaging studies show an acetabular labral tear, and tear of the tendinous insertion of the gluteus minimus muscle. Dr. Lotman testified that he disagrees with Dr. White's opinion that the Claimant sustained a compressive injury, based on his review of the MRI, and that he did not see evidence of compressive forces sufficient to cause an injury in Claimant's right hip, or forces sufficient to cause a cervical injury. Dr. Lotman concluded that it was not medically probable that the elevator incident would result in an acetabular labral tear or the need for surgery. Although, he did agree that the surgery recommended by Dr. White is medically reasonable.

15. Claimant testified at hearing that in addition to her job duties, she participates in other recreational facilities, such as canoeing, swimming, golfing, and hiking, and that prior to May 2023, she had no difficulties doing those activities due to her hip. Claimant testified that on May 4, 2023, she entered the elevator at police headquarters with a service dog she is training, to descend three floors to the parking garage. Claimant indicated the elevator came to a hard stop and "jammed" her, and it felt like it hit a cement wall. Claimant testified that she did not know if the elevator descended at a normal speed, and did not have a sensation of free falling, but only that the elevator came to a very hard stop.

16. She testified that she had an immediate headache, neck pain, and tooth pain after the elevator stopped. When she walked from the elevator to her car, she indicated she began to notice leg and back pain. She reported the incident to her lieutenant, and called the "OUCH" line. Claimant testified that when she went to the emergency room at Good Samaritan, she had pain in her lower back, butt, teeth, and neck.

17. The elevator in which Claimant was riding was equipped with a video camera that recorded the incident. The video (Ex. N) is inconsistent with Claimant's perception of the event, and with her later reports to health care providers. The video demonstrates that Claimant entered the elevator with her dog, carrying a small messenger bag on her right shoulder. Claimant pressed a button, and stood in the elevator looking toward the floor.

After approximately 25 seconds, the elevator appears to come to a stop and slightly shake. Claimant then looked up toward the camera. It does not appear that the elevator's motion imparted any significant force on Claimant. For example, Claimant's head was not snapped forward or backward, her knees did not buckle, the lanyard around her neck did not rise or fall, her shoulder bag was not dislodged, and she did not appear to lose her balance, brace her body, or reach for support. The video continues to show Claimant for approximately 24 seconds after the incident before she exited the elevator. During this time, while Claimant appeared startled, she did not exhibit any behaviors consistent with a traumatic injury, such as reaching for a body part or limping.

STIPULATIONS

At hearing, the parties stipulated to the following:

1. Claimant's average weekly wages is $2,632.49.

2. If the claim is found compensable, Claimant is entitled to temporary total disability benefits from May 5, 2023 to May 14, 2023, and temporary partial disability benefits from May 15, 2023 to May 2023.

3. Exhibit N is a true and accurate depiction of the elevator incident, and the elevator is the only elevator at police headquarters equipped with a camera. The camera is affixed inside the elevator and travels with the elevator at the same speed.

CONCLUSIONS OF LAW

Generally

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

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

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO Aug. 25, 2014).

Claimant has failed to establish by a preponderance of the evidence that she sustained an injury arising out of the course of her employment with Employer. The threshold issue in this case is whether the May 4, 2023 elevator incident was sufficient to cause a compensable injury. Claimant attributed multiple injuries to the incident, initially reporting neck pain, low back pain, tooth pain and a headache. Approximately twelve weeks later Claimant began reporting symptoms in her hip.

Although Claimant's health care providers have attributed these conditions to the elevator incident, no credible evidence was admitted that any treating provider viewed the video of the incident. Instead, the providers based their opinions on Claimant's description of the incident. Specifically, that the elevator dropped three or four floors, stopped abruptly and imparted significant forces on Claimant's body. The video evidence, however, demonstrates that the elevator incident was not consistent with Claimant's perception of the incident, or her reports to health care providers. While the video demonstrates that the Claimant was surprised or stunned by the elevator's stop, it does not show that any significant forces were transferred to Claimant. The ALJ finds credible Dr. Lotman's

opinion that the video does not demonstrate Claimant sustained sufficient forces to cause a hip or neck injury.

Claimant also reported to her providers details of the incident that are either inconsistent with the video or her medical records. For example, Claimant reported to Dr. Pula that she was carrying a heavy bag containing all of her police gear, when the video demonstrates Claimant was carrying a small messenger bag. Claimant also reported to Dr. White that she had right hip pain immediately after the incident. Claimant's medical records contain no documentation of hip complaints until July 25, 2023, twelve weeks after the incident. Finally, Claimant's reports to providers that the elevator dropped or fell multiple floors is inconsistent with her testimony that she had no sensation of freefalling, and could not tell if the elevator moved faster than its normal speed.

Dr. White's opinion that Claimant's right hip pathology was the result of compressive forces caused by the elevator incident is not supported by the evidence. First, the elevator video is not consistent with a drop of more than three stories, and shows only that the elevator shook when it came to a stop. Claimant was not knocked off balance, and does not appear to have sustained compressive force sufficient to cause injury. Second, in part, Dr. White's opinion is based on Claimant's report experiencing right hip symptoms "ever since" the elevator incident. Claimant's medical records contain no documentation of hip complaints until July 25, 2023, twelve weeks after the incident. Accordingly, the ALJ does not find Dr. White's opinion persuasive.

Similarly, although Dr. Pula diagnosed Claimant with a neck strain, the diagnosis was based on subjective reports, and the Claimant's reports that the elevator dropped three or four floors, and that she was carrying a heavy bag with all of her police equipment on her right shoulder. No credible evidence was admitted indicating that Dr. Pula reviewed the video of the incident. The ALJ does not find Dr. Pula's opinions persuasive.

Considering all of the evidence, the ALJ finds that Claimant has failed to establish, more likely than not, that the May 4, 2023 elevator malfunction caused a compensable injury. Claimant's claim is denied and dismissed.

Medical Benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School Dist.,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). When the respondents challenge a 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)

Because Claimant has failed to establish a compensable injury, Claimant has failed to establish an entitlement to medical benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that she sustained a compensable injury arising out of the May 4, 2023 elevator incident. Claimant's request for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 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 16, 2024

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that Respondents violated Section 8-43-204(7), C.R.S., by making three settlement payments late, and are subject to penalties.

STIPULATIONS

The parties stipulated to the following:

- The parties entered into a settlement agreement for $65,000.
- Respondents received notice of the approval of the settlement agreement on August 28, 2023.
- Pursuant to Section 8-43-204(7), C.R.S., the settlement proceeds had to be paid to Claimant, or his attorney, within 15 days, i.e., September 12, 2023.
- Respondents issued a check for $56,493.70 on September 13, 2023, and a check for $8,406.30 on September 14, 2023, and check for $100.00 on September 26, 2023.
- Claimant's attorney did not know the exact date he received each check.

FINDINGS OF FACT

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

1. The Claimant and Respondents entered into a settlement agreement in the amount of $65,000.

2. Respondents received notice of the approval of the settlement agreement on August 28, 2023.

3. Pursuant to Section 8-43-204(7), C.R.S., the settlement proceeds had to be paid to Claimant, or his attorney, within 15 days, i.e., September 12, 2023.

4. Respondents issued a check for $56,493.70 on September 13, 2023, and a check for $8,406.30 on September 14, 2023, and check for $100.00 on September 26, 2023.

5. The issuance date of each check is found to be the date each check was mailed to Claimant's attorney. Therefore, the ALJ finds that:

a. The check for $56,493.70, was mailed to Claimant's counsel on September 13, 2023, and was one day late.

b. The check for $8,406.30 was mailed to Claimant's counsel on September 14, 2023, and was two days late.

c. The check for $100.00 was mailed to Claimant's counsel on September 26, 2023, and was 14 days late.

6. Claimant did not present any testimony as to any harm incurred due to the untimely payment of the settlement proceeds. Therefore, the ALJ infers that Claimant did not suffer any harm from the late payment of the settlement proceeds – other than the proceeds were not received when due.

7. Respondents did not present any testimony to explain why the settlement proceeds were not paid timely. Therefore, the ALJ infers and finds that the Respondents knew, or reasonably should have known, that they were in violation of the Act, and that their failure to pay the settlement proceeds within the 15 day time period is objectively unreasonable. However, based on evidence, or lack thereof, the ALJ does not find that their conduct was intentional, vindictive, or reprehensible.

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

I. Whether Claimant proved by a preponderance of the evidence that Respondents violated Section 8-43-204(7), C.R.S., by making three settlement payments late, and are subject to penalties.

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 Bus. Products v. Industrial Claim Appeals Off.*, 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 violates 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 Off.,* 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 Sch. Dist. 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 Off.,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Off.*, 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 8-43-204(7) provides that "Any lump sum payable as a full and final settlement shall be paid to the claimant or the claimant's attorney within 15 calendar days after the date the executed settlement order is received by the carrier." The date settlement proceeds are "paid to the Claimant, is determined by the date the settlement

proceeds are mailed. *See Arnhold v. UPS*, W.C. No. 4-979-208-02 (ICAO, February 24, 2017.)

In this case, Respondents received notice of the approval of the settlement agreement on August 28, 2023. Therefore, pursuant to Section 8-43-204(7), C.R.S., the settlement proceeds had to be paid to Claimant, or his attorney, within 15 days, i.e., September 12, 2023.

Claimant established that:

a. The check for $56,493.70, was mailed to Claimant's counsel on September 13, 2023, and was one day late.

b. The check for $8,406.30 was mailed to Claimant's counsel on September 14, 2023, and was two days late.

c. The check for $100.00 was mailed to Claimant's counsel on September 26, 2023, and was 14 days late.

The parties stipulated that the settlement proceeds were not paid timely. Therefore, Respondents violated § 8-43-204(7), C.R.S. Moreover, the ALJ found that the Respondents failure to pay the settlement proceeds in a timely manner was objectively unreasonable – since no reason was provided by Respondents.

Section 8-43-304(1) of the Colorado Revised Statutes, affords the ALJ wide discretion to impose a penalty from $1.00 up to $1,000.00 for each offense. The statute provides that every day during which a person fails to comply with a lawful order or fails to perform a duty imposed by the Act "shall constitute a separate and distinct violation thereof." § 8-43-305, C.R.S.

An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Housley,* W.C. No. 5-143-923. The ALJ may consider the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by a claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Id.* Any penalty should not be excessive, meaning it should not be grossly disproportionate to the conduct in question. *Id.*

In this case, Claimant did not receive the proceeds of his $65,000 settlement within the 15 day time period set forth in Section 8-43-204(7). However, the check for the majority of the settlement proceeds - $56,493.70 – was issued and mailed just one day late. Then, the next check for the settlement proceeds - $8,406.30 – was issued and mailed to claimant just two days late. Lastly, the final check for the rest of the settlement proceeds - $100.00 – was issued and mailed 14 days late.

The ALJ finds and concludes that the delay of two days in issuing and mailing Claimant the checks for the majority of the settlement proceeds - $64.900 - did not harm Claimant, other than being late. On the other hand, Claimant has a statutory right to receive the entire settlement proceeds timely.

Therefore, based on the facts and circumstance of this case, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that Respondents violated Section 8-43-204(7) and are subject to penalties.

In determining the amount of penalties, the ALJ has considered the fact that Respondents issued and mailed checks for all but $100.00 of the settlement proceeds two days after the statutory deadline and then paid Claimant the remaining $100.00 14 days after the statutory deadline. Thus, Respondents issued checks for more than 99% of the settlement proceeds two days after the statutory deadline. The ALJ has also considered the fact that Claimant did not demonstrate any harm was caused by the untimely payment of all the settlement proceeds in full by the statutory deadline. But Claimant does have a right to all the settlement proceeds on time and that did not occur. Therefore, the ALJ finds and concludes that Respondents shall be penalized at a rate of $20.00 per day for 14 days for their failure to pay the full settlement in a timely matter. This results in a total penalty of $280.00.

ORDER

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

1. Respondents shall pay penalties in the amount of $20.00 per day for 14 days for a total of penalty of $280.00.
2. Pursuant to § 8-43-304(1) the penalty assessed is apportioned between Claimant and the Colorado uninsured employer fund created in § 8-67-105.
3. Fifty percent of the penalty assessed - $140.00 - shall be paid to Claimant and the remaining fifty percent of the penalty assessed - $140.00 - shall be paid to the Colorado uninsured employer fund.
4. 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 17, 2024

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 proved by a preponderance of the evidence that temporary total disability (TTD) benefits should be terminated effective January 3, 2023, pursuant to § 8-42-105(4), C.R.S.

2. Whether Respondents have proved the existence of an overpayment for TTD paid but not owed pursuant to § 8-42-105(4), C.R.S.

FINDINGS OF FACT

1. On October 11, 2005, Claimant began working for Employer as a loss prevention inspector. His responsibilities included inspections of boilers, mechanical equipment, electrical equipment, and HVAC systems. The job was physical and involved climbing ladders and entering confined spaces, narrow windows, and pressure vessels. The job also involved a lot of driving, and Claimant would find himself in the car between four and six hours a day.

2. Claimant was injured on the job on October 25, 2022, when his vehicle was rear-ended at an intersection.

3. Respondents filed a General Admission of Liability (GAL) two days later admitting for ongoing TTD benefits beginning October 27, 2022.

4. Claimant was seen at UC Health on October 31, 2022, by Dr. Stephen Alix, with complaints primarily involving his neck, upper extremities, low back, and legs. Claimant was concerned about the long term effects on his chronic back pain. X-rays were ordered for his neck and low back.

5. On November 10, 2022, Claimant saw Casey Jones, PA-C, at Workwell for his work injury. Claimant told PA Jones that he had never had any prior problems of that type nor any medical treatment for that type of condition. PA Jones diagnosed Claimant with a cervical spine sprain and a strain of the back wall of the thorax. Claimant was referred for massage therapy and physical therapy, and he was prescribed muscle relaxers. PA Jones assigned Claimant temporary work restrictions limiting Claimant to fifteen pounds lifting, pushing, pulling, and carrying, limiting Claimant to driving intervals of no more than thirty minutes, and an allowance to stretch for ten minutes every hour.

6. Claimant continued to follow up with Workwell on November 15, November 21, and December 19, 2022. Each time, Claimant was continued on the same temporary work restrictions.

7. On January 2, 2023, Claimant submitted a resignation letter to his employer. The letter read in relevant part:

> I have been on STD since October 26th and have not returned to my normal physical abilities prior to the auto accident I was involved in. Given my present physical condition at this time, I'm no longer able to perform my job duties up to the standard that I'm accustomed to. Therefore, it is with a sense of sorrow tempered with an overwhelming feeling of gratitude for being a part of this great Company. Regrettably, I must now concede relinquishment of my position with HSB.

8. Respondent-Employer accepted Claimant's resignation, characterizing it as a retirement. In response to that e-mail from Respondent-Employer, Claimant did not correct Respondent-Employer's characterization of the resignation as a retirement. Claimant was paid a $1,000 retirement award. Claimant was seventy-one years old at the time he submitted his resignation.

9. Approximately one month later, on February 9, 2023, Respondents filed a Petition to Modify, Terminate or Suspend Compensation (WC54). Claimant issued a timely objection to Respondents' Petition to Modify on March 1, 2023. Respondents later, on December 14, 2023, file an Application for Hearing seeking to terminate Claimant's TTD based on his voluntary resignation.

10. In the meantime, Claimant's temporary work restrictions were continued on March 13, April 3, April 17, and May 11, 2023. It was not until May 30, 2023, that Dr. Beatty loosened Claimant's temporary work restrictions to lifting, pushing, pulling, and carrying twenty pounds, driving intervals of up to forty-five minutes at a time, and with an allowance for stretching for ten minutes every hour.

