ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered a 36% scheduled impairment to his left knee?

FINDINGS OF FACT

1. Claimant worked 14 years for Employer, initially as a volunteer firefighter and eventually ascending to the position of Fire Chief. He sustained admitted injuries on December 14, 2017 when a ladder on which he was working collapsed unexpectedly.

2. Claimant's most impactful injuries involved multiple displaced fractures of the right foot. He underwent several surgeries on the right foot and developed serious complications related to infections. Eventually, he had a below-the-knee amputation (BKA) in August 2020. Claimant was assigned a 90% lower extremity rating for the right BKA, which was admitted and not disputed by Respondents.

3. Claimant also injured his left knee in the work accident. He saw Dr. Michael Feign, an orthopedic surgeon, on January 3, 2018, and reported 8/10 "constant" left knee pain since the injury. He was having difficulty weightbearing and was using a wheelchair. Examination of the left knee showed pain mostly along the proximal fibula and lateral tibial plateau. Dr. Feign reviewed left knee x-rays taken at the emergency department immediately after the accident, which showed no fracture. However, because "[the] patient did have a fall from 10 feet," he ordered an MRI to rule out a nondisplaced tibial plateau or fibular fracture.

4. The left knee MRI was completed on January 5, 2018. In terms of acute pathology, the MRI showed a nondisplaced intra-articular fibular head fracture, a bone marrow contusion of the lateral tibial plateau with surrounding microtrabecular fracture, and a medial gastrocnemius strain. It also showed pre-existing tricompartmental osteoarthritis.

5. Claimant followed up with Dr. Feign to review the MRI on January 11, 2018. Dr. Feign opined Claimant sustained an acute gastrocnemius strain "as well as direct trauma to the lateral side of his knee causing a nondisplaced fracture of the proximal fibula and irritation of an arthritic proximal tibia-fibula joint." He did not believe surgery was necessary and recommended conservative treatment.

6. Thereafter, Claimant's treatment was primarily focused on his right foot. However, he continued to see Dr. Feign periodically for left knee pain. On February 28, 2018, Dr. Feign documented Claimant's knee had not improved because he was "completely non-weightbearing on his right foot and even tho[ugh he has] been using crutches and a walker he has been putting much more strain on his left knee." Dr. Feign

opined, “is understandable with his arthritic change and his acute trauma to have more pain since he is putting all of his weight on his left knee.” Dr. Feign encouraged Claimant to use his wheeled scooter or iWalk “which can help decrease some of the stress on his left knee.”

7. Dr. Nicholas Olsen performed an IME for Respondents on January 28, 2019. Claimant reported continued left knee pain with ambulation “despite adequate time to heal a stress fracture of the fibula.” Examination of the left knee showed significant tenderness around the fibular head and the peroneal nerve. There was a positive Tinel’s sign and some findings in the L4 distribution, which suggested injury to the peroneal nerve at the knee. Dr. Olsen opined “[Claimant’s] left knee complaints are work-related.” Dr. Olsen thought a peroneal nerve neuropraxia or contusion probably explained his symptoms of numbness and tingling.

8. Claimant was referred to Dr. Thomas Centi in January 2020 for an evaluation of MMI and impairment. Dr. Centi determined Claimant was not at MMI, in part because of issues related to the left knee. Dr. Centi recommended an updated left knee MRI and possible orthopedic referral depending on the results.

9. Dr. David Hahn performed a right BKA on August 4, 2020. After the BKA, Claimant’s physicians turned their attention more specifically to the persistent left knee symptoms.

10. Claimant started seeing Dr. Kareem Sobky for the left knee on September 2, 2020. He described chronic lateral left knee pain “since the injury.” He reported lateral sided locking and catching, swelling, and giving way. He was also having more pain in the patellofemoral articulation and episodic “large effusions.” Dr. Sobky noted Claimant’s left knee injury had been largely untreated because of the predominant focus on the right leg. Dr. Sobky opined, “[Claimant] has definitely [been] stressing the left knee as he has been putting all of his weight on that side. It is also likely that he has worsened problems in the left knee as the patellofemoral chondromalacia as he has really been unable to bear weight on the right lower extremity for years now.” Dr. Sobky ordered an MRI and administered a steroid injection to the left knee.

11. At a follow-up appointment on December 4, 2020, Dr. Sobky noted Claimant had received his right left prosthesis “but is bearing significant weight on his left side so his left knee is very irritated. He is working diligently with the prosthesis and fitting but unfortunately the left knee is just taking the brunt of the weight and is really aggravated.” The previous injection had only lasted two weeks, so Dr. Sobky injected the left knee with different medication “to see if we can give him longer-lasting symptomatic relief.” Dr. Sobky opined Claimant would probably need a total knee replacement for his “post-traumatic osteoarthritis,” although the high risk of infection was a major concern.

12. Dr. Sobky has continued to treat Claimant’s left knee symptomatically, primarily with periodic injections and bracing.

13. Dr. Olsen performed another IME for Respondents on October 18, 2021. Dr. Olsen acknowledged Claimant suffered a nondisplaced intraarticular fracture of the left fibular head and a bone marrow contusion of the lateral tibial plateau from the work accident. But he opined the fibular head fracture had fully healed and Claimant's ongoing left knee symptoms were solely related to "end-stage" osteoarthritis. Dr. Olsen stated the accident did not aggravate Claimant's underlying arthritis and his ongoing symptoms reflected the natural progression of his pre-existing condition. Dr. Olsen determined Claimant was at MMI with no impairment related to the left knee. He assigned a 90% lower extremity rating for the right BKA.

14. On December 9, 2021, Dr. Hahn agreed that Claimant reached MMI as of October 18, 2021. Dr. Hahn did not address impairment, as he is not Level II accredited.

15. Respondents referred Claimant to Dr. Douglas Scott for an impairment rating on May 21, 2022. Dr. Scott opined the left fibular head fracture and bone bruise had "healed and resolved." He agreed with Dr. Olsen that Claimant's ongoing left knee complaints were related to osteoarthritis and were not injury-related. As a result, he assigned no impairment for the left knee. Like Dr. Olsen, he provided a 90% lower extremity rating for the right BKA.

16. Respondents filed a Final Admission of Liability (FAL) admitting for the 90% right lower extremity rating. Claimant timely objected and requested a DIME.

17. Claimant saw Dr. John Bissell for the DIME on December 6, 2022. Dr. Bissell agreed Claimant's condition had stabilized and he was at MMI as of October 28, 2021. He also agreed with Dr. Olsen and Dr. Scott that Claimant has a 90% lower extremity impairment for the right BKA. However, he opined Claimant has injury-related permanent impairment to his left knee. Dr. Bissell noted Claimant suffered a left knee fibular head fracture and lateral tibial plateau microfracture. Although those conditions eventually healed, he believed the injury permanently aggravated Claimant's pre-existing osteoarthritis. He pointed to consistent treatment for left knee symptoms since the accident. He emphasized that the accident subjected Claimant's knee to sufficient trauma "to fracture the knee in two places (and strain his gastrocnemius muscle)." Dr. Bissell further noted Claimant was working full duty with no knee-related limitations immediately before the accident despite the pre-existing arthritis. Applying a "but for" analysis, Dr. Bissell determined Claimant would probably still be working full duty, as he had done up until December 2017, had the accident not occurred. Dr. Bissell believed a left total knee arthroplasty would be causally related to the injury, but "it is not clear surgery will ever be possible for him as it poses such a high risk of infection." Therefore, Claimant was at MMI with permanent impairment. Dr. Bissell assigned a 36% lower extremity rating for the left knee. The rating was based on "aggravated osteoarthritis" under Table 40 combined with range of motion deficits.

18. Dr. Olsen testified at hearing consistent with his reports. He emphasized that the fibular head fracture was "outside the knee joint proper," and therefore had no structural impact on the pre-existing osteoarthritis. He noted Claimant had left knee surgery 37 years ago, including repairs to the ACL, MCL, and probably the meniscus. The

prior surgery set the stage for future development of osteoarthritis. Given the pre-existing degenerative changes shown on the initial MRI, Dr. Olsen opined it was inevitable Claimant would eventually develop increasing pain and range of motion deficits, unrelated to the accident. He did not believe the work accident aggravated or accelerated the underlying osteoarthritis. Dr. Olsen offered no critique of Dr. Bissell's rating methodology; he simply disagrees that the ongoing knee symptoms are injury-related.

19. Claimant performed physically demanding work for Employer for 14 years, initially as a volunteer firefighter and then as a Fire Chief. He completed quarterly physical performance tests to evaluate his ability to perform tasks including carrying, crawling, operating the Jaws of Life, climbing ladders, and lifting up to 150 pounds. There is no persuasive evidence Claimant's ability to perform his job was limited in any way by left knee symptoms before the work accident. Although Claimant injured his left knee and had surgery in the 1980s, he recovered well and had no problems for more than 30 years before the 2017 injury. Claimant had not previously been diagnosed with osteoarthritis, chondromalacia, or knee instability, and the persuasive evidence shows Claimant's left knee was probably asymptomatic before the work accident.

20. Claimant's testimony regarding his pre-injury functional capacity and lack of left knee symptoms is credible and persuasive.

21. Dr. Bissell's conclusions are consistent with and supported by the opinions of Dr. Sobky and Claimant's credible testimony. Dr. Bissell's opinions regarding Claimant's left knee impairment are credible and more persuasive than the contrary opinions offered by Dr. Olsen and Dr. Scott.

22. Claimant proved by a preponderance of the evidence he suffered a 36% lower extremity impairment to his left knee.

CONCLUSIONS OF LAW

If an injury results in permanent medical impairment, the claimant is entitled to PPD benefits pursuant to §§ 8-42-107(2) and/or 8-42-107(8). The Workers' Compensation Act applies different formulas for calculating PPD depending on whether the body part in question is listed on the "schedule of disabilities." In this case, the parties agree that Claimant suffered purely "scheduled" impairments, which are addressed under § 8-42-107(2). Although the DIME process applies to MMI determinations in all cases, the DIME procedure does not apply to scheduled impairment ratings. *See* § 8-42-107(8)(a); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000). The claimant has the burden to establish scheduled impairment by a preponderance of the evidence. *E.g., Burciaga v. AMB Janitorial Services, Inc.*, W.C. No. 4-777-882 (November 5, 2010). A DIME's determination regarding scheduled impairment is not entitled to special weight but is simply another opinion to consider when evaluating the preponderance of persuasive evidence. *Sanchez de Bailon v. Final Order Pinnacle Foods Corp.*, W.C. No. 5-080-057 (November 10, 2020).

A pre-existing condition does not disqualify a claim for compensation where the industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

As found, Claimant proved he has a 36% scheduled lower extremity rating to the left knee, as determined by Dr. Bissell. Claimant developed significant left knee pain immediately after the accident, which continued unabated to the time of MMI. As Dr. Bissell pointed out, Claimant's experienced direct trauma to his left knee sufficient to fracture the fibular head and cause a microfracture of the tibial plateau. Although the fibular head is not part of the "knee joint proper," the same cannot be said of the tibial plateau. Moreover, Claimant's left knee has endured several years of unusual stress because of overcompensating for the right foot injury. Dr. Sobky is persuasive that the lengthy period of altered gait mechanics probably aggravated Claimant's underlying osteoarthritis. Although Claimant had advanced osteoarthritis in his left knee immediately before the industrial accident, it was asymptomatic and nondisabling despite engaging in physically demanding work. The opinions of Dr. Bissell and Dr. Sobky are credible and more persuasive than the contrary opinions offered by Dr. Olsen and Dr. Scott. No physician has pointed to any flaw in Dr. Bissell's rating methodology, aside from the causation determination. Dr. Bissell's rating is consistent with the AMA Guides and appropriately quantifies the permanent left knee impairment caused by the work accident.

ORDER

It is therefore ordered that:

1. Insurer shall play Claimant PPD benefits based on a 36% left knee scheduled rating.

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

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

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

DATED: June 2, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-201-695-005

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he is permitted to recover penalties against Respondent for wrongfully withholding benefits pursuant to §8-43-304(1), C.R.S. or §8-43-401(2)(a), C.R.S.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties pursuant to §8-43-207(1)(p), C.R.S. for Respondent's failure to obey ALJ Lovato's December 6, 2022 Order requiring reimbursement of medical expenses.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of disfigurement benefits.

FINDINGS OF FACT

1. Claimant is a 32-year-old male who began working for Employer as an installation technician in October 2019. [Redacted, hereinafter RS] is the sole owner of Employer. Claimant and RS[Redacted] were Employer's only employees in March 2022.

2. On March 3, 2022 Claimant was repairing a surveillance camera on the side of a house at a residential property in Franktown, Colorado. Claimant fell from a ladder, landed on his heels and shattered both heel bones.

3. Claimant underwent an open reduction internal fixation of the bilateral calcaneus fractures on March 5, 2022. Jeremy Christensen, DPM, of Rock Canyon Foot & Ankle, performed the surgery.

4. On December 6, 2022 ALJ Lovato issued Findings of Fact, Conclusions of Law and Order (Order) in this matter. She determined that Claimant's March 3, 2022 injuries were compensable and he was entitled to receive reasonable, necessary and related medical treatment. The Order specifically required Respondent to "reimburse Claimant for any medical expenses related to his March 3, 2022, injury." However, ALJ Lovato noted that, although multiple invoices and bills were admitted into evidence, it was unclear "what amounts have been paid, and what amounts are outstanding." The Order explained that, because ALJ Lovato was unable to determine Claimant's outstanding medical expenses, "[c]ounsel for Claimant and Respondent shall confer regarding the medical expenses. If the parties are unable to reach an agreement, either Claimant or Respondent may file an Application for Hearing on this issue."

5. RS[Redacted] testified at the hearing in this matter. He admitted to the contents of several email communications with Claimant's counsel regarding satisfaction of ALJ Lovato's December 6, 2022 Order. RS[Redacted] also acknowledged receiving all the medical bills and the itemized ledger of medical expenses from Claimant's counsel. He did not dispute

the amount of medical benefits. Finally, RS[Redacted] recognized that, despite the attempts of Claimant's counsel to confer, he has not paid any of the outstanding medical bills.

6. The record reveals the following itemized list of Claimant's medical expenses as a result of his March 3, 2022 injury:

Dane Raggio - Medical Bills		
DOS	Provider	Amount
3/7/22	TraumaOne, PC	$221.00
4/29/22	Marrington Medical Consultants, LLC	$964.04
3/4/22-3/8/22	Colorado Surgical & Critical Care Assoc.	$2,598.00
3/4/22-3/8/22	Physican Pain Consultants	$1,586.00
3/8/22-3/11/22	Westminster Rehab	$4,350.00
3/3/22-3/8/22	Castle Rock Adventist Hospital	$49,597.02
3/14/22/4/21/22	Rock Canyon Foot & Ankle Clinic, LLC	$3,282.00
11/15/22	John S. Hughes, MD	$2,750.00
	Total:	**$65,348.06**

As reflected in the preceding chart, Claimant's uncontroverted medical expenses total $65,348.06.

7. In her December 6, 2022 Order, ALJ Lovato also found that "Employer does not currently maintain a workers' compensation insurance policy, nor did Employer have workers' compensation insurance on March 3, 2022." ALJ Lovato thus determined that Respondent "shall pay $1,048.80 in penalties for failure to admit or deny liability." She noted that 50% of the penalties were to be paid to Claimant and 50% to the Subsequent Injury Fund. Respondent admitted that he has not paid any penalties either to Claimant or to the Subsequent Injury Fund.

8. Claimant testified at the hearing in this matter. He explained that, as a result of his March 5, 2022 surgery, he has approximately five-inch-long scars on the outside of both feet. Claimant remarked that the scars are painful, discolored, thick, and raised from the surface of the skin.

9. Claimant has demonstrated it is more probably true than not that he is permitted to recover penalties against Respondent for wrongfully withholding benefits pursuant to §8-43-401(2)(a), C.R.S. On January 4-5, 2023 Claimant's counsel conferred with RS[Redacted] regarding the outstanding amounts owed and provided a detailed list of outstanding medical expenses. RS[Redacted] testified that he received all of Claimant's medical records, bills and an itemized ledger of medical expenses. He did not dispute the amount or authenticity of Claimant's outstanding medical bills, and otherwise made no attempt to confer about the amount of reimbursement. RS[Redacted] also testified that he understood ALJ Lovato's Order required him to pay Claimant's outstanding medical expenses. Finally, RS[Redacted]acknowledged he has not paid any of Claimant's outstanding medical bills.

10. Because over six months have elapsed since ALJ Lovato's order, Respondent's failure to reimburse Claimant has surpassed the 30-day time limit by over five months. A

reasonable Respondent would neither fail to pay penalties and benefits lawfully imposed by an ALJ nor ignore Claimant's attempts to confer regarding compliance with a court order.

11. Respondent admittedly failed to pay Claimant's medical expenses. RS[Redacted] detailed that he has not paid Claimant's medical expenses because he was waiting until he received additional funding from a bank or other source. However, the convenience or ability of a respondent to pay benefits is not dispositive. Notably, if Respondent required additional time to seek funding, RS[Redacted] could have sought assistance from the court by filing an application for hearing on the issue of Claimant's medical expenses or simply conferred with undersigned counsel. However, Respondent, chose to ignore counsel and failed to take any action to comply with ALJ Lovato's order.

12. Based on a review of the record, penalties pursuant to §8-43-401(2)(a), C.R.S. are appropriate. The preceding statute provides for penalties of eight percent of the amount of wrongfully withheld benefits. Employer failed to act as a reasonable respondent in neglecting to comply with ALJ Lovato's December 6, 2022 Order. Specifically, the record reveals that RS[Redacted] knowingly did not confer or make any attempt to reimburse Claimant for his medical expenses. Claimant's outstanding medical expenses total $65,348.06. Eight percent of $65,348.06 yields a statutory penalty of $5,227.84.

13. The court is further empowered to order any "sanctions provided in the Colorado rules of civil procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an administrative law judge." §8-43-207(1)(p), C.R.S. Furthermore, under C.R.C.P. 37(b)(2), if a party "fails to obey an order" the court may order that party "to pay the reasonable expenses, including attorney's fees, caused by the failure," unless "the failure was substantially justified." Although there is little dispute that Respondent failed to obey ALJ Lovato's December 6, 2022 order, additional penalties are not warranted at this time. The penalty of $5,227.84 is sufficient to penalize Employer's violation of the law and encourage future compliance without being excessively punitive. Fifty percent of the penalty shall be paid to Claimant and fifty percent to the Subsequent Injury Fund.

14. Claimant has proven it is more probably true than not that he is entitled to an award of disfigurement benefits. As a result of his work injury, Claimant sustained serious, permanent scarring on parts of his body normally exposed to public view. He exhibited approximately five-inch-long scars on the lateral aspects of both feet because of the surgery performed by Dr. Christensen as necessitated by his work injuries. Claimant credibly testified that the scars are painful, discolored, thick, and raised off the surface of the skin. Because Claimant has sustained serious permanent disfigurement to areas of the body normally exposed to public view, he is entitled to additional compensation. Insurer shall pay Claimant $2,500.00 for the disfigurement.

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).

Penalties

4. In cases where penalties are premised on an order requiring payment of medical benefits, the ALJ may impose penalties based on either §8-43-401(2)(a), C.R.S. or §8-43-304(1), C.R.S.; *Giddings v. Indus. Claim Appeals Off.*, 39 P.3d 1211, 1213 (Colo. App. 2001). In the present matter, ALJ Lovato ordered Respondent to pay Claimant's medical benefits pursuant to §8-42-101(6)(a)-(b), C.R.S. The preceding statute provides that if a respondent fails to furnish medical benefits for a claim that is admitted or found to be compensable, "the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided." Because ALJ Lovato's Order was premised on the payment of Claimant's outstanding medical expenses for a compensable claim, penalties may be imposed under either §8-43-401(2)(a) or §8-43-304(1), C.R.S.

5. Section 8-43-304(1), C.R.S. authorizes the imposition of penalties not to exceed $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), C.R.S. even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001).

6. Pursuant to §8-43-401(2)(a), C.R.S. all insurers and self-insured employers "shall pay benefits within thirty days after any benefits are due." If a respondent "knowingly delays payment of medical benefits for more than thirty days or knowingly stops payments, such insurer or self-insured employer shall pay a penalty of eight percent of the amount of wrongfully withheld benefits." *Id*. The imposition of penalties is governed by an objective standard of negligence. As such, it is measured by the reasonableness of the respondent's actions "and does not require knowledge that conduct was unreasonable or in bad faith."

Pueblo School Dist. No. 70 v. Toth, 924 P.2d 1094 (Colo. App. 1996). Penalties may thus be assessed against a respondent for neglecting to take action that a reasonable respondent would take to comply with a lawful order. *Id*.

7. An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital,* W.C. No. 4-619-954 (ICAO. May 5, 2006). However, any penalty assessed should not be excessive or grossly disproportionate to the conduct in question. When determining the penalty, the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the other party and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products v. Indus. Claim Appeals Off.,* 126 P.3d 323 (Colo. App. 2005).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he is permitted to recover penalties against Respondent for wrongfully withholding benefits pursuant to §8-43-401(2)(a), C.R.S. On January 4-5, 2023 Claimant's counsel conferred with RS[Redacted] regarding the outstanding amounts owed and provided a detailed list of outstanding medical expenses. RS[Redacted] testified that he received all of Claimant's medical records, bills and an itemized ledger of medical expenses. He did not dispute the amount or authenticity of Claimant's outstanding medical bills, and otherwise made no attempt to confer about the amount of reimbursement. RS[Redacted] also testified that he understood ALJ Lovato's Order required him to pay Claimant's outstanding medical expenses. Finally, RS[Redacted] acknowledged he has not paid any of Claimant's outstanding medical bills.

9. As found, because over six months have elapsed since ALJ Lovato's order, Respondent's failure to reimburse Claimant has surpassed the 30-day time limit by over five months. A reasonable Respondent would neither fail to pay penalties and benefits lawfully imposed by an ALJ nor ignore Claimant's attempts to confer regarding compliance with a court order.

10. As found, Respondent admittedly failed to pay Claimant's medical expenses. RS[Redacted] detailed that he has not paid Claimant's medical expenses because he was waiting until he received additional funding from a bank or other source. However, the convenience or ability of a respondent to pay benefits is not dispositive. Notably, if Respondent required additional time to seek funding, RS[Redacted] could have sought assistance from the court by filing an application for hearing on the issue of Claimant's medical expenses or simply conferred with undersigned counsel. However, Respondent, chose to ignore counsel and failed to take any action to comply with ALJ Lovato's order.

11. As found, based on a review of the record, penalties pursuant to §8-43-401(2)(a), C.R.S. are appropriate. The preceding statute provides for penalties of eight percent of the amount of wrongfully withheld benefits. Employer failed to act as a reasonable respondent in neglecting to comply with ALJ Lovato's December 6, 2022 Order. Specifically, the record reveals that RS[Redacted] knowingly did not confer or make any attempt to reimburse Claimant for his medical expenses. Claimant's outstanding medical expenses total $65,348.06. Eight percent of $65,348.06 yields a statutory penalty of $5,227.84.

12. As found, the court is further empowered to order any "sanctions provided in the Colorado rules of civil procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an administrative law judge." §8-43-207(1)(p), C.R.S. Furthermore, under C.R.C.P. 37(b)(2), if a party "fails to obey an order" the court may order that party "to pay the reasonable expenses, including attorney's fees, caused by the failure," unless "the failure was substantially justified." Although there is little dispute that Respondent failed to obey ALJ Lovato's December 6, 2022 order, additional penalties are not warranted at this time. The penalty of $5,227.84 is sufficient to penalize Employer's violation of the law and encourage future compliance without being excessively punitive. Fifty percent of the penalty shall be paid to Claimant and fifty percent to the Subsequent Injury Fund.

Disfigurement

13. Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." A disfigurement, for Workers' Compensation purposes, is "an observable impairment of the natural appearance of a person." *Arkin v. Indus. Com'n of Colo.*, 358 P.2d 879, 884 (Colo. 1961). If scars are apparent in swimming attire a disfigurement award is appropriate. *See Twilight Jones Lounge v. Showers,* 732 P.2d 1230, at1232 (Colo. App. 1986).

14. As found, Claimant has proven by a preponderance of the evidence that he is entitled to an award of disfigurement benefits. As a result of his work injury, Claimant sustained serious, permanent scarring on parts of his body normally exposed to public view. He exhibited approximately five-inch-long scars on the lateral aspects of both feet because of the surgery performed by Dr. Christensen as necessitated by his work injuries. Claimant credibly testified that the scars are painful, discolored, thick, and raised off the surface of the skin. Because Claimant has sustained serious permanent disfigurement to areas of the body normally exposed to public view, he is entitled to additional compensation. Insurer shall pay Claimant $2,500.00 for the disfigurement.

Payment to Trustee or Posting of Bond

15. Under §8-43-408(2), C.R.S. an employer must pay to the trustee of the Division of Workers' Compensation (Division) an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. Alternatively, "employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado."

16. This Order awards no ongoing benefits, so the present value equals the total benefits awarded. The Order awards medical benefits of $65,348.06, penalties of $5,227.84 and disfigurement benefits of $2,500.00 for total compensation of $73,075.90. Respondent is thus required to pay the trustee of the Division a total amount of $73,075.90. In the alternative, Respondent may file a bond with the Division signed by two or more responsible sureties approved by the Director or by a surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The

Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to mariya.cassin@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

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

1. Respondent shall reimburse Claimant for reasonable and necessary medical benefits totaling $65,348.06.

2. Respondent shall pay $5,227.84 in penalties. Fifty percent of the penalty shall be paid to Claimant and fifty percent to the Subsequent Injury Fund.

3. Respondent shall pay Claimant $2,500.00 in disfigurement benefits.

4. In lieu of payment of the above compensation and benefits to Claimant, Employer shall:

a. Deposit the sum of $73,075.90, adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, c/o Mariya Cassin, 633 17th St. Suite 400, Denver, CO 80202; or

b. File a bond in the sum of $73,075.90 with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation, or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation and benefits awarded.

c. Respondent shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Respondent of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

5. Respondent shall pay statutory interest at the rate of 8% per annum on benefits not paid when due.

6. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or order authorizing distribution provides otherwise.

7. Pursuant to §8-42-101(4), C.R.S. any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Respondent is solely liable and responsible for the payment of all medical costs related to Claimant's work injuries.

8. 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: June 2, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-197-307-004

ISSUES

I. Whether the claimant has proven by a preponderance of the evidence she is entitled to temporary disability benefits.

II. Whether the claimant is responsible for her termination and not entitled to temporary disability benefits.

III. The claimant's average weekly wage.

STIPULATIONS

- The parties stipulated that if the claimant is awarded temporary disability benefits, they will work together to determine the amount of TTD and TPD that is payable.

FINDINGS OF FACT

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

1. The claimant worked for the employer as an overnight supervisor for a women's shelter.
2. Despite her supervisory role, the claimant also performed physical tasks as a shelter aid, including lifting up to 50 pounds. Examples of her lifting tasks include assisting with food deliveries, such as carrying 6-gallon boxes of milk weighing about 50 pounds, cleaning the facility (including mopping and sweeping), packing residents' belongings into totes (some weighing over 25 pounds), and setting up and taking down cots. These tasks required the use of both upper extremities.
3. On February 4, 2022, while working at the women's shelter, the claimant began implementing the shelter's new policy that required all shelter residents, and potential residents, to have their belongings searched for the safety of everyone in the shelter. At about 8:30 a.m., a potential resident named [Redacted, hereinafter NM] arrived. NM[Redacted] is a man, that identifies as a woman. NM[Redacted] was informed by the claimant that her belongings needed to be searched before being admitted to the shelter. NM[Redacted] refused. Therefore, the claimant told NM[Redacted] that she could not stay at the shelter.
4. After telling her that she could not stay at the shelter, NM[Redacted] launched an unprovoked assault against the claimant. Without warning NM[Redacted] threw a right-hand punch at the claimant. The first punch narrowly missed the claimant's head.

Subsequently, NM[Redacted] forcefully grabbed hold of the claimant's long braided hair with her left hand to gain control of the claimant's head, and then threw another right hand punch that struck the left side of the claimant's head. In response to this vicious assault, the claimant moved backwards through a doorway that was behind her, while NM[Redacted] kept advancing, and maintained her grasp of the claimant's hair. While being assaulted, the claimant started fighting back. The claimant tried to hit NM[Redacted], but NM[Redacted] lost her balance and started falling towards the ground. While NM[Redacted] was still falling towards the ground, the claimant tried to hit her one more time, and then tried once again the instant NM[Redacted] landed on the ground. The time the claimant spent trying stop the attack by hitting NM[Redacted] was about 2 seconds. Throughout the assault, the claimant reasonably believed her safety was at risk and had no reason to believe that NM[Redacted] intended to cease the attack – even while NM[Redacted] was falling to the ground and was on the ground for a moment.

5. As NM[Redacted] fell to the floor, a female coworker intervened, placing herself between NM[Redacted] and the claimant. Right after falling, NM[Redacted] swiftly rose and lunged towards both the coworker and the claimant, attempting to resume the assault.
6. After lunging towards the co-worker and the claimant, the co-worker attempted to take control of the situation by yelling at the assailant and motioning her to leave. About a second later, both the co-worker and the claimant attempted to pull NM[Redacted] out of the room and through the doorway so she would leave the shelter. This attempt lasted about a second. While NM[Redacted] started walking away, it appears the claimant tried to take control of the situation by yelling at NM[Redacted] to get out of the shelter. Based on the claimant's actions, NM[Redacted] stopped assaulting her and began to leave the shelter.
7. Throughout the violent assault, the claimant's actions focused on self-defense and thwarting the assailant's intentions. The assailant's actions, including forcefully grabbing the claimant's hair and striking her head with a closed fist showed an intent to cause severe bodily harm. Had the claimant not defended herself and effectively persuaded the assailant to cease the attack through her fighting back, vocalizations, and body language, the extent of the claimant's injuries could have been far more severe.
8. Moreover, the fact that the claimant defended herself and attempted to stop the assault by trying to hit NM[Redacted], even when NM[Redacted] landed on the floor, during an approximate 2-second period, was reasonable and appropriate as demonstrated by NM[Redacted] standing up and then lunging at the claimant - in an attempt to continue the assault.
9. At no time did the claimant become the aggressor. All actions taken by the claimant were reasonable and necessary to defend herself from the vicious assault.
10. [Redacted, hereinafter NL], representing the employer's HR department, provided testimony on behalf of the employer. She stated that comprehensive new hire training was provided to employees, encompassing de-escalation techniques, establishing

boundaries, personal safety measures, and thorough review of the employee handbook.

11. The employer's Codes of Conduct, as outlined in section 3.11, explicitly prohibits threats or acts of violence from employees towards fellow employees, clients, volunteers, vendors, and others acting on behalf of the agency. Workplace violence encompasses verbal or physical threats, intimidation, and aggressive physical contact that may result in injury or harm to an individual's life, well-being, family, or property. NL[Redacted] testified that violations of the code of conduct could lead to termination and emphasized the gravity of such decisions, which are only reached after a comprehensive investigation. She also stated that she personally reviewed video footage of the altercation and conducted interviews with staff before the claimant's termination. NL[Redacted] did not, however, discuss the matter with the claimant.

12. NL[Redacted] also stated during her testimony that she believed that at some point the claimant became the aggressor in the altercation. She cited the claimant's continued striking of NM[Redacted], even when NM[Redacted] was on the ground. Additionally, NL[Redacted] pointed out various factors, such as the claimant's failure to retreat to a larger room after the participant started walking away, her persistent verbal confrontation, her pursuit of the participant despite physical restraint by another employee, and her body language suggesting aggressiveness. She also stated that no evidence suggested that the claimant sought to protect other employees from the assailant through her body language.

13. Upon determining that the claimant had violated the Codes of Conduct, the employer immediately terminated the claimant’s employment on the day the claimant was assaulted and injured.

14. In essence, the employer contends that once NM[Redacted] fell to the ground, she no longer posed a threat, thereby rendering the claimant's continued defensive actions, including attempts to hit her to defend herself within a brief two-second timeframe, unjustifiable. The employer also contends that the claimant transitioned from a victim to an aggressor by orally confronting the assailant and persuading the assailant to stop the attack and leave the shelter.

15. The court’s view of the assault against the claimant, and her actions of defending herself, differs significantly from the employer's. The ALJ does not perceive the assault in the same context as the employer. Instead, the ALJ finds that the claimant responded reasonably by fighting back, attempting to strike the assailant, and vocalizing commands to halt the assault. It was precisely the claimant's active resistance, body language, and vocal intervention that effectively stopped the assault and prevented the assailant from inflicting further harm upon the claimant and possibly others.

16. The employer argues that they consistently instruct employees in de-escalation techniques. That said, these techniques address verbal confrontations rather than physical violent assaults against employees.

17. NL[Redacted] conceded during cross-examination, that they do not provide their employees any training on how an employee is to defend themselves during a physical

assault. Nor do they have a specific policy outlining exactly what to do when assaulted by someone – let alone what to do when the assailant intends to cause great bodily harm.

18. In addition, during her cross-examination, NL[Redacted] was asked whether she agreed that NM[Redacted], who is a man that identifies as a woman, appeared much taller and bigger than the claimant. Despite the video evidence, which shows NM[Redacted] is much taller than the claimant, NL[Redacted] would not admit that the assailant was taller than the claimant. Instead, she said the camera angle made it hard to tell. Her evasiveness and refusal to agree that the video clearly shows that NM[Redacted] is much taller than the claimant greatly diminishes NL's[Redacted] credibility as it relates to the employer's policies, enforcement of their policies, her interpretation of the video, and the basis for terminating the claimant.

19. The claimant testified that following the punch to the head, she experienced disorientation and received no immediate assistance. Recognizing the need to safeguard herself, she engaged in self-defense. While falling and being separated from the assailant, she threw some punches to defend herself. The perception of the claimant was that the assailant exhibited no signs of surrender and did not express any intention to cease the assault-even when he fell to the ground. The ALJ finds the claimant's perceptions and actions to be reasonable and appropriate under the circumstances. The ALJ also finds the claimant's testimony to be credible.

20. The claimant had never received instructions or protocols from the employer to refrain from protecting oneself if being physically assaulted. Nor was any guidance or training provided for self-defense techniques.

21. The first person the claimant spoke to after the assault was [Redacted, hereinafter SK], the director. The first thing SK[Redacted] said was "please tell me you did not hit him back."

22. The ALJ finds that the claimant's actions actually de-escalated the situation. In other words, given the circumstances, the claimant's defensive actions, body language, and vocalizations neutralized the threat posed by the assailant. And although the claimant sustained substantial injuries, the claimant's resistance, body language, and vocalizations likely minimized the extent of her injuries.

23. At no point did the claimant assume the role of an aggressor. She reacted to an assault and attempted to protect herself the best way she knew how, and such actions were completely reasonable under the circumstances.

24. Claimant testified about her job duties. As found above, the claimant worked for the employer as an overnight supervisor for a women's shelter. But, despite her supervisory role, the claimant also performed physical tasks as a shelter aid, including lifting up to 50 pounds. Examples of such tasks included assisting with food deliveries, such as carrying 6-gallon boxes of milk weighing about 50 pounds, cleaning the facility (including mopping and sweeping), packing residents' belongings into totes (some weighing over 25 pounds), and setting up and taking down cots.

25. On February 4, 2022, the day of the assault, the claimant presented to Denver Health with primary complaints of pain involving her right forearm, wrist, and hand. The

Claimant was evaluated and underwent x-rays, which were normal. Claimant was given a splint to wear and provided restrictions. The claimant was restricted from lifting anything with her right arm until February 7, 2022. Claimant was also advised to return to the ER or urgent care if her symptoms worsened.

26. The day after the assault, the claimant's condition worsened so she returned to Denver Health. At this visit, the claimant complained of headaches, blurred vision, nausea, and right sided pain in her shoulder, arm, and hand.

27. On February 7, 2022, the claimant presented to Concentra. At this visit, the claimant complained of a headache, dizziness, blurred vision, neck pain, and right arm pain. After being evaluated, the assessment included a right shoulder strain, right forearm strain, right wrist strain, cervical strain, head contusion, face contusion, migraine, and right scapula pain. The claimant was prescribed various medications, physical therapy, and referred to a psychologist due to the assault. The claimant was restricted to performing modified duty from February 5, 2022, to her next follow up appointment. Her restrictions included no lifting.

28. On February 11, 2022, the claimant returned to Concentra with similar complaints that included severe pain in her neck, upper back, and right arm. She was also suffering from a lot of anxiety due to the assault. It was also noted that the Claimant had not been working since the assault. After assessing the claimant, her work restrictions were continued. The claimant was limited to modified duty and no lifting greater than 2 pounds with her right upper extremity.

29. On February 18, 2022, the claimant returned to Concentra. At this visit, it was noted that the claimant was adhering to the work restrictions as prescribed. At this visit, the claimant still complained of headaches, neck pain, right shoulder and scapula pain, right wrist, as well as stress and adjustment reaction resulting in not sleeping due to stress. The report also indicates that the claimant had also been working as a hairstylist, braiding hair, but that she had to cancel appointments because she cannot use her right wrist. Her work restrictions of no lifting or carrying anything greater than 2 pounds and no reaching overhead were continued.

30. On March 11, 2022, another referral was made for the claimant to see a psychologist.

31. As of March 18, 2022, the claimant had been working for the [Redacted, hereinafter SA] for the past weeks and had also been working at a Covid testing center, and both jobs, at that time, allowed her to work within her restrictions. Her restrictions were increased, and she could lift up to 5 pounds with her right upper extremity.

32. As a result of her injuries, and after the assault, the claimant could not perform her regular job duties at the shelter that required lifting up to 50 pounds and her inability to perform her regular job duties exceeded three days.

33. On the day of the assault, and shortly after the claimant's discharge from the hospital, the employer terminated claimant. The employer terminated the claimant for being in a "physically violent altercation with a participant" because the employer thought that the claimant's actions were "inappropriate, unprofessional, and do not condone how we treat participants at [Redacted, hereinafter CC]." According to the employer, the

Claimant's actions of defending herself violated their code of conduct and workplace policies.

34. The employer submitted portions of their code of conduct and workplace policies. The portions they provided set forth the expectations for each employee as well as a section about preventing violence in the workplace. The conduct policy provides the following:

> *Conduct Expectations*:
>
> Certain standards are necessary for efficient operation of the Agency, for the benefit and protection of the rights and safety of Agency employees, and to reflect respect for those individuals and families coming to the Agency for services. Conduct that interferes with operations or brings discredit to the Agency will not be tolerated whether it occurs on or off Agency time or Agency property. CC[Redacted] expects from its employees the highest standards of competence, loyalty and service. In all dealings with clients, the general public and with each other, employees must respect the dignity of each individual. All employees are expected to engage in mutual and cooperative actions in relation to one another. It is vital that clients, visitors, and fellow employees are treated with unfailing courtesy and understanding at all times, regardless of the situation. Employees are expected to conduct themselves professionally and behave in a manner that is respectful of the Vision, Mission and Core Values of CC[Redacted].

35. The policy about violence provides:

> Preventing Violence in the Workplace.
>
> The Agency is committed to providing employees with a safe work environment. Threatened or actual violence by or toward our employees is strictly prohibited on our premises or on a work site. Threats or actual violence by employees is prohibited towards other employees, clients, volunteers, vendors and other people acting on behalf of the Agency. Violence in the workplace may be described as verbal or physical threats, intimidation, and/or aggressive physical contact. Prohibited conduct includes, but is not limited, to the following:
>
> - Inflicting or threatening injury or damage to another person's life, health, wellbeing, family or property;
> - Possessing a firearm, explosive or other dangerous weapon on Agency premises or using an object as a weapon;
> - Throwing objects;
> - Slamming items such as doors, drawers, desks, etc.;
> - Abusing or damaging Agency or employee property;
> - Using obscene or abusive language or gestures in a threatening manner; or,

- Raising voices in a threatening manner.

36. As found above, the claimant was terminated for how she defended herself. Moreover, the act of defending herself from a violent assault, in the manner she did, would not reasonably be expected to cause the loss of employment. In other words, defending yourself against a violent assault by fighting back and yelling at the assailant would not be expected to cost you your job.

37. The ALJ finds that the policies submitted by the employer do not apply to the circumstances of this case, defending oneself during an assault, and how the claimant defended herself.

38. The ALJ is mindful that in some cases, an assault victim can cross the line and become the aggressor. But in this case, the ALJ finds that the claimant did not come close to that line and did not cross that line.

39. Thus, the ALJ finds that the termination was neither reasonable nor warranted under the circumstances. Thus, the claimant is not at-fault for her termination and subsequent wage loss.

40. At the time of her injury, the claimant was working four jobs. The claimant was working for the employer, [Redacted, hereinafter ES], and the SA[Redacted]. The claimant also worked at home braiding hair. The claimant did not, however, seek to have her income from braiding hair included in her average weekly wage.

41. The employer's wage records, that were submitted at the hearing, are from June 19, 2021 through January 28, 2022-which is 223 days. The records show that the Claimant started at an hourly rate of $16.87 per hour, but then got a raise around July 17, 2021, to $19.00 per hour. Therefore, in calculating the claimant's average weekly wage, the ALJ has taken the hours worked from June 19, 2021 through January 28, 2022, and determined the claimant's average weekly wage, based on the higher wage of $19.00 per hour. Between June 19, 2021, and January 28, 2022, the Claimant earned $33,694.51. But based on an hourly rate of $19.00, she would have earned $34,038.50. Therefore, the ALJ has used the higher figure and finds that the claimant's average weekly wage at the employer is $1,068.48.[1]

42. The claimant had concurrent employment at ES[Redacted] at the time of her work injury. In order to determine her average weekly wage from her concurrent employment at the time of the jury, the ALJ will use her gross earnings from 2021. During 2021, the claimant earned $22,374.60 at ES[Redacted]. Dividing her gross earnings by 52 weeks results in an average weekly wage from ES[Redacted] of $430.28.

43. The claimant also worked at the SA[Redacted]. There are wage records that show the claimant earned $855.00, for 42.75 hours of work, at $20.00 per hour, from

[1] $34,038.50/223 days = $152.64 per day. $152.64 x 7 days = $1,068.48 per week. The ALJ also did not include the $350 bonus the claimant received in 2021 since there was no indication that the bonus, and the amount of the bonus, was regularly expected.

January 16, 2022, through January 29, 2022.[2] Therefore, this results in an average weekly wage from the SA[Redacted] of $427.50.

44. While the claimant did not submit wage records from ES[Redacted] that shows the amount she earned from January 1, 2022, through February 4, 2022, the ALJ still finds that the 2021 wages from ES[Redacted] represent a portion of the claimant's earning capacity at the time of the accident. Therefore, based on the three jobs the claimant was working at the time of her injury, the claimant's average weekly wage is found to be $1,926.26.[3]

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 must 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

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[2] The ALJ did not include bereavement or public health payments from the SA[Redacted] since those do not appear to be based on hours worked and do not assist in determining loss of earning capacity under the facts and circumstances of this case.

[3] Archdiocese of Denver of $1,068.48, plus ES[Redacted] of $430.28, plus the SA[Redacted] of $427.50, equals $1,926.26.

P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has proven by a preponderance of the evidence she is entitled to temporary disability benefits.

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *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).

The claimant's testimony and statements to her medical providers is found to be credible. As found, the claimant worked for the employer as an overnight supervisor for a women's shelter. But despite her supervisory role, the claimant also performed physical tasks as a shelter aid, including lifting weights up to 50 pounds. Examples of such tasks included assisting with food deliveries, such as carrying 6-gallon boxes of milk weighing about 50 pounds, cleaning the facility (including mopping and sweeping), packing residents' belongings into totes (some weighing over 25 pounds), and setting up and taking down cots.

As further found, the claimant was injured on February 4, 2022. Due to her work injury, the claimant was restricted from performing her regular job duties.

- For example, on February 4, 2022, the day of the assault, the claimant presented to Denver Health with primary complaints pain involving her right forearm, wrist, and hand. Based on her injuries, the claimant was restricted from lifting anything with her right arm.
- On February 7, 2022, the claimant presented for additional medical treatment. At this visit, the claimant complained of a headache, dizziness, blurred vision, neck pain, and right arm pain. After being evaluated, the assessment included a right

shoulder strain, right forearm strain, right wrist strain, cervical strain, head contusion, face contusion, migraine, and right scapula pain. The claimant was prescribed various medications, physical therapy, and referred to a psychologist due to the assault. Lastly, the claimant was restricted to performing modified duty from February 5, 2022, to her next follow up appointment and her restrictions included no lifting.

- On February 11, 2022, the claimant returned to Concentra with similar complaints that included severe pain in her neck, upper back, and right arm. She was also suffering from a lot of anxiety due to the assault. It was also noted that the claimant had not been working since the assault. After assessing the claimant, her work restrictions were continued. The claimant was limited to modified duty and no lifting greater than 2 pounds with her right upper extremity.
- Then, on February 18, 2022, the claimant returned to Concentra. At this visit, it was noted that the claimant was adhering to the work restrictions as prescribed. At this visit, the claimant still complained of headaches, neck pain, right shoulder and scapula strain, right wrist, as well as stress and adjustment reaction resulting in not sleeping due to stress. The report also indicates that the claimant had also been working as a hairstylist, braiding hair, but that she had to cancel appointments because she cannot use her right wrist. Her work restrictions of no lifting or carrying anything greater than 2 pounds and no reaching overhead were continued.

Based on the claimant's testimony and the medical records, the ALJ finds and concludes that the claimant has established by a preponderance of the evidence that she is entitled to temporary disability benefits as of February 5, 2022.

II. Whether Claimant was responsible for her termination and not entitled to any temporary disability benefits.

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As found, the claimant was violently assaulted by a patron of the shelter. In order to defend herself, the claimant fought back and hit the assailant and yelled at the assailant.

The employer contends that the claimant violated company policies by volitionally hitting and attempting to hit the assailant in self-defense and by yelling at the assailant in an attempt to get the assailant to stop assaulting her and to leave the facility.

The ALJ has watched the surveillance video several times and found that the claimant acted reasonably under the circumstances. The ALJ further found that the claimant's actions would not reasonably be expected to result in someone being terminated – for defending themselves from a violent assault.

The ALJ further found that the policies implemented by the employer to de-escalate situations only pertains to verbal situations and not physical assaults. Moreover, the ALJ further found that the employer did not provide any training for what an employee should do if they are physically and violently assaulted. In fact, the ALJ finds and concludes that it was the claimant's actions of fighting back and yelling at the assailant that de-escalated the situation and caused the assailant to stop assaulting the claimant and begin to leave the facility.

Based on the totality of the evidence, the ALJ finds and concludes that the respondents failed to establish by a preponderance of the evidence that claimant's volitional actions of defending herself make her at-fault for her termination and subsequent wage loss. As a result, the claimant is entitled to temporary disability benefits.

III. The claimant's 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.*

As found, at the time of her injury, the claimant had four jobs. The claimant worked for the employer, the SA[Redacted], ES[Redacted], and braided hair at home. The claimant did not, however, request that her earnings from braiding hair be considered in determining her average weekly wage.

As found, the wage records from the employer that were submitted at the hearing, are from June 19, 2021 through January 28, 2022-which is 223 days. The records show that the claimant started at an hourly rate of $16.87 per hour, but then got a raise around July 17, 2021, to $19.00 per hour. Therefore, in calculating the claimant's average weekly wage, the ALJ took the hours worked from June 19, 2021 through January 28, 2022, and determined the claimant's average weekly wage, based on the higher wage of $19.00 per hour. Thus, between June 19, 2021, and January 28, 2022, the claimant earned $33,694.51. But based on an hourly rate of $19.00, she would have earned $34,038.50. Therefore, the ALJ used $34,038.50 to determine her average weekly wage and finds and concludes that the claimant's average weekly wage at the employer is $1,068.48.

As also found, the claimant had concurrent employment at ES[Redacted]. As set forth in the W-2 submitted by the claimant for 2021, the claimant earned $22,374.60. Dividing her yearly earnings by 52 weeks results in an average weekly wage from ES[Redacted] of $430.28. While the documents from ES[Redacted] cover only 2021, the ALJ still finds and concludes that the claimant was working for ES[Redacted] in 2022 and that earnings from such employer should be included in calculating her average weekly wage.

Lastly, as also found, the claimant concurrently worked at the SA[Redacted]. The wage records from the SA[Redacted] show the claimant earned $855.00, for 42.75 hours of work, at $20.00 per hour, from January 16, 2021 through January 29, 2022. Therefore, this results in an average weekly wage from the SA[Redacted] of $427.50.

The ALJ finds and concludes that the fairest and most equitable way to determine the claimant's average weekly wage based on the evidence submitted at the hearing is to add the average weekly wage from each of the three employers together. As a result, the ALJ finds and concludes that the claimant established by a preponderance of the evidence that she was working three jobs at the time of her accident and that her average weekly wage is $1,926.26.[4]

ORDER

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

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[4] Claimant, in her proposed order, contends that the maximum AWW for this claim is $1,738.38. It is, however, up to the parties to determine how the maximum AWW cap applies in calculating the claimant's TTD and TPD benefits since that issue is not before the ALJ.

1. The claimant is entitled to temporary disability benefits from February 5, 2022, until terminated by law.
2. The claimant is not responsible for her termination and is not at fault for her wage loss.
3. The claimant's average weekly wage is $1,926.26.
4. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: June 5, 2023

/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. 5-203-709-002

ISSUES

I. Whether the respondents established by a preponderance of the evidence that the claimant violated a safety rule and are entitled to reduce his indemnity benefits by 50%.

II. Whether the claimant established that the need for treatment of his left knee is reasonably necessary and related to his work injury.

FINDINGS OF FACT

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

Date of Compensable Accident

1. The claimant sustained a compensable injury on April 20, 2022.

Hiring and Training of Claimant.

2. The Claimant was hired by the employer on January 31, 2022, to work as a forklift driver. Claimant's job duties as a forklift driver included transporting freight, pulling merchandise, replacing freight, filing orders, and controlling freight flow in an indoor warehouse. **RHE J, 171; Hearing Tr. 29, ll. 20-25, Tr. 30, ll. 1-6.**

3. On January 31, 2022, the claimant completed the employer's "Daily Onboarding Quiz- Day One". On February 1, 2022, the claimant completed the employer's "Daily Onboarding Quiz- Day 2". On February 3, 2022, the claimant completed the employer's "Daily Onboarding Quiz- Day 3". **RHE J, 165-170.** Daily Quiz 1 and 3 both outline the importance of a clear workplace and keeping the workplace and floors clean of debris. However, the claimant's job did not involve cleaning debris off the floors. The claimant also acknowledged receipt and understanding of the essential functions of, and an ability to perform, the employer's forklift operator position. **RHE J, 174.**

4. [Redacted, hereinafter KR], the employer's Operations' Manager Over Environmental Health, and Safety testified at the hearing. As the Environment Health and Safety Manager, KR[Redacted] is familiar with the safety training provided to the employer's associates, including the employer's lift operators. **Tr. 68, ll. 23-25, Tr. 69, ll.1-6.** KR[Redacted] credibly testified the employer has a forklift training program complied of Crown[1] videos, subsequent testing, followed by four hours of training on use of the forklift, and additional training for the associate's first 90 days of employment. **Tr. 71, ll. 6-16.** According to KR[Redacted], together with when the employee completes the

[1] Crown is the manufacturer of the forklift involved in the Claimant's accident.

first portion of their forklift training, they are also required to read through the training with the trainer and sign off on it. **Tr. 73, ll. 20-23.** The employer also requires their forklift operators to be certified, which involves watching a manufacturer-specific video, passing a test, completing four additional hours of training with a trainer, with a checklist and training guide, and finally completing a practical exam. **Tr. 74, ll. 1-25, Tr. 75, ll. 1-15.**

Safety Rules

5. The employer did submit into evidence a document titled "General Safe Work Practices." The document contains a few rules that govern the operation of forklifts. But there is not a written rule that says driving a forklift above a certain speed is unsafe and not allowed. It does not appear that the claimant was told such either. In addition, although the document has a place for the claimant's signature, the copy submitted by the employer is not signed by anyone. Therefore, it is not clear that this document was provided to the claimant.
6. The employer failed to submit sufficient and credible evidence to establish that they have any safety rules, whether verbal or in writing, that govern the proper speed the forklift drivers should drive while working in the warehouse.
7. But the claimant did admit during his testimony that going full speed on his forklift down an aisle would violate a safety rule. **Tr. 48, ll. 8-10**.
8. [Redacted, hereinafter AL] testified at the hearing and on behalf of the employer. He testified that about two hours before the accident, he noticed that some pallets looked like they had been "bulldozed." Bulldozing is when a forklift driver pushes empty pallets out of the way with the forks of the forklift. He credibly testified that about two hours before the accident he advised the claimant to not bulldoze any pallets. Thus, the claimant was advised to not bulldoze pallets.

Write-ups - Coaching Events - Enforcement

9. Based on KR'S[Redacted] testimony, on February 10, 2022, the claimant received a coaching for "Failure to follow power equipment operating rules not otherwise covered specifically within this guideline". **RHE J, 201.** The specific incident in which the Claimant was involved was striking a fixed object, in this case, a bollard. **Tr. 67, ll. 21-25.** Following the February 10, 2022, incident, the claimant received additional training relating to the operation of a forklift, going over the employer's safety rules, completing a "safety observation," and spending additional time with a trainer. **Hearing Tr. 82, ll. 11-22.**
10. On March 31, 2022, the claimant again received a coaching for "Failure to follow power equipment operating rules not otherwise covered specifically within this guideline". **RHE J, 200.** According to KR's[Redacted] testimony the March 31, 2022, coaching involved the claimant's improper placement of pallets on the rack. **Tr. 83, ll14-25.** After the claimant received this coaching, his manager asked a driver from a different shift to give the claimant additional safety training on the operation of the forklift. **Tr. 84, ll. 20-25, Tr. 85, ll. 1-4.**
11. On April 13, 2022, the claimant received a Safety Accountability, Step One Safety

Rule Violation, a more severe safety violation than the two occurrences previously received, for careless operation of equipment. **Tr. 85, ll. 2-24, RHE J, 199.** This safety rule violation occurred due to the claimant hitting a sprinkler head while placing a pallet on a shelf. **Tr. 76**. KR[Redacted] testified that accountability is given to the employee, and the training is given after. In this case, after the claimant received the Step One Safety Rule Violation, he "open doored" it with his manager, [Redacted, hereinafter MR]. The open-door process took place the morning of his April 20, 2022, accident. **Tr. 86, ll. 12-22.** The claimant was unhappy or disgruntled about receiving the Safety Rule Violation. **Tr. 109, ll. 10-14.** During their open-door discussion the morning of April 20, 2022, MR[Redacted] emphasized to the claimant the expectation for any lift driver who works for the Employer to hold themselves accountable to a safety-first mindset. **Tr. 111, ll. 4-10.**

12. KR[Redacted] also stated that the claimant has also been coached on his need to meet production requirements or his quota. **Tr. 77, ll. 20-25**. In other words, the employer told the claimant that he had to work faster. Since the claimant's job required him to drive a forklift, the only way for him to improve his production would be to work faster by lifting and placing products on the shelves faster and driving faster.

13. None of the prior write-ups, or coaching, involve the claimant driving too fast. On the contrary, the claimant was coached for not meeting production—working too slow.

14. The employer has surveillance cameras in the warehouse. There was no credible evidence submitted demonstrating the employer attempted to enforce any type of speed limit in the warehouse by reviewing the surveillance tape regularly and advising employees to keep their speed down.

15. Based on KR's[Redacted] testimony, each forklift has a governor that limits its speed to 9 miles per hour. **Tr. 67, ll. 2-3**. Thus, if the employer wanted to make sure that each forklift was always driven slower, no matter how it impacted each driver's production, they could have set the governor at a lower speed. In other words, if 9 miles per hour is too fast, then it would appear the employer had the means to limit the speed - but chose not to. In essence, the employer allowed forklifts to drive up to 9 miles per hour – apparently to assist each driver meet their production quota.

16. None of the claimant's prior write-ups or coaching are found to be willful violations of any of the employer's safety rules. Instead, they merely represent the claimant's lack of experience and skill as an indoor forklift driver and the requirement that he work faster to meet his production or quota.

Accident

17. On April 20, 2022, the claimant, after completing his break, was working in "Module 9" operating a forklift, replenishing freight. After slotting a rack of freight, the claimant brought the forks of his lift down, facing away from him, while making his way to grab the next freight, he came across some type of floor debris, which resulted in a loss of control of the forklift, preventing his forklift from stopping, and causing him to impale his left thigh on a pallet. **Hearing Tr. 34, ll. 13-25, Tr. 35, ll. 1-25, Tr. 36, ll. 1-7.**

18. At the time of the accident, the claimant was driving approximately 4 miles per hour. **Hearing Tr. 55, ll. 19-21.**

19. KR[Redacted] testified that following the claimant's accident, she inspected the accident scene. She also reviewed CCTV footage of the accident, which is included in the record as Exhibits K and L. Based on her observations, KR[Redacted] noted markings on the rack of the module indicating it had been struck by a pallet, she also noticed that paint was removed and there were scratches. Plus, the top pallet was missing a board, which KR[Redacted] believed was the board that impaled the claimant's leg. All the nails and boards on the pallet were shifted as if it occurred on impact. The entire side of the pallet was bent, and every board on the pallet was bent, and the nails pulled as if from a hard direct blow. **Tr. 79, ll. 12-25, Tr. 80, ll. 1-2.** Based on her review of the CCTV video, KR[Redacted] offered her lay opinion that the accident occurred when the claimant pulled replenishment product from the other side of the rack, had a full load of product on his forks, went through the breezeway, traveled 90 feet in five seconds, going full speed, and made contact with a stack of pallets on the ground, and then drove the pallets into the rack of the module. Because the module rack is immobile, the pallet was driven into the claimant's left leg. **Tr. 95, ll. 12-25.** Following the claimant's accident, KR[Redacted] inspected the accident scene. Based on her inspection, she stated that there was some debris covering the floor - which is consistent with the claimant's testimony that the accident might have resulted from debris on the floor. **Tr. 87, ll. 3-8.**

20. The surveillance or CCTV video admitted into evidence and relied on KR[Redacted] to conclude the claimant was driving carelessly and at an excessive speed is of very poor quality. The video appears to be a video taken of the video being played on a monitor. When viewing the video, you can see the timestamp on the video as well as the playback speed. For example, on one video, at about 6:45.37, the video shows a forklift, which is allegedly being driven by the claimant, driving quickly past the end of an aisle. But upon closer inspection of the video, the video is being played back at 4 times the normal speed. Thus, this misrepresents the speed of the forklift seen on the video. The court has also reviewed the video to try to determine the portion of the video that allegedly shows the claimant traveling 90 feet in 5 seconds. However, the ALJ cannot find that portion of the video that arguably shows the claimant traveling very fast and allegedly covering 90 feet in five seconds. For example, there is a section of the video that shows a forklift going down an aisle – and it appears to be going quickly. This is at around 7:03.30 through 7:04.03. But again, a review of the playback speed of this portion of the video shows that it is being played back at 8 times its normal speed. There is also another video which is of better quality, but does not appear to show the claimant speeding or going too fast. As a result, the ALJ does not find the video to be reliable evidence of the speed the claimant was driving at the time of the accident or just before the accident. Thus, because KR[Redacted] relied on the video, which the ALJ does not find persuasive, the ALJ also does not find KR's[Redacted] testimony regarding her contention that the accident was caused by the claimant driving too fast to be reliable or persuasive.

21. There was some testimony about the possibility that the claimant might have been injured while "bulldozing" pallets. Bulldozing is when a forklift driver uses his forklift to push or "bulldoze" empty pallets out of the way. There was, however, a lack of credible evidence that the claimant was injured due to bulldozing pallets.

22. Moreover, there was also testimony from [Redacted, hereinafter CN]. He testified that he visited the claimant in the hospital after the accident. He further testified that the claimant told him that the accident occurred while trying to retrieve a replenishment pallet, he tried to back out and in doing so, struck a stack of empty pallets. **Hearing Tr. 110, ll. 1-8.**

23. The ALJ credits the claimant's testimony that he lost control of the forklift due to debris on the floor and not due to excessive speed or bulldozing pallets. This is supported by the testimony of [Redacted, hereinafter ML] who also testified that there was some debris on the floor after the accident. As a result, the ALJ finds it was an accident - and was not caused by the claimant's willful violation of a safety rule such as speeding or bulldozing.

Medical Treatment after Accident and Knee Complaints

24. After the accident, the claimant was transported by Emergency Medical Services to Kaiser Permanente Hospital where he was diagnosed with a penetrating injury just above the left knee by a wood pallet, with damage to the popliteal artery and vein. **RHE B.** The claimant subsequently underwent removal of the impaled wood from the left popliteal fossa, repair of the popliteal artery and popliteal vein transections with interposition reversed autogenous saphenous vein grafts, irrigation and debridement of wound, closure of muscle fascia, application of negative pressure wound VAC, and lateral closure. **RHE C, 9.**

25. On the day of the accident, and while in the hospital, the claimant also complained of left knee pain. As a result, they took x-rays of his left knee. The x-rays demonstrated small joint effusion, surgical clips, skin staples, and gas within the soft tissues. **RHE C, 28.**

26. While in the hospital, the claimant also noticed knee pain when he started to become mobile. **Tr. 34, ll. 3-6.**

27. The claimant subsequently underwent an extensive course of treatment, including multiple surgeries with skin grafting, and physical therapy, including physical therapy to the left knee, massage therapy, and psychological counseling.

28. On June 7, 2022, the claimant was evaluated by Christopher Amaral, PA-C. At this time, the claimant still had left knee pain and a feeling of instability. As a result of ongoing knee pain and instability, the claimant was referred for physical therapy.

29. On June 20, 2022, the claimant was seen by Oscar Sanders, M.D. for his thigh injury, the wound from the impaling injury, and his symptoms that included knee pain and a feeling of instability in his knee. As for his knee, Dr. Sanders discussed with the claimant the possibility of intra-articular pathology and an MRI to help determine the cause of his knee pain and instability. Dr. Sanders, however, decided to hold off on getting an MRI until after the claimant underwent reconstructive wound care treatments with the plastic surgeon for the thigh wound, but yet directed the claimant to continue with physical therapy for his knee symptoms. **CHE 145-147**.

30. On July 13, 2022, the claimant was again seen by Dr. Sanders. At the appointment, the claimant still had ongoing knee symptoms. After the appointment, Dr. Sanders

completed WC164 form and stated that the work-related diagnosis included a left knee sprain. **CHE 162**.

31. On August 22, 2022, the claimant was seen by Dr. Sanders and his primary complaints involved his left knee. At this appointment, he described an incident where his knee gave out and also indicated that although he has tried to increase his walking, he has to stop about every 10 minutes due to knee pain and that he is using a cane to help him walk. Thus, Dr. Sanders ordered an MRI. **CHE 165-166**.

32. In September 2022, the claimant underwent the left knee MRI ordered by Dr. Sanders. The MRI showed the following:

    a. Chronic grade 2 sprain of the proximal MCL.

    b. A focal full-thickness defect between the proximal MCL and an adjacent medial retinaculum.

    c. Areas of high-grade cartilage loss within the patellofemoral compartment.

    d. Strains of the vastus medialis, vastus lateralis, and biceps femoris.

    e. Small joint effusion.

33. Based on the findings on the MRI, and the claimant's concerns about having a full recovery, he was referred to Dr. Javernick, an orthopedic surgeon, for an evaluation. **CHE 174-175**.

34. Orthopedic surgeon, Dr. Matthew Javernick, evaluated the Claimant on September 21, 2022. In connection with his evaluation, Dr. Javernick reviewed the Claimant's left knee MRI. According to Dr. Javernick, the left knee MRI showed only a small amount of chondromalacia patella, with a focal defect in the MCL, but this was focal did not involve the entirety of the MCL, and clinically was completely stable. Dr. Javernick diagnosed the Claimant with chondromalacia patella with a stable medial collateral ligament, opining the majority of the claimant's complaints are unrelated to the knee, but related to the significant trauma that occurred upstream of the knee. From an orthopedic standpoint regarding the knee, Dr. Javernick's only recommendations were low impact activity and strengthening activities. **RHE F, 111.** It is not clear whether the strengthening activities were to be provided via physical therapy since it does not appear that he wrote the claimant a prescription for physical therapy.

35. On October 4, 2022, the claimant was again seen by Dr. Sanders. At this appointment, Dr. Sander's revised the claimant's diagnosis regarding his knee by including a tear of the medial collateral ligament and chondromalacia of the left patellofemoral joint. He also noted that the claimant was seen by Dr. Javernick and Dr. Javernick did not think the claimant was a surgical candidate. Dr. Javernick thought that the claimant's knee was stable and that the majority, but not all, of the claimant's knee complaints related to the significant trauma that is affecting both the vascular and lymphatic return from the lower leg. Therefore, Dr. Sanders referred the claimant to Dr. Reichhardt for a physiatry consultation to assess the claimant's symptoms, which included his left knee. **CHE 180-181.**

36. On November 16, 2022, Dr. Bernton issued a report setting forth his opinion about the cause of the claimant's knee pain. In his report, Dr. Bernton discussed the findings on examination and on the MRI. Dr. Bernton concluded that the claimant has some chondromalacia in his left knee, but that it is unrelated to the work accident. Thus, he concluded that the claimant's left knee problems are unrelated to his work injury and therefore any need for treatment is not work related. In his report, however, Dr. Berton failed to adequately address any aggravation of the claimant's chondromalacia and also failed to address the possible cause of the claimant's knee pain as Dr. Reichhardt explained in his December 20, 2022, report. Moreover, Dr. Bernton failed to explain the cause of the claimant's knee pain, when his knee pain did not exist before the work accident, and then developed right after the accident. As found, the immediate development of the claimant's knee pain after the accident is documented in the medical records that show the claimant complained of left knee pain on the day of the accident and had x-rays taken of his knee that same day. Dr. Bernton also failed to address whether the effusion in the claimant's knee joint is or is not evidence of an injury. As a result, the ALJ does not find Dr. Berton's opinions and conclusions to be persuasive.

37. On December 20, 2022, the claimant was seen by Dr. Reichhardt. At this appointment Dr. Reichhardt addressed the cause of the claimant's knee pain and the need for medical treatment. Dr. Reichhardt concluded that the claimant's knee pain and need for treatment relates to the work accident. Dr. Reichhardt stated that:

> It is, however, medically probable that his left knee was injured as a result of the accident. Certainly, the force of the blunt penetrating injury could have put sufficient force on his knee to tear the MCL. In addition, his reaction to the trauma potentially could have caused additional injury to the patellofemoral compartment and/or aggravated underlying patellofemoral degenerative changes. In addition, the damage to the quadriceps could have caused worsening of patellofemoral tracking, aggravating any underlying patellofemoral degenerative changes. It is medically probable that his knee pain relates to his work-related injury.

38. The ALJ finds Dr. Reichhardt's opinions and conclusions to be persuasive. His conclusions about the cause of the claimant's knee pain and need for medical treatment considered the force of the accident and the torn MCL demonstrated on the MRI. He also provided additional opinions as to the possible cause of the claimant's knee pain such as the possible aggravation of the patellofemoral compartment or tracking changes caused by the damage to the claimant's quadriceps. Although Dr. Reichhardt cannot provide a definitive cause of the claimant's knee pain, or the pain generator, his thought process is logical and consistent with the underlying medical records and the information available to him at the time of his assessment. Thus, the ALJ finds Dr. Reichhardt's opinion that the work accident caused the claimant's left knee pain and caused the need for medical treatment to be credible and highly persuasive.

39. As a result, the work accident injured the claimant's left knee and caused his knee pain and feeling of instability. Thus, the accident caused the need for medical

treatment to cure and relieve the claimant from the effects of his work-related left knee injury.

CONCLUSIONS OF LAW

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

General Provisions

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

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

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

I. Whether the respondents established that the claimant violated a safety rule and are entitled to reduce his indemnity benefits by 50%.

Section 8-42-112(1)(b), C.R.S. provides for a fifty percent reduction in compensation "where injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." The burden of proof is on the respondents to establish that the claimant willfully violated the safety rule, and resolution of this issue is generally one of fact for determination by the ALJ. *Lori's Family Dining, Inc., v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). An employee's violation of a safety rule need not be considered willful if the employee had some "plausible purpose to explain his violation a rule." *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1995).

A violation which is the product of mere negligence, forgetfulness or inadvertence is not willful. *Johnson v. Denver Tramway Corp.*, 171 P.2d 410 (Colo. 1946). Conduct which might otherwise constitute a safety rule violation may not be willful misconduct if the employee's actions were intended to facilitate accomplishment of a task or of the employer's business. *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO August 25, 2000). Thus, a violation of a safety rule may not be considered willful if the employee can provide some plausible purpose for the conduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

Moreover, in order to establish a safety rule violation, the employer must establish that the adopted safety rule was enforced. *See Lori's Family Dining, Inc., v. Industrial Claim Appeals Office*, 907 P.2d 715, 718 (Colo. App. 1995):

The employer contends that the claimant was driving the forklift at an excessive rate of speed, which violated a safety rule, and that driving too fast resulted in a loss of control and collision with a wooden pallet. To support this contention, the employer has provided various employment records, testimony, and surveillance footage. The ultimate determination of whether the claimant's actions violated a safety rule and whether this violation was the cause of the accident and injuries rests on the weight and credibility attributed to the evidence presented.

After a comprehensive review and analysis of the evidence presented, the ALJ finds and concludes that the employer did not meet their burden of proof by establishing, by a preponderance of the evidence, that there was a safety rule about driving too fast, that the rule was enforced, that the claimant willfully violated the rule, that the claimant was driving too fast, and that the violation caused the accident and the claimant’s injuries.

The ALJ’s opinion is based on several factors. First, there is a lack of credible and persuasive evidence to support a finding that there is a specific rule against driving too fast. Although the claimant agreed that driving full speed down an aisle would violate a safety rule, there is a lack of credible evidence establishing that the employer had such a rule, adopted such a rule, and enforced such a rule. As a result, all that is left is some evidence that driving full speed down an aisle would violate a safety rule.

Second, there is a lack of credible evidence that any rule about driving too fast was enforced. To the contrary, the claimant was coached on his production. In other words, he was coached to increase the speed at which he performed his job. Thus, even if the claimant were driving too fast and the speed of the forklift contributed to the accident, the claimant was coached, encouraged, and directed to work faster – which must have meant he had to drive faster to move more product in a given period of time. As a result, demanding more production would eviscerate or nullify any safety rule about driving speed that could have existed. Thus, the employer's desire for the claimant to work faster not only reveals a lack of any type of rule against driving too fast, but also demonstrates a lack of enforcement of any rule about the speed at which the drivers drive.

Third, each forklift was governed so that it could not be driven over 9 miles per hour. If driving up to 9 miles per hour was too fast to drive in the warehouse, then the employer probably had the ability to govern the speed of each forklift to a speed they determined was safe. Thus, their decision to not limit or govern the speed of each forklift to a lower speed also tends to show the lack of a rule, as well as a lack of enforcement, of any rule that precluded driving 9 miles per hour.

Fourth, the employer relies heavily on the surveillance video and KR's[Redacted] contention that the video shows the claimant driving too fast – or full speed – while performing his job. As found by the ALJ, the surveillance video was not found to be persuasive evidence regarding the speed the claimant was driving at the time of the accident. As found above, the video provided to the court is being played at different speeds at various times. For example, some portions of the video are being played back at 4 times the normal speed and sometimes it is being played back at 8 times the normal speed. The video is also very grainy and of poor quality. Thus, the ALJ did not find the video and KR's[Redacted] interpretation of the video to be persuasive. As a result, the ALJ did not find that the accident was caused by the claimant driving too fast.

Fifth, the ALJ found that the accident was not caused by the claimant driving full speed or driving too fast. The ALJ found that the accident was caused by debris on the floor, which was not left by the claimant.

There was also a contention that the claimant might have been injured while bulldozing pallets, which the employer advised the claimant not to do shortly before the accident. The ALJ, however, has also considered this argument and found that there is a lack of credible evidence to support a finding that the claimant's accident and injuries were caused by him bulldozing pallets.

The ALJ does acknowledge that the employer tries to have a safe working environment and attempts to correct the behavior of its employees in a manner that prevents accidents from happening, and from happening again.

That said, based on the facts and circumstance here, the court finds and concludes that the employer failed to establish by a preponderance of the evidence that the accident was caused by the claimant willfully violating a safety rule.

II. Whether the claimant established that the need for treatment of his left knee is reasonably necessary and related to the work injury.

The claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A preexisting disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting disease or infirmity 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). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In this case, the claimant suffered a severe injury to his leg. As found, the claimant was driving a forklift and crashed into a wooden pallet. Crashing into the pallet resulted in a large piece of wood impaling and going through the claimant's left leg - just above his left knee.

Dr. Reichhardt credibly and persuasively concluded that the accident injured the claimant's left knee and necessitated the need for medical treatment. As found, Dr. Reichhardt concluded that:

> It is, however, medically probable that his left knee was injured as a result of the accident. Certainly, the force of the blunt penetrating injury could have put sufficient force on his knee to tear the MCL. In addition, his reaction to the trauma potentially could have caused additional injury to the patellofemoral compartment and/or aggravated underlying patellofemoral degenerative changes. In addition, the damage to the quadriceps could have caused worsening of patellofemoral tracking, aggravating any underlying patellofemoral degenerative changes. It is medically probable that his knee pain relates to his work-related injury.

On the other hand, Dr. Bernton gave the opinion that the claimant's knee complaints are unrelated to the industrial injury. The ALJ, however, did not find Dr. Bernton's opinions on causation to be persuasive for several reasons. First, Dr. Bernton failed to take into consideration and explain how the contemporaneous onset of the claimant's knee pain following the severe accident and injury is inconsistent with a finding that the accident injured the claimant's knee. As found above, the claimant complained of knee pain immediately after the accident and while in the hospital. Moreover, his complaints resulted in x-rays being taken of his knee. Second, Dr. Bernton also failed to consider that the claimant complained of left knee pain when he started putting more weight on his left leg after his numerous surgeries. Third, Dr. Bernton failed to address the fact that the claimant did not have any knee pain or symptoms before the accident and then did have knee pain immediately after the accident.

As a result, the ALJ finds and concludes that the claimant established by a preponderance of the evidence that the accident caused an injury to the claimant's left knee and caused the need for medical treatment involving his left knee. Thus, the ALJ finds and concludes that the claimant is entitled to reasonably necessary medical treatment to cure and relieve him from the effects of the work accident involving his left knee.

ORDER

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

1. The employer failed to establish by a preponderance of the evidence that the claimant violated a safety rule and that his indemnity benefits should be reduced by 50%.
2. The employer shall provide reasonable and necessary medical treatment to cure and relieve the claimant from the effects of the work accident which resulted in an injury to his left knee.
3. Issues not expressly decided herein are reserved to the parties for future determination.

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

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 9, 2023.

/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 5-182-400-003

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment on September 10, 2021.

2. Whether Claimant established an entitlement to reasonable and necessary medical benefits to cure or relieve the effects of an industrial injury.

3. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability benefits.

4. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is an 85 -year-old woman who worked part-time for Employer distributing food samples to customers at [Redacted, hereinafter SC]. Claimant had performed this type of work for various companies for approximately eight years.

2. Claimant's job duties required her to prepare food, push a wheeled cart weighing approximately 100 pounds from the back of the store into the shopping area, and stand on her feet for approximately six hours per shift.

3. On September 10, 2021, Claimant was working for Employer. During her lunch break, Claimant went to the cafeteria, gave herself an insulin shot, then ate her lunch. After she ate, she went into the restroom. While in a stall in the bathroom Claimant started to sit on a toilet when she fell to the floor onto her left side. Claimant testified at hearing that she did not know what caused her to fall on September 10, 2021.

4. On September 10, 2021, Claimant was taken by ambulance to North Colorado Medical Center (NCMC) where she was examined in the emergency department. Claimant reported she "was at the store in the restroom and her left leg gave out on her." (Ex. 8) Imaging studies demonstrated that Claimant sustained a comminuted intertrochanteric fracture of the left hip requiring surgery. Claimant remained hospitalized until September 25, 2021. (Ex. 8).

5. During her hospitalization, on September 11, 2021, Claimant was examined by Costa Alimonos, D.O., and also reported her leg gave out suddenly when she was injured on September 10, 2021. (Ex. 8).

6. On September 12, 2021, while hospitalized at NCMC, Claimant underwent an occupational therapy evaluation with Mary Swain, OT. Under the heading "Function Prior

to Admission," the occupational therapy report states: "Pt. lives in a Ranch Level house. Pt. reporting independence w/ADL's and IADL's. Pt. ambulates w/SPC [single point cane]." (Ex. 8).

7. Claimant has a history of issues with pain and weakness in her left leg dating to 2019. In October 2019, Claimant was seen at North Colorado Medical Center for left hip pain radiating to her mid-thigh, not associated with any known injury. (Ex. E). Imaging studies demonstrated mild to moderate degenerative changes in the left hip and knee, and lower back. (Ex. E). On October 29, 2019, The nurse practitioner Claimant saw, Maribeth Taylor, NP, indicated these findings could explain Claimant's left leg weakness symptoms, and recommended Claimant consider a cane or walker "if it gets worse." (Ex. F). From this, the ALJ infers Claimant had previously reported left leg weakness.

8. On November 21, 2019, Claimant saw Kelly Sanderford, M.D., at Banner, reporting intermittent stabbing pain in the left thigh, mild pain radiating from her back to her lower leg and thigh. Dr. Sanderford also documented that Claimant had a history of syncope and collapse, without further detail. (Ex. G & J). She reported feeling as if her leg was "going to give out," and pain in her thigh at random times. Dr. Sanderford reviewed Claimant's imaging studies and noted Claimant had minimal arthritis in her hips, but severe degenerative lumbar disease. She suspected Claimant's reported left thigh pain was radicular pain from her back, and recommended an MRI and physical therapy. Dr. Sanderford's diagnosis was lumbago with sciatica on the left side, and pain in the left thigh. (Ex. G & I).

9. An MRI of Claimant's lumbar spine was performed on December 2, 2019, for a diagnosis of left leg pain. The MRI demonstrated "[m]oderate to severe spinal canal stenosis and associated subarticular zone narrowing asymmetric to the left side at L3-4 which could cause irritation/impingement of adjacent descending nerve roots asymmetric to the left side;" and "[m]oderate left L4-5 subarticular zone narrowing which could potentially cause adjacent descending nerve irritation." (Ex. H).

10. At Claimant's physical therapy appointment on December 4, 2019, she reported having pain in the left thigh and buttocks, which began in August 2019. The physical therapist noted Claimant "ambulates into therapy using a SPC [single point cane]. The cane is not adjustable and is too tall for her." The physical therapist recommended Claimant find "a cane that is more appropriate for her height." (Ex. K). Claimant reported pain in her left thigh and buttocks which she indicated began in August 2019, and was not associated with any known event. (Ex. J).

11. On December 20, 2019, Claimant reported to physical therapy that "she doesn't have much pain, just the left leg gives out sometimes." Claimant's stated physical therapy goal was to be able to walk without pain. Claimant also reported she was scheduled to see a back specialist -- Dr. Blatt -- at the end of January 2020. (Ex. L). On January 10, 2020, Claimant reported increasing pain and that she did not feel therapy was helping beyond providing temporary relief that did not last. (Ex. P).

12. On or about January 23, 2020, Claimant saw David Blatt, M.D., a neurologist at the Banner Health Clinic. Dr. Blatt diagnosed Claimant with left lateral thigh pain, IT band/trochanteric bursitis. Dr. Blatt referred Claimant for additional physical therapy. (Ex. O). On January 31, 2020, Claimant reported to physical therapy that she had seen a neurologist who thought her pain was due to bursitis and her IT band, and indicated that the neurologist wanted Claimant to continue physical therapy. (Other than the referral from Dr. Blatt - Ex. O - no records of his evaluation or treatment were offered or admitted into evidence).

13. At hearing, Claimant testified that she did not know the reason she fell on September 10, 2021. Claimant testified she did not report to the NCMC ER physician that her leg “gave out,” when she fell on September 10, 2021, and that she never reported that her leg was “giving out” in 2019. Claimant further testified that prior to her September 9, 2021 injury, she had not owned, borrowed, or used a cane. Claimant’s testimony on these issues is inconsistent with her medical records and is not reliable or credible.

14. Claimant’s medical records indicate Claimant reported her left leg giving out to the ER physician on September 10, 2021. On September 11, 2021, Claimant also reported that her leg "gave out" the following day to a different physician. (Ex. B). Claimant’s testimony that she had never reported her leg giving out in 2019 is also contrary to her medical records. Claimant reported to Dr. Sanderford in November 2019 that she felt that her leg was going to give out; and reported to physical therapy on December 10, 2019 that her “left leg gives out sometimes.” (Ex. G & K). The ALJ finds the contemporaneous medical records from multiple providers more credible and persuasive than Claimant's testimony to the contrary.

15. Claimant’s testimony that she had not used a cane prior to her fall is also inconsistent with her medical records. Specifically, physical therapy records from December 4, 2019 indicate Claimant was using a non-adjustable single point cane that was too tall for her, and the therapist recommended Claimant find an appropriately-sized cane. (Ex. K). After her September 10, 2021 injury, Claimant reported to occupational therapy that she was using a single point cane prior to her injury. (Ex. 8). Given that Claimant’s use of a cane prior to her accident is documented by two different providers, and the level of detail in the physical therapy records related to Claimant’s usage of a cane, the ALJ finds the records more reliable and credible than Claimant’s testimony that she had not previously used a cane.

16. Claimant has not worked since her injury due to continuing issues related to her left hip fracture.

17. Allison Fall, M.D., was admitted as an expert in physical medicine and rehabilitation. Dr. Fall performed an independent medical examination of Claimant at Respondents’ request, and testified by deposition in lieu of live testimony. Dr. Fall opined that the cause of Claimant’s injury was likely due to weakness in supporting her body. Dr. Fall also testified that Claimant’s MRI findings were consistent with an L3-4 nerve irritation that could cause weakness in Claimant’s thigh muscles.

CONCLUSIONS OF LAW

Generally

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

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

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of 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). The evidence establishes that Claimant's injury occurred "in the course" of his employment. That is, it occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014). The issue before the ALJ is whether Claimant's injury "arose out of" his employment.

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

As the Colorado Supreme Court explained in *City of Brighton*, "All risks that cause injury to employees can be placed within three well-established, overarching categories: (1) employment risks, which are directly tied to the work itself; (2) personal risks, which are inherently personal or private to the employee him- or herself; and (3) neutral risks, which are neither employment related nor personal." *City of Brighton*, 318 P.3d at 502.

Employment risks are "risks inherent to the work environment itself." *City of Brighton*, 318 P.3d at 502. Typically, the causal connection between employment risks and employment are obvious. *Id*. The evidence in this case does not establish that Claimant's injury was the result of an "employment risk." No evidence was admitted credibly establishing that the physical condition of the bathroom where Claimant was injured contributed to her injury, or that some action associated with her employment caused her to fall. Claimant's injury does not constitute an "employment risk" because neither the physical condition of the location Claimant was injured, nor a specific work-related activity caused her injury.

Consequently, the compensability of Claimant's September 10, 2021 injury rests on whether it was the result of a personal risk, or a neutral risk. Personal risks are entirely personal or private to the employee herself, such as an employee's preexisting idiopathic medical conditions unrelated to employment. *City of Brighton*, 318 P.3d at 503. Personal risks are generally not compensable unless an exception applies, such as when a "special hazard" of employment contributes to an injury that is primarily caused by a preexisting condition. *Id*.

Neutral risks are those risks that are neither employment nor personal risks, and includes "unexplained falls" (*i.e.*, falls with a truly unknown cause or mechanism). City of Brighton, *supra*. Neutral risks are analyzed under a "but-for" test. That is, an "unexplained fall 'arises out' the employment if the fall would not have occurred but for the fact that the

conditions and obligations of employment placed the employee in the position where he or she was injured." *Id*.

Claimant has failed to establish by a preponderance of the evidence that the fall she sustained on September 10, 2021 was "unexplained," or the result of a "neutral risk." Claimant asserts that the cause of her fall is "unexplained" primarily based on Claimant's testimony that she did not know why she fell. However, the evidence demonstrates it is more likely than not that Claimant fell on September 10, 2021 because of weakness in her left leg, consistent with Claimant's two separate reports to physicians at NCMC that her left leg gave out. As found, Claimant's testimony that she did not report her leg giving out was not credible and was inconsistent with her medical records. Given Claimant's history of left leg weakness, and reports of her leg previously "giving out," the cause of Claimant's fall is more likely than not due to her preexisting idiopathic conditions, that is, a condition personal to Claimant. Thus, the ALJ concludes that Claimant's injury was the result of a personal risk, unrelated to her employment. Claimant has failed to establish that she sustained an injury arising out of the course of her employment with Employer.

MEDICAL BENEFITS

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish a compensable injury, Claimant's claim for medical benefits is denied and dismissed.

TEMPORARY TOTAL DISABILITY

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove her industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). 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).

Because Claimant has failed to establish a compensable injury, Clamant has not established an entitlement to temporary disability benefits. Claimant's request for determination of her average weekly wage is denied as moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that she sustained a compensable injury arising out of the course of her employment with Employer on September 10, 2021. Claimant's claim is denied and dismissed.

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

3. Claimant's request for temporary disability benefits is denied and dismissed.

4. All issues are dismissed as moot.

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: June 6, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-210-972-001

ISSUES

1. Did Claimant prove by a preponderance of the evidence that Respondents violated § 8-43-203, C.R.S. by failing to file a position statement within 20 days of receiving notice of Claimant's Worker's Claim for Compensation, and if so, is Claimant entitled to a penalty?

2. Did Claimant prove by a preponderance of the evidence that Respondents violated the October 18, 2022, Director's Order by failing to file a position statement within 15 days of the date of the Order, and if so, is Claimant entitled to a penalty?

3. Did Claimant prove by a preponderance of the evidence that Respondents failed to timely provide Claimant with a designated provider list pursuant to WCRP 8-2, and if so, is Claimant entitled to a penalty?

4. If Claimant successfully demonstrated that Respondents were in violation of the Rules, Statues or an Order, have Respondents shown by a preponderance of the evidence that Claimant failed to set forth the alleged penalties with specificity by not including the dates the alleged violations began and ended on the Application for Hearing (AFH)?

5. If Respondents successfully demonstrated that any violations have been cured, did Claimant prove by clear and convincing evidence that Respondents knew or should have known that they were in violation of the Rules, Statutes or Orders?

6. If Claimant proved she is entitled to penalties, what are the applicable penalty periods and amounts?

FINDINGS OF FACT

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

1. Claimant suffered a work-related injury on June 24, 2022. Claimant credibly testified that on June 24, 2022, she was in her [Redacted, hereinafter PL] returning from a site when a deer came out of nowhere and hit her car.

2. Claimant credibly testified that she injured her neck and lower back in the accident. She further testified that she was diagnosed with multiple sclerosis (MS) in 2010, and that the 2022 motor vehicle accident caused her MS to flare up.

3. A few days after the accident, on June 29, 2022, Claimant went to the Emergency Room (ER) at UC Health in Broomfield. The following day, June 30, 2022, Claimant

returned to the ER at UC Health. Claimant testified she subsequently went to her PCP at Broomfield Family Practice.

4. Prior to the accident, Claimant had been involved in two other motor vehicle accidents within the two prior years. Claimant credibly testified that the pain she experienced from the June 24, 2022 accident, was similar to her pain and injuries from the previous motor vehicle accidents. At the time of the June 24, 2022 accident, Claimant was treating for her injuries from the other two accidents. Claimant testified that unlike the previous accidents, the 2022 accident escalated her MS, and she experienced vertigo.

5. On July 17, 2022, Claimant filed a Worker's Claim for Compensation. Claimant noted on the form that she injured her neck, upper back and lower back on June 24, 2022 when a deer jumped in front of her moving vehicle. She left the section "[d]ate employer notified" blank. (Ex. A). The ALJ infers that as of July 17, 2022, Claimant had not reported her injury to Employer.

6. On July 21, 2022, the Division of Workers' Compensation (Division) wrote to Insurer at [Redacted, hereinafter AS]. The Division sent Insurer a copy of Claimant's Workers' Claim for Compensation, and informed Insurer that pursuant to § 8-43-203, C.R.S. and WCRP 5-2, it had 20 days, or until August 10, 2022, to either admit or deny liability. (Ex. 1).

7. On September 6, 2022, the Division sent Insurer another letter, again addressed to AS[Redacted]. This letter was fashioned as an "**URGENT NOTICE REQUIRING IMMEDIATE RESPONSE."** The Division notified Insurer that it had failed to admit or deny liability within 20 days and that **"[t]he period for filing a position statement has expired and you are now in a potential penalty situation."** Failure to respond immediately "could result in issuance of a Director's order and imposition of penalties." (Ex. 9). Insurer did not respond to the Division by September 26, 2022.

8. On September 6, 2022, Insurer's third-party administrator (TPA), [Redacted, hereinafter ES], wrote to Claimant. The communication is from [Redacted, hereinafter CS], Sr. Claims Representative at ES[Redacted]. According to the "cover page," the enclosures included a self-addressed envelope, authorization to disclose health information, and a medical treatment provider list. (Ex. 9).[1] The ALJ infers that the stated enclosures, including but not limited to, a medical treatment provider list, were sent to Claimant.

9. The ALJ finds that Insurer was aware of Claimant's Worker's Compensation Claim, as of September 6, 2022.

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[1] Claimant's Exhibit 9, which was admitted into evidence over Respondents' counsel's objection, contains the September 6, 2022 "Cover Page for Mailing" from ES[Redacted] to Claimant, a one page communication from ES[Redacted] to Claimant regarding opting out of medical document exchange, and the September 6, 2022, **"URGENT NOTICE"** to Insurer from the Division. The cover page, is page 1 of 12, but the exhibit does not contain 12 pages. While the September 6, 2022, "**URGENT NOTICE"** to Insurer was attached as part of Exhibit 9, there is no objective evidence in the record that this Notice was sent to Claimant, or that it was a part of the materials CS[Redacted] sent to Claimant.

10. On October 18, 2022, the Director issued an Order, whereby Insurer was ordered to submit an admission of liability or notice of contest within 15 days, or by November 2, 2022. The Order specifically read "**[f]ailure to respond as ordered will result in imposition of penalties of up to $1,000 per day as permitted by § 8-43-304 for failure to comply with an order of the director."** (Ex. 2). Insurer had until November 2, 2022 to respond to the Director's Order. The Order was sent to Insurer at AS[Redacted]. The Order also informed Insurer that it had the responsibility of informing the TPA of the claim and informing the Division if the claim had been assigned to a TPA.

11. There is no objective evidence in the record that Insurer notified the Division that the claim had been assigned to Insurer's TPA, ES[Redacted].

12. On November 17, 2022, Respondents filed a General Admission of Liability (GAL), admitting liability, specifically for medical benefits. (Ex. B).

13. The ALJ finds that Respondents filed the GAL more than 20 days after the Division sent Insurer a copy of Claimant's Worker's Claim for Compensation. The ALJ finds that the GAL was filed more than 15 days after the deadline to respond to the Director's Order. Respondents offered no evidence as to why they failed to respond to the letters from the Division, or to the Director's Order prior to November 17, 2022. The ALJ finds that Respondents violated the Act and failed to timely respond to a Director's Order, but cured such violations on November 17, 2022.

14. Respondents presented no objective evidence to address their failure to timely respond to the Division and the Director's Order. The ALJ finds that Respondents' conduct was not objectively reasonable.

15. On November 23, 2022, CS[Redacted] sent a facsimile to [Redacted, hereinafter NR] that included a list of four physicians for Claimant "as requested." (Ex. 4). This number is Claimant's counsel's fax number. He subsequently wrote to CS[Redacted] and told her Claimant selected Injury Care Associates & Occupational Medicine as her authorized treatment provider. (Ex. 5).

16. On December 5, 2022, Claimant filed an AFH, endorsing multiple penalty allegations.[2] The penalty allegations relevant to this matter include:

a. "Respondent's failure to file a position statement either admitting or contesting liability within 20 days after a workers' compensation claim is filed – C.R.S. § 8-43-203."

b. "Respondents failure to comply with a Director's Order dated October 18, 2022 requiring an admission of liability or a notice of contest within 15 days."

[2] At hearing, Claimant withdrew the penalty alleged pursuant to § 8-43-203(4), C.R.S. for failure to produce a copy of the claim file.

c. “Respondents failure to designate an ATP or provide Claimant with a four-doctor panel – WCRP 8-2.”

(Ex. C).

17. The “penalties” section of the OAC’s AFH states “[d]escribe with specificity the grounds on which a penalty is asserted, including the order, rule or section of the statute allegedly violated, and the dates on which you claim the violation began and ended.”

18. The ALJ finds that even though Claimant did not specify the dates the violations allegedly began and ended, Claimant described her penalty claims with specificity as required by § 8-43-304(4), C.R.S.

19. Claimant testified that Insurer’s delay in filing a GAL and providing her with a list of designated providers, caused her stress, uncertainty and hardship. Claimant also testified that she sought, and received medical care from her primary care physicians following her June 24, 2022 accident.

20. The ALJ finds that Insurer’s delay in responding to the Division and the Director, by not taking a position with respect to Claimant’s Worker’s Claim for compensation did not delay Claimant receiving medical 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 a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The 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).

General Penalties

Section 8-43-304(4) of the Colorado Revised Statutes provides that an application for hearing on penalties shall "state with specificity the grounds on which the penalty is being asserted." The specificity requirement serves two functions. First, it provides notice of the basis of the claim so that the putative violator may exercise its right to cure the violation. Second, it ensures the alleged violator receives notice of the legal and factual bases for the penalty claim so that their rights to present evidence, confront adverse evidence, and present argument in support of their position are protected. *Matthys v. Colo. Springs*, W.C. 4-662-890 (2007) (citing *Major Medical Insur. Fund v. Indus. Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003)). Failure to state with specificity the grounds on which a penalty is being asserted subjects the claim to dismissal. *See Young v. Bobby Brown Bail Bonds, Inc*., W.C. No. 4-632-376 (Apr. 7, 2010); *Marcelli v. Echostar Dish Network*, W.C. No. 4-776-535 (March 2, 2010); *Gonzales v. Denver Public School*, W. C. Nos. 4-437-328, 4-441-546 (Dec. 27, 2001); *Brown v. Durango Transportation Inc.,* W. C. No. 4-255-485 (Oct. 2, 1996).

Respondents argue that Claimant failed to assert her penalty claims with specificity because she did not set forth the dates on which the alleged violations began and ended. While this language is listed on the OAC's AFH form, this language is not required by the statute. *See* § 8-43-304(4), C.R.S. Respondents cured the violations by filing a GAL on November 17, 2022. Further, Claimant's penalty claims gave Respondents notice of the legal and factual basis of the claims. As found Claimant's penalty claims were plead with specificity. (Findings of fact ¶ 18).

The general penalty provision sets forth four categories of conduct and authorizes the imposition of the described penalties when an employer or insurer: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) 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 (4) fails, neglects or refuses to obey any lawful order of the director or the panel. § 8-43-304(1) C.R.S.; *see Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001). The purpose of the penalty provision in Section 8-43-304(1) of the Colorado Revised Statutes is to deter misconduct. *McManus v. Indus. Claim Appeals Office,* 81 P.3d 1074 (Colo. App. 2003).

The imposition of penalties under the general penalty provision is a two-step process. The ALJ must first determine whether the disputed conduct constituted a violation of the Act, of a duty lawfully enjoined, or of an order. If the ALJ finds such a

violation, she may impose penalties if she also finds that the actions were not objectively reasonable. *Pioneers Hosp. of Rio Blanco v. Indus. Claims Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (court required to determine whether insurer's conduct was reasonable).

As found, Respondents violated § 8-43-304(1), C.R.S., by failing to file a position statement within 20 days after receiving Notice from the Division that Claimant filed a Worker's Compensation Claim. (Findings of fact ¶ 13). Respondents also violated this statute by failing to comply with a Director's Order requiring an admission of liability or a notice of contest within 15 days of October 18, 2022. (*Id.*). Respondents did not offer any evidence as to why they did not file a position statement with the Division or comply with the Director's Order. As found, Insurer knew by September 6, 2022 that Claimant had filed a Worker's Claim for Compensation. (Findings of fact ¶ 9). Respondents failed to establish that not timely filing a position statement with the Division when Respondents received notice that Claimant filed a Worker's Claim for Compensation is reasonable. Similarly, Respondents failed to establish that the failure to timely respond to the Director's Order was reasonable. As found, Respondents' violations were not objectively reasonable. (Findings of fact ¶ 14).

Section 8-43-304(4) of the Colorado Revised Statutes provides that even if the facts warrant the imposition of a penalty, the violator has a grace period to "cure" the violation. If, within 20 days of the filing of the AFH, the violator or noncomplying person, cures the violation, no penalty can be assessed unless the aggrieved party shows by clear and convincing evidence that the violator knew or should have known of the violation. There is no presumption that curing the problem within the 20-day period establishes that the violator knew or should have known of the violation. A fact or proposition has been proved by clear and convincing evidence if, considering all the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage Co. v. Gussert,* 914 P.2d 411 (Colo.App. 1995).

Respondents cured their violations on November 17, 2022, when they filed a GAL. (Findings of fact ¶ 13). This was before Claimant filed her AFH on December 5, 2022, so arguably within the 20-day cure period. As found, Insurer's TPA corresponded with Claimant regarding the claim on September 6, 2022. (Findings of fact ¶ 8). A reasonable Insurer knows that it is required to timely respond to a Worker's Claim for Compensation. A reasonable Insurer also know it must reply to all communications from the Division, including, but not limited to, a Director's Order. It is highly probable and free from substantial doubt that Respondents knew, or should have known, at least by September 6, 2022, that Claimant filed a Worker's Claim for Compensation, and Respondents were required to comply with the requirements of the Act. Thus, Claimant has proven by clear and convincing evidence that by September 6, 2022, Insurer knew Claimant filed a Worker's Claim for Compensation, and Respondents knew, or reasonably should have known that they were in violation of the Act and the Director's Order. Claimant demonstrated by a preponderance of the evidence that penalties should be assessed against the Respondents.

The amount of the penalty may be based on several factors including the extent of

harm to the claimant, the duration and type of violation, the insurer's motivation for the violation, the insurer's mitigation, and whether or not the misconduct is representative of a pattern of misconduct. *Anderton v. Hewlett Packard*, W.C. No. 4-344-781 (Nov. 23, 2004): *Grant v. Prof'l Contract Servs*, W.C. No. 4-531-613 (Sept. 16, 2005). Claimant testified her harm from the Insurer's violations was uncertainty and stress. Claimant did not testify as to the medical treatments she was allegedly forced to forego or how the delay specifically stalled her healing process. There is no objective evidence in the record that Insurer's actions constituted part of a pattern of misconduct, or that there was any malicious motivation by the Respondents. There was minimal harm to Claimant. Further, Respondents' actions were negligent because they did not involve a pattern of misconduct, and there is no evidence of any malicious motivation.

The ALJ finds that from September 6, 2022 to November 17, 2022, Respondents did not file a position statement in relation to Claimant's Worker's Claim for Compensation. The ALJ finds that Respondents did not timely respond to the Director's Order by November 2, 2022. Respondents filed a GAL on November 17, 2022. Respondents committed two separate violations, albeit for similar conduct. The ALJ fines Respondents $10.00/day for failing to respond to the Division regarding Claimant's Worker's Claim for Compensation, from September 6, 2022 to November 17, 2022. This is a total penalty of $730.00. The ALJ finds that the appropriate penalty for violating the Director's Order is $50.00/day, and this occurred from November 2, 2022 until November 17, 2022, for a penalty of $750.00. The total penalty of $1,480.00 is sufficient to penalize Respondents' violation of the law and encourage future compliance without being excessively punitive. Fifty percent (50%) of this penalty shall be paid to Claimant and fifty percent (50%) to the Colorado Uninsured Employers Fund.

Penalties Pursuant to W.C.R.P. 8-2

Section 8-43-404 of the Colorado Revised Statutes provides the employer or insurer the statutory right, in the first instance, to select a physician to treat the industrial injury. If Respondents fail to comply with WCRP 8, the right of selection passes to the claimant, with the result being that the physician selected by the claimant is authorized to treat the injury. *See Ruybal v. Univ. Health Sciences Ctr.*, 768 P.2d 1259 (Colo. App. 1988)*.; Tellez v. Teledyne Waterpik*, W.C. No. 3-990-062 (March 24, 1992); *Buhrmann v. Univ. of Colo. Health Sciences Ctr.*, W.C. No. 4- 253-689 (Nov. 4, 1996); *In the Matter of the Claim of Matthew Bolerjack, Claimant*, W.C. No. 4-905-434-02, 2014 WL 3886660, at *3 (July 29, 2014). The ALJ finds and concludes that the penalty for Respondents' failure to provide an injured employee a designated provider list, is set forth in the Rule itself, *i.e.* the right of selection passes from the Respondents to Claimant. Pursuant to WCRP 8(E), the right to select the authorized treating physician passed to the Claimant seven business days after Respondents had notice of the injury and allegedly failed to provide a designated provider list.

Claimant failed to prove by a preponderance of the evidence that Claimant is entitled to penalties for failing to designate an ATP or provide Claimant with a designated provider list within seven business day of receiving notice of the injury.

ORDER

It is therefore ordered that:

1. Penalties are assessed against Respondents for a violation of § 8-43-203(1), C.R.S. for failing to file a position statement as requested by the Division on July 21, 2022. Penalties are awarded from September 6, 2022 to November 17, 2022 in the amount of $730.00. Fifty percent of the penalty shall by paid to Claimant, and fifty percent of the penalty shall be paid to the Colorado Uninsured Employer's Fund. The check for the Colorado Uninsured Employer's Fund shall be payable to and sent to the Division of Workers' Compensation Revenue Assessment Unit, 633 17th Street, Suite 400, Denver, Colorado 80202.

2. Penalties are assessed against Respondents for a violation of § 8-43-203(1), C.R.S. for failing to respond to the October 18, 2022, Director's Order. Penalties are awarded from November 2, 2022 to November 17, 2022 in the amount of $750.00. Fifty percent of the penalty shall by paid to Claimant, and fifty percent of the penalty shall be paid to the Colorado Uninsured Employer's Fund. The check for the Colorado Uninsured Employer's Fund shall be payable to and sent to the Division of Workers' Compensation Revenue Assessment Unit, 633 17th Street, Suite 400, Denver, Colorado 80202.

3. Claimant's request for penalties pursuant to W.C.R.P 8-2 is denied and dismissed.

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

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

DATED: June 6, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-218-288-001

ISSUES

- Did Claimant prove he suffered a compensable injury to his right shoulder on July 21, 2022?

- If Claimant proved a compensable injury, did he prove a January 31, 2023 MRI was reasonably needed and causally related to the injury?

- The parties stipulated to an average weekly wage of $1,110.29.

FINDINGS OF FACT

1. Claimant has an extensive history of nonwork-related right shoulder problems. He saw Dr. Andrew Parker in July 2020 for approximately two months of right shoulder pain. Dr. Parker diagnosed a non-traumatic right rotator cuff tear and performed an arthroscopy on September 24, 2020. Claimant reinjured the shoulder in December 2020 and underwent a revision rotator cuff repair. Claimant's right shoulder remained symptomatic, and he had a third rotator cuff surgery on March 10, 2021. He reinjured the shoulder and had a fourth surgery on May 12, 2021.

2. Claimant continued to have problems with his right shoulder and ultimately had a reverse total shoulder arthroplasty on September 23, 2021. The arthroplasty was successful. At a post-surgery evaluation on December 20, 2021 the surgeon noted Claimant was "doing very well" with minimal pain and good range of motion. He was participating in PT and wanted to return to work. No additional pre-claim records were submitted at the hearing.

3. Claimant works for Employer as a technician, monitoring robotic sandwich-processing machines.

4. On July 21, 2022, Claimant developed pain in his right shoulder while shoveling "[Redacted, hereinafter UE]" sandwiches that were spilling out of a packaging machine. Claimant was using a lightweight plastic shovel to scoop the sandwiches into a tote for disposal. The combined weight of the shovel and sandwiches was approximately 5 pounds. Claimant scooped a batch of sandwiches, twisted to the right, and tossed them into the tote. While doing so, he felt pain and a "tearing" sensation in his right shoulder. Claimant reported the symptoms to his supervisor but was able to finish his shift by limiting use of his right arm. Claimant was scheduled off the next three days for the weekend, and he and his supervisor decided the best course of action was to rest and ice the shoulder and see if it improved with time. Claimant requested no treatment.

5. Claimant's shoulder continued to bother him the rest of that day and the next day. Two days later, on July 23, 2022, Claimant dislocated his right shoulder while

reaching overhead to don a shirt. His arm became "stuck," and he pulled it down forcefully with the left arm, causing a loud "pop."

6. Claimant went to work on Monday, July 25 and completed an accident report. The report states Claimant was shoveling sandwiches into a tote when he "felt a tear and or a pop in his right shoulder." Claimant was evaluated by Employer's on-site nurse, but no corresponding records from the evaluation were submitted at the hearing.

7. Claimant saw PA-C John Hundley at the UCHealth Occupational Medicine Clinic on July 29, 2022. Claimant stated he developed severe pain in his right shoulder while shoveling sandwiches into a tote. Claimant had since rested his shoulder but his symptoms continued to worsen, to the point that "now he has extremely limited range of motion and sometimes has a feeling that his shoulder is spontaneously dislocating."[1] Claimant's shoulder range of motion was severely limited in all planes. Because of Claimant's high level of reported symptoms and complex surgical history, Mr. Hundley referred Claimant for an orthopedic evaluation. He also assigned work restrictions of "no forceful lifting, pushing or pulling with the right arm. No reaching overhead with the right arm. Must wear arm sling when active." Mr. Hundley opined Claimant's symptoms and clinical presentation were consistent with a work-related injury.

8. Claimant saw PA-C Mark Cuthbertson at Panorama Orthopedics on August 9, 2022. Claimant described the sandwich-shoveling incident and said his shoulder pain had been worse with pushing and pulling "since that time." Mr. Cuthbertson also documented that "[Claimant] dislocated the shoulder with forward flexion and overhead activity two days after the shoveling injury. It had gotten stuck in an overhead position, so he forced the joint back into reduction and experienced a significant pop when trying to bring his arm down." Claimant's right shoulder flexion was significantly reduced. X-rays showed intact arthroplasty hardware with no sign of loosening, although Mr. Cuthbertson thought Claimant may need a metal suppression MRI to fully evaluate the condition of the shoulder. Mr. Cuthbertson ordered PT and recommended Claimant follow up with Dr. John Caldwell.

9. Dr. Caldwell evaluated Claimant on August 19, 2022. Claimant described his history of shoulder problems culminating in the reverse total shoulder arthroplasty. He said his shoulder "was performing well until recently . . . he was shoveling some objects off the floor and then felt a tearing sensation in his shoulder." Claimant also reported, "he was taking his shirt off overhead with his arm extended over his head, it got stuck in that position. He had to manually relocate the shoulder using his other arm . . . he felt a large clunk followed by an immediate onset of pain." Claimant was tender to palpation over the anterior shoulder and right biceps. Dr. Caldwell reviewed imaging and saw no clear evidence of hardware complications. He opined Claimant's symptoms were probably related to "a muscular-type injury that he sustained while he had the subluxation." Dr. Caldwell recommended additional PT.

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[1] Claimant credibly testified he told Mr. Hundley about the July 23 dislocation event, but had no control over the specific way Mr. Hundley chose to write his report.

10. Claimant followed up with Dr. Caldwell on September 28, 2022. He had made minor progress in PT, but "his shoulder is still nowhere near where it was before this event in July." Dr. Caldwell was concerned Claimant may have dislodged his prosthesis and recommended a metal suppression MRI.

11. Respondents filed a Notice of Contest denying the claim on October 12, 2022.

12. Claimant returned to Dr. Caldwell on January 20, 2023. His symptoms were unchanged. The MRI had not been completed because of insurance authorization issues. Dr. Caldwell noted the x-rays showed no apparent problems with the prosthesis, "however, his physical exam today . . . does bring up suspicion of a possible acromial stress fracture versus a muscular tear or sprain." Dr. Caldwell reiterated his request for an MRI.

13. Claimant had the MRI on January 31, 2023. It showed an area of increased signal and lucency along the humeral stem "suspicious for loosening" of the prosthesis. There was muscle atrophy and fatty infiltration and a possible low-grade teres minor strain, but no tears. Claimant paid $350 out-of-pocket for the MRI.

14. Dr. Mark Failinger performed an IME for Respondents on February 25, 2023. Claimant reported ongoing shoulder pain, largely unchanged since the incidents in July 2022. Claimant was working his regular job with self-modifications to reduce the strain on his right shoulder. Dr. Failinger opined it was not medically probable that the act of shoveling sandwiches described by Claimant caused new pathology in the shoulder. Instead, he opined the dislocation on July 23 was the cause of Claimant's ongoing symptoms. Dr. Failinger concluded, "the only diagnosis possibly related to the work accident would be a mild shoulder strain, with the dislocation event not reasonably related to the patient's work activities."

15. Dr. Failinger testified at the hearing to elaborate on the opinions expressed in his report. Although Claimant reported feeling a tear while shoveling the sandwiches, Dr. Failinger testified patients frequently perceive a tearing sensation even though no actual tear has occurred. The MRI shows no tear of any structure in the shoulder, and Dr. Failinger explained that the nature of a reverse total shoulder arthroplasty means "there is really no rotator cuff to tear." He opined the potential hardware loosening shown on the MRI was unrelated to the shoveling incident but could have been caused by the dislocation. However, he agreed with Mr. Hundley that Claimant probably suffered a minor "strain" on July 21. Dr. Failinger conceded, "the patient noticed something that was new or different, and I don't think you can just say nothing happened." He further testified the teres minor strain shown on the MRI was probably caused by the shoveling incident. He agreed it was reasonable for Mr. Hundley to diagnose a minor shoulder strain and give Claimant temporary work restrictions at the initial evaluation. He also agreed it was reasonable to order an MRI to investigate the possible strain vs. loosening of the hardware. However, he reiterated the minor strain could not have contributed to the subsequent dislocation, and concluded Claimant's ongoing shoulder symptoms are related to the dislocation and not the shoveling incident.

16. Claimant proved he suffered a compensable injury to his right shoulder on July 21, 2022. Claimant's descriptions of the work accident and the subsequent development and progression of symptoms are generally credible. The persuasive evidence shows he probably suffered a minor soft-tissue strain, which reasonably required evaluation, conservative treatment, and temporary work restrictions. Claimant's shoulder strain had not resolved and remained symptomatic when he suffered the dislocation on July 23, 2022. Claimant's symptoms immediately thereafter reflected a combination of the work injury and the nonwork-related dislocation. Even though the work injury was not the sole cause of Claimant's symptoms, it was a "significant factor" in his need for evaluations and treatment in late July and early August 2022.

17. Claimant proved the evaluations and treatment received from Mr. Hundley and Panorama Orthopedics were reasonably needed to cure and relieve the effects of his compensable injury. The MRI was a reasonable diagnostic test to investigate the nature of the underlying injury and determine a course of treatment. Claimant is entitled to reimbursement of the $350 he paid out-of-pocket for the MRI.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *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 he seeks benefits. *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). An industrial injury need not be the "sole cause" of a need for medical treatment to be deemed a "proximate cause." Rather, it is sufficient if the injury is a "significant factor" in the sense that there is a "direct causal relationship" between the injuy and the need for treatment. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

Even a minor "strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused them to seek medical treatment. *E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

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

As found, Claimant proved he suffered a compensable injury at work on July 21, 2022. He probably suffered a minor soft-tissue strain, which reasonably required evaluation, treatment, and temporary work restrictions. Claimant's shoulder strain had not resolved and remained symptomatic when he suffered the dislocation on July 23, 2022. His symptoms immediately thereafter reflected a combination of the work injury and the nonwork-related shoulder dislocation. Even though the work injury was not the sole cause of Claimant's symptoms, it was a "significant factor" in his need for evaluations and treatment in late July and early August 2022. Dr. Failinger may be correct that Claimant's mild shoulder strain resolved, and his current symptoms are solely related to the subsequent dislocation. However, the ALJ has no authority to make such a finding at this juncture, which would be tantamount to a determination of MMI.

B. Medical benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the claimant's entitlement to medical benefits is disputed, the claimant must prove the treatment is reasonably needed and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved the evaluations and treatment received from Mr. Hundley and Panorama Orthopedics were reasonably needed to cure and relieve the effects of his compensable injury. The MRI was a reasonable diagnostic test to investigate the nature of the underlying injury and determine a course of treatment. Claimant is entitled to reimbursement of the $350 he paid out-of-pocket for the MRI. Section 8-42-101(6)(a); WCRP 16-10(H).

ORDER

It is therefore ordered that:

1. Claimant's claim for a July 21, 2022 right shoulder injury is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including the July 29, 2022 evaluation with Mr. Hudley, and the appointments at Panorama Orthopedics on August 9, August 19, and September 28, 2022, and January 20, 2023.

3. Insurer shall reimburse Claimant $350 he paid out-of-pocket for the January 31, 2023 right shoulder MRI.

4. Claimant's average weekly wage is $1,110.29.

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

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

DATED: June 8, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-214-450-001

ISSUES

1. Whether the respondent has demonstrated, by a preponderance of the evidence, that on July 12, 2022, the claimant was not an employee of the employer, but rather an independent contractor.

2. If the claimant is deemed an employee of the employer, whether the claimant has demonstrated, by a preponderance of the evidence, that she sustained an injury arising out of and in the course and scope of her employment.

3. If the claimant proves a compensable injury, whether claimant has demonstrated by a preponderance of the evidence that the medical treatment she received was authorized.

4. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she received was reasonable and necessary to cure and relieve her from the effects of the injury.

5. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits.

6. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that penalties shall be assessed pursuant to Section 8-43-408, C.R.S. for the respondent's alleged failure to obtain and maintain worker's compensation insurance.

FINDINGS OF FACT

The parties provided conflicting versions of events in this matter. The ALJ has considered the evidence and testimony presented at hearing and makes the following findings of fact:

1. The respondent operates a funeral and cremation business. The claimant previously worked for the employer and returned in May 2022. [Redacted, hereinafter MG] asserts that the claimant was an independent contractor when she returned to work for the respondent in May 2022.

2. Upon her return the claimant worked as the general manager and funeral director. The claimant's business cards identified these as the claimant's titles. The claimant's job duties included all facets of operating the respondent's business. The

claimant was paid $20.00 per hour. The claimant was paid via check. These checks were issued to the claimant in her own name.

3. On July 7, 2022, MG[Redacted] authored a letter stating that the claimant was paid $2,500.00 per month. The purpose of this letter was to assist the claimant with obtaining a mortgage. The ALJ calculates that this would be equal to $576.92 per week ($2,500.00 times 12 months in a year is $30,000.00; divided by 52 weeks is $576.92.)

4. On July 12, 2022[1], the respondent's workforce met at a local cemetery to engage in upkeep of the cemetery. This included painting a sign and cutting grass around headstones. On that date, the claimant operated a riding lawnmower at the cemetery. This specific piece of equipment has a mechanism that allows the driver to raise and lower the blade while in operation. This is done by pressing down a foot pedal with one's right foot.

5. Typically as the respondent's general manager and funeral director the claimant would not have been engaged in mowing activities. However, on July 12, 2022 it was necessary for the claimant to mow, because the respondent was short-handed and the claimant had absorbed a number of job duties, including mowing.

6. On July 12, 2022, the claimant used the pedal mechanism on the mower to raise and lower the blade while mowing around headstones and sprinklers. While operating the mower in this manner and pushing down on the foot lever, the claimant felt a pop in her right knee and experienced pain symptoms.

7. Other workers were present when the claimant felt this pop and pain in her knee, including MG[Redacted]. The claimant was allowed to stop working and sat in a vehicle while the others continued working.

8. After July 12, 2022, the claimant continued to perform all of her normal job duties, despite ongoing pain and swelling in her right knee. The claimant utilized a knee brace and crutches. The claimant asked MG[Redacted] to provide her with information for filing a workers' compensation claim. MG[Redacted] repeatedly assured the claimant that the company did have workers' compensation insurance and promised to provide her with the relevant information. MG[Redacted] did not provide the claimant with the requested workers' compensation information.

9. Initially, the claimant believed that her knee was simply sprained and she attempted to self-treat her symptoms. However, the claimant's right knee symptoms did not improve and she sought medical treatment.

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[1] The date of July 13, 2022 appears in the medical records and on the claimant's Application for Hearing. The ALJ is persuaded by the claimant's testimony that this was a typographical error, and the incident at Issue occurred on July 12, 2022. Click to Open Sidebar

10. On August 11, 2022, the claimant again requested the insurance information from MG[Redacted] via text message. MG[Redacted] responded "Progressive Insurance and some other company. I can get numbers etc tomorrow."

11. On August 12, 2022, the claimant was seen by her primary care provider {PCP) Dr. Tarek Arja with Grand Valley Family Medicine. The claimant did not see Dr. Arja prior to that date for three primary reasons: 1) she hoped her knee would improve without medical treatment; 2) she was busy working for the respondent; and 3) MG[Redacted] was not providing workers' compensation insurance information to her.

12. On August 12, 2022, the claimant's appointment with Dr. Arja was via "telehealth" and no examination was performed. On that date, the claimant reported to Dr. Arja that she had injured her right knee one month prior while operating a riding lawn mower for her employer. The claimant reported that her right knee symptoms included pain, swelling, decreased range of motion, and instability. Dr. Arja recommended the claimant rest and elevate her right knee. He also recommended the use of a knee brace, ice, and heat. Finally, Dr. Arja ordered x-rays[2] of the claimant's right knee.

13. On August 12, 2022, MG[Redacted] texted the claimant and stated that the parties "should go other routes ... I don't like the lack of respect for each other. Not good. I appreciate all you have done I really do". When the claimant asked if she was being terminated, MG[Redacted] responded "Yes I'm sorry". Thereafter, the claimant was provided a letter dated August 12, 2022 in which the respondent notified the claimant that her employment was terminated as of that date. The letter did not provide a reason for the termination. MG[Redacted] testified that the claimant was terminated due to poor performance.

14. On August 18, 2022, the claimant was examined by Dr. Arja. On that date, Dr. Arja listed the claimant's right knee symptoms as pain, swelling, locking, instability, decreased range of motion, and decreased weight bearing. In addition, Dr. Arja noted that the claimant experienced a popping sound in her right knee at the time of the injury. On examination, Dr. Arja noted that the claimant had moderate right knee tenderness on palpation "about the anterior aspect, over the lateral joint line, over the medial joint line and over the patella". Dr. Arja recommended the continued use of the knee brace and over-the-counter pain medications. Dr. Arja also referred the claimant to physical therapy. The claimant was restricted from all work on August 18, 2022.

15. The claimant began physical therapy on August 23, 2022. The claimant continued to be restricted from all work.

16. The claimant had a telehealth visit with Dr. Arja on August 27, 2022. Dr. Arja continued to recommend physical therapy and use of a knee brace.

[2] It is unclear from the records entered into evidence whether the x-rays recommended by Dr. Arja were ever taken.

17. A letter dated September 2, 2022[3] was admitted into evidence at the hearing. The respondent stated that the claimant's employment was terminated "due to the lack of not following the vision we have set forth as a company." The letter further stated that the claimant's "business and leadership practices were not to our standards, expectations and processes that weren't being followed. You had total supervision and management over the staff and some things weren't handled properly." In that letter the respondent also stated that the company does have workers' compensation insurance.

18. On January 5, 2023, Dr. Arja authored a letter in which he stated that the claimant was released to full work duty as of December 20, 2022.

19. While working for the respondent, the claimant worked a varied schedule depending upon the company workload. At times the claimant would report to work as early as 7:00 a.m. At other times, the claimant would arrive by 9:00 a.m. The claimant's workday typically ended between 3:00 p.m. and 3:30 p.m. A time sheet for a two week period in May 2022 demonstrates that the claimant worked 61 hours during that time.

20. Based upon the time sheet entered into evidence, the ALJ calculates that the claimant typically worked 6 hours per day, five days per week for a total of 30 hours per week. At $20.00 per hour this is equal to $600.00 per week. The ALJ determines that $600.00 per week was the claimant's average weekly wage {AWW) with the respondent as of the date of her work injury.

21. While working for the respondent, the claimant had two other part time jobs as a home health worker. The claimant worked for [Redacted, hereinafter CK] and was paid $15.25 per hour. In the 12-week period leading up to July 12, 2023 the claimant had earnings with CK[Redacted] of $3,685.92. The claimant also worked for [Redacted, hereinafter KU] providing care for her mother. That employer paid the claimant $15.00 per hour. Based upon the claimant's testimony, the ALJ infers that the claimant worked approximately 15 hours per week while working for KU[Redacted].

22. As a result of the work restrictions placed by Dr. Arja on August 18, 2022, the claimant was unable to perform her job duties for CK[Redacted] and KU[Redacted]. The claimant retired to work with CK[Redacted] on January 17, 2023. She returned to work for KU[Redacted] on January 22, 2023.

23. With regard to her concurrent employment with CK[Redacted] and KU[Redacted], the ALJ makes the following calculations. The claimant's AWW with CK[Redacted] was $307.16; {$3,685.92 divided by 12 weeks is equal to $307.16 per week). The claimant's AWW with KU[Redacted] was $225.00; ($15.00 per hour at 15 hours per week equals $225.00).

24. The claimant asserts that the employer does not have workers' compensation insurance, as evidenced by the employer's failure to provide her with that

[3] The claimant testified that she did not receive the September 2, 2022 letter until she was provided with the exhibits of this hearing.

information. MG[Redacted] testified that the respondent does carry workers' compensation insurance for their employees. However, no evidence was provided of the respondent's workers' compensation policy and/or related coverage. In addition, no insurance company has been identified in this matter.

25. With regard to whether the claimant was an independent contractor, the ALJ credits the claimant's testimony and the various documents entered into evidence. The ALJ finds that the respondent has failed to demonstrate that it is more likely than not that the claimant was an independent contractor. In reaching this finding, the ALJ notes that the claimant was paid an hourly rate and was paid in her own name. The claimant's business cards identified her as a general manager and funeral director. The respondent stated that the claimant "had total supervision and management over the staff'. The ALJ finds that such oversight and management would not be delegated to a contractor. In addition, the respondent provided the claimant with instruction, training, and tools. These facts indicate that the respondent exercised direction and control over the claimant in the performance of the work. The ALJ finds that the claimant did not engage in an independent trade or business providing similar services to others, nor did she intend to do so at the time of the injury. For all of the foregoing reasons, the ALJ concludes that the claimant was an employee of the respondent and was not an independent contractor.

26. The ALJ further credits the claimant's testimony and the medical reports entered into evidence. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that on July 12, 2022, the claimant suffered a right knee injury while working for the employer.

27. The ALJ credits the claimant's testimony and the medical reports entered into evidence and finds that the claimant has demonstrated that it is more likely than not that the treatment she received for her right knee from Dr. Arja and the recommended physical therapy was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the July 12, 2023 work injury.

28. The ALJ credits the claimant's testimony, the medical records, and wage records entered into evidence and finds that the claimant has demonstrated that it is more likely than not that for the period of August 18, 2022 through January 5, 2023 the claimant suffered a wage loss due to her work restrictions.

29. The ALJ calculates that as of July 12, 2022, the claimant's AWW from all employers was $1,132.16; (the total of $600.00, $307.16, and $225.00). The claimant's rate for temporary total disability (TTD) benefits is $754.77; (two-thirds of the AWW of $1,132.16).

30. The ALJ is not persuaded that the claimant was at fault for the termination of her employment with the respondent.

31. The ALJ finds that the claimant has demonstrated that it is more likely than not that as of July 12, 2022, the respondent did not obtain and/or maintain workers' compensation insurance.

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. "Employee" includes "every person in the service of any person, association of persons, firm or private corporation... under any contract of hire, express or implied." Section 8-40-202(b), C.R.S.

5. Under Section 8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed."

6. As found, the claimant provided services to the respondent and was paid for her services. Therefore, the claimant is presumed to be an employee of the respondent.

7. The respondent has the burden of proving that the claimant was an independent contractor rather than an employee. Section 8-40-202{2){b){II), C.R.S., sets forth nine factors to balance in determining if claimant is an employee or an independent contractor. *See Carpet Exchange of Denver; Inc. v. Industrial Claim Appeals Office,* 859 P.2d 278 (Colo. App. 1993). Those nine factors are whether the person for whom services are provided:

- required the individual to work exclusively for the person for whom services are performed; (except that the individual may choose to work exclusively for that person for a finite period of time specified in the document);

- established a quality standard for the individual; (except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed);

- paid a salary or hourly rate but rather a fixed or contract rate;

- may terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce results that meet the specifications of the contract;

- provided more than minimal training for the individual;

- provided tools or benefits to the individual; (except that materials and equipment may be supplied);

- dictated the time of performance; (except the completion schedule and range of mutually agreeable work hours may be established);

- paid the individual personally, instead of making checks payable to the trade or business name of the individual; and,

- combined their business operations in any way with the individual's business, or maintained such operations as separate and distinct.

8. A document may satisfy the requirement to prove independence, but a document is not required. Section 8-40-202(2)(b)(III), C.R.S, provides that the existence of any one of those factors is not conclusive evidence that the individual is an employee. Consequently, the statute does not require satisfaction of all nine criteria in Section 8-40-202(2)(b)(11) in order to prove by a preponderance of the evidence that the individual is not an employee. See *Nelson v. Industrial Claim Appeals Office,* 981 P.2d 210 (Colo. App. 1999).

9. In *Industrial Claim Appeals Office v. Softrock Geological Services,* 325 P.3d 560 (Colo. 2014) the Supreme Court revised the standard previously used to analyze whether or not an employee is customarily engaged in an independent trade or business. The previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not "engaged" in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court stated "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565. Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in Section 8-202(2)(b)(II), but also any other relevant factors. *Pierce v. Pella Windows & Doors,* W.C. No. 4-950-181, May 4, 2015.

10. The *Softrock* Court pointed to *Long View Systems Corp. v. Industrial Claim Appeals Office,* 197 P.3d 295 (Colo. App. 2008) in which the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose benefit liability on the emptoyer. See *Pierce v. Pella Windows & Doors,* W.C. No. 4-950-181, May 4, 2015.

11. Section 8-40-202(b)(IV), C.R.S., provides that a written document may create a rebuttable presumption of an independent contractor relationship if it meets the nine criteria listed in Section 8-40-202(b)(II), C.R.S. and includes language in boldface font or underlined typed that the worker is not entitled to workers' compensation benefits and is obligated to pay all necessary taxes. Additionally, the document must be signed by both parties. Here there was no written contract.

12. The ALJ has considered the nine factors listed in Section 8-40-202(2)(b)(11), C.R.S. and the totality of the circumstances of the relationship of the parties and concludes that the claimant was an employee of the respondent. The respondent has failed, by a preponderance of the evidence, to overcome the presumption of an employee-employer relationship. In reaching this conclusion the ALJ notes that the claimant was paid an hourly rate and was paid in her own name. The claimant's business cards identified her as a general manager and funeral director. The respondent stated that the claimant "had total supervision and management over the staff'. As found, such oversight and management would not be delegated to an independent contractor. In addition, the respondent provided the claimant with

instruction, training, and tools. These facts indicate that the respondent exercised direction and control over the claimant in the performance of the work. The ALJ finds that the claimant did not engage in an independent trade or business providing similar services to others, nor did she intend to do so at the time of the injury.

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

14. As found, the claimant has demonstrated by a preponderance of the evidence that she suffered an injury that arose out of and in the course and scope of her employment with the respondent on July 12, 2022. As found, the claimant's testimony and the medical records are credible and persuasive.

15. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.,* W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion...." *Greager v. Industrial Commission,* 701P.2d 168 (Colo. App. 1985), *citing,* 2 A. Larson, *Workers' Compensation Law* Section 61.12(9)(1983).

16. There is no persuasive evidence in the record to indicate that the respondent provided the claimant with a list of designated medical providers, upon learning of the claimant's work injury. In the absence of a selection of physician by the respondent, the claimant has demonstrated by a preponderance of the evidence that choice of medical provider passed to the claimant. Therefore, the medical treatment the claimant received as a result of the July 12, 2022 work injury is authorized medical treatment.

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

18. As found, the claimant has demonstrated by a preponderance of the evidence that the medical treatment she received following the July 12, 2022 injury was reasonable and necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records and the testimony of the claimant are credible and persuasive.

19. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra,* requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra.* 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 prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymbum v. Symbios Logic,* 952 P.2d 831 (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 (Colo. App. 1998).

20. As found, the claimant has demonstrated, by a preponderance of the evidence, that the July 12, 2022 work injury caused disability that resulted in a wage loss from August 18, 2022 through January 5, 2023. Therefore, the claimant is entitled to TTD benefits during that period of time. As found, the medical records and the testimony of the claimant are credible and persuasive.

21. The ALJ must determine a claimant's AWW by calculating the monetary rate at which services are paid to the claimant under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon her AWW on a date other than the date of the injury. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid* & *Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food* & *Commercial Workers Local No.* 7, W.C. No. 4-240-475 (ICAO, May 7, 2007).

22. As found, the claimant's AWW is $1,132.16 and her TTD rate is $754.77. The ALJ calculates that the claimant is owed unpaid TTD benefits totalling $15,203.22.

23. Sections 8-43-408(1) and (2) C.R.S., provide that in cases in which a claimant suffers a compensable injury and the employer failed to comply with the insurance provisions of the Colorado Workers' Compensation Act, the employer shall pay the Colorado uninsured employer fund an amount equal to the present value of all unpaid compensation or benefits.

24. Section 8-43-408(1)(5), C.R.S., provides that in cases in which a claimant suffers a compensable injury and the employer failed to comply with the insurance provisions of the Colorado Workers' Compensation Act, the employer shall also pay the Colorado uninsured employer fund an amount equal to twenty five percent (25%) of the compensation or benefits due to the claimant. Based upon the calculations above, 25 percent of the TTD owed is $4,332.93.

ORDER

It is therefore ordered:

1. On July 12, 2023, the claimant was an employee of the respondent.

2. The claimant suffered a compensable injury on July 12, 2022.

3. The respondent is responsible for the medical treatment the claimant received for her right knee including treatment with Dr. Arja beginning August 12, 2022 and physical therapy.

4. The claimant's average weekly wage (AWW) is $1,132.16.

5. The claimant is entitled to temporary total disability (TTD) benefits for the period of August 18, 2022 through January 5, 2023, totaling $15,203.22.

6. The respondent shall pay interest to claimant at the statutory rate of 8% per annum on all amounts of compensation not paid when due.

7. For failing to maintain workers' compensation insurance, the respondent shall pay the Colorado uninsured employer fund $15,203.22. The respondent shall also pay to the Colorado uninsured employer fund an amount equal to 25% of the TTD benefits due to the claimant for the period of August 18, 2022 through January 5, 2023, which is $3,823.31. The employer shall send such payment to the Colorado Uninsured Employer Fund to the Division of Workers' Compensation, 633 17th St., Suite 400, Denver, CO 80202.

8. The respondent shall pay Interest to the Colorado uninsured employer fund at the statutory rate of 4% per annum on all amounts of compensation not paid when due.

9. In lieu of payment of the above compensation and benefits to the claimant, the respondent shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of $19,026.31 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation Division Trustee, c/o Mariya Cassin. The check shall be mailed to the Division of Workers' Compensation Revenue Assessment Unit, 633 17th St., Suite 400, Denver, CO 80202. OR

b. Within ten (10) days of the date of service of this order, file a bond in the sum of $19,026.31 with the Division of Workers' Compensation within ten (10) days of the date of this order:

i. Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

ii. Issued by a surety company authorized to do business in Colorado.

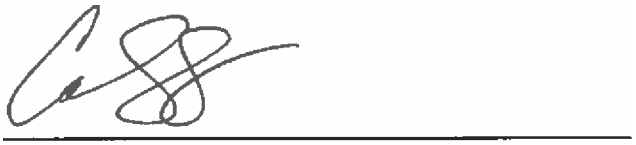
iii. The bond shall guarantee payment of the compensation and benefits awarded.

10. The respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

11. The filing of any appeal, including a petition to review, shall not relieve the respondent of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

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

Dated June 13, 2023.



Cassandra M. Sidanycz
Administrative Law Judge

Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. Section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-201-119-001

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that the December 23, 2022 facsimile from the office of Authorized Treating Provider (ATP) Paul Stanton, D.O. to Respondents requesting authorization for a C4-7 anterior cervical discectomy constituted a completed request pursuant to W.C.R.P. Rule 16-7.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to the penalty of automatic authorization for the surgery requested by Dr. Stanton because Respondents failed to respond to the request within 10 days pursuant to W.C.R.P. Rule 16-7(B)(2).

3. Whether Claimant has demonstrated by a preponderance of the evidence that the C4-7 anterior cervical discectomy performed by Dr. Stanton on March 10, 2023 was reasonable, necessary and causally related to his March 4, 2022 industrial injury.

FINDINGS OF FACT

1. Claimant is a 63-year-old male who has worked for Employer for 26½ years as a Delivery Driver.

2. On March 14, 2022 Claimant was delivering [Redacted, hereinafter OT] bread with 12 loaves per tray and 15 trays in a cart. The 12 loaves on 15 trays weighed approximately 250 to 300 pounds. While pushing the cart, a wheel became caught in a crack on the floor and the cart started to fall. Claimant grabbed the cart with his left arm and stopped it from falling, but twisted his left shoulder.

3. On March 16, 2022 Claimant completed a Statement of Injury or Illness. In the report, he noted that he injured his left shoulder while catching a falling stack of product.

4. Claimant initially attempted to treat his left shoulder pain with ice. However, when his symptoms did not resolve he visited Authorized Treating Provider (ATP) Concentra Medical Centers (Concentra) in Pueblo, Colorado on March 18, 2022 for treatment. Brendon Madrid, N.P. recorded that, while Claimant was moving a stack of product he hit a crack in the floor and the stack started to tip over. Claimant caught the stack and felt a pull in his left shoulder. Claimant reported persistent left shoulder pain that radiated into the neck, back, and left arm. NP Madrid diagnosed Claimant with a left shoulder strain and referred him for physical therapy.

5. Claimant was eventually diagnosed with a left shoulder rotator cuff tear. On February 25, 2022 he underwent surgical repair with ATP David Walden, M.D.

6. On March 25, 2022 Claimant visited St. Thomas More Hospital Outpatient Rehabilitation Department for physical therapy. He completed an intake form with a pain diagram and noted symptoms in the left shoulder. Claimant's description of functional issues was also limited to the left shoulder. The physical therapist assessed Claimant with a strain of unspecified muscles, fascia and tendon at the shoulder and upper left arm. Notably, Claimant's symptoms were consistent with a rotator cuff injury.

7. On April 1, 2022 Claimant returned to Concentra in Pueblo and was evaluated by Debra Anshutz, N.P. Claimant reported persistent pain in the shoulder that radiated into his back, neck, and left arm. He also exhibited numbness in the fingers. NP Anshutz noted that Claimant had completed two physical therapy visits and undergone a CT of the left shoulder on March 29, 2022. NP Anshutz assigned work restrictions.

8. Claimant transferred medical care from the Concentra in Pueblo to the Concentra in Cañon City. On April 5, 2022 he had his first visit with ATP Steven Walter Quakenbush, PA-C. PA-C Quakenbush examined Claimant and recorded there were no pain complaints in the head, neck, left elbow, wrist or hand. There was also no numbness of the extremity. PA-C Quakenbush diagnosed Claimant with a "left shoulder sprain with suspected right RTC tears."

9. On April 7, 2022 Claimant visited Dr. Walden for an examination. Dr. Walden remarked that all of Claimant's pain was located in the rotator cuff distribution.

10. On April 26, 2022 Claimant returned to PA-C Quakenbush and had no neck pain with full range of motion. Review of systems was also negative for neck pain and stiffness.

11. Claimant's first mention of neck pain to PA-C Quakenbush did not occur until September 20, 2022 or four months after the shoulder surgery and six months after the work incident. PA-C Quakenbush noted radiating pain from the left lateral neck into Claimant's shoulder. Claimant also had progressive weakness involving his left upper extremity. PA-C Quakenbush noted Dr. Walden had requested an EMG to assess whether Claimant's left shoulder symptoms involved scapulothoracic pain or radicular pain from the cervical spine.

12. The record reveals that Claimant suffered from significant underlying cervical spine degeneration. A December 20, 2022 cervical spine MRI showed cervical disc disease at C4-5 and C5-6 with "severe" collapse of the disc space, facet spondylosis, and "severe" foraminal stenosis. The imaging also showed spondylolisthesis at C4-5 that was "reduced when lying supine indicating instability."

13. On December 22, 2022 Claimant visited ATP Paul Stanton, D.O. for an evaluation. Dr. Stanton commented that Claimant still had left-sided shoulder pain and some weakness with overhead activities. He diagnosed Claimant with cervical disc disorders at C4-7 with radiculopathy. Dr. Stanton concluded that "[a]t this point, I think [Claimant] will require a reconstruction of his C4-7 levels to stabilize his spondylolisthesis."

14. On December 23, 2022 Dr. Stanton's office faxed to the correct number for Respondents a 22-page document requesting a C4-7 anterior cervical discectomy/fusion. The transmission was admitted as Exhibit 10 at the hearing. The request had the wrong claim number but the correct date of birth and date of injury,

15. Claims representative [Redacted, hereinafter MF] testified at hearing in this matter. He commented that he never received a request for cervical surgery via fax on December 23, 2022 or at any subsequent time. MF[Redacted] showed his fax in-box and explained how this confirmed he never received the transmission. On December 23, 2022 the only fax he received was another medical record from Dr. Walden. MF[Redacted] revealed his fax cue and explained that documents are organized by claim number. Exhibit 10 is a fax cover sheet with the letterhead of Colorado Springs Orthopaedic Group, dated December 23, 2022 that has no information identifying Claimant. The second page of Exhibit 10, with the letterhead of The Spine Center, is the Request for Pre-Authorization for Surgery Procedure. The document has an incorrect claim number of 1E01E01189371.

16. When the December 23, 2022 surgical request from Dr. Stanton's office was not timely addressed, the office contacted MF[Redacted]. He requested resubmission of the documents. Dr. Stanton's office then sent the surgical request on January 9, 2023. MF[Redacted] explained that that he received the prior authorization documents by email on January 9, 2023. He immediately took action and scheduled an appointment with Dr. Rauzzino for an independent medical examination. He also sent a denial of the prior authorization request to Dr. Stanton and Claimant on January 11, 2023.

17. MF[Redacted]acknowledged that there were other medical records in the file that reflected the incorrect claim number. He specifically could not explain why the MRI submission of Dr. Stanton on December 3, 2022 found at Exhibit 9, which had the wrong claim number, made it into his electronic file.

18. On January 24, 2023 Claimant returned to PA-C Quakenbush for an evaluation. PA-C Quakenbush recounted that Claimant continued to experience pain down the left lateral neck into the shoulder and upper arm. He also had some transient numbness into his left fourth and fifth fingers. PA-C Quakenbush noted that on December 20, 2022 Dr. Stanton had diagnosed Claimant with multilevel degenerative changes of cervical spine and severe right neuroforaminal stenosis at C5-6 and C6-7. Claimant had been recommended for surgical intervention of his cervical condition.

19. On March 6, 2023 Claimant underwent an independent medical examination with Michael J. Rauzzino, M.D. Dr. Rauzzino reviewed Claimant's medical records and performed a physical examination. On April 24, 2023 the parties conducted the pre-hearing evidentiary deposition of Dr. Rauzzino. He maintained that, although Claimant injured his left shoulder while attempting to prevent a rack of bread from falling at work on March 14, 2022, the medical records do not reflect that he injured his neck or cervical spine during the incident. Dr. Rauzzino specified that the mechanism of injury was consistent with the medical records and Claimant suffered immediate left shoulder pain. However, Claimant did not suffer neck pain during the incident.

20. Notably, Dr. Rauzzino explained that the temporal proximity of an event must be in closely associated with the development of symptoms. He remarked that the records revealed “there was no neck pain, there was no injury to the cervical spine for many, many months after the injury.” If Claimant had suffered an injury to his cervical spine while attempting to prevent a rack of bread from falling, his symptoms would have presented immediately. However, the record reflects that Claimant’s first mention of neck symptoms to PA-C Quakenbush did not occur until September 20, 2022 or four months after the shoulder surgery and six months after the work incident.

21. Dr. Rauzzino explained that Claimant suffers from degenerative changes to his cervical spine that are unrelated to the March 14, 2022 accident. He noted that he had reviewed the plain films of the cervical spine from November 10, 2022 and an MRI of the cervical spine dated December 20, 2022. The plain films did not demonstrate any traumatic instability at C4-5, but only physiologic motion from degeneration. The cervical spine MRI revealed the absence of any acute injury such as a left-sided disc extrusion. Dr. Rauzzino summarized that the “findings are all chronic, degenerative, and pre-existing.” He testified in his deposition that there were several levels where the space for the nerves had been narrowed. However, the key finding “was that there was no acute structural injury to the neck.” The MRI reflected chronic, degenerative changes that developed over a number of years and were not caused by trauma. Importantly, Dr. Rauzzino reasoned that the pathology reflected on the December 20, 2022 MRI was not caused or accelerated by the workplace event of March 14, 2022. There was also no aggravation of Claimant’s pre-existing, degenerative condition leading to a permanent change in his condition as a result of attempting to prevent a rack of bread from falling at work. Dr. Rauzzino remarked that the natural history of Claimant’s degenerative arthritis and foraminal stenosis is that it will progress over time.

22. Based on the EMG results, Dr. Rauzzino reasoned that Claimant likely experienced an injury to the suprascapular nerve at the time he caught the bread rack. An injury to the suprascapular nerve is the reason Claimant continued to have symptoms after the shoulder surgery was completed. Dr. Rauzzino summarized that the records were very clear that Claimant did not suffer an injury to the cervical spine based on the mechanism of injury and reporting of symptoms. He emphasized that the pathology in Claimant’s cervical spine was “100 percent not caused by the injury at work.” There was simply no acute disk herniation that could be attributed to the March 14, 2022 work incident.

23. On March 10, 2022 Claimant underwent the C4-7 anterior cervical discectomy fusion surgery proposed by Dr. Stanton under private insurance. Claimant continues to remain off work following the surgery, has not been released from care, and has not been returned to modified duty. He testified the surgery has provided pain relief and significantly improved his range of motion. Claimant summarized that the rotator cuff surgery performed by Dr. Walden did not relieve his symptoms, but the cervical surgery with Dr. Stanton has had a good outcome with expected continued progress.

24. Claimant has failed to prove it is more probably true than not that the December 23, 2022 facsimile from the office of ATP Dr. Stanton to Respondents

requesting authorization for a C4-7 anterior cervical discectomy constituted a completed request pursuant to W.C.R.P. Rule 16-7. Initially, on December 23, 2022 Dr. Stanton's office faxed to the correct number for Respondents a 22-page document requesting a C4-7 anterior cervical discectomy/fusion. The request had the wrong claim number but the correct date of birth and date of injury, Respondents assert that, because of an incorrect claim number, Claimant failed to submit a completed request to trigger Rule 16.

25. MF[Redacted] showed his fax in-box and explained how this confirmed he never received the transmission. Exhibit 10 reveals a fax cover sheet with the letterhead of Colorado Springs Orthopaedic Group, dated December 23, 2022 that has no claim or information identifying Claimant. The second page of Exhibit 10, with the letterhead of The Spine Center, is the Request for Pre-Authorization for Surgery Procedure with an incorrect claim number. Because of the incorrect claim number, it is likely the fax was never routed to the correct location. Although Dr. Stanton's office submitted a 22-page document seeking surgical authorization, information including procedure codes and date of birth are not helpful when not connected to the correct claim. The consequences of a failure to timely respond to a prior authorization request are significant. Because of the time-sensitive nature of acting on a request for prior authorization, it is imperative for the request to be delivered to the individual responsible for adjusting the claim. Respondents were not culpable for an incorrect claim number and do not carry the burden of researching and identifying the claim under which a request is being made. Accordingly, the December 23, 2022 fax from Dr. Stanton's office presented in Exhibit 10 did not constitute a completed request for prior authorization. The 10-day requirement to respond in Rule 16-7(B)(2) thus was not triggered on December 23, 2022.

26. Claimant has failed to establish it is more probably true than not that he is entitled to the penalty of automatic authorization for the surgery requested by Dr. Stanton because Respondents failed to respond to the request within 10 days pursuant to W.C.R.P. Rule 16-7(B)(2). Specifically, even if the December 23, 2022 fax from Dr. Stanton's office presented in Exhibit 10 constituted a completed request and the 10-day requirement to respond in Rule 16-7(B)(2) was triggered, the penalty of automatic authorization was not warranted. Initially, because Respondents did not timely respond to the surgical request, they violated Rule 16-7(B)(2). However, the record reflects that Respondents' conduct was not objectively unreasonable because it was predicated on a rational argument based in law or fact.

27. MF[Redacted] showed his fax in-box at the hearing and explained how this confirmed that he never received the transmission from Dr. Stanton's office. On December 23, 2022 the only fax he received was another medical record from Dr. Walden. MF[Redacted] also explained his fax cue in which documents are organized by claim number. Respondents' procedure for distributing incoming fax documents was a reasonable approach. When the December 23, 2022 surgical request from Dr. Stanton's office was not timely addressed, the office contacted MF[Redacted]. He requested resubmission of the surgical request. Dr. Stanton's office then resubmitted the documentation on January 9, 2023. MF[Redacted] verified that he received the prior authorization request by email on January 9, 2023. He immediately took action and scheduled an appointment with Dr. Rauzzino for an independent medical examination.

He also sent a denial of the prior authorization to Dr. Stanton and to Claimant on January 11, 2023. MF's[Redacted] actions constituted a genuine effort to comply with the 10-day requirement to respond in Rule 16-7(B)(2). Because Respondents efforts in addressing the December 23, 2022 request for surgical authorization were predicated on a rational argument based in law or fact, their actions were not objectively unreasonable. Accordingly, Claimant's request for automatic authorization of the surgery requested by Dr. Stanton on December 23, 2022 is denied and dismissed.

28. Claimant has failed to demonstrate it is more probably true than not that the C4-7 anterior cervical discectomy fusion surgery performed by Dr. Stanton on March 10, 2023 was reasonable, necessary and causally related to his March 4, 2022 industrial injury. Initially, on March 14, 2022 Claimant injured his left shoulder at work while attempting to prevent a rack of bread from falling. Claimant was eventually diagnosed with a left shoulder rotator cuff tear. On February 25, 2022 he underwent surgical repair with Dr. Walden.

29. Following Claimant's left shoulder surgery he had reduced pain complaints in his armpit and chest area. Although Claimant attended several physical therapy visits, his left shoulder and trapezius area remained painful. Claimant's first mention of neck pain to PA-C Quakenbush did not occur until September 20, 2022 or four months after the shoulder surgery and six months after the work accident. PA-C Quakenbush noted radiating pain from the left lateral neck into Claimant's shoulder. On December 22, 2022 Dr. Stanton commented that Claimant still had left-sided shoulder pain and some weakness with overhead activities. He diagnosed Claimant with cervical disc disorders at C4-7 with radiculopathy. Dr. Stanton concluded that "[a]t this point, I think [Claimant] will require a reconstruction of his C4-7 levels to stabilize his spondylolisthesis." Respondents subsequently denied the proposed surgery. Nevertheless, Claimant underwent the procedure through his personal insurance on March 10, 2023.

30. Despite the surgical request from Dr. Stanton, the persuasive opinion and testimony of Dr. Rauzzino reflects that the proposed surgery was not reasonable, necessary and causally related to Claimant's March 4, 2022 industrial injury. Dr. Rauzzino explained that the medical records reflect that "there was no neck pain, there was no injury to the cervical spine for many, many months after the injury." If Claimant had suffered an injury to his cervical spine while attempting to prevent a rack of bread from falling, his symptoms would have presented immediately. However, the record reflects that Claimant's first mention of neck symptoms to PA-C Quakenbush did not occur until September 20, 2022 or four months after the shoulder surgery and six months after the work incident. Furthermore, Dr. Rauzzino explained that Claimant's cervical MRI reflected chronic, degenerative changes that developed over a number of years and were not caused by trauma. Importantly, Dr. Rauzzino reasoned that the pathology reflected on the December 20, 2022 MRI was not caused or accelerated by the March 14, 2022 work incident. There was also no aggravation of Claimant's pre-existing, degenerative condition leading to a permanent change in his condition after attempting to prevent a rack of bread from falling at work. Dr. Rauzzino remarked that the natural history of Claimant's degenerative arthritis and foraminal stenosis is that it will progress over time. He summarized that the records were very clear in demonstrating that Claimant did not

sustain a cervical spine injury based on the mechanism of injury or reporting of symptoms. Dr. Rauzzino emphasized that the pathology in Claimant's cervical spine was "100 percent not caused by the injury at work."

31. Based on the extensive medical records and persuasive opinion of Dr. Rauzzino, the surgery performed by Dr. Stanton on March 10, 2023 was not reasonable, necessary and causally related to Claimant's March 14, 2022 work activities. The record reveals that Claimant injured his left shoulder while attempting to prevent a rack of bread from falling at work on March 14, 2022. However, the medical records do not reflect that he injured his neck or cervical spine during the incident. He instead suffered from a pre-existing, degenerative spinal condition unrelated to his work activities. Claimant's employment thus did not aggravate, accelerate or combine with his pre-existing condition to produce the need for surgical intervention. Accordingly, Claimant's C4-7 anterior cervical discectomy fusion surgery performed on March 10, 2023 was not reasonable, necessary and causally related to his March 14, 2022 work accident.

CONCLUSIONS OF LAW

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

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

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

Completed Request for Prior Authorization

4. Claimant seeks a determination with regard to authorization of the C4-7 anterior cervical discectomy fusion surgery recommended by Dr. Stanton. He asserts that

the proposed surgery was automatically authorized under Rule 16-7 in effect at the time of the request for prior authorization on December 23, 2022. Notably, Respondents failure to deny or authorize the proposed surgery within 10 days under Rule 16-7-I(B)(I) deemed the surgery authorized pursuant to Rule 16-7-2(E). Claimant plead "[p]enalty period begins 12/23/22 and continues until carrier authorizes treatment."

5. Rule 16-7-2(E) specifies:

> Failure of the payer to timely comply in full with all Prior Authorization requirements outlined in this rule shall be deemed authorization for payment of the requested treatment unless the payer has scheduled an independent medical examination (IME) and notified the requesting provider of the IME within the time prescribed for responding.

6. Rule 16-7(B)(2) specifically pertains to denials for medical reasons. The Rule provides that "the payer shall respond to all Prior Authorization requests in writing within 10 days from receipt of a completed request as defined per this Rule." Therefore, for Rule 16-7(B)(2) to apply, the medical provider must submit a completed prior authorization request.

7. To complete a prior authorization request under Rule 16-7(C), the provider "shall concurrently explain the reasonableness and medical necessity of the treatment requested and shall provide relevant supporting documentation (documentation used in the provider's decision-making process to substantiate need for the requested treatment)." A completed request under Rule 16-7(C) includes "[a]n adequate definition or description of the nature, extent and necessity for the treatment;" an identification of the applicable MTG; and a final diagnosis. The issue of whether a provider has submitted a completed request is a question of fact to be determined by the ALJ. *See Aguirre v. Nortrack*, W.C. No. 4-742-953 (ICAO, Oct. 5, 2011). It is Claimant's burden to prove that a completed request was sent to respondents in order for Rule 16's penalty of automatic approval to apply. *Murray v. Tristate Generation and Transmission Ass'n,* W.C. No. 4-997-086-02 (ICAO, Dec. 22, 2017). A respondent is not required to plead insufficiency of a request for authorization as an affirmative defense. *McDaniel v. Vail Associates, Inc.*, W.C. No. 3-111-363 (ICAO, July 18, 2011).

8. As found, Claimant has failed to prove by a preponderance of the evidence that the December 23, 2022 facsimile from the office of ATP Dr. Stanton to Respondents requesting authorization for a C4-7 anterior cervical discectomy constituted a completed request pursuant to W.C.R.P. Rule 16-7. Initially, on December 23, 2022 Dr. Stanton's office faxed to the correct number for Respondents a 22-page document requesting a C4-7 anterior cervical discectomy/fusion. The request had the wrong claim number but the correct date of birth and date of injury, Respondents assert that, because of an incorrect claim number, Claimant failed to submit a completed request to trigger Rule 16.

9. As found, MF[Redacted] showed his fax in-box and explained how this confirmed he never received the transmission. Exhibit 10 reveals a fax cover sheet with the letterhead of Colorado Springs Orthopaedic Group, dated December 23, 2022 that

has no claim or information identifying Claimant. The second page of Exhibit 10, with the letterhead of The Spine Center, is the Request for Pre-Authorization for Surgery Procedure with an incorrect claim number. Because of the incorrect claim number, it is likely the fax was never routed to the correct location. Although Dr. Stanton's office submitted a 22-page document seeking surgical authorization, information including procedure codes and date of birth are not helpful when not connected to the correct claim. The consequences of a failure to timely respond to a prior authorization request are significant. Because of the time-sensitive nature of acting on a request for prior authorization, it is imperative for the request to be delivered to the individual responsible for adjusting the claim. Respondents were not culpable for an incorrect claim number and do not carry the burden of researching and identifying the claim under which a request is being made. Accordingly, the December 23, 2022 fax from Dr. Stanton's office presented in Exhibit 10 did not constitute a completed request for prior authorization. The 10-day requirement to respond in Rule 16-7(B)(2) thus was not triggered on December 23, 2022.

Penalty of Automatic Authorization pursuant to Rule 16-7

10. Section 8-43-304(1), C.R.S. authorizes the imposition of penalties not to exceed $1000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under §8-43-304(1), C.R.S. even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001). The failure to comply with a procedural rule has been determined to be a failure to obey an "order" and failure to perform a "duty lawfully enjoined" within the meaning of §8-43-304(1), C.R.S.; *Pioneers Hospital v. Indus. Claim Appeals Off.*, 114 P.3d 97, 98 (Colo. App. 2005).

11. Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must ascertain whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of an action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Indus. Claim Appeals Off.,* 107 P.3d 965 (Colo. App. 2003) ("reasonableness of conduct in defense of penalty claim is predicated on rational argument based in law or fact.") *In Re Claim of Murray*, W.C. No. 4-997-086-02 (ICAO, Aug. 16, 2017). The question of whether a party's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Indus. Claim Appeals Off.,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010). Where the violator fails to offer a reasonable factual or legal explanation for its actions, the ALJ may infer the opposing party sustained its burden to prove the violation was objectively unreasonable. *Human Resource Co. v. Indus. Claim Appeals Off.*, 984 P.2d 1194, 1197 (Colo. App. 1999).

12. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to the penalty of automatic authorization for the surgery requested by Dr. Stanton because Respondents failed to respond to the request within 10 days pursuant to W.C.R.P. Rule 16-7(B)(2). Specifically, even if the December 23, 2022 fax from Dr. Stanton's office presented in Exhibit 10 constituted a completed request and the 10-day requirement to respond in Rule 16-7(B)(2) was triggered, the penalty of automatic authorization was not warranted. Initially, because Respondents did not timely respond to the surgical request, they violated Rule 16-7(B)(2). However, the record reflects that Respondents' conduct was not objectively unreasonable because it was predicated on a rational argument based in law or fact.

13. As found, MF[Redacted] showed his fax in-box at the hearing and explained how this confirmed that he never received the transmission from Dr. Stanton's office. On December 23, 2022 the only fax he received was another medical record from Dr. Walden. MF[Redacted] also explained his fax cue in which documents are organized by claim number. Respondents' procedure for distributing incoming fax documents was a reasonable approach. When the December 23, 2022 surgical request from Dr. Stanton's office was not timely addressed, the office contacted MF[Redacted]. He requested resubmission of the surgical request. Dr. Stanton's office then resubmitted the documentation on January 9, 2023. MF[Redacted] verified that he received the prior authorization request by email on January 9, 2023. He immediately took action and scheduled an appointment with Dr. Rauzzino for an independent medical examination. He also sent a denial of the prior authorization to Dr. Stanton and to Claimant on January 11, 2023. MF's[Redacted] actions constituted a genuine effort to comply with the 10-day requirement to respond in Rule 16-7(B)(2). Because Respondents efforts in addressing the December 23, 2022 request for surgical authorization were predicated on a rational argument based in law or fact, their actions were not objectively unreasonable. Accordingly, Claimant's request for automatic authorization of the surgery requested by Dr. Stanton on December 23, 2022 is denied and dismissed.

Reasonable, Necessary and Causally Related

14. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*,

W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

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

16. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the C4-7 anterior cervical discectomy fusion surgery performed by Dr. Stanton on March 10, 2023 was reasonable, necessary and causally related to his March 4, 2022 industrial injury. Initially, on March 14, 2022 Claimant injured his left shoulder at work while attempting to prevent a rack of bread from falling. Claimant was eventually diagnosed with a left shoulder rotator cuff tear. On February 25, 2022 he underwent surgical repair with Dr. Walden.

17. As found, following Claimant's left shoulder surgery he had reduced pain complaints in his armpit and chest area. Although Claimant attended several physical therapy visits, his left shoulder and trapezius area remained painful. Claimant's first mention of neck pain to PA-C Quakenbush did not occur until September 20, 2022 or four months after the shoulder surgery and six months after the work accident. PA-C Quakenbush noted radiating pain from the left lateral neck into Claimant's shoulder. On December 22, 2022 Dr. Stanton commented that Claimant still had left-sided shoulder pain and some weakness with overhead activities. He diagnosed Claimant with cervical disc disorders at C4-7 with radiculopathy. Dr. Stanton concluded that "[a]t this point, I think [Claimant] will require a reconstruction of his C4-7 levels to stabilize his spondylolisthesis." Respondents subsequently denied the proposed surgery. Nevertheless, Claimant underwent the procedure through his personal insurance on March 10, 2023.

18. As found, despite the surgical request from Dr. Stanton, the persuasive opinion and testimony of Dr. Rauzzino reflects that the proposed surgery was not reasonable, necessary and causally related to Claimant's March 4, 2022 industrial injury. Dr. Rauzzino explained that the medical records reflect that "there was no neck pain, there was no injury to the cervical spine for many, many months after the injury." If Claimant had suffered an injury to his cervical spine while attempting to prevent a rack of bread from falling, his symptoms would have presented immediately. However, the record reflects that Claimant's first mention of neck symptoms to PA-C Quakenbush did not occur until September 20, 2022 or four months after the shoulder surgery and six months after the work incident. Furthermore, Dr. Rauzzino explained that Claimant's cervical MRI reflected chronic, degenerative changes that developed over a number of years and were not caused by trauma. Importantly, Dr. Rauzzino reasoned that the pathology reflected on the December 20, 2022 MRI was not caused or accelerated by the March 14, 2022

work incident. There was also no aggravation of Claimant's pre-existing, degenerative condition leading to a permanent change in his condition after attempting to prevent a rack of bread from falling at work. Dr. Rauzzino remarked that the natural history of Claimant's degenerative arthritis and foraminal stenosis is that it will progress over time. He summarized that the records were very clear in demonstrating that Claimant did not sustain a cervical spine injury based on the mechanism of injury or reporting of symptoms. Dr. Rauzzino emphasized that the pathology in Claimant's cervical spine was "100 percent not caused by the injury at work."

19. As found, based on the extensive medical records and persuasive opinion of Dr. Rauzzino, the surgery performed by Dr. Stanton on March 10, 2023 was not reasonable, necessary and causally related to Claimant's March 14, 2022 work activities. The record reveals that Claimant injured his left shoulder while attempting to prevent a rack of bread from falling at work on March 14, 2022. However, the medical records do not reflect that he injured his neck or cervical spine during the incident. He instead suffered from a pre-existing, degenerative spinal condition unrelated to his work activities. Claimant's employment thus did not aggravate, accelerate or combine with his pre-existing condition to produce the need for surgical intervention. Accordingly, Claimant's C4-7 anterior cervical discectomy fusion surgery performed on March 10, 2023 was not reasonable, necessary and causally related to his March 14, 2022 work accident.

ORDER

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

1. The December 23, 2022 fax from Dr. Stanton's office presented in Exhibit 10 did not constitute a completed request for prior authorization.

2. Claimant's request for the penalty of automatic authorization of the surgery requested by Dr. Stanton on December 23, 2022 is denied and dismissed.

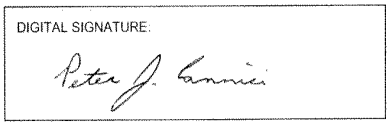
3. Claimant's C4-7 anterior cervical discectomy fusion surgery performed on March 10, 2023 was not reasonable, necessary and causally related to his March 14, 2022 work accident.

4. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For*

further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: June 13, 2023.



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

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that her claim should be reopened based on a worsening of condition since she was placed at maximum medical improvement (MMI) on June 22, 2021.

II. If the claim is reopened, whether Claimant has proven by a preponderance of the evidence that the ulnar nerve transposition surgery recommended by Dr. Larsen is reasonable, necessary, and related to the work injury?

III. If the claim is reopened, whether Claimant established by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits?

IV. Does the evidence presented support Respondents' contention that Claimant is attempting to circumvent the DIME to obtain a surgery that was previously recommended and not performed?

V. Does the evidence presented support Claimant's contention that Respondents are estopped from challenging the recommendation for ulnar nerve transposition surgery?

Because this ALJ finds Claimant's claim for TTD benefits premature, this order does not address her entitlement to TTD.

FINDINGS OF FACT

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

Claimant's January 20, 2020 Injury and Subsequent Treatment

1. This matter previously was before this ALJ on April 6, 2022, on Claimant's Application for Hearing to convert her scheduled impairment to impairment of the whole person. By Summary Order of May 5, 2022, this ALJ found that while Claimant had sustained injuries to both her wrist and ulnar nerve at the elbow, the impairment caused by these injuries would remain on the schedule of injuries. Accordingly, the claim for conversion to whole person impairment was denied and dismissed. (Clmt's Hrg. Ex. 3).

2. Claimant works as a police officer for Employer. She injured her left wrist/forearm/elbow while trying to effectuate the arrest of an intoxicated and combative suspect on January 20, 2020. (Resp. Hrg. Ex. A, p. 1).

3. Following her injury, Claimant underwent significant medical care,

including physical therapy and subsequent referral to Dr. Karl Larsen at the Colorado Center for Orthopedic Excellence. Early diagnostic testing to include MRI of the left wrist demonstrated no occult fractures or triangular fibrocartilage complex (TFCC) disruption. (Resp. Hrg. Ex. A, p. 2).

4. During an appointment with Physician Assistant (PA) Stephanie Noble at the Colorado Center for Orthopedic Excellence on February 14, 2020, Claimant's physical examination was suggestive of and consistent with a TFCC tear which was not "clearly delineated" on the previously obtained MRI. (Clmt's Hrg. Ex. 6, p. 33). PA Noble recommended a cortisone injection to the extensor carpi ulnaris (ECU) tendon sheath followed by long arm casting to "fully immobilize" the wrist and forearm to prevent "pronosupination" as she felt that this may help the soft tissue and TFCC tear heal. *Id*. at p. 34. Regarding the condition of Claimant's left elbow, PA Noble noted: "If [Claimant] *continues* to have elbow pain, she may benefit from obtaining an MRI of the elbow as well, but at this point the majority of her symptoms appear to be at the wrist". *Id.* at p. 34 (emphasis added). Dr. Larsen agreed with PA Noble's treatment plan. *Id.* Accordingly, Claimant was administered a corticosteroid injection and placed in a long arm cast.

5. Based upon the content of PA Noble's 2/14/2020 record, including the statement that should Claimant "continue" to have elbow pain, the ALJ finds it reasonable to infer that Claimant was probably experiencing elbow symptoms shortly after her January 20, 2020 injury and before she was placed in a long arm cast.

6. Claimant returned to the Colorado Center for Orthopedic Excellence on March 23, 2020 where she was evaluated by Dr. Larsen. (Clmt's Hrg. Ex. 6, p. 35). Claimant reported little improvement from the previously administered injection. *Id.* Her cast was removed and an examination attempted. *Id*. Noting that the examination was of limited value due to Claimant's stiffness from immobilization, Dr. Larsen placed Claimant's wrist in a brace and referred her to Occupational Therapy to work on "gentle range of motion and desensitization". *Id*. A return appointment was set for approximately one month. *Id.* If Claimant was not doing well at this appointment, Dr. Larsen noted that decisions would need to be made about proceeding to surgery. *Id*.

7. During a follow-up visit on April 22, 2020, Claimant reported continued "snapping" on the ulnar side of the wrist and pain with rotation and ulnar deviation. (Clmt's Hrg. Ex. 6, pp. 36-39). Physical examination revealed continued instability of the distal ulna and "mild" synovitis about the ECU tendon. *Id*. Claimant expressed a desire to proceed with a repair surgery but it was noted that she was 8 weeks pregnant which complicated surgical scheduling. *Id.*

8. After consulting with Claimant's obstetrician, Dr. Larsen took her to the operating room on June 11, 2020 for completion of a left wrist arthroscopy with debridement of triangular fibrocartilage tear, a left distal radioulnar joint (DRUJ) stabilization and left ECU tendon sheath reconstruction procedure. (Clmt's Hrg. Ex. 6, p. 44).

9. Claimant experienced persistent post-surgical pain around the DRUJ with range of motion. (Clmt's Hrg. Ex. 6, p. 57). On September 4, 2020, a steroid injection was administered to help her "cope" with the rigors of therapy and provide pain relief. *Id*. It was also noted during this follow-up appointment, that Claimant had been unable to wean herself from her brace. *Id*.

10. During an October 20, 2020 appointment with PA Noble, Claimant reported that the previously administered steroid injection gave her approximately two weeks of relief but her pain had returned and she had a recurrence of the clicking in her left wrist. (Clmt's Hrg. Ex. 6, p. 59). She also complained of a new burning sensation into the ring and small finger as well as the underneath (volar) aspect of the left wrist. *Id.* Physical examination, including provocative testing, i.e. a thumb grind and Tinel's over the ulnar nerve were positive for pain, laxity and burning in the ring and small finger. *Id.* In addition to having left ulnar-sided wrist pain, Claimant was diagnosed with thumb CMC laxity and cubital tunnel syndrome. *Id*.

11. At a December 7, 2020, follow-up appointment, Claimant reported persistent left wrist pain and recurrent clicking. (Clmt's Hrg. Ex. 6, p. 60). Physical examination revealed that the ECU tendon was tender and "somewhat mobile" indicating that Claimant had possibly stretched out her June 11, 2020 surgical reconstruction. *Id*. Dr. Larsen was able to produce wrist clicking with a "midcarpal load and shift maneuver" suggesting the presence of midcarpal instability. *Id.* Claimant was noted to be nearly 9 months pregnant by this appointment, which Dr. Larsen felt was contributing to her ligamentous laxity. *Id*. Outside of an injection into the ECU tendon sheath, Dr. Larsen recommended "taking a long period of time to let [Claimant's] body recover from the hormonal effects of her pregnancy before [considering] anything else". *Id*.

12. Claimant underwent electrodiagnostic testing on March 31, 2021 with Dr. Katharine Leppard. Testing demonstrated objective evidence of "left ulnar mononeuropathy at the elbow, mild in severity." (Resp. Hrg. Ex. J, p. 50). Motor nerve conduction across the Guyon's canal was reportedly "normal" and there was no evidence of median nerve mononeuropathy at the wrist or electrodiagnostic evidence a radiculopathy, brachial plexopathy, neurogenic thoracic outlet or radial mononeuropathy in the left upper extremity. *Id*.

13. By April 16, 2021, Claimant's wrist was noted to be doing "relatively well with just some aching discomfort". (Clmt's Hrg. Ex. 6, p. 64). Claimant had returned to "regular duty work by this date; however, Claimant experienced a worsening of the radiating pain from her medial left elbow into the hand with numbness and tingling into the ring and small fingers after a session of target practice at the firing range. *Id*. It was noted that Claimant had felt similar symptoms, albeit with less numbness and tingling since coming out of her long arm cast on March 23, 2020. (See ¶ 5 above). Dr. Larsen noted the possibility that Claimant's prior long arm casting had somehow aggravated the condition of Claimant's elbow but he added that her elbow had "not been particularly symptomatic until we tried to return her to normal duty". *Id*. at p. 65. Because

Claimant's elbow symptoms were worsening and because she had a "somewhat" subluxable ulnar nerve at the elbow with a positive Tinel's sign and elbow flexion compression test along with prior electrodiagnostic evidence of ulnar neuropathy, Dr. Larsen recommended a return to therapy to "work on specific nerve gliding exercises". *Id*. Barring symptomatic improvement with these exercises, Dr. Larsen noted that Claimant may require an ulnar nerve transposition surgery. *Id*.

14. Respondents sent Claimant for a second opinion with Dr. Jeffrey Watson. (Clmt's Hrg. Ex. 5). Dr. Watson, by report of June 9, 2021, noted Claimant's previous history of surgery by Dr. Larsen, her persistent left wrist and elbow pain, including *both lateral* and *medial* elbow pain along with occasional numbness over the ulnar border of the right hand. (Clmt's Hrg. Ex. 5, p. 26). Physical examination revealed "slight hypermobility of the right ulnar nerve with flexion and extension, but it does not firmly subluxate over the medial upper condyle".[1] *Id*. at p. 27. Percussion testing revealed a "mildly positive Tinel's sign along the ulnar nerve at the cubital tunnel", left slightly greater than right. *Id*. Moreover, Claimant demonstrated marked tenderness with palpation of the ulnar fovea as well as the ECU tendon. She also had ECU subluxation with provocative maneuvers, which was caused additional pain. *Id.* Dr. Watson concluded that Claimant's presentation was a "difficult" one as she had pain at her elbow, forearm and wrist following a "complex" wrist reconstruction effort. *Id*. He was not confident that Claimant's pain was emanating from her ulnar nerve because she had "more focal pain around the ulnar part of the wrist as opposed to the ulnar nerve distribution" and "minimal changes on her electrodiagnostic evaluation. *Id*. at p. 28. Instead, Dr. Watson felt that Claimant's problems were more likely coming from persistent instability of the extensor carpi ulnaris tendon. *Id.* While he had no confidence in a revision stabilization procedure of the TFCC or DRUJ, Dr. Watson noted that a revision stabilization of the ECU tendon "may be worthwhile", although he described this surgery as a "big commitment". *Id.*

15. The ALJ credits the October 20, 2020 and April 16, 2021 of PA Noble and Dr. Larsen respectively to find that Claimant probably has cubital tunnel syndrome related to her January 20, 2020 work injury.

16. Claimant was seen by Dr. Nicholas Kurz on June 22, 2021. (Clmt's Hrg. Ex. 4, p. 21). Dr. Kurz had previously released Claimant to full duty on her last visit to the City of Colorado Springs Occupational Medicine Clinic in March of 2021. Claimant had not returned to full duty but instead had taken vacation and then went on light duty pending the opinions by Dr. Larsen and the second opinion by Dr. Watson. According to Dr. Kurz' examination at that time, Claimant had a normal exam with full range of motion, strength and sensation. *Id*. at pp. 21-22. Dr. Kurz also noted that Dr. Larsen

[1] The ALJ finds Dr. Watson's reference to occasional numbness over the ulnar border of the right hand and slight hypermobility of the right ulnar nerve perplexing as Claimant has never reported any symptoms associated with the right elbow. Accordingly, the ALJ has given consideration to the possibility that Dr. Watson's reference to right hand pain and hypermobility or the ulnar nerve may be a typographical error. Nonetheless, Dr. Watson's examination revealed a positive ulnar nerve Tinel's sign over the left elbow, which is consistent with Dr. Larsen's finding on examination.

was of the opinion that some of Claimant's ligamentous wrist laxity was due to her pregnancy and he would expect that to improve with the passage of time and "to recover from the hormonal effects of her pregnancy." *Id*. at p. 22. Accordingly, Dr. Kurz placed Claimant at MMI without impairment and while his report indicated that maintenance treatment may be warranted, the Final Admission of Liability (FAL) filed by Respondents on July 16, 2021, stated that no medical maintenance was required. (Clmt's Hrg. Ex. 4, p. 22; see also Resp. Hrg. Ex. W, p. 112).

17. Claimant requested a Division Independent Medical Examination (DIME) to assess her left wrist and elbow following the filing of Respondents' July 16, 2021 FAL. Dr. John Bissell was selected as the physician to complete the requested DIME. Shortly before she saw Dr. Bissell on November 4, 2021, Claimant returned to full duty work.

Dr. Bissell's DIME

18. Dr. Bissell completed his DIME on November 4, 2021. (Clmt's Hrg. Ex. 8). During the DIME, Claimant reported "chronic aching, stabbing and burning in her left elbow and *medial* forearm with numbness and pins and needles in her left medial hand particularly in the fourth and fifth digits".[2] *Id*. at p. 105. Concerning the condition of Claimant's left elbow, Dr. Bissell documented the following:

> Dr. Larsen recommended ulnar nerve transposition but Dr. Kurz referred her for [a] second opinion [with] Dr. Watson. Dr. Watson told her the nerve injury was not significant enough but he found that she had persistent instability and recommended another stabilization surgery. Surgery was not approved and Dr. Kurz released her to full duty, which she started this week.

(Clmt's Hrg. Ex. 8, p. 103).

19. Although the physical examination section of Dr. Bissell's DIME report is devoid of any suggestion that he tested the left ulnar nerve for hypermobility, Dr. Bissell did perform a Tinel's test of the left ulnar nerve at the elbow. (Clmt's Hrg. Ex. 8, p. 106). Dr. Bissell documented a positive Tinel's test at the elbow, which caused "paresthesia extending into [Claimant's] fingers". *Id.* In reaching his clinical diagnosis of "left ulnar neuropathy, probably at the elbow, mild-claim related", Dr. Bissell cited the results of Claimant's nerve conduction study completed by Dr. Leppard on March 31, 2021. *Id*. at pp. 106-107. Indeed, Dr. Bissell noted: "Left upper limb EMG/NCV testing was complex and in summary showed *probable* left ulnar neuropathy at the elbow and mild sensory only left median neuropathy at the wrist. She saw hand surgeon Dr. Larsen who opined she might benefit from ulnar nerve transposition surgery and she had a second opinion

[2] The ALJ finds Dr. Bissell's reference to symptoms emanating from the left "medial" portion of the hand a likely error as the fourth and fifth digits are located on the lateral, i.e. outside aspect of the hand rather than on the medial (inside) aspect of the hand.

with hand surgeon Dr. Watson who opined she might benefit from revision extensor carpi ulnaris tendon stabilization". *Id*. at p. 107 (emphasis added).

20. Dr. Bissell concluded that Claimant was at MMI and assigned a total of 14% upper extremity impairment rating, 2% of which was given for Claimant's claim related left ulnar neuropathy above mid forearm. (Clmt's Hrg. Ex. 8, p. 107). Dr. Bissell recommended that Claimant follow-up with Dr. Kurz over the next year to assess her progress, noting that her symptoms should abate with ergonomic adjustment, bracing, resolution of the hormonal effects of pregnancy (ligamentous laxity) and time. *Id*. at p. 108. He did not recommend additional surgery, noting that multiple surgeries were unlikely to result in an improvement in pain or function. *Id*.

21. The ALJ finds that when Claimant was placed at MMI in June of 2021, differing opinions were given by examining experts as to what type of surgery may be of benefit to her at that time. Given the ongoing possibility that the laxity in her wrist could improve following the delivery of her child combined with the disparate opinions regarding the location of her pain generator, and the fact that she had been placed at MMI without impairment, the ALJ finds it reasonable that Claimant would be content to try to live with the state of her elbow condition as of June 22, 2021.

22. On December 1, 2021, Respondents filed an FAL consistent with the MMI and impairment rating opinions expressed by Dr. Bissell in his November 4, 2021 DIME report. (Clmt's Hrg. Ex. 9, p. 116). While Respondents admitted to the MMI and impairment rating determinations of Dr. Bissell, they denied maintenance care benefits pursuant to Dr. Kurz' June 22, 2021 report. *Id.*

23. Claimant subsequently filed an Application for Hearing seeking to convert her 14% scheduled rating to impairment of the whole person. As noted above, a hearing concerning conversion of Claimant's scheduled impairment commenced April 6, 2022. (Clmt's Hrg. Ex. 3). At this hearing, neither Claimant nor Respondents sought to overcome Dr. Bissell's DIME opinions as to MMI, or impairment nor did Claimant seek future maintenance medical care. *Id*. After Claimant's conversion request was denied and dismissed, she filed the current Application for Hearing seeking to reopen her claim for additional medical benefits, specifically surgery directed to the left elbow along with temporary total disability (TTD) benefits commencing October 10, 2022 and ongoing. (Clmt's Hrg. Ex. 1).

24. In support of their position that Claimant's request for conversion of her scheduled impairment should be denied and dismissed, Respondent presented a records review report authored by Dr. Thomas Mordick at the April 6, 2022 hearing. This same January 22, 2022 report is included in Respondents current Exhibit packet. (See Resp. Hrg. Ex. B). The ALJ has carefully reviewed this report a second time. In his January 22, 2022 report, Dr. Mordick notes:

> On 11-04-21 a Division IME was performed by Dr. Bissell. He stated his opinion that the claimant was at MMI. In (sic) awarded a

> 14% upper extremity rating. Of note 2% was for the ulnar nerve. [Redacted, hereinafter MC] did not complain of ulnar nerve issues for 10 months after her injury and 4 months after her surgery. In medical probability, immobilization in a cast does not result in cubital tunnel syndrome, and if somehow a cast should irritate the ulnar nerve it would happen while the cast was on and not months later. Therefore, in medical probability, the ulnar nerve complaints are not related to the injury of 01-20-2020."

(Resp. Hrg. Ex. B, p.14).

25. While it is clear that Dr. Mordick disagreed with Dr. Bissell's conclusion that Claimant's left elbow symptoms/complaints were causally related to her January 20, 2020 work injury as of January 22, 2022, Respondents did not raise any objection to Dr. Bissell's DIME determination regarding the cause of Claimant's left ulnar nerve/cubital tunnel symptoms at the time of the April 6, 2022 hearing.

26. Claimant returned for a follow-up appointment with Dr. Larsen on October 10, 2022. (Resp. Hrg. Ex. T). During this encounter, Dr. Larsen noted that he had not seen Claimant since May 2021, at which time it had been determined that Claimant had "ulnar neuritis of the left elbow with ulnar nerve subluxation as well as some persistent pain about her ulnar wrist". *Id*. at p. 83. Dr. Larsen also indicated that his recommendation to proceed with an ulnar nerve transposition surgery had been denied with Respondents' request for a second opinion with Dr. Watson. *Id.* Since the denial of the request for elbow surgery, Dr. Larsen noted that Claimant was experiencing "*significant worsening* pain localized to [Claimant's] elbow radiating out to her hand". *Id*. (emphasis added). Examination directed to the left *medial* elbow revealed tenderness over the ulnar nerve which was "palpably subluxable". *Id*. at p. 84. Claimant was careful to note that subluxation of the ulnar nerve reproduces the symptoms that she is having in her elbow and radiating into her hand. *Id*. Claimant also had a "painfully positive" Tinel's sign at the elbow, a palpably unstable ECU tendon and pain with an ulnocarpal grinding test at the wrist. *Id*. Dr. Larsen opined that Claimant had both an elbow problem and ongoing issues with her wrist. (See generally, Resp. Hrg. Ex. T, p. 85). He concluded that her "most symptomatic problem was ulnar neuritis at the medial elbow with ulnar nerve subluxation, noting that this was "electrodiagnostically associated with ulnar neuropathy at the elbow that was mild but her symptoms are more of pain and radiating symptoms when the nerve subluxate" (sic). *Id*. Dr. Larsen felt that Claimant remained a good candidate for an ulnar nerve transposition surgery and Claimant expressed a desire to proceed. *Id.*

27. Claimant was evaluated by Dr. Mordick for a WCRP, Rule 16 opinion on December 6, 2022. During this appointment, Claimant purportedly reported "constant pain in the *lateral* aspect of the left elbow. (Resp. Hrg. Ex. C, p. 16)(emphasis added). According to Dr. Mordick's independent medical examination (IME) report, Claimant described her pain as extending from the lateral aspect of the elbow to the ulnar side of the wrist. *Id.* at p. 17. Dr. Mordick did not appreciate any ulnar nerve subluxation on

examination and according to his report, Claimant did not complain of tenderness over the medial epicondyle. *Id*. Dr. Mordick found Claimant's examination to be atypical for cubital tunnel syndrome and because her elbow pain was lateral rather than medial, he recommended against ulnar nerve transposition surgery. *Id*. at p. 18.

28. Claimant returned to Dr. Larsen following Dr. Mordick's IME. She was reevaluated by Dr. Larsen on January 16, 2023, because Dr. Mordick's examination was in complete opposition to what he (Dr. Larsen) found on exam during Claimant's October 10, 2022 appointment. (Resp. Hrg. Ex. U, p. 87; see also, Clmt's Hrg. Ex. 6, p. 90).

29. During a January 16, 2023 appointment, Claimant reported to Dr. Larsen that Dr. Mordick spent approximately 5 minutes on his examination and that she was still having ongoing symptoms, that her ulnar nerve was subluxing at the elbow and that with pressure on the area of the ulnar nerve, she experiences "numbness in the ulnar digits of the hand". (Resp. Hrg. Ex. U, p. 87). Claimant localized her pain over the posterior and posteromedial aspect of the elbow. *Id.* at p. 88. She specifically denied any "*lateral* elbow pain". *Id*. (emphasis added). Physical examination noted a complete absence of tenderness over the lateral epicondyle; however, Claimant complained of tenderness over the ulnar nerve and demonstrated a positive elbow flexion compression test. *Id*. According to Dr. Larsen, he and Claimant could both appreciate the ulnar nerve subluxing over the medial epicondyle during his physical examination. *Id*.

30. Dr. Larsen concluded that Claimant had "very clear evidence of ulnar nerve subluxation and ulnar neuritis with a low degree of ulnar neuropathy on electrodiagnostic test. (Resp. Hrg. Ex. U, p. 88). He was unable to reconcile the differences between his examinations and the examination of Dr. Mordick. *Id.*

31. Dr. Mordick recorded the December 6, 2022, IME appointment with Claimant and the audio recording has been moved into evidence. (Clmt's Hrg. Ex. 10). The ALJ has carefully listened to the entire audio recording of this appointment. The recording is 15 minutes and 38 seconds in length. The first minute and 13 seconds of the recording consists of introductory statements made by "[Redacted, hereinafter NA]", an employee of Dr. Mordick's office followed by Claimant's consent to audio record the examination. Dr. Mordick introduces himself at 1:14 into the audio and proceeds to gather a history from Claimant for the next 4 minutes and 16 seconds, i.e. approximately to the 5 minute and 30 second mark of the audio when he asks Claimant to show him where she is having pain. Claimant confirms that the pain is difficult locate but concedes she has worsening pain on the outside of the left forearm/elbow. Dr. Mordick obtains additional history up to the 7 minute and 57 second mark of the recording when the actual physical examination begins. During the physical examination, Claimant reports having numbness in the ring and pinkie finger along with ½ of the middle finger. Following a basic sensory assessment, Dr. Mordick completes a palpatory examination of the left extremity. Dr. Mordick provides no verbal description of the areas palpated which reportedly cause/reproduce Claimant's pain. The palpatory examination proceeds to the 15 minute and 35 second mark of the audio recording,

making the complete examination approximately 7 minutes and 38 seconds in length. During the examination, Claimant reported that palpation to the area of the elbow caused soreness/pain in essentially the entire left forearm and a shooting sensation into the pinkie.

32. In a letter directed to Respondents' attorney dated January 20, 2023, Dr. Mordick reiterated his recommendation against proceeding with left ulnar nerve decompression with transposition surgery. (Resp. Hrg. Ex. D, p. 22). Dr. Mordick repeated his concerns that the cause of Claimant's elbow problems did not appear related to Claimant's January 20, 2020 injury. *Id*. Moreover, he cited Claimant's atypical and inconsistent examination findings, lateral rather than medial elbow pain, and weak EMG findings as additional evidence that the requested cubital tunnel surgery was not reasonable or necessary. *Id.*

33. Following Dr. Mordick's IME, Respondents requested a medical records review opinion from Dr. Lawrence Lesnak. Dr. Lesnak issued a report on February 6, 2023, outlining his opinions regarding Claimant's candidacy for left ulnar nerve transposition surgery at the elbow. (Resp. Hrg. Ex. E, pp. 26-29). In addition to the reasons cited by Dr. Mordick as support for denying Dr. Larsen's request for elbow surgery, Dr. Lesnak opined that the nerve conduction velocity study performed by Dr. Leppard did not meet the criteria for a diagnosis of mild ulnar motor neuropathy across the elbow. *Id.* at pp. 28-29. According to Dr. Lesnak, the 13 m/sec decrease in Claimant's ulnar nerve conduction was below the 15 m/sec or greater decrease "*required*" for the aforementioned diagnosis. Id. at p. 28 (emphasis in original). Dr. Lesnak did not recommend repeat EMG/NCV testing to determine whether there had been any interim change in Claimant's nerve conduction velocities between the time of Dr. Leppard's testing and his records review.

The Deposition Testimony of Dr. Larsen

34. Dr. Larsen is a Board-certified, fellowship trained orthopedic hand and upper extremity surgeon. He graduated from the Uniformed Services University of the Health Sciences Medical School and did a year of general surgical training in the Air Force where he served as a flight surgeon. He thereafter did an orthopedic residency and then a subspecialty fellowship in hand and microvascular surgery and then served as an upper extremity surgeon at the Air Force Academy before going into private practice in 2008. He is Level II certified with the Division of Workers' Compensation (DOWC) and serves on the DIME panel of the DOWC. (Depo. Tr. Dr. Larsen, pp. 4-6, ll. 1-23).

35. Dr. Larsen testified that he recommended ulnar nerve transposition surgery because Claimant's clinical presentation included positive provocative testing (tenderness and instability of the ulnar nerve) supporting his conclusion that she had ulnar neuritis in combination with a low degree of ulnar neuropathy. (Depo. Tr. Dr. Larsen, pp. 11-12, ll. 1-8). So, he testified that he "offered [Claimant] a surgery that

would manage both, but the driving force was the ulnar neuritis" causing worsening pain around the ulnar nerve. *Id*. at ll. 8-10.

36. Dr. Larsen testified that after he received Dr. Mordick's December 6, 2022 report, he had Claimant brought back on January 16, 2023 to reexamine her yet again to "verify" what he was seeing because Dr. Mordick's examination results were in complete opposition to what he was seeing. (Depo. Tr. Dr. Larsen, p. 17-18, l. 1). According to Dr. Larsen, his examination findings from January 16, 2023, were consistent to what he had seen in October 2020 and May 24, 2021 and it appeared that Claimant's symptoms associated with left wrist/elbow were becoming more painful to her. *Id*. at p. 18-19, ll.1-4.

37. Dr. Larsen disagreed with the conclusions of Dr. Mordick as set out in his January 20, 2023 report (Resp. Ex. D, p. 22-23) when he suggested that the proposed ulnar nerve transposition surgery be denied on the basis that Claimant reported lateral not medial elbow pain and did not demonstrate ulnar nerve instability. (Depo. Tr. Dr. Larsen, p. 21, ll. 3-17). According to Dr. Larsen, Claimant's lateral elbow pain has not been a prominent part of her complaints or treatment over the years and he conspicuously felt the nerve sublux on examination. *Id.* When questioned as to whether the recommendation presently for the surgery on the elbow was based simply on Claimant's complaints of pain, Dr. Larsen testified that it is based not only on the Claimant's complaints of pain but also the provocative examination and the subluxation of the ulnar nerve eliciting pain behavior. *Id*. at p. 25, ll. 14-24.

38. Dr. Larsen opined that as of Claimant's October 10, 2022 examination, her left upper extremity symptoms appeared to render her unable to perform the full range of duties associated with her position as a police officer. (Depo. Tr. Dr. Larsen, p. 15, ll. 5-10).

Claimant's Hearing Testimony

39. Claimant testified that at the time of her initial injury she injured her wrist, had a burning sensation in her forearm and had pain and discomfort in her elbow. Claimant testified that with the passage of time, her elbow pain has gotten worse. She acknowledged that as of May 24, 2021, Dr. Larsen thought that surgery should be done on the elbow, but that Dr. Kurz had her get a second opinion with Dr. Watson who recommended that she proceed with additional wrist surgery. With two different opinions from two well-known doctors, as to the suspected pain generator, Claimant testified that she did not know what to do.

40. The evidence presented supports a finding that Claimant did not have any treatment between the time Dr. Kurz placed her at MMI on June 22, 2021 and October 10, 2022, when she returned to Dr. Larsen with complaints of worsening pain localized to the elbow and radiating out to the hand. By this time, Claimant's case would have been closed to additional medical benefits for approximately 10 month, i.e. since

December 31, 2021 by virtue of the fact that she did not object to Respondents 12/1/2021 FAL denying maintenance medical benefits.

41. Claimant testified that by October 10, 2022 this date her elbow pain had become constant and that she had shooting pains inside the left elbow and constant pain and numbness and tingling in her hand. Claimant described the pain as being on the inside or medial side of her elbow and thought that the difference in opinions/documentation of the physicians regarding the location of her pain may be related to the different way that the doctors performed their examinations and whether she had her elbow flexed or extended. Regardless, Claimant testified that the elbow pain she is enduring currently is in the same location as it was in May of 2021. According to Claimant, this pain and the other associated symptoms, including numbness and tingling in the pinky, ring, and one half of the middle figure are now constant in nature and more intense than she felt previously. Indeed, Claimant testified that when she went back to patrol duty in September of 2022 she noticed a significant worsening of her elbow pain/symptoms which progressively became more and more bothersome until it was constant. Claimant also testified that she could feel the ulnar nerve slipping out during her examinations with Dr. Larsen.

42. During cross-examination, Claimant admitted that she was off work for 12 weeks with whiplash following a motor vehicle accident on September 20, 2022. She also admitted that she is off work presently due to high risk pregnancy and symptoms consistent with supraventricular tachycardia.

The Testimony of Dr. Thomas Mordick

43. Dr. Thomas Mordick testified as a Board-certified, fellowship trained hand surgeon. Regarding Claimant's reported symptoms, Dr. Mordick testified that when he evaluated Claimant, she unmistakably indicated that she had lateral, not medial elbow pain and numbness in the left middle finger, ring and small fingers. The other notes indicate the left ring and small finger, which ·Dr. Mordick agreed would be more consistent with cubital tunnel syndrome, but Dr. Mordick testified that Claimant very specifically reported that she had numbness in her middle finger when he evaluated her. According to Dr. Mordick, such middle finger numbness would be an atypical distribution for an ulnar nerve problem. Dr. Mordick did not appreciate any ulnar nerve subluxation on examination and he testified that Dr. Lesnak reported that the EMG/NCV testing did not support a diagnosis of cubital tunnel syndrome. For these reasons, Dr. Mordick testified that the recommended ulnar nerve transposition surgery is not indicated.

44. Concerning Claimant's reported worsening of condition, Dr. Mordick testified that Claimant told him that her pain and numbness were unchanged for a long period of time. Accordingly, Dr. Mordick testified: "So, there does not appear to be any worsening of numbness, which would be indicative of cubital tunnel syndrome. As noted, this ALJ has listened carefully to the entire audio recording of Dr. Mordick's IME examination. That review would indicate that during the palpatory examination of Claimant's left wrist/elbow, Dr. Mordick never asked Claimant whether the pain he was

eliciting was worse than she had experienced previously. Moreover, on at least three occasions, Claimant told Dr. Mordick that her symptoms were worsening with time. Indeed, in reference to the shooting pain that Claimant reported travels from her elbow down her forearm, Claimant stated it has gotten "worse" as time has gone on. (Clmt's Hrg. Ex. 10, audio recording 4:14). She also reported that her symptoms were "getting worse and worse" and she now has "constant" pain at the elbow to the wrist. *Id*. at 5:19. Finally when asked pointedly whether her pain was different or the same as before, Claimant responded, "I would say it is getting worse at this point. *Id*. at 6:24.

45. The ALJ finds Claimant's testimony that her elbow pain and other associated symptoms, including paresthesia (numbness) have worsened since being placed at MMI on June 22, 2021, credible and more persuasive than the contrary statements of Dr. Mordick that she reported her pain and numbness were unchanged.

46. Based upon the evidence presented, the ALJ finds the medical situation surrounding the condition of Claimant's left elbow and wrist to be complicated. The ALJ is persuaded that Claimant likely suffered two separate injuries to her left upper extremity during the January 20, 2020 incident, one related to the TFCC and ECU tendon, i.e. the lateral aspect of the wrist and the other involving the elbow. Based upon the evidence presented, the ALJ is convinced that these injuries/conditions are probably causing pain and other associated symptoms in the entire left forearm, including the wrist and both the lateral and medial side of the elbow. Indeed, the ALJ is convinced that Claimant does have lateral forearm and elbow pain that is probably emanating from the injury to her ECU tendon and perhaps her TFCC injury. Moreover, there is electrodiagnostic evidence of ulnar nerve irritation/neuropathy at the elbow which is probably causing the reported medial elbow pain and associated symptoms (numbness/tingling) that are reproducible with provocative testing (Tinel's/grind test/ulnar nerve subluxation). Although mild in nature, Claimant's abnormal EMG/NCV testing results constitute some "objective" evidence that her ulnar nerve is not completely healthy. Based upon the evidence presented, the ALJ finds that Claimant's ulnar nerve irritation/neuropathy represents the probable source of her persistent and worsening elbow pain.

47. Dr. Lesnak's suggestion that Claimant's reported worsening ulnar nerve pain and associated cubital tunnel syndrome symptoms are not explained by the results of her EMG testing is not persuasive. Indeed, Dr. Leppard concluded that Claimant's testing yielded an abnormal result and that Claimant had mild ulnar neuropathy at the elbow. Moreover, Dr. Bissell seemingly adopted Dr. Leppard's EMG testing results when he concluded that Claimant had "left ulnar neuropathy, probably at the elbow, mild-claim related". (Clmt's Hrg. Ex. 8, pp. 106-107). As noted, Respondent's did not challenge Dr. Bissell's DIME finding concerning the cause of Claimant's ulnar neuropathy. Consequently, the ALJ finds any suggestion that Claimant does not have an ulnar neuropathy in direct contradiction to Dr. Bissell's diagnostic opinion concerning Claimant's elbow and his determination that Claimant's ulnar neuropathy is "claim related". Nevertheless, the evidence presented persuades the ALJ that Claimant's ulnar nerve irritation and cubital tunnel symptoms are probably related to the January

20, 2020, incident and that the condition of Claimant's elbow is deteriorating. As presented, the evidence also supports a finding that the proposed ulnar nerve transposition surgery is reasonable and necessary to treat the advancing symptoms associated with Claimant's ulnar nerve/elbow injury. Accordingly, the ALJ finds that Claimant has proven that she is entitled to a reopening of her case to seek this otherwise reasonable, necessary and claim related medical care.

48. As to the Claimant's request for temporary disability benefits, Dr. Larsen has indicated that he does not believe that she can perform the full range of duties required of a police officer. Claimant testified she is presently on extended leave due to special circumstances surrounding a high risk pregnancy that precludes her from doing any work. The disability associated with Claimant's pregnancy will cease upon the delivery of her child in early July. Nonetheless, Claimant is unsure as to whether she has been cleared to proceed with the recommended ulnar nerve transposition surgery by her ob-gyn doctor. Accordingly, Claimant may have to wait until the delivery of her child before she can proceed with surgery. Based upon the evidence presented, the ALJ is convinced that Claimant is entitled to temporary disability benefits commencing when her disability from the pregnancy ceases and until such time as she is placed at MMI following the ulnar nerve transposition surgery. Regardless, the ALJ finds an Order concerning the payment of TTD to be premature until the special circumstances surrounding Claimant's high risk pregnancy are no longer precluding her employment.

CONCLUSIONS OF LAW

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

General Legal Principles

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

B. In accordance with §8-43-215, C.R.S., this decision contains specific findings of fact, conclusions of law and an order. In rendering this decision, the ALJ

has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice, or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. As found here, Claimant's testimony regarding the alleged worsening of her condition is credible and persuasive. Based upon the evidence presented, the ALJ is convinced that Claimant has a serious medical condition in the left elbow/forearm caused by an injury to the ulnar nerve during the January 20, 2020 work incident. As noted above, the ALJ is also persuaded that the condition of Claimant's left elbow is worsening with the passage of time and that the proposed ulnar nerve transposition surgery is a reasonable, necessary treatment option to cure and relieve her of the ongoing symptoms/dysfunction caused by this claim related condition.

D. The weight and credibility to be assigned expert testimony is also matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion). As found, the testimony/opinions of PA Noble and Dr. Larsen regarding the cause of Claimant's left wrist/elbow condition and her need for surgery are more convincing than the contrary opinions of Drs. Mordick and Lesnak. Here, the evidence presented substantially supports a conclusion that Claimant's left elbow symptoms came on shortly after an inciting event related to Claimant's work activity, specifically tussling with a drunken combative suspect. As found, this condition has been deemed to be related to this January 20, 2020 incident by PA Noble and Drs. Larsen and Bissell. Moreover, the evidence presented, including the audio recording of Claimant's IME with Dr. Mordick supports a conclusion that the overall condition of Claimant's the left forearm is worsening.

Claimant's Request to Reopen Based on a Change of Condition

E. A request for continuing medical treatment must be presented at the time of MMI, *Hanna v. Print Expediters Inc.*, 77 P. 3d 863 (Colo.App., 2003). Furthermore, the issue of medical benefits is closed if the respondents file an uncontested final admission that denies liability for future medical benefits. *Burke v. Industrial Claim*

Appeals Office, 905 P. 2d 1 (Colo. App. 1994). Indeed, C.R.S. § 8-43-203(2)(b)(II) provides that a case will be "automatically closed as to the issues admitted in the [FAL] if the claimant does not, within thirty days after the date of the [FAL], contest the [FAL] in writing and request a hearing on *any disputed issues that are ripe for hearing*." . . . (emphasis added). *Olivas-Soto v. Indust. Claim Appeals Office*, 143 P.3d 1178 (Colo.App. 2006). "Once issues are closed, they may only be reopened on the grounds stated in C.R.S. § 8-43-303. C.R.S. § 8-43-203(2) (d). Among those grounds is a change in the claimant's condition. C.R.S. Section 8-43-303(1); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261 (Colo.App. 2004); *See also, Milco Construction v. Cowan*, 860 P. 2d 539 (Colo.App. 1992) (a claim may reopened for further medical treatment when the claimant experiences an "unexpected and unforeseeable" change in condition); *Brown and Root, Inc. v. Industrial Claim Appeals Office*, 833 P. 2d 780 (Colo.App. 1991).

F. Based upon the evidence presented, the ALJ is persuaded that Claimant objected to and filed an Application for Hearing contesting Respondents' December 1, 2021 FAL. Nonetheless, Claimant did not include an objection to Respondents denial of liability for future medical care, i.e. maintenance treatment benefits in her Application for Hearing. Indeed, the only issue for determination at hearing following Claimant's DIME was whether she was entitled to have her scheduled impairment of the left upper extremity converted to whole person impairment. Accordingly, the ALJ is convinced that the issue of medical benefits, including post-MMI treatment closed because it was not endorsed within thirty days of the FAL as required by § 8-43-203(2)(b)(II).

G. Nevertheless, § 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based upon a change in condition which occurs after maximum medical improvement. *El Paso County Department of Social Services v. Donn*, 865 P.2d 877 (Colo.App. 1993). In seeking to reopen a claim, the claimant shoulders the burden of proving his/her condition has changed and he/she is entitled to additional benefits by a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo.App. 2005).

H. A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo.App. 2008); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo.App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (Oct. 25, 2006). The question of whether a claimant established a change in the condition of a physical or mental condition causally connected to the original compensable injury, is one of fact for determination by the ALJ. *Faulkner v. Industrial Claim Appeals Office*, 12, P.3d 844 (Colo.App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo.App. 1999); *In re Nguyen,* W.C. No. 4-543-945 (ICAP, July 19, 2004). Where the claimant alleges a change in condition, as here, the ALJ may credit the claimant's testimony as to the worsening of symptoms/problems as sufficient to order a reopening of the case. *See, Savio House v. Dennis,* 665 P.2d 141 (Colo.App. 1983).

Nonetheless, reopening is only appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo.App. 2000); *Jefferson County School District v. Goldsmith,* 878 P. 2d 116 (Colo. App.1994); *Dorman v. B & W. Construction Co.,* 765 P.2d 1033 (Colo.App. 1988); and *Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo.App. 1990).

I. Here, the evidence presented supports a conclusion that Claimant has proven that her left elbow condition was caused by an injury traceable to the January 20, 2020 work incident and that the condition of her elbow has worsened with the passage of time as evidenced by the manifestation of constant symptoms, including paresthesia since being placed at MMI by Dr. Kurz on June 22, 2021. Indeed, the record evidence persuades the ALJ to find and conclude that Claimant's persistent and worsening elbow pain and associated symptoms warrants additional treatment, including surgery which the ALJ is convinced is reasonably necessary and designed to cure and relieve her ongoing symptoms and functional decline. While not unanticipated, the recommendation for ulnar nerve transposition surgery nevertheless resulted from a fundamental change in Claimant's condition over time as evidenced by her now "constant symptoms" and her inability to perform the full range of duties associated with her work as a police officer. Accordingly, Claimant's request to reopen her claim is granted.

Respondents' Assertions Regarding Circumventing the DIME

J. Citing the decision announced by the Court of Appeals in *Justiniano v. Industrial Claim Appeals Office*, 410 P.3d 659 (Colo.App. 2016), Respondents contend that Claimant's request to reopen her claim for additional medical treatment amounts to an impermissible attempt to circumvent the higher standard of clear and convincing evidence required to challenge Dr. Bissell's DIME. Based upon the evidence presented, the ALJ is not convinced. In *Justiniano,* Claimant proceeded through a DIME and the DIME doctor determined that she had reached MMI. Thereafter, Ms. Justiniano's employer and its workers' compensation insurance carrier filed a FAL advising her that she had 30 days to file an objection. Claimant did not file an objection. Instead, she filed a petition to reopen her claim within two weeks after the filing of the FAL, while the claim was still open. As part of her petition to reopen, Ms. Justiniano used medical information that post-dated the DIME. The ALJ denied and dismissed the petition to reopen concluding that Ms. Justiniano was "actually attempting to challenge the DIME regarding the MMI determination by suggesting that [she] required additional medical care, specifically the wrist surgery performed [in September 2013] in order to reach MMI". In concluding that Claimant's petition to reopen was a constructive challenge to MMI, the ALJ determined that Ms. Justiniano's petition to reopen constituted an attempt to avoid the higher clear and convincing burden of proof required to challenge the determination that she had reached MMI. Claimant appealed the ALJ's decision and the Panel affirmed.

K. In affirming the Panel, the Court noted that the statutory authority to reopen a claim is "permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ". *Justiniano, supra* (quoting *Cordova v. Indust. Claim Appeals Office*, 197 P.3d 220, 222 (Colo.App 2008). Although the Court did not reach the question as to the validity of the petition to reopen in the face of an open FAL, the Court did note that claimant's petition to reopen was premature because the claim had not yet closed. Moreover, the Court cited claimant's counsel's admission that the decision to file a petition to reopen rather than contest the DIME opinion regarding MMI was in part "strategic" because he did not believe that claimant could overcome the DIME. In light of these factors, the Court concluded that the ALJ did not abuse her discretion in dismissing claimant's petition to reopen nor did the panel err in upholding the ALJ. *Justiniano, supra* at p. 662.

L. In the instant case, the ALJ notes that Claimant made no attempt to challenge the DIME and that her case had been closed for many months before she petitioned to reopen for additional medical treatment on the basis that she experienced a change in her condition during that time period. As found here, there is ample evidence to support a conclusion that Claimant suffered a change in condition caused by her industrial injury. Undeniably, Claimant has reported a post-MMI increase in her symptoms and per Dr. Larsen, there is evidence of greater functional loss, including Claimant's inability to carry out the full range of essential duties associated with her job due to the industrial injury. Accordingly, the ALJ is not convinced that Claimant is attempting an end run around the DIME in order to take advantage of a lower burden of proof to obtain additional medical benefits, including surgery for a condition that she tried to live with post MMI. Notably, the DIME process does not control whether the claimant's condition has worsened following the date of MMI or whether the worsening is causally related to the industrial injury. In fact, MMI represents a point in time where a claimant's condition becomes stable and where any permanent impairment associated with the injury is determinable. *Cordova, supra* at p. 190.

M. In concluding that Claimant is entitled to a reopening of her claim, the ALJ finds the claim for *Debra Hague v. Duckwall-Alco Stores Inc*. W.C. 4-522-932 (April 19, 2005) instructive. Similar to the situation here, the ALJ found that Ms. Hague had proven that she suffered a worsened condition caused by her industrial injury. Accordingly, he reopened the claim for additional medical treatment, including a "transposition/decompression of the ulnar nerve". *Id*. Akin to the situation presented in Hague, this ALJ finds that Dr. Kurz' and Dr. Bissell's MMI determination merely fixed a single point in time when Claimant's condition had become stable and this point in time did not "legally or factually rule out the possibility that the Claimant's condition could not subsequently worsen as evidenced by [her] additional symptoms and diagnoses and the need for additional treatment". Just as in *Hague*, the instant case involves a worsening of condition many months after MMI rather than a challenge to MMI. Thus, the ALJ is convinced, as was the ALJ in Hague, that Claimant is not attempting to circumvent the DIME process but rather exercise her "statutory right to reopen based on worsened condition". *Id.* (See also, Gomez *v. University of Colorado*, WC's 4-945-122-04, 4-929-679 & 4-936-273 (ICAO, Apr. 17, 2020).

Claimant's Contentions Concerning Estopple

N. Although developed in the context of judicial proceedings, the doctrines of *res judicata* (claim preclusion) and collateral estopple (issue preclusion) may be applied to administrative proceedings in Workers Compensation Claims to bind the parties to an administrative agency's findings of fact or conclusions of law." *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001); see *Holnam v. Industrial Claim Appeals Office,* 159 P.3d 795 (Colo.App. 2006*)*. Claim and issue preclusion are affirmative defenses that must be pled and proven by the party seeking to apply the doctrines. *Bristol Bay Prods., LLC v. Lampack*, 312 P.3d 1155, 1164 (Colo. 2013).

O. *Res Judicata* or claim preclusion bars relitigation of previously decided matters and matters that could have been raised in a prior proceeding but were not. *Foster v. Plock,* 411 P.3d 1008, 1014 (Colo.App.2016). The elements of claim preclusion are: "(1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, (4) identity or privity of parties to the actions." *Camus v. State Farm Insurance*, 151 P.3d 678, 680 (Colo.App. 2006). Claim preclusion blocks litigation of claims that were or might have been decided only if the claims are tied by the same injury. *Layton Construction Co. v. Shaw Contract Flooring Servs., Inc.*, 409 P.3d 602 (Colo.App. 2016); *Loveland Essential Grp. v. Grommon Farms, Inc*., 318 P.3d 6 (Colo.App.2012). As noted, claim preclusion is an affirmative defense which must be plead and proven by the party seeking to apply the doctrines, i.e. the Claimant in this particular case. Although cited in her position statement, Claimant did not specifically plead claim preclusion as an affirmative defense to be applied in the instant matter. Moreover, application of the principle of *res judicata* has been rejected in cases involving reopening, based upon the broad discretion afforded in the area, which favors a just result over the interest of the litigants in a final resolution of the claim. See, *Hernandez v. Cattle King Beef Company*, 3-714-045 (February 26, 1988) (noting that the ALJ had the discretion to reopen *sua sponte* in the absence of a petition to reopen.); *Padilla v. Industrial Commission*, 696 P.2d 273 (Colo. 1985).

P. Issue preclusion is broader than claim preclusion in that it applies to a cause of action different from that involved in the original proceeding. However, issue preclusion is narrower than claim preclusion because it does not apply to matters that could have been litigated in the prior proceeding but were not. *Pomeroy v. Waitkus*, 183 Colo. 244, 517 P.2d 396 (1974). Issue preclusion bars relitigation of an issue if:

> (1) the issue sought to be precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom [issue preclusion] is asserted has been a party to or is in privity with a party to the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Youngs v. Indus. Claim Appeals Office, 297 P.3d 964, 974 (Colo.App. 2012); *Feeley v. Indus. Claim Appeals Office*, 195 P.3d 1154, 1156 (Colo.App. 2008). An issue can be identical for issue preclusion purposes if either the facts or the legal matter raised is the same. *Carpenter v. Young*, 773 P.2d 561, 565 n. 5 (Colo.1989).

Q. In this case, Claimant argues that Respondents should be estopped from asserting that Claimant does not suffer from claim related ulnar neuropathy based upon Respondent's failure to raise any objection to Dr. Bissell's DIME determination regarding the cause of Claimant's left ulnar nerve/cubital tunnel symptoms at the time of the April 6, 2022 hearing. Respondents counter Claimant's contention by asserting that prongs 1 and 4 of the above referenced legal test have not been met. Based upon the evidence presented, the ALJ agrees. Nonetheless, even assuming that issue preclusion does not prohibit the re-litigation of the compensability of the ulnar nerve injury, the evidence presented supports a conclusion that Claimant sustained an injury to her ulnar nerve in the compensable January 20, 2020 on the job injury and based upon the testimony of Dr. Larsen and the Claimant this injury has worsened since the date of MMI and that the proposed surgery by Dr. Larsen is reasonably necessary to cure and relieve Claimant of her injuries.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen is granted.

2. The proposed ulnar nerve transposition surgery is reasonably necessary and causally related to the claimant's compensable injury of January 20, 2020.

3. Claimant's claim for temporary disability benefits is reserved and held in abeyance as her current inability to work is related to a non-industrial related cause, i.e. her high risk pregnancy. Once this non-work related disability ceases, Claimant will be entitled to temporary disability benefits as provided for in C.R.S. §§ 8-42-105 and 106, until terminated as provided therein.

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

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

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

DATED: June 13, 2023

/s/ Richard M. Lamphere

Richard M. Lamphere
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-195-272-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the L3-L4, L4-L5 laminectomy recommended by Dr. Rauzzino is reasonably necessary to cure and relieve him of the effects of his January 28, 2022 injury.

II. Whether Claimant proved by a preponderance of the evidence that Respondent failed to timely deny a complete prior authorization request and consequently deemed the requested surgery authorized.

FINDINGS OF FACT

1. This is an admitted claim involving a January 28, 2022 injury. Claimant was a truck driver. He injured his low back during a home delivery while unloading 800 pounds of furniture.

2. On April 4, 2022, Claimant reported "right anterior thigh cramping pain with prolonged sitting." Nathan Adams, PA noted Claimant's weight as 230 pounds in December 2022. He also noted that Claimant was a smoker and discussed with him the importance of cessation to improve recovery and reduce associated risks. PA Adams added that Dr. Castro had "said he wouldn't do surgery unless [Claimant] quit smoking."

3. On April 27, 2022, Claimant saw Dr. Mechelle Viola-Lewis. Claimant reported that he noticed "no change" resulting from taking Medrol Dosepak.

4. On August 31, 2022, Claimant saw Dr. Vanderkool and told him that he could walk only one to two minutes before getting severe nerve pain in his right hip, radiating down his whole right leg.

5. Dr. Michael Rauzzino saw Claimant on November 22, 2022. Dr. Rauzzino noted in that report: "I reviewed the MRI of his lumbar spine done on April 7, 2022 at SimonMed, which shows severe spinal stenosis at L4-L5 and L3-L4, L4-L5 is the worst level. There is also little bit of stenosis at L2-L3 and L5-S1. He has degenerative disc disease at L5-S1. He has had injections with Dr. Olsen, which has not been curative for him. He says they help temporarily then his symptoms get back." Dr. Rauzzino noted that Claimant had severe spinal stenosis at L4-L5 and to a lesser extent at L3-L4. He noted that Claimant had signs and symptoms classic of neurogenic claudication. Dr. Rauzzino made no mention of referring Claimant for any other tests and did not comment upon Claimant's smoking or obesity. Nevertheless, he recommended a two-level decompression without

fusion. The report was faxed to Respondent on November 30, 2022, with a Rule 16-7, WCRP, request for prior authorization included on the fax cover sheet for an L3-L4 laminectomy. Dr. Rauzzino did not include the L4-L5 level in his request.

6. On January 4, 2023, Respondent issued a denial of prior authorization of the L3-L4 laminectomy requested by Dr. Rauzzino. Attached to the denial was an undated[1] record review report by Dr. Aaron Morgenstein, an orthopaedic surgeon board certified in Colorado. Dr. Morgenstein opined that the requested bilateral L3-L4 laminectomy was not medically necessary. He reasoned that Claimant's most severe level of spinal stenosis was at L4-L5, not L3-L4. Dr. Morgenstein appeared to imply that the L4-L5 level should be prioritized.

7. On January 17, 2023, Dr. Rauzzino submitted a request for prior authorization for L3-L5 laminectomy. Attached was a copy of Dr. Rauzzino's November 22, 2022 report and an April 7, 2022 MRI of the lumbar spine without contrast showing "[m]ultilevel chronic degenerative disc disease and degenerative central canal and neural foraminal narrowing . . . [and] central canal stenosis involving L4-L5 level." Respondent neither authorized nor denied the request.

8. On January 26, 2023, Claimant saw PA Adams and reported experiencing radicular symptoms.

9. On April 19, 2023, Dr. Rauzzino submitted another request for prior authorization for an L3-4, L4-L5 laminectomy. Dr. Rauzzino attached his November 22, 2022 report and a copy of the April 7, 2022 MRI.

10. Claimant was examined by Dr. Viola-Lewis on April 20, 2023. The history portion of the corresponding report noted some improvement after Dr. Olson's injections.

11. On May 3, 2023, Respondent issued a denial of prior authorization of the L3-L4 and L4-L5 levels. Attached to the denial was an undated[2] record review report by Dr. Morgenstein. Dr. Morgenstein opined that the requested procedure was "not medically necessary," reasoning that "there are vague and conflicting symptoms of neurogenic claudication, the lumbar MRI is greater than one year old, the surgeon's last office visit is greater than 5 months old, and there is lack of documentation of the claimant having failure of a trial of 6 weeks of active therapy."

12. At hearing, Claimant testified that he received physical therapy of about 12 weeks. The physical therapy was not beneficial. He also testified that he received three injections. He testified that the injections did not help at all, nor did chiropractic care, of which he had about three or four visits. Claimant testified that he refused prescriptions for pain medications.

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[1] Though, the referral date was noted as December 30, 2022.

[2] Though, the referral date was noted as May 2, 2023.

13. During cross examination, Claimant admitted that he is a smoker. He smokes less than a pack a day but has been a smoker for thirty years. Claimant also testified that he is six feet tall, weighs about 215 to 220 pounds. Claimant acknowledged that no provider sent him for psychological testing.

14. The Court finds Claimant's testimony credible, except insofar as he testified that he declined pain medications, as the medical records document him taking a trial of Medrol Dosepak.

15. The Court also credits the opinions of Dr. Rauzzino over those of Dr. Morgenstein insofar as Dr. Rauzzino recommends a an L3-4, L4-L5 laminectomy. Dr. Morgenstein's rationale in his original peer review was that the most severe level of spinal stenosis was at L4-L5, not L3-L4, yet Dr. Rauzzino requested prior authorization for a laminectomy only at the L3-L4 level. Dr. Rauzzino resubmitted his request two more times, revising his request to include the L4-L5 level. By the time Dr. Morgenstein completed a follow-up peer review five months later, Dr. Morgenstein recommended against the procedure on four bases: "there are vague and conflicting symptoms of neurogenic claudication, the lumbar MRI is greater than one year old, the surgeon's last office visit is greater than 5 months old, and there is lack of documentation of the claimant having failure of a trial of 6 weeks of active therapy." Notably the second and third rationales would not have applied to Dr. Rauzzino's original November 22, 2022 recommendation and arose only because of the delay in treatment. Regarding the first rationale, the Court notes that there is sufficient medical documentation of Claimant experiencing radicular symptoms arising from his low back condition. Regarding the last rationale, the Court credits Claimant's testimony that he underwent physical therapy and injections without relief.

16. The Court finds that the L3-L4, L4L-5 laminectomy recommended by Dr. Rauzzino to be reasonably necessary to cure and relieve Claimant of the effects of his January 28, 2022 injury.

CONCLUSIONS OF LAW

Generally

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

interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

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

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

Medical Benefits

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

Although respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury, respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. *See Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo.App.2002)(upholding employer's refusal to pay for third arthroscopic procedure after having paid for multiple surgical procedures).

As found above, the L3-L4, L4-L5 laminectomy recommended by Dr. Rauzzino is reasonably necessary to cure and relieve Claimant of the symptoms of his injury.

Aside from Dr. Morgenstein's rationale for recommending against the procedure, Respondent argues that the recommendations of the Medical Treatment Guidelines (MTGs) weigh against authorization of the procedure.

The Colorado Division of Workers' Compensation has issued medical treatment guidelines under Rule 17, WCRP, as evidence of professional standards for treatment of high-cost or high-frequency medical procedures. *See* Rule 17-1(A), W.C.R.P. An ALJ is not bound to the treatment guidelines in his or her determination of whether a particular treatment is reasonable and necessary. *See Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006)(it is appropriate for the ALJ to consider the guidelines on questions such as diagnosis, but the guidelines are not definitive). However, it is appropriate for an ALJ to consider the treatment guidelines in determining the reasonableness and medical necessity of a particular treatment. *Stamey v. C2 Utility Contractors, Inc.*, W.C. Nos. 4-503-974 and 4-669-250 at *2 (August 21, 2008).

Respondent specifically argues that Dr. Rauzzino failed to consider Claimant's smoking and obesity and the absence of psychological screening in this case prior to surgery.

Regarding smoking, the MTGs note only that there is strong evidence that smoking is a non-occupational risk factor for lumbar radicular pain. Rule 17, WCRP, Exhibit 1, p. 13. Although the MTGs also note that there is some evidence that "[p]atients who smoke respond less favorably to non-operative spine care than nonsmokers," Rule 17, WCRP, Exhibit 1, p. 111, that portion of the MTGs does not address the impact of smoking on surgical outcomes. The Court acknowledges that, intuitively, it seems logical that smoking *could* have a negative impact on a surgical outcome. However, the Court finds insufficient evidence in the case to lead it to find that smoking is *likely* to result in a negative surgical outcome.

Respondent also pointed to Claimant's obesity as a risk factor for low back pain. However, the MTGs associate obesity with negative surgical outcomes only when the obesity is morbid:

> Functional improvement and relief of back pain from most back surgery is similar between patients with a body mass index (BMI) under 25 and overweight or mildly obese patients with a BMI between 25 and 35. Mild obesity does not appear to have an adverse effect on the responsiveness to surgery for these clinical outcomes.

Rule 17, WCRP, Exhibit 1, p. 68.

Respondent points out that Claimant's weight has fluctuated, insinuating that it is possible that his BMI may now be above 35 kg/m^2. Claimant testified that he is six feet tall and 220 pounds. The Court found this testimony credible and takes judicial notice that this corresponds with a BMI of 30 kg/m^2. Based on the MTGs, there is good evidence that Claimant's mild obesity is unlikely to have a negative impact on the

outcome of the two-level laminectomy recommended by Dr. Rauzzino. Therefore, the Court finds Claimant's obesity to be unlikely to affect a surgical outcome.

Respondent also points to the absence of psychological screening in this case, despite the MTGs' recommendation for psychological screening prior to surgery. Specifically, the MTGs note undiagnosed depression to be contraindications to decompressive surgery. The MTGs state, "A psychological screen with a follow-up psychological evaluation, if indicated, is required prior to proceeding with decompressive surgery." Rule 17, Exhibit 1, p. 72. Respondent directs the Court's attention to various other provisions of the MTGs that observe the importance of a psychological screening prior to proceeding with surgery so as to ensure psychological factors will not interfere with the outcome of surgery.

The Court recognizes the absence of a psychological screen in this case as concerning. However, the evidence of the record does not lead the Court to suspect that Claimant in fact suffers from depression or any other mental condition that would impede his recovery. In light of the totality of the facts of this case, the Court finds the absence of a psychological screen to be relevant, but not dispositive, on the question of whether the two-level laminectomy recommended by Dr. Rauzzino is reasonable and necessary to cure and relieve Claimant of the effects of his injury.

Claimant also presented arguments that Respondent failed to provide a timely authorization or denial of Dr. Rauzzino's first two requests for prior authorization, and that the procedure is deemed authorized pursuant to Rule 16-7-2, WCRP. Respondent presented arguments that the requests were not complete requests for prior authorization pursuant to Rule 16-7(C), WCRP, and therefore Respondent was not required to comply with the requirements of Rule 16-7-1, WCRP, regarding prior authorization denials. Because the Court finds the L3-L4, L4-L5 laminectomy to be reasonably necessary to cure and relieve Claimant of the effects of his work injury, the Court need not address the question of whether Respondent inadvertently authorized the surgery by virtue of a failure to provide a timely denial of a complete prior authorization request.

ORDER

1. Claimant has proved by a preponderance of the evidence that the L3-L4, L4-L5 laminectomy recommended by Dr. Rauzzino is reasonably necessary to cure and relieve him of the effects of his January 28, 2022 injury.

2. Respondent shall pay for an L3-L4, L4-L5 laminectomy with Dr. Rauzzino.

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

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

DATED: June 13, 2023.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-118-442-002

ISSUES[1]

1. Whether Claimant established by a preponderance of the evidence grounds for reopening her claim based on a change of her condition.

2. If Claimant establishes grounds for reopening, whether Claimant established by a preponderance of the evidence that surgery recommended by Lily Daniali, M.D. is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury.

3. Whether Claimant established by a preponderance of the evidence that medications recommended by Dr. Sanders for maintenance care and admitted by Respondents should be authorized.

4. If Claimant's claim is reopened, whether she established by a preponderance of the evidence an entitlement to temporary total disability benefits.

FINDINGS OF FACT

1. On September 6, 2019, Claimant sustained an admitted injury to her right forearm when she sustained a dry ice burn arising out of the course of her employment with Employer.

2. Claimant was initially seen at North Colorado Medical Center and treated in the burn unit for a 2% total body skin area (TBSA) partial thickness burn/frostbite injury of the volar aspect of her right forearm. She was admitted for wound care on September 13, 2019 and discharged on September 16, 2019. (Ex. H).

3. Over the next several years, Claimant's care was directed by authorized treating physician (ATP) Oscar Sanders, at the UC Health Occupational Medicine Clinic. During this time, Claimant was referred to various providers for evaluation and treatment of her wound, and associated pain. Throughout, Claimant reported hypersensitivity and pain in the area of her burn scar that did not extend beyond the scarred area to other areas of her arm or body. Claimant's scar covers an area of approximately 1 ½ inches by 2 ½ inches on the right forearm. (Ex. D). The area of hypersensitivity was described by providers as approximately 2 ½ inches by 1 ½ inches or approximately 3 cm in diameter. (Ex. N & D).

[1] In her position statement, Claimant endorsed as an issue "Should Claimant be entitled to have a nurse case manager appointed to her case as recommended by her authorized treating physician?" This issue was not endorsed in Claimant's Application for Hearing, nor was it identified at hearing as an issue for consideration. As such, the ALJ lacks authority to determine this issue.

4. Claimant treated with the NCMC Burn Unit from September 2019 until January 12, 2021 when she was discharged from their care with a well-healed wound and mature scar. (Ex. H).

5. Over the course of her care, Dr. Sanders referred Claimant to additional providers for evaluation of her ongoing pain.

6. On February 4, 2020, Dr. Sanders referred Claimant for a plastic surgery consult for potential scar revision treatments, and continued care. Claimant reported persistent hypersensitivity that was improving. He also referred Claimant for psychotherapy counseling due to her injury-related adjustment disorder. (Ex. I).

7. On February 17, 2020, Claimant saw Lily Daniali, M.D., a plastic surgeon at Swedish Medical Center. Claimant reported hypersensitivity and increasing pain in her right forearm. Dr. Daniali noted Claimant's burn injury was well-healed, but extremely sensitive to touch. She was diagnosed with a second-degree burn injury to her right forearm with allodynia. Claimant was recommended to see a hand therapist to begin work on desensitization of her injury, and started on gabapentin for nerve pain. (Ex. K).

8. Claimant returned to Dr. Daniali on June 15, 2020. Dr. Daniali found a positive Tinel's sign over the medial and antebrachial sensory area, and noted significant hypersensitivity in that area. Claimant's reported pain level was 8/10, and she reported Dr. Daniali discussed possible surgical options, and recommended a diagnostic lidocaine injection to determine if Claimant had nerve scarring and pain. (Ex. K).

9. On July 13, 2020, Dr. Daniali performed the "a diagnostic block of the area of maximal hypersensitivity within [Claimant's] burn scare where she had the maximally positive Tinