**Office of Administrative Courts**
**State of Colorado**
**Workers' Compensation No. WC 5-249-588-004**

## Issues

1. Whether Claimant established by a preponderance of the evidence that he is entitled to Temporary Total Disability (TTD) benefits from September 1, 2023 to July 29, 2024.

2. Whether Respondent established by clear and convincing evidence that the permanent impairment rating assigned by the Division Independent Medical Examination (DIME) physician Dr. Sharma is incorrect.

3. Whether Claimant established by a preponderance of the evidence that he sustained a serious permanent disfigurement to areas of the body normally exposed to public view entitling him to disfigurement benefits pursuant to section 8-42-108, C.R.S.

## Stipulations

1. Claimant's Average Weekly Wage (AWW) is $1200.00.

2. Claimant was paid no wages by Employer from September 1, 2023 through July 29, 2024.

## Findings of Fact

### *Claimant's Medical History*

1. Claimant has a mechanical heart valve. As a result, Claimant is required to take blood thinner medication such as Coumadin (warfarin).

#### 2018

2. In February 2018, Claimant was taken by ambulance to Texas Health Arlington Memorial Emergency Department in Arlington, Texas. Ex. 6 p. 77. Claimant reported

having chest pain and shortness of breath. *Id.* at p. 66. It was noted that Claimant had "[p]revious visits for chest pain. Normal vitals." *Id.* at p. 67. Claimant was diagnosed with subtherapeutic [International Normalized Ration (INR)] and was discharged after being instructed to take an extra dose of warfarin. *Id.* at p. 71 ("He stated he failed to take his coumadin multiple times this week.").

3. In August 2018, Claimant returned to Texas Health Arlington Memorial Emergency Department. Ex. 6 p. 78. Claimant reported intermittent choking sensations. *Id.* Claimant stated "this has happened often and he has been to facilities before and told he needs to follow up with a GI doctor but he does not know why or what causes it." *Id.* at p. 79. Claimant was given a GI cocktail and discharged with instructions to see a GI doctor. *Id.* at p. 80-81.

2020

4. In January 2020, Claimant again presented to Texas Health Arlington Memorial Emergency Department. Ex. 6 p. 84. Claimant reported several days of palpitations and chest pain. *Id.* Claimant's testing was normal. Claimant was diagnosed with "subtherapeutic anticoagulation" and discharged after being told of "the importance of outpatient follow up and he can't miss doses of coumadin." *Id.* at p. 88.

5. On February 25, 2020, Claimant presented to Medical City Arlington Emergency Room in Arlington, Texas. Ex. 6 p. 94. Claimant reported "midsternal chest pain that started 10 minutes prior to arrival." *Id.* Claimant "reports he thinks he has food stuck in his chest, reports it is not his heart." *Id.* at p. 101. Claimant was given morphine and a GI cocktail and was discharged. *Id.* at p. 101-02.

6. In April 2020, Claimant returned to Texas Health Arlington Memorial Emergency Department for shortness of breath. Ex. 6 p. 106. Claimant's testing was normal. *Id.* at p. 111.

7. In September 2020, Claimant presented to the Parkland Emergency Department in Dallas, Texas. Claimant first presented after an assault and he underwent a CT scan of head. Ex. 6 p. 117. His CT scan was normal. *Id.* at p. 133.

8. Claimant returned to the Parkland Emergency Department three days later with neck pain, dizziness, worsening headache on his left side, and trouble with his vision. Ex. 6 p. 134. Claimant underwent a second CT scan that was unremarkable. *Id.* at p. 141.

2021

9. On January 20, 2021, Claimant returned to Texas Health Arlington Memorial Emergency Department complaining of chest pain, headache, and "left hand numbness tingling and sharp pains in his fingers has been ongoing for 3 days and is worse at night." Ex. 6 p. 143. Claimant underwent testing and was diagnosed with "hypertension, unspecified type", "chest pain, unspecified type" and "carpal tunnel syndrome of left wrist." *Id.* at p. 148.

10. On June 1, 2021, Claimant returned to the Parkland Emergency Department complaining of shortness of breath, trouble breathing through his mouth, and being unable to eat quickly. Ex. 6 p. 149. Claimant's "workup is unremarkable, except subtherapeutic INR." *Id.* at p. 151. Claimant was diagnosed with sinusitis, unspecified chronicity, unspecified location. *Id.* at p. 153.

11. On June 21, 2021, Claimant again returned to Parkland Emergency Department complaining of chest pain and shortness of breath "onset last night while eating dinner." Ex. 6 p. 156. It was noted that Claimant "[w]as last seen for chest pain at outside facility in January 2021 and at that time he had cardiac workup including labs that were unremarkable and discharged in stable condition with low suspicion for ACS. He was last seen here on 6/1/21 for difficulty breathing through nose and shortness of breath. Was found to have subtherapeutic INR due to non compliance and was instructed to take his meds as prescribed." *Id.* at p. 158. Claimant's "[l]abs unremarkable. INR still slightly subtherapeutic at 2.3 however improved from last INR check." *Id.* at p. 159. Claimant was diagnosed with chronic rhinitis and subacute sinusitis, unspecified location. *Id.* at p. 160.

12. On July 10, 2021, Claimant presented to Texas Arlington Memorial Emergency Department complaining of shortness of breath. Ex. 6 p. 164. Claimant stated he had been having episodes of hyperventilation and anxiety. *Id*. Claimant's constitution was noted as "anxious appearing." *Id.* at p. 165. Claimant's labs and a radiograph of his chest were normal. The attending physician noted "Pt's sxs are most likely anxiety related and pt has been advised to follow-up with PCP and cardiologist." *Id.* at p. 170. Claimant was diagnosed with chest pain, unspecified type, shortness of breath, and anxiety. *Id.*

2022

13. On May 8, 2022, Claimant presented to the Poudre Valley Hospital Emergency Department in Fort Collins, Colorado, complaining of "a severe 10 out of 10 headache and no history of headaches." Ex. 6 pp. 175; 178 ("Pt co diffuse headache, denies hx. States he is concerned that it might be due to high blood pressure. advil and aspirin pta."). Claimant underwent a CT of his head which was negative for intracranial hemorrhage. *Id.* at p. 177. It was noted that Claimant had recently moved from Texas and had not been taking warfarin "for a couple of weeks" because he did not have an established primary care doctor or cardiologist. *Id.* at p. 175. Claimant requested a refill of his warfarin, was restarted on warfarin, and was referred to a cardiology clinic. *Id.* Claimant was diagnosed with headache, unspecified, presence of prosthetic heart valve, patient's other noncompliance with medication regimen, and long term (current) use of anticoagulants. *Id.* at p. 180.

14. On June 14, 2022, Claimant returned to Poudre Valley Hospital Emergency Department complaining of chest pain. Ex. 6 p. 181. Claimant "[s]ays it starts in the epigastrium going up substernally into his throat. This is worse with eating and symptoms seem more gastro logic than cardiac. IV was established labs are drawn cardiac work-up is negative D-dimer is negative." *Id.* at p. 183. Claimant was given Lovenox and warfarin for subtherapeutic INR and a GI cocktail. *Id.*

15. On June 25, 2022, Claimant again returned to Poudre Valley Hospital Emergency Department complaining of chest pain and dysphagia. Ex. 6 p. 190. Claimant reported pain with swallowing and "globus sensation." *Id.* at p. 193. Claimant was not taking his

warfarin because of difficulty taking pills. *Id.* Claimant's "lab work, EKG, chest x-ray were unremarkable [other] than a subtherapeutic INR." *Id.* at p. 197. Claimant underwent a CTA of chest/abdomen/pelvis that was also unremarkable. *Id.* at 202.

*Work Injury*

16. On August 2, 2023, while working as a mechanic for Employer, Claimant fell down a set of stairs and struck his head. *See* Ex. 5. Claimant was taken by a coworker to the Medical Center of the Rockies' Emergency Department (MCR ED) in Loveland, Colorado, where he was seen by Blaine Evans, D.O. Ex. 6 p. 207.

17. Upon arriving at the MCR ED, Claimant reported to Dr. Evans that he was carrying sheet-metal walking down steps when he tripped and fell and hit his head. Ex. 6 p. 209. Dr. Evans noted Claimant experienced a loss of consciousness. *Id.* However, triage notes from Jennifer Janiec, R.N., state no loss of consciousness, which Claimant later reported to other physicians. *Id.* at p. 215; Ex. K p. 87 ("He did not think he lost consciousness, but he did feel dazed and dizzy."); Ex. L p. 102 ("pt was working as a mechanic to move objects, fell down about 15 stairs per pt, hit head, no LOC"). Claimant sustained a laceration to his left scalp, but he denied nausea, vomiting, or double vision, and only reported a slight headache at the injury site. Ex. 6 p. 209.

18. Claimant's scalp laceration was superficial and did not require repair. Ex. 6 p. 209. Dr. Evans noted Claimant's cervical back had a normal range of motion and he had a supple neck. *Id.* at p. 211.

19. Because Claimant hit his head and takes warfarin, Dr. Evans ordered a CT scan of Claimant's head. Ex. 6 p. 215. While Dr. Evans' initial notes mentioned an intracranial hemorrhage based on the CT scan, the CT scan itself showed no evidence of hemorrhage and no intracranial abnormalities. *Id.* at p. 213. Claimant also underwent laboratory testing as a part of his visit and it was noted that he had a slightly subtherapeutic INR. *Id.* at p. 212.

20. Claimant was at the MCR ED for approximately an hour and a half. Ex. 6 p. 214-23. Claimant's final diagnoses were injury of the head, laceration of scalp, and

subtherapeutic INR. *Id.* at p. 242. Dr. Evans did not prescribe Claimant any medications. Claimant was discharged with a recommendation to follow up with his doctor as an outpatient. *Id.* at p. 241-46.

21. After being released, Claimant did not return to work with Employer. *See* Ex. T; Ex. S. Claimant never returned to work with Employer.

22. At the time of the injury, Employer did not carry workers' compensation insurance.

*Post-Injury Treatment*

23. On August 5, 2023, Claimant reported to the MCR ED with neck pain. Ex. 6 p. 250 ("He states that he is now having some neck pain as well as headaches and fatigue. Hears some ringing in his left ear. He ambulated in. No chest or abdominal or back pain."). Claimant was seen by Kyle Markel, D.O. Claimant underwent a CTA of his head/neck and a CT of his cervical spine which were unremarkable. *Id.* at p. 252-55. Claimant also had lab work which was unremarkable except for his subtherapeutic INR. *Id.* at p. 252. It was noted on his physical exam that Claimant had "[n]o signs of head trauma" and his neck had "[l]imited range of motion secondary to pain, no obvious hematomas or masses." *Id.* at p. 251. Claimant reported 8/10 pain. *Id.* at p. 258. Claimant was given morphine and iopamidol in the emergency department and prescriptions for 10 tablets of cyclobenzaprine (Flexeril) and 60 tablets of acetaminophen. *Id.* at p. 266. Dr. Markel diagnosed Claimant with tinnitus, left ear, cervicalgia, abnormal coagulation profile, headache, unspecified, nicotine dependence, other tobacco product, uncomplicated, and long term (current) use of anticoagulants. *Id.* at p. 289. Claimant was given strict return precautions and told to follow up with his doctor. *Id.* at p. 287.

24. On August 8, 2023, Claimant reported to the MCR ED with right lateral lower back pain and buttock pain radiating down his right leg. Ex. 6 p. 295 ("Patient is [in] today for right lateral lower back pain, buttock pain which radiates down the right leg. This occurred yesterday. Recent fall and struck his head, reports he did not have any back pain after the incident, unsure if he was positioning himself different or do anything differently with his positioning to cause the back pain but he had no specific injury to his back."). Claimant

was seen by Brock Reichert, PA-C. Claimant underwent an x-ray of his lumbar spine which was unremarkable. *Id.* at p. 298. Claimant's physical examination showed no midline spinal tenderness, no step-off or deformity to the lumbar or thoracic spine, no saddle anesthesia, and 5/5 lower extremity strength when tested against resistance. *Id.* at p. 295. Claimant was "[n]egative for neck stiffness." *Id.* at p. 297. Claimant reported 10/10 pain. *Id.* at p. 301. Claimant was diagnosed with sciatica of the right side and was given Valium and Decadron in the emergency department and prescriptions for 10 hydrocodone-acetaminophen (Norco) tablets and 15 prednisone tablets with no refills. *Id.* at pp. 299; 306; 319.

25. On August 24, 2023, Claimant reported to UCHealth Emergency Room – Harmony Campus (Harmony Campus ER) in Fort Collins, Colorado, with sleep disturbances, intermittent confusion, insomnia, and intermittent dizziness. Ex. 6 p. 327 ("States he is having a hard time falling asleep and waking up in the middle of the night feeling very panicked. Intermittently confused for a few seconds but then able to orient himself. States that if he is able to get a good night sleep however the symptoms do not seem to occur. Complains of very minimal headache although these only seem to occur during the events as well and does not seem to have a headache at this time. No vision or speech changes. No numbness or weakness in the arms or legs. No chest pain or shortness of breath but does feel his chest to be tight and anxious when the symptoms occur although again they are very self-limited. No abdomen or flank pain. No other obvious systemic symptoms. Improved with rest and seemed to be worsened when he is not able to sleep."); *id.* at p. 330 ("Pt reports he had a head injury August 2 and this morning he woke up confused, had difficulty finding his roommates for assistance. Pt reports this is the third episode and states a previous episode he was trying to call 911 but did not know how to use the phone. Pt reports when he looks at bright lights he gets a headache and dizzy. Pt denies CP/SOB. Pt denies n/v."). Claimant was seen by Daniel Dayton Arguello, M.D. Claimant did not undergo any testing, as Dr. Arguello noted: "At this point, given the multiple evaluations and reassuring imaging in the past, I do not believe a further evaluation is indicated. . . . At this point, I do believe he would benefit from a short course of Ativan to help with his sleep and anxiety. We did discuss the importance of returning immediately should he develop a severe headache, vision or

speech changes, numbness weakness or other neurological sequelae. Patient was very reassured after a long discussion and was very thankful for the medication." *Id.* at p. 326. Claimant was prescribed 20 tablets of Ativan with no refills. *Id.* at p. 337. Claimant's physical examination was normal, including his cervical spine. *Id.* at p. 328. Claimant reported 6/10 pain. *Id.* at p. 332. Dr. Arguello diagnosed Claimant with postconcussional syndrome and nicotine dependence, other tobacco product, uncomplicated. *Id.* at p. 248.

26. Claimant was not diagnosed with a concussion at his August 2, 2023, August 5, 2023, or his August 8, 2023 emergency department visits.

27. On September 4, 2023, Claimant returned to the MCR ED with neck pain. Ex. 6 p. 345; *id.* at p. 360 ("Pt has neck pain that began 1 month ago after he fell down some stairs while at work. He was seen immediately after this incident. He says he has pain worse with movement. No numbness or tingling and the pain does not radiate."). Claimant was seen by Paul Richard Sullivan, M.D. Dr. Sullivan reviewed Claimant's prior visits to emergency departments and determined additional imaging was not indicated. *Id.* at p. 356. Claimant's physical examination of his neck showed a full range of motion with rotation bilaterally as well as extension. *Id.* at p. 359. Claimant reported 7/10 pain. *Id.* at p. 362. Dr. Sullivan diagnosed Claimant with cervical paraspinal muscle spasm and prescribed him 20 tablets of Flexeril with no additional refills. *Id.* at pp. 360; 366; 378.

28. On October 9, 2023, Claimant reported to the Harmony Campus ER complaining of insomnia and neck pain. Ex. 6 p. 386; *id.* at p. 383 ("[C]hronic pain in the muscles in the sides of his neck that radiates out towards his shoulder. No weakness numbness or tingling. Headache is not chronic but he does state that at times when he is active or at night when is driving he will have worsening headache symptoms."). Claimant was seen by Darren Erick Tremblay, D.O. Dr. Tremblay noted Claimant "refuses all work-up here in the emergency room and simply wants medications to help him sleep and his neck discomfort. I have discussed that the medicines he was previously using together including Norco and Ativan are an unsafe combination. I did state I would give him a small supply of pain medicines but would switch his muscle relaxer to Flexeril to hopefully improve safety profile." *Id.* at p. 382. Claimant's blood pressure was 166/116 and he

reported 10/10 pain. *Id.* at p. 388. Claimant was prescribed 20 tablets of Flexeril and 15 tablets of Norco with no refills. *Id.* at p. 393. Claimant's physical examination of his cervical spine showed "normal range of motion and neck supple" with "tenderness." *Id.* at p. 385. Dr. Tremblay diagnosed Claimant with cervicalgia, essential (primary) hypertension, other insomnia, and nicotine dependence, other tobacco product, uncomplicated. *Id.* at p. 410.

29. On October 29, 2023, Claimant returned to the Harmony Campus ER complaining of headache and dizziness. Ex. 6 p. 412. Claimant was seen by Robert Francis Doyle, D.O. Dr. Doyle noted Claimant "[p]resents with complaint of headache. He had a traumatic injury with concussion 2 months ago and has had recurrent headaches since then. These are right-sided described as dull and moderate in intensity. No nausea or vomiting. No focal weakness. No recent illness. He states that he normally takes Flexeril in the evening which helps with the headaches and also helps him sleep. He is out of that." *Id.* at p. 414. The triage notes state: "Headache, gets them often but medications not working today. Top and frontal, lights make it worse, gets dizzy when walking. No other nueo deficits. Gets headaches frequently when watching tv, was told he needs glasses but does not wear them." *Id.* at p. 417. Claimant's blood pressure was 166/87 and he reported experiencing 7/10 pain. *Id.* at p. 419. The physical examination notes state "[n]egative for . . . neck pain" and "[c]ervical back: Normal range of motion and neck supple." *Id.* at p. 416. Dr. Doyle discontinued Claimant's previous prescriptions for Flexeril and Norco and ordered 10 tablets of Norco and 30 tables of Flexeril for Claimant with no refills. *Id.* at p. 424-25. Dr. Doyle diagnosed Claimant with postconcussive syndrome. *Id.* at p. 437.

30. On November 7, 2023, Claimant reported to the MCR ED for a refill of his Coumadin. Ex. 6 p. 440. It was noted that Claimant had no headaches. *Id.* at p. 445. Claimant was seen by Brian Ezar Cooper, M.D. Dr. Cooper wrote:

**DISCUSSION :** 36 y.o. male presented for emergency evaluation. The patient was seen and evaluated shortly after being placed in room. I have reviewed patient's vitals, nursing notes, medications, and allergies. Vitals are normal. Given his presenting symptoms and severity of illness as discussed below, I ordered laboratory evaluation. Patient has not had his INR checked lately, and I did recommend that we check an INR today. Given that he has a mechanical aortic valve, his goal would be 2.5-3.5. Patient has no medical complaints today, and is not experiencing any strokelike symptoms. Case discussed with my attending physician, Dr. Cooper.

INR today is 1.0. This is subtherapeutic. Dr. Cooper and I agreed to treat patient with Lovenox, start patient back on Coumadin, and have patient have recheck on his INR in 5 days to determine whether he needs to continue Lovenox. This was all discussed with the patient, and he verbalizes understanding and agreement. 80 mg of Lovenox was given here in the ER. Rx Coumadin 5 mg tablets, #30. Rx Lovenox for 5 days. I also recommended that he either follow-up with the PCP in 5 days to have his INR rechecked (we discussed the Sunrise clinic or the family medicine Center walk-in clinic or even the ER if he is unable to to be seen in the other clinics). We also discussed return precautions to the ER.

*Id.* at p. 443. Claimant's physical examination was negative for dizziness and headaches. *Id.* at p. 446. Claimant's blood pressure was 144/94 and he reported having no pain. *Id.* at p. 449. Dr. Cooper noted Claimant told him he quit smoking three years ago but that he vapes every day. *Id.* at p. 445-46. Claimant was diagnosed with abnormal coagulation profile, long term (current) use of anticoagulants, and presence of prosthetic heart valve. *Id.* at p. 472. Dr. Cooper discharged Claimant with injectable Lovenox and 30 tablets of warfarin. *Id.* at p. 457.

31. On December 15, 2023, Claimant returned to Harmony Campus ER. Ex. 6 p. 473. Claimant presented with a nosebleed and was seen by Matthew Steven Martin, M.D. *Id.* Dr. Martin wrote: "The patient is a 36 y.o. male who presents for evaluation of epistaxis. Patient states he woke up this morning with epistaxis as he was brushing his teeth. Patient has had epistaxis in the past after a minor head injury. Patient is currently on Coumadin secondary to aortic valve repair in the past. He denied any trauma or injury. Denies any other constitutional symptomology." *Id.* at p. 477. Claimant's blood pressure was 161/106, he reported no pain, and his physical examination showed normal range of motion for his cervical back. *Id.* at pp. 478; 482. Dr. Martin diagnosed Claimant with epistaxis, long term (current) use of anticoagulants, abnormal coagulation profile, and nicotine dependence, other tobacco product, uncomplicated. *Id.* at p. 508. Dr. Martin provided Claimant "with a prescription for the Coumadin for the next few days until he can follow-up with primary care. Patient also given 3 pills of Ativan he asked as a sleep aid." *Id.* at p. 476.

*Independent Medical Evaluation (IME)*

32. Four days later, on December 19, 2023, Claimant underwent an IME with Barry A. Ogin, M.D. for evaluation of his work injury. Ex. K. At the time he saw Dr. Ogin, Claimant complained of persistent neck pain, headaches, severe anxiety, pain radiating down his left arm, and occasional issues with his low back with radiation down his left leg and into his calf and foot. *Id.* at p. 88.

33. On his physical examination of Claimant, Dr. Ogin noted that Claimant's cervical range of motion was limited in all directions due to pain. Ex. K p. 92. Based on the imaging Claimant received, the fact that Claimant had normal range of motion in his cervical spine in the month after the injury but now had limited range of motion, the continued progression of Claimant's symptomatology, and the onset of left-sided complaints over three months after the injury, Dr. Ogin concluded it was likely Claimant has somatoform disorder. *Id.*

34. Dr. Ogin noted Claimant's severe anxiety.

> [redacted] does admit to having severe anxiety. He describes panic attacks, where he is either in his house or in his shower and suddenly has to get outside. It is to the point where he actually has to drive in his car to a Walmart or Waffle House parking lot several days per week. He then just sits in his car until he calms down and can go home. This may take one to two hours. He likewise admits to being anxious even in our examination room, which he describes as claustrophobic. During these panic attacks, he reports that he has chest tightness and cannot breathe. Due to his anxiety, his sleep is extremely disturbed, only getting 2-3 hours per night.

Ex. K p. 94.

35. Dr. Ogin opined "[T]he most likely explanation for his subjective complaints are underlying psychiatric issues. It does not appear that the psychiatric issues began with his occupational injury. Indeed, he had multiple emergency room visits in 2022 for similar vague and nonspecific complaints including headache, chest pain, shortness of breath, dysphagia, and abdominal discomfort. He underwent an extensive workup at that time, including cardiac studies, chest, abdomen, and pelvis CTA imaging; EGD studies and extensive blood work, all of which were basically normal. He reported dysphagia so severe that he was unable to keep down solids and had lost significant weight in a relatively short time frame. At the time, he was also complaining of only being able to get 3-4 hours of sleep per night due to shortness of breath and chest discomfort. After an extensive workup, which came back negative, his providers were 'perplexed.'" Ex. K p. 94-95.

36. Dr. Ogin concluded that Claimant sustained a superficial left parietal scalp laceration and a possible cervical strain or mild concussion from his August 2, 2023 fall. Claimant's "dramatic worsening of symptomatology over time . . . is not consistent with a soft tissue injury or a concussion." Ex. K p. 95. In his opinion, Claimant's new and worsening complaints are not attributable to his occupational injury and "appear to be driven by severe psychiatric distress" and his fall "was not of the scope or severity to produce severe psychiatric distress" and instead is "preexisting in nature" as indicated by his "similar vague somatic complaints in the year prior" to his work injury. *Id.* at p. 96.

37. Claimant left the United States for Iraq in December 2023. Tr. p. 33. Claimant returned to the United States sometime prior to July 29, 2024.

*MMI*

38. Claimant was determined to be an employee of Employer in January 2024. Ex. 5. After application, Claimant was admitted into the Colorado Uninsured Employer's Fund (CUE Fund). *See* Tr. p. 26.

39. At the request of the CUE Fund, Claimant was seen at Concentra Medical Centers (Concentra). The CUE Fund first scheduled an appointment for Claimant on May 24, 2024. Claimant did not attend the appointment.

40. Claimant had rescheduled appointments with Concentra on June 28, 2024 and July 15, 2024. Claimant missed both the scheduled appointments.

41. Claimant finally appeared at Concentra on July 29, 2024. Ex. L. Claimant was seen by Samantha Holmes, PA-C. PA Holmes noted Claimant's concerns as "headaches, neck pain, tinging in left hand and left foot." *Id.* at p. 102.

42. According to PA Holmes, Claimant "denies h/o anxiety or depression." Ex. L p. 102.

43. PA Holmes stated:

> I agree with the IME summary regarding patient[']s concerns. Plausible that the [patient] could have sustained a cervical strain. CT neck in ED showed mild spondylosis. No other abnormalities. Head CT was also neg. IME recs including consideration of PT and possible psychological referral. However, IME was completed 8 months ago. At this point, his musculoskeletal neck pain is no longer in acute injury period and likely would have resolved by 6 months. Since injury, he has also had a normal neck physical examination in the ED (see HPI). At end of visit, patient reported to me that I did not do a physical exam and became very agitated. This is incorrect. I completed a cervical spine exam and nuero was stable. Given 1 year since injury, it is not likely his neck soreness and soft tissue injury would be persistent. Case was closed today. I educated him re: I do not recommend he take ibuprofen as he reports he takes Warfarin. I encouraged him to establish care with a PCP. Multiple prior records list anxiety

> and insomnia symptoms. Today, he denies mental health history. He is no longer employed. He reports he has legal representation with an attorney. Sent chart to supervising physician, Dr. Cava for review.

Ex. L p. 105-06.

44. On July 29, 2024, PA Holmes recommended Claimant be placed at MMI with no restrictions and no permanent impairment. Ex. L p. 107. She did not recommend that Claimant receive maintenance care. *Id.* Kathryn Bird, D.O. agreed with PA Holmes' recommendations. *Id.* at p. 108. Amanda Cava, M.D., completed a physician's report of worker's compensation injury documenting MMI with no restrictions, no permanent impairment, and no maintenance care. *Id.* at p. 109.

45. Based on Dr. Cava's report, the CUE Fund filed a Final Admission of Liability (FAL) on July 31, 2024. Ex. 3.

*Division Independent Medical Examination (DIME)*

46. Claimant challenged the FAL and requested a DIME. Ex. 6 p. 46. Claimant requested the DIME physician evaluate his left and right elbow; left and right shoulder; cervical, thoracic, and lumbar spine; psychological; and traumatic brain injury (TBI). *Id.*

47. On November 4, 2024, Claimant attended a DIME with Anjmun Sharma, M.D. Ex. M.

48. Dr. Sharma diagnosed Claimant with anxiety, depressed mood, adjustment disorder, headaches, postconcussion syndrome, and scalp laceration, fully healed. Ex. M. p. 115. Dr. Sharma agreed with Dr. Cava's date of MMI (July 29, 2024). *Id.* at p. 116. Dr. Sharma gave Claimant a 12% whole person impairment rating for headaches and a 16% whole person impairment rating for psychological impairment, for a final combined whole person impairment of 26%. *Id.* at p. 116. Dr. Sharma assigned no permanent work restrictions and maintenance medical benefits of psychological counseling. Dr. Sharma concluded that the psychological counseling will "better help

[Claimant] cognitively cope, develop better coping skills, and also to be able to sleep better to function at a more improved level. This should hopefully help him move forward. Nevertheless, these impairments are appropriate. They are permanent and do accurately reflect his current level of functioning." *Id.* at p. 117.

49. Dr. Sharma's report contains multiple errors and inconsistencies.

a. Dr. Sharma noted that Claimant's scalp laceration "was stapled quickly." Ex. M p. 111. Claimant's scalp laceration was superficial and did not require repair. Ex. 6 p. 209.

b. Dr. Sharma stated that Claimant's August 2, 2023 CT scan "notes some intracranial hemorrhage." Ex. M p. 111. Claimant's scan showed no hemorrhage and no intercranial abnormalities. Ex. 6 p. 213.

c. Dr. Sharma stated Claimant "does not smoke." Ex. M p. 112. Records available to Dr. Sharma establish Claimant smoked a pack of cigarettes a day for years and that he now vapes every day and has a nicotine use disorder. *See, e.g.*, Ex. 6 pp. 143; 164; 410; 445-46.

d. Dr. Sharma's summary of Claimant's August 5, 2023 emergency room includes statements that Claimant presented "as a walk-in for evaluation of his INR," Claimant reported "having lower back pain," and the CT scan demonstrated "straining of normal cervical lordosis." Ex. M p. 112. In fact, Claimant presented for neck pain, headaches, tiredness, and left ear ringing, Claimant did not report any lower back pain, and the CT scan showed "straightening of normal cervical lordosis." Ex. 6 p. 256.

e. Dr. Sharma stated Claimant presented with and was examined for lumbar back pain at emergency room visits on August 30, 2023,[1] October 9, 2023, and October

[1] Claimant was seen on September 4, 2023, not August 30, 2023. Dr. Sharma's summary lists the provider Claimant saw on September 4, 2023 and some of the conclusions of that provider. Therefore, the ALJ infers Dr. Sharma reviewed the September 4, 2023 emergency room visit and that there is not a separate visit from August 30, 2023.

29, 2023. Ex. M p. 113. None of the medical records for those emergency room visits list complaints of lumbar back pain. Ex. 6 pp. 345-78; 386-410; 412-37. Meanwhile, Dr. Sharma made no note of Claimant's August 8, 2023 emergency room visit in which Claimant did complain of low back pain. *Id.* at p. 295-97.

f. Dr. Sharma summarized Dr. Ogin's IME as concluding "Psychiatric disease was caused by occupational injury." Ex. M p. 114. Dr. Ogin opined "[T]he most likely explanation for his subjective complaints are underlying psychiatric issues. *It does not appear that the psychiatric issues began with his occupational injury.*" Ex. K p. 94-95 (emphasis added). Further, Dr. Sharma stated Dr. Ogin concluded "pain in the bilateral lower extremities" was an injury Claimant sustained as a result of his August 2, 2023 fall. Ex. M p. 114. Dr. Ogin instead listed that as a subjective complaint by Claimant but concluded Claimant's "back and leg symptoms were initially documented on the right side, beginning five or six days after the occupational injury, and would also not be related to the injury. The symptoms are now worse on the left leg." Ex. K p. 96.

g. Under "pertinent medical issues" Dr. Sharma states: "I do not find any evidence in the medical records that the patient obtained any medical care aside from some diagnostics for either the right or left elbow, the right or left shoulder, *nor did he obtain any medical care for the cervical, thoracic or lumbar spines*." Ex. M p. 114 (emphasis added). Claimant was diagnosed with cervicalgia and/or cervical paraspinal muscle spasms on August 5, 2023, September 4, 2023, and October 9, 2023, and received care, including multiple prescriptions for Flexeril and Norco, for his cervical spine complaints. Claimant also sought treatment for his lumbar spine on August 8, 2023, and was provided medications. Further, the medical records provided to Dr. Sharma demonstrate Claimant did not have any diagnostics for his right or left elbow or his right or left shoulder. *See* Ex. 6.

h. Under "date and discussion of MMI" Dr. Sharma wrote: "The patient was assigned a maximum medical improvement date by the authorized treating provider, which happens to be the Emergency Room in this case, or by the division independent

medical exam by Dr. Amanda Cava, Concentra Medical Clinics on July 29, 2024. I concur with that date of MMI." Ex. M p. 116. Dr. Cava did not complete a DIME of Claimant. Dr. Sharma did not otherwise document or refer to Claimant's July 29, 2024 visit to Concentra concluding Claimant was at MMI.

i. In the body of his report, Dr. Sharma gave Claimant a 26% whole person impairment rating. Ex. M p. 116. On the permanent work-related mental impairment rating report worksheet he completed, Dr. Sharma gave Claimant a 27% whole person impairment rating. *Id.* at p. 129.

50. Dr. Sharma reported Claimant told him he "is still having a significant amount of headaches." Ex. M p. 114. Claimant "reports some difficulty with concentration, judgment and performing some activities of daily tasks that require high executive level of functioning." *Id.* Claimant "also has been having difficulty with sleep and he is experienced [sic] a significant amount of more anxiety and difficulty focusing and concentrating in general and as a result, he is still reporting headaches as a result of the post concussion symptoms that have been consistently present since the date of the injury." *Id.* at p. 115. Dr. Sharma did not address Claimant's similar complaints of headaches and sleep in 2022, even though highlighted by Dr. Ogin in his IME.

51. Under "psychological evaluation" Dr. Sharma wrote: "Although the patient does meet criteria for a psychological impairment, he was never seen or examined. He was never offered any cognitive behavioral therapy. I will discuss this below later in my report, but nevertheless, the patient has been having a significant amount of anxiety and psychological dysfunction as a result of this injury accident. He is no longer working at this time. He reports he is still struggling with focus, concentration, headaches, which are precluding his ability to return to any type of job at this time." Ex. M p. 115.

52. Dr. Sharma had copies of Claimant's emergency room visits from 2018 to 2022. Ex. 6. Dr. Sharma did not address Claimant's prior diagnosis of anxiety in July 2021. Ex. 6 p. 164-70. Outside of his statement "the patient has been having a significant amount of anxiety and psychological dysfunction as a result of this injury accident," Dr.

Sharma does not explain how he concluded Claimant's anxiety, depressed mood, and adjustment disorder are related to Claimant's August 2, 2023 fall.

53. Under "rationale for your decision" Dr. Sharma wrote: "I have assigned a. . . 16% whole person impairment for depressed mood, anxiety, and adjustment disorder. The patient never had any psychological evaluation, yet he is still struggling with these things. As a result, I do believe that he should have been offered treatment for his psychological condition, but he never was and that is why we have the result where we have now of this impairment that is significantly affecting his ability to return to work and to be functional in a work site." Ex. M p. 116. In that section, Dr. Sharma did not explain the 12% whole person impairment for episodic neurological disorders (headaches) except to state "I provided an impairment that is consistent with the patient's current level of functioning . . . ." *Id.*

54. Dr. Sharma assigned Claimant no permanent work restrictions. Ex. M p. 117.

55. Dr. Sharma rated Claimant as a "3" on the permanent work-related mental impairment rating report worksheet. Ex. M p. 129. A "3" is defined as "mental symptoms, arising from the work-related psychiatric diagnosis, and not likely to remit despite medical treatment, are moderately impairing." *Id.* at p. 126. Under activities of daily living, Dr. Sharma rated Claimant a 3 for sexual function and sleep. Under adaptation to stress, Dr. Sharma rated Claimant a 3 for perform activities (including work) on schedule and adapt to job performance requirements. Dr. Sharma did not discuss these ratings, or the information he considered when determining these ratings, in the body of his report.

*Claimant's Testimony*

56. At hearing, Claimant testified that after his fall, he has experienced headaches, dizziness, depression, sleep disturbances, neck pain, and pain radiating down to his left hand. Tr. p. 17. Claimant testified to having 8/10 pain on the date of the hearing. Tr. p. 34.

57. Claimant testified that he did not work from September 1, 2023 to July 29, 2024 because he cannot be on a schedule due to dizziness, headaches, depression, and lack

of sleep. Tr. p. 19. His headaches will "mess with [his] vision" and if he drives and sees lights, "the lights give [him] a headache." *Id.* at p. 34. He also "used to be on a lot – like a lot of medications" that would make him "unconscious." *Id.* at p. 19-20.

58. Review of Claimant's medical records demonstrate that Claimant was prescribed a total of 80 Flexeril, 23 Ativan, 35 Norco, 15 prednisone, and 60 acetametaphine tablets between August 5, 2023 and December 15, 2023. The ALJ infers that if Claimant was taking the medication as prescribed, he would have run out by the end of December 2023.

59. Claimant was out of the country from December 2023 to sometime before July 29, 2024. Tr. p. 33-34. While out of the country Claimant sought additional pain medications from providers in Iraq. *Id.* at p. 32-33. Claimant began driving for Roadie, a delivery service similar to DoorDash, after he returned to the United States. *Id.* at p. 36.

60. Claimant reported to Dr. Sharma in November 2024 that he was not working and that he was unable to return to any type of work due to the symptoms from his injury. Ex. M p. 115.

61. The ALJ finds Claimant lacks credibility. Claimant's repeated assertions that he is unable to work due to the medications he has been prescribed rings hollow. And at emergency room visits in September 2020, January 2021, and May 2022, Claimant reported neck pain, headaches, and/or left hand numbness, Ex. 6 pp. 134, 143, 175, the same complaints he testified at hearing were a result of August 2, 2023 fall. Further, Claimant's multiple delays in attending an appointment with Concentra evidences a lack of desire by Claimant to be evaluated for his industrial injury. The ALJ infers from Claimant's behavior that Claimant had no ongoing symptoms from his industrial injury because had he been suffering ongoing symptoms he would have been eager to receive diagnosis and treatment at that time.

*Dr. Ogin's Testimony*

62. Dr. Ogin testified at hearing consistent with his IME and a supplemental IME he completed on January 11, 2025. *See* Ex. K; Ex. N. Dr. Ogin was admitted as an expert in physical medicine rehabilitation and pain management. Tr. p. 61.

63. In his opinion, considering Claimant's self-reported history of severe panic attacks, combined with Claimant's medical records showing a pattern of vague somatic complaints with consistently unremarkable workups, "it becomes clear . . . that these complaints are likely driven by psychological distress, and they're presenting as . . . physical complaints." Tr. p. 67.

64. Dr. Ogin strongly disagreed with Dr. Sharma's 16% whole person mental impairment rating. Tr. p. 77; *see* Ex. N. In his opinion, Dr. Sharma is the first to diagnose Claimant with depressed mood and adjustment disorder and, therefore, "I don't see how he could also say that he's at MMI, because he's obviously never received any workup or treatment through this claim." Tr. p. 79. Further, Dr. Sharma made no casual association between Claimant's psychological conditions and the industrial injury. And Dr. Sharma did not take into account Claimant's pre-existing psychological status, the mechanism and magnitude of the injury, and any treatment and diagnostic studies received when summarily concluding that Claimant was suffering from multiple work-related psychological conditions. Tr. p. 79.

65. Dr. Ogin also disagreed with Dr. Sharma's conclusion that Claimant has a 12% whole person impairment for "episodic neurological disorder" for headaches. In his experience, when someone has a brain injury that causes headaches, the headaches do not get progressively worse over time. Here, Claimant's medical records show that in the initial month after the injury, headaches were not a major factor. Yet by the time Claimant saw Dr. Sharma, he was reporting daily debilitating headaches. Dr. Sharma did not describe how he concluded the progressively worsening headaches were related to Claimant's industrial injury. And like with his conclusions for psychological disorders, Dr. Sharma does not explain how he determined Claimant was at MMI for his headaches "because he's had no workup, no treatment, other than his ER visits." Tr. p. 81.

66. The ALJ finds Dr. Ogin's testimony and opinions persuasive. The ALJ finds Dr. Ogin's opinions not to be a mere difference of opinion from Dr. Sharma but instead establish significant errors made by Dr. Sharma in his DIME report.

*Additional Facts*

67. Between August 2, 2023 and September 19, 2023, Claimant and Employer were in contact via text message. Ex. T; Ex. S. Employer terminated Claimant on September 21, 2023. Ex. R.

68. Claimant suffered a superficial laceration to the left side of his scalp which did not require closure. Ex. 6 p. 209. In a photograph of his shaved head provided by Claimant, there is no serious disfigurement. Ex. 9; *see* Ex. M p. 115 ("There is no scar and it is barely visible at this point in time."); Ex. K p. 92 ("I do not see any obvious scarring on his head.").

69. Claimant had no visible disfigurement at the March 18, 2025 hearing.

**Conclusions of Law**

The purpose of the 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 litigation. § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 318 (1979). The facts in a workers' compensation case must be interpreted neutrally - neither in favor of the rights of the claimant, nor in favor of the rights of respondents - and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

contradicted; and bias, prejudice, or interest. *Bodensieck v. Indus. Claim Appeals Off.*, 183 P.3d 684, 687 (Colo. App. 2008).

The weight and credibility to be assigned expert testimony is also a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186, 191 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 165 Colo. 504, 506 (1968).

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

**TTD**

"Temporary disability benefits are intended to compensate a claimant for actual wages lost during the time the claimant is unable to work because of injury." *PDM Molding v. Stanberg*, 898 P.2d 542, 548 (Colo. 1995). To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he or she left work as a result of the disability, and that the disability resulted in an actual wage loss. § 8-42-103(1), C.R.S.; § 8-42-105(1), C.R.S.; *see City of Colo. Springs v. Indus. Claim Appeals Off.*, 954 P.2d 637, 639 (Colo. App. 1997).

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 a claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999); *but see Montoya v. Indus. Claim Appeals Off.*, 2018 COA 19, 488 P.3d 314. There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). 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 regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998).

A claimant must establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *Linder Chevrolet v. Indus. Claim Appeals Off.*, 914 P.2d 496, 498 (Colo. App. 1995).

Claimant has failed to establish by a preponderance of the evidence that he suffered a disability entitling him to TTD benefits. Only Claimant testified that the injuries from his August 2, 2023 fall are the reason he did not return to work. While a claimant may establish a physical disability through testimony alone, that testimony must be persuasive. Here, the ALJ found Claimant's testimony lacked credibility. Outside of Claimant's self-reported symptoms, which were often unverifiable, there is no credible evidence to support a conclusion that his fall caused a loss or restriction of bodily function for more than three work shifts. Simply put, the diagnostic testing in the medical records does not support Claimant's subjective opinion that his injury prevented him from returning to work.

Claimant also did not present sufficient evidence to establish that he suffered impairment of his wage earning capacity. As stated, only Claimant restricted himself from resuming his regular employment. While Claimant's treatment in emergency departments may have factored into his lack of documented work restrictions, that fact does not make it more likely than not that Claimant had restrictions that prevented him from returning to regular employment. The medical treatment Claimant received in emergency departments involved examinations and testing that could have evidenced impairment of his wage earning capacity. Instead, those medical records establish normal testing and unremarkable results.

Ultimately, the ALJ concludes that Claimant has failed to establish by a preponderance of the evidence that there is a casual connection between his August 2, 2023 fall and his decision not to return to work for Employer.

**Overcoming DIME**

A DIME physician's medical impairment rating may be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's findings must produce evidence showing it highly probable the DIME physician is incorrect. *Metro*

*Moving & Storage Co. v. Gussert*, 914 P.2d 411, 413 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club*, W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Indus. Claim Appeals Off.,* 78 P.3d 1150, 1152 (Colo. App. 2003) (citing *Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590 (Colo. App. 1998)). Consequently, a DIME physician's finding that a causal relationship exists between an injury and a particular impairment must be overcome by clear and convincing evidence. *Rivera v. Fox Rent A Car Inc.*, W.C. No. 5-237-769 (ICAO, Apr. 21, 2025)*; see Qual-Med, Inc.,* 961 P.2d at 592. The rating physician's determination concerning the causes of impairment should include an assessment of data collected during a clinical evaluation, which involves information obtained by history, clinical findings obtained from a physical evaluation, laboratory tests, and function measurements. *Wackenhut Corp. v. Indus. Claim Appeals Off.,* 17 P.3d 202, 204 (Colo. App. 2000).

A DIME physician must rate a claimant's medical impairment in accordance with the AMA Guides. § 8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Off.*, 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviation from the AMA Guides "does not compel automatically rejection of the DIME opinion." *In Re Gurrola*, W.C. No. 4-631-447 (ICAO Nov. 13, 2006). "Instead, the ALJ may consider a technical deviation from the AMA Guides in determining the weight to be given the DIME physician's findings…." *Id*.

A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *Gonzales v. Browning Ferris Indus. of Colo.*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000). Whether the DIME physician properly applied the *AMA Guides*, and whether the rating was overcome by clear and convincing evidence, present questions of fact for determination by the ALJ. *Paredes v. ABM Indus.,* W.C. No. 4-862-312-02 (ICAO Apr. 14, 2014).

Here, the ALJ concludes that Respondent has overcome Dr. Sharma's opinions on permanent medical impairment by clear and convincing evidence. Based on the multitude of errors and inconsistencies in Dr. Sharma's DIME, Respondent has shown a high probability that Dr. Sharma's conclusions are incorrect. Dr. Sharma got basic information in his report incorrect. Using that incorrect information, he went on to make

unsupported determinations about the causes of Claimant's reported symptoms and his permanent medical impairment. The ALJ is unable to determine how Dr. Sharma concluded that Claimant's newly-diagnosed depressed mood and adjustment disorder were related to his August 2, 2023 fall. And Dr. Sharma did not explain how he concluded Claimant's previously diagnosed anxiety was casually related to his industrial injury. As to Claimant's reported headaches, Dr. Sharma did not address Claimant's previous emergency room visits for headaches or explain how he concluded the headaches were related to the August 2, 2023 injury. Moreover, like Dr. Ogin, the ALJ is baffled by Dr. Sharma's contradictory conclusions that Claimant has never been treated for his headaches and his newly-diagnosed psychological conditions and yet he is at MMI for those conditions. Dr. Sharma's permanent impairment rating is not credible, persuasive, or supported by the evidence. Instead, the evidence clearly and convincingly establishes it highly probable that Dr. Sharma's 26% whole person impairment rating he attributed to Claimant's August 2, 2023 injury is incorrect.

Where a DIME physician's rating has been overcome, in whole or in part, the question of the claimant's correct impairment rating then becomes a question of fact for the ALJ to independently determine the rating based on the preponderance of the evidence. *Mosley v. Indus. Claim Appeals Off.*, 78 P.3d 1151, 1153 (Colo. App. 2003) (once the DIME is overcome "the ALJ was free to consider the other evidence concerning claimant's permanent medical impairment").

Dr. Ogin credibly opined that Claimant's August 2, 2023 injury was not the cause of Claimant's current complaints and, therefore, Claimant suffered no permanent impairment based on his industrial injury. Also included in the evidence was the opinion of PA Holmes, confirmed by Drs. Bird and Cava, that Claimant suffered no permanent medical impairment from his fall. These opinions are supported by Claimant's extensive medical history showing similar complaints of headache, dizziness, numbness in his left arm, and anxiety prior to his industrial injury. The ALJ is persuaded by those opinions. As a result, based on a preponderance of the evidence, the ALJ finds and concludes that Claimant has suffered no permanent impairment as a result of his August 2, 2023 industrial injury.

## Disfigurement

Pursuant to section 8-42-108, C.R.S., a claimant who has sustained a serious permanent disfigurement to areas of the body normally exposed to public view is entitled to additional compensation. *See Arkin v. Indus. Comm'n*, 358 P.2d 879, 884 (Colo. 1961) ("A disfigurement is an observable impairment of the natural appearance of a person."); *Nagle v. City & Cnty. of Denver*, W.C. No. 5-105-891 (ICAO, July 24, 2020). The claimant must establish that he has sustained a serious permanent disfigurement by a preponderance of the evidence. § 8-43-201, C.R.S.

As found, Claimant had no visible disfigurement at the hearing. Further, the photograph of his shaved head shows no serious disfigurement. The ALJ therefore finds and concludes that Claimant has failed to establish by a preponderance of the evidence that he has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

## Order

It is therefore ordered that:

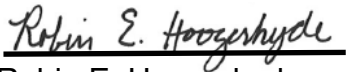
1. Claimant's claim for TTD benefits is denied and dismissed.

2. Respondents have established by clear and convincing evidence that the DIME physician erred in assigning Claimant a 26% whole person impairment rating. A preponderance of the evidence supports a finding that Claimant suffered no permanent impairment as a result of his industrial injury.

3. Claimant's claim for disfigurement benefits is denied and dismissed.

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

**SIGNED**: July 1, 2025.



Robin E. Hoogerhyde
Administrative Law Judge

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. 5-245-306-001**

## ISSUES

I. What did the Claimant prove, by a preponderance of the evidence, is her average weekly wage?

## STIPULATIONS

1. The Claimant's hourly rate prior to December 30, 2022, was $48.41.
2. The Claimant's hourly rate after December 30, 2022, was $49.96.

## FINDINGS OF FACT

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

1. Claimant is a flight attendant who has been employed by Employer for nearly 10 years.
2. On July 7, 2023, Claimant sustained a compensable work injury.
3. Before December 30, 2022, Claimant earned $48.41 per hour. As of December 30, 2022, her hourly rate increased to $49.96 and remained unchanged through the date of injury.
4. Claimant's compensation structure includes hourly wages, advance payments, per diem pay payments, and profit sharing.
5. Claimant asserts that her average weekly wage (AWW) should be $739.50. She bases this figure on gross earnings of $22,290.75 during the 211-day period from November 30, 2022, through June 29, 2023, as reflected in the year-to-date

(YTD) earnings on her paystub. (Ex. 13; Ex. B, p. 21)[1] Based on the paystubs in Respondents' Exhibit B, Employer's fiscal year used for YTD earnings began on November 30, 2022. (See Ex. B, pp. 21–34) Claimant's calculation of $739.50, derived by dividing her YTD gross earnings by 211 days and multiplying by 7, is mathematically accurate based on the components she included. However, as discussed in the conclusions of law, not all of the earnings she included - such as non-taxable per diem payments and profit sharing - are properly includable under Colorado law for purposes of calculating AWW. Accordingly, while her arithmetic is correct, the legal foundation of her calculation is not supported by statute, or case law under the facts of this case.

6. Claimant asserts that her average weekly wage (AWW) should be $739.50. She bases this figure on gross earnings of $22,290.75 during the 211-day period from November 30, 2022, through June 29, 2023, as reflected in the year-to-date (YTD) earnings on her paystub. (Ex. 13; Ex. B, p. 21)(*See also* footnote 1) Based on the paystubs in Respondents' Exhibit B, Employer's fiscal year used for YTD earnings began on November 30, 2022. (See Ex. B, pg. 21-34)

7. In coming up with the YTD gross earnings total of $22,290.75, Claimant included the following categories and amounts:

[1] ($22,290.75÷211)×7= $739.50.

**HOURS AND EARNINGS**

| | | Current | | | YTD | |
|---|---|---|---|---|---|---|
| **Description** | **Rate** | **Hours WKD** | **Oth Hours** | **Earnings** | **Hours** | **Earnings** |
| Regular Pay | | | | 2,536.95 | | 18,815.96 |
| Per Diem Pay Non Taxable | | | | 327.16 | | 1,503.25 |
| Flight Advance | | | | -2,483.01 | | 0.00 |
| * Imputed Income LTD | | | | 4.84 | | 67.76 |
| * Imputed Income - Travel | | | | 24.00 | | 958.80 |
| Adj - Claim Per Diem Non | | | | 0.00 | | 9.30 |
| Flight Advance Recovery | | | | 0.00 | | 552.51 |
| * Imputed Income - Taxes | | | | 0.00 | | 26.66 |
| Per Diem Pay Taxable | | | | 0.00 | | 270.50 |
| Profit Sharing | | | | 0.00 | | 1,139.23 |
| **TOTAL:** | | **0.00** | **0.00** | **381.10** | **0.00** | **22,290.75** |
| *** Denotes Excluded From Earnings Total** | | | | | | |

- Regular Pay: $18,815.96
- Per Diem Pay (Non-Taxable): $1,503.25
- Flight Advance: $0.00
- Adjustment – Claim Per Diem (Non-Taxable): $9.30
- Flight Advance Recovery: $552.51
- Per Diem Pay (Taxable): $270.50
- Profit Sharing: $1,139.23

8. Although additional line items appear on the paystub - such as Imputed Income for LTD, Travel, and Taxes - these amounts are not included in the YTD total of $22,290.75 used by Claimant in her AWW calculation since they are not included in the YTD total on the paystub. (See Ex 13 and B, p. 34)

9. Respondents contend that Claimant's AWW is $590.94. This calculation is based on total earnings of $30,644.09 over a 363-day period from July 1, 2022, through June 29, 2023, consisting of $29,504.86 in regular wages and $1,139.23 in profit sharing. Dividing the total earnings by 363 days yields a daily wage of $84.42, which, when multiplied by seven, results in an AWW of $590.94. This calculation does not, however, retroactively account for the Claimant's raise on December 30, 2022, of $1.55 when her hourly wage went from $48.41 to $49.96.

10. Respondents assert that their approach fairly captures Claimant's earnings over a full year and complies with the statutory aim of producing a representative and equitable wage. While Respondents present alternative calculations resulting in higher AWW figures ($599.73 or $670.99), those are offered only if the Court finds a shorter or adjusted wage period more appropriate. For example, the $599.73 calculation incorporates Claimant's raise into the calculation by assuming she was making the $49.96 per hour starting July 1, 2022, and the $670.99 calculation also includes Claimant's profit sharing.

11. Claimant testified that she is provided with an advance each month towards her projected work hours and then the advance is deducted from her actual work hours. She agreed that if she is advanced more than which she is entitled to be paid based on her hours worked, an adjustment will have to be made by deducting the overpayment from her earnings. On the other hand, if she works more than what is advanced, she gets paid additional wages. The ALJ credits this testimony and finds that Claimant is provided an advance against future earnings and any overpayment will be deducted from future earnings.

12. The paystubs for the periods May 1–15, 2023, and May 1–30, 2023, show that Claimant received a flight pay advance in the amount of $2,483.01. However, during that time, Claimant only worked enough hours to earn $1,712.39 in regular wages and $218.11 in non-taxable per diem payments. As a result, Claimant was overpaid by $552.51. This overpayment was included in Claimant's gross and taxable wages for the pay period. (Ex. B, pp. 31–32)

13. On the following paystub for the period May 31–June 15, 2023, the Employer reconciled the overpayment by recording a "Flight Advance Recovery Arrear" of $552.51 as a "Before Tax Deduction." This payroll adjustment reduced Claimant's taxable wages for that pay period, thereby offsetting the taxes previously withheld on the overpayment. (Ex. B, p. 33) The reconciliation also appears in subsequent pay records and is reflected in the payroll summary spreadsheet submitted by both parties. (Ex. B)

14. Claimant also received $1,139.23 in profit sharing during the fiscal year, as reflected on her paystubs. Claimant, however, did not establish that the profit sharing had a calculable present-day cash value, that she had immediate access to it, and that it was not contingent on future events like company profits or continued employment.

15. Claimant also testified that the average weekly wage proposed by Respondents is inconsistent with her spending and savings. Such testimony, however, is not found to be relevant for the calculation of her average weekly wage.

## 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).

## I. What did the Claimant prove, by a preponderance of the evidence, is her average weekly wage?

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

**Adjusted Regular Pay of $18,930.01**

From November 30, 2022, through June 29, 2023, (the 211 day pay period) Claimant earned $18,815.96 in Regular Pay. However, her earnings from November 30 through December 29, 2022, were paid at $48.41 per hour, the rate in effect prior to her $1.55 per hour raise on December 30, 2022. Had she been paid at the higher rate of $49.96 for those hours, she would have earned an additional $114.05. Therefore, Claimant's Regular Pay would have been $18,930.01 for the November 30th to June 29, 2023, pay period. The ALJ finds that using this amount, before any additional adjustments, fairly determines Claimant's wages during this period by averaging her pay over several months and incorporating her hourly rate of pay, $49.96, that was in effect

at the time of her injury in July 2023. Therefore, an adjusted regular pay of $18,930.01 will be used to determine Claimant's average weekly wage. [2]

**Non-Taxable Per Diem Payment of $1,503.25 and $9.30**

During the pay period, Claimant was paid $1,503.25 and $9.30 in non-taxable per diem payments. Claimant contends these payments should be included in calculating her average weekly wage.

Section 8-42-102(2) specifically provides that when determining the Claimant's average weekly wage, non-taxable per diem payments shall not be included. The provision provides:

> Average weekly wages for the purpose of computing benefits provided in articles 40 to 47 of this title, except as provided in this section, shall be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of the injury, and in the following manner; *except that any portion of such remuneration representing a per diem payment shall be excluded from the calculation unless such payment is considered wages for federal income tax purposes* (emphasis added):

In addition, Section 8-40-201(19)(c) provides:

> No per diem payment shall be considered wages under this subsection (19) unless it is also considered wages for federal income tax purposes.

[2] Claimant earned $3,562.11 in regular wages during the portion of the pay period that preceded her raise. Dividing $3,562.11 by her pre-raise hourly rate of $48.41 results in approximately 73.58 hours worked. Multiplying those 73.58 hours by the $1.55 per-hour increase (the difference between $49.96 and $48.41) yields an upward wage adjustment of $114.05. Therefore, Claimant's adjusted Regular Pay for the November 30, 2022, through June 29, 2023, period is $18,930.01 ($18,815.96 + $114.05).

Thus, when calculating Claimant's average weekly wage, non-taxable per diem payments are not included in the calculation of the claimant's average weekly wage. *See also Young v. Industrial Claim Appeals Off.*, 969 P.2d 735 (Colo. App. 1998), and § 8-40-201(19)(c) (No per diem payment shall be considered wages unless it is also considered wages for federal income tax purposes.) Therefore, the $1,503.25 and $9.30 in non-taxable per diem payments made to Claimant during the pay period cannot be used to determine her average weekly wage.

**Flight Advance Recovery of $552.51**

The determination of average weekly wage or actual earnings must be based on wages earned through services performed and retained by the employee, not on payroll advances that are later recouped. Although the $552.51 flight advance overpayment was initially included in Claimant's gross and taxable wages, the Employer subsequently reconciled the overpayment by deducting the same amount as a before-tax deduction in the following pay period. This deduction effectively reduced Claimant's taxable income for that period and offset the tax impact of the earlier inclusion. Because the $552.51 was a payroll advance that was not retained by Claimant and did not constitute compensation for services performed, it is not properly included in the calculation of Claimant's actual earnings or average weekly wage.

**Taxable Per Diem Payments of $270.50**

Claimant was also paid $270.50 in per diem payments that were taxable. Since non-taxable per diem payments are specifically excluded when determining Claimant's average weekly wage, the ALJ finds and concludes that the taxable per diem payments should be included. Therefore, the $270.50 in taxable per diem payments will be included in Claimant's average weekly wage.

**Profit Sharing of $1,139.23**

Section 8-40-201(19)(a)-(b) provides that wages shall be limited to the money rate at which Claimant's services are paid but does not include any fringe benefits that are not specifically set forth in subsection (19). Profit sharing is not specifically set forth in subsection 19.

The test to determine whether a fringe benefit, such as profit sharing, should be included in determining the Claimant's average weekly wage was established in *Meeker v. Provenant Health Partners*, 929 P.2d 26, 28 (Colo. App. 1996). The *Meeker* test requires that a benefit satisfy both prongs of a two-part analysis: first, whether "a reasonable, present-day, cash equivalent value can be placed upon it," and second, whether "the employee has reasonable access on a day-to-day basis, either actually or potentially, to the benefit, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances." *Id.* This test has been consistently applied by the ICAO Panel to distinguish between includable wages and excluded fringe benefits. *See Orrell v. Coors Porcelain*, W.C. No. 4-251-934 (May 22, 1997) (profit sharing plan failed *Meeker* test due to lack of present-day cash value and contingent nature); *Yex v. ABC Supply Co.*, W.C. No. 4-910-373-01 (May 16, 2014) (annual bonus based on branch profitability excluded as fringe benefit); *Burd v. Builder Services Grp. Inc.*, W.C. No. 5-058-572-01 (July 9, 2019) (signing bonus excluded as fringe benefit lacking day-to-day access). Benefits that fail either prong of the *Meeker* test are classified as "similar advantage or fringe benefit not specifically enumerated" under § 8-40-201(19)(b), C.R.S., and are therefore excluded from wage calculations.

Claimant did not establish that the profit sharing had a calculable present-day cash value, that she had immediate access to it, or that it was not contingent on future events such as company profitability or continued employment. Accordingly, the $1,139.23 in profit sharing is excluded from the AWW calculation.

**Determination of Average Weekly Wage**

Section 8-42-102(2), C.R.S., provides the default method for calculating a claimant's average weekly wage (AWW) based on the remuneration received at the time of injury. However, § 8-42-102(3), C.R.S., authorizes the ALJ to depart from the default method and calculate the AWW in a manner that fairly approximates wage loss and diminished earning capacity when necessary. *See Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As explained above, while the ALJ has discretion to determine a fair and reasonable AWW, that discretion must be exercised in accordance with applicable law. Including payments not permitted by statute constitutes an abuse of discretion. See Coates, Reid & Waldron v. Vigil, 856 P.2d 850, 856 (Colo. 1993).

In this case, the ALJ finds that using the pay period from November 30, 2022, through June 29, 2023, is reasonable and appropriate. Based on the evidence, the following earnings are included in calculating the Claimant's AWW:

**Wage Calculation Summary**

**Adjusted Regular Pay**

- Original earnings (11/30/22–6/29/23): $18,815.96
- Adjustment for raise on 12/30/22: + $114.05
- **Revised Total Regular Pay: $18,930.01**

**Other Includable Earnings**

- **Taxable per diem: + $270.50**

**Total Earnings for AWW** **$19,200.51** (aggregate of the above)

**Average Weekly Wage Calculation**

- Period: **211 days** (from 11/30/22 through 6/29/23)
- Daily wage: **$19,200.51 ÷ 211 = $91.00**
- Average weekly wage: **$91.00 × 7 = $637.00**

**ORDER**

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

1. Claimant's average weekly wage is $637.00.

2. 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 7, 2025

/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 5-053-221-001**

## Issues

1. Whether Claimant has established by a preponderance of the evidence that his claim should be reopened for medical benefits pursuant to section 8-43-303(2)(b), C.R.S.

2. Whether Claimant has established by a preponderance of the evidence that Respondents must provide maintenance medical benefits that have not been requested by an authorized provider.

## Findings of Fact

1. On May 10, 2016, Claimant sustained an admitted industrial injury, when he lifted a keg and injured his lower back. Ex. B.

*MMI and Maintenance Care*

2. Dr. Ogin placed Claimant at maximum medical improvement (MMI) on July 3, 2017, with an 11% whole person impairment rating and no work restrictions. Ex. A.

3. For maintenance medical benefits, Dr. Ogin stated that Claimant "is going to continue with his independent exercises. He will continued with the compounded pain cream which is allowing him to continue to work and avoid oral medications and their side effects. I have renewed his muscle relaxers. As part of a maintenance program, the patient may be allowed to return for repeat radiofrequency neurotomy procedures in the future, presuming that he gets a minimum of six months of sustained relief and functional improvement with each procedure. I will allow him to be seen in the office on two to three visits per year for flare-ups, medication refills or for consideration of repeat rhizotomies." Ex. A.

4. On August 7, 2017, Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Ogin's recommendation. Ex. B. Respondents admitted for maintenance medical benefits. *Id.*

*Medical Treatment Since Place at MMI in July 2017*

5. Between 2017 and 2023, Claimant was seen by physical therapists, chiropractors, massage therapists, and pain medicine experts as maintenance medical care for his admitted work injury. *See, e.g.*, Exs. B-U. Claimant underwent bilateral medial branch

blocks at L3, L4 and L5 on July 24, 2018, left-sided medial branch radiofrequency neurotomy at L3, L4 and L5 on August 28, 2018, and right-sided medial branch radiofrequency neurotomy at L3, L4 and L5 on September 11, 2018. *See* Ex. N. Claimant underwent radiofrequency ablation on the left side at L3, L4 and L5 on July 27, 2021. *Id.*

6. On November 27, 2022, Respondents' expert Scott Primack, D.O., completed a report of his record review of Claimant's post-MMI maintenance medical treatment. Ex. N.

7. In Dr. Primack's professional opinion, as of November 2022, Claimant's post-MMI maintenance treatment was inappropriate because "[h]e has had way too much passive care." Ex. N p. 73. According to Dr. Primack, Claimant had changed jobs and his new job placed "significant stress and strain across his lumbar spine" and, therefore, "as to within a reasonable degree of medical probability, opiates, massage therapy, physical therapy, chiropractic sessions, injections, and repeat rhizotomies would not be related to the 05/10/2016 work injury." Ex. N p. 73.

8. Dr. Primack wrote: "[t]he patient's injury was not severe or profound. He has facet syndrome. He has been through an exorbitant amount of massage therapy and physical therapy. Based upon the history and extensive medical records, I would not provide any maintenance treatment for his work injury from 05/10/2016." Ex. N p. 74.

9. In February 2023, Claimant was seen by his authorized provider, Tomas Salazar, M.D. Ex. O. At that visit, Claimant expressed a desire to undergo a repeat radiofrequency ablation on the left side at L3, L4 and L5. Ex. O p. 75.

10. Dr. Primack's report was shared with Dr. Salazar. Ex. Q. In a letter to Insurer received March 7, 2023, Dr. Salazar wrote:

> I also agree that the patient is at MMI and I also agree that his passive care has continued for too long of a time frame. It would be appropriate for him to receive massage therapy, chiropractic care, and physical therapy in the event of flares of his prior injury, but in the interim, it is reasonable to stop those treatments and have him proceed with a home exercise program.
>
> . . . .

> I do disagree that repeat radiofrequency ablation is not indicated. When [redacted] was placed at maximum medical improvement on 7/3/17, it was discussed that he could return for repeat radiofrequency ablation procedures if they continued to provide a minimum of 6 months of sustained functional improvement with each procedure. This has clearly been the case for this patient as he has been able to return to work and perform daily activities due to his treatment. As time from last radiofrequency ablation lengthens, his ability to perform his daily activities has lessened each time. At this point in time, he is over 15 months since his previous radiofrequency ablation, providing the nerves with ample time to regrow and once again provide pain input for the facet joints.

Ex. Q p. 87.

11. Claimant saw Dr. Salazar in April, June, and August 2023. Exs. O-P, R. At his April 2023 visit, Dr. Salazar told Claimant "his insurance is no longer going to cover massage therapy and chiropractor and that he unfortunately will not be able to keep doing those, despite him reporting a significant amount of relief with them." Ex. O p. 75. Claimant wished to follow up with radiofrequency ablations and Dr. Salazar noted "I explained to him his case was under review and that I agreed that he should have repeat RFAs." *Id.*

12. Claimant's June and August 2023 visits focused on a tapering of his opioid medications due to "UDT issues" and "multiple UDT violations." Ex. P p. 79; Ex. R p. 88. In September 2023, Dr. Salazar stopped prescribing Claimant opioid medications. Ex. T.

13. The medical records admitted into evidence do not contain a request by Dr. Salazar in 2023 to perform a radiofrequency ablation of Claimant's left-side at L3, L4 and L5.

14. The medical records admitted into evidence contain no additional visits between Claimant and Dr. Salazar after September 2023.

15. In December 2023, Claimant was seen by Mountain View Pain Center for a second opinion concerning his pain and in January 2024, Claimant was seen by Mountain View Pain Center Physical Therapy for persistent lower back and left anterior hip pain. Exs. V-X.

16. On December 24, 2024, Claimant filed an application for hearing with the Office of Administrative Courts. Claimant endorsed the following issues: medical benefits and petition to reopen claim. Under "other issues" Claimant wrote "[c]hronic pain in lower back, continued medical treatment."

*Testimony*

17. Claimant testified at hearing that he is seeking medical treatment in the form of massage therapy, physical therapy, and chiropractic care for his May 10, 2016 injury. Claimant is not seeking continued pain medication.

18. Claimant testified that since injuring his lower back in May 2016 he has had constant pain. The severity of the pain waxes and wanes but is always present. He has undergone injections, burning of nerves, physical therapy, massage therapy, and chiropractic care which have all helped relieve his pain.

19. Claimant could not recall being released by Dr. Ogin. He testified that he was transferred to Dr. Salazar.

20. Claimant's worked multiple jobs since his injury, including working as a manager, a merchandiser, and a health care driver. His jobs have caused flare-ups of his lower back pain. Claimant also acts as a high school basketball referee.

21. Claimant has not seen Dr. Salazar since he was told that he was stopping his medications.

22. The ALJ finds Claimant's testimony credible.

23. Dr. Primack testified at hearing and was admitted as an expert in rehabilitation and occupational medicine. Dr. Primack testified consistent with his November 2022 report. *See* Ex. N.

24. In his professional opinion, ongoing passive treatment for Claimant's lower back is contraindicated by the AMA Guidelines. While passive treatments may feel good to Claimant, they are not indicated to be continued for a 2016 low back injury with spondylosis.

25. Claimant's flare-ups do not relate back to his May 2016 injury.

26. At this time, radiofrequency ablations and/or injections are contraindicated because multiple treatments will cause Claimant to lose muscle mass in his lower back and with lumbar spondylosis Claimant needs those muscles.

27. Dr. Ogin noted Claimant's positive response to injections "dropped off" over time.

28. On cross-examination Dr. Primack conceded that multiple radiofrequency ablations can be given but cautioned that having radiofrequency ablations multiple times "you can get into trouble."

29. The ALJ did not find Dr. Primack's opinions particularly persuasive and assigns little weight to Dr. Primack's report and testimony.

30. Respondents have not denied any specific request for maintenance medical treatment for Claimant submitted by an authorized provider.

**Conclusions of Law**

The purpose of the 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 litigation. § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 318 (1979). The facts in a workers' compensation case must be interpreted neutrally – neither in favor of the rights of the claimant, nor in favor of the rights of the respondents – and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

contradicted; and bias, prejudice, or interest. *Bodensieck v. Indus. Claim Appeals Off.*, 183 P.3d 684, 687 (Colo. App. 2008).

The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Off.*, 55 P.3d 186, 191 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 165 Colo. 504, 506 (1968).

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

*Petition to Reopen*

Section 8-43-303, C.R.S., authorizes the reopening of a claim on a number of grounds, including error, mistake, or change in condition. The claimant bears the burden of proof to establish, by a preponderance of the evidence, that the worsening of their physical or mental condition is causally related to the industrial injury. § 8-43-303(4), C.R.S. However, a change in condition by itself is not sufficient to justify reopening, and the claimant must also establish that reopening is appropriate because the claimant's degree of permanent disability has changed, or when additional medical or temporary disability benefits are warranted. *Richards v. Indus. Claim Appeals Off.*, 996 P.2d 756, 758 (Colo. App. 2000).

By contrast, under *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1988), once respondents admit for maintenance medical benefits after MMI, the claimant is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity. In turn, once admitted, "[b]ecause future maintenance medical benefits are, by their very nature, not yet awarded, those benefits remain open and are not closed by an otherwise closed FAL." *Bolton v. Indus. Claim Appeals Off.*, 2019 COA 47, ¶ 24. Accordingly, since the issue of medical maintenance benefits has not closed based on the FAL, a claimant does not need to seek reopening to obtain future medical maintenance benefits as admitted under *Grover*. Instead, the

claimant only needs to apply for a hearing in cases where the respondents refused payment for specific maintenance treatment that has been denied as unrelated, unreasonable or unnecessary. *Walker v. Life Care Ctrs. of Am.*, W.C. No. 4-953-561-02 (ICAO, Mar. 30, 2017) (citing section 8-43-203(2)(d), C.R.S.).

Since reopening a claim to obtain general maintenance medical benefits is not possible because the issue of maintenance medical care is not closed, to justify reopening a claim to obtain further medical benefits, a claimant has to establish that his condition has worsened to the extent that he is no longer at MMI and there are further medical benefits that "are reasonably expected to improve the condition." *See Mockmore v. Joslins*, W.C. No. 4-343-875 (ICAO, Apr. 8, 2005).

While Claimant endorsed "petition to reopen" on his application for hearing, from discussion and testimony at the hearing, the ALJ believes that Claimant is not in fact seeking to reopen his claim under the reopening statute but instead is seeking further maintenance medical care. In the event Claimant is seeking to reopen his claim under section 8-43-303(2)(b), C.R.S., the ALJ finds and concludes Claimant has not established that his condition has worsened and that he is no longer at MMI.

Claimant testified at hearing that he wants to continue to receive physical therapy, massage therapy, chiropractic, and other medical care in order to temporarily relieve his chronic low-back pain. Claimant did not testify that his condition has worsened or that his degree of permanent disability has changed, and the record does not contain the opinion by a qualified medical professional that Claimant is no longer at MMI and that further medical benefits will improve his condition. Instead, the record contains the opinions of Drs. Ogin, Salazar, and Primack, who all concluded that by July 3, 2017, Claimant was at MMI and Claimant did not introduce evidence to refute those opinions. Without credible evidence establishing that he has experienced a change in condition such that he is no longer at MMI, Claimant has failed to establish by a preponderance of the evidence that his claim should be reopened under section 8-43-303(2)(b), C.R.S.

*Maintenance Medical Benefits*

As discussed above, under *Grover v. Indus. Comm'n*, 759 P.2d 705, 710 (Colo. 1988), once respondents admit for maintenance medical benefits after MMI, the claimant is entitled to a general award of future medical benefits, subject to the employer's right to

contest compensability, reasonableness, or necessity. Instead, the claimant only needs to apply for a hearing in cases where the respondents refused payment for specific maintenance treatment that has been denied as unrelated, unreasonable or unnecessary. *Walker v. Life Care Ctrs. of Am.*, W.C. No. 4-953-561-02 (ICAO, Mar. 30, 2017) (citing section 8-43-203(2)(d), C.R.S. (once any liability is admitted, payments shall continue according to admitted liability)).

Here, Respondents admitted for maintenance medical benefits. Dr. Ogin's report recommended maintenance care of independent exercises, compounded pain cream, and "repeat radiofrequency neurotomy procedures in the future, presuming that he gets a minimum of six months of sustained relief and functional improvement with each procedure. I will allow him to be seen in the office on two or three visits per year for flare-ups, medication refills or consideration of repeat rhizotomies." Claimant received maintenance medical benefits in the form of massage therapy, physical therapy, chiropractic care, pain medication, and radiofrequency ablations between 2017 and 2023.

Claimant contends that Respondents have refused treatment for his admitted injury. However, the evidence at hearing establishes that Respondents have not refused any maintenance medical benefits requested by an authorized provider. Instead, the evidence demonstrated that Dr. Salazar agreed it was reasonable to stop passive treatments in March 2023, Claimant's opioid medications were terminated in September 2023, and there is no denied request for radiofrequency ablation. Testimony established that Claimant has not seen his authorized provider since September 2023, when he was taken off opioid medications, and as of the date of the hearing no authorized provider had requested Claimant receive additional therapies or treatment as maintenance medical care.

Without a request for specific maintenance treatment which has been denied as unrelated, unreasonable or unnecessary, there is no medical benefit for the ALJ to review at this time. Under section 8-43-211(2), C.R.S., "a hearing on issues ripe for adjudication" will be held. "An issue is ripe for hearing when it 'is real, immediate, and fit for adjudication.'" *Youngs v. Indus. Claim Appeals Off.*, 2012 COA 85M, ¶ 14 (quoting *Olivas-Soto v. Indus. Claim Appeals Off.*, 143 P.3d 1178, 1179 (Colo. App. 2006)). "Conversely, an issue is not ripe and 'adjudication should be withheld for uncertain or

contingent future matters that suppose a speculative injury which may never occur.'" *Id.* Respondents admitted to maintenance medical benefits. Without a specific request for maintenance medical treatment that has been denied by Respondents, any determination by the ALJ would be based upon a speculative injury – the presumption that should an authorized provider prescribe Claimant passive therapies Respondents will deny that request – which may never occur.

**Order**

It is therefore ordered that:

1. Claimant's petition to reopen his claim is denied and dismissed.

2. Because Respondents admitted for maintenance medical benefits in their FAL and there are no current maintenance medical benefits requested by an authorized provider which Respondents have denied, Claimant's request for a hearing on maintenance medical benefits is not ripe for adjudication.

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

Signed: July 9, 2025.

Robin E. Hoogerhyde
Administrative Law Judge

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

## ISSUES

- Whether Claimant proved entitlement to temporary total disability (TTD) benefits for the period of May 17, 2024, through October 7, 2024?
- Did Claimant prove by a preponderance of the evidence that the left lower extremity rating should be "converted" to the 6% whole person equivalent?
- Medical Benefits after MMI?
- Disfigurement?

## FINDINGS OF FACT

1. Claimant was employed by Respondent in the fire department on January 13, 2024, when he was stepping off a fire truck and injured his left knee. The claim was initially denied but later admitted following a compensability hearing.

2. Claimant was treated at UCHealth on January 17, 2024. He was diagnosed with sprain of the left knee, effusion of the left knee and tricompartment osteoarthritis of the left knee. Claimant was initially treated conservatively with physical therapy, bracing and taking naproxen.

3. Claimant was placed on modified duty on January 22, 2024.

4. On May 6, 2024, the applicable work restrictions included a 20-pound limit for lifting, carrying, and pushing/pulling. Additionally, Claimant was restricted from climbing ladders, stairs, and kneeling. Claimant was also instructed to sit for 90% of the time.

5. Claimant testified that on May 17, 2024, he was told that he was no longer allowed to work the modified duty role due to language in his Union contract that he needed to take sick leave on a denied workers' compensation claim. When that decision was made, Claimant was not at full duty work, and he testified that he would not have been able to do his normal work.

6. After conservative treatment did not alleviate his symptoms, his doctor recommended surgery.

7. Claimant had knee surgery on July 12, 2024. After knee surgery, Claimant had physical therapy (P.T.). On October 7, 2024, Claimant returned to his modified duty work since he was successful at hearing proving his claim to be compensable.

8. On November 14, 2024, that he was able to do some running and jumping in P.T. He requested that he be returned to full duty work.

9. Claimant was placed at MMI on December 6, 2024, and was given a 15% lower extremity rating by Claimant's authorized treating physician, Dr. Centi. The 15% converts to 6% whole person. Dr. Centi did not recommend maintenance care after MMI.

10. Claimant has three arthroscopic portal scars that are each ½ inches in diameter. They are reddish in color compared to the surrounding skin. Claimant also claims a limp as the result of an antalgic gate stemming from his admitted knee injury. The limp is not always apparent. For example, the Claimant was not limping when he came into the Court house, but he was limping when asked to walk across the courtroom. Regarding the limp, Dr. Failinger, Respondent's IME doctor indicated that his review of the later records from Dr. Centi did not show evidence of an ongoing antalgic gait.

## CONCLUSIONS OF LAW

### A. Claimant failed to prove whole person impairment due to his injured left knee.

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

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

The mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc.*, W.C. No. 5-095-589-002 (July 8, 2021).

In this case, the Claimant has failed to sustain his burden that his back or hip pain is due to an altered gait steming from his knee injury. Although Claimant testified that he experiences more frequent back and hip pain since his work injury, there is no credible medical evidence that this back and hip pain are due to his knee injury.

**B. Temporay Disability**

Although Claimant was initially offered modified work to accommodate his restrictions, the Employer withdrew the offer since the Worker's Claim was denied and Claimant was forced to take sick leave and holiday leave beginning on May 18, 2024 until October 6, 2024. The Employer again offered modified work based on the determination that the Claim was compensable. Therefore, the Claimant is entitled to TTD from May 18, 2024 through October 6, 2024.

**C. Medical Benefits**

When placed at MMI, Dr. Centi did not recommend any future medical treatment. I find that Dr. Centi is credible and persuasive with respect to the lack of need for future medical treatment.

**D. Disfigurement**

Claimant has a visible disfigurement to the body consisting of three arthroscopic portal scars, which are discolored, compared to the surrounding skin and are approximately ½ inch in diameter. Claimant also claims a limp as the result of an antalgic gate stemming from his admitted knee injury. The limp is not always apparent. For example, the Claimant was not limping when he came into the Court house, but he was limping when asked to walk across the courtroom. Based on this discrepancy the Claimant is entitled to a disfigurement award for the arthroscopic portal scars only.

## ORDER

It is therefore ordered that:

1. Claimant's request to convert the impairment rating from a scheduled rating to a whole person rating is denied and dismissed.

2. The Respondent shall pay Claimant TTD from May 18, 2024, through October 6, 2024, plus interest on all amounts owed.

3. The Claimant has failed to sustain his burden that he requires medical treatment after MMI.

4. Insurer shall pay Claimant $900 for disfigurement for the portal scars and the occasional limp. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

DATED: July 10, 2024

Michael A. Perales
Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

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

## Issues on Remand

1. Whether Claimant proved by a preponderance of the evidence he sustained a compensable work injury arising out of and in the course of employment for Respondent.

2. Whether Claimant proved by a preponderance of the evidence he is entitled to reasonable, necessary and related medical treatment.

3. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability (TTD) benefits from March 15, 2024 through May 14, 2024 and temporary partial disability (TPD) benefits from May 15, 2024 through August 20, 2024.

## Findings of Fact

1. Claimant began performing services for Respondent in November 2023. At that time, Claimant owned one semi-truck, which he operated under his own company, Delta. The Internal Revenue Service assigned Delta an Employer Identification Number (EIN) on March 4, 2022. Ex. F. Claimant transported loads dispatched by Respondent. In January 2024, Claimant ceased operating Delta and established another company, TZ, with its own EIN. Claimant continued providing services for Respondent in the same capacity using his own truck. Claimant was the sole individual providing services under Delta and then TZ.

2. Claimant testified that, from November 2023 to February 9, 2024, he performed services for Respondent in the capacity of an owner/operator as an independent contractor. He testified that, during such time period, Respondent paid Claimant by the load, he was free to accept or reject any loads, and he was responsible for all expenses related to the operation of his truck, including diesel, maintenance and insurance.

Claimant testified he was free to work for any other company, although he did not do so from November 2023 to February 9, 2024. Claimant testified that, from November 2023 to February 9, 2024 he grossed an average of $5,000 to $7,000 per week performing services for Respondent, resulting in approximately $4,000 per week in earnings after expenses.

3. On February 9, 2024, Claimant parked his truck because it was no longer working due to a broken "GR." Claimant testified he had to fix the GR, the turbo, oil leaks, water hoses and tires. Claimant estimated the repairs would cost approximately $10,000. Claimant testified that, as of the date of the hearing, he has yet to fix his truck because he does not have the money to do so. Claimant testified that his company, TZ, did not provide any services to Respondent after his truck broke down on February 9, 2024. Claimant testified he has not operated TZ since February 9, 2024.

4. Claimant testified he looked for other work but was unable to find any and, on February 13, 2024, he returned to work for Respondent as a driver using a truck provided by Respondent. Claimant alleges he became an employee of Respondent at such time. Claimant testified his pay as a driver was set by Respondent without any negotiation at $0.55/mile. Claimant testified he was not responsible for any expenses related to the truck provided by Respondent. Claimant testified he was not able to refuse any driving trips or decide which trips to take and he was required to report to Respondent to notify of when he was near the unloading location and when he picked up the next load.

5. Subsequent to February 9, 2024 Claimant continued to perform the same services for Respondent that he did prior to February 9, 2024, transporting loads.

6. On March 14, 2024 Claimant was involved in a motor vehicle accident (MVA) while transporting a load from Utah to Colorado dispatched by Respondent. The MVA occurred at the end of a ten-day trip transporting loads for Respondent. On March 14, 2024, Claimant picked up a load in Cedar City, Utah which was to be delivered to Denver, Colorado. Claimant testified that, when he arrived in Grand Junction, Colorado, he had to take a detour through Salida, Colorado because I-70 was closed due to snow. Claimant called Mr. Farinas to advise him of the detour, which Mr. Farinas approved. At

approximately 10:40 p.m., Claimant's truck slid and crashed into a mountainside in Salida, Colorado. Claimant testified that the icy road caused the truck to slide and crash on the mountain. Claimant sustained injuries as a result of the MVA. Claimant called the owner of Respondent, Yair Diaz Farinas, to report the MVA, who came to pick Claimant up from Salida on the evening of March 15, 2024.

7. Claimant sought treatment at Banner North Colorado Medical Center Emergency Department (Banner North) immediately after the MVA. He was ultimately diagnosed with a comminuted intra-articular displaced left radial shaft and distal radius fracture. Claimant testified he underwent surgery with hardware and that he returned to a medical provider to have the stitches removed. Claimant underwent evaluation and treatment at Banner North, Mountain Vista Orthopedics and Heart of the Rockies Regional Medical Center. Claimant testified he did not undergo any other medical treatment for his injury because he does not have money to pay the doctor. Claimant testified his current limitations include difficulty lifting more than 20 pounds above waist or table level and increased pain when exposed to cold temperatures.

8. The documentary evidence regarding Claimant's pay submitted by both parties does not cover the entire time period for which Claimant provided services for Respondent. Claimant's Exhibit 1 includes pay records for the following periods: 1/3/2024-1/14-2024, 1/21/2024-1/14/2024, 1/28/2024-2/4/2024 and 2/5/2024-2/11/2024. Under the section "Trip Amount" there is a total dollar amount that does not reflect any specific calculation of mileage. Claimant's Exhibit 3 includes a pay record for the period 2/18/2024-2/25/2024 in which it appears the amount is calculated based on mileage at $0.55/mile.

9. Claimant testified he earned $959.70 for his first week as a driver for Respondent. The record includes copy of a check issued by Employer, No. 1177 for $959.70, dated February 21, 2024, payable to Claimant's company, TZ, as "owner operator." Ex. 2, p. 009. No pay record was offered as evidence detailing the method of calculation for the first week Claimant worked as a driver for Respondent. Check stubs produced by Respondent include No. 1179, dated February 22, 2024, referencing

payment to TZ for $1,593.60 as “Driver.” Ex. 2, p. 010. Claimant testified he did not receive a check for $1,593.60 referenced by check stub 1179.

10. Claimant testified that he was paid $1,533.75 for his second week of driving, as evidenced by Check No. 1181, dated March 2, 2024, written by Respondent made payable to TZ as “owner operator.” Id.

11. In addition to the $959.70 and $1,533.75 payment for his first two weeks of driving, Respondent also paid Claimant $800 on March 14, 2024 through the money transfer application Zelle.

12. Claimant testified that, after payment for his first two weeks of driving, he had driven an additional 7,412 miles for which he was owed $4,076 which after a deduction of the $800, left a balance of $3,276 he believes is owed to him by Respondent. Claimant testified that, after the MVA, he asked Mr. Farinas to pay him what he was owed for his driving. Claimant testified Mr. Farinas refused to pay him because Claimant had damaged the truck in the MVA. Claimant testified he stopped working for Respondent after the MVA.

13. Claimant returned to work at a mechanic shop on May 15, 2024, making $900.00 per week. He worked at these wages until August 20, 2024, when he started working as a driver making $1,700.00 per week.

14. Both before and after February 9, 2024, Respondent issued payment to Claimant in Claimant’s business name (first Delta, then TZ).

15. When asked why, after February 9, 2024, he accepted checks made payable to his company TZ instead of his individual name, Claimant testified there was no time to discuss his checks as he was very busy driving or sleeping and he needed to get paid to pay his rent and expenses.

16. Francisco Vilorio testified at hearing on behalf of Respondent. Mr. Vilorio testified that he began providing services for Respondent in April 2024 and does so as an independent contractor. Mr. Vilorio testified that Respondent “is a carrier and I’m leased

on to his DLT, which is his authority. That's what I do. So we're different companies, we're just attached because he does have his Department of Transportation certificate." Hrg. Tr. 47:13-17. Mr. Vilorio testified that he has his own company under Mr. Farina's authority, which he referred to as a "lease on contractor." Hrg. Tr. 47:20-21.

17. Mr. Farinas testified at hearing on behalf of Respondent. Mr. Farinas testified he hired Claimant to work as an independent contractor and that Claimant worked in such capacity throughout the entirety of his time performing services for Respondent. Mr. Farinas testified that Respondent does not hire nor have any drivers, and that all of the individuals providing services for Respondent are business owners and independent contractors.

18. Mr. Farinas testified that Claimant provided services for Respondent first as the owner/operator of Delta, and then as the owner/operator of TZ. Claimant completed W-9 forms and provided Respondent his companies' EINs.

19. Exhibit H includes a W-9 Request for Taxpayer Identification Number and Certification for Claimant's company, TZ. The form is dated February 12, 2024. Mr. Farinas testified that Claimant provided him the form on February 14, 2024, as Claimant said he was no longer operating Delta due to some issues. Mr. Farinas did not ask Claimant to provide Respondent the new W-9 form for TZ.

20. Mr. Farinas testified that the truck Claimant was driving at the time of the MVA was a truck Respondent lent to Claimant because Claimant's own truck broke down. He testified, "[Claimant] let us know that his truck broke down and we loaned him one so that he could finish the job, and he was going to bring back his truck the next week." Hrg. Tr. 62:2-5. Mr. Farinas testified that Respondent had a lease agreement with another company, GADIS Freight, for the truck and that the truck was working under and insured under GADIS Freight. Mr. Farinas testified that Respondent lent Claimant the truck to use because there was already a commitment to transporting loads that needed to be completed.

21. Mr. Farinas testified,

Q: You were also responsible -- your company was responsible for paying his wages for driving whatever truck you assigned to him, correct?

A: So how it happened is for that trip in particular we were going to pay the diesel and anything that would break, that would be [Respondent] to GADIS Freight.

Q: It was not his responsibility to pay for any expenses related to the truck that you loaned him, correct? ·

A: That's correct.

Q: He was only paid for driving the vehicle that you say belonged to GADIS. His only pay was per mile, correct?

A: No, there was a commitment, an agreement to finish the job.

Q: Did that job that you claimed there was an agreement to finish, did that job ever got finished? When was it finished?

A: No, he was driving carelessly and he had an accident.

Hrg. Tr. 56:19-25, 57:1-11.

22. Mr. Farinas testified that Claimant was always paid by the load and there was no agreement to pay based on mileage. Mr. Farinas testified that owner/operators can pay for their own diesel or use Respondent's credit card for the diesel, which Respondent then deducts from their pay. As Respondent lent Claimant the GADIS Freight truck to use after February 9, 2024, Respondent and Claimant agreed Claimant was not responsible for those truck expenses up front. Mr. Farinas testified,

Q: You loaned him a truck but you were responsible for for all expenses of using that truck, correct?· He did not have to pay maintenance, he did not have to pay insurance, correct?

A: All the expenses were going to be taken out from that and they would be paid. They had to be paid to GADIS Freight and whatever was going to be left over, that's what he would get as his part.

Hrg. Tr. 62:6-13.

23. Mr. Farinas testified that Claimant was paid for his services performed, including the last two weeks of services, but not by miles. Mr. Farinas deducted from Claimant's pay the loss of the loads that were not delivered due to the MVA.

24. Claimant and Respondent did not enter into any written document regarding Claimant's performance of services for Respondent, either before or after February 9, 2024.

25. The ALJ credits the Claimant's testimony, as supported by the records, and finds Claimant proved it is more likely than not he sustained a compensable industrial injury during the course and scope of his employment for Respondent on March 14, 2024.

26. Claimant proved it is more likely than not the medical treatment he received at Banner Health, Mountain Vista Orthopedics and Heart of the Rockies Regional Medical Center was reasonable, necessary and related treatment to cure and relieve the effects of the March 14, 2024 work injury. Claimant is entitled to reasonably necessary medical treatment related to the work injury.

27. Claimant proved it is more likely than not the March 14, 2024 work injury caused a disability lasting more three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss from March 15, 2024 through May 15, 2024. Claimant is entitled to TTD benefits for such period.

28. Claimant proved it is more likely than not the work injury caused Claimant's disability and partial wage loss from May 15, 2024 through August 20, 2024, entitling Claimant to TPD benefits for such period.

## Conclusions of Law

### *Generally*

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

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

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

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

***Compensability***

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

As found, Claimant proved by a preponderance of the evidence he sustained a compensable work injury on March 14, 2024. Claimant's injury occurred while he was transporting loads for Respondent. Such duties were within Claimant's regular work-related functions and during the time and place limits of his work. The nature of Claimant's work-related functions involved driving and transporting loads at various times of the day. Claimant credibly testified he took a detour due to inclement weather, of which he advised Mr. Farinas and Mr. Farinas approved. Claimant credibly testified regarding the occurrence of the work injury and his testimony is corroborated by the records. Based on the totality of the evidence, Claimant proved it is more likely true than not he suffered a

compensable work injury on March 14, 2024 arising out of and in the course of his employment, resulting in disability and the need for medical treatment.

### *Medical Treatment*

Respondents are liable for medical treatment that is causally related, reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As Claimant proved he sustained a compensable work injury, Respondent is liable for reasonable, necessary and related medical treatment for the injury. As found, Claimant proved by a preponderance of the evidence the medical treatment he received at Banner Health, Mountain Vista Orthopedics and Heart of the Rockies Regional Medical Center was reasonable, necessary and related medical care. Claimant underwent evaluation and treatment with the above providers specifically for the work injury. The nature and severity of Claimant's work injury necessitated the evaluation and treatment. The evaluation and treatment was the direct result of Claimant's March 14, 2024 work injury, and was reasonable and necessary to cure and relieve the effects of the work injury. Accordingly, Respondent is liable for the costs of such medical treatment as well as other reasonably necessary and causally related medical treatment.

### *Temporary Total Disability*

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as

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

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

As found, Claimant proved it is more probable than not he is entitled to TTD benefits from March 15, 2024 through May 14, 2024. Claimant sustained an arm fracture as a result of the work injury, which led to surgery and a period of recovery. Claimant left work as a result of the disability caused by his work injury. As a result of the work injury and resultant disability, Claimant did not earn any wages from March 15, 2024 through May 14, 2024.

***Temporary Partial Disability***

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson*, 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

On May 15, 2024 Claimant returned to different employment performing mechanical work. Nonetheless, Claimant earned less than what he was making as a

driver leading up to the work injury. The ALJ is persuaded this partial wage loss was due to the disability caused by the work injury. Claimant proved by a preponderance of the evidence the March 14, 2024 work injury resulted in disability and partial wage loss from May 15, 2024 through August 20, 2024 entitling him to TPD benefits for that period.

**Order**

It is therefore ordered that:

1. Claimant sustained a compensable work injury on March 14, 2024 arising out of and in the course and scope of his employment with Respondent.

2. Claimant is entitled to reasonable and necessary medical benefits related to his March 14, 2024 work injury. Claimant's treatment at Banner Health, Mountain Vista Orthopedics and Heart of the Rockies Regional Medical Center was reasonable, necessary, and related to his March 14, 2024 work injury. Respondent shall pay for the associated costs of such treatment, as well as other reasonable, necessary and related medical treatment, subject to the Division of Workers' Compensation Fee Schedule.

3. Respondent shall pay Claimant TTD benefits for the period of March 15, 2024 through May 14, 2024.

4. Respondent shall pay Claimant TPD benefits for the period May 15, 2024 through August 20, 2024.

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

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

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: July 11, 2025

Kara R. Cayce
Administrative Law Judge

## Issues

I. Whether Respondents produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinions of Dr. Dwight Caughfield regarding maximum medical improvement (MMI).

II. Whether Claimant established, by a preponderance of the evidence, that the C4-7 ACDF (Anterior Cervical Discectomy and Fusion) surgical procedure, as recommended by Dr. Michael Rauzzino, is reasonable, necessary and related to his February 17, 2022, industrial injury.

## FINDINGS OF FACT

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

1. Around 3:00 a.m. on February 17, 2022, Claimant, who was working as a delivery driver for Employer, suffered a concussion and injuries to his cervical and lumbar spine when he fell backwards over a loaded pallet striking his head on the cement freight dock outside of Employer's warehouse. Claimant explained that he was at the warehouse alone and working to unload his truck of the cargo necessary to cover his deliveries for the day. As he set about his work, Claimant realized that the rear of his delivery truck and the freight dock did not line up completely. Accordingly, Claimant testified that he intended to cover the gap between the truck and the loading dock with a dock plate, which Employer kept hanging on a wall adjacent to the loading dock. Claimant testified that the that the aisle he had to negotiate to get to where the dock plate was hanging was cluttered making it difficult to access. Claimant testified that he was able to reach the dock plate, which he reported weighed 80-100 pounds. As Claimant pulled the plate from the wall, he lost his balance and began to stumble backwards. As Claimant staggered backward with the dock plate in hand, he tripped over a truck axle and gear box resting on a pallet in the aisle. Claimant testified that he fell backward over the top

of the gear box while holding onto the dock plate. Claimant landed on his buttocks and low back with the full weight of the dock plate. The momentum associated with Claimant's fall continued its backward trajectory causing him to strike the back of his head on the cement loading dock, dislodging and breaking his eyeglasses. Claimant reportedly lost consciousness upon striking his head on the cement. He testified that after he woke up, he got the dock plate off of himself and sat in a chair while he called his supervisor, who did not answer.

2. After sitting for a while, Claimant testified that he felt well enough to finish unloading his truck. He then proceeded to unload approximately 20 boxes of car parts at the Colorado Springs warehouse before proceeding to his last delivery stop of the day by driving to Pueblo, Colorado.

3. Claimant testified that he completed his shift around 5:30 a.m. or 6:00 a.m. after which, he called his supervisor again to report the incident. Claimant testified that he was told to seek treatment at Concentra Medical Centers (hereinafter Concentra). According to Claimant, he drove to Concentra on February 17, 2022, and after his initial evaluation there, he was referred to the emergency room at Grandview Hospital because he was on blood thinners due to a history of pulmonary embolism prompting the need for further evaluation. (RHE I, pp. 77-80). While at Concentra, Claimant complained of radiating pain in his legs bilaterally and stated that he had severe headaches on the right side of his head. He was diagnosed with a closed head injury, sprain and strain of the cervical spine, and a lumbar strain. (CHE 1, p. 4).

4. Claimant then drove to Grandview Hospital where he presented to the Emergency Room (ER). (RHE H). Upon exam, Grandview noted a benign neuro exam, some tenderness along the cervical spine, no back pain or myalgias, and no evidence of trauma in the thoracic spine, sacroiliac spine, hips, or bilateral lower extremities. *Id*. at 27. A computer tomography ("CT") scan of the cervical spine revealed no acute fracture and multilevel degenerative changes at C5-C6 and C6-C7. *Id*. at 28-29. A CT scan of the brain revealed no evidence of acute hemorrhage or fracture. *Id*. at

29. Contrary to his hearing testimony, Claimant reported to the providers at Grandview that he did not believe that he lost consciousness from the injury. *Id*. at 25.

5. Liability for Claimant's injuries was admitted, and he received various forms of conservative treatment to include chiropractic care and physical therapy under the direction of the providers at Concentra. (RHE I).

6. On April 7, 2022, Claimant was evaluated by Physician Assistant (PA) Mendy Peterson for continued complaints of lower back and neck pain. (RHE I, p. 109). While Claimant's pain had improved some, he reported persistent pain with "turning [his] head side to side". *Id.*

7. On April 18, 2022, Claimant was evaluated by Dr. Kristina Robinson. (RHE I, pp. 115-120). Dr. Robinson ordered an MRI of the cervical spine without contrast. *Id.* at 117.

8. Claimant underwent an MRI of the cervical spine on April 28, 2022. (RHE L). The imaging revealed multilevel abnormal findings leading to the following impressions as articulated by Dr. Joel Rosner:

> 1. Disc Herniation (Extrusion Type) C6/C7: Posterior central extrusion measuring 4 mm AP by 8 mm transverse with caudal central subligamentous migration of disc material noted. Herniation compresses the thecal sac with slight flattening of the anterior margin of the cord.
>
> 2. Disc herniation (protrusion type) C5/C6 level: Broad-based posterior protrusion measuring up to 4 mm AP with minimal marginal spurring. Hemiation mildly flattens the cord and compresses the exiting C6 nerve root sleeves.
>
> 3. Central spinal Canal stenosis C5/C6 and C6/C7: Mid sagittal diameter of the canal reduced to 9 mm and 9.7 mm at C6/C7. Preservation of CSF signal anterior and posterior to the cord at both levels.

4. Foraminal stenosis: Mild right-sided stenosis C4/C5. Mild bilateral stenosis CS/C6. Mild to moderate bilateral stenosis C6/C7.

5. Discopathy With Posterior Annular Bulging C3/C4 and C4/C5 and C6/C7: Disc narrowing at C4/C5 and more advanced at C6/C7. Posterior annular bulging at all 3 levels.

6. Empty sella: CSF signal occupies approximately 80% of the sella turcica with flattening of the pituitary to 3-4 mm.

(RHE L, pp. 222-223).

9. Following his cervical MRI, Dr. Robinson referred Claimant to Dr. Michael Rauzzino for a neurosurgical evaluation. (CHE 3). Claimant met with Dr. Rauzzino on May 31, 2022, during which consultation, he reported an inability to turn his neck along with migraine headaches and radiating pain into his shoulders and occasional tingling into his hands. Claimant also reported some changes in his fine motor movements. *Id*. at 14. Regarding the findings/impression noted on Claimant's MRI and the cause of Claimant's persistent symptoms, Dr. Rauzzino noted, "The findings of the cervical spine [MRI] are mostly degenerative. However, there is no record of being symptomatic prior to [the] fall and therefore I do believe [Claimant] is symptomatic as a result of the occupational injury". *Id*. at 15. Dr. Rauzzino referred Claimant to Dr. Kenneth Finn for pain management and injection therapy.

10. Claimant presented to Kenneth Finn, M.D. for an initial consultation on June 24, 2022. During this appointment, Claimant denied any upper extremity radicular pain, numbness, or paresthesia. (RHE I, p. 124). Dr. Finn found no evidence of neurologic compromise suggesting an acute radicular process. Cervical medial branch blocks were recommended. *Id*. at 127.

11. After a change in his authorized treating physician (from Concentra), Claimant began treating with Dr. Miguel Castrejon on July 18, 2022. (RHE K, p. 152).

12. On August 3, 2022, Dr. Finn administered cervical facet joint medial branch blocks at the right C2-C4. (RHE J, pp. 146-147). On August 23, 2022, Claimant returned to Dr. Finn at which time he reported a poor response to the injections. *Id.* at 148.

13. On September 12, 2022, Claimant reported to Dr. Castrejon that he had worsening neck pain after his injections with Dr. Finn. (RHE K, p. 161; RHE O, p. 257; RHE R, p. 292). Claimant also reported numbness in his right upper extremity for the first time since his May 31, 2022, appointment with Dr. Rauzzino. (RHE K, p. 161). Dr. Castrejon performed an electromyography ("EMG") of Claimant's right upper extremity on September 13, 2022. The findings were consistent with carpal tunnel syndrome; however, there were no findings that supported the presence of cervical radiculopathy. *Id*. at 164, 169. Nonetheless, the results of Claimant's EMG did not exclude the presence of a sensory radiculopathy. *Id*. at 200.

14. Dr. Castrejon placed Claimant at MMI with impairment during a follow-up appointment on April 25, 2023. (RHE K, pp. 199-202). At the time of this encounter, Claimant described "constant dull to occasional sharp pain that extends to both shoulder blades". *Id*. at 199. He reported muscle tightness and spasms and decreased range of motion that limits any prolonged driving activities. *Id*. He also described "daily dull headaches at the base of his neck that intermittently increase to full 'migraine headaches' that begin at the base of his head and extend to the frontal region where they become pressure like and throbbing". *Id*. He described "photophobia and phonophobia" and "constant dull and stabbing pain across the lower back that occasionally extended into his buttocks", which was "worse with prolonged sitting and standing". *Id*. at 199-200.

15. Dr. Castrejon assigned 18% whole person impairment for the cervical spine, 15% whole person impairment for the lumbar spine, and 15% whole person impairment for headaches for a combined impairment rating of 41%. (RHE K, p. 201).

16. Claimant disagreed with Dr. Castrejon's determinations regarding MMI and

impairment and requested a Division Independent Medical Examination (DIME). Dr. Caughfield was selected to perform the DIME. However, prior to seeing Dr. Caughfield, Claimant would attend Independent Medical Examinations (IMEs) with Dr. John Burris and Dr. Jack Rook.

17. Claimant attended a Respondent requested IME with Dr. John Burris on August 15, 2023. Claimant wore sunglasses to this IME. He also used a single point cane during the examination. (RHE M, p. 237). He reported that he had lost consciousness for an unknown period after striking his head on the ground, but denied current radiation of pain, numbness, or weakness into his arms or legs *Id*. at 225, 227.

18. On examination, Dr. Burris noted that Claimant provided minimal effort, displayed multiple nonorganic signs, exhibited a non-physiologic presentation, and there were significant inconsistencies between range of motion observed during casual observation and those provided during examination. (RHE M, p. 241). Overall, Dr. Burris found Claimant's physical examination benign with diffuse myofascial tenderness and decreased range of motion with normal neurologic function. *Id*. While Claimant used the cane for ambulation, Dr. Burris noted he could walk with a normal gait pattern without use of the cane. Claimant could also transfer without hesitation. *Id*. at 238. Following his IME, Dr. Burris determined that Claimant's only work-related diagnoses were a minor scalp contusion and a minor soft tissue strain to the cervical spine. *Id.* at 241. He concluded that Claimant had reached MMI. *Id.* Due to what he felt was a relatively minor workplace event, the nonspecific nature of Claimant's pain complaints without correlation to objective findings and historical inconsistencies in the record, Dr. Burris concluded that a spinal disorder could not established in this case. Accordingly, he opined that there is no objective basis to assign impairment for spinal disorders. *Id*. at 241-242. Dr. Burris also opined that when the mechanism of injury (MOI) was combined with the fact that Claimant completed his shift involving manual labor and had a normal neurologic exam, negative diagnostic testing, and no amnesia, that there is no basis for a mild traumatic brain injury ("TBI"), concussion, or post-traumatic headache diagnoses. (RHE M, p. 242).

19. Claimant sought the independent medical opinions of Dr. Jack Rook. He attended an IME with Dr. Rook on October 3, 2023. During this IME, it was noted that Claimant was wearing sunglasses and ambulated normally into the examination room. (CHE 4, p. 28). When discussing his injuries, Claimant reported that he had lost consciousness after the hitting his head and "everything went blank." *Id*. at 18. Dr. Rook noted that since he fell backward and hit his head, Claimant has "struggled with severe headaches, neck pain, back pain, and increased worsening of his post-traumatic stress disorder symptoms and anxiety associated with chronic pain, financial loss, and frustrations with the Workers' Compensation system". *Id*. at 30. Dr. Rook opined that Claimant has "significant pathology and a cervical spine based upon his MRI scan which demonstrated disc herniations at 2 levels including migration of the disc at C6-7 and spinal cord impingement and deformity". *Id.* Dr. Rook concluded that Claimant was not at MMI and recommended a follow-up with Dr. Rauzzino. *Id*. at 30-31. Indeed, Dr. Rook noted, "[Claimant's] headaches seem to be triggered by his cervical condition, and definitive treatment of the cervical spine (which would likely include a multilevel decompression and fusion procedure) might improve this disabling condition". *Id*. Although he concluded that Claimant was not at MMI, Dr. Rook generally agreed with the impairment assigned by Dr. Castrejon. *Id*. at 31. Dr. Rook assigned Claimant a 19% impairment for the cervical spine, a 16% impairment for the lumbar spine, and a 15% impairment for the headaches for a total combined whole person impairment rating of 42%. *Id*. at 31-32.

20. Claimant met with Dr. Dwight Caughfield on November 2, 2023, for his DIME. Claimant used a cane during the exam but did not demonstrate balance issues upon observation. (RHE N, p. 249). He also wore dark glasses and stated that any bright lights aggravated his headaches. *Id.* Dr. Caughfield opined that Claimant's primary functional barriers were neck pain and headaches based on constant 7/10 neck pain that limited motion in all planes. (RHE N, p. 248). Claimant's neck pain was noted to trigger 8/10 intensity level migraines, prompting Claimant's need to lie down for two hours everyday. *Id*. Claimant's headaches were noted to be "aggravated by neck motion and when intense include flashing dots and wavy lines". *Id*. Claimant expressed a desire to return to Dr. Rauzzino to discuss surgical options as he understood, per his prior

discussions with Dr. Rauzzino, that surgery represented an option with "about a 50% success rate" if injection therapy did not help. *Id.* Claimant then advised Dr. Caughfield that injections with Dr. Finn "provided no benefit . . . for his pain or function". *Id*.

21. After taking a history, reviewing the medical records and performing a physical examination, Dr. Caughfield determined that Claimant was not at MMI and needed additional cervical workup. (RHE N, p. 250). It was determined that Claimant may also benefit from facet lumbar injections. *Id*. Lumbar surgery was not recommended, as the imaging and exam findings did not correlate with nerve impingement. *Id.* Dr. Caughfield opined that Claimant's TBI had resolved with no cognitive residual, and it appeared that the headaches were cervicogenic in origin. *Id.* Concerning Claimant's cervical spine, Dr. Caughfield noted that the "recommended options for a cervical injury as outlined in the cervical spine injury treatment guidelines, page 51, recommendation 124" had not been completed. *Id*. He noted further that the "guidelines allow for surgical intervention for unresolved neck pain if he has failed more conservative measures and has been screened for confounding psychological conditions". *Id*. Finally, Dr. Caughfield noted "that [Claimant] has completed attempts at chiropractic, physical therapy, pharmacotherapy, and injections without improvement and function and therefore surgical intervention can be considered. However, psychological screening for surgical appropriateness should be completed first per the guidelines". *Id*.

22. While Dr. Caughfield noted that Claimant had a psychological screening that identified an adjustment disorder, this screening did not "specifically discuss surgical implications and anticipated only temporary aggravation due to the injury but [Claimant] remains at risk for confounding psychological conditions given his past history of PTSD with anxiety and depression. (RHE N, p. 250). Accordingly, Dr. Caughfield opined that Claimant "should complete [a] psychological screening and any recommended testing/treatment before proceeding with surgical options. *Id*. Dr. Caughfield assigned a conditional 26% cervical impairment, a 27% lumbar impairment, and a 15% impairment for headaches. Combined, Claimant was issued a 55% whole person impairment. *Id*.

23. Respondents filed an Application for Hearing to overcome Dr. Caughfield's DIME determinations regarding MMI and impairment. While the hearing was pending, Claimant returned to Dr. Castrejon and Dr. Rauzzino in follow-up of his cervical spine condition. (See generally, RHE K and O).

24. On February 2, 2024, Claimant had a repeat cervical MRI. The imaging revealed spondylosis worse at C5-C6 and C6-C7; protrusion and/or osteophytes; mild right foraminal narrowing at C4-C5; and mild canal and moderate left worse than right foraminal narrowing at C5-C6 and C6-C7. (RHE P, pp. 263-264). Claimant also underwent another CT scan of the cervical spine which demonstrated similar findings to the February 2, 2024, MRI. (RHE Q, p. 268).

25. On February 27, 2024, Dr. Rauzzino recommended an epidural steroid injection at C6-C7. If this injection failed to provide relief, Dr. Rauzzino opined that Claimant would need an ACDF at C5-C7. (RHE O, p. 258). On August 30, 2024, Claimant had an epidural steroid injection from Dr. Finn that provided 25% temporary relief. (RHE K, p. 215).

26. Claimant returned to Dr. Rauzzino's care on October 18, 2024. (RHE O, p. 259). As part of his treatment record following this appointment, Dr. Rauzzino noted that Claimant had exhausted conservative treatment options. Accordingly, Dr. Rauzzino requested authorization to perform an ACDF at C4-C7. *Id.*

27. On October 28, 2024, Dr. Kimberly Terry, completed a "Physician Advisor" record review through MedInsights, a subsidiary of Gallagher Bassett Services, Inc. (RHE Q). Dr. Terry opined that the only industrially related injuries were a concussion, a cervical sprain, and a lumbar sprain. *Id*. at 269. Dr. Terry opined further that Claimant's physical exam findings were more indicative of chronic degenerative changes in the spine. *Id*. at 270-271. Finally, Dr. Terry opined that Claimant's sprains should have been resolved by the point of her review regardless of treatment as it had been over two years since the date of injury. *Id.* at 270.

28. Respondents requested another IME following Dr. Rauzzino's request for authorization to proceed with C4-7 ACDF surgery. Accordingly, Claimant attended an IME with Dr. Qing-Min Chen on December 4, 2024. On exam, Claimant was noted to be using a cane in his right hand. (RHE R, p. 277). Claimant stated that he had trouble with memory, balance, and experienced spots in his eyes. He believed his balance issues were a result of his eye problems. *Id*. at 276. Claimant also told Dr. Chen that he could not turn his neck. *Id*. at 294.

29. Dr. Chen expressed concern that Claimant's pain generators had not been adequately identified, noting that nothing in the way of workup "would give [him] any sort of confidence the [proposed] surgery would help Claimant". (RHE R, p. 296). He stated "that based on Colorado medical treatment guidelines for cervical spine fusion under recommendation 145, Claimant does not have the imaging studies that really demonstrate nerve root compression on the right side based on the MRI dated February 2, 2024. *Id.* at 292. Dr. Chen also opined that the second part of Recommendation 145 for persistent non-radicular cervical pain is not met because all pain generators have not been defined or treated. *Id.* Accordingly, Dr. Chen found that Claimant had reached MMI, was not a surgical candidate, had exhausted all conservative treatment, and the surgical recommendation of Dr. Rauzzino would likely be more harmful than helpful. *Id*.

30. Respondents hired DigiStream Investigations to conduct surveillance of Claimant. (RHE S, videos 1-3). On December 3, 2024, video footage of Claimant was obtained which shows Claimant leaving his garage, walking out to his truck in the paved parking lot, and entering the driver's side of his truck without the use of a cane. He then drove away with his wife riding in the passenger seat. (RHE S, video 1). The footage then shows Claimant leaving the office building of Dr. Chen while utilizing a cane in his right hand. Claimant is seen walking across the parking lot to his truck with Ms. Roemmich. The footage does not show Claimant losing his balance or any fall during his walk back to his truck. DigiStream followed Claimant's truck and captured it at what appears to be a grocery store. Claimant is then filmed driving the truck as he is pulling

into his residence. After arriving home, Claimant exits his truck and walks with a slight, but perceptive gait disturbance, into his garage without the assistance of his cane. *Id.*

31. Claimant testified that he used the cane at Dr. Chen's IME appointment because, he had a bad headache since he had to ride all the way to Denver. Because he had a really bad headache, Claimant testified that his balance was also really bad.

32. DigiStream conducted additional video surveillance on December 7, 2024. In the video tape from this surveillance, Claimant is seen tossing trash bags and broken-down cardboard into the bed of his truck, which is parked in front of the entrance to his garage. After loading his trash, Claimant enters the truck and drives to an area where he stops to retrieve his mail. After stopping, the video next shows Claimant walking to his truck, mail in hand. Claimant enters the truck and drives off. Surveillance next picks Claimant up in front of a large trash receptacle where he is seen tossing the trash that he had loaded into the bed of his truck previously. After tossing his trash, Claimant enters his truck and drives off. Claimant proceeds to his residence and parks in front of his garage. He exits his truck, walks around the rear of the truck with a wide based gait to the passenger's door where he retrieves a shopping bag, which he carries into the open garage. At 1:32:51 of the video tape, Claimant is observed backing his truck into his driveway. As he backs his truck into the drive, Claimant is observed to rotate his head to complete the backing manauver. Claimant then exists the truck and walks with his wife into the open garage without utilizing a cane. (RHE S, video 1).

33. Video tape obtain on December 19, 2024, is similar in content to that obtained on December 7, 2024. Indeed, Claimant is seen placing empty cardboard into the bed of his truck located in the paved parking spot, entering and exiting the garage multiple times, driving to a dumpster located on a concrete lot, carrying the cardboard an estimated 20 feet across concrete to the dispose in the dumpster, driving to the mailroom, walking into and out of the mailroom, and driving back home to park in the paved parking spot. This entire footage captured Claimant ambulating without a cane. Later, Claimant is observed to take his dog for a short walk to a grassy area near his home. He then

walked across a paved parking lot and entered his garage. Again, Claimant is not using his cane. (RHE S, video 1).

34. On January 2, 2025, DigiStream captured Claimant walking in and out of his garage to his truck and bending and moving around in his garage as he reorganizes it. At 12:30 on the video tape, Claimant is seen lifting what appears to be an aluminum ladder, placing it a few feet from its original position. Claimant is not observed to be using cane during the entirety of this footage, and he demonstrated no overt pain behavior. (RHE S, videos 1 &2).

35. On January 6, 2025, DigiStream filmed Claimant placing a box into the bed of his truck and driving away at approximately 11:24 a.m. Shortly thereafter, Claimant was filmed at a Safeway and placing packs of Gatorade and soft drinks into the bed of the truck parked in the paved parking lot. Claimant then drove to Costco and was filmed operating a gas pump located on concrete. Afterwards, Claimant drove to a UPS, carried a package into the building, exited the building, and drove back home. He arrived back to his home at approximately 12:50 p.m. and carried groceries inside to his residence. Claimant did not use a cane during the entirety of this footage. (RHE S, video 3).

36. On January 6, 2025, Claimant was also filmed in the parking lot of Dr. Castrejon's office building for a medical appointment. He was filmed exiting the truck, grabbing his cane out of the truck, and entering the building while utilizing the cane in his right hand. (RHE S, video 3). In Dr. Castrejon's January 6, 2025, medical report, he noted Claimant presented with the cane, his gait was antalgic, the Romberg was equivocal, and Claimant was unable to heel, and toe walk due to poor balance. (RHE K, p. 216). Claimant was filmed exiting Dr. Castrejon's office building while utilizing a cane in his right hand. He placed the cane in the vehicle and then drove away. RHE S, video 3.

37. Claimant testified that he get migraines, blurred vision, and sees lines that affects his balance. He testified that he gets headaches every day. He indicated that he uses his cane for balance, so he does not fall. However, he testified that he is not afraid

of falling around his truck, that is typically parked in a paved lot or falling onto grass. He stated, “It’s on the cement and uneven ground is what worries me.” Ms. Roemmich also testified that Claimant usually “uses the cane if we are going someplace where there's asphalt, sidewalks, you know, something hard that he might fall and hit himself.” Claimant also testified that distance is a large component of why he uses the cane.

38. Claimant admitted in testimony that no doctor has prescribed him a cane for ambulating, and he decided to use it on his own. He also testified that he began using the cane about 1 year ago. Claimant testified that he uses his cane in both hands and is not concerned about falling from using the cane in the right hand with radicular symptoms because he has sufficient strength in his arm and hands.

39. Claimant testified that he is able to cook, bathe himself, do chores at home, run errands and drive himself to medical appointments. He has difficulty donning his socks and shoes. He testified that no physician has issued restrictions saying he cannot drive, adding that he drives despite seeing “lines” in his visual field during migraine headaches. He also testified that since the injury, he has experienced 8/10 head and neck pain every day. Ms. Roemmich testified that Claimant’s migraines prevent him from driving “if they’re bad enough.” However, if he is experiencing a more normal migraine on a normal day, she is not concerned about him driving.

40. Dr. Castrejon performed a repeat EMG on April 22, 2025. (CHE 14). In his report regarding this test, Dr. Castrejon noted that Claimant has “been experiencing progressive worsening of neck and right upper limb pain.” *Id*. at 77. Claimant also reported “constant dull to sharp stabbing neck pain that extends to both shoulders and into the right arm to the hand with numbness and tingling currently into the first 2 digits. He reports numbness and tingling in the median nerve distribution. He reports sensation of weakness to his right upper limb.” *Id*. at 78. Dr. Castrejon concluded that Claimant’s EMG testing was “abnormal” with findings on the study consistent with the “presence of mild electrical median neuropathy at the wrist, carpal tunnel syndrome, primary sensory and chronic right C5/6 radiculopathy. There were no findings to support the presence of

polyneuropathy or plexopathy." *Id*. at 80. Finally, Dr. Castrejon stated; "today's findings offer support for the presence of the cervical radiculopathy that involves the C5 and C6, with somewhat more C5 features. This differs from the prior study wherein there was no evidence of cervical radiculopathy. However, this did not exclude the presence of sensory radiculopathy. Treatment options can involve C5 vs and/or C6 transforaminal steroid injection. In this case, consideration for cervical fusion is considered to be medically reasonable." *Id*.

41. In a report dated April 23, 2025, Dr. Castrejon pointed out the various radiological studies of the cervical spine and the recent EMG test which were positive for chronic right C6 radiculopathy. (CHE 13, p. 74). Dr. Castrejon disagrees with Dr. Chen's opinion that since the initial EMG was negative for the presence of cervical radiculopathy, then this firmly excludes the presence of cervical radiculopathy. *Id*. Indeed, Dr. Castrejon stated, "I remind Dr. Chen that this is not the case, and he is welcome to review electrodiagnostic literature surrounding the inability to detect pure sensory radiculopathies. In this case, a 'negative' electrodiagnostic study for radiculopathy does not exclude the presence of sensory radiculopathy. Irregardless, his most recent study provided different findings. Ultimately, in contradistinction to the opinion of multiple specialists, it was the opinion of Dr. Chen that the patient was not a surgical candidate. The basis for this decision appears to be the lack of response to cervical spinal injections and lack of benefit with all conservative modalities. *Id*. at 74-75. Dr. Castrejon went on to point out that Dr. Finn performed medial branch blocks in an effort to determine whether Claimant's etiology was facet in origin and that these injections failed to provide any benefit, which was not surprising to Dr. Castrejon because the etiology of Claimant's pain is "discogenic in nature." *Id*. Dr. Castrejon further stated that "having reviewed Dr. Chen's report, I respectfully disagree with his opinion as they do not override the significant imaging and diagnostic findings nor the lack of benefit with treatment provided thus far." *Id.* Dr. Castrejon concluded that Claimant is not at MMI, and "that the surgical recommendations offered by Dr. Rauzzino are considered medically appropriate based upon the diagnostic studies that have been performed and the lack of benefit that has been achieved with all treatment provided thus far." *Id.* Finally, Dr. Castrejon stated that

while he is not a spinal surgeon, he was "able to comment on the need for surgery to treat the subjective complaints and objective findings, which have become functionally limiting to [Claimant] and which are considered medically reasonable." *Id.*

42. Dr. Rauzzino testified by evidentiary deposition on April 28, 2025. Dr. Rauzzino testified that Claimant experienced a "significant mechanism of injury, in the sense that he fell backwards and struck the back of his head", noting further that this is a "classic mechanism for causing a cervical spine injury." (Depo. Tr., p. 6, ll. 14-17). Dr. Rauzzino examined that it was a significant MOI because it is an acceleration/deceleration incident because when you fall in this fashion, "the head stops, [and] then cervical spine gets thrust forward and back." *Id*. at p. 7, ll. 3-6.

43. Dr. Rauzzino testified that he saw Claimant on October 15, 2024. At that time, Claimant was still symptomatic with neck pain and medically his symptoms were down the right arm mainly into his first 2 digits. (Depo. Tr. p. 12, ll. 22-23, p. 13, ll. 1-3). Dr. Rauzzino noted that Claimant had been referred for injections with Dr. Finn and that those injections were not helpful in the long term and at that point he was offered the option of living with his symptoms or pursuing surgery. (Depo. Tr., p. 13, ll. 4-10). Claimant determined that he wanted to pursue surgery and Dr. Rauzzino then recommended an anterior cervical decompression fusion from the C4 -C7. Id. at ll. 12-21.

44. Dr. Rauzzino opined that Claimant was a good candidate for surgery despite his age, he believed that the surgery would help alleviate Claimant's persistent symptoms. (Depo. Tr., p. 14, ll. 14-25). Accordingly, he testified that the surgery was reasonable, necessary and related to Claimant's trip and fall. (Depo. Tr., p. 15, ll. 19-22). Dr. Rauzzino does not believe that [redacted] is at MMI simply because he has not undergone surgery. (Depo. Tr., p. 16, ll. 9-12).

45. Dr. Rauzzino reviewed the EMG completed by Dr. Castrejon and was asked

whether the EMG affected his opinion about the need for surgery one way or another. (Depo. Tr., p. 17, ll. 4-10). In response, Dr. Rauzzino stated that, "this report is consistent with the symptoms I've seen all along, in terms of where he reported the symptoms. It makes the report provided by the doctor (Dr Chen) who denied the surgery less strong to me. His take on things is inconsistent with the multiple doctors seeing him directly over time and reporting symptoms." Id. at ll. 23-25, p. 18, ll. 1-4. Dr. Rauzzino continued by noting, "the second thing is that it does show that he does have evidence of nerve root compression at C5-C6, as I said all along. And this would indicate that nerves were compressed and symptomatic. And given the fact that his symptoms have been very similar throughout the process, this would just indicate to me that more confirmatory evidence for the fact that he sustained an injury to the C5-C6 with nerve root compression and radiculopathy that requires you know, it is a possibility for surgery if he wants. It also helps in terms of how you look at the Workers' Compensation guidelines for documentation and evidence for appropriateness of surgery". (Depo. Tr., p. 18, ll. 6-21).

46. Dr. Rauzzino testified that he does not agree with Dr. Chen's conclusion that Claimant does not meet the criteria for cervical fusion surgery as set forth in the medical treatment guidelines. Indeed, Dr. Rauzzino testified that when the findings on EMG and MRI imaging (demonstrating nerve root compression and spinal cord compromise and which correlate with Claimant's persistent symptoms) are combined with Claimant's persistent neck and hand symptoms (which have failed conservative treatment), there is "clearly [a] sufficient reason to proceed with surgery". (Depo. Tr. p. 20, ll. 12-25, p. 21-23, ll. 1-8). In short, Dr. Rauzzino opined that Claimant meets the criteria set out in Medical Treatment Guideline 145. (Depo. Tr., p. 23- ll. 3-4).

47. In responding to the peer review report written by Dr. Kimberly Terry that the surgery is not reasonable and necessary because it is related to pre-existing degenerative and age conditions and is not related to the compensable injury, Dr. Rauzzino stated, "the doctor made the medical error in the sense that -- and I say this as a level II accredited Workers' Comp provider and have worked in the system for many years. It is not necessary that there be an acute structural injury to the spine, such as a

disc herniation or a broken bone, to produce symptoms. If the patient has significant pre-existing disease which predisposes him to injury. In this situation, [redacted] clearly has degenerative changes. He's 68 years old. He has narrowing of the nerves to start with. And because of this, when he fell and struck his head and went to the acceleration and deceleration injury, the nerves were injured because, you know they start off on a smaller place than average. So, were it not for the injury, he would not be symptomatic. The fact that he is more likely to be symptomatic because he has pre-existing degenerative changes, that's just the fact. That is just the way it is. But he became symptomatic as a result of the injury". (Depo. Tr., p. 25, ll. 11-25, p. 26, ll. 1-6).

48. The Colorado Workers' Compensation Rules of Procedure, specifically Rule 17, Exhibit 8, Recommendation 145 provides:

> Spinal fusion is reserved for patients who meet either of the following sets of criteria:
> either
> • cervical radiculopathy resulting in incapacitating pain; and
> • imaging studies (e.g., MRI) consistent with clinical findings, demonstrating nerve root or spinal cord compromise; and
> • one of the following:
> o progressive functional neurological deficit; or
> o persistent motor deficit; or
> o persistent or recurrent arm pain with functional limitations, unresponsive to conservative treatment after 6 weeks; or
> o static neurological deficit associated with significant radicular pain.
>
> or
> • persistent non-radicular cervical pain unrelieved by non-operative treatment; and
> • all pain generators are adequately defined and treated; and

> • all physical medicine and manual therapy interventions are completed; and
> • imaging studies demonstrate spinal stenosis with instability or disc pathology, requiring decompression; and
> • psychological evaluation, with confounding issues addressed as discussed in recommendation 144; and
> • one of the following:
> o improvement of symptoms has plateaued, and the residual symptoms of pain and signs of functional disability are unacceptable at the end of 6 months of active treatment; or
> o frequent symptom recurrence causes serious functional limitations even if a non-operative active treatment program provides satisfactory symptom relief and functional restoration at each occurrence (tables 39, 40)

(W.C.R.P., Rule 17, Exhibit 8, Cervical Spine Injury, Recommendation 145).

49. W.C.R.P., Rule 17, Exhibit 8 also provides that a "Psychological evaluation is required to assess suitability for a cervical fusion." W.C.R.P., Rule 17, Exhibit 8, Recommendation 144 (emphasis added). Indeed Rule 17, Exhibit 8, Recommendation 144 indicates: "Documentation should include the following items with associated treatment recommendations:

> • psychological factors that might influence elective surgical treatment outcomes; or
> • psychological factors that might complicate surgical recovery.

*Id.*

50. Recommendation 144 also notes that "[c]onfounding depression or anxiety must be addressed prior to proceeding with surgery. (W.C.R.P., Rule 17, Exhibit 8, Recommendation 144). Finally, Recommendation 144 provides that the "[p]resurgical

psychological evaluation should not be done by a psychologist employed by the physician performing the [surgical] procedure. *Id.*

51. Based upon the evidence presented, the ALJ credits Dr. Rauzzino's opinions to find that Claimant meets the above-referenced criteria for proceeding with a spinal fusion. Indeed, EMG testing supports a finding that Claimant has a cervical radiculopathy resulting in incapacitating pain. Moreover, the findings on Claimant's MRI are consistent with clinical findings of neck pain and paresthesia, supporting Dr. Rauzzino's conclusion that Claimant suffers from nerve root compromise. Finally, Claimant has reported persistent pain in his neck with arm/hand paresthesia causing functional limitations that have been unresponsive to conservative treatment and injection therapy after 6 weeks duration. While the ALJ is persuaded that Claimant otherwise meets the criteria for proceeding with the cervical fusion requested by Dr. Rauzzino, the treatment guidelines require a psychological evaluation to determine Claimant's "suitability" to proceed with surgery.

52. Concerning the aforementioned need to undergo a psychological evaluation, Dr. Rauzzino testified as follows:

> Q. When we were looking at Section 8 here for spinal fusions and Medical Treatment Guidelines, there's also an indication of undergoing a psychological evaluation. Do you think that's something that [redacted] should undergo prior to you operating on him?
>
> A. I'm satisfied, in my evaluation, that he doesn't require it. But if the guidelines require it and that's what it takes to get his surgery accomplished, I would have no problem sending him for such an evaluation because I'm sure he would do well with it and be cleared for surgery.

(Depo. Tr., p. 33, ll. 11-23). As noted, Claimant has a pre-existing history of PTSD, anxiety and depression. Because these conditions may influence surgical outcomes and complicate his surgical recovery, the ALJ credits Recommendation 144 and Dr. Rauzzino's above cited testimony to find that proceeding to a multilevel cervical fusion in the absence of a comprehensive psychological evaluation is ill-advised. The ALJ further finds that completion of a psychological evaluation in this case is necessary before proceeding with surgery.

## Conclusions of Law

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

*Generally*

A. To receive compensation or medical benefits, a claimant must prove that he/she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *see also, 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), *cert. denied* September 15, 1997.

B. Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S.

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

*Dr. Caughfield's MMI Determination*

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

E. Clear and convincing" evidence has been defined as evidence which demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). In other words, to overcome a DIME physician's opinion regarding permanent medical impairment, the party challenging the DIME must demonstrate that the physician's determinations in this regard is highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015,

1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

F. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert,* 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The question of whether the DIME properly applied the Guides or other rating protocols is an issue of fact for the ALJ. *See McLane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999). Proof that a division independent medical examiner deviated from the AMA Guides does not compel the ALJ to find that the rating has been overcome by clear and convincing evidence. Rather, proof of such a deviation constitutes some evidence which the ALJ may consider in determining whether the challenge to the rating should be sustained. *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Almanza v. Majestic Industries,* W.C. No. 4-490-054 (Nov. 13, 2003); *Smith v. Public Service Company of Colorado,* W.C. No. 4-313-575 (May 20, 2002).

G. In this case, the totality of the evidence supports the conclusion that Claimant sustained injuries to his head (mild traumatic brain injury and concussion) neck, and back on February 17, 2022. Indeed, Respondents have admitted that Claimant's injuries are compensable. (RHE B & D). Importantly, Dr. Rauzzino, a board-certified neurosurgeon with 20 years of neurosurgical experience, testified that the mechanism of injury is consistent with the injuries that Claimant sustained on February 17, 2022. After considering the totality of the evidence presented, including the various IMEs of Drs. Burris, Rook, and Chen, along with the physician advisor opinion of Dr. Terry and the DIME report of Dr. Caughfield, the ALJ concludes that Respondents have failed to produce unmistakable evidence establishing that Dr. Caughfield's determination

regarding MMI is highly probably incorrect. In this case, the persuasive medical evidence establishes that Claimant's current condition meets the criteria set out at Recommendation 145 of W.C.R.P., Rule 17, Exhibit 8. Indeed, Claimant's nerve conduction study results are consistent with cervical radiculopathy according to Dr. Castrejon. Moreover, Claimant's MRI demonstrates nerve root compression, which, based on the testimony of Dr. Rauzzino, the ALJ concludes probably explains Claimant's persistent neck and upper extremity symptoms. Finally, while Claimant has undergone substantial conservative care and injection therapy, that care has failed to relieve his persistent pain or improve his functional limitation. While Dr. Burris, Dr. Chen and Dr. Terry maintain contrary opinions and disagree with Drs. Rook, Rauzzino and Caughfield, professional differences of opinion between medical experts does not constitute clear and convincing evidence, which is necessary to overcome Dr. Caughfield's opinions concerning causality and MMI. *See generally, Gonzales v. Browning Farris Indust. of Colorado, W.C. No. 4-350-356 (ICAO March 22, 2000).* Consequently, Respondents have failed to meet their required legal burden to set the MMI determination aside. Accordingly, Respondents' request for the same must be denied and dismissed.

*The Proposed C4-C7 ACDF Spinal Surgery Recommended by Dr. Rauzzino*

H. A claimant is entitled to medical benefits that are related to and otherwise reasonably necessary to cure or relieve the effects of the industrial injury. See § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 521 (Colo. App. 1999). Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

I. The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were 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, 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1) (c), C.R.S. 2013. In this case, the totality of the evidence presented, including Claimant's testimony, his medical records and the testimony of Dr. Rauzzino persuades the ALJ that the Claimant's February 17, 2022, trip and fall probably resulted in a sprain/strain and an acute aggravation of a pre-existing degenerative condition giving rise to Claimant's symptoms and need for medical treatment. As found, the contrary opinions of Drs. Burris, Chen and Terry are unconvincing.

J. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claims Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain, as is the case here, is proximately caused by the employment–related activities. See *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940).

K. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of the natural

progression of a pre-existing condition that is unrelated to the employment. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (August 18, 2005). In this case, the totality of the evidence presented persuades the ALJ that while Claimant probably had a pre-existing degenerative condition in his cervical spine, he had not been treated for neck pain prior to aggravating this condition after tripping and falling on Employer's loading dock. Here is simply no persuasive evidence to establish that Claimant was symptomatic or receiving active treatment for his neck leading up to his February 17, 2022, injury. Indeed, Claimant testified that prior to the February 17, 2022, incident he did not have any spinal issues, was 100% healthy, and was jogging about 10 miles a week. Even Insurer felt that Claimant had sustained a compensable injuries as evidenced by the filing of a General Admission of Liability. Nonetheless, Respondents now contest Claimant's need for ongoing treatment, including ACDF surgery, asserting that the need for surgery is unrelated to Claimant's February 17, 2022, industrial accident/injury. As concluded above, the ALJ finds these suggestions unconvincing.

L. In concluding that Claimant has proven that his neck condition is related to an occupational exposure, the ALJ has considered the Medical Treatment Guidelines, specifically Rule 17, Exhibit 8. The Medical Treatment Guidelines (MTG's) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005).

M. The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. See, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight and have been accepted in the assessment and treatment of cervical injuries. See generally, W.C.R.P., Rule 17, Exhibit 8.

N. A Claimant must not only establish that the proposed treatment he/she is seeking is related to his industrial injury but is also reasonable and necessary. In this case, the evidence presented supports the conclusion that Claimant has undergone multiple conservative treatment modalities including, chiropractic treatment, physical therapy, medication management and injections, all without sustained improvement. Moreover, according to Dr. Castrejon and Dr. Rauzzino, Claimant is suffering from impingement in the cervical spine, as evidenced by the results of his EMG and MRI, which correlate with Claimant's radicular pain and paresthesia. This imaging combined with Claimant's clinical examination prompted Dr. Rauzzino to conclude that Claimant has significant disease that should be addressed with surgical intervention. Based upon the evidence presented, the ALJ concludes that Claimant has established that the proposed ACDF surgery is not only related to the February 17, 2022, trip and fall but also reasonable and necessary to decompress Claimant's demonstrated cervical impingement in an effort to reduce his pain and improve his function. Nonetheless, Rule 17 Exhibit 8, Recommendation 144 of the MTGs specifically notes that completion of a psychological evaluation is required to assess suitability for a cervical fusion. Such an evaluation has not been completed in this case. Because Claimant suffers from pre-existing PTSD, anxiety and depression, the ALJ concludes it is also reasonable and necessary that Claimant complete the required psychological evaluation before proceeding with the otherwise reasonable, necessary and causally related surgery recommended by Dr. Rauzzino.

## Order

It is therefore Ordered:

1. Respondent's request to set aside the MMI determination of Dr. Caughfield is denied. Claimant shall be returned to Dr. Rauzzino for further consultation and evaluation, to include referral for a comprehensive psychological evaluation in keeping with W.C.R.P., Rule 17, Exhibit 8, Recommendation 144.

2. Assuming that Claimant is deemed psychologically suitable for a cervical fusion, Respondents shall authorize and pay for all expenses associated with completion of the C4-7 ACDF surgery as recommended by Dr. Rauzzino. Payment shall be in accordance with the Colorado workers' compensation medical benefits fee schedule.

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

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

Dated: July 23, 2025

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge

**Office of Administrative Courts**
**State of Colorado**
**Workers' Compensation No. WC 5-199-053-002**

## Issues

► Whether Respondents have proven by clear and convincing evidence that the impairment rating provided by Dr. Khoi Pham in his Division Independent Medical Examination ("DIME") report was in error?

## Findings of Fact

1. Claimant sustained an admitted injury arising out of and in the course and scope of his employment with Employer on March 2, 2022 when he was involved in a roll-over motor vehicle accident in which Claimant was ejected from the vehicle. Claimant was taken by ambulance to the Grand River Medical Center Emergency Room ("ER") immediately following the accident. Claimant was diagnosed with (1) flexion distraction injury identified at T12 and L1 (2) transverse fracture of his L1 vertebral body through the superior endplate which extended into the elements; (3) comminuted fractures of the bilateral pedicles and facet joints at T12 with distraction of the fraction fragments and spinous process fractures also seen at T12; (4) bone fragment identified within the right T11-T12 neuroforamen, which represented an unstable spine fracture; (5) right L1, L2 and L3 transverse process fractures; (6) bilateral posterior fifth rib fractures; and (7) pulmonary contusions within the poster aspects of the bilateral upward lobes and lower lobes. Claimant also had a small laceration to his left elbow.

2. While at the hospital, Claimant underwent computed tomography ("CT") scans of his head, face, cervical spine, chest, abdomen and pelvis. Claimant underwent surgery to address the spinal fractures under the auspices of Dr. Agrawal on March 4, 2022.

3. Claimant underwent a course of care with Work Partners after being discharged from Summit West Care after his hospitalization. Claimant was subsequently referred to St. Mary's Neurosurgery Clinic for evaluation on February 6, 2024. Claimant was examined by physicians' assistant ("PA") Derek Diaz on February 6, 2024. PA Diaz noted Claimant had a tumultuous postoperative course of treatment.

4. Claimant was eventually placed at maximum medical improvement ("MMI") by Dr. Steven Brown on April 10, 2024. Dr. Brown provided the Claimant with an impairment rating of 21% whole person based on his examination. Dr. Brown's impairment included 2% for a specific disorder of the thoracic spine under table 53 and 5% for a specific disorder the lumbar spine for compression fracture of L1 under Table 53. See Table 53(1).

5. Dr. Brown also obtained range of motion measurements from Claimant that included 3% for flexion of the thoracic spine, 1% for right rotation of the thoracic spine and 1% for left rotation of the thoracic spine. Dr. Brown noted that the range of motion impairment of the thoracic spine combined for a 5% impairment.

6. Dr. Brown obtained range of motion measurements for the lumbar spine as well that included 5% for right lateral flexion and 5% for left lateral flexion. Dr. Brown combined the impairments for a total of 10% impairment for the range of motion for the lumbar spine. Dr. Brown did not provide range of motion measurements for lumbar flexion and extension as the measurements were deemed invalid.

7. Dr. Brown combined the 5% thoracic spine range of motion with the 2% thoracic spine specific disorder impairment to obtain a permanent impairment rating of 7% of the thoracic spine. Dr. Brown combined the 10% range of motion impairment rating of the lumbar spine with the 5% specific disorder impairment rating and obtained an impairment rating of 15% of the lumbar spine. Dr. Brown then combined the 7% permanent impairment rating of the thoracic spine with the 15% impairment rating of the lumbar spine and calculated a permanent impairment rating of 21 % whole person for Claimant's March 2, 2022 injury.

8. Claimant subsequently underwent a DIME with Dr. Khoi Pham on November 13, 2024. Dr. Pham noted Claimant's accident history and course of treatment. Dr. Pham agreed with Dr. Brown that Claimant was at MMI as of April 10, 2024. Dr. Brown noted Claimant's psychiatric treatment after the injury and determined Claimant was entitled to an impairment rating of 7% whole person for his psychological impairment and traumatic brain injury based on the psychiatric worksheet.

9. With regard to Claimant's physical impairment, Dr. Pham provided Claimant with a specific disorder impairment rating under Table 53(IV) of 12% whole person, then noted Claimant needed a second surgery to remove the hardware, which under Table 53(IV) entitled Claimant to an addition 2% whole person impairment for a total specific disorder rating of 14%. Dr. Pham determined Claimant was also entitled to an impairment rating of 14% of the lumbar spine for range of motion, which included 8% for lumbar flexion, 3% for lumbar extension, 1% for right lateral flexion and 2% for left lateral flexion. Combining the 14% specific disorder rating with the 14% range of motion deficiencies, Dr. Pham determined Claimant was entitled to a permanent impairment rating of 26% whole person for the lumbar spine. Dr. Pham combined the 26% impairment rating of the lumbar spine with the 4% impairment he calculated for Claimant's range of motion deficiencies for the thoracic spine and determined that Claimant was entitle to a total impairment rating of 29% whole person for his spine injuries.

10. Dr. Pham determined that Claimant's comprehensive impairment rating was 34% whole person after combining the 29% whole person impairment rating with the 7% psychiatric impairment rating.

11. Respondents obtained an independent medical examination ("IME") of Claimant with Dr. Mark Paz on April 8, 2025. Dr. Paz reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Paz noted Claimant's injuries in his IME report including the lumbar and thoracic spine fractures and hardware removal. Dr. Paz performed range of motion measurements of Claimant's thoracic and lumbar spine measurements were invalid and

incomplete, respectively. Dr. Paz found that Claimant's lumbar spine range of motion measurements were incomplete as Claimant was unable to complete the necessary three straight leg raises of the right or left lower extremity. Dr. Paz noted that on physical examination, Claimant achieved full extension of both knees while seated without any pain behaviors, and noted strength testifying of the hip flexors to be 4/5 and 5/5.

12. Dr. Paz noted that is was unclear why the straight leg raise measurements obtained by Dr. Pham were different from his attempt to obtain measurements as Claimant denied that his condition had worsened since the DIME examination. Dr. Paz further opined in his report that the 7% mental impairment rating provided by Dr. Pham should be deferred to a level 11accredited psychologist.

13. Dr. Paz testified at hearing in this matter consistent with his IME report. Dr. Paz testified that Dr. Brown properly invalidated the range of motion measurements for Claimant's lumbar flexion and extension based on the validation test. Dr. Paz testified that getting range of motion measurements is a necessary part of an impairment rating examination. Dr. Paz testified he reviewed Dr. Pham's DIME report and noted Dr. Pham found Claimant's lumbar range of motion to be valid. Dr. Paz testified he could not find documentation to determine if Dr. Paz used active range of motion in his measurements.

14. Dr. Pham testified by deposition in this matter. Dr. Pham testified that he performed active range of motion measurements for Claimant's lumbar spine range of motion and found the measurements to be valid. Dr. Pham provided a bit of confusing testimony regarding the difference between active and passive range of motion, specifically noting in his testimony that he was not sure what was meant by "active" and "passive".

15. Dr. Pham's description of the range of motion testing, according to the ALJ's reading of the testimony, reflects Dr. Pham describing active range of motion. Specifically, Dr. Pham described the procedure as "we just have the patient do the range of motion, and then we stop when the patient is experiencing pain or discomfort."

The ALJ notes that on cross-examination, in describing the range of motion measurements, and the discrepancy involving Claimant's right straight leg raising test being 40 degrees and the left straight leg raising test being 20 degrees, Dr. Pham testified:

> "Well that's what happened in this case. I raised the patient's leg, and that's 40 degrees when he could no longer go; and on the other leg, it's 20 degrees."

16. When asked if he was referring to "passive range of motion, Dr. Pham then answered:

> "Yes. We ask the patient to raise the leg and we measure it. ... And then we usually stop when the patient can no longer go further when he's in pain."

17. The ALJ interprets the testimony of Dr. Pham to describe active range of motion testing as opposed to passive range of motion. While there is some discrepancy with regard to Dr. Pham's use of pronouns to describe the range of motion testing, Dr. Pham does indicate repeatedly that they ask the patient to perform the maneuver and then they measure the movement. Therefore, the ALJ finds no issue with regard to the range of motion measurements obtained by Dr. Pham in his IME report.

18. Dr. Paz testified on rebuttal for Respondents. Dr. Paz noted that his interpretation of Dr. Pham's testimony involved Dr. Pham describing passive range of motion as opposed to active range of motion. The ALJ disagrees with the interpretation of the testimony of Dr. Pham and does not credit the testimony of Dr. Paz in this regard in coming to a conclusion involving Dr. Pham's testimony in this case.

19. Notably, the burden of proof in this case is on Respondents to establish that it is highly probable and free from substantial doubt that Dr. Pham erred in his assessment of the impairment rating in this case. The ALJ determines that the testimony of Dr. Pham does not establish that Dr. Pham improperly used passive range

of motion measurements when determining the range of motion measurements in this case.

20. Respondents noted in their post-hearing position statement that they were not contesting any portion of Dr. Pham's permanent impairment rating beyond the inclusion of the lumbar flexion (8% whole person) and extension (3% whole person) measurements (which combined to an impairment rating of 11 % whole person). Therefore, the analysis in this order is limited only to that area of the DIME report. Specifically, Respondents conceded the psychiatric impairment rating and the rating for the lumbar spine.

21. Respondents cite to the Colorado Division of Workers' Compensation Desk Aid #11 (entered into evidence as Exhibit H during Dr. Paz's rebuttal deposition) and note that any form of assisted range of motion is not part of the impairment rating process. However, the ALJ fails to find that the conflicting testimony provided by Dr. Pham establishes that Dr. Pham's examination failed to include active range of motion as required by Desk Aid #11. At the very least, the ALJ determines that Respondents have failed to establish that it is highly probable and free from substantial doubt that Dr. Pham assisted Claimant while performing the range of motion measurements.

22. Furthermore, Desk Aid #11 notes in paragraph 11 of the Spinal Rating portion of the aid, that in performing range of motion measurements, if the measurements are determined to be invalid, the patient must be given another visit to repeat the range of motion testing. Notable, in the case of Dr. Brown and Dr. Paz, Claimant was not provided with the opportunity to repeat the testing.

23. While it is true, as argued by Respondents, that in paragraph 8 of the DIME panel notes it allows the physician the opportunity to use accept invalidated measurements from other reports, in lieu of bringing the claimant back for a second set of measurements. However, this is left to the discretion of the DIME provider, and there is no indication as to what Dr. Pham would have chosen to do in this case if the range of motion tests were invalid. Regardless, this would require a finding by the ALJ that the range of motion testing was improper, and the ALJ does not find any issue with the

range of motion testing performed by Dr. Pham in this case based on the evidence presented in this case.

24. Based on these findings, the ALJ determines that Respondents have failed to overcome the findings of Dr. Pham with regard to the impairment rating provided to Claimant with regard to his March 2, 2022 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. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016.

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

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage* Co. *v. Gussert,* 914 P.2d 411 (Colo.

App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado,* W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in her opinions.

5. As found, Respondents have failed to establish that the opinion provided by Dr. Pham regarding the issue of Claimant's permanent impairment rating was incorrect. Dr. Pham's decision to use the range of motion measurements obtained during his examination is found to be appropriate in this case. The ALJ further finds that Respondents have failed to establish that it is highly probable and free from substantial doubt that Dr. Pham violated any of the guidelines set forth the Colorado Division of Workers' Compensation by assisting the Claimant in obtaining the range of motion measurements.

## Order

It is therefore ordered that:

1. Respondents have failed to overcome the impairment rating provided by Dr. Pham in his November 13, 2024 DIME report. Respondents shall admit for the 34% permanent impairment rating provided by Dr. Pham in his DIME report.

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

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

long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** 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. 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.

DATED: July 24, 2025

Keith E. Mottram

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

**OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**
**WORKERS' COMPENSATION NO. 5-265-045-003**

## ISSUE

I. Whether Claimant established, by a preponderance of the evidence that the need for total knee surgery recommended by Dr. Hale is reasonable, necessary and related to her compensable work related injury?

## FINDINGS OF FACT

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

1. Claimant has been working for Employer for approximately 24 years. On February 4, 2024 Claimant was working as the seafood department supervisor. Her job duties included helping customers, weighing product on scales, unloading products and displaying them on shelves, cutting products, and cleaning. She was required to regularly lift and carry thirty pounds, constant standing and walking, use of step stools with three to four steps, kneeling, and squatting.
2. Claimant sustained an admitted injury to her right knee on February 4, 2024 when she slipped and fell on ice while she was cleaning the fish case. She fell face first and landed on her hands and knees on the tile floor. Clamant had pain in both knees and could not easily stand or walk.
3. Following the incident, Claimant began treating with Medicine Business-Injury (MBI) on February 8, 2024. She complained of injuries to her left hand, right arm, back and knees. The diagnoses included sprain of the left wrist, contusion of the right shoulder and sprain of the right shoulder. Claimant testified that the initial treatment at MBI was for the hand and wrist. MBI did not concentrate of the knees until April 2024.
4. Dr. Orent performed a IME of the Claimant on November 11, 2024 at the request of Claimant. It is his opinion that Claimant's knee pain is consistent with the fall that Claimant described. As part of the history given by Claimant she indicated that

she had a ¾ menisectomy about 20 years ago. Since then, she had been able to her physically demanding job which included working long hours with prolonged standing and walking. He acknowledged that she has osteoarthritis but it was his opinion that she permanently aggravated the osteoarthritis when she fell at work. As such the need for the total knee replacement to the right knee proposed by Dr. Hale is related to the work injury.

5. Dr. Failinger saw Claimant for an IME at the request of Respondents. He agreed that Claimant had severe osteoarthritis, but based on the MRI of the right knee, there were no acute findings that showed the fall aggravated her knee condition.

## Conclusions of Law

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

*Generally*

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

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may

resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

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

D. The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he/she sustained a work-related injury or occupational disease. Indeed, an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989).

*Medical Benefits*

E. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, 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*.

F. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). I conclude that the total knee surgery recommended by Dr. Hale is related to the work injury. Claimant had

not treated for her knee for many years. Although she had occasional pain after working, it was controlled with over the counter medication. Claimant performed a physically demanding job with long hours and prolonged standing. Yet she was able to do it until the fall. After the fall, the Claimant was limited as to her prior work and was not able to perform her usual work duties. I conclude that the fall was an aggravation of her preexisting osteoarthritis that resulted in a recommendation for a total knee replacement. This conclusion is based on the opinions of Dr. Orent, whom I find credible and persuasive.

## ORDER

It is therefore ordered that:

1. Claimant's request for the right knee surgery recommended by Dr. Hale is granted..

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

DATED: July 24, 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. 5-179-844-006**

---

## Issues

- Did Respondents prove by a preponderance of the evidence that no additional medical treatment is reasonably needed or causally related to the admitted work injury?
- If Respondents failed to prove a basis to terminate further medical treatment, did Claimant prove by a preponderance of the evidence that she is entitled to additional psychological treatment and testing for CRPS?

## Findings of Fact

1. Claimant worked for Employer as a cashier. On July 21, 2021, Claimant experienced an electrical shock to her left hand when she touched a metal table. She reported severe pain traveling up the left arm and into her neck.

2. Claimant saw Dr. J. Douglas Bradley at Concentra on July 23, 2021. She reported numbness, burning, and weakness in her left arm. On examination of the left arm, Dr. Bradley noted "mild" erythema, swelling, and tenderness. Claimant exhibited normal strength and sensation with full range of motion. Dr. Bradley diagnosed an electrical shock to the left upper extremity. He administered a Toradol injection and prescribed anti-inflammatories. Claimant was allowed to work fully duty with the only limitation that she wear rubber gloves while working.

3. Claimant returned to Concentra on July 26, 2021, and was evaluated by Jennifer Livingston, NP. Claimant reported her arm was no better. She said she lacked "full control" of her arm and had difficulty performing basic activities such as bathing and dressing. Examination revealed mild persistent redness and swelling in the left arm. Strength and sensation were normal. Ms. Livingston referred Claimant to Dr. Scott Primack for an EMG. Ms. Livingston expressed doubt about the causal relationship between the accident and Claimant's reported symptoms.

4. Claimant attended a PT evaluation on July 28, 2021. Although she reported severe ongoing left upper extremity symptoms, the therapist identified no objective musculoskeletal pathology. She was discharged from PT that same day.

5. On August 20, 2021, Dr. Bradley evaluated Claimant and opined the objective findings were inconsistent with a work-related mechanism of injury.

6. Respondents filed a Notice of Contest on August 23, 2021.

7. Claimant saw Dr. Primack on September 1, 2021. The left median nerve was within normal limits. However, the remainder of the testing was aborted because Claimant complained of extreme pain with even the lowest level of electrical stimulation.

8. Claimant followed up with Dr. Bradley on September 23, 2021, and reported ongoing symptoms of bilateral tingling, muscle spasms, and soreness. However, the left arm appeared normal, with no significant findings except minor tenderness in the upper arm. Dr. Bradley opined Claimant was at MMI with no permanent impairment, no restrictions, and no need for maintenance care.

9. Dr. John Burris performed an IME for Respondents on December 14, 2021. Claimant reported multiple severe symptoms affecting her left arm, including sharp, aching, stabbing, and shooting pain, and paresthesia in a "glove-type distribution." Claimant held her left arm in front of her body with her hand in a guarded claw-like position, although she repeatedly used the hand normally to adjust her face mask during the IME. Examination of the left upper extremity was entirely benign with no objective abnormalities. Dr. Burris noted Claimant's pain complaints followed no dermatomal pattern and were out of proportion to the examination findings. Dr. Burris was impressed with an "extreme somatic focus with clear psychosomatic overlay," and opined that "any exposure to an electric current was very minor and did not result in identifiable physical pathology." He thought the treatment Claimant received through Concentra was reasonable for the acute episode of left arm pain at work "regardless of the level of exposure or nature of injury." However, he concluded that "her current complaints . . . are not likely related and appear to be psychosocial in nature." Dr. Burris agreed with Dr. Bradley that Claimant was at MMI on September 23, 2021, with no impairment. Regarding maintenance care, Dr. Burris noted a previous psychological referral for "situational mixed anxiety and depressive disorder" had not been pursued. He thought it reasonable to

provide 6-8 sessions of psychological treatment to include cognitive behavioral therapy and pain coping strategies. He indicated the treatment would not preclude MMI and could be provided as maintenance care.

10. A hearing was held before Judge Richard M. Lamphere on February 24, 2022, to address compensability and medical benefits. Judge Lamphere found that Claimant proved a compensable injury because experienced a shock at work, which prompted her to seek treatment. However, Judge Lamphere also found that the electrical exposure was "relatively minor" and probably did not cause tissue damage sufficient to explain her ongoing reported symptoms. The variable nature of Claimant's symptoms combined with the lack of abnormal examination findings indicated that "psychosocial factors are playing a role in her persistent symptoms." Crediting Dr. Burris' opinions, Judge Lamphere concluded that Claimant failed to prove a diagnostic sonographic evaluation was reasonably needed.

11. After receiving Judge Lamphere's Order, Respondents filed a Final Admission of Liability (FAL) based on Dr. Bradley's determination of MMI with no impairment. Claimant timely objected and requested a DIME.

12. Dr. Anjmun Sharma conducted the DIME on September 30, 2022. He accepted that Claimant sustained an electric shock that traveled from her arm to her neck but noted that such injuries typically resolve quickly. Since Claimant was working full duty without restrictions, Dr. Sharma thought her prognosis was "excellent." He diagnosed a cervical strain and nonspecific left upper extremity pain. He agreed that Claimant reached MMI on September 23, 2021, and assigned a 12% whole person impairment rating for the cervical strain. Dr. Sharma gave no impairment rating for the left upper extremity. He recommended no maintenance care and no permanent restrictions.

13. Respondents filed an FAL on October 27, 2022, admitting for the DIME's impairment rating. The FAL denied medical benefits after MMI.

14. Claimant saw a neurologist, Dr. Dongkwan Jin, on April 3, 2022, outside of the workers' compensation system. She described persistent pain and numbness in the left hand, which she attributed to the 2021 work accident. Claimant was worried she had CRPS. Dr. Jin was "not convinced with skin discoloration at this time as her skin color is symmetric from left to right to me." Nor did he observe any swelling. Dr. Jin opined her

presentation was “atypical for CRPS with no significant muscle atrophy, dysautonomic symptoms, [and] normal nerve conduction study.” Dr. Jin noted additional testing such as a bone scan or autonomic function testing “may provide more information regarding this diagnosis.” However, Dr. Jin did not diagnose CRPS.

15. A hearing was conducted before Judge Michael A. Perales on August 1, 2023, regarding medical benefits after MMI, reimbursement for an emergency room visit, and disfigurement. Judge Perales granted Claimant’s request for a general award of medical benefits after MMI, noting that Dr. Burris had recommended a brief course of psychological treatment in his previous IME. Judge Perales denied coverage for the emergency room visit because Claimant failed to prove it was the result of a bona fide emergency. Regarding disfigurement, Claimant displayed her left arm at hearing which showed splotchy redness in the biceps and triceps compared to the right arm. Judge Perales was persuaded by Dr. Burris’ testimony that there was no causal relationship between the blotchy redness on the left arm and the work injury. Therefore, he denied and dismissed Claimant’s request for disfigurement benefits.

16. Claimant returned to Concentra on October 11, 2023, and was evaluated by Tara Guy, PA-C. Ms. Guy understood Claimant was there for maintenance treatment but was unclear what that treatment would entail. She spoke with Claimant’s counsel by phone, who advised that Claimant was only seeking psychological treatment, and the care she was pursuing through neurology was being done under her personal health insurance. Ms. Guy reviewed Dr. Burris’s IME report and noted the recommendation for 6-8 psychological sessions to include CBT and instruction in pain-coping strategies. Ms. Guy concluded that Claimant remained at MMI but agreed with Dr. Burris that 6-8 sessions of cognitive behavioral therapy was reasonable maintenance treatment. She explained to Claimant and her counsel “that maintenance care is set with an endpoint rather than left open ended.” Ms. Guy referred Claimant to the Sababa Group for psychological treatment.

17. Claimant commenced psychological counseling with Kristi Carroll, LCSW, on October 30, 2023. She complained of anxiety and decreased concentration and focus. Ms. Carroll diagnosed an anxiety disorder due to a physiological condition and recommended cognitive behavioral therapy twice per week. Claimant completed six

sessions and was discharged on November 21, 2023. The therapist opined, “no further mental health counseling related to this injury is needed at this time due to reported functional improvements and reduction of previously reported mental health symptoms.”

18. After her discharge from Sababa, Claimant continued to seek treatment outside of the workers’ compensation system. She saw Lucas Derting, PA-C, at the UCHealth Pain Clinic on December 4, 2023, and reported paresthesia, burning pain, and color changes in the left upper extremity. She had previously tried Cymbalta and gabapentin without benefit. Mr. Derting diagnosed neuropathic pain and CRPS type 1 as the “initial working diagnosis.” The diagnosis of CRPS appears based primarily on Claimant’s described symptoms, as there were minimal corresponding exam findings consistent with CRPS. Mr. Derting prescribed Lyrica and recommended a left stellate ganglion block.

19. Dr. Peter Sykora performed the stellate ganglion block on January 25, 2024. At a follow-up appointment with Mr. Derting, Claimant reported reduced pain after the block. Claimant had a second stellate block on April 18, 2024, although there are no follow up notes documenting the outcome.

20. Dr. Daniel Peterson, a supervising physician at Concentra, issued a report on November 12, 2024, after attending a Samms Conference with counsel and reviewing additional records. Dr. Peterson noted that Claimant’s personal providers had diagnosed possible CRPS but had not documented findings consistent with the Budapest Criteria as outlined in the MTGs. Dr. Peterson reviewed the counseling records from Sababa but found them unhelpful. He hoped that Dr. Robert Kleinman would accept a referral for a psychiatric evaluation. Dr. Peterson concluded, “It is still my medical opinion after review of this record that Somatic Disorder is still more likely than the DX of CRPS. The placebo effect of a very impressive procedure like stellate ganglion block must be considered in assessing the actual improvement in [Claimant’s] pain level.”

21. Dr. Kleinman performed a psychiatric IME on November 25, 2024. He diagnosed an unspecified somatic symptom disorder and unspecified depressive disorder but concluded that these diagnoses are not related to the July 2021 work injury. He noted the accident caused no objective injury or pathology and was insufficient to cause Claimant’s depression and anxiety. Instead, he opined Claimant was converting unrelated

psychological factors into physical complaints. Psychological testing further supported the diagnosis of a persistent mood disorder unrelated to the injury. Dr. Kleinman agreed with the multiple other providers that Claimant is at MMI. He opined no further mental health treatment is reasonably needed or causally related to the work accident.

22. On December 27, 2024, after reviewing Dr. Kleinman's report, Dr. Peterson agreed that Claimant requires no additional treatment causally related to the injury.

23. Claimant attended an IME with Dr. Jeffrey Wunder on March 13, 2025. The upper extremity examination was largely normal, with no evidence of edema, swelling, discoloration, or temperature change. Arm circumference measurements showed no significant differences. Neurologic examination was normal, with no sensory evidence of CRPS, vasomotor changes, or trophic changes. Her hands were slightly cool and sweating, consistent with anxiety. There were no objective findings on physical examination to explain her subjective symptoms. He noted Claimant had a "minor trivial exposure to an electrical shock," which produced no observable physical abnormality and could not reasonably account for her reported symptoms. His impression was nonspecific left upper extremity symptoms and psychological factors affecting symptom presentation. Claimant's normal examination supported no diagnosis of any specific physical condition. He saw no evidence of CRPS. He further observed that no authorized treating provider or any previous IME documented findings consistent with the Budapest Criteria for CRPS, including the DIME. He acknowledged that Claimant reported benefit from stellate blocks but there was no contemporaneous documentation to measure the efficacy of the procedure per the criteria in the MTGs. He opined no further medical evaluations or treatment were reasonably needed and may actually be harmful by "instill[ing] a deeper belief that there is something terribly wrong." He pointed out that Claimant had continued working a cleaning job since the accident with no limitations or difficulty.

24. Dr. Wunder and Dr. Kleinman testified at hearing consistently with their reports. Dr. Kleinman reiterated that the diagnoses of depression and somatic symptom disorder are unrelated to the electrical shock at work. He emphasized that the work injury was minor and inconsequential, as confirmed by multiple examining physicians. He explained that Claimant was converting pre-existing emotional distress into physical complaints and blaming external parties like Employer and the workers' compensation

system rather than taking responsibility for her condition. Based on these findings, Dr. Kleinman recommended against any further psychiatric treatment through workers' compensation, arguing it would be counterproductive and reinforce her psychosomatic complaints.

25. In his testimony, Dr. Wunder elaborated on his conclusion Claimant does not likely have CRPS. His examination revealed no objective findings consistent with CRPS, including no evidence of hyperesthesia, allodynia, temperature asymmetry, color changes, or edema. He also pointed to Claimant's pain drawing that showed signs of psychological overlay and exaggeration. He testified that stellate ganglion blocks cannot be relied upon for diagnosis because pain is subjective and influenced by emotional factors, and the proper diagnostic protocols were not followed in Claimant's case.

26. Claimant testified she continued to experience burning pain in her left upper arm and the muscles in her forearm felt tight. She said her pain waxed and waned and that she also experienced weakness in her arm. She indicated her belief that she has CRPS and that she would like further psychological treatment. She did not feel the psychological treatment provided by Ms. Carroll was helpful or sufficient. Claimant confirmed that she returned to work following her injury, including operating her personal cleaning business about 20 to 25 hours a week, with no formal work restrictions assigned by any physician.

27. The opinions and conclusions of Dr. Peterson, Dr. Wunder, and Dr. Kleinman are credible and persuasive.

28. Respondents proved that no further treatment is reasonably needed or causally related to the July 21, 2021 work injury.

## Conclusions of Law

The respondents are liable for medical treatment from authorized providers that is reasonably needed to cure or relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond maximum medical improvement (MMI) if the claimant requires maintenance care to prevent further deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Even where the respondents admit liability for medical benefits after MMI, they retain the right to challenge

the compensability and reasonable necessity of specific treatment. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003).

Ordinarily, the claimant must prove by a preponderance of the evidence that an injury directly and proximately caused the condition for which they seek benefits, and that the requested treatment is reasonably necessary. *Walmart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). But § 8-43-201(1) places the burden of proof on the party seeking to modify an issue previously determined by an admission or order. In this case, because Respondents are attempting to terminate a general award of medical benefits after MMI, they must prove that no further treatment is reasonably needed or causally related to the work injury. *Salisbury v. Prowers County School District RE2*, W.C. No. 7-702-144 (June 5, 2013); *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (October 1, 2013).

As found, Respondents proved no additional medical treatment is reasonably needed or causally related to the work accident. Although Claimant experienced a minor shock, there is no persuasive contemporaneous evidence of tissue damage that would reasonably be expected to cause long-term symptoms. The persuasive opinion evidence consistently supports this conclusion. As the DIME noted, “she merely had an electrical charge or current go into her arm and most people simply recover very quickly from it.” Dr. Burris similarly characterized the electrical exposure as “very minor,” resulting in no identifiable physical pathology. He further noted that Claimant’s pain complaints were unrelated to the July 21, 2021 incident and were probably psychosocial in nature. Dr. Burris’ conclusions were echoed by Dr. Wunder, who opined that Claimant suffered no physical injury and that her symptoms were likely psychosomatic. Dr. Kleinman diagnosed a somatic symptom disorder and depressive disorder, unrelated to the work injury. Dr. Kleinman specifically concluded that Claimant was “converting psychological factors into physical complaints” and “needlessly pursuing treatment for symptoms, which are not objectively identified.” After reviewing Dr. Kleinman’s report in conjunction with other records, Dr. Peterson concluded that Claimant’s “current complaints are somatoform in nature and not caused by the minor electric shock.” As a result, Dr. Peterson recommended no further treatment. The opinions of Dr. Peterson, Dr. Wunder,

and Dr. Kleinman are persuasive that no further treatment is reasonably needed or causally related.

**Order**

It is therefore ordered that:

1. Respondents' request to withdraw their admission for medical benefits after MMI and terminate future medical benefits is granted. Claimant's claim for further medical benefits related to the July 21, 2021 accident 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 28, 2025

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

## Issues

1. Whether Claimant has overcome the opinion of Authorized Treating Physician (ATP) Margaret Griffith, M.D. that he sustained a 3% upper extremity impairment rating and reached Maximum Medical Improvement (MMI) on January 29, 2025 as a result of his October 26, 2023 industrial injury.

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

3. Whether Claimant has presented substantial evidence to support a determination that medical maintenance treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition.

4. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive disfigurement benefits as a result of his October 26, 2023 industrial injury.

## Findings of Fact

1. Claimant worked for Employer as a special education teacher. On October 26, 2023 Claimant was attacked by a special needs student. Specifically, the student grabbed Claimant's left hand and twisted his fourth or ring finger.

2. Claimant received medical treatment through Authorized Treating Provider (ATP) Medicine Business and Industry. He was diagnosed with a fracture of the fourth proximal phalanx on the left ring finger.

3. On November 3, 2024 Claimant underwent open reduction and internal fixation surgery on his ring finger with Matthew DeLarosa, M.D. The fracture healed, but the finger was deformed and had rotational limitations.

4. On April 19, 2024 Claimant underwent a second surgical procedure involving hardware removal and tenolysis of the extensor tendon. Although Claimant had significantly improved range of motion after the procedure, he still suffered rotational deformity.

5. On April 22, 2024 Respondent filed a General Admission of Liability (GAL). The GAL acknowledged that Claimant earned an Average Weekly Wage (AWW) of $942.06 and was entitled to receive Temporary Total Disability (TTD) benefits for the period April 19, 2024 and continuing. Respondent calculated Claimant's AWW based on the wages he was earning at the time of his injury. Claimant confirmed in his testimony that the admitted AWW was consistent with the wages he was earning on October 26, 2023.

6. On May 13, 2024 Respondent filed a second GAL. The GAL acknowledged that Claimant earned an AWW of $942.06 and was entitled to receive TTD benefits for the period April 19, 2024 through April 28, 2024. TTD terminated on April 28, 2024 because Claimant had returned to full-duty employment.

7. On July 24, 2024 Claimant underwent an evaluation with Craig Davis, M.D. He noted that Claimant had plateaued regarding left ring finger range of motion. Claimant still experienced overlap between the ring and middle fingers in attempting to make a fist. Dr. Davis explained Claimant was a reasonable candidate for a surgical procedure involving a corrective osteotomy of the proximal phalanx to realign the digit and correct rotation.

8. On January 29, 2025 Margaret Griffith, M.D. determined Claimant had reached Maximum Medical Improvement (MMI) for his condition. She assigned a 29% impairment rating for Claimant's left hand based on ring finger range of motion deficits and malrotation. The 29% rating converted to a 3% left upper extremity impairment rating. Dr. Griffith released Claimant to regular duty employment and suggested home

exercises. She recommended medical maintenance benefits including consistent work with a hand therapist for two months.

9. On February 24, 2025 Respondent filed a Final Admission of Liability (FAL). The document reiterated that Claimant had earned an AWW of $942.06. He received TTD benefits for the period April 19, 2024 through April 28, 2024 and Permanent Partial Disability (PPD) benefits for the period January 29, 2025 through March 12, 2025. As determined by Dr. Griffith, Claimant reached MMI on January 29, 2025 with a 3% scheduled impairment rating for his left upper extremity. Respondent admitted to reasonable and necessary medical maintenance benefits after MMI. Claimant did not file an objection to the FAL or request a Division Independent Medical Examination (DIME).

10. On March 7, 2025 Claimant filed an Application for Hearing (AFH). He asserted he was not at MMI, was entitled to additional lost wages, and sought additional psychological treatment. Claimant also endorsed PPD benefits and disfigurement as issues for hearing. Claimant did not endorse the issues of AWW or TTD benefits.

11. Claimant testified at the hearing that he was entitled to additional lost wages based on an expected higher AWW. He explained that, subsequent to reaching MMI, he began working as a counselor and was earning more than he was at the time of his work injury. However, Claimant acknowledged he did not actually lose any wages as a counselor due to his injury. Moreover, he confirmed that he did not begin working as a counselor until after he reached MMI.

12. Claimant explained that he was entitled to additional permanent disability benefits because of the psychological impact of his injury. Furthermore, he required additional psychological treatment to address continuing difficulties from his injuries. However, he recognized that he had not actually sought any additional treatment. Claimant also had not contacted Respondent seeking approval for additional medical maintenance treatment.

13. At the outset of the hearing, Respondent objected to consideration of the AWW issue because it was not endorsed on the Application for Hearing (AFH). Claimant also did not submit any evidence regarding his AWW calculation. Furthermore, Claimant did not offer any evidence that Respondent denied authorization for any requested treatment, and there was no evidence that Claimant sought post-MMI treatment. Finally, he did not produce any evidence of disfigurement.

14. There is no dispute that on January 29, 2025 Dr. Griffith placed Claimant at MMI and assigned a 3% left upper extremity impairment rating. However, Claimant did not pursue a DIME. He is now challenging the reasons and propriety of Dr. Griffith's decision to place him at MMI and assign a 3% rating. The dispute must be resolved through the DIME process because the ALJ has no authority to resolve Claimant's contentions prior to completion of the DIME. The medical record demonstrates that ATP Griffith unambiguously determined that Claimant reached MMI on January 29, 2025 because of his October 26, 2023 industrial injuries. Dr. Griffith's MMI and impairment determinations are not ripe for adjudication absent a DIME. Claimant's challenge to Dr. Griffith's determination that he reached MMI on January 29, 2025 and suffered a 3% left upper extremity impairment is thus denied and dismissed.

15. Respondent has consistently maintained that Claimant earned an AWW of $942.06. The AWW was calculated and based upon Claimant's wages at the time of his accident and injury. Furthermore, Claimant's own testimony confirms that any increased wages he began to earn did not begin until after he had reached MMI. Because the clear language of the statute requires an AWW to be calculated at the time of the accident that caused the compensable injury, and Claimant has not produced any evidence that his wages were higher than admitted, he failed to carry his burden of proof to establish entitlement to a different AWW. Claimant simply has not provided evidence that the admitted AWW is incorrect or otherwise erroneous. Therefore, the record reveals an AWW of $942.06 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

16. In the February 24, 2025 FAL Respondent admitted to reasonable and necessary medical maintenance benefits after MMI. However, Claimant has not requested any specific medical maintenance treatment and Respondent has thus not denied any particular treatment. Because there are no specific benefits in dispute and Respondent already admitted for maintenance medical treatment, there is no issue ripe for determination concerning maintenance treatment. If a dispute arises over specific treatment, Claimant may file an AFH seeking authorization of the care.

17. At hearing Claimant failed to present any evidence concerning disfigurement caused by his October 26, 2023 work injury. Although Claimant underwent two surgical procedures to repair rotational limitations of his left ring finger, he has not produced any evidence of disfigurement. He has thus failed to meet his burden of proof to establish entitlement to disfigurement benefits. Accordingly, Claimant's request for disfigurement benefits 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. Sections 8-42-107(8)(b)(I), (II) and (III), C.R.S. provide that the initial determination of MMI is made by an ATP. The ATP's opinion is binding, and the parties may not litigate the issue of MMI unless the party disputing the ATP's determination of MMI obtains a DIME. *Town of Ignacio v. Indus. Claim Appeals Off.* 70 P.3d 513 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.*, 5 P.3d 385 (Colo. App. 2000); *see* §8-42-107(8)(b)(III), C.R.S. In the absence of a DIME, ALJs lack the authority to hear a challenge to the treating physician's finding of MMI. *Story v. Indus. Claim Appeals Off.*, 910 P.2d 80 (Colo. App. 1995); *Postlewait v. Midwest Barricade*, 905 P.2d 21 (Colo. App. 1995). A DIME is thus a prerequisite to any hearing concerning the validity of an ATP's finding of MMI. Absent a DIME, an ALJ lacks jurisdiction to resolve a dispute concerning the determination. *See Town of Ignacio*, 70 P.3d at 515 Story, 910 P.2d at 82.

5. As found, there is no dispute that on January 29, 2025 Dr. Griffith placed Claimant at MMI and assigned a 3% left upper extremity impairment rating. However, Claimant did not pursue a DIME. He is now challenging the reasons and propriety of Dr. Griffith's decision to place him at MMI and assign a 3% rating. The dispute must be resolved through the DIME process because the ALJ has no authority to resolve Claimant's contentions prior to completion of the DIME. The medical record demonstrates that ATP Griffith unambiguously determined that Claimant reached MMI on January 29, 2025 because of his October 26, 2023 industrial injuries. Dr. Griffith's MMI and impairment determinations are not ripe for adjudication absent a DIME. Claimant's

challenge to Dr. Griffith's determination that he reached MMI on January 29, 2025 and suffered a 3% left upper extremity impairment is thus denied and dismissed.

*Average Weekly Wage*

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

7. As found, Respondent has consistently maintained that Claimant earned an AWW of $942.06. The AWW was calculated and based upon Claimant's wages at the time of his accident and injury. Furthermore, Claimant's own testimony confirms that any increased wages he began to earn did not begin until after he had reached MMI. Because the clear language of the statute requires an AWW to be calculated at the time of the accident that caused the compensable injury, and Claimant has not produced any evidence that his wages were higher than admitted, he failed to carry his burden of proof to establish entitlement to a different AWW. Claimant simply has not provided evidence that the admitted AWW is incorrect or otherwise erroneous. Therefore, the record reveals an AWW of $942.06 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

*Medical Maintenance Benefits*

8. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of her condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013); *see* §8-43-201(1), C.R.S. (stating that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

9. As found, in the February 24, 2025 FAL Respondent admitted to reasonable and necessary medical maintenance benefits after MMI. However, Claimant has not requested any specific medical maintenance treatment and Respondent has thus not denied any particular treatment. Because there are no specific benefits in dispute and Respondent already admitted for maintenance medical treatment, there is no issue ripe for determination concerning maintenance treatment. If a dispute arises over specific treatment, Claimant may file an AFH seeking authorization of the care.

*Disfigurement*

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

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

12. As found, at hearing Claimant failed to present any evidence concerning disfigurement caused by his October 26, 2023 work injury. Although Claimant underwent two surgical procedures to repair rotational limitations of his left ring finger, he has not produced any evidence of disfigurement. He has thus failed to meet his burden of proof to establish entitlement to disfigurement benefits. Accordingly, Claimant's request for disfigurement benefits 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 challenge to Dr. Griffith's determination that he reached MMI on January 29, 2025 and suffered a 3% left upper extremity impairment is denied and dismissed.

2. An AWW of $942.06 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

3. Claimant's request for medical maintenance benefits is not ripe for adjudication.

4. Claimant's request for disfigurement benefits is denied and dismissed.

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 28, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

**Office of Administrative Courts**

**State of Colorado**

**Workers' Compensation No. WC 5-283-392-001 & 002**

---

## Issues

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on September 3, 2024.
2. Whether Claimant established by a preponderance of the evidence that Respondents are subject to penalties for failing to timely admit or deny liability in violation of § 8-43-203(1)(a), C.R.S.

## Findings of Fact

1. Claimant began work for Employer as a welder on August 27, 2024. Claimant alleges that on September 3, 2024, he sustained an injury to his eyes arising out of the course of his employment. Specifically, Claimant alleges that he experienced a "welder's flash" injury, resulting from exposure to arc flashes from co-workers welding near him. Claimant testified that after the exposure, he felt pain and a sensation similar to sand in his eyes, and that he sought medical treatment as a result.

2. On September 5, 2024, Claimant resigned his employment from Employer, indicating that he notified Employer of his alleged injury on September 4, 2024, and indicating he would like to be seen by a medical professional. Employer filed a First Report of Injury on September 5, 2024, indicating that claimant reported the injury on September 4, 2024. (Ex. A).

3. On September 5, 2024, Claimant saw Kelly Hayzlett, PA, at NextCare Urgent Care. (Ex. F, G & H). PA Hayzlett diagnosed Claimant with UV keratosis, welder's flash, and migraine. The NextCare record contain little information regarding the examination performed. PA Hayzlett assigned work restrictions indicating Claimant could return to work on September 11, 2024 with restrictions of no bright lights, no stimulation and breaks for headaches, and referred him for an evaluation with an ophthalmologist, and prescribed ibuprofen. (Ex. H).

4. On September 12, 2024, Respondents filed a Notice of Contest, which was mailed to Claimant at a post office box in Aurora, Colorado. (Ex. B). Claimant testified at hearing that he did not receive the Notice of Contest, and did not receive a call notifying him that his claim was denied. At hearing, Dana Kotowski, the adjuster for Claimant's claim, testified the Notice of Contest was sent to the post office box listed on the certificate of service, and that Claimant provided this address. Ms. Kotowski further testified, credibly, that Claimant was notified of the notice of denial in a telephone call on September 16, 2024. On September 17, 2024, Claimant sent an email to an adjuster at Insurer indicating that he was "not able to check my PO box," and requested that all documents that were mailed to him be sent by email. (Ex. B). From this, the ALJ concludes that Respondents mailed the Notice of Contest to Claimant's post office box, that Claimant had not checked his post office box, and that Claimant was made aware of the notice of denial by telephone on September 16, 2024.

5. On September 17, 2024, Dr. Brett-Ashley Palmer[1] examined Claimant at Front Range Family Eye Care. Dr. Palmer's physical examination of Claimant was normal in all respects. She diagnosed Claimant with "Welder's flash, resolved, no corneal damage," and recommended Claimant "Start PFAT BID OU." (Ex. I).

6. Claimant testified at hearing that his eye condition had resolved, and that he is not seeking further medical care.

## 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

[1] The record does not contain indicate whether Dr. Palmer is an ophthalmologist or optometrist.

the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

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

**Compensability**

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). A claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of"

employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Id.*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO Aug. 10, 2015).

The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." §8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO, Aug. 25, 2014). A potentially harmful industrial exposure, however, must result in a diagnosable medical condition or disease to constitute a compensable "injury." *See Vanbuskirk v. Eagle Picher*, W.C. No. 4-613-913 (ICAO Apr. 13, 2005) (Potentially harmful industrial exposure must result in a "disease" before medical benefits may be recovered).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment. Specifically, Claimant established that he sustained a "welder's flash" injury, which, although it resolved within two weeks, caused the need for medical treatment. PA Hayzlett diagnosed Claimant with UV keratitis, and both she and Dr. Palmer diagnosed Claimant with "welder's flash."

Although the diagnoses was based, apparently, on Claimant's subjective report of symptoms, based on the totality of the evidence, the ALJ finds credible Claimant's testimony that he did experience symptoms, leading to the need for medical treatment, including evaluation by Dr. Palmer. Accordingly, Claimant has established a compensable injury.

**Penalty Claim**

Claimant has failed, however, to establish a basis for imposing any penalty on Respondents. Whether statutory penalties may be imposed under § 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

Claimant asserts that Respondents violated § 8-43-203(1)(a), C.R.S., which requires an employer or insurer to notify the injured employee in writing whether liability is admitted or contested within twenty days after the first report of injury is filed. The credible evidence demonstrates that Insurer mailed the Notice of Contest to Claimant's post office box on September 12, 2024. "There is a rebuttable presumption that a letter which was properly addressed, stamped, and mailed was duly delivered to the addressee." *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Here, the Notice of Contest includes a certificate of delivery, indicating the document was mailed to Claimant, the Division, and Employer on September 12, 2024. Although Ms. Kotowsky was not familiar with the specific process or procedures used by Insurer, she did testify that the

standard procedure used by Insurer was that documents are mailed by a different department at Insurer. “[T]he existence of a business custom or practice is sufficient to warrant a presumption that a particular letter was duly posted.” *National Motors, Inc. v. Newman*, 484 P.2d 125, 126 (Colo. App. 1971), *see also EZ Bldg. Components Mfg., LLC v. Industrial Claim Appeals Office of State*, 74 P.3d 516 (Colo. App. 2003) (“The existence of a business custom is sufficient to warrant a presumption that notice was sent, and it is the province of the trier of fact to decide whether that presumption is overcome by other evidence.”) Claimant did not offer evidence sufficient to rebut the presumption that the document was duly mailed to the address on the certificate of service. The ALJ does not find Claimant’s testimony that he did not receive the Notice of Contest sufficient evidence to establish that Insure failed to follow its standard procedure of mailing the document to the address listed on the certificate of service on the date indicated. Claimant’s argument that Insurer did not require signature confirmation is irrelevant, nothing in the Worker’s Compensation Act or applicable rules requires an insurer to require signature confirmation. Claimant has failed to establish that Respondents violated § 8-43-203(1)(a), C.R.S. Accordingly, Claimant has failed to establish grounds for subjecting Respondents to any penalty.

**Order**

It is therefore ordered that:

1. Claimant sustained a compensable injury arising out of the course of his employment with Employer on September 3, 2024, from which he recovered.
2. Claimant’s claim for penalties is denied and dismissed. All matters not determined herein are reserved for future determination.

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

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated: July 28, 2025

Steven R. Kabler
Administrative Law Judge

## ISSUES

- Did Claimant overcome the DIME's determination that the Claimant is at MMI by clear and convincing evidence?
- Did Claimant overcome the DIME's determination of Permanent Impairment by clear and convincing evidence?
- Did Claimant prove entitlement to maintenance medical treatment.
- Offset for the third-party settlement.

## STIPULATION

Claimant settled a third-party personal injury claim for $35,000. At the time of settlement, the Respondents subrogation lien was $5,517.47 and at the time of hearing, the lien was $6,290.60. The third-party settlement did not allocate the settlement proceeds between economic and non-economic damage and Claimant has not requested a hearing in District Court to make the allocation.

## FINDINGS OF FACT

1. Claimant is a commercial truck driver. His employer is a trucking company based out of Alamosa, Colorado. Claimant worked for employer as a truck driver, dispatcher and mechanic. Employer is owned by Claimant's wife, Natalie Herrera.

2. Claimant suffered admitted injury to his left knee and head when he tripped getting out of his truck. As he was tripping, he stepped into an uncovered floor grate, causing him to fall. This occurred on June 2, 2023. Although he initially declined transport to the hospital, he called the EMTs back after about 20 minutes.

3. Claimant was transported to UCHealth, Memorial Hospital Central. His initial diagnoses were concussion without loss of consciousness and acute pain of the left knee. CT scans of the brain, cervical spine and thoracic spine were taken and there were

no acute findings. An x-ray of the left knee was taken and showed no acute abnormality. The Claimant was discharged.

4. On June 8, Claimant was seen at Valley-Wide Health Systems. At that time his assessments included post concussion syndrome, multilevel spine pain, pain in left hip and left leg pain.

5. Claimant was seen at Valley-Wide next on July 7, 2023, with complaints of headaches and knee pain. The doctor commented in the physical exam section that Claimant's left knee had medial joint laxity but was unable to assess anterior and posterior drawer due to guarding. The doctor also noted that the cervical spine had tenderness and muscle tension.

6. Claimant saw his surgeon, Dr. Defee, for his regular knee appointment on August 7, 2023. He explained he had fallen since their last appointment. Dr. Defee identified Claimant's knee issues as bilateral degenerative joint disease ("DJD") and right knee chondromalacia. He administered bilateral knee ESIs, and refilled Claimant's usual pain medications. On November 22, 2023, Claimant returned to Dr. Defee for the first time since August 7th, requesting his usual right knee ESI, but not a left knee ESI.

7. On August 9, 2025, Dr. Lesnak conducted an IME at Respondents' request, which included obtaining a history from Claimant, reviewing prior and post-accident medical records, examining Claimant, reviewing surveillance videos, and administering a Computerized Outcome Assessment Test. Dr. Lesnak's head injury related opinions were that Claimant had subjective complaints of intermittent brief episodes of dizziness, without any reproducible objective findings on exam, a head CT scan performed on June 2, 2023, which identified no acute abnormalities, no clinical evidence of gross or focal cognitive abnormalities, inconsistency between Claimant alleging he lost consciousness when compared to contemporaneous records, and significantly expanding neurological complaints many months after the work injury. With regard to Claimant's knee complaints,

Dr. Lesnak noted Claimant had chronic preexisting issues with both knees, probable symptomatic chronic left knee OA, no evidence of knee joint instability, and no evidence of specific symptomatic knee meniscal/ligamentous pathology. With respect to Claimant's mental complaints, Dr. Lesnak noted Claimant had subjective complaints of panic attacks, but testing revealed a high level of somatic pain complaints strongly suggesting the presence of an underlying somatic disorder/somatoform disorder. He observed that patients with high level somatic pain complaints/somatic disorder frequently embellish/exaggerate their symptoms, causing the reported subjective symptoms to be unreliable. He opined that Claimant's subjective complaints and functional abilities were unreliable, and there is no question Claimant was malingering. Finally, while acknowledging the June 2, 2023, incident occurred, he opined that Claimant did not sustain an injury or develop a medical diagnosis as a result of the incident.

8. Dr. Reilly's neuropsychological report, Dr. Lesnak's IME report, Claimant's answers to interrogatories, and surveillance videos were provided to Dr. Zickefoose for her review. In a report dated August 23, 2024, Dr. Zickefoose summarized what she was provided, describing some of Claimant's activities captured on surveillance. With respect to her updated opinions, Dr. Zickefoose wrote:

> "I agree with Dr. Lesnak that patient is at MMI. There is no doubt that the incident happened but there is no reason to believe he had a traumatic brain injury. He had a concussion without loss of consciousness and the natural history of those are for symptoms to resolve not worsen. His back was never mentioned in June 2023 and therefore in my opinion should not be part of this claim. Also, he has documented history of chronic low back pain. His left knee was the only one mentioned in June 2023 not his right. He had been receiving care from Dr. Defee

since at least 2018 for bilaterally chronic knee pain. He has no need for further care. He has no permanent impairment."

9. On November 15, 2024, Dr. Phillip Smaldone conducted the DIME. After obtaining a history from Claimant, examining Claimant, and reviewing his medical records, Dr. Smaldone agreed with Dr. Zickefoose that Claimant reached MMI by August 23, 2024. With regard to impairment, Dr. Smaldone first noted "[t]he available records, history, physical examination, and diagnostic testing do not reveal evidence of permanent impairment of the left knee, secondary to post-concussive syndrome, or work-related psychiatric disorder." He measured left knee impairment rating (4%), but he indicated Claimant's ongoing left knee symptoms are chronic and unrelated to the work injury. He also provided a mental impairment rating (10%), but clarified "[r]egarding a work-related psychiatric pathology, throughout the entire medical record there was no complaint of depression or anxiety, and no assessment which captured these as symptoms. Though the current PHQ-9, GAD-6 and WC-M3 document moderate anxiety and mild depression, it would be inappropriate to associate these complaints with this claim given the lack of supporting evidence from medical record." With respect to the reported concussion symptoms, Dr. Smaldone provided a 0% rating, explaining "[i]t is my opinion based on the variability of subjective symptoms, and Dr. Reilly's neuropsychological evaluation that there are no permanent impairment related to mTBI." He opined that "[a]fter a detailed review of the medical records and [DIME], I believe that [Claimant] is at maximum medical improvement (as of 08/23/24) and that no permanent impairment should be given for the left knee, and (the) psychiatric pathologies, or traumatic brain injury. He further concluded that no permanent work restrictions nor maintenance care were warranted.

10. No medical provider has opined that Dr. Smaldone erred in his opinions

regarding MMI, causation nor impairment. Dr. Smaldone's opinions are consistent with the neuropsychological opinion of Dr. Reilly, the IME opinion of Dr. Lesnak, the August 23, 2024, MMI, causation and impairment rating opinions of Dr. Zickefoose, and the record as a whole. His opinions on MMI and impairment are credible and persuasive.

11. On December 17, 2024, Insurer filed a final admission consistent with Dr. Smaldone's opinions regarding MMI and permanent impairment. Maintenance medical care was denied. As of that date, Claimant had received $6,290.60 in medical benefits under the claim.

12. On October 23, 2024, Claimant settled his third-party claim with Industrial Realty Group (Nationwide/Amco) for $35,000. The third-party settlement did not allocate between economic and non-economic damages. On November 14, 2023, Nationwide notified Insurer of the settlement, noting that the settlement was inclusive of medical bills and liens. As of the date of hearing, Claimant had not requested a *Jorgensen*[1] hearing to obtain an allocation of the third-party settlement proceeds between economic and non-economic damages.

## CONCLUSIONS OF LAW

### A. Burden of proof

Claimant must overcome the DIME's determination that the Claimant is at MMI and 0% impairment by clear and convincing evidence.

### B. Claimant did not overcome the DIME determination that the Claimant is at MMI and 0% impairment by clear and convincing evidence.

[1] CCIA v. Jorgensen, 992 P.2d 1156, S.Ct. 2000

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

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. As a matter of diagnosis, the assessment of MMI inherently requires the DIME physician to identify and evaluate all diagnoses that are causally related to the claim's injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* supra. Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must also be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* supra; *Qual-Med, Inc. v. Industrial Claim Appeals Office,* supra.

Claimant failed to overcome, by clear and convincing evidence, the opinion of Dr. Smaldone that Claimant reached MMI for the consequences of his June 2, 2023, work injury as of August 23, 2024. Dr. Smaldone's MMI opinion is based upon a thorough

analysis of the evidence, his MMI opinion is strongly supported by Claimant's pre and post-accident treatment records, and the evaluations of Drs. Reilly, Zickefoose, and Lesnak, which all align with the medical evidence. Dr. Smaldone's MMI opinion is based upon objective evidence, and not Claimant's subjective complaints of ongoing post-concussion symptoms, knee pain, and mental issues, which are not reliable, nor credible. Dr. Smaldone's MMI opinion is thorough, credible, and persuasive.

The determination and assessment of permanent impairment requires the DIME physician to diagnose the claimant's condition or conditions and determine their causal relationship to the industrial injury. *See Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998) As with MMI, a DIME physician's findings regarding impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8) (b) (III), C.R.S.

A DIME physician is required to rate a claimant's impairment in accordance with the AMA Guides. Section 8-42-107 (8) (c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). The questions of whether the DIME physician has correctly applied the rating protocols, and ultimately whether the rating itself has been overcome by clear and convincing evidence, are questions of fact for the ALJ. *McLane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999*); Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 2002 (Colo. App. 2000); *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

### C. Post MMI Medical Benefits

The need for medical care may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo.1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo.App. 2003); *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). The claimant must prove entitlement to *Grove*r medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (ICAO, Dec. 28, 2015. An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.*, supra; *Anderson v. SOS Staffing Services*, W.C. No. 4-543-730 (ICAO, July 14, 2006).

As found, Claimant failed to meet his burden to prove he is entitled to maintenance care. Drs. Reilly, Lesnak, Zickefoose and Smaldone have all credibly and persuasively opined that Claimant does not require additional care for his alleged work injury related conditions. There is insufficient credible evidence, nor any persuasive evidence, establishing future medical treatment will be reasonably necessary to relieve the effects or to prevent further deterioration of Claimant's work injury related conditions. Claimant's request for additional medical care must therefore be denied and dismissed.

### D. Respondents' Subrogation Offset

A workers' compensation insurer has a right of subrogation against a third party for all amounts the third party pays to an injured employee for damages the third party caused. Section 8-41-203(1)(b) and (c), C.R.S. Where a settlement is reached with the third-party tortfeasor, the insurer's subrogation interest extends to settlement proceeds.

If the parties to the settlement agreement do not allocate the proceeds, they may request the trial court to do so. *Reliance Ins. Co. v. Blackford*, 100 P.3d 578, 580 (Colo.App.2004); *Kennedy v. Industrial Commission*, 735 P.2d 891 (Colo.App. 1986).

The subrogation right extends to "all moneys collected from the third party causing the injury" for all economic damages and physical impairment and disfigurement damages that are paid or payable in the future. Section 8-41-203(1)(d)(I), C.R.S. The policy behind the statute is to avoid double recovery by claimants who receive workers' compensation benefits and recover those same benefits from the tortfeasor without reimbursing the insurer. See *Colorado Compensation Ins. Auth. v. Jorgenson*, 992.P/2d 1156 (Colo. 2000); *Martinez v. St. Joseph Hosp. and Nursing Home of Del Norte, Inc.*, 878 P.2d 13 (Colo.App. 1984).

Respondents' lien as of the date of hearing was $6,290.60, and Claimant settled his third-party claim for $35,000. It is undisputed that there was no deficiency between Claimant's settlement of his third-party case and the amount the workers' compensation carrier (Insurer) paid to Claimant in benefits. Claimant was not under a duty to obtain written approval from Insurer before entering into his third-party settlement.

As evidenced by the third party settlement agreement, the parties to that agreement did not allocate the settlement proceeds between economic and non-economic damages, and there was no evidence Claimant moved for an evidentiary hearing in accordance with *Colorado Compensation Ins. Auth. v. Jorgenson*, supra, to determine what portion, if any, of the proceeds the workers' compensation carrier would be entitled to receive for its subrogated interest. Claimant failed to provide a basis for apportionment of his third-party settlement proceeds between economic and non-

economic damages and, therefore it is appropriate to permit an offset for the entire settlement amount. *Ross v. Colorado Cab Co. d/b/a Yellow Cab of Denver and Old Republic Insur. Co.*, 2012 WL 6619300 (Colo.Ind.Cl.App.Off.)

While it is well settled that an ALJ lacks jurisdiction to attempt an apportionment of settlement proceeds since such jurisdiction lies in the district court (see *Jorgensen v. Colo.Comp. Ins. Auth*, supra; *Jordan v. Fonken & Stevens, P.C.*, 914 P.2d 394 (Colo.App. 1995)), the ALJ may nevertheless determine and enforce the carrier's subrogation claim pursuant to §8-41-203(1), C.R.S. based on the evidence presented. *Jordan v. Fonken & Stevens, P.C.*, supra; *Brownson-Rausin v. ICAO*, Colo.App. No. 04CA1966 (Nov. 10, 2005) (NSOP); *Ross v. Colorado Cab Co. d/b/a Yellow Cab of Denver and Old Republic Insur. Co.*, supra.

The case of *Ross v. Colorado Cab Co. d/b/a Yellow Cab of Denver and Old Republic Insur. Co., supra,* is directly on point. In *Ross*, as in the case at hand, the claimant settled his third-party claim for more than the carrier's lien, the settlement was silent with respect to an allocation between economic and non-economic damages, and the claimant did not request a *Jorgensen* hearing as of the date of the workers' compensation hearing. ICAP affirmed the ALJ's determination that it was proper to permit an offset for the entire third-party settlement amount under these circumstances. Under this same reasoning and based on the stipulations and evidence presented at hearing, Respondents are entitled to a $35,000 offset against any future benefits under the Workers' Compensation Act. See also, *Andrews v. ICAO*, 952 P.2d 853 (Colo.App. 1998) (under subrogation scheme of §8-41-203, C.R.S., the insurer has the statutory right to claim an offset against future workers' compensation benefits).

## ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME's determination that the Claimant is at MMI as of August 23, 2024 is denied and dismissed.

2. Claimant's request to overcome the DIME's determination that Claimant has no permanent impairment related to his claim is denied and dismissed.

3. The Claimant is not entitled to post-MMI medical treatment.

4. Respondents' request for an offset of $35,000 against future medical and indemnity benefits paid under this claim in the future is granted.

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

DATED: July 29, 2025

Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 27

and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

## ISSUES

- Did Claimant overcome the DIME's determination that the Claimant is at MMI by clear and convincing evidence?
- Did Claimant overcome the DIME's determination of Permanent Impairment by clear and convincing evidence?
- Did Claimant prove entitlement to maintenance medical treatment.
- Offset for the third-party settlement.

## STIPULATION

Claimant settled a third-party personal injury claim for $35,000. At the time of settlement, the Respondents subrogation lien was $5,517.47 and at the time of hearing, the lien was $6,290.60. The third-party settlement did not allocate the settlement proceeds between economic and non-economic damage and Claimant has not requested a hearing in District Court to make the allocation.

## FINDINGS OF FACT

1. Claimant is a commercial truck driver. His employer is a trucking company based out of Alamosa, Colorado. Claimant worked for employer as a truck driver, dispatcher and mechanic. Employer is owned by Claimant's wife, Natalie Herrera.

2. Claimant suffered admitted injury to his left knee and head when he tripped getting out of his truck. As he was tripping, he stepped into an uncovered floor grate, causing him to fall. This occurred on June 2, 2023. Although he initially declined transport to the hospital, he called the EMTs back after about 20 minutes.

3. Claimant was transported to UCHealth, Memorial Hospital Central. His initial diagnoses were concussion without loss of consciousness and acute pain of the left knee. CT scans of the brain, cervical spine and thoracic spine were taken and there were

no acute findings. An x-ray of the left knee was taken and showed no acute abnormality. The Claimant was discharged.

4. On June 8, Claimant was seen at Valley-Wide Health Systems. At that time his assessments included post concussion syndrome, multilevel spine pain, pain in left hip and left leg pain.

5. Claimant was seen at Valley-Wide next on July 7, 2023, with complaints of headaches and knee pain. The doctor commented in the physical exam section that Claimant's left knee had medial joint laxity but was unable to assess anterior and posterior drawer due to guarding. The doctor also noted that the cervical spine had tenderness and muscle tension.

6. Claimant saw his surgeon, Dr. Defee, for his regular knee appointment on August 7, 2023. He explained he had fallen since their last appointment. Dr. Defee identified Claimant's knee issues as bilateral degenerative joint disease ("DJD") and right knee chondromalacia. He administered bilateral knee ESIs, and refilled Claimant's usual pain medications. On November 22, 2023, Claimant returned to Dr. Defee for the first time since August 7th, requesting his usual right knee ESI, but not a left knee ESI.

7. On August 9, 2025, Dr. Lesnak conducted an IME at Respondents' request, which included obtaining a history from Claimant, reviewing prior and post-accident medical records, examining Claimant, reviewing surveillance videos, and administering a Computerized Outcome Assessment Test. Dr. Lesnak's head injury related opinions were that Claimant had subjective complaints of intermittent brief episodes of dizziness, without any reproducible objective findings on exam, a head CT scan performed on June 2, 2023, which identified no acute abnormalities, no clinical evidence of gross or focal cognitive abnormalities, inconsistency between Claimant alleging he lost consciousness when compared to contemporaneous records, and significantly expanding neurological complaints many months after the work injury. With regard to Claimant's knee complaints,

Dr. Lesnak noted Claimant had chronic preexisting issues with both knees, probable symptomatic chronic left knee OA, no evidence of knee joint instability, and no evidence of specific symptomatic knee meniscal/ligamentous pathology. With respect to Claimant's mental complaints, Dr. Lesnak noted Claimant had subjective complaints of panic attacks, but testing revealed a high level of somatic pain complaints strongly suggesting the presence of an underlying somatic disorder/somatoform disorder. He observed that patients with high level somatic pain complaints/somatic disorder frequently embellish/exaggerate their symptoms, causing the reported subjective symptoms to be unreliable. He opined that Claimant's subjective complaints and functional abilities were unreliable, and there is no question Claimant was malingering. Finally, while acknowledging the June 2, 2023, incident occurred, he opined that Claimant did not sustain an injury or develop a medical diagnosis as a result of the incident.

8. Dr. Reilly's neuropsychological report, Dr. Lesnak's IME report, Claimant's answers to interrogatories, and surveillance videos were provided to Dr. Zickefoose for her review. In a report dated August 23, 2024, Dr. Zickefoose summarized what she was provided, describing some of Claimant's activities captured on surveillance. With respect to her updated opinions, Dr. Zickefoose wrote:

> "I agree with Dr. Lesnak that patient is at MMI. There is no doubt that the incident happened but there is no reason to believe he had a traumatic brain injury. He had a concussion without loss of consciousness and the natural history of those are for symptoms to resolve not worsen. His back was never mentioned in June 2023 and therefore in my opinion should not be part of this claim. Also, he has documented history of chronic low back pain. His left knee was the only one mentioned in June 2023 not his right. He had been receiving care from Dr. Defee

since at least 2018 for bilaterally chronic knee pain. He has no need for further care. He has no permanent impairment."

9. On November 15, 2024, Dr. Phillip Smaldone conducted the DIME. After obtaining a history from Claimant, examining Claimant, and reviewing his medical records, Dr. Smaldone agreed with Dr. Zickefoose that Claimant reached MMI by August 23, 2024. With regard to impairment, Dr. Smaldone first noted "[t]he available records, history, physical examination, and diagnostic testing do not reveal evidence of permanent impairment of the left knee, secondary to post-concussive syndrome, or work-related psychiatric disorder." He measured left knee impairment rating (4%), but he indicated Claimant's ongoing left knee symptoms are chronic and unrelated to the work injury. He also provided a mental impairment rating (10%), but clarified "[r]egarding a work-related psychiatric pathology, throughout the entire medical record there was no complaint of depression or anxiety, and no assessment which captured these as symptoms. Though the current PHQ-9, GAD-6 and WC-M3 document moderate anxiety and mild depression, it would be inappropriate to associate these complaints with this claim given the lack of supporting evidence from medical record." With respect to the reported concussion symptoms, Dr. Smaldone provided a 0% rating, explaining "[i]t is my opinion based on the variability of subjective symptoms, and Dr. Reilly's neuropsychological evaluation that there are no permanent impairment related to mTBI." He opined that "[a]fter a detailed review of the medical records and [DIME], I believe that [Claimant] is at maximum medical improvement (as of 08/23/24) and that no permanent impairment should be given for the left knee, and (the) psychiatric pathologies, or traumatic brain injury. He further concluded that no permanent work restrictions nor maintenance care were warranted.

10. No medical provider has opined that Dr. Smaldone erred in his opinions

regarding MMI, causation nor impairment. Dr. Smaldone's opinions are consistent with the neuropsychological opinion of Dr. Reilly, the IME opinion of Dr. Lesnak, the August 23, 2024, MMI, causation and impairment rating opinions of Dr. Zickefoose, and the record as a whole. His opinions on MMI and impairment are credible and persuasive.

11. On December 17, 2024, Insurer filed a final admission consistent with Dr. Smaldone's opinions regarding MMI and permanent impairment. Maintenance medical care was denied. As of that date, Claimant had received $6,290.60 in medical benefits under the claim.

12. On October 23, 2024, Claimant settled his third-party claim with Industrial Realty Group (Nationwide/Amco) for $35,000. The third-party settlement did not allocate between economic and non-economic damages. On November 14, 2023, Nationwide notified Insurer of the settlement, noting that the settlement was inclusive of medical bills and liens. As of the date of hearing, Claimant had not requested a *Jorgensen*[1] hearing to obtain an allocation of the third-party settlement proceeds between economic and non-economic damages.

## CONCLUSIONS OF LAW

### A. Burden of proof

Claimant must overcome the DIME's determination that the Claimant is at MMI and 0% impairment by clear and convincing evidence.

### B. Claimant did not overcome the DIME determination that the Claimant is at MMI and 0% impairment by clear and convincing evidence.

[1] CCIA v. Jorgensen, 992 P.2d 1156, S.Ct. 2000

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

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. As a matter of diagnosis, the assessment of MMI inherently requires the DIME physician to identify and evaluate all diagnoses that are causally related to the claim's injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* supra. Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must also be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* supra; *Qual-Med, Inc. v. Industrial Claim Appeals Office,* supra.

Claimant failed to overcome, by clear and convincing evidence, the opinion of Dr. Smaldone that Claimant reached MMI for the consequences of his June 2, 2023, work injury as of August 23, 2024. Dr. Smaldone's MMI opinion is based upon a thorough

analysis of the evidence, his MMI opinion is strongly supported by Claimant's pre and post-accident treatment records, and the evaluations of Drs. Reilly, Zickefoose, and Lesnak, which all align with the medical evidence. Dr. Smaldone's MMI opinion is based upon objective evidence, and not Claimant's subjective complaints of ongoing post-concussion symptoms, knee pain, and mental issues, which are not reliable, nor credible. Dr. Smaldone's MMI opinion is thorough, credible, and persuasive.

The determination and assessment of permanent impairment requires the DIME physician to diagnose the claimant's condition or conditions and determine their causal relationship to the industrial injury. *See Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998) As with MMI, a DIME physician's findings regarding impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8) (b) (III), C.R.S.

A DIME physician is required to rate a claimant's impairment in accordance with the AMA Guides. Section 8-42-107 (8) (c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). The questions of whether the DIME physician has correctly applied the rating protocols, and ultimately whether the rating itself has been overcome by clear and convincing evidence, are questions of fact for the ALJ. *McLane Western Inc. v. Industrial Claim Appeals Office,* 996 P.2d 263 (Colo. App. 1999*); Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 2002 (Colo. App. 2000); *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

### C. Post MMI Medical Benefits

The need for medical care may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo.1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo.App. 2003); *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). The claimant must prove entitlement to *Grove*r medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (ICAO, Dec. 28, 2015. An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.*, supra; *Anderson v. SOS Staffing Services*, W.C. No. 4-543-730 (ICAO, July 14, 2006).

As found, Claimant failed to meet his burden to prove he is entitled to maintenance care. Drs. Reilly, Lesnak, Zickefoose and Smaldone have all credibly and persuasively opined that Claimant does not require additional care for his alleged work injury related conditions. There is insufficient credible evidence, nor any persuasive evidence, establishing future medical treatment will be reasonably necessary to relieve the effects or to prevent further deterioration of Claimant's work injury related conditions. Claimant's request for additional medical care must therefore be denied and dismissed.

### D. Respondents' Subrogation Offset

A workers' compensation insurer has a right of subrogation against a third party for all amounts the third party pays to an injured employee for damages the third party caused. Section 8-41-203(1)(b) and (c), C.R.S. Where a settlement is reached with the third-party tortfeasor, the insurer's subrogation interest extends to settlement proceeds.

If the parties to the settlement agreement do not allocate the proceeds, they may request the trial court to do so. *Reliance Ins. Co. v. Blackford*, 100 P.3d 578, 580 (Colo.App.2004); *Kennedy v. Industrial Commission*, 735 P.2d 891 (Colo.App. 1986).

The subrogation right extends to "all moneys collected from the third party causing the injury" for all economic damages and physical impairment and disfigurement damages that are paid or payable in the future. Section 8-41-203(1)(d)(I), C.R.S. The policy behind the statute is to avoid double recovery by claimants who receive workers' compensation benefits and recover those same benefits from the tortfeasor without reimbursing the insurer. See *Colorado Compensation Ins. Auth. v. Jorgenson*, 992.P/2d 1156 (Colo. 2000); *Martinez v. St. Joseph Hosp. and Nursing Home of Del Norte, Inc.*, 878 P.2d 13 (Colo.App. 1984).

Respondents' lien as of the date of hearing was $6,290.60, and Claimant settled his third-party claim for $35,000. It is undisputed that there was no deficiency between Claimant's settlement of his third-party case and the amount the workers' compensation carrier (Insurer) paid to Claimant in benefits. Claimant was not under a duty to obtain written approval from Insurer before entering into his third-party settlement.

As evidenced by the third party settlement agreement, the parties to that agreement did not allocate the settlement proceeds between economic and non-economic damages, and there was no evidence Claimant moved for an evidentiary hearing in accordance with *Colorado Compensation Ins. Auth. v. Jorgenson*, supra, to determine what portion, if any, of the proceeds the workers' compensation carrier would be entitled to receive for its subrogated interest. Claimant failed to provide a basis for apportionment of his third-party settlement proceeds between economic and non-

economic damages and, therefore it is appropriate to permit an offset for the entire settlement amount. *Ross v. Colorado Cab Co. d/b/a Yellow Cab of Denver and Old Republic Insur. Co.*, 2012 WL 6619300 (Colo.Ind.Cl.App.Off.)

While it is well settled that an ALJ lacks jurisdiction to attempt an apportionment of settlement proceeds since such jurisdiction lies in the district court (see *Jorgensen v. Colo.Comp. Ins. Auth*, supra; *Jordan v. Fonken & Stevens, P.C.*, 914 P.2d 394 (Colo.App. 1995)), the ALJ may nevertheless determine and enforce the carrier's subrogation claim pursuant to §8-41-203(1), C.R.S. based on the evidence presented. *Jordan v. Fonken & Stevens, P.C.*, supra; *Brownson-Rausin v. ICAO*, Colo.App. No. 04CA1966 (Nov. 10, 2005) (NSOP); *Ross v. Colorado Cab Co. d/b/a Yellow Cab of Denver and Old Republic Insur. Co.*, supra.

The case of *Ross v. Colorado Cab Co. d/b/a Yellow Cab of Denver and Old Republic Insur. Co., supra,* is directly on point. In *Ross*, as in the case at hand, the claimant settled his third-party claim for more than the carrier's lien, the settlement was silent with respect to an allocation between economic and non-economic damages, and the claimant did not request a *Jorgensen* hearing as of the date of the workers' compensation hearing. ICAP affirmed the ALJ's determination that it was proper to permit an offset for the entire third-party settlement amount under these circumstances. Under this same reasoning and based on the stipulations and evidence presented at hearing, Respondents are entitled to a $35,000 offset against any future benefits under the Workers' Compensation Act. See also, *Andrews v. ICAO*, 952 P.2d 853 (Colo.App. 1998) (under subrogation scheme of §8-41-203, C.R.S., the insurer has the statutory right to claim an offset against future workers' compensation benefits).

## ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME's determination that the Claimant is at MMI as of August 23, 2024 is denied and dismissed.

2. Claimant's request to overcome the DIME's determination that Claimant has no permanent impairment related to his claim is denied and dismissed.

3. The Claimant is not entitled to post-MMI medical treatment.

4. Respondents' request for an offset of $35,000 against future medical and indemnity benefits paid under this claim in the future is granted.

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

DATED: July 29, 2025

Michael A. Perales

Michael A. Perales
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 27

and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

**Office of Administrative Courts**
**State of Colorado**
**Workers' Compensation Number 5-299-018-001**

## Issues

1. Has Claimant demonstrated, by a preponderance of the evidence, that on January 29, 2025, he suffered an injury arising out of and in the course and scope of his employment with Employer?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of a right rotator cuff tear constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

## Findings of Fact

1. Claimant is self-employed as an attorney. Employer is the S-corp that Claimant established for his law practice. Claimant is a 100 percent owner of the Employer S-corp. As of the date of the hearing, Claimant is the only employee of Employer.[1]

2. Claimant testified that at some point following an injury in 2018, he began researching exercise programs. Claimant further testified that he began doing hourly exercises while at work. Each day he would set hourly alarms and on the hour he would stop his work and engage in some form of exercise for three to four minutes. Claimant testified that he would vary the nature of his exercises throughout the day. These exercises included walking, the use of resistance bands, hand weights, squats, push-ups, and other similar exercises.

[1] On January 29, 2025, Claimant had one "very" part-time employee, his son, who worked approximately one hour per day.

3. Claimant also testified that in engaging in this daily and hourly routine he noticed improved focus, improved concentration, and the ability to notice errors in his work. Claimant asserts that these factors made him a better attorney which benefited his clients and therefore provided a benefit to Employer.

4. Claimant testified that he implemented this exercise routine in his role as Employer. As Employer, he expected the company's employee (himself) to engage in the exercises. Claimant testified that the exercise regimen was not a written mandate, as he has experience in what exercises are most beneficial.

5. Claimant also testified that he last had another full-time employee in 2022. Claimant testified that as Employer, he expected that employee to get up every hour and walk or do some basic exercises. The employee could select what exercises to perform. That directive was verbal, and not a written policy.

6. Claimant testified that at 10:00 a.m., on January 29, 2025, he was engaging in his exercise routine, specifically, he was doing push-ups. While doing so, Claimant felt and heard a tearing sensation in his right shoulder. Claimant testified that he had immediate pain, and believed he had torn his rotator cuff.

7. On February 3, 2025, Claimant sought treatment with Dr. Kennan Vance at Grand Valley Orthopedics. In the medical record of that date, Dr. Vance noted Claimant's report that he had experienced right shoulder pain "for about [two] years but states that it 'ripped' Wednesday a week ago". Dr. Vance ordered x-rays of Claimant's right shoulder.

8. Claimant testified that he did not tell Dr. Vance that he had right shoulder symptoms for two years.

9. The x-rays were performed on February 3, 2025, and showed, *inter alia*, glenohumeral arthritic changes; an osteophyte formation on the inferior aspect of the glenoid; significant joint space narrowing; and a slight proximal humeral migration.

10. Based on the x-ray findings, Dr. Vance opined that Claimant had torn his rotator cuff and ordered magnetic re[illegible]nance imaging (MRI) of Claimant's right shoulder.

11. The right shoulder MRI was also performed on February 3, 2025. The MRI showed, a high-grade near complete tear for the distal supraspinatus tendon; severe tendinosis of the distal infraspinatus tendon; a low-grade partial thickness tearing of the superior distal subscapularis tendon; tendinosis of the intraarticular biceps tendon; and a paralabral cyst.

12. On February 6, 2025, Employer completed a First Report of Injury or Illness and submitted it to Insurer regarding the January 29, 2025 incident. As Claimant is both employee and Employer, the First Report was completed by Claimant.

13. Based upon the medical records admitted into evidence, after February 3, 2025, Claimant did not return to Dr. Vance for further consultation or treatment.

14. Due to the findings on imaging, Claimant sought consultation with Dr. Peter Millet at Steadman Clinic. Claimant was seen by Dr. Millet on February 18, 2025. At that time, Claimant reported that he felt a popping sensation and immediate pain in his right shoulder while doing push-ups at work. Dr. Millet reviewed the imaging and identified Claimant's diagnosis as complete rotator cuff tear or rupture of the right shoulder. Dr. Millet recommended that Claimant undergo surgery. Specifically, Dr. Millet ordered a right shoulder arthroscopy, debridement, subacromial compression, rotator cuff repair, biceps tenodesis, and PRP[2] injection.

15. On February 21, 2025, Claimant was seen by Ashley Hardin, PA-C. On that date, PA Hardin completed a Physician's Report of Workers' Compensation Injury (form WC164). In that document, PA Hardin identified Claimant's diagnosis as right shoulder pain, supraspinatus and subscapularis tear. PA Hardin recommended Claimant "follow up with ortho".

16. Claimant testified that he was seen by PA Hardin as his workers' compensation provider.

---

[2] Platelet rich plasma.

17. Claimant underwent the recommended arthroscopic surgery on March 6, 2025. On that date, Dr. Millet performed the following: right shoulder rotator cuff repair, subacromial decompression and acromioplasty; open biceps tenodesis; extensive debridement; lysis of adhesions; and a PRP injection.

18. On March 7, 2025, Respondents filed a Notice of Contest on the basis that Claimant's injury was not work related.

19. Claimant argues that because he injured his right shoulder while engaged in an exercise program at work, his injury should be found compensable. In support of this argument, Claimant asserts that in his role as Employe, he received mandates from Insurer to implement a wellness program. Articles regarding employee wellness were admitted into evidence. For example, one article suggests purchasing stand-up desks for employees or engaging in a mindfulness practice. That same article states that "a five-minute jaunt once an hour boosts your overall wellbeing, according to researchers, lifting energy and concentration levels." In reviewing these materials, the ALJ finds no mandate or directive from Insurer. Rather, the articles provided by Claimant indicate general information regarding wellness.

20. The ALJ is not persuaded by Claimant's assertion that because he, as Employer, expected himself, as Claimant, to engage in an exercise activity at work, that the act of engaging in said activity became mandatory. The ALJ finds that although Claimant is both employee and Employer in this matter, his decision to engage in the exercise program was a personal decision and therefore voluntary.

21. Furthermore, the ALJ finds that allowing an employer who is also a claimant/employee to declare that certain activities are mandatory and thus "work related" would result in absurd outcomes for insurers.

22. The ALJ also credits the medical records and notes that it was not until after Claimant received the results of the MRI, that he reported an incident at work. The initial medical report with Dr. Vance mentions two years of right shoulder symptoms with a tearing incident the week prior. The ALJ credits that medical record and finds that

Claimant did not report the incident occurred at work while he was engaged in an exercise program.

23. Now therefore, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that he suffered an injury arising out of and in the course and scope of his employment. Furthermore, the ALJ finds that Claimant was engaged in a voluntary recreational activity or program, as contemplated by Section 8-40-201(8), C.R.S.

## Conclusions of Law

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

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

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

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

5. Pursuant to Section 8–40–201(8), C.R.S., the term "employment" does not include "an employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." *White v. Industrial Claim Appeals Office,* 8 P.3d. 621, 623 (Colo. App. 2000).

6. When the activity involves an exercise program, the Colorado Supreme Court has held that a court should look to the following factors to determine whether an injury is compensable: (1) whether the injury occurred during working hours; (2) whether the injury occurred on the employer's premises; (3) whether the employer initiated the employee's exercise program; (4) whether the employer exerted any control or direction over the employee's exercise program; and (5) whether the employer stood to benefit from the employee's exercise program. Factors (1) and (2) carry greater weight because the time and place of injury are particularly strong indicators of whether an injury arose out of and in the course of the employee's employment. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, at 210-211.

7. The current statute requires that a claimant's motive for participation in the recreational activity also be determined and that compensation be denied if participation in the recreational activity was voluntary, even if the employer promoted or sponsored the activity. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo.App.1998).

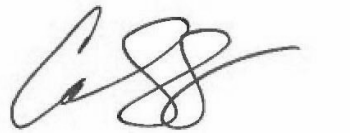
8. Ultimately, the question of whether the claimant's participation in the recreational activity was voluntary is one of fact for determination by the ALJ. *See Schniedwind v. Rite of Passage Inc*., WC 5-051-507 (ICAO, Mar. 12, 2019) (where the claimant voluntarily participated in a bicycle ride organized by the employer for its clients that resulted in only a small benefit to the employer, the bicycle ride was a voluntary recreational activity and claimant's injury during the ride was thus not compensable); *In re Claim of Kendrick*, WC 4-991-007 (ICAO, Nov. 15, 2016) (rejecting the claimant's claim that running fell under the personal comfort doctrine as a way to maintain his health because it constituted a recreational activity).

9. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that on January 29, 2025, he suffered an injury arising out of and in the course and scope of his employment with Employer. As found, Claimant was engaged in a recreational activity, specifically an exercise program, when he injured his right shoulder on January 29, 2025. Although the activity did occur during work hours, at the place of employment, and Employer may have derived some benefit from Claimant's increased focus, the ALJ concludes that the activity was voluntary. As the Claimant and Employer are one and the same, the ALJ concludes that as the only employee, an employer cannot simply declare something as mandatory to remove the activity from being voluntary and recreational.

## Order

It is therefore ordered, Claimant's claim regarding a right shoulder injury is denied and dismissed.

Dated July 30, 2025.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review via email to either **oac-ptr@state.co.us** or to **oac-dvr@state.co.us**. If the Petition to Review is emailed to either of the aforementioned email addresses, 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 also recommended that you provide a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

**Office of Administrative Courts**
**State of Colorado**
**Workers' Compensation No. WC 5-266-900-003**

## Issues

1. Whether Claimant proved by a preponderance of the evidence her settlement should be reopened on the grounds of fraud.

2. Whether Claimant proved by a preponderance of the evidence her settlement should be reopened on the grounds of a mutual mistake of material fact.

## Findings of Fact

1. Claimant is 71-years-old. Claimant worked for Employer as a salesperson in the cosmetics department. Claimant sustained an admitted industrial injury to her left knee during the course and scope of her employment for Employer on February 13, 2024.

### *History of Prior Left Knee Condition and Treatment*

2. Claimant underwent a right knee arthroscopy and partial medial meniscectomy on January 30, 2019. As relevant here, Claimant has a prior history of chronic left knee symptoms and treatment, as evidenced by medical records dating back to 2019.

3. On August 7, 2019, Claimant sought treatment at the emergency department of SCL Lutheran Hospital with complaints of left knee pain. Claimant reported that she felt a sharp pain on the side of her knee after exiting a vehicle. She further reported that she had a similar episode two years prior for which she underwent chiropractic treatment that helped with the inflammation. X-rays showed mild osteoarthritis. Claimant was diagnosed with a sprain of the left medial collateral ligament ("MCL").

4. On August 20, 2019, Claimant presented to Anthony Beardmore, M.D. at Denver Health's orthopedic department complaining of eight days of medial-sided left knee pain. Claimant was again diagnosed with an MCL sprain and instructed to treat with rest, ice, compression and elevation ("RICE") and pain medication.

5. On September 24, 2019, Claimant attended a follow-up appointment for her left knee with Ashley Donnell, PA-C at Denver Health. Claimant reported she had been doing better until recently when her knee gave out on her, causing worsening medial left knee pain. PA Donnell diagnosed Claimant with an acute on chronic left MCL sprain and ordered an MRI.

6. Claimant underwent a left knee MRI on September 29, 2019. The radiologist noted the following impression: "1. Medial meniscal body/posterior horn tear looks degenerative and is accompanied by medial compartment degenerative bone marrow edema and cartilage irregularity. 2. No MCL tear. 3. Patellar fissuring with degenerative bone marrow edema." Ex. T, p. 197.

7. Claimant returned to PA Donnell on October 1, 2019 for follow-up of the left knee. PA Donnell noted that x-rays from this visit showed medial compartment joint space narrowing and patella arthritic changes. She further noted that the 9/29/2019 left knee MRI showed a medial meniscal degenerative tear, medial compartment arthritic changes with degenerative bone marrow edema and cartilage irregularity, and patellar fissuring with degenerative bone marrow edema. PA Donnell diagnosed Claimant with left knee acute on chronic pain with degenerative medial meniscus tear and medial and patellofemoral arthritis. She recommended RICE, a hinged knee brace, and Meloxicam. PA Donnell discussed conservative versus operative intervention of the left knee, recommending a trial of conservative management with physical therapy exercises and cortisone injection. PA Donnell discussed with Claimant the risk of worsening symptoms with a knee scope and meniscectomy with underlying arthritis. PA Donnell administered a cortisone injection to Claimant's left knee at this visit.

8. At a follow-up visit with PA Donnell on November 12, 2019, Claimant reported experiencing significant improvement following the injection with pain rated 2/10.

9. Claimant again presented to PA Donnell on January 14, 2020 for a follow-up of her left knee pain. PA Donnell noted that Claimant had a known degenerative medical meniscus tear and medial patellofemoral arthritis. Claimant reported 8/10 pain in her left knee. PA Donnell noted "[Claimant] would like to avoid surgery. She would like a repeat

injection." Id. at 188. PA Donnell administered a cortisone injection to Claimant's left knee and recommended continued therapy and pain management.

10. PA Donnell administered yet another cortisone injection to Claimant's left knee on May 13, 2020, again noting that Claimant wanted to avoid surgery.

11. Claimant returned to PA Donnell for treatment of her left knee on March 17, 2021. PA Donnell noted Claimant last had a left knee cortisone injection on 8/18/2020. Claimant reported that the injection helped for about seven months, with 8/10 pain returning approximately one week ago. PA Donnell again noted Claimant wanted to avoid surgery. Claimant requested another left knee injection, which PA Donnell administered at this visit.

12. At a follow-up appointment with PA Donnell on June 22, 2021, Claimant reported that the 3/17/2021 injection provided approximately three months of relief, with the pain returning about one week ago at level 7-8/10. PA Donnell administered another cortisone injection to Claimant's left knee. PA Donnell noted,

> [Claimant] would like repeat injection today. She would also like to consider knee arthroscopy - discussed that previous MRI did show medial and patellofemoral arthritis and degenerative meniscus tear. Discussed that knee arthroscopy with underlying arthritis may not improve symptoms and may even make them worse. She is now wanting to consider arthroscopy as is [sic] worked well with right knee. We will update xrays and MRI and determine if arthroscopy is even a viable option even with the understanding that doing a partial meniscectomy could make pain worse.

Id. at 176.

13. On January 11, 2022, Claimant reported to PA Donnell that the 6/22/2021 left knee injection helped for six months, with current 7-8/10 pain returning about one week prior. X-rays of the left knee showed mild medial compartment and patellofemoral osteoarthrosis, not significantly changed since 10/1/2019. PA Donnell administered a cortisone injection to the left knee. PA Donnell noted,

> [Claimant] would like repeat injection today. She is hesitant for surgery, discussed that if she would also like to consider knee arthroscopy we would want an updated MRI to determine the progression of arthritic changes - discussed that previous MRI did show medial and patellofemoral arthritis with degenerative meniscus tear. Discussed that knee arthroscopy with underlying arthritis may not improve symptoms and may even make them worse.

Id. at 170.

14. On March 29, 2023, Claimant saw PA Donnell for a follow-up of her bilateral knee pain. Claimant reported that the pain came and went in her bilateral knees, with the left knee pain greater than the right knee pain at thae time. PA Donnell administered cortisone injections to each knee.

15. Claimant returned to PA Donnell on September 19, 2023 for bilateral knee pain. Claimant again reported that the pain came and went in her bilateral knees. There was no new injury. At this visit Claimant reported 7/10 pain, right greater than left. Claimant requested additional cortisone injections, which PA Donnell again administered to each knee.

16. On January 29, 2024, Claimant sought treatment at the emergency department of SCL Lutheran Hospital with complaints of worsening chronic left knee pain without any trauma. Claimant reported experiencing worsening left knee and calf pain over the last two months, with swelling of the knee in the last month and a sharp pain in the left calf up the thigh in the last two weeks. Claimant underwent a left lower extremity venous duplex ultrasound, which was negative for any abnormalities. The provider diagnosed Claimant with chronic left knee pain. He recommended RICE and follow-up with Claimant's primary care physician or orthopedic specialist.

17. Claimant attended a follow-up appointment with PA Donnell on February 6, 2024. Claimant reported worsening pain and swelling on her left knee with no specific injury. Claimant reported 10/10 pain. X-rays demonstrated tricompartmental subchondral sclerosis and marginal osteophyte formation consistent with osteoarthropathy, as well as nonspecific trace knee effusion. On examination of the left knee, PA Donnell noted

tenderness in the medial joint line and patella, moderate effusion, and range of motion of 0 degrees extension and 130 degrees flexion. McMurray, varus, Lachman, drawer, pivot shift and patellar apprehension tests were all negative. PA Donnell assessed Claimant with chronic bilateral knee pain due to mild to moderate medial compartment osteoarthritis, acute left knee pain and swelling. PA Donnell administered another cortisone injection to Claimant's left knee.

***February 13, 2024 Work Injury***

18. Claimant sustained an admitted industrial injury to her left knee on February 13, 2024 when she tripped and fell over a box.

19. Claimant saw PA Donnell on February 27, 2024 reporting that, about one week after the 2/6/2024 left knee injection, she fell and twisted her knee at work and since had continued pain. Claimant reported noticing slight improvement in the knee swelling in comparison to before the recent injection. Claimant complained of 8/10 pain to the medial joint line and IT band. On examination of the left knee, PA Donnell noted tenderness in patella and medial joint line, mild effusion, and range of motion of 0 degrees extension and 130 degrees flexion. McMurray, varus, Lachman, drawer, pivot shift and patellar apprehension tests were again all negative. PA Donnell noted that left knee x-rays from 2/6/2024 showed mild progression of medial compartment osteoarthritis with medial compartment joint space narrowing. PA Donnell refilled Claimant's Naproxen prescription and discussed conservative management. Claimant asked about aspirating her left knee, which PA Donnell declined to do because the effusion was "very minimal." Ex. T., p. 137. PA Donnell remarked that it was also too soon for Claimant to undergo a repeat cortisone injection. PA Donnell noted, "Discussed once failure of conservative management, we will have patient seen by joint team for a total knee replacement. But do not believe she has failed conservative management at this time." Id.

20. Claimant subsequently underwent evaluation and treatment at authorized provider American Family Care Urgent Care ("AFC"). Claimant initially presented to Charlotte Withers, PA on March 4, 2024 at AFC. Left knee x-rays were negative for acute fractures. Claimant was diagnosed with left leg pain, prescribed Celebrex and referred for a left knee MRI and to OrthoOne at Swedish Medical Center for an orthopedic evaluation.

21. Claimant underwent a left knee MRI on March 13, 2024. The radiologist's impression was:

> 1. Tricompartmental chondromalacia, worst in the medial tibiofemoral compartment where there is broad full-thickness cartilage loss with significant subchondral marrow edema within the medial femoral condyle and medial tibial plateau. No discrete subchondral fracture line is seen.
> 2. Complex macerated appearing tear of the medial meniscus.
> 3. Intra-articular body within the anterior superior joint recess measuring up to 1.0 cm.
> 4. Edema along the course of the MCL which otherwise appears to be intact. This is likely reactive, but a low-grade MCL sprain could have a similar appearance.
> 5. Moderate size joint effusion.

Ex. U, p. 210.

22. Claimant saw orthopedic surgeon John S. Woodward Jr., M.D. at OrthoOne on March 20, 2024. Claimant reported that she had left knee pain in the past and got a cortisone injection 2-3 months prior that did not help at all. Dr. Woodward noted that x-rays showed severe medial and patellofemoral osteoarthritis and an MRI showed severe advanced osteoarthritis with an intra-articular loose body and a degenerative medial meniscus. His assessments were primary osteoarthritis of the left knee and left knee pain. Dr. Woodward concluded that Claimant sustained a left knee osteoarthritic flare from the 2/13/2024 work injury. He discussed conservative treatment with Claimant but ultimately recommended that Claimant undergo a total knee replacement due to the severity of her osteoarthritis.

23. Claimant attended follow-up appointments at AFC on March 20, April 2, and April 10, 2024 with complaints of continued left knee pain. It was noted surgical repair for the meniscus and a total knee replacement was discussed, and the parties were awaiting an independent medical examination ("IME").

24. At the request of Respondents, Mark S. Failinger, M.D. performed an IME on May 1, 2024. Claimant reported to Dr. Failinger a history of "not very much" left knee pain,

despite some arthritis. Ex. Y, p. 289. Claimant reported that she underwent some knee injections every four months starting in 2023 to treat arthritic pain, but that no surgery was recommended and no other injections were performed. Claimant reported that the injections did not help her left knee pain and were not necessary for the pain. Claimant reported current 10/10 left knee pain, which at best decreased to 6-7/10 pain within the prior one to two weeks.

25. In addition to obtaining Claimant's history and performing a medical examination, Dr. Failinger performed a comprehensive review of records dated October 9, 2018 to May 1, 2024 including, but not limited to, the records of the medical visits and imaging the ALJ reviewed as exhibits and referenced in the above findings of fact. Dr. Failinger accurately detailed and summarized the medical records he reviewed in his IME report.

26. Dr. Failinger opined that, within a reasonable degree of medical probability, Claimant sustained a left knee strain with a low possibility of a contusion as a result of the February 13, 2024 work incident. He compared Claimant's 3/13/2024 left knee MRI to her 9/29/2019 MRI, noting that the former showed no evidence of any acute pathology created in the work incident. He noted that the bony edema seen on the 3/13/2024 MRI was similar to the edema noted on the 9/29/2019 MRI, with no evidence of severe anterior soft tissue edema consistent with a major contusion occurring. Dr. Failinger explained that the 3/13/2024 MRI findings were to be expected and represented the natural progression of Claimant's pre-existing degenerative left knee condition, as evidenced by the chondromalacia and severe loss of the medial meniscus with articular cartilage thinning and some far tibial plateau medial fracturing and articular loss on the 9/29/2019 MRI. He concluded that, based on review of the MRIs alone, one could not state with medical probability the February 13, 2024 created any new pathology.

27. In support of his conclusion, Dr. Failinger further discussed Claimant's documented history of pre-existing left knee symptoms and treatment, including complaints and treatment in the weeks leading up to the work injury. Dr. Failinger noted Claimant presented to the emergency room on January 29, 2024 with severe left knee pain that was most reasonably due to the presence of progressive osteoarthritis. He further noted Claimant saw PA Donnell on February 6, 2024 with 10/10 left knee pain and effusion consistent with continued breakdown of the articular cartilage. Regarding

Claimant's February 27, 2024 evaluation with PA Donnell, Dr. Failinger noted complaints of pain in the IT band area were new but would be consistent with a strain. He explained, however, Claimant's reported pain level improved to 8/10, indicating the work fall did not increase Claimant's pain nor worsen the pre-existing effusion. Dr. Failinger further explained that Claimant's MRI showed severe pre-existing medial compartment arthritis and medial meniscus degeneration, which was the most reasonable source of her pain.

28. Dr. Failinger opined that the work injury did not cause any permanent aggravation nor acceleration of Claimant's pre-existing condition and that her ongoing symptoms were the result of the natural history and waxing and waning course of her pre-existing degenerative joint disease. He opined that, at most, Claimant sustained a left knee strain due to the work injury.

29. Dr. Failinger noted that PRP injections, viscosupplementation injections and a total knee replacement would be reasonable and necessary treatment to treat Claimant's pre-existing severe and progressive degenerative joint disease, which he reiterated was not causally related to the work injury. Dr. Failinger opined Claimant was at maximum medical improvement ("MMI") for the work injury with no permanent impairment, noting strains generally resolve within six weeks.

30. On May 28, 2024, Gregory B. Cairns, Esq. entered his appearance as Claimant's counsel.

31. Claimant's authorized treating physician ("ATP") at AFC, Zeeshan Ahmad, M.D., reviewed Dr. Failinger's IME report. In a letter Dr. Ahmad signed on June 5, 2024, he agreed with Dr. Failinger's opinion that Claimant sustained a knee strain as a result of the work injury and reached MMI on or around March 26, 2024 with no permanent impairment.

32. On June 11, 2024, Insurer filed a Final Admission of Liability ("FAL") admitting to an MMI date of 3/26/2024 and no maintenance medical benefits or permanent impairment pursuant to Dr. Ahmad's June 5, 2025 letter. The FAL was addressed to Claimant and Claimant's then-counsel.

33. On June 12, 2024, Claimant's then-counsel filed an Application for Hearing ("AFH") on behalf of Claimant endorsing various issues including, among other things, medical benefits and temporary total disability benefits.

34. On July 9, 2024, Claimant's then-counsel also filed a Notice and Proposal and Application for a Division Independent Medical Examination ("DIME") on behalf of Claimant.

***Settlement***

35. On July 12, 2024, Claimant signed and executed a Workers' Compensation Claim(s) Settlement Agreement ("Settlement Agreement"). The Settlement Agreement specified, in relevant part:

> 1. Claimant sustained or alleges injuries or occupational diseases arising out of and in the course of employment with the employer on or about February 13, 2024, including but not limited to her left lower extremity. Other disabilities, impairments and conditions that may be the result of these injuries or diseases but that are not listed here are, nevertheless, intended by all parties to be included in and resolved FOREVER by this settlement.
>
> 2. In **full and final** settlement of all benefits, compensation, penalties and interest to which Claimant is or might be entitled to as a result of these alleged injuries or occupational diseases, Respondents agree to pay and Claimant agrees to accept the following sum of Four Thousand Five Hundred Dollars ($4,500.00), in addition to all benefits that have been previously paid to or on behalf of the Claimant…
>
> 3. As consideration for the amount paid under the terms of this settlement, Claimant rejects, waives, and forever gives up the right to claim all compensation and benefits to which Claimant might be entitled for each injury or occupational disease claimed here, including but not limited to the following, unless specifically provided otherwise in paragraph 9A of this agreement:
>
> . . .
>
> h. Medical, surgical, hospital, and all other health care benefits, including chiropractic care and mileage reimbursement incurred after the date of the approval of this settlement agreement by the Division

of Workers' Compensation or by an administrative law judge from the Office of Administrative Courts.

. . .

4. **The parties stipulate and agree that this claim will never be reopened except on the grounds of fraud or mutual mistake of material fact.**

. . .

6. Claimant realizes that there may be unknown injuries, conditions, diseases or disabilities as a consequence of these alleged injuries or occupational diseases, including the possibility of a worsening of the conditions. In return for the money paid or other consideration provided in this settlement, Claimant rejects, waives and FOREVER gives up the right to make any kind of claim for workers' compensation benefits against Respondents for any such unknown injuries, conditions, diseases, or disabilities resulting from the injuries or occupational diseases, whether or not admitted, that are the subject of this settlement. The Claimant and Respondents agree that this settlement, when approved by the Division of Workers' Compensation or by an administrative law judge from the Office of Administrative Courts, ends FOREVER the Claimant's right to receive any further workers' compensation money and benefits even if the Claimant later feels that Claimant made a mistake in settling this matter or later regrets having settled.

7. Claimant understands that **this is a final settlement** and that approval of this settlement by the Division of Workers' Compensation or by an administrative law judge from the Office of Administrative Courts dismisses this matter with prejudice and FOREVER closes all issues relating to this matter. Claimant is agreeing to this settlement of Claimant's own free will, without force, pressure, or coercion from anyone. Claimant is not relying upon any promises, guarantees, or predictions made by anyone as to

Claimant's physical or mental condition; the nature, extent and duration of the injuries or occupational diseases as to any other aspect of this matter.

. . .

9. A. The parties agree to each of these additional terms as part of this settlement:

(1) In entering into this settlement agreement, the parties have taken into account that the Claimant may need present and future medical care and that the settlement proceeds include consideration for present and future medical care. The parties agree that the Respondents will not be responsible for any medical care needed by the Claimant, even if Claimant's future medical expenses are greater than, equal to, or less than the amount of the settlement…

. . .

(3) The parties stipulate and agree that this claim will never be reopened except on the grounds of fraud or mutual mistake of material fact, pursuant to the provisions of § 8-43-303, C.R.S….

. . .

(5) It is the intent of the parties that paragraph 6 of this agreement shall end FOREVER claimant's right to receive any benefits under the Workers Compensation Act as it relates to claimant's medical condition including the right to reopen this claim. The parties stipulate and agree that any change in claimant's medical condition, including the discovery of a previously unknown injury, condition, disease, or disability as a consequence of these alleged injuries or occupational diseases, shall not constitute a mutual mistake of material fact justifying reopening of the claim.

Ex. G, pp. 42-44.

36. Claimant was represented by her then-counsel when she entered into the Settlement Agreement. On July 12, 2024, Claimant also signed a Division of Workers' Compensation ("DOWC") Choice of Settlement Advisement form in which she selected

the option, “I have been advised of my rights by my attorney regarding settlement and am requesting immediate approval of the settlement agreement.” Id. at 47.

37. The Director of the DOWC approved the settlement by order dated July 17, 2024.

***Post-Settlement***

38. Claimant continued to seek treatment for her left knee subsequent to the settlement. On August 28, 2024, Claimant underwent a left knee arthroscopy with partial medial meniscectomy performed by Jessica L. Churchill, M.D. at Denver Health.

39. On September 9, 2024 Dr. Churchill issued a letter stating,

> It is my medical opinion that [Claimant] had significant disability from her left knee. She had many months of pain and suffering that could have likely been avoided by timely surgery. She should not have had to wait for treatment of her knee. She is now recovering from surgery in my care…

Ex. T, p. 116.

40. Dr. Churchill issued another letter dated October 7, 2024 stating, “It is my opinion that [Claimant] needs an updated IME or functional assessment exam from after her left knee surgery. Assessments from prior to her surgery are likely inaccurate. We will attempt to set up an evaluation here at Denver Health for her…” Id. at p. 115.

41. On December 13, 2024, Claimant filed an AFH on her own behalf endorsing the issues of medical benefits and average weekly wage.

42. On December 9, 2024, Claimant attended a follow-up evaluation with Ranee M. Shenoi, M.D. at a physical medicine and rehabilitation outpatient clinic. Claimant reported that she sustained a work injury to her left knee on February 13, 2024, that she felt she was not treated well, and that she wanted to reopen her settled case. Dr. Shenoi noted that Claimant believed workers’ compensation should have covered her surgery and continued temporary disability benefits. Claimant reported 3/10 left knee pain and swelling. Dr. Shenoi advised Claimant to file with the DOWC to see if she can get a DIME to reinstate the case. Dr. Shenoi wrote,

> I do not believe patient is at MMI. The L medial meniscus injury is a separate injury from OA and it should be treated separately under Work Comp. I have given a patient a copy of this clinic note to file with her papers. Also, patient's

> current L knee ROM and the fact that she underwent medial meniscectomy warrants a permanent impairment rating using AMA Guides to Evaluation of Permanent Impairment, 3rd ed revised.

Ex. 2.

43. On December 26, 2024, the DOWC issued an order granting Mr. Cairns' motion to withdraw as Claimant's counsel.

44. Dr. Churchill authored another letter dated April 7, 2025 in which she stated, "It is my medical opinion that [Claimant] should not have see [sic] her initial IME physician. There is a clear bias, and she was very unhappy with how she was treated." Ex. T, p. 103. Dr. Churchill further referenced Dr. Shenoi's opinion from her December 9, 2024 evaluation of Claimant.

45. An April 7, 2025 physical therapy record notes Claimant was concerned about the increased varus alignment of her left knee, which Claimant attributed to the prolonged duration between her work injury and surgery.

46. On April 28, 2025, Dr. Churchill issued another letter stating,

> It is my professional opinion that [Claimant's] initial IME is medically incorrect at best and fraudulent at worst. It is ridded with inaccuracies about her and her condition. As the physician treating her meniscus tear, I can confirm that it was likely worsened by her activity between time of injury and her surgery.

Ex. 1.

47. Claimant testified at hearing to her dissatisfaction with the workers' compensation system, treatment from her workers' compensation providers, Dr. Failinger's IME, and the perceived demeanor of Respondents' counsel and adjuster.

48. Claimant testified that she was aware Dr. Woodward recommended surgery, but that she told Respondents' counsel she was not going to undergo a knee replacement because she felt that she just needed a meniscus repair. Claimant testified that she did not understand why Respondents just continued to send her to AFC without giving her the meniscectomy. Claimant testified to her belief that the repeated follow-ups at AFC

and Dr. Failinger's IME delayed her treatment and ultimately worsened her condition. Claimant testified to her understanding that her torn meniscus and need for surgery was caused by the work injury and had nothing to do with her pre-existing arthritis.

49. Claimant testified that she felt Dr. Failinger did not treat her like her personal doctors treated her. She testified that Dr. Failinger incorrectly documented her weight and height in his IME report. Claimant testified that she was communicating with Respondents' counsel and adjuster throughout the claim and felt they just had "one thing after another" for her to do and then suddenly her benefits stopped. She testified to her perception that Respondents' counsel was "mean." She testified that she did not know why Respondents' counsel and adjuster were not more helpful.

50. Claimant testified she had legal representation when she entered into the settlement, and that she chose to settle her claim. She testified that, around the time of the work injury and settlement, she was taking care of her ailing 97-year-old mother and subsequently making burial arrangements, she could have lost her house, and had "so many things going on" and that she "just did not see clearly at all." Claimant testified that she was tired and discouraged by the entire process and that she feels her claim should have been handled differently.

51. Claimant further that she got "fed up" and used her own insurance to pay for her left knee surgery. She testified that she has experienced some improvement and continues to undergo physical therapy for her left knee, which she states is now crooked. Claimant denied that, prior to the work injury, she received 8-9 left knee injections or told her doctor that she wanted to avoid left knee surgery.

52. Dr. Failinger credibly testified at hearing on behalf of Respondents. Dr. Failinger testified as an expert in orthopedic surgery. Dr. Failinger testified consistent with his IME report. Dr. Failinger testified that Claimant has a long history of left knee symptoms and injections leading up to the work injury. He testified that he reviewed the September 2019 and March 2024 MRI films, which showed the natural progression of Claimant's preexisting arthritic changes, as well as the natural progression of her preexisting complex medial meniscus tear. He testified that the March 2024 MRI showed no evidence of a new acute meniscus tear. Dr. Failinger testified that, within a reasonable degree of

medical probability, the source of Claimant's pain was her preexisting severe arthritis and not the preexisting torn meniscus.

53. Dr. Failinger explained there is no evidence that the work injury was the source of Claimant's new pain and dysfunction, as on February 6, 2024, Claimant reported 10/10 pain and later reported to Dr. Woodward that the injection she received that day did not help her pain. Dr. Failinger testified that the March 2024 MRI did not show any worsening effusion, instead showing the same effusion noted at the February 6, 2024 evaluation. Dr. Failinger testified that Claimant's medial meniscus tear was complex and macerated, which refers to a degenerative process that takes place over time. He explained that complex and macerate Dr. Failinger testified that, on imaging, Claimant's meniscus had the classic appearance of a meniscus that has been degenerating over the course of many years. He explained that the March 2024 MRI did not show any acute tear or worsening pathology resulting from the work injury.

54. Dr. Failinger testified that Claimant's need for a total knee replacement or medial meniscus surgery was not causally related to the work injury.

55. Dr. Failinger further testified that he did not make any mistake with regard to his opinion, nor was he aware of any mistake regarding any fact that the parties mutually believed at the time. Dr. Failinger testified he did not intentionally mispresent anything regarding Claimant's condition or claim, nor did he conspire with anyone to reach a specific opinion regarding Claimant's condition. He explained that his opinions were his own and that he continues to have the same opinion regarding Claimant's condition and need for treatment.

## Conclusions of Law

### *Generally*

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

facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

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

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

***Reopening a Settlement***

A settlement agreement may only be reopened upon a showing of fraud or mutual mistake of material fact. §8-43-204(1) and Section 8-43-303(2)(a) & (b) C.R.S. The party attempting to reopen the issue or claim bears the burden of proof. §8-43-303(4), C.R.S.

Here Claimant entered into a full and final settlement of her claim, approved by the DOWC on July 17, 2024. Multiple provisions of the Settlement Agreement clearly state

that the settlement is a full and final settlement that will forever resolve all issues relating to Claimant's February 13, 2024 work injury, and that the settlement will never be reopened except on the grounds of fraud or mutual mistake of material fact. Claimant was represented by counsel at the time of the settlement and signed the Settlement Agreement and the Choice of Settlement Advisement form affirming that her attorney advised her of her settlement rights. Accordingly, fraud or mutual mistake of material fact are the only grounds upon which Claimant may reopen her settlement.

To prove fraud, it must be shown that (1) the party misrepresented or concealed a material existing fact that in equity and good conscience should be disclosed; (2) the party knew they were making a false representation or concealing a material fact; (3) the other party was ignorant of the existence of the true facts; (4) the party making the representation or concealing a fact did so with the intent to induce action on the part of the other party; and (5) the misrepresentation or concealment caused damage to the other party. *See Valdez v. Alstom Inc.*, WC 4-784-196-002 (ICAO), Dec. 30, 2021), citing *Morrison v. Goodspeed*, 60 P.2d 458 (Colo. 1937); *Ingels v. Ingels*, 487 P.2d 812, 815 (Colo. App. 1971); *Beeson v. Albertson's, Inc*., W.C. No. 3-968-056 (April 30, 1996); *see also Tygrett v. Denver Water*, WC 4-979-139-002 (ICAO, Dec. 7, 2021). To succeed on a claim for fraudulent concealment or nondisclosure, a party must show the other party had a duty to disclose material information. *Poly Trucking, Inc. v. Concentra Health Servs., Inc*., 93 P.3d 561, 563–64 (Colo. App. 2004).

When a party seeks to reopen based on mistake, the ALJ must determine "whether a mistake was made, and if so, whether it was the type of mistake which justifies reopening." *Travelers Insurance Co. v. Indus. Comm'n*, 646 P.2d 399, 400 (Colo. App. 1981). When determining whether a mistake justifies reopening, the ALJ may consider whether it could have been avoided through the exercise of available remedies and due diligence, including the timely presentation of evidence. *See Klosterman v. Indus. Comm'n*, 694 P.2d 873 (Colo. App. 1984).

The doctrine of mutual mistake has three primary criteria. *England v. Propane*, 395 P.3d 766, 771 (Colo. 2017). First, the mistake must be mutual, meaning "both parties must share the same factual misconception." *Cary v. Chevron*, 867 P.2d 117, 118 (Colo.

App. 1993). Second, the mistaken fact must be material, meaning that it is a fact that goes to "the very basis of the contract." *England*, 395 P.3d at 771. A material fact is one which relates to a basic assumption on which the contract was made. *In re Claim of Matus*, WC 4-740-062-01 (ICAO, Mar. 20, 2018). Third, the mistaken fact must be a past or present existing one, as opposed to a fact that develops in the future. *England*, 395 P.3d at 771; s*ee Malloy v. City Market*, WC 5-052-617-006 (ICAO, May 25, 2022) (ALJ properly determined that the doctor's failure to provide an impairment rating for the claimant's lumbar spine constituted a mistake under §8-43-303(1), C.R.S.).

Claimant failed to meet her burden to prove her settlement should be reopened due to fraud or mutual mistake of material fact. The ALJ acknowledges Claimant is dissatisfied with the workers' compensation system, the treatment she received by workers' compensation providers, and her interactions with Dr. Failinger, Respondents' counsel, and the adjuster on the claim. Claimant took issue with the demeanor of Dr. Failinger and Respondents' counsel, Dr. Failinger's IME opinion, and generally feels Respondents' counsel and adjuster were unhelpful and that her claim should have been handled differently. Claimant's stated dissatisfaction with the workers' compensation system and the outcome of her claim, as well as her stated grievances with providers, Dr. Failinger, Respondents' counsel and the adjuster are not grounds to reopen her settlement nor do they otherwise not constitute fraud or mutual mistake of material fact.

The crux of Claimant's argument is that her left medial meniscus tear, surgery and treatment were causally related to the February 13, 2024, work injury and should have been covered under workers' compensation. The ALJ reiterates that, because this is a settled claim, Claimant's request to reopen her settlement is not an opportunity to simply relitigate the relatedness of Claimant's left knee condition and need for treatment. Prior to settlement, Claimant had the opportunity to, and did, object to the FAL and seek a DIME. Shortly thereafter Claimant elected to settle her claim, forever resolving any related issues pursuant to the terms of the settlement agreement, unless reopened on the grounds of fraud or mutual mistake of material fact. Here, fraud refers to the intentional misrepresentation of material facts by Respondents that inducted the settlement, and mutual mistake refers to a material fact of which both Claimant and Respondents were mistaken that related to a basic assumption on which the settlement was made.

Claimant relies on the opinions of her personal physicians Drs. Churchill and Shenoi, who have provided treatment to Claimant's left knee subsequent to the settlement. Dr. Shenoi's opinion is limited to her statements in a 12/9/2024 medical record in which she opined that Claimant's medial meniscus injury is separate from osteoarthritis and should be treated under workers' compensation, and that Claimant is not at MMI and would warrant a permanent impairment rating. Dr. Shenoi provided no further explanation or specifics regarding her opinions, nor any causation analysis. Dr. Shenoi does not point to any potentially misrepresented or concealed material fact or mutually shared factual misconception.

While Dr. Churchill opined that Dr. Failinger's IME was "medically incorrect at best, and fraudulent at worst" and "riddled with inaccuracies," again no specifics, further explanation, or causation analysis is provided. Simply referring to Dr. Failinger's IME as medically incorrect, inaccurate, or "fraudulent" and having a different opinion is not sufficient evidence of actual fraud or a mutual mistake of material fact on the part of Respondents. Dr. Churchill does not specify any of the alleged inaccuracies in the IME or provide any specifics upon which she bases her claims that Dr. Failinger was biased and his IME "fraudulent." That Claimant was unhappy with her interaction with Dr. Failinger and his opinion does not establish fraud, nor does the fact Dr. Failinger came to a different conclusion than Drs. Churchill and Shenoi regarding Claimant's condition and need for treatment as related to the work injury. Dr. Churchill's opinion that Claimant should have underwent the meniscectomy earlier under workers' compensation also is not evidence of fraud or mutual mistake of material fact.

Dr. Failinger clearly addressed Claimant's left knee condition, including the medial meniscus tear, and need for potential treatment in his IME report, providing a detailed records review and thorough analysis and explanation regarding his opinions. This was all available to Claimant and known at the time of settlement. Dr. Failinger credibly testified his opinions are his own and that he did not intentionally mispresent or conceal anything, nor conspire with Respondents to do so. That Dr. Failinger may have incorrectly documented Claimant's height and weight in his report does not rise to the level of a misrepresentation of material fact demonstrating fraud.

The record is replete with evidence supporting Dr. Failinger's opinion, which ATP Dr. Ahmad also shared. Claimant's medical records clearly demonstrate Claimant has a history of chronic, preexisting, severe osteoarthritis and a degenerative medial meniscus tear, as confirmed by a September 2019 MRI. Potential operative treatment for Claimant's left knee, including a meniscectomy, is referenced in Claimant's medical records dating back to October 2019 and in records thereafter. Multiple records note Claimant wanted to avoid surgery. Claimant consistently sought left knee treatment from 2019-2024, reporting 8-10/10 pain and undergoing at least nine cortisone injections to her left knee during such time period, including an injection on February 6, 2024, just one week prior to the work injury. When PA Donnell reevaluated Claimant on February 27, 2024, Claimant reported 8/10 pain and effusion was noted to be very minimal, compared to documented moderate effusion on February 6, 2024 with 10/10 pain. Claimant's March 2024 MRI showed the progression of a complex, macerated medial meniscus tear, which was present dating back to September 2019.

Dr. Failinger's findings and opinions are not automatically rendered misrepresentations, concealments, or mistakes of material fact solely because there are different medical opinions. Here, the evidence offered merely demonstrates a difference of opinion. No evidence was offered as to any actual mutual mistake of material fact or any material fact that was misrepresented or concealed by Respondents, let alone done intentionally.

Based on the totality of the evidence, Claimant failed to prove it is more probably true than not her settlement should be reopened on the grounds of fraud or mutual mistake of material fact. The credible and persuasive evidence does not establish Respondents knowingly misrepresented or concealed a material fact that should be disclosed with the intent to induce action on the part of Claimant. The credible and persuasive evidence also does not establish that both parties shared the same material factual misconception relating to Claimant's condition, claim or the settlement.

## Order

It is therefore ordered that:

1. Claimant's request to reopen her settlement is denied and dismissed.

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

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

Dated: July 31, 2025

Kara R. Cayce
Administrative Law Judge

| | |
|---|---|
| **State of Colorado**<br>**Office of Administrative Courts**<br>1525 Sherman Street, 4th Floor, Denver, CO 80203 | |
| In the Matter of the Workers' Compensation Claim of:<br>[redacted]<br><br>vs.<br>**North Metro Fire Rescue District**<br>Employer, and<br><br>**Special Districts Property & Liability Pool c/o Sedgwick Claims Management Services, Inc.,**<br>Insurer, Respondents. | ▲ **COURT USE ONLY** ▲<br><br>**CASE NUMBER:**<br><br>**WC No. 5-223-897-003** |

**Findings of Fact, Conclusions of Law and Order**

**If you need screen-reader-friendly version of this document, please contact the OAC through one of the following options:**

Form: ADA Accommodation and Accessible Document Request

Email: dpa_oac-dvr@state.co.us

Telephone: 303-866-2000

Administrative Law Judge Peter J. Cannici presided at the hearing in this matter on June 26, 2025 through Google Meet video conferencing. Jesselyn Zailic, Esq. represented Claimant [redacted] Gregory K. Chambers, Esq. represented Respondents North Metro Fire Rescue District and Special Districts Property & Liability Pool c/o Sedgwick Claims Management Services, Inc. The ALJ digitally recorded the proceedings from approximately 1:30 pm until 2:10 p.m. He admitted Claimant's Exhibits 1-6 and Respondents' Exhibits A-N into evidence. He held the record open until July 28, 2025 so the parties could submit position statements.

In this order, [redacted] will be referred to as "Claimant," North Metro Fire Rescue District will be referred to as "Employer" and Special Districts Property & Liability Pool c/o

Sedgwick Claims Management Services, Inc. will be referred to as “Insurer.” Employer and Insurer will be referred to collectively as “Respondents.”

Also in this order, “Judge” refers to the Administrative Law Judge, “C.R.S.” refers to Colorado Revised Statutes (2024); “OACRP” refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and “WCRP” refers to Workers’ Compensation Rules of Procedure, 7 CCR 1101-3.

**Certificate of Service**

I hereby certify that I have served true and correct copies of the foregoing **Findings of Fact, Conclusions of Law and Order** by U.S. Mail, or by e-mail addressed as follows:

Jesselyn Zailic, Esq.
jzailac@burgsimpson.com

Gregory K. Chambers, Esq.
gchambers@dnvrlaw.com

Division of Workers' Compensation-by e-mail

Date: 7/31/2025

/s/ Scott Drew
Court Clerk

## Issue

Whether Claimant has presented substantial evidence to support a determination that he is entitled to a general award of medical maintenance benefits for his December 31, 2022 Marshall Fire exposure.

## Stipulation

Claimant's current medication is reasonable and necessary to treat his pulmonary condition.

## Findings of Fact

1. Claimant was employed by Employer as a paramedic and firefighter. He typically worked 48-hour shifts followed by 96 hours off. At the time of his admitted injury, he had been working as a firefighter for five years and had not had any concerning smoke exposure until he was working on the Marshall Fire on December 31, 2021.

2. On December 31, 2021 Claimant was called into work because of the Marshall Fire. He reported to his station at the Rocky Mountain Metropolitan Airport. Upon arrival, a fire engine that had been deployed to assist with the Marshall Fire returned to the station. Claimant assisted in treating the firefighters who had been on the front line and helped clean the engine.

3. Around midnight, Claimant and his crew were called to the front line of the fire. They were assigned to a house that was partially burned and collapsed. The crew watched the house and continually extinguished the fire as it reignited.

4. During his time on the front line, Claimant was not wearing respiratory protection.

The entire supply had been exhausted during the initial phases of the fire. Claimant worked from 3:00 p.m. on December 31, 2021 until approximately noon the following day.

5. Several days later, sometime between January 4-9, 2022, Claimant went skiing and experienced shortness of breath. He later testified this was the first time he had exerted himself since the Marshall Fire.

6. Claimant initially went to Urgent Care at National Jewish Health and was referred to their pulmonology department. On January 20, 2022 he visited Homi Kapadia, M.D. Claimant reported a longstanding feeling of decreased respiratory function and the recent onset of upper respiratory infection symptoms following the Marshall Fire.

7. Claimant has continued to receive treatment at National Jewish Health. He was diagnosed with a smoke inhalation injury and asthma. He had not previously been diagnosed with asthma. Claimant received medications that included Trelegy, Singular, and a rescue inhaler.

8. On December 15, 2022 Respondents filed a General Admission of Liability (GAL). Respondents acknowledged that on December 31, 2021 Claimant suffered a work injury.

9. Prior to his injury, Claimant had undergone several pulmonary function tests. A pulmonary function test (PFT) involves expiration into a device called a spirometer. Several parameters are measured during the test, including FVC, FEV1, and FEV1/FVC. FVC stands for forced vital capacity. The test measures the amount of air expelled from the lungs during a complete exhalation following a deep breath. FEV1 is the forced expiratory volume in one second. The test measures the volume of air expelled in the first second of the exhalation process during the same maneuver used to measure FVC. Finally, FEV1/FVC is the ratio of the volume of air expelled in the first second (FEV1) to the total volume expelled during the entire breath (FVC).

10. On April 5, 2018, several years prior to Claimant's date of injury, he underwent a PFT as part of his employment. The FEV1/FVC ratio was 70.5%. Evaluating physician Sander

Orent, M.D. noted that Claimant had "some mild reactive airway" and recommended an albuterol inhaler if he got "a lung full of smoke, for self-rescue, or if you develop a respiratory infection or if you are going to exercise in cold weather." This would qualify for a class 1 impairment under Table 8, page 125, of the AMA Guides to the Evaluation Permanent Impairment, Third Edition Revised (*AMA Guides*).

11. Claimant again underwent a PFT as part of an employment physical on April 6, 2019. The PFT showed Claimant's FEV1 value was 4.61 liters. It showed a FEV1/FVC ratio of 67.7% that was somewhat worse from the prior year. The results would qualify for a class 2 impairment under Table 8 of the *AMA Guides*.

12. Claimant underwent another PFT on December 9, 2021 or just a few weeks before his date of injury. The PFT showed a FEV1/FVC of 56% that would correspond with a class 3 impairment under Table 8 of the *AMA Guides*.

13. On March 9, 2022 Claimant visited Authorized Treating Physician (ATP) David M. Ferraro, M.D. at National Jewish Health for an examination. Dr. Ferraro noted that Claimant was initially seen in January, 2022 for symptoms consistent with asthma exacerbation after fighting the Marshall Fire in December 2021. He determined that Claimant

> has a confirmed diagnosis of asthma, based both on a positive methacholine challenge and obstruction with positive bronchodilator response on PFTs. After resolution of his recent exacerbation, he is now back at his baseline and has no concerns today.

14. On March 17, 2022 ATP Margaret Irish, M.D. concluded that Claimant had reached Maximum Medical improvement (MMI). She commented that Claimant requires follow-up at National Jewish Hospital in three months and then annually. Dr. Irish did not mention any continuing medications.

15. On July 26, 2022 Douglas C. Scott, M.D. conducted a records review of Claimant's condition. He diagnosed Claimant with a temporary exacerbation of his asthma

condition caused by the Marshall Fire. However, Claimant returned to his baseline condition by March 9, 2022. In addressing Claimant's Trelegy prescription, Dr. Scott explained that the medication may be reasonable and necessary for Claimant's pre-existing asthmatic condition, but his need for Trelegy was not causally related to the effects of the December 31, 2021 Marshall Fire exposure.

16. On December 4, 2022 Claimant underwent a permanent impairment evaluation with ATP Annyce Mayer, M.D. Dr. Mayer noted that Claimant had no history of asthma, had been on high-dose Trelegy since July and had essentially reported the resolution of all symptoms. Claimant was also working full duty. Although Claimant had been using his inhaler once a week or less, his asthma had not kept him from completing tasks at work and home. He had not recently experienced any shortness of breath and had not had any sleep disruption from his asthma in the past four weeks. Dr. Mayer summarized that Claimant was "back to his former physical activities without limitation." She concluded that Claimant had reached MMI and suffered a 25% whole person impairment as a result of his asthma. Dr. Mayer echoed Dr. Irish's recommendation for medical maintenance benefits.

17. Respondents challenged Dr. Mayer's determinations and sought a Division Independent Medical Examination (DIME). In the meantime, Respondents obtained an Independent Medical Examination (IME) with Jeffrey Schwartz, M.D. on February 27, 2023. At the IME, Claimant underwent a PFT that showed an FEV1/FVC value of 70%. Claimant's FEV1 value was 5.26 liters, which was an improvement from the April 2019 PFT. Dr. Schwartz also considered Claimant's history and reviewed his medical records.

18. Dr. Schwartz reasoned the symptoms following the Marshall Fire were likely due to bacterial sinusitis rather than smoke exposure. He considered the nature of Claimant's symptoms and lack of immediate respiratory issues following the fire. Dr. Schwartz commented that the PFTs from 2018 and 2019 showed evidence of airflow obstruction suggesting undiagnosed asthma. He pointed out that the asthma was preexisting and not caused by the Marshall Fire. Claimant's symptoms constituted an exacerbation rather than a new onset.

19. Claimant underwent the DIME with Michael A. Volz, M.D. on May 20, 2023.

Claimant reported he was feeling better than the last few years now that he was taking Trelegy. Dr. Volz reviewed Claimant's history, including the prior PFTs. He commented that the "evolving reduction in lung function tests prior to the [date of injury] would suggest the pre-existing state was slowly worsening" and the manifestations would have occurred at some time. Dr. Volz determined Claimant developed acute bronchitis following the date of injury and the condition resolved once he began taking Trelegy. He thus reasoned that Claimant reached MMI on February 27, 2023 or the date of his highest lung function testing. He determined Claimant had a 10% whole-person impairment. However, apportionment was appropriate because Claimant's impairment prior to the Marshall Fire would have been 30%. There was thus no objectively measurable information to support permanent impairment. Dr. Volz explained that Claimant requires Albuterol as needed. However, because the lung function tests were suboptimal prior to the date of injury, Claimant required Trelegy or a similar medication. However, he reasoned that "since finally returning to an optimal state as demonstrated by the lung function tests in February 2023, the ongoing need for this type of medication has not been objectively established for this Claimant in terms of the lung function tests."

20. On December 13, 2023 Dr. Volz testified through an evidentiary deposition. He discussed his DIME and Claimant's progression from a class 1 pulmonary impairment in 2018 to a class 3 pulmonary impairment in December 2021 based on Claimant's PFTs. Regarding the February 27, 2023 PFT, Dr. Volz noted that Claimant's condition had improved to the point where he would have warranted a class 2 impairment. He did not conduct further pulmonary function testing because post-injury PFTs showed improvement.

21. Dr. Volz referred to a Lifescan Wellness report from January 16, 2023 confirming Claimant had no ongoing respiratory symptoms close to reaching MMI. However, Dr. Volz noted that Claimant's medications could be masking an underlying permanent worsening of his pre-existing asthma, and the degree to which it would have worsened was impossible to determine without ceasing the treatment. Furthermore, to the extent any permanent worsening existed, Dr. Volz expressed uncertainty as to whether it would have been due to the natural course of Claimant's pre-existing lung condition or there was a component of permanent aggravation from the Marshall Fire incident. Nevertheless, by using Trelegy, Claimant's lung function was better than it had been prior to the exposure. Dr. Volz thus concluded that Claimant had a 10%

whole person pulmonary impairment, but none of it was attributable to his December 31, 2021 Marshall Fire injury.

22. Dr. Volz clarified that he assigned an un-apportioned 10% impairment rating for Claimant's respiratory condition. However, the final combined impairment rating was 0% because Claimant's impairment prior to the Marshall Fire would have been 30%. Dr. Volz commented that there was at least a reasonable degree of medical probability that the worsening of Claimant's respiratory condition was due, at least in part, to the natural progression of his worsening asthma condition. He detailed that "the evolving reduction in lung function tests prior to the date of injury would suggest the preexisting state of slowly worsening and can be argued that manifestations within a reasonable degree of medical probability would have occurred sometime" regardless of whether it was related to a work event. It was reasonably probable that Claimant's underlying respiratory condition prior to his Marshall Fire exposure would have continued to worsen.

23. On June 27, 2024 ALJ Stephen J. Abbott issued Findings of Fact, Conclusions of Law and Order (FFCL) in this matter. He concluded that Claimant had not proven by clear and convincing evidence that DIME Dr. Volz erred in assigning Claimant a 0% whole person impairment for the December 31, 2021 injury. Dr. Volz relied on the progressively worsening PFTs, including those from 2018, 2019, and 2021. Claimant's improved pulmonary function following treatment for the injury revealed a level of function better than prior to the date of injury. Therefore, any residual pulmonary impairment was not the result of the December 31, 2021 injury. ALJ Abbott did not consider the issue of medical maintenance benefits.

24. ALJ Abbott found that Dr. Volz' opinion regarding Claimant's impairment was that Claimant suffered a 10% whole person pulmonary impairment, but none of the rating was attributable to Claimant's December 31, 2021 injury. He clarified that, notwithstanding Dr. Volz' use of the apportionment worksheet as part of the DIME, Dr. Volz' opinion was that Claimant's permanent impairment arising from the December 31, 2021 injury was 0%. Moreover, ALJ Abbott remarked that Claimant argued he required Trelegy as part of his maintenance care based on a new impairment that he sustained in the December 31, 2021 Marshall Fire exposure. However, ALJ Abbott noted that, as determined by Dr. Volz, Claimant likely needed

Trelegy even prior to his date of injury.

25. Claimant appealed ALJ Abbott's FFCL to the Industrial Claim Appeals Office (ICAO). The ICAO affirmed the FFCL and noted that "substantial evidence supports the ALJ's factual finding that the claimant did not prove by clear and convincing evidence that Dr. Volz' opinion was highly probably incorrect in his ultimate determination that the claimant suffered no additional permanent impairment as a result of his work incident."

26. On January 28, 2025 Respondents filed a Final Admission of Liability (FAL). Respondents noted that Claimant had reached MMI on March 27, 2022 with no permanent impairment. Respondents did not admit to medical maintenance care after MMI.

27. Dr. Schwartz testified at the hearing in this matter. He affirmed his previous testimony from the March 27, 2024 hearing and reviewed pulmonary function tests from before and after the Marshall Fire. Dr. Schwartz remarked that there was no objective worsening of Claimant's pulmonary function after the Marshall Fire exposure. He explained that Claimant's need for asthma medication, including Trelegy, was present before the incident. Dr. Schwartz concluded that the exposure did not cause the continuing need for asthma medications. He explained that Dr. Volz's DIME opinion regarding maintenance care supported his opinion that Claimant's current condition was unrelated to the work incident. Specifically, Dr. Volz had determined Claimant required Trelegy prior to the Marshall Fire, and the event was not the cause of his need for the medication.

28. Dr. Schwartz detailed that, in comparing the FEV1/FEV from the December 9, 2021 PFT with the February 18, 2022 prebronchodilator PFT, the 56% ratio was identical. In determining whether the Marshall Fire incident caused any permanent worsening of Claimant's pulmonary function, the ratio in the two PFTs was critically important:

> Well, it is critically important because that ratio is a measure of airflow obstruction. Asthma is a condition of variable airflow obstruction. So, to get a quick and accurate measure of airflow obstruction, we look at that ratio. So, his ratio, which normally for an individual without asthma would be 70 percent or above, his ratio on December 9, 2021, was 56 percent,

> would show moderate or moderately severe airflow obstruction. And as we looked at briefly in February 2022, a few months after this December study when he was untreated, his airflow obstruction measured remarkably and exactly the same at 56 percent ratio.

After considering the two ratios, Dr. Schwartz concluded that there was no objective measurement of worsening of pulmonary function because of the Marshall Fire exposure on December 31, 2021.

29. Dr. Schwartz explained that Trelegy is an inhaled medication for asthma that contains three medications including two long-acting bronchodilators and an inhaled corticosteroid. He testified that, if Claimant was on Trelegy prior to the Marshall Fire, he would have experienced improvement in his airflow obstruction that would have been substantially similar to the improvement he had after the exposure. He also reviewed Dr. Volz' maintenance recommendations from his DIME report. In response to the question as to whether Dr. Volz' statement supported his opinion about whether the Marshall Fire was the cause of Claimant's need for Trelegy, Dr. Schwartz responded that

> [Dr. Volz] is saying "then" in reference to before the Marshall fire, the date of the injury, as well as, of course, now or post-date of injury, that Trelegy would be an effective medication for him.

Dr. Schwartz summarized that Claimant's need for continuing medications to control his asthma was not the result of the Marshall Fire exposure.

30. Claimant has failed to present substantial evidence to support a determination that he is entitled to a general award of medical maintenance benefits for his December 31, 2022 Marshall Fire exposure. Initially, on December 31, 2021 Claimant was involved in fighting the Marshall Fire. Several days later, sometime between January 4-9, 2022, Claimant went skiing and experienced shortness of breath. He sought treatment at National Jewish Health for his respiratory symptoms. Claimant was diagnosed with a smoke inhalation injury and asthma.

31. Prior to the Marshall Fire, Claimant had undergone PFT testing that revealed

progressive worsening of respiratory function from 2018- 2021. Notably, the PFT from April 6, 2019 revealed a FEV1/FVC ratio of 67.7% that corresponded with a class 2 impairment. The PFT from December 9, 2021 showed a substantially reduced FEV1 with an FEV1/FVC ratio of 56% that would correspond with a class 3 impairment on Table 8.

32. On March 17, 2022 ATP Dr. Irish concluded that Claimant had reached MMI for his Marshall Fire exposure. She commented that Claimant requires follow-up at National Jewish Health in three months and then annually. Notably, Dr. Irish did not mention any continuing medications. Similarly, on December 4, 2022 ATP Dr. Mayer noted that Claimant had no history of asthma, had been on high-dose Trelegy since July and had essentially reported the resolution of all symptoms. She concluded that Claimant had reached MMI and suffered a 25% whole person impairment because of his exposure. Dr. Mayer echoed Dr. Irish's recommendation for medical maintenance benefits.

33. Claimant subsequently underwent a DIME with Dr. Volz. He determined that Claimant's pulmonary function was progressively declining beginning in 2018. Notably, as of December 2021, or prior to the exposure, Claimant's pulmonary function was worse than it was when he reached MMI. Claimant's pulmonary function following treatment had improved from prior to the date of injury. Therefore, any residual pulmonary impairment would not be the result of the December 31, 2021 injury. Dr. Volz reasoned that Claimant suffered a 10% whole person pulmonary impairment, but none of the rating was attributable to his occupational injury. He thus concluded that Claimant suffered a 0% permanent impairment. Dr. Volz commented that there was at least a reasonable degree of medical probability that the worsening of Claimant's respiratory condition was due, at least in part, to the natural progression of his worsening asthma condition. He detailed that "the evolving reduction in lung function tests prior to the date of injury would suggest the preexisting state of slowly worsening and can be argued that manifestations within a reasonable degree of medical probability would have occurred sometime" regardless of whether it was related to a work event. Importantly, Dr. Volz noted that Claimant likely needed Trelegy prior to his date of injury. Based on Dr. Volz' DIME report, Respondents filed a FAL providing that Claimant reached MMI on March 27, 2022 with no impairment. Respondents did not admit to medical maintenance care after MMI.

34. Similarly, Dr. Schwartz remarked that there was no objective worsening of Claimant's pulmonary function after the Marshall Fire exposure. He explained that Claimant's need for asthma medication, including Trelegy, was present before the Marshall Fire. Dr. Schwartz concluded that the exposure did not cause the continuing need for asthma medications. He explained that Dr. Volz' DIME opinion regarding maintenance care supported his opinion that Claimant's current condition was unrelated to the work incident. Dr. Volz summarized that Claimant required Trelegy prior to the Marshall Fire, and the event was not the cause of his need for the medication.

35. Although Claimant now contends he is entitled to medical maintenance benefits because of his Marshall Fire exposure, the record demonstrates that the incident only caused a temporary exacerbation of his pre-existing asthma condition that has resolved. Because of the resolution in symptoms, any need for medical maintenance benefits is no longer causally related to the incident. Notably, the opinions of both DIME Dr. Volz and Dr. Schwartz that Claimant has a 0% impairment rating because of the Marshall Fire is compelling. Both physicians have determined that the Marshall Fire exposure did not cause any permanent worsening of Claimant's underlying respiratory condition. Therefore, any continuing treatment that Claimant requires is solely the result of his preexisting respiratory condition.

36. Although Claimant asserts that he requires medical maintenance treatment for his asthma, the record reveals he has returned to his baseline respiratory condition after the exacerbation of his symptoms from the December 31, 2021 Marshall Fire exposure. Notably, ATPs Dr. Irish and Dr. Mayer only noted that Claimant requires follow-up at National Jewish Hospital in three months and then annually. However, they did not mention any continuing medications. The preceding recommendation is insufficient to support a continuing award of medical maintenance benefits because of the persuasive medical opinions demonstrating that Claimant's symptoms caused by the exposure have resolved. Notably, both Dr. Ferraro and Dr. Scott commented that Claimant suffered a temporary exacerbation of his asthma condition caused by the Marshall Fire that returned to baseline by March 9, 2022. Furthermore, Dr. Scott explained that Claimant's Trelegy prescription may be reasonable and necessary for his pre-existing asthmatic condition, but his need for the medication is not causally related to the effects of the December 31, 2021 Marshall Fire exposure. In conjunction with the persuasive opinions

of Dr. Volz and Dr. Schwartz, Claimant has failed to demonstrate he is entitled to receive medical maintenance benefits. Claimant's request for medical maintenance benefits is thus denied and dismissed.

## Conclusions of Law

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. 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. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of her condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical

treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013); *see* §8-43-201(1), C.R.S. (stating that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification"). Specifically, respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

5. As found, Claimant has failed to present substantial evidence to support a determination that he is entitled to a general award of medical maintenance benefits for his December 31, 2022 Marshall Fire exposure. Initially, on December 31, 2021 Claimant was involved in fighting the Marshall Fire. Several days later, sometime between January 4-9, 2022, Claimant went skiing and experienced shortness of breath. He sought treatment at National Jewish Health for his respiratory symptoms. Claimant was diagnosed with a smoke inhalation injury and asthma.

6. As found, prior to the Marshall Fire, Claimant had undergone PFT testing that revealed progressive worsening of respiratory function from 2018- 2021. Notably, the PFT from April 6, 2019 revealed a FEV1/FVC ratio of 67.7% that corresponded with a class 2 impairment. The PFT from December 9, 2021 showed a substantially reduced FEV1 with an FEV1/FVC ratio of 56% that would correspond with a class 3 impairment on Table 8.

7. As found, on March 17, 2022 ATP Dr. Irish concluded that Claimant had reached MMI for his Marshall Fire exposure. She commented that Claimant requires follow-up at National Jewish Health in three months and then annually. Notably, Dr. Irish did not mention any continuing medications. Similarly, on December 4, 2022 ATP Dr. Mayer noted that Claimant had no history of asthma, had been on high-dose Trelegy since July and had essentially reported the resolution of all symptoms. She concluded that Claimant had reached MMI and suffered a 25%

whole person impairment because of his exposure. Dr. Mayer echoed Dr. Irish's recommendation for medical maintenance benefits.

8. As found, Claimant subsequently underwent a DIME with Dr. Volz. He determined that Claimant's pulmonary function was progressively declining beginning in 2018. Notably, as of December 2021, or prior to the exposure, Claimant's pulmonary function was worse than it was when he reached MMI. Claimant's pulmonary function following treatment had improved from prior to the date of injury. Therefore, any residual pulmonary impairment would not be the result of the December 31, 2021 injury. Dr. Volz reasoned that Claimant suffered a 10% whole person pulmonary impairment, but none of the rating was attributable to his occupational injury. He thus concluded that Claimant suffered a 0% permanent impairment. Dr. Volz commented that there was at least a reasonable degree of medical probability that the worsening of Claimant's respiratory condition was due, at least in part, to the natural progression of his worsening asthma condition. He detailed that "the evolving reduction in lung function tests prior to the date of injury would suggest the preexisting state of slowly worsening and can be argued that manifestations within a reasonable degree of medical probability would have occurred sometime" regardless of whether it was related to a work event. Importantly, Dr. Volz noted that Claimant likely needed Trelegy prior to his date of injury. Based on Dr. Volz' DIME report, Respondents filed a FAL providing that Claimant reached MMI on March 27, 2022 with no impairment. Respondents did not admit to medical maintenance care after MMI.

9. As found, similarly, Dr. Schwartz remarked that there was no objective worsening of Claimant's pulmonary function after the Marshall Fire exposure. He explained that Claimant's need for asthma medication, including Trelegy, was present before the Marshall Fire. Dr. Schwartz concluded that the exposure did not cause the continuing need for asthma medications. He explained that Dr. Volz' DIME opinion regarding maintenance care supported his opinion that Claimant's current condition was unrelated to the work incident. Dr. Volz summarized that Claimant required Trelegy prior to the Marshall Fire, and the event was not the cause of his need for the medication.

10. As found, although Claimant now contends he is entitled to medical maintenance benefits because of his Marshall Fire exposure, the record demonstrates that the incident only

caused a temporary exacerbation of his pre-existing asthma condition that has resolved. Because of the resolution in symptoms, any need for medical maintenance benefits is no longer causally related to the incident. Notably, the opinions of both DIME Dr. Volz and Dr. Schwartz that Claimant has a 0% impairment rating because of the Marshall Fire is compelling. Both physicians have determined that the Marshall Fire exposure did not cause any permanent worsening of Claimant's underlying respiratory condition. Therefore, any continuing treatment that Claimant requires is solely the result of his preexisting respiratory condition.

11. As found, although Claimant asserts that he requires medical maintenance treatment for his asthma, the record reveals he has returned to his baseline respiratory condition after the exacerbation of his symptoms from the December 31, 2021 Marshall Fire exposure. Notably, ATPs Dr. Irish and Dr. Mayer only noted that Claimant requires follow-up at National Jewish Hospital in three months and then annually. However, they did not mention any continuing medications. The preceding recommendation is insufficient to support a continuing award of medical maintenance benefits because of the persuasive medical opinions demonstrating that Claimant's symptoms caused by the exposure have resolved. Notably, both Dr. Ferraro and Dr. Scott commented that Claimant suffered a temporary exacerbation of his asthma condition caused by the Marshall Fire that returned to baseline by March 9, 2022. Furthermore, Dr. Scott explained that Claimant's Trelegy prescription may be reasonable and necessary for his pre-existing asthmatic condition, but his need for the medication is not causally related to the effects of the December 31, 2021 Marshall Fire exposure. In conjunction with the persuasive opinions of Dr. Volz and Dr. Schwartz, Claimant has failed to demonstrate he is entitled to receive medical maintenance benefits. Claimant's request for medical maintenance benefits is thus denied and dismissed.

## Order

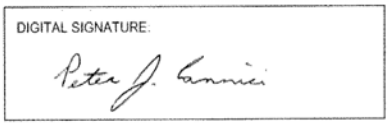
Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for a general award of medical maintenance benefits is denied and dismissed.

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

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

DATED: July 31, 2025.




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