11. On June 13, 2023, Claimant complained of ongoing symptoms of vertigo. Dr. Jacqueline Denning continued Claimant's temporary work restrictions. Dr. Denning continued the restrictions on June 29

12. Claimant continued his medical treatment for his injury through Dr. Barry Ogin at Colorado Rehabilitation and Occupational Medicine for the next few months up to January 2024, which included a series of medial branch blocks and radiofrequency ablation of the medial branches. Dr. Ogin did not modify Claimant's temporary work restrictions.

13. On July 10, 2023, Dr. Charity Styles loosened Claimant's temporary work restrictions further to thirty pounds lifting, pushing, pulling, and carrying, with no changes to the limitations on driving and stretching. Dr. Styles continued those restrictions again on September 11, 2023, as did Dr. Gayle Long on October 2, and October 23, 2023.

14. On November 17, 2023, Dr. Long removed the temporary work restriction with regard to ten minutes of stretching every hour, but otherwise left in place the temporary work restrictions of thirty pounds lifting, pushing, pulling, and carrying, and no more than forty-five-minute intervals of driving. She again left these restrictions unchanged on December 15, 2023, January 16, 2024, February 6, 2024, and February 27, 2024.

15. There is no evidence in the record that any treating physician released Claimant to regular employment or placed him at maximum medical improvement.

16. Respondents presented at hearing the testimony of [Redacted, hereinafter JR], Claimant's supervisor at the time of Claimant's injury and subsequent resignation. JR[Redacted] testified that Claimant would have still been employed had he not retired and that the employer planned to maintain Claimant's employment during the course of Claimant's recovery. JR[Redacted] also testified that Respondent-Employer never offers modified duty to its employees, and that it did not offer modified duty to Claimant at any point. Employees are not to return to work until they are one-hundred percent.

17. The Court finds JR[Redacted] testimony credible.

18. Claimant testified in his own defense. Claimant testified consistent with the above regarding the nature of his work as an inspector. Claimant also testified that after his injury he never returned to work in any capacity. Claimant testified that at the time of the injury, he did not have any plans to retire. However, he submitted his resignation because he personally felt that he was unable to continue working his job and that there was no other reason for his resignation. Claimant testified that his condition continued to worsen after his separation from employment.

19. The Court finds Claimant's testimony credible.

20. Ultimately, the Court finds that Claimant is responsible for his own termination from employment. Respondent-Employer did not eliminate Claimant's position and planned to hold the position for Claimant once Claimant was to return to full duty. Claimant's decision to terminate his own employment based on the speculation that he would be unable to return to work in the future was premature and unnecessary.

21. However, the Court also finds that Claimant's wage loss was not the result of his resignation. Claimant's wage loss began immediately upon Claimant's injury and continued as a result of Claimant's temporary work restrictions. At the time of his resignation, Claimant was still completely off work due to his temporary work restrictions and receiving no wages from Respondent-Employer. Claimant continued to be under temporary work restrictions up through January 2024, and there is no evidence that he has been released to regular employment at any point. Claimant's wage loss would have persisted with or without his resignation.

Therefore, Claimant's wage loss in not the result of his resignation but instead due to his ongoing temporary disability.

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).

Termination of TTD

Respondents seek an order terminating TTD as of January 3, 2023, based on Claimant's resignation from employment.

Under section 8–43–201(1), a party seeking to modify a general or final admission, a summary order, or a full order has the burden to prove by a preponderance of the evidence that such a modification should be made. *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014).

In this case, TTD remains open under Respondents' October 27, 2022 GAL. It is Respondents' burden to prove by a preponderance of the evidence that TTD should be terminated effective January 3, 2023.

Respondents argue that TTD should be terminated effective January 3, 2023, on the theory that Claimant is responsible for his own termination of employment, and that TTD should be terminated by virtue of § 8-42-105(4), C.R.S. That statute provides 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." Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S. (emphasis added).

In order for a claimant to be responsible for termination, the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *Colorado Springs Disposal v. Indus. Claim Appeals Off.*, 58 P.3d 1061 (Colo.App.2002); *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo.App.1995). That determination must be based upon an examination of the totality of circumstances. *Id*.

The parties argue a trio of cases that address whether a claimant who retires because he believes that he can no longer perform the work as a result of his injury is responsible for termination.

In *Aguilera v. Valley Nissan Subaru LLC*, W.C. No. 5-112-736 (Dec. 1, 2020), a claimant appealed an ALJ's order terminating temporary total disability benefits on the basis of the claimant's responsibility for termination pursuant to §§ 8-42-105(4) and 8-42-103(1)(g), C.R.S. The claimant in that case had undergone shoulder surgery, and the respondents had begun paying TTD. The employer ultimately terminated the claimant's employment for the claimant's failure to return phone calls to the employer while she was out on TTD and the failure to return to work after her temporary work restrictions had been loosened. The claimant had not been released to regular duty. The respondents filed a Petition to Modify, Terminate, or Suspend compensation with the Division on the basis that the claimant "voluntarily resigned when employer had modified duty available to her at full wages." However, there was no evidence that the employer made a written offer of modified duty as required by § 8-42-105(3), C.R.S. The ALJ found the claimant was responsible for her termination, and, therefore, the ALJ ordered that TTD benefits were

terminated. The ICAO panel reversed the ALJ's order, disagreeing that it was the termination of employment that resulted in the wage loss.

In *Bonney v. Pueblo Youth Services Bureau*, W.C. No. 4-485-720 (Oct. 3, 2001), a claimant resigned from her employment due to her having missed work due to symptoms related to her work injury and due to her symptoms making it impossible for her to continue working. The ALJ found that the claimant was not responsible for her termination. On appeal, the ICAO affirmed, reasoning that the claimant's reasons for terminating the employment were not the result of "volitional conduct" or control over the circumstances of the separation. Rather, the separation was caused the development of disabling physical limitations resulting from the occupational disease, circumstances for which the claimant may not be held "responsible" within the meaning of that term. The Panel held that "a claimant who terminates the pre-injury employment relationship because the industrial injury has rendered the claimant physically unable to continue to perform the duties of regular employment is not 'responsible' for the loss of the employment." *See Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo.App.1999).

In *Kiesnowski v. United Airlines*, W.C. No. 4-492-753 (2004), a claimant sustained wrist injuries that prevented him from doing his work. The claimant was not provided modified duty work. Despite not yet being ready to retire, the claimant told his supervisor that he felt uncomfortable remaining employed when he could do no work, to which the supervisor responded that he did not understand why the claimant remained employed. The claimant therefore retired because he did not believe he had any alternative. The ALJ found that the claimant was not responsible for his termination, reasoning that the claimant believed he did not have any alternative and that he would not have retired but for the industrial injury. The ICAO panel affirmed the ALJ, observing that "a temporarily disabled employee who terminates his employment because he is unable to do the job because of the effects of the injury is not 'responsible' for the separation within the meaning of the Act."

The parties' arguments appear to focus exclusively on whether Claimant was responsible for his termination of employment without regard to whether any wage loss actually resulted from the termination.

Section 8-42-105(4), C.R.S., provides for termination of TTD only where the wage loss is the result of the termination of employment. Where a claimant would have sustained a wage loss due to the industrial injury even if the claimant had not retired, the wage loss attributable to the industrial injury is not the result of the retirement, and the claimant remains entitled to temporary disability benefits for that portion of the wage loss attributable to the industrial injury. *Lucero v. City of Durango*, W.C. No 5-195-588 (Mar. 21, 2024).

As found, Claimant's wage loss here was not the result of his resignation, but was instead due to Claimant's temporary work restrictions, which continued from before Claimant's resignation to well after. Claimant's wage loss would have persisted with or

without his resignation. Like the claimant in *Aguilera*, Claimant's employment terminated while he was temporarily and totally disabled, and therefore there was no wage loss that resulted from the termination of employment.

The Court concludes that Respondents have failed to meet their burden to prove that Claimant's TTD should be terminated effective January 3, 2023, pursuant to § 8-42-105(4), C.R.S.

ORDER

It is therefore ordered that:

1. Respondents' request to terminate TTD effective January 3, 2023, pursuant to § 8-42-105(4), C.R.S., is denied.

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

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

DATED: July 17, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-191-991-001

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that the right thumb trigger release surgery recommended by Dr. Kavi Sachar is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted work injury?

FINDINGS OF FACT

1. On December 21, 2021, Claimant was injured when he was operating a truck for Respondent and was struck by another vehicle. Following the automobile accident, Claimant had pain in his chest, both hands, both knees, and his neck. The only body part at issue in this order is Claimant's right thumb.

2. At the beginning of this claim, Claimant's authorized treating provider (ATP) was Dr. Kevin Pulsipher. During his treatment of Claimant, Dr. Pulsipher referred Claimant to Dr. John Knutson for a surgical consultation. On May 2, 2022, and July 9, 2022, Claimant was seen by Dr. Knutson and reported ongoing right thumb pain. Dr. Knutson diagnosed an injury to Claimant's right ulnar collateral ligament (UCL) and recommended continuing conservative treatment.

3. Claimant testified that conservative treatment of his right hand and thumb included physical therapy and the use of a brace for his right hand. Claimant also testified that this brace reduced the range of motion in his right hand. Claimant understood that the purpose of this brace was to protect his right hand from further injury.

4. Subsequently, Dr. Timothy Meilner became Claimant's ATP. On January 17, 2023, Claimant was seen by Dr. Meilner. At that time, Claimant reported that he continued to have right hand symptoms. Dr. Meilner referred Claimant to The Steadman Clinic for an orthopedic consultation. The reason indicated in that referral was "persistent [right] thumb pain and weakness [status post] UCL sprain."

5. On January 20, 2023, Claimant attended an independent medical examination (IME) with Dr. Tashof Bernton. In connection with the IME, Dr. Bernton reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his January 20, 2023 IME report, Dr. Bernton noted that Claimant suffered an avulsion fracture to his right thumb. Dr. Bernton opined that surgical treatment of the fracture was necessary and related to Claimant's December 21, 2021 work injury.

6. On February 1, 2023, Claimant was seen by Dr. Kavi Sachar at The Steadman Clinic. At that time, Dr. Sachar noted that Claimant had an avulsion type injury to his right thumb metacarpophalangeal joint (MCPJ). Dr. Sachar recommended surgery.

7. On March 28, 2023, Dr. Sachar performed a right thumb fusion. This procedure included placement of a metal plate and screws in the bones of Claimant's right thumb.

8. Following surgery, Claimant was instructed to use a right hand brace to reduce movement of his thumb. Claimant was to utilize this brace for approximately six weeks. On April 10, 2023, Claimant returned to his normal job duties with work restrictions. These restrictions included the ongoing use of brace on his right hand, and a weight limitation. After six weeks of wearing the brace, Claimant was released to return to full duty without restrictions. At the time of his release to full duty, Claimant's job duties included operating levers, wheels, shifters, and joysticks in heavy equipment. These actions included extensive squeezing, grasping, and pulling with his right hand: Claimant testified he was able to perform work tasks without issue after he took the brace off for some time, but then developed a painful bump on the base of his thumb as he continued working.

9. On July 3, 2023, Claimant was seen by Dr. Meilner. At that time, Claimant reported that his right thumb was stiff and he was unable to oppose his thumb and little finger.

10. On October 3, 2023, Claimant returned to Dr. Sachar and reported tenderness along the palm-side of his thumb, with clicking and catching. On examination, Dr. Sachar noted the bump on the base of Claimant's right thumb. Claimant reported to Dr. Sachar that he had this bump for four to five months. Also on October 3, 2023, x-rays of Claimant's right hand were performed and showed "intact MCP hardware with solid fusion mass." At that time, Dr. Sachar recommended conservative treatment, including a steroid injection into the tendon sheath. Dr. Sachar noted that if conservative treatment failed, surgery would be necessary to correct Claimant's right trigger thumb.

11. At that same October 3, 2023 visit with Dr. Sachar, Claimant underwent the recommended steroid injection. Claimant testified that he experienced approximately one month of symptom relief following the injection. However, at the end of that time period, the clicking and catching symptoms returned to Claimant's right thumb.

12. After review of additional medical records, on November 3, 2023, Dr. Bernton authored another report. Specifically, Dr. Bernton noted that Claimant had undergone the MCP fusion on his right hand. Dr. Bernton also noted that since that surgery Claimant had developed trigger thumb. Dr. Bernton opined that the development of trigger thumb

was not a complication of the March 2023 surgery. Therefore, Dr. Bernton opined that Claimant's trigger thumb was not related to the work injury. In support of these opinions, Dr. Bernton noted that Claimant's trigger thumb symptoms did not become evident until five months after the fusion surgery. Dr. Bernton further opined that Claimant had reached maximum medical improvement (MMI) as to his right thumb on October 3, 2023.

13. On January 25, 2024, Dr. Sachar submitted an authorization request to Respondent for a right thumb trigger finger release.

14. On February 5, 2024, Claimant was seen by Dr. Meilner. In the medical record of that date, Dr. Meilner noted that although the trigger release procedure had been scheduled, it was canceled. Dr. Meliner opined that Claimant's trigger thumb condition, (and the need for trigger release) was causally related to Claimant's work injury. Specifically, Dr. Meilner stated that Claimant's right thumb condition "is directly a sequela of the surgery on his [right] hand/thumb."

15. On April 15, 2024, Dr. Bernton authored a third report. In that report, Dr. Bernton referenced Dr. Meilner's opinion that Claimant's right trigger thumb condition was work related. Dr. Bernton indicated his disagreement with Dr. Meilner. In doing so, Dr. Bernton referenced his November 2023 report regarding the trigger thumb diagnosis. Dr. Bernton reiterated his opinion that the trigger thumb is not work related.

16. Dr. Bernton's testimony was consistent with his reports. Dr. Bernton testified that Claimant does have a right trigger thumb. Dr. Bernton also testified that the recommended release surgery is reasonable to treat Claimant's condition. It continues to be Dr. Bernton's opinion that Claimant's right trigger thumb and the recommended surgery are not related to the December 2021 work injury, or the thumb fusion performed by Dr. Sachar. During his testimony, Dr. Bernton supported this opinion by reiterating the lapse in time between the thumb fusion surgery and the development of the bump at the base of Claimant's thumb. Dr. Bernton also noted that Dr. Sachar identified Claimant's trigger thumb condition in a portion of the medical records that was separate from a statement regarding Claimant's recovery from the fusion surgery.

17. During his testimony, Dr. Bernton was asked to review an x-ray image of Claimant's right thumb following the March 2023 fusion surgery. Dr. Bernton testified that it appeared that the surgical screws went beyond the edge of the bone, and into soft tissue. Dr. Bernton testified that given the location of these screws, it was possible that Claimant developed the trigger thumb condition when he returned to his normal job duties of gripping/grasping.

18. Claimant testified that his current right thumb symptoms include the lump at the base of his right thumb, with ongoing tenderness and soreness. During his testimony, Claimant demonstrated the limited range of motion in his left thumb. Claimant testified that he would like to undergo the recommended trigger release surgery to improve the range of motion in his right thumb, and return to his normal job duties.

19. The ALJ credits the medical records and Claimant's testimony. The ALJ also credits the opinions of Drs. Sachar and Meilner, over the contrary opinions of Dr. Bernton. The ALJ specifically credits the opinion of Dr. Meilner that Claimant's right trigger thumb condition is related to the prior fusion. The ALJ is persuaded that the current condition of Claimant's right thumb is causally related to the fusion surgery, as well as the admitted work injury. Therefore, the ALJ finds that Claimant has demonstrated that it is more likely than not that the right thumb trigger release surgery recommended by Dr. Sachar is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted December 21, 2021 work injury.

CONCLUSIONS OF LAW

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

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

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

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

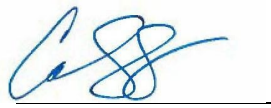
5. As found, Claimant has demonstrated, by a preponderance of the evidence, that the right thumb trigger release surgery recommended by Dr. Sachar is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted

work injury. As found, the medical records, Claimant's testimony, and the opinions of Drs. Sachar and Meilner are credible and persuasive on this issue.

ORDER

It is therefore ordered that Respondent shall pay for the right thumb trigger release surgery recommended by Dr. Sachar, pursuant to the Colorado Medical Fee Schedule.

Dated July 18, 2024.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
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If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 27. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.
You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **It is recommended that you send a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that his claim should be reopened pursuant to Section 8-43-303, C.R.S., due to a change in his condition?

If the claim is reopened, has Claimant demonstrated, by a preponderance of the evidence, that medical treatment recommended by Dr. Randal Shelton is reasonable and necessary to cure and relieve Claimant from the effects of the admitted February 24, 2021 work injury?

If the claimant is not reopened, has Claimant demonstrated, by a preponderance of the evidence, that medical treatment recommended by Dr. Shelton is reasonable and necessary to maintain Claimant at maximum medical improvement (MMI)?

FINDINGS OF FACT

1. Claimant suffered an injury to his low back while performing his normal job duties on February 24, 2021. Respondents have admitted liability for Claimant's February 24, 2021 work injury.

2. During this claim, Claimant's authorized treating provider (ATP) has been Dr. Randal Shelton. Claimant has undergone a number of treatment modalities throughout the course of this claim. That treatment has included physical therapy, massage therapy, transforaminal steroid injections, trigger point injections, sacroiliac (SI) joint injections, and medications.

3. On May 1, 2023, Dr. Shelton determined that Claimant had reached maximum medical improvement (MMI). At that time, Dr. Shelton assessed a permanent impairment rating of 26 percent, whole person. Dr. Shelton determined that Claimant could return to work with a 40 pound lifting restriction. Dr. Shelton recommended post-MMI treatment that included medication management. On that same date, Dr. Shelton ordered refills on three medications; cyclobenzaprine (5 mg); Lyrica (75 mg); and hydrocodone-acetaminophen (325 mg}.

4. On August 30, 2023, Claimant attended a Division sponsored independent medical examination (DIME) with Dr. David Elfenbein. In connection with the DIME, Dr. Elfenbein reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In the DIME report, Dr. Elfenbein agreed with Dr. Shelton that Claimant had reached MMI as of May 1, 2023. With regard to permanent impairment, Dr. Elfenbein assessed permanent impairment of 26 percent, whole person. With regard to post-MMI maintenance medical treatment, Dr. Elfenbein recommended

ongoing treatment with Dr. Shelton "for maintenance of [Claimant's] medications". Dr. Elfenbein noted that injections would not be beneficial, and Claimant was not a surgical candidate.

5. Relying upon Dr. Elfenbein's DIME report, on September 21, 2023, Respondents filed a Final Admission of Liability (FAL) admitting for the MMI date of May 1, 2023, and a whole person permanent impairment rating of 26 percent. The FAL also admitted for post-MMI maintenance medical treatment.

6. Claimant was seen by Dr. Shelton on November 27, 2023. At that time, Claimant reported that continued use of Lyrica and cyclobenzaprine were effective in treating Claimant's back pain. Dr. Shelton also "prescribed" a two year pass at the Montrose Rec Center to address Claimant's low back pain.

7. On January 30, 2024, Claimant sought treatment with Dr. Shelton. Claimant testified that he pursued treatment at that time because he was experiencing an increase in his low back pain, with pain into his left leg. In the January 30, 2024 medical record, Dr. Shelton lists Claimant's conditions as low back pain, left SI pain, left greater than right sciatica, and depression. Dr. Shelton opined that further injections would likely not benefit Claimant, as injections were not previously helpful. Dr. Shelton refilled prescriptions for both Lyrics and cyclobenzaprine and noted that increasing the dosages of these medications could be helpful.

8. On May 13, 2024, Claimant returned to Dr. Shelton. At that time, Claimant reported continued worsening of his low back pain. Claimant specifically reported low back pain radiating into his left lower extremity. At that time, Dr. Shelton increased the dosage for cyclobenzaprine to 10 mg. Claimant's prescription for Lyrica was also adjusted.

9. On May 17, 2024, physician advisor for the Insurer, Dr. Mahdy Flores, reviewed the request for cyclobenzaprine. Dr. Flores opined that the requested medication, cyclobenzaprine, was not medically necessary to treat Claimant's low back condition. In support of this opinion, Dr. Flores noted that "muscle relaxants are most useful for acute musculoskeletal injury or exacerbation of injury." Dr. Flores further noted that there was no documented objective improvement with Claimant's prior use of this medication.

10. Based upon the opinions of Dr. Flores, Respondents denied authorization for cyclobenzaprine.

11. On June 6, 2024, Claimant attended an IME with Dr. Douglas Scott. In connection with the IME, Dr. Scott reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. Dr. Scott opined that at the time of the work injury, Claimant suffered a lumbar sprain/strain. Dr. Scott further opined that Claimant's condition has not worsened since he was placed at MMt. Therefore, it is Dr. Scott's opinion that "other than the maintenance previously

prescribed and completed by" Dr. Shelton, Claimant does not need any additional post-MMI maintenance treatment.

12. Dr. Scott's testimony was consistent with his written report. Dr. Scott testified that Claimant's complaints of lower back pain were likely amplified due to a psychological component, and that Claimant's lumbar strain did not require any additional treatment or intervention. Dr. Scott also testified that he agrees with Dr. Flores that the prescription for cyclobenzaprine is not medically necessary. Dr. Scott also noted that cyclobenzaprine is an addictive medication.

13. Claimant testified that he has experienced a change of his low back condition, in the form of worsening symptoms. Claimant testified that Dr. Shelton has increased his medications to address these low back symptoms.

14. The ALJ credits Claimant's testimony regarding the nature and status of his low back pain and related symptoms. The ALJ credits the medical records and finds that that beginning in November 2023, Dr. Shelton addressed adjusting Claimant's medications. The ALJ also credits Dr. Scott's testimony that Claimant's condition has not worsened. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that he has suffered a worsening of his condition to warrant a reopening of his claim.

15. Although Claimant's claim shall not be reopened, the ALJ now addresses whether the recommendations of Dr Shelton constitute reasonable and necessary maintenance medical treatment. The ALJ credits Claimant's testimony and specifically the records of the ATP, Dr. Shelton, and finds that Claimant has demonstrated that it is more likely than not that adjustments to his medications, as recommended by Dr. Shelton, are reasonable and necessary to maintain Claimant at MMI.

CONCLUSIONS OF LAW

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

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

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

4. Section 8-43-303(1) provides that "any award" may be reopened within six years after the date of injury "on the ground of fraud, an overpayment, an error, mistake, or a change in condition." Reopening for "mistake" can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1,* 924 P.2d 1177 (Colo. App. 1996).

5. A change in condition refers to "a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

6. 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). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission,* 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

7. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that he has experienced a change in condition to warrant a reopening of his claim pursuant to to Section 8-43-303, C.R.S. As found, the medical records and Dr. Scott's opinions are credible and persuasive on this issue.

8. As found, Claimant has demonstrated, by a preponderance of the evidence, that the treatment **currently** recommended by Dr. Randal Shelton **(specifically adjustments to Claimant's medications)** is reasonable and necessary to maintain Claimant at maximum medical improvement. As found, Claimant's testimony and the medical records are credible and persuasive on this issue.

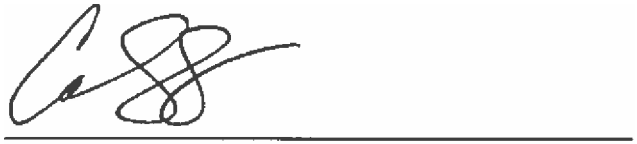
ORDER

It is therefore ordered:

1. Claimant's request to reopen his claim is denied and dismissed.

2. Respondents shall pay for the **post-MMI medical treatment currently recommended by Dr. Randal Shelton (specifically adjustments to Claimant's medications),** pursuant to the Colorado Medical Fee Schedule.

3. All matters not determined here are reserved for future determination. Dated July 18, 2024.



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ISSUES

1. Whether Respondents proved by a preponderance of the evidence that Claimant was responsible for termination of her employment with Employer on September 29, 2022.

2. If Claimant was responsible for her termination, whether Respondents established by a preponderance of the evidence that Claimant received an overpayment of TTD benefits after October 13, 2022, entitling Respondents to repayment or offset against future benefits.

3. If Claimant was not responsible for her termination, whether Respondents established by a preponderance of the evidence that Claimant received an overpayment of TTD benefits after Claimant began employment with a subsequent employer, entitling Respondents to repayment or offset against future benefits.

FINDINGS OF FACT

1. Claimant sustained an admitted injury to her right shoulder/clavicle arising out of the course of her employment with Employer on August 19, 2022.

2. On September 1, 2022, Insurer filed a General Admission of Liability (GAL) admitting liability for TTD benefits in the amount of $359.59 per week, based on an average weekly wage of $539.35. (Ex. A).

3. As the result of her injuries, Claimant was subject to work restrictions. Initially, Claimant was permitted to work on modified duty, and Employer accommodated Claimant's restrictions. During this time, Insurer paid Claimant temporary disability benefits. On September 26, 2022, Claimant's authorized treating physician (ATP), Kelsy Smithart, D.O., placed Claimant on a full "no work" restriction. (Ex. D). On September 26, 2022, Insurer filed an Amended GAL, admitting liability for TTD benefits for the period of September 23, 2022 through September 26, 2022. (Ex. B). Insurer continued to pay Claimant TTD benefits after September 26, 2022.

4. On September 29, 2022, Claimant texted [Redacted, hereinafter LS], her team lead at Employer, and stated: " I [am] reaching out to let you know that I am quitting[.] I appreciate the chance to work with you but due to my injury I'm not comfortable working at this time." (Ex. G). At the time, Claimant was subject to a on a full no work restriction, and unable to work due to her work-related injuries. (Ex. D). LS[Redacted] reasonably interpreted Claimant's text as a resignation of employment. At hearing, Claimant testified that her text message was a poor choice of words, and that she did not intend to resign her employment, but merely to inform LS[Redacted] that she had work restrictions which

prevented her from working. Claimant testified that she believed she would return to work for Employer once her restrictions were changed to permitted her to work.

5. On October 14, 2022, Dr. Smithart changed Claimant's work restrictions to permit modified duty, with restrictions including no use of the right hand, and lifting no more than five pounds with her left hand[1]. In January 2023, Dr. Smithhart removed Claimant's left-hand lifting restriction, so that Claimant's only restriction was no use of her right hand. In April 2023, Dr. Smithart further relaxed the work restriction, permitting Claimant to use her right hand to push, pull or lift up to two pounds. Over the following ten months, Claimant's right arm lifting restriction was gradually increased to seven pounds. After October 14, 2022, Claimant was subject to only modified work restrictions, which did not prevent her from working. At Claimant's last documented visit with Dr. Smithart on February 12, 2024, Dr. Smithart indicated that Claimant had not reached maximum medical improvement, and that date of MMI was "unknown." (Ex. D).

6. After her work restrictions were modified on October 14, 2022, Claimant did not contact Employer and did not seek to return to work for Employer. On November 7, 2022, Claimant reported to Dr. Smithart that she had decided to quit her job with Employer and was looking for new opportunities. (Ex. D, p. 70). Claimant testified that she began looking for work in October 2022. In February 2023, she applied for a server/bartender job with [Redacted, hereinafter BW], and began work there in May 2023. Claimant testified that she continued to work for BW[Redacted] through the date of hearing.

7. From September 26, 2022 through October 14, 2022, Respondent paid Claimant TTD benefits totaling $976.03, based on an AWW of $539.35 which corresponds to a weekly TTD benefit of $359.59. From October 15, 2022 through March 30, 2024, Respondents paid Claimant TTD benefits totaling $27,238.84. (Ex. F). Claimant continued to receive and accept TTD payments of $359.59 per week while also working for BW[Redacted].

8. [Redacted, hereinafter ES], the current general manager of the location Claimant worked for Employer testified that Employer would have been able to accommodate Claimant's modified work restrictions, including the restriction of no use of the right hand, and lifting less than 5 pounds with the left hand. Although ES[Redacted] was not the general manager while Claimant worked for Employer, he has worked for Employer as a general manager for more than eight years and is familiar with Employer's policies and procedures for accommodating work restrictions for injured workers. ES[Redacted] also testified that Employer would not have offered Claimant modified duty after September 29, 2022, because Employer no longer employed Claimant. ES[Redacted] testimony was credible.

[1] The ALJ notes that the October 14, 2022 visit during which Claimant's restrictions were changed to permit her to return to modified duty was in the afternoon of November 14, 2022, and was not signed by Dr. Smithart until 9:34 p.m. Thus, the ALJ finds that as a practical matter, Claimant could not return to employment until October 15, 2022.

CONCLUSIONS OF LAW

Generally

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

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

The 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).

Responsibility For Termination & Temporary Total Disability Benefits

The Workers' Compensation Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for termination of the employment relationship. *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); The termination statutes -- §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. -- provide: "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." *See also In re of Davis*, W.C. No. 4-631-681 (ICAO Apr. 24, 2006).

"Under the termination statutes, sections 8-42-103(1)(g) and 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from

employment." *Gilmore*, 187 P.3d at 1132. "Generally, the question of whether the claimant acted volitionally, and therefore is 'responsible' for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances." *Gonzales v. Indus. Comm'n*, 740 P.2d 999 (Colo. 1987); *Windom v. Lawrence Constr. Co.*, W.C. No. 4-487-966 (ICAO Nov. 1, 2002). *In re Olaes*, WC. No. 4-782-977 (ICAO April 12, 2011). Implicit in the termination statutes is a requirement that Respondents prove Claimant committed an "act" which formed the basis for her termination. Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Trans., Inc. v. Indus. Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

Respondents have shown by a preponderance of the evidence that Claimant voluntarily terminated her employment on September 29, 2022, by informing LS[Redacted] of her decision to quit. Despite Claimant's testimony that the text was poorly worded, she did not intend to resign, and that she only intended to convey that she was subject to a full work restriction, her subsequent actions demonstrate otherwise. Claimant did not contact Employer again after September 29, 2022. When her work restrictions were relaxed on October 14, 2022, Claimant did not notify Employer and request to return to work, and instead began looking for other employment. Eventually secured a position at BW[Redacted] in May 2023. Thus, the ALJ concludes that Claimant's resignation via text message on September 29, 2022, demonstrates that she voluntarily terminated her employment with Employer on that date. Claimant was, therefore, responsible for her termination.

Notwithstanding, Respondents ability to terminate Claimant's temporary total disability benefits is not absolute. To terminate TTD benefits under § 8-42-105 (4), C.R.S., an injured workers' wage loss must "result" from the termination, rather than the work-related injury. "[W]age loss does not 'result' from a termination if the injury had totally disabled the claimant such that he is not capable of performing any employment. In that situation, the wage loss stems entirely from the disability caused by the injury, not the claimant's conduct in causing the loss of prior employment." *Selvage v. Terrance Gardens*, W.C. No. 4-486-812 (ICAO Sep. 23, 2002). Thus, TTD benefits may not be terminated under 8-42-105 (4), C.R.S., until an injured worker is able to work in some capacity. *See Frisch v. Berwick Electric Co.*, W.C. No. 5-033-012-02 (ICAO Oct. 11, 2018); *Gilmore*, 187 p.3d 1129. The fact that Employer did not offer Claimant modified employment because she had resigned has no bearing on the fact that she was physically able to work. *Gilmore*, 187 P.3d at 1132.

Respondents must pay Claimant's TTD benefits for the period of time she was unable to work due to her work injuries until she was able to work in some capacity. Claimant was physically unable to work from September 29, 2022 until she was released to modified duty effective October 15, 2022. The ALJ concludes that the modified work restrictions put in place on October 14, 2022, including no use of the right arm and lifting up to two pounds with her left arm do not rise to the level of a total disability which prevented the Claimant from working in any capacity. Thus, Claimant was able to perform work in some capacity as of October 15, 2022.

The ALJ concludes that Claimant was entitled to TTD benefits from September 29, 2022 until through October 14, 2022. As of October 15, 2022, Claimant's physical condition permitted her to work in some capacity, and as such, her loss of income after that date was attributable to her termination, rather than her industrial injury.

Overpayment

Pursuant to § 8–43–303(1) C.R.S., upon a *prima facie* showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to money already paid except in cases of fraud or overpayment. *Id.* In relevant part, the Colorado Workers' Compensation Act defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive. § 8-40-201 (15.5), C.R.S. (2021). An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Section 8-42-113.5 (1)(c), C.R.S., authorizes insurers to seek and order for repayment of an overpayment, and ALJs are authorized to conduct hearings to require such repayments. § 8-43-207 (q), C.R.S. Respondents may retroactively recover an overpayment of benefits, and such recover is not limited to duplicate benefits. *In re Wheeler*, W.C. No. 4-995-488-004 (ICAO Apr. 23, 2019); *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

Respondents bear the burden of proof to establish, by a preponderance of the evidence, that a claimant received and overpayment, and that respondents are entitled to recovery of that overpayment. *City & Cty. of Denver v. Indus. Claim Appeals Off.*, 58 P.3d 1162, 1164-1165 (Colo. App. 2002); See *In the Matter of the Claim of Robert D. Scott, Claimant*, W.C. No. 4-777-897, (ICAO Oct. 28, 2009).

As found, Claimant's right to TTD benefits ended on October 15, 2022. Exhibit F demonstrates that Respondents continued to pay Claimant TTD benefits from October 15, 2022 through at least March 30, 2024 at the rate of $359.59 per week, totaling $27,238.84. Claimant was not entitled to these benefits, they constitute an overpayment, which Respondents are entitled to recover. To the extent Respondents continued to pay Claimant TTD benefits after March 30, 2024, those payments also constitute an over payment which Respondents are also entitled to recover.

Repayment

Under § 8-43-303 (1), C.R.S., upon a finding of an overpayment, an order of repayment is mandatory. When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will

not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994).

Respondents request that they be permitted to offset the TTD overpayment against future permanent partial disability (PPD) benefits. As of the date of hearing, Claimant had not been placed at MMI. However, in position statements Respondents' counsel represented that Claimant has now reached MMI and been assigned a permanent impairment rating, entitling Claimant to PPD benefits, but no Final Admission of Liability has been filed. The ALJ determines the appropriate method for recovery of the TTD overpayment Claimant has received is to offset the overpayment against any permanent partial disability payment to which Claimant may be entitled. Respondents may reduce the payment of any PPD benefits to which Claimant may be entitled by $27,238.84, plus any TTD benefits paid to Claimant for periods after March 30, 2024.

If after offset, the overpayment has not been fully recovered, either party may file an application for hearing to determine the appropriate rate of repayment.

ORDER

It is therefore ordered that:

1. Claimant was responsible for her termination of employment on September 29, 2022.

2. Claimant's entitlement to TTD benefits terminated on October 15, 2022, the date she was returned to modified duty.

3. The TTD benefits Claimant received for the period beginning October 15, 2022 constitute an overpayment, which Respondents are entitled to recover.

4. Respondents may offset Claimant's overpayment against any PPD benefits to which Claimant is entitled.

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 18, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-141-704-002

PROCEDURAL MATTER

During the hearing in this matter, Claimant's counsel sought to admit a medical record generated by Authorized Treating Physician (ATP) Joan Mankowski, M.D. that was not contained in either set of hearing Exhibits. Respondent initially objected, but then withdrew the objection. Judge Cannici noted that, after the hearing, Claimant's counsel could submit the record and he would "admit Exhibit 5 for the Claimant, which is Dr. Mankowski's report from August 2019."

Instead, of submitting the August 2019 medical record, Claimant's submitted part of Dr. Mankowski's June 22, 2020 medical report after the hearing as Exhibit 5. Dr. Mankowski noted that her Figure 84 worksheet for Calculations with Apportionment was attached to her June 22, 2020 narrative report. However, Claimant's Exhibit 5 failed to include Dr. Mankowski's "Figure 84. Spine Impairment Summary" worksheet.

In Figure 84, Dr. Mankowski remarked that she apportioned Claimant's 2019 range of motion rating by subtracting the range of motion rating Rachel L. Basse, M.D. had assigned in Claimant's 2004 Workers' Compensation claim. The apportionment was not evident from the limited pages Claimant submitted as Exhibit 5. Therefore, Respondent's counsel has submitted Dr. Mankowski's June 22, 2020 "Figure 84. Spine Impairment Summary" medical record for consideration. For purposes of completeness, Exhibit 5 will include the June 22, 2020 medical report and accompanying Figure 84 Summary.

ISSUES

1. Whether Respondent has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Gregory Reichhardt, M.D. that Claimant suffered a 13% range of motion impairment as a result of his June 17, 2019 industrial injury.

2. Whether Claimant has produced clear and convincing evidence to overcome the DIME opinion of Dr. Reichhardt that Claimant suffered a 0% apportioned impairment for a specific disorder of the lumbar spine as a result of his June 17, 2019 industrial injury.

3. Whether Respondent's are permitted to recover an overpayment of $18,266.59 in Permanent Partial Disability (PPD) benefits.

FINDINGS OF FACT

1. On June 27, 2019 Claimant suffered an admitted industrial injury to his lower back during the course and scope of his employment with Employer.

2. In a prior Workers' Compensation claim from August 9, 2004 Claimant sustained a work-related injury to his lumbosacral spine. The matter was assigned Colorado Workers' Compensation case number 4-650-388.

3. An MRI after the 2004 injury revealed a right paracentral disc herniation at L5-S1 affecting the right S1 nerve root. Claimant initially received conservative treatment including an epidural steroid injection/selective nerve root block, physical therapy, massage therapy and a home exercise program.

4. Claimant also underwent two surgeries in case number 4-650-388. On August 6, 2005 he underwent a right L5-S1 hemilarninotomy, decompression and excision of a disc herniation. On May 21, 2008 Claimant had a second surgery that included a microlaminectomy with removal of a herniated left-sided lumbar disc at L5-S1.

4. Rachel Basse, M.D. treated Claimant for this August 9, 2004 lumbosacral work-injury. She ultimately assigned Claimant a 27% whole person permanent impairment rating.

5. On August 10, 2009 Respondent filed a Final Admission of Liability (FAL) in Workers' Compensation case number 4-650-388. The FAL acknowledged that Claimant had sustained a 27% whole person impairment rating.

6. The 27% whole person rating consisted of the following:

- 10% pursuant to Table 53(II)(E) for residual low back pain following a surgically treated disc lesion;
- 2% under Table 53(II)(G) for a second procedure/surgery;
- 11% for lumbar spine Range of Motion (ROM) deficits;
- 1% for persistent right S1 sensory radiculopathy;
- 1% for left S1 sensory radiculopathy;
- 2% for left S1 motor involvement of the lower extremity.

7. Claimant reported that on June 27, 2019 he injured his lower back while shoveling at work. He specifically commented that his injury occurred because he "was lifting the shovel and moving the wrong way." Claimant remarked he "had to shovel to a height of about five to six feet to get into the bucket." He reported lower back pain as well as right foot numbness and weakness.

8. Claimant subsequently received conservative medical treatment. He underwent diagnostic testing, injections and chiropractic care.

9. On June 22, 2020 Authorized Treating Physician (ATP) Joan Mankowski, M.D. determined Claimant had reached Maximum Medical Improvement (MMI). Relying on the *American Medical Association Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*), Dr. Mankowski initially assigned the following: (1) a 7% rating pursuant to Table 53 for prolonged pain and rigidity with moderate to severe degenerative changes of the lumbar spine; (2) an 18% rating for ROM deficits; and (3) a 1%

lower extremity rating for right L5 sensory radiculopathy.

10. Notably, Dr. Mankowski remarked that Claimant had received a 27% whole person impairment rating from Dr. Basse in 2009 as a result of his August 9, 2004 Workers' Compensation injury. After apportionment, Dr. Mankowski assigned a 14% whole person lumbar spine permanent impairment rating. Dr. Mankowski specifically apportioned the 11% ROM rating assigned by Dr. Basse. Subtracting 11% from the 18% rating Dr. Mankowski had assigned, yielded a 7% ROM impairment. Combining the 7% rating pursuant to Table 53 with the remaining 7% rating for ROM deficits yielded a 14% whole person permanent impairment rating as a result of Claimant's June 27, 2019 industrial injury.

11. After Respondent's filed a Final Admission of Liability (FAL) consistent with Dr. Mankowski's impairment determinations, Claimant sought a Division Independent Medical Examination (DIME). On January 15, 2021 Claimant underwent a DIME with Joseph Morreale, M.D. Dr. Morreale determined Claimant had not reached MMI and required further treatment. He assigned a provisional 20% whole person impairment rating.

12. Claimant subsequently received additional treatment for his lower back condition. He noted lower back pain that radiated into his right groin with numbness and tingling into his right foot.

13. On January 3, 2024 Claimant underwent a follow-up DIME with Gregory Reichhardt, M.D. After reviewing Claimant's medical records and conducting a physical examination, Dr. Reichhardt determined that Claimant reached MMI on December 19, 2022. He assigned a 24% whole person impairment rating without apportionment. The rating included a 12% whole person impairment pursuant to Table 53 for a specific disorder of the lumbar spine and a second surgery. However, the 12% rating was apportioned entirely to Claimant's 2004 injury because the two prior surgeries were related to the injury. Claimant's total apportioned rating for a specific disorder was thus zero percent. Dr. Reichhardt also assigned a 13% whole person impairment rating for ROM deficits. He explained that Claimant had no restrictions, no episodes of back pain, no lost time and no medical visits for one year prior to his June 27, 2019 work injury. Dr. Reichhardt thus did not apportion the ROM rating based on Claimant's prior injury in case number 4-650-388. Finally, Dr. Reichhardt assigned a 3% lower extremity impairment that converted to a 1% whole person rating. After apportionment, Claimant thus suffered a 14% whole person impairment for his June 27, 2019 work injury.

14. On March 27, 2024 Samuel Y. Chan, M.D. performed a records review of Claimant's claim. He specifically addressed whether Dr. Reichhardt's ROM impairment rating should be apportioned based on Claimant's August 9, 2004 work injury. Dr. Chan noted that Dr. Reichhardt did not reference or appear to review Dr. Basse's impairment rating report. Relying on the Desk Aid 11 of the Division of Workers' Compensation Impairment Rating Tips from July 2020, Dr. Chan reasoned that apportionment of Claimant's current impairment was warranted because of his 2004 work injury. Dr. Chan

explained that Claimant had received an 11% whole person impairment rating for lumbosacral ROM deficits in case number 4-650-388. In the present case, Dr. Reichhardt assigned a 13% rating for ROM deficits. Subtracting the previous 11% rating yields a 2% whole person impairment for ROM deficits as a result of the June 27, 2019 injury.

15. Claims adjuster [Redacted, hereinafter MT] testified at the hearing in this matter. She explained that Respondent filed a FAL in the present matter acknowledging that Claimant suffered a 7% whole person impairment rating as a result of his June 27, 2019 industrial injury. MT[Redacted] remarked that the FAL admitted that Claimant was entitled to receive $31,266.54 in Permanent Partial Disability (PPD) benefits. Claimant has received the TPD benefits.

16. Dr. Chan also testified at the hearing in this matter. He maintained that Dr. Reichhardt erroneously assigned Claimant a 14% whole person impairment for his June 27, 2019 work injury. Instead, after apportionment for ROM deficits from Claimant's prior work injury, he suffered a 3% whole person impairment in the present claim. Dr. Chan explained Desk Aid's 10, 11, and 14 published by the Division of Workers' Compensation provide that a previous rating for ROM deficits should be subtracted from a current ROM rating in order to identify a true ROM deficit. Specifically, Dr. Basse assigned an 11% whole person impairment for Claimant's lumbar spine ROM deficits as a result of his August 9, 2004 work injury. Dr. Reichhardt assigned a 13% whole person impairment for Claimant's lumbar spine ROM deficits as a result of his June 27, 2019 work injury. Subtracting Claimant's 11% rating from his current 13% impairment yields a 2% whole person impairment rating for ROM deficits in Claimant's present claim. Combining the 2% remaining lumbar range of motion impairment with Dr. Reichhardt's 1% whole person rating for a lower extremity impairment yields a 3% whole person impairment as a result of Claimant's June 27, 2019 admitted industrial injury.

17. Respondent has produced clear and convincing evidence to overcome the DIME opinion of Dr. Reichhardt that Claimant suffered a 13% range of motion impairment as a result of his June 17, 2019 industrial injury. Initially, on June 27, 2019 Claimant suffered an admitted industrial injury to his lower back. In a prior Workers' Compensation claim from August 9, 2004 Claimant sustained a work-related injury to his lumbosacral spine. He received a 27% whole person impairment rating that included the following: 10% pursuant to Table 53(II)(E) for residual low back pain following a surgically treated disc lesion; 2% under Table 53(II)(G) for a second procedure/surgery;11% for lumbar spine ROM deficits; 1% for persistent right S1 sensory radiculopathy;1% for left S1 sensory radiculopathy; and 2% for left S1 motor involvement of the lower extremity.

18. On June 22, 2020 ATP Dr. Mankowski determined Claimant had reached MMI for his June 27, 2019 work injury and assigned permanent impairment ratings. Dr. Mankowski remarked that Claimant had received a 27% whole person impairment rating from Dr. Basse in 2009 as a result of his August 9, 2004 Workers' Compensation injury. She specifically apportioned the 11% ROM rating assigned by Dr. Basse. Subtracting 11% from the 18% rating Dr. Mankowski had assigned, yielded a 7% ROM impairment. Combining the 7% rating pursuant to Table 53 with the remaining 7% rating for ROM

deficits yielded a 14% whole person permanent impairment rating as a result of Claimant's June 27, 2019 industrial injury.

19. Claimant challenged Dr. Mankowski's determination and sought a DIME. DIME Dr. Reichhardt assigned a 24% whole person impairment rating without apportionment. The rating included a 12% whole person impairment pursuant to Table 53 for a specific disorder of the lumbar spine and a second surgery. However, the 12% rating was apportioned entirely to Claimant's prior August 9, 2004 injury. Claimant's total apportioned specific disorder impairment was thus zero percent. Dr. Reichhardt also assigned a 13% whole person impairment rating for ROM deficits. He did not apportion the 13% rating because Claimant had no restrictions, no episodes of back pain, no lost time and no medical visits for one year prior to his June 27, 2019 work injury. Finally, Dr. Reichhardt assigned a 3% lower extremity impairment that converted to a 1% whole person rating. After apportionment, Claimant thus suffered a 14% whole person impairment for his June 27, 2019 work injury.

20. Respondent contends that Dr. Reichhardt's failure to subtract Claimant's 11% ROM impairment, assigned by Dr. Basse in case number 4-650-388, from the 13% ROM rating in the present matter was clearly erroneous. Dr. Chan explained that apportionment of Claimant's current impairment was warranted because of his 2004 work injury. Based on the *AMA Guides*, apportionment involves subtracting the previous impairment as it existed at the time of the subsequent injury from the injured worker's total impairment. Dr. Chan maintained that Dr. Reichhardt erroneously assigned Claimant a 14% whole person impairment for his June 27, 2019 work injury. Specifically, Dr. Basse assigned an 11% whole person impairment for Claimant's lumbar spine ROM deficits as a result of his August 9, 2004 work injury. Dr. Chan reasoned that a previous rating for ROM deficits should be subtracted from a current ROM rating in order to identify a true ROM deficit. Dr. Reichhardt assigned a 13% whole person impairment for Claimant's lumbar spine ROM deficits in the current case. Subtracting Claimant's prior 11% rating from his present 13% impairment yields a 2% whole person impairment rating for ROM deficits.

21. Dr. Chan's opinion is consistent with §8-42-104(5)(a)&(b), C.R.S. and WCRP 12-3 because they specify that a permanent medical impairment rating applicable to a body part shall be deducted from the permanent medical impairment rating for a subsequent injury to the same body part. Notably, WCRP 12-3 provides that "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." Moreover, ATP Dr. Mankowski also specifically apportioned the 11% ROM rating assigned by Dr. Basse.

22. The preceding analysis reflects that Dr. Reichhardt was clearly erroneous in failing to apportion Claimant's lumbar ROM deficits based on the 11% rating for lumbar ROM deficits that Dr. Basse had assigned in case number 4-650-388. The record reveals unmistakable evidence free from serious or substantial doubt that Dr. Reichhardt incorrectly failed to properly apportion Claimant's prior lumbar ROM impairment. Notably, Dr. Reichhardt correctly apportioned a 12% whole person impairment pursuant to Table

53 for a specific disorder of the lumbar spine as a result of Claimant's August 9, 2004 injury. Therefore, combining the 2% remaining lumbar ROM impairment after apportionment with Dr. Reichhardt's 1% whole person rating for a lower extremity impairment yields a 3% whole person rating for Claimant's June 27, 2019 admitted industrial injury.

23. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Reichhardt that he suffered a 0% apportioned impairment for a specific disorder of the lumbar spine as a result of his June 17, 2019 industrial injuries. Dr. Reichhardt correctly apportioned Claimant's 12% whole person impairment pursuant to Table 53 for a specific disorder of the lumbar spine to prior case number 4-650-388. Notably, he explained that he followed §8-42-104(5)(a), C.R.S. in apportioning the specific disorder impairment. Furthermore, Dr. Chan's report and testimony supports Dr. Reichhardt's apportionment. Claimant has not produced contrary evidence that Dr. Reichhardt erroneously apportioned the Table 53 rating. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Reichhardt incorrectly apportioned his prior Table 53 impairment rating from case number 4-650-388.

24. Claims Adjuster MT[Redacted] testified that Respondent filed a FAL in the present matter acknowledging that Claimant suffered a 7% whole person impairment rating as a result of his June 27, 2019 industrial injury. MT[Redacted] remarked that the FAL admitted Claimant was entitled to receive $31,266.54 in PPD benefits.

25. The record reflects Respondent has paid Claimant $31,266.54 (.07 x 400 x. 1.34 x $833.33) in PPD benefits in the present claim based on the admitted 7% whole person impairment rating. However, because Respondent has overcome Dr. Reichhardt's DIME opinion, the correct whole person impairment rating is 3%. The 3% whole person impairment rating is worth $12,999.95 (.03 x 400 x 1.30 x $833.33= $12,999.95) in PPD benefits. Subtracting $12,999.95 from $31,266.54 yields an overpayment of $18,266.59 in PPD benefits.

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).

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 from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S. *See Yeutter v. Indus. Claim Appeals Off.*, 487 P.3d 1007, 1012 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Off.*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on causation is also entitled to presumptive weight. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

7. “Clear and convincing evidence” is evidence that demonstrates it is “highly probable” the DIME physician's rating is incorrect. *Qual-Med, Inc.,* 961 P.2d at 592. In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. If a party has carried the initial burden of overcoming the DIME physician’s impairment rating by clear and convincing evidence, the ALJ’s determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc.*, WC 4-600-47 (ICAO, Nov. 16, 2006). When applying the preponderance of the evidence standard the ALJ is “not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence.” *Id.* When the ALJ determines that the DIME physician’s rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, WC 4-561-848 (ICAO, Mar. 19, 2004).

9. Apportionment is made by subtracting from the injured worker's impairment the preexisting impairment as it existed at the time of the subsequent injury. Desk Aid 11 of the Impairment Rating Tips details that a physician may provide an opinion on apportionment for any pre-existing work related permanent impairment to the same body part “where medical records or other objective evidence substantiate a pre-existing impairment.” Apportionment shall be made by subtracting the pre-existing impairment as it existed at the time of the subsequent injury or occupational disease from the injured worker’s total impairment.

10. Section 8-42-104(5)(a)&(b), C.R.S. and WCRP 12-3(B) specify that apportionment is required only after the DIME physician initially determines that the industrial injury has caused ratable impairment under the *AMA Guides*. *Hernandez v. Dairy Farmers of America*, WC 5-028-658 (ICAO, Feb. 4, 2020). Section 8-42-104(5)(a)&(b), C.R.S. explicitly provides that a permanent medical impairment rating applicable to a body part shall be deducted from the permanent medical impairment rating for a subsequent injury to the same body part. *See* Desk Aid 14, Apportionment Calculation Worksheet (apportionment involves “Preferably subtracting like from like, i.e. ROM from ROM”). Similarly, WCRP 12-3(B) specifies that "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." Consequently, both the statute and Rule presume that apportionment applies as long as there is a subsequent permanent impairment causally related to the industrial injury. *See Wallace v. Phil Long Ford Motor City*, WC 5-106-788 (ICAO, Jan. 8, 2021); *Hernandez v. Dairy Farmers of America*, WC 5-028-658 (ICAO, Feb. 4, 2020). The purpose of the statute is to preclude

a claimant from recovering twice for the same impairment. *See In re Kellebrew,* WC 964-409-01 (ICAO, Feb. 6, 2017).

11. As found, Respondent has produced clear and convincing evidence to overcome the DIME opinion of Dr. Reichhardt that Claimant suffered a 13% range of motion impairment as a result of his June 17, 2019 industrial injury. Initially, on June 27, 2019 Claimant suffered an admitted industrial injury to his lower back. In a prior Workers' Compensation claim from August 9, 2004 Claimant sustained a work-related injury to his lumbosacral spine. He received a 27% whole person impairment rating that included the following: 10% pursuant to Table 53(II)(E) for residual low back pain following a surgically treated disc lesion; 2% under Table 53(II)(G) for a second procedure/surgery;11% for lumbar spine ROM deficits; 1% for persistent right S1 sensory radiculopathy;1% for left S1 sensory radiculopathy; and 2% for left S1 motor involvement of the lower extremity.

12. As found, on June 22, 2020 ATP Dr. Mankowski determined Claimant had reached MMI for his June 27, 2019 work injury and assigned permanent impairment ratings. Dr. Mankowski remarked that Claimant had received a 27% whole person impairment rating from Dr. Basse in 2009 as a result of his August 9, 2004 Workers' Compensation injury. She specifically apportioned the 11% ROM rating assigned by Dr. Basse. Subtracting 11% from the 18% rating Dr. Mankowski had assigned, yielded a 7% ROM impairment. Combining the 7% rating pursuant to Table 53 with the remaining 7% rating for ROM deficits yielded a 14% whole person permanent impairment rating as a result of Claimant's June 27, 2019 industrial injury.

13. As found, Claimant challenged Dr. Mankowski's determination and sought a DIME. DIME Dr. Reichhardt assigned a 24% whole person impairment rating without apportionment. The rating included a 12% whole person impairment pursuant to Table 53 for a specific disorder of the lumbar spine and a second surgery. However, the 12% rating was apportioned entirely to Claimant's prior August 9, 2004 injury. Claimant's total apportioned specific disorder impairment was thus zero percent. Dr. Reichhardt also assigned a 13% whole person impairment rating for ROM deficits. He did not apportion the 13% rating because Claimant had no restrictions, no episodes of back pain, no lost time and no medical visits for one year prior to his June 27, 2019 work injury. Finally, Dr. Reichhardt assigned a 3% lower extremity impairment that converted to a 1% whole person rating. After apportionment, Claimant thus suffered a 14% whole person impairment for his June 27, 2019 work injury.

14. As found, Respondent contends that Dr. Reichhardt's failure to subtract Claimant's 11% ROM impairment, assigned by Dr. Basse in case number 4-650-388, from the 13% ROM rating in the present matter was clearly erroneous. Dr. Chan explained that apportionment of Claimant's current impairment was warranted because of his 2004 work injury. Based on the *AMA Guides*, apportionment involves subtracting the previous impairment as it existed at the time of the subsequent injury from the injured worker's total impairment. Dr. Chan maintained that Dr. Reichhardt erroneously assigned Claimant a 14% whole person impairment for his June 27, 2019 work injury. Specifically, Dr. Basse assigned an 11% whole person impairment for Claimant's lumbar spine ROM deficits as a result of his August 9, 2004 work injury. Dr. Chan reasoned that a previous rating for

ROM deficits should be subtracted from a current ROM rating in order to identify a true ROM deficit. Dr. Reichhardt assigned a 13% whole person impairment for Claimant's lumbar spine ROM deficits in the current case. Subtracting Claimant's prior 11% rating from his present 13% impairment yields a 2% whole person impairment rating for ROM deficits.

15. As found, Dr. Chan's opinion is consistent with §8-42-104(5)(a)&(b), C.R.S. and WCRP 12-3 because they specify that a permanent medical impairment rating applicable to a body part shall be deducted from the permanent medical impairment rating for a subsequent injury to the same body part. Notably, WCRP 12-3 provides that "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." Moreover, ATP Dr. Mankowski also specifically apportioned the 11% ROM rating assigned by Dr. Basse.

16. As found, the preceding analysis reflects that Dr. Reichhardt was clearly erroneous in failing to apportion Claimant's lumbar ROM deficits based on the 11% rating for lumbar ROM deficits that Dr. Basse had assigned in case number 4-650-388. The record reveals unmistakable evidence free from serious or substantial doubt that Dr. Reichhardt incorrectly failed to properly apportion Claimant's prior lumbar ROM impairment. Notably, Dr. Reichhardt correctly apportioned a 12% whole person impairment pursuant to Table 53 for a specific disorder of the lumbar spine as a result of Claimant's August 9, 2004 injury. Therefore, combining the 2% remaining lumbar ROM impairment after apportionment with Dr. Reichhardt's 1% whole person rating for a lower extremity impairment yields a 3% whole person rating for Claimant's June 27, 2019 admitted industrial injury.

17. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Reichhardt that he suffered a 0% apportioned impairment for a specific disorder of the lumbar spine as a result of his June 17, 2019 industrial injuries. Dr. Reichhardt correctly apportioned Claimant's 12% whole person impairment pursuant to Table 53 for a specific disorder of the lumbar spine to prior case number 4-650-388. Notably, he explained that he followed §8-42-104(5)(a), C.R.S. in apportioning the specific disorder impairment. Furthermore, Dr. Chan's report and testimony supports Dr. Reichhardt's apportionment. Claimant has not produced contrary evidence that Dr. Reichhardt erroneously apportioned the Table 53 rating. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Reichhardt incorrectly apportioned his prior Table 53 impairment rating from case number 4-650-388.

Overpayment

18. Section 8-40-201(15.5), C.R.S, defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." There are thus three categories of possible overpayment pursuant to §8-40-201(15.5). *In Re Grandestaff,* No. 4-717-644 (ICAP, Mar. 11, 2013). An overpayment may occur even if it did not exist at

the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Therefore, retroactive recovery for an overpayment is permitted. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

19. The statute defining "overpayment" was effective until January 1, 2022. In "workers' compensation cases, the substantive rights and liabilities of the parties are determined by the statute in effect at the time of a claimant's injury, while procedural changes in the statute become effective during the pendency of a claim." *Berthold v. Indus. Claim Appeals Off.*, 410 P.3d 810, 814 (Colo. App. 2017); *see Rosa v. Indus. Claim Appeals Off.*, 885 P.2d at 334 ("[T]he general rule [is] that the rights and liabilities of the parties are determined by the statute in effect at the time of injury, except that procedural changes may be immediately applied to ongoing claims for benefits."). House Bill 21-1207 amended the definition of "overpayment" in §8-40-201(15.5), C.R.S. effective January 1, 2022. However, the amended definition is inapplicable here because Claimant was injured on June 27, 2019.

20. As found, Claims Adjuster MT[Redacted] testified that Respondent filed a FAL in the present matter acknowledging that Claimant suffered a 7% whole person impairment rating as a result of his June 27, 2019 industrial injury. MT[Redacted] remarked that the FAL admitted Claimant was entitled to receive $31,266.54 in PPD benefits.

21. As found, the record reflects Respondent has paid Claimant $31,266.54 (.07 x 400 x. 1.34 x $833.33) in PPD benefits in the present claim based on the admitted 7% whole person impairment rating. However, because Respondent has overcome Dr. Reichhardt's DIME opinion, the correct whole person impairment rating is 3%. The 3% whole person impairment rating is worth $12,999.95 (.03 x 400 x 1.30 x $833.33= $12,999.95) in PPD benefits. Subtracting $12,999.95 from $31,266.54 yields an overpayment of $18,266.59 in PPD benefits.

ORDER

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

1. Respondent has overcome Dr. Reichhardt's DIME opinion that Claimant suffered a 13% ROM impairment as a result of his June 17, 2019 industrial injury. After apportionment, Claimant suffered a 2% ROM impairment in the present claim.

2. Claimant has failed to overcome Dr. Reichhardt's apportioned 0% Table 53 rating.

3. Claimant suffered a total 3% whole person impairment as a result of his June 17, 2019 industrial injury.

4. Claimant has received an overpayment of $18,266.59 in PPD benefits.

5. 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 19, 2024.

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. Has Claimant demonstrated, by a preponderance of the evidence, that the lumbar fusion surgery recommended by Dr. Addison Wood is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted January 9, 2023 work injury?

2. Have Respondents demonstrated, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment with Employer?

FINDINGS OF FACT

1. Claimant worked for Employer as a locator. His job duties included installing fiber optics for Employer's customers. On January 9, 2023, Claimant was digging a hole as part of his normal job duties as a locator. While doing so, Claimant twisted his body and heard a "pop". Claimant testified that he experienced immediate pain and he was unable to move.

2. On January 10, 2023, Claimant sought treatment with his chiropractor, Dr. Russell Wouters. Claimant testified that following that chiropractic appointment his back symptoms initially felt better. However, Claimant continued to have back pain and he reported the incident to a supervisor, [Redacted, hereinafter PD], on January 11, 2023.

3. Claimant's authorized treating physician (ATP) for this claim is Dr. Randall Shelton at Cedar Point Health. On January 12, 2023, Claimant was seen in Dr. Shelton's practice by Elizabeth Singleton, PA-C. On that date, Claimant described his injury and reported pain in his right lower back, and radiating into his right leg. PA Singleton ordered x-rays of Claimant's lumbar spine and recommended ice, heat, and stretching. PA Singleton also placed Claimant under work restrictions of no lifting, carrying, pushing, or pulling.

4. On January 16, 2023, lumbar spine x-rays were performed. The x-rays showed nothing acute. The x-rays did show an L5 pars defect, with grade 1 anterolisthesis.

5. On January 16, 2023, Claimant returned to Dr. Shelton's practice and was seen by Chris Polsley, PA-C. At that time, Claimant reported persistent pain that worsened with movement. PA Polsley ordered chiropractic treatment and physical therapy. PA Polsley adjusted Claimant's work restrictions to include a ten pound lifting, carrying, pushing, or pulling restriction, and no lifting from below the waist.

6. On February 17, 2023, Claimant was seen by Dr. Shelton. At that time, Claimant reported that he was doing better and that his pain was one out of ten. Dr. Shelton agreed with chiropractic treatment and physical therapy. In addition, Dr. Shelton released Claimant to full duty with no work restrictions. Dr. Shelton opined that Claimant would reach maximum medical improvement (MMI) in one to two months.

7. On March 14, 2023, Claimant returned to PA Polsley. In the medical record of that date, PA Polsley noted that Claimant had developed right sided sciatica. PA Polsley ordered magnetic resonance imaging (MRI) of Claimant's lumbar spine. A return to physical therapy and muscle relaxers were also ordered. In addition PA Polsley assigned work restrictions of no lifting, carrying, pushing, or pulling over 20 pounds.

8. On March 16, 2023, Respondents filed a General Admission of Liability (GAL) regarding the January 9, 2023 injury.

9. On April 9, 2023, a lumbar spine MRI was performed. The MRI showed a mild annular bulge at the L4-L5 level; and an L5 pars defect with grade 1 anterolisthesis.

10. On April 14, 2023, Claimant was seen by Dr. Shelton. At that time, Claimant reported that his pain was stable, but worsened with walking. Dr. Shelton reviewed the recent MRI results with Claimant. In the medical record of that date, Dr. Shelton stated "MRI shows obvious injury with pars defect and nerve root compression." Dr. Shelton ordered additional physical therapy and referred Claimant to Dr. Samuel Holmes for pain management and rehabilitation.

11. On May 1, 2023, Ctaimant was seen by Laura Boucher, PA-C at Montrose Regional Spine and Pain Center. At that time, Claimant reported that his symptoms included low back pain that radiated down his right leg into his right calf and foot. Claimant denied any numbness, tingling, or weakness. PA Boucher reviewed the recent MRI results and recommended right L5 and S1 transforaminal epidural steroid injections (TFESIs). PA Boucher also noted that "[s]urgical discussion was discussed with [Claimant] but is not necessary at this time."

12. On May 17, 2023, Dr. Holmes administered TFESIs at the right L5-S1 and right S1 level.

13. On June 13, 2023, Claimant returned to Dr. Holmes and reported "modest improvement" from the injections. Claimant also reported ongoing right L5 and S1 radicular symptoms. After discussion of treatment options (including physical therapy, repeat injections, and gabapentin) Claimant elected to pursue physical therapy.

14. On June 21, 2023, Claimant was involved in a motor vehicle accident (MVA) and received medical treatment at Montrose Regional Health. The records admitted into evidence describe the accident as "[Claimant} was [the] unrestrained driver in an [motor vehicle collision] where he struck another vehicle at approximately 60

to 70 miles per hour." Claimant reported mild chest pain and pain in his left index finger. Claimant made no reports of back pain.

15. On November 7, 2023, Claimant returned to Dr. Holmes. At that time, Dr. Holmes noted that Claimant's symptoms had not significantly improved. Therefore, he ordered a lumbar spine CT scan and a surgical consultation.

16. Claimant testified regarding various activities he has engaged in since the work injury. These activities have included hiking, hunting, fishing, boating, and bowling. Claimant further testified that these activities have impacted his low back symptoms. Claimant testified that although he has continued to engage in these various activities, he has to walk slowly, and take breaks.

17. [Redacted, hereinafter KO] is Claimant's significant other. KO[Redacted] testified regarding photographs and videos of Claimant that she posted on her various social media accounts. KO[Redacted] testimony addressed activities she and Claimant engaged in during 2023. These activities included camping, hiking, hunting, skeet shooting, bowling, and boating. KO[Redacted] testified that in November 2023 she and Claimant completed a 13 mile hike in 10 hours. The specific social media post describes the hike as "rugged". The ALJ has reviewed the social media history admitted into evidence.

18. Claimant provided specific testimony regarding a symptom "flare" while bowling in November 2023. Claimant testified that at that time he and his significant other bowled two games. During that time, Claimant began to feel tightness in his back. However, Claimant was awoken with such extreme back pain that he transported himself to the emergency department (ED) at Montrose Memorial Hospital.

19. On November 20, 2023, Claimant was seen at Montrose Memorial Hospital. At that time, Claimant described his work injury and subsequent medical treatment. Claimant also reported "worsening pain" after bowling the day prior. While Claimant was in the ED, a lumbar spine computed tomography (CT) scan was performed. In that same medical record, Dr. Avery Mackenzie noted that the CT scan showed no acute abnormality. Claimant was instructed to attend his upcoming scheduled surgical consultation. Claimant was further instructed to apply ice and limit lifting. In addition, Claimant was prescribed oxycodone for pain.

20. On November 30, 2023, Claimant was seen by Dr. Addison Wood for a surgical consultation. Dr. Wood recommended a L5-S1 transforaminal lumbar interbody fusion (TLIF) surgery. Claimant indicated he wished to consider surgery. Claimant returned to Dr. Wood on December 8, 2023. At that time, Claimant wanted to undergo the recommended surgery. The medical record of that date identified the specific recommended procedure to be an open right sided L5-S1 TLIF.

21. At the request of Respondents, on January 24, 2024, Claimant attended an independent medical examination (IME) with Dr. Scott Primack. In connection with the IME, Dr. Primack reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In his IME report, Dr. Primack

identified Claimant's diagnoses as spondylolisthesis (Type I to Type II) and a disk herniation at the L5-S1 level with effacement of the L5 nerve root. Dr. Primack opined that the recommended fusion surgery would address both the herniated disk and the spondylolisthesis. Dr. Primack further opined that the fusion would be reasonable and necessary medical treatment of Claimant's condition. Dr. Primack further opined that the need for surgery was related to Claimant's work injury.

22. February 9, 2024, Dr. Primack authored an addendum to his IME report. In the addendum, Dr. Primack again opined that the recommended fusion surgery was reasonable and necessary to treat Claimant's condition. However, Dr. Primack changed his opinion on whether the need for the recommended surgery was related to Claimant' work injury. Specifically, Dr. Primack opined that "the surgical intervention ... [is] not part of the work injury." In support of his changed relatedness opinion, Dr. Primack pointed to his review of KO[Redacted] social media posts. With regard to these posts, Dr. Primack noted that Claimant's "activity level in November 2023, independent of his work injury" significantly aggravated his underlying spondylolisthesis." It is Dr. Primack's opinion that Claimant "would not be able to tolerate 13 miles of aggressive and demanding hiking with a rucksack or uneven terrain in 10 hours."

23. On April 15, 2024, Dr. Qing-Min Chen authored a report after completing a records review. In addition to a review of Claimant's medical records, Dr. Chen also reviewed KO[Redacted] social media posts. Dr. Chen opined that on January 9, 2023 Claimant suffered a work related soft tissue injury, specifically a lumbar strain. Dr. Chen further opined that Claimant reached maximum medical improvement (MMI) on February 17, 2023. Dr. Chen referenced two "interval injuries" that Claimant suffered. Those interval injuries were the June 21, 2023 MVA and the November 20, 2023 worsening back pain after bowling. In both instances, it is Dr. Chen's opinion that these events are not related to the work injury. Dr. Chen explained that there is no evidence that the spondylolisthesis at L5-S1 was caused by Claimant's work injury. Dr. Chen further noted that the January 9, 2023 work injury did not cause an aggravation of Claimant's preexisting spondylolisthesis.

24. Dr. Chen's deposition testimony was consistent with his written report. Dr. Chen explained that Claimant' primary issue is a "slipped vertebra". Specifically, the L4-L5 vertebra has slipped forward into L4-S1, which has resulted in "dynamic instability". Dr. Chen further testified that Claimant has a pars defect. Pars defects typically occur in adolescence, usually with high school athletes. Dr. Chen explained that the MRI showed that the bone is rounded around Claimant's pars defect. This indicates that the pars defect is a chronic issue. While the recommended fusion may be beneficial in treating Claimant's condition, it continues to be Dr. Chen's opinion that any need for that surgery is unrelated to Claimant's work injury.

25. Claimant is no longer employed by Employer. Claimant's last day of employment was March 28, 2024. Records admitted into evidence state that Claimant was terminated from employment because he "refused to return to his assigned [t]eam".

26. During his employment with Employer, Claimant worked on 20 Crew. On March 27, 2024, Claimant was to return to work for Employer. However, Claimant was informed that he would not be working on 20 Crew, instead he was now assigned to 1O Crew. Due to personality conflicts, Claimant did not want to work on 1O Crew. On the morning of March 27, 2024, Claimant attempted to communicate to management that he did not want to work with 10 Crew. Claimant was informed that was his assigned crew and was provided transportation to meet with 10 Crew.

27. Claimant testified that upon his arrival, he was confronted by the team lead of 10 Crew, [Redacted, hereinafter SS]. Claimant described this interaction with SS[Redacted] was a verbal confrontation that did not result in any physical contact. Claimant further testified that he believed that SS[Redacted] wanted to physically fight Claimant. Claimant also testified that he informed SS[Redacted] that if he struck Claimant, then Claimant would "sue" him. Claimant explained in his testimony that due to the condition of his back, he had concerns that a physical fight could leave him paralyzed. During this confrontation, SS[Redacted] made reference to Claimant's June 2023 MVA. Claimant testified that he found this reference to the MVA to be "verbal assault."

28. On March 28, 2024, Claimant met with members of management (PD[Redacted] and [Redacted, hereinafter BS]) regarding the March 27, 2024 incident with SS[Redacted]. Claimant was informed that the position available to him was on 1O Crew. Claimant stated that he did not wish to work on that crew. Claimant was advised that if he did not return to 10 Crew, there was no other work available to him, and his employment would be terminated. Claimant understood that his refusal to report to work with 10 Crew would result in termination of his employment. Despite this knowledge, Claimant refused to work with 10 Crew, and his employment was terminated. The ALJ specifically finds that Claimant was not terminated because of the interaction with SS[Redacted] on March 27, 2024.

29. With regard to the recommended fusion surgery, the ALJ credits the medical records and the February 9, 2024 opinions of Dr. Primack and the testimony and opinions of Dr. Chen. The ALJ specifically credits Dr. Chen's testimony that there is no evidence that the spondylolisthesis at L5-S1 was caused by Claimant's work injury and that the January 9, 2023 work injury did not cause an aggravation of Claimant's preexisting spondylolisthesis. The ALJ finds that while the recommended fusion surgery may be reasonable and necessary to address the condition of Claimant's back, the need for surgery is not related to the work injury. Therefore, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that the recommended fusion surgery is necessary to cure and relieve Claimant from the effects of the admitted work injury.

30. The ALJ credits Claimant's testimony and finds that he understood that if he refused to report to 1O Crew his employment would be terminated. Despite this understanding, Claimant refused to work with 10 Crew. This was a volitional act on the part of Claimant. The ALJ finds that Respondents have demonstrated that it is more likely than not that Claimant was responsible for the termination of his employment.

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.$. 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 the lumbar fusion surgery recommended by Dr. Wood is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted January 9, 2023 work injury. As found, the medical records and the opinions of Ors. Primack and Chen are credible and persuasive on this issue.

6. Sections 8-42-105(4) and 8-42-103(1)(9), C.R.S., contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office,* 58 P3d 1061 (Colo. App. 2002), the court held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault" applicable prior to the decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing,* W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. *See Padilla v. Digital Equipment Corp.,* 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

7. As found, Respondents have demonstrated, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment with Employer. As found, Claimant knew his refusal to work with 10 Crew would result in the termination of his employment. As found, Claimant acted volitionally when he refused to work with 1O Crew. Therefore, Claimant is not entitled to temporary disability benefits as he is responsible for any wage loss.

ORDER

It is therefore ordered:

1. Claimant's request for the recommended lumbar fusion is denied and dismissed.

2. Claimant was responsible for the termination of his employment, **effective March 29, 2024.** Therefore, he is not entitled to temporary disability benefits as he is responsible for any wage loss **after his last shift on March 28, 2024.**

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

Dated July 22, 2024.

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

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

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

ISSUES

- Did Respondents prove no further medical treatment is reasonably needed or causally related to the admitted industrial injury?

- If Respondents failed to withdraw their admission, did Claimant prove additional massage therapy is reasonably needed and causally related medical treatment after MMI?

FINDINGS OF FACT

Claimant has worked for Employer as a production line operator since 2013.

Claimant sought treatment from her PCP at the Monfort Family Clinic on February 21, 2019 for left shoulder pain. Claimant reported she was "sore from work since 28 January, and then it ended up hurting more." The provider noted the injury was "atraumatic." Examination of the left shoulder showed mild trapezius pain with shoulder flexion. The assessment was "mild minimal findings likely impingement." She was given a 10-pound work restriction and advised to "follow up with work comp if work injury."

On April 24, 2019, Claimant was seen at UCHealth Urgent Care. She stated that "3 days ago at work she started having pain to left shoulder, neck after peeling plastic." Examination showed tenderness in the left shoulder and left thoracic area, but full range of motion and no spasm. The provider diagnosed an upper back strain with potential trapezius muscle involvement and shoulder pain. Claimant was given "light duty" restrictions.

Claimant reported the injury to Employer and was referred to Midtown Occupational Health. She saw PA-C Michael Deitz at Midtown on May 6, 2019. Claimant reported she was pulling plastic with her left arm and felt pain in her left neck, periscapular shoulder, and left arm. She wrote on the intake form that the incident occurred on April 22, 2019. Claimant's left triceps was tender to palpation and she had a painful trigger point in the left rhomboid and periscapular area. Mr. Dietz diagnosed a left periscapular strain. He gave Claimant work restrictions and referred her to massage therapy.

Respondents admitted liability with an injury date of April 22, 2019.

A cervical MRI on September 16, 2019 showed degenerative disc disease at C5-6 and C6-7, and moderate to severe left neuroforaminal stenosis at C6-7. No acute pathology was identified.

Claimant followed up with Dr. Oscar Sanders at Midtown on September 23, 2019, and reported significant improvement. She was "doing everything normal" at work but working at her own pace and avoiding heavy lifting. She reported occasional sharp pain in the left

neck and upper back. She stated the pain “comes and goes and is not associated with any particular activity or movement.” She had completed massage therapy and was performing a home exercise program. Dr. Sanders explained to Claimant that the cervical disc pathology was not caused by her work. He thought the work “possibly” exacerbated the underlying pathology but could not say it was “probable.”

Dr. Sanders put Claimant at MMI on October 2, 2019, with no impairment and no permanent restrictions. He recommended one follow-up visit within 6 months if her symptoms persisted or worsened.

Claimant returned to Dr. Sanders on January 24, 2020 complaining of increasing radicular symptoms in the left upper extremity. She reported that her symptoms had “completely resolved with physical therapy until 1 to 2 months ago,” but now her left arm was weakening, and her left hand would go numb. She also reported difficulty working her regular job. Dr. Sanders opined Claimant was no longer at MMI and recommended a cervical MRI

A cervical MRI on January 31, 2020 showed no changes at the C5-6 level from the 2019 MRI, and slight improvement was seen at the C6-7 level, which was initially the worst of the two levels.

Claimant underwent electrodiagnostic testing with Dr. Reichhardt on May 15, 2020. The testing was negative except for a mild component of bilateral carpal tunnel syndrome.

An October 19, 2020 left shoulder MRI revealed only mild tendinosis of the supraspinatus and infraspinatus.

After additional physical and massage therapy, Dr. Sanders again placed the claimant at MMI on January 5, 2021. This time, he assigned a 17% whole person impairment rating for the cervical spine and restricted the claimant to 10 pounds lifting, pushing, carrying, and pulling, and no repetitive neck flexion. For maintenance care, he recommended coverage of medications and repeat trigger point or epidural steroid injections for the next three years.

Respondents filed a Final Admission of Liability (“FAL”) on March 4, 2021, admitting for the 17% rating and medical benefits after MMI. Claimant did not object to the FAL and the claim closed per the terms of the FAL.

On February 23, 2021, Claimant appeared for an “urgent” maintenance care visit with Dr. Sanders. She reported that she was doing generally well until that weekend after straightening up from reaching down to tie her shoelaces, causing increased neck pain. Dr. Sanders voiced concern for “ongoing life stressors.” He recommended restarting medical massage and undergoing acupuncture. He refilled Flexeril and started her on etodolac and Voltaren gel. He also referred her to psychotherapy for chronic pain management.

On May 10, 2021, Claimant explained to physiatrist Gregory Reichhardt, M.D. that she had developed numbness and tingling in both hands, including all her fingers. On August

17, 2021, Dr. Reichhardt recorded no improvement from a cervical epidural steroid injection, with symptoms worsening over time.

A September 30, 2021 cervical MRI showed a superimposed left subarticular zone extrusion at C5-6, which was “new” when compared to the MRI from the January 2020 MRI. Respondents’ expert, Dr. Ogin, persuasively opined the new left-sided herniation correlated with Claimant’s worsening pain complaints in her her left arm.

About eight months later, on April 8, 2022, the claimant presented to UCHealth Urgent Care with 10/10 “extreme” and “excruciating” left neck pain. She complained that the pain down her left arm caused it to spasm to the point that her left hand was making a fist.

Massage therapy resumed on August 25, 2022.

On August 28, 2023, Claimant reported to Dr. Sanders that she was worse, with neck pain radiating into the left upper extremity and pain in the upper, mid, and lower back.

Dr. Sanders put Claimant at MMI for the third time on September 27, 2023. For maintenance care, Dr. Sanders referenced physician follow-up, medications, and possibly a cervical fusion.

Dr. Barry Ogin performed an IME for Respondents on May 5, 2023. Dr. Ogin also authored three supplemental reports and testified at hearing. Claimant reported constant 8-10/10 pain in the left trapezius and around the left scapula. She also described constant pain, numbness and tingling down her left arm. She was using Lidoderm patches and Voltaren gel regularly, and muscle relaxers occasionally. She reported short-term relief from massage therapy. Dr. Ogin opined Claimant's “relatively minor” work injury had resolved years ago, and her ongoing symptoms caused by degenerative spinal pathology that was neither caused nor aggravated by her work. The large new disc extrusion at C5-C6 would explain some of Claimant’s worsening symptomatology, but is unrelated to the work injury. Dr. Ogin opined, “To the degree that her subjective complaints have a spinal origin, this would be related to a progressive degenerative condition in her neck.” Dr. Ogin concluded that any additional treatment is unrelated to the work injury.

On March 26, 2024, Dr. Sanders wrote a letter Claimant’s counsel addressing causation. He acknowledged that the claimant’s work-related diagnoses would be cervical myofascial strain, with likely myofascial strains to the left upper trapezius and periscapular region. He felt that Claimant likely exacerbated her underlying cervical pathology but could not state with a reasonable degree of medical probability that it was a permanent aggravation. He agreed with Dr. Ogin that Claimant’s “initial myofascial strains ha[d] most likely resolved and that her current symptomatology is most likely secondary to her pre-existing degenerative pathology.”

Dr. Ogin’s opinions are credible and more persuasive than any contrary opinions in the record.

Respondents proved no further medical treatment is causally related to the admitted industrial injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the industrial injury. Section 8-42-101(1)(a). The need for medical treatment may extend beyond maximum medical improvement (MMI) if the claimant requires periodic maintenance care to relieve the effects of the injury or prevent deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An injury need not be the sole cause of a claimant's need for treatment so long as there is a "direct causal relationship" to the industrial accident. *Seifreid v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1996); *Munoz v. JBS Swift & Co. USA, LLC*, W.C. No. 4-780-871-03 (October 7, 2014).

Even where the respondents admit liability for medical benefits after MMI, they retain the right to challenge the compensability and reasonable necessity of specific treatment. *Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo. App. 2003). Ordinarily, the claimant must prove by a preponderance of the evidence that an injury directly and proximately caused the condition for which they seek benefits, and that the requested treatment is reasonably needed. *Walmart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). But § 8-43-201(1) places the burden of proof on the party seeking to modify an issue determined by an admission or order. If the effect of the respondents' challenge to medical treatment is to terminate all previously admitted maintenance benefits, the respondents must prove no further treatment is reasonable, necessary or related to the injury. *Salisbury v. Prowers County School District RE2*, W.C. No. 7-702-144 (ICAO, June 5, 2013); *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (ICAO, October 1, 2013).

As found, Respondents proved no further treatment is causally related to the admitted industrial injury. Dr. Ogin's analysis and conclusions are credible and persuasive. The April 2019 injury was minor and caused no objective structural injury. The September 2019 cervical MRI showed pre-existing degenerative changes, but no acute pathology. At most, the work accident caused a soft tissue strain and temporary symptomatic exacerbation of her underlying degenerative condition. The injury was successfully treated with conservative measures and essentially resolved by October 2019. Subsequent MRIs showed progressive pathology unrelated to the original injury. As Dr. Ogin persuasively opined, the subsequent persistence and worsening of Claimant's symptoms reflects the natural progression of her underlying condition without contribution from the industrial injury.

ORDER

It is therefore ordered that:

1. Respondents request to terminate Claimant's entitlement to medical benefits after MMI is granted.

2. Claimant's claim for additional massage therapy is denied and dismissed.

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

DATED: July 23, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-252-372-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable injury on August 2, 2023, arising out of the course and scope of his employment with Employer.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to receive reasonable, necessary, and causally related medical benefits for his industrial injuries.

3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits for the period August 2, 2023, until terminated by statute.

4. Whether Claimant is entitled to select his authorized treating physician.

FINDINGS OF FACT

1. Claimant was hired by Employer on July 24, 2024, to perform home remodeling services for Employer's clients. At the time of his injury, Claimant earned $18.00 per hour, and worked 8 hours per day, five days per week. Claimant's testified that he earned approximately $720.00 per week. (Ex. 1).

2. Employer did not carry worker's compensation on August 2, 2023. (Ex. 2).

3. On August 2, 2023, Claimant was working at a job site located at [Redacted, hereinafter AD]. At approximately 3:50 p.m., he went to get an electric saw from Employer's truck. As Claimant was handling the electric saw, the saw turned on, accidentally cutting Claimant's left hand. (Ex. 1). Claimant testified, credibly, that he notified his supervisor, who took Claimant to the emergency department at Rose Medical Center.

4. On August 2, 2024, at Rose Medical Center, Claimant was evaluated for a laceration extending from the palmar tip of his left index finger to approximately the metacarpophalangeal joint. X-rays taken at the emergency department demonstrated a comminuted and mildly displaced fracture of the second middle phalanx, which extends to the DIP joint, and likely the base of the second distal phalanx. Laceration repair was completed, and Claimant was placed on a splint. Claimant was discharged on August 4, 2023, with instructions to follow up with an orthopedic specialist. (Ex. 5).

5. On August 11, 2023, Claimant returned to the Rose Medical Center for follow-up and suture removal. Claimant's wounds were noted to be healing with no signs of

developing infection. He was prescribed oxycodone for pain and was advised to follow up with hand surgery on August 16, 2023. (Ex. 5).

6. Claimant testified that Employer did not provide Claimant with a list of designated providers. Claimant testified that he attended three hospital visits after his injury, but has not had additional care. He indicated that he did not attend the follow up appointment for his hand, or therapy, and has been unable to obtain additional treatment because he lacks the financial resources and was not working.

7. At hearing, Claimant testified, credibly, that he briefly returned to work for Employer for a time after the injury, but was not able to continue. Claimant last worked for Employer on August 30, 2023. (Ex. 1). Claimant obtained new employment with [Redacted, hereinafter WT] on March 11, 2024. Claimant credibly testified that he continues to experience difficulty with his left hand, including needing to take rest from his current employment due to using his left hand. Claimant demonstrated at hearing his limited ability to move the index finger on his left hand, and testified that he does not have the same capacity to use the hand as before. He testified that his hand becomes swollen and develops blood clots with use. Claimant's testimony and the medical records indicate that Claimant continues to experience difficulty with his left hand which diminishes his ability to function, and to work without restrictions.

CONCLUSIONS OF LAW

Generally

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

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

Cline, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO Aug. 25, 2014).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his left hand arising out of the course of his employment with Employer on August 2, 2023, when his left index finger was cut by an electric saw. Claimant's testimony regarding how the incident occurred and the injury he sustained was credible, and supported by the contemporaneous medical record. Claimant's left index finger injury is compensable.

Medical benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has establish that he sustained a compensable injury, Claimant is entitled to an award of general medical benefits for all authorized treatment that is reasonable, necessary and related to the injuries sustained on August 2, 2023.

Following Claimant's August 2, 2023 injury, Claimant received treatment at emergency room of Rose Medical Center where he remained until discharge on August 4, 2023. Claimant's laceration was repaired and treated by the various providers at Rose. The evidence demonstrates that the treatment Claimant received at Rose, including the August 2, 2023 admission and the August 11, 2023 admission was authorized, reasonable, necessary and causally-related to the August 2, 2023 injury.

Temporary Total Disability Benefits

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

Claimant's testimony and the medical records from Rose Medical Center demonstrate that Claimant was unable to work at full capacity as of the date of his injury, and that he continues to experience some level of restrictions to the present. Claimant's last day of work for Employer was August 30, 2023. No credible evidence was admitted demonstrating that Claimant has reached maximum medical improvement. Claimant has established by a preponderance of the evidence an entitlement to temporary disability benefits from August 30, 2023, until terminated by statute. Insufficient evidence was presented to determine whether Claimant is entitled to temporary disability benefits between the August 2, 2023 and August 30, 2023.

Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Rule 8-2 (A)(2) clarifies that, "[a] copy of the written designated provider list must be given to the injured worker in a verifiable manner

within seven (7) business days following the date the employer has notice of the injury." The term "business days" refers to any day other than a Saturday, Sunday, or legal holiday. W.C.R.P. 1-2 (C).

An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006). If upon notice of the injury the employer does not timely designate an ATP, the right of selection passes to the claimant. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987), *see also* W.C.R.P. 8-2 (E) ("If the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing.")

Claimant has established that employer did not provide Claimant with a designated provider list as required by the Act. As a result, the right of selection of an authorized treating physician passed to Claimant.

ORDER

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

1. Claimant sustained a compensable injury to his left hand on August 2, 2023, arising out of the course and scope of his employment with Employer.

2. Claimant entitled to receive reasonable, necessary medical benefits to cure or relieve the effects of the August 2, 2023 injury.

3. Claimant is entitled to TTD benefits for the period August 30, 2023, until terminated by statute. The issue of whether Claimant is entitled to temporary disability benefits from August 2, 2023 until August 30, 2023 is reserved for future determination.

4. Claimant is entitled to select an authorized treating physician to treat his work-related injuries.

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

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

DATED: July 23, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-257-996-001

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of $2,062.21.

2. Claimant is entitled to receive Temporary Partial Disability (TPD) benefits for the period April 14, 2023 through June 23, 2023 in the amount of $160.71 each week.

3. Claimant is entitled to receive TPD benefits for the period June 24, 2023 until terminated by statute in the amount of $71.82 each week.

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the left total shoulder arthroplasty requested by Authorized Treating Physician (ATP) Nathan Faulkner M.D. is reasonable, necessary and causally related to her April 5, 2023 industrial injury.

FINDINGS OF FACT

1. Claimant is a 54-year old female who works for Employer as a Sheriff's Deputy in the [Redacted, hereinafter AC]. She specifically works in the psychiatric section of the medical unit. Claimant's job duties include managing the safety and security of inmates.

2. On April 5, 2023 Claimant approached a cell door with her sergeant and a nurse to provide medications to an inmate. They unlocked and opened the "food slot" on the door to deliver the medication. The slot is approximately 8 x 3 x 4 inches, waist high, and opens outward the ground.

3. The nurse poured a cup of Gatorade and passed it through the slot. The inmate pulled the cup inside the cell and put his hand through the slot for his medication. As the nurse administered the medication, the inmate put his other hand out the door with the cup and threw urine and Gatorade at Claimant, the sergeant and the nurse.

4. Claimant and the sergeant attempted to control the situation by closing and locking the door slot. However, the inmate leaned against the slot with his full weight. Claimant testified she tried to pry the inmate's fingers off the slot and push him back. She attempted to remove her Taser from its holster by reaching behind with her left arm while pushing up on the slot door with her right hand. Claimant explained that she is required to press a button while rocking the Taser to pull it up and out of the holster. However, the Taser stuck when she tried to dislodge it. She eventually had to call for backup to control the situation.

5. In the process of trying to remove her Taser from the holster, Claimant suffered

left shoulder pain. The pain extended from her neck down to her arm. She experienced increased pain and numbness following the event. Claimant reported the injury to Employer.

6. Claimant had a previous left biceps tear and underwent a rotator cuff repair in 2001. She did not mention any issues performing personal tasks or her job duties. Claimant also has not received any medical treatment for her left shoulder since her prior surgery.

7. On April 6, 2023 Claimant visited Physician's Assistant Hanna Bodkin at Authorized Treating Provider (ATP) Concentra Medical Centers. Claimant explained that, while delivering medications to an inmate through a food opening, a struggle ensued. She developed severe anterior chest pain that radiated into her left shoulder. After conducting a physical examination, PA-C Bodkin diagnosed Claimant with a left shoulder sprain. PA-C Bodkin remarked that her objective findings were consistent with a work-related mechanism of injury and assigned work restrictions.

8. On April 21, 2023 Claimant underwent a chest and left shoulder MRI. The imaging revealed severe glenohumeral osteoarthritis with degenerative remodeling on both sides of the joint, and multiple ossified intra-articular bodies. Additionally, Claimant had mild supraspinatus and infraspinatus tendinopathy with a superimposed tiny articular-sided tear at the anterior supraspinatus. Finally, Claimant exhibited moderate acromioclavicular osteoarthrosis.

9. On May 30, 2023 Claimant began receiving treatment from Orthopedic Centers of Colorado. Physician's Assistant Cara Cohn commented that Claimant had injured her left shoulder at work while lifting a food slot against a combative inmate. She noted that Claimant had likely exacerbated her underlying degenerative joint disease during the event. PA-C Cohn administered a steroid injection and recommended physical therapy. Although Claimant exhibited initial improvement from the injection, the relief only lasted for one day.

10. On June 21, 2023 Claimant returned to PA-C Cohn for an examination. PA-C Cohn assessed Claimant with degenerative joint disease of the left shoulder. She reasoned that, because Claimant had not suffered left shoulder problems prior to her work injury, treatment was properly covered under Workers' Compensation. Because of Claimant's significant pain and dysfunction despite conservative treatment, she recommended surgery in the form of a left total shoulder arthroplasty.

11. On June 28, 2023 Nathan Faulkner, M.D. sought surgical authorization for a left total shoulder arthroplasty. He diagnosed Claimant with left shoulder degenerative joint disease. Insurer denied the surgical request.

12. On July 5, 2023 William Ciccone II, M.D. conducted a records review. Dr. Ciccone described that Claimant suffers from severe glenohumeral arthritis that pre-existed his work-related injury. He reasoned that Claimant's prior left shoulder surgery contributed to her current condition. Dr. Ciccone explained Claimant's mechanism of injury of pulling up on a food tray could not have caused or accelerated her degenerative changes. Although he determined that the requested shoulder replacement would benefit Claimant, he determined the the need for was not related to the April 5, 2023 work incident.

13. Michael Worrell, D.O. conducted a records review on September 18, 2023. Dr. Worrell noted Claimant had remarked at her June 6, 2023 physical therapy appointment that she had discomfort due to arthritis prior to her work injury. He agreed with Claimant's treatment providers that she requires a left shoulder arthroplasty, and found no reason to obtain a second opinion. However, he also agreed with Dr. Ciccone that the need for a shoulder replacement is due to arthritis. There is no causal relationship between the April 5, 2023 work-related injury and need for surgery.

14. Despite the denial of Claimant's shoulder surgery, she has continued to receive Workers' Compensation treatment for her cervical spine issues caused by the April 5, 2023 work incident.

15. Frederic Zimmerman, D.O. provided the primary treatment for Claimant's cervical spine. On August 3, 2023 he gave Claimant several treatment options, including: repeating oral steroids at a higher dose, administering epidural steroid injections, and possible surgery. Claimant chose oral steroids. Subsequently, Claimant reported to Dr. Zimmerman that the oral dexamethasone eliminated both her neck and arm symptoms for the three days that she took the medication.

16. Dr. Zimmerman also recommended proceeding with left C5-6 transforaminal epidural steroid injections (ESI) for diagnostic and therapeutic purposes. After a Rule 16 review, Allison M. Fall, M.D. agreed that Claimant sustained a neck injury. John T. Sacha, M.D. administered the C5-6 ESIs.

17. On March 13, 2024 Dr. Ciccone conducted an Independent Medical Examination (IME) of Claimant. He reviewed Claimant's medical records and performed a physical examination. Claimant reported that her shoulder injury occurred when she reached down for her Taser with her left arm. She developed shoulder pain from her neck down through her left arm. Claimant denied prior shoulder problems, but acknowledged some stiffness before the work incident. Dr. Ciccone noted that imaging only revealed degenerative changes without any acute trauma. The incident did not affect Claimant's pre-existing chronic shoulder condition. Dr. Ciccone concluded that reaching for a Taser or pushing on a food slot door was not a mechanism that would be associated with a significant shoulder injury. Instead, Claimant's current symptoms are reflective of the significant degenerative changes in the shoulder. Therefore, although the requested surgery was reasonable, the procedure was not causally related to her work accident.

18. On May 14, 2024 the parties conducted the post-hearing evidentiary deposition of Dr. Ciccone. He maintained that the requested left total shoulder arthroplasty was not causally related to Claimant's April 5, 2023 work incident. Specifically, Claimant's described mechanism of injury of reaching behind to grab a Taser would not even cause her to lift her shoulder. The movement would not produce trauma to aggravate or accelerate her pre-existing arthritic condition. Rather, Dr. Ciccone explained that arthritic changes visible on Claimant's imaging are normally accompanied by a waxing and waning of symptoms that can remain dormant or emerge at any time with or without an injury. He detailed that symptoms can occur with any activity. Notably, "[i]t can happen with day-to-day activities. It is just when the

degeneration in the joint gets to the point where it becomes symptomatic." Thus, while Dr. Ciccone acknowledged the requested total arthroplasty is reasonable and necessary to address Claimant's degenerative condition, the need for surgery is not causally related to her April 5, 2023 work event.

19. Claimant has failed to demonstrate it is more probably true than not that the left shoulder surgery requested by Dr. Faulkner is causally related to her April 5, 2023 industrial injury. Initially, Claimant explained that on April 5, 2023 she was involved in a scuffle with an inmate while attempting to administer medications through a slot in his cell door. In the process of trying to remove her Taser from her holster, Claimant suffered left shoulder pain that extended from her neck down through her left arm.

20. Claimant subsequently received conservative treatment in the form of physical therapy, diagnostic imaging studies and injections. A left shoulder MRI revealed severe glenohumeral osteoarthritis with degenerative remodeling on both sides of the left shoulder joint, but no acute injury. PA-C Cohn subsequently remarked that Claimant had likely exacerbated her underlying degenerative joint disease during the April 25, 2023 struggle. Because of Claimant's significant pain and dysfunction despite conservative treatment, she recommended surgery in the form of a left total shoulder arthroplasty. On June 28, 2023 Dr. Faulkner sought surgical authorization for the procedure.

21. Despite Dr. Faulkner's request, the record is replete with evidence that Claimant had a significant, pre-existing left shoulder condition prior to her work accident. After conducting a records review, Dr. Ciccone described that Claimant suffers from severe glenohumeral arthritis that pre-existed her work-related injury. He reasoned that Claimant's prior left shoulder surgery contributed to her current condition. Dr. Ciccone explained Claimant's mechanism of injury of pulling up on a food tray could not have caused or accelerated her degenerative changes. Although he determined that the requested shoulder replacement would benefit Claimant, he determined the need for surgery was not related to the April 5, 2023 work incident. Similarly, after performing a records review, Dr. Worrell agreed with Dr. Ciccone that the need for a shoulder replacement was due to pre-existing arthritis. There is no causal relationship between the April 5, 2023 work-related injury and need for surgery.

22. Dr. Ciccone also conducted an IME and testified through a post-hearing evidentiary deposition in this matter. He maintained that Claimant's need for a total left shoulder arthroplasty was not causally related to her April 5, 2023 work event. Dr. Ciccone noted that imaging only revealed degenerative changes without any acute trauma. The incident did not affect Claimant's pre-existing chronic shoulder condition. Dr. Ciccone concluded that reaching for a Taser or pushing on a food slot door was not a mechanism that would be associated with a significant shoulder injury. Specifically, Claimant's described mechanism of injury of reaching behind to grab a Taser would not even cause her to lift her shoulder. The movement would not produce trauma to aggravate or accelerate her pre-existing arthritic condition. Rather, Dr. Ciccone explained that arthritic changes visible on Claimant's imaging are normally accompanied by a waxing and waning of symptoms that can remain dormant or emerge at any time with or without an injury. Claimant's current symptoms are reflective of the significant degenerative changes in her left shoulder. Therefore, although the requested surgery is

reasonable, the procedure is not causally related to her work accident.

23. Based on the medical records and persuasive testimony of Dr. Ciccone, Claimant's request for left shoulder surgery is not likely causally related to her work activities for Employer. Claimant suffered from a significant, pre-existing condition that was not aggravated or accelerated by her work activities on April 3, 2023. There is simply a lack of a causal relationship between the April 5, 2023 incident and need for surgery. Although Claimant may have established a compensable claim and need for initial, conservative medical treatment for her shoulder and cervical spine, the requested surgical procedure is not causally related to the April 5, 2023 incident. Accordingly, Claimant's request for a total left shoulder arthroplasty as recommended by Dr. Faulkner is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

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

6. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the left shoulder surgery requested by ATP Dr. Faulkner is causally related to her April 5, 2023 industrial injury. Initially, Claimant explained that on April 5, 2023 she was involved in a scuffle with an inmate while attempting to administer medications through a slot in his cell door. In the process of trying to remove her Taser from her holster, Claimant suffered left shoulder pain that extended from her neck down through her left arm.

7. As found, Claimant subsequently received conservative treatment in the form of physical therapy, diagnostic imaging studies and injections. A left shoulder MRI revealed severe glenohumeral osteoarthritis with degenerative remodeling on both sides of the left shoulder joint, but no acute injury. PA-C Cohn subsequently remarked that Claimant had likely exacerbated her underlying degenerative joint disease during the April 25, 2023 struggle. Because of Claimant's significant pain and dysfunction despite conservative treatment, she recommended surgery in the form of a left total shoulder arthroplasty. On June 28, 2023 Dr. Faulkner sought surgical authorization for the procedure.

8. As found, despite Dr. Faulkner's request, the record is replete with evidence that Claimant had a significant, pre-existing left shoulder condition prior to her work accident. After conducting a records review, Dr. Ciccone described that Claimant suffers from severe glenohumeral arthritis that pre-existed her work-related injury. He reasoned that Claimant's prior left shoulder surgery contributed to her current condition. Dr. Ciccone explained Claimant's mechanism of injury of pulling up on a food tray could not have caused or accelerated her degenerative changes. Although he determined that the requested shoulder replacement would benefit Claimant, he determined the need for surgery was not related to the April 5, 2023 work incident. Similarly, after performing a records review, Dr. Worrell agreed with Dr. Ciccone that the need for a shoulder replacement was due to pre-existing arthritis. There is no causal relationship between the April 5, 2023 work-related injury and need for surgery.

9. As found, Dr. Ciccone also conducted an IME and testified through a post-hearing evidentiary deposition in this matter. He maintained that Claimant's need for a total left shoulder arthroplasty was not causally related to her April 5, 2023 work event. Dr. Ciccone noted that imaging only revealed degenerative changes without any acute trauma. The incident did not affect Claimant's pre-existing chronic shoulder condition. Dr. Ciccone concluded that reaching for a Taser or pushing on a food slot door was not a mechanism that would be associated with a significant shoulder injury. Specifically, Claimant's described mechanism of injury of reaching behind to grab a Taser would not even cause her to lift her shoulder. The movement would not

produce trauma to aggravate or accelerate her pre-existing arthritic condition. Rather, Dr. Ciccone explained that arthritic changes visible on Claimant's imaging are normally accompanied by a waxing and waning of symptoms that can remain dormant or emerge at any time with or without an injury. Claimant's current symptoms are reflective of the significant degenerative changes in her left shoulder. Therefore, although the requested surgery is reasonable, the procedure is not causally related to her work accident.

10. As found, based on the medical records and persuasive testimony of Dr. Ciccone, Claimant's request for left shoulder surgery is not likely causally related to her work activities for Employer. Claimant suffered from a significant, pre-existing condition that was not aggravated or accelerated by her work activities on April 3, 2023. There is simply a lack of a causal relationship between the April 5, 2023 incident and need for surgery. Although Claimant may have established a compensable claim and need for initial, conservative medical treatment for her shoulder and cervical spine, the requested surgical procedure is not causally related to the April 5, 2023 incident. Accordingly, Claimant's request for a total left shoulder arthroplasty as recommended by Dr. Faulkner is denied and dismissed.

ORDER

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

1. Claimant's request for a total left shoulder arthroplasty as recommended by Dr. Faulkner is denied and dismissed.

2. Claimant earned an Average Weekly Wage (AWW) of $2,062.21.

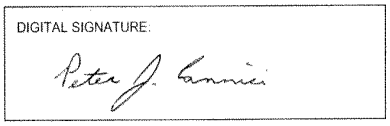
3. Claimant shall receive TPD benefits for the period April 14, 2023 through June 23, 2023 in the amount of $160.71 each week.

4. Claimant shall receive TPD benefits for the period June 24, 2023 until terminated by statute in the amount of $71.82 each week.

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

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

DATED: July 24, 2024.



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

ISSUES

1. Determination of the DIME's opinion regarding Claimant's date of maximum medical improvement (MMI) and permanent impairment rating.

FINDINGS OF FACT

1. Claimant sustained an admitted injury arising out of the course of his employment on January 3, 2022, when he fell onto his left hip, injuring his left knee. (Ex. D).

2. On June 5, 2023, Claimant's authorized treating physician (ATP) at Concentra, David Hnida, D.O., placed Claimant at MMI for his January 3, 2022 industrial injury effective that day. No credible evidence was admitted that Claimant received further care for his January 3, 2022 industrial injury. The treatment Claimant received at after June 5, 2023 was for different conditions which appear unrelated. (Ex. E).

3. On November 9, 2023, Claimant underwent a Division independent medical examination (DIME) with Bryan Alvarez, M.D. Dr. Alvarez found Claimant not at MMI and, indicated the decision not to place Claimant at MMI was "solely due to the need to have a one-time evaluation by PM&R [*i.e.*, a physical medicine and rehabilitation physician] to assess if he would benefit from PRP injections." He further indicated that if the PM&R physician did not agree that a PRP injection was reasonable, he recommended that Claimant be placed at MMI. Dr. Alvarez assigned Claimant a provisional 5% permanent impairment rating for left knee range of motion deficits. Dr. Alvarez also recommended maintenance care, to include physical therapy, and dry needing. (Ex. A).

4. After completion of the DIME, Respondents arranged for Claimant to be seen by Lawrence Lesnak, D.O., to evaluate his knee for potential PRP injections. Claimant was scheduled for two appointments, one on January 29, 2024 and one on March 4, 2024. Claimant did not attend either visit. (Exs. B, H, I, and J).

5. On March 14, 2024, Respondents' counsel wrote Dr. Lesnak requesting his opinion on whether Claimant had reached MMI. On March 26, 2024, Dr. Lesnak responded, stating "After reviewing all of the medical records that have been provided to me pertaining to [Claimant] there is no medical evidence to support that he is a candidate for PRP injections to his [left] knee as it pertains to his 1/3.22 work incident claim." (Ex. B).

6. Thereafter, Respondents contacted Dr. Alvarez and provided him Dr. Lesnak's March 26, 2024 letter. On April 18, 2024, Dr. Alvarez responded and opined that Claimant had reached MMI, and that his provisional 5% left lower extremity permanent impairment rating was appropriate. Although Respondents requested that Dr. Alvarez state the date Claimant reached MMI, he did not do so in his response. (Ex. C).

7. At hearing, Claimant testified that he agreed with Dr. Alvarez's opinion that he had reached MMI and his assignment of 5% permanent impairment of his left lower extremity, and specifically his knee.

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).

Determination Of DIME Opinion re: MMI and Impairment

The parties do not dispute that Claimant reached MMI and that Claimant has a 5% permanent impairment rating for his lower left extremity. Although the DIME physician indicated on April 18, 2024 that Claimant had reached MMI, he did not assign a specific date.

As part of the DIME process, the DIME physician is charged with the responsibility of determining whether a claimant has reached MMI, and determining what, if any, permanent impairment rating is appropriate. If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). "A DIME physician's finding of MMI consists not only of the initial report, but also any subsequent opinion given by the physician." *Samuels v. Deli Zone*, W.C., No. 4-761-359-02 (ICAO June 18, 2014), *citing Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Thus, the ALJ should consider all of the DIME physician's written and oral testimony. *Samuels, supra, citing Lambert & Sons, Inc. v. Indus. Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998).

The Act defines MMI as "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S. A finding that the claimant needs additional medical treatment to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO, May 20, 2004).

When the DIME was performed on November 9, 2023, Dr. Alvarez indicated the sole reason he did not place Claimant at MMI was to facilitate a one-time evaluation to assess whether PRP injections would benefit Claimant. Thus, the ALJ finds that Dr. Alvarez's opinion was that had not reached MMI by November 9, 2023, because further evaluation was necessary. That Claimant did not undergo the recommended evaluation does not change that opinion. When Dr. Alvarez did affirmatively state that Claimant had reached MMI on April 18, 2024, he did not make the MMI date retroactive to either his DIME examination, or the date assigned by Dr. Hnida, and merely indicated Claimant was at MMI. The ALJ thus concludes that Dr. Alvarez placed Claimant at MMI effective April 18, 2024, with a left lower extremity impairment rating of 5%.

ORDER

It is therefore ordered that:

1. Claimant reached maximum medical improvement on April 18, 2024.

2. Claimant's permanent impairment rating is 5% for his left lower extremity.

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 25, 2024

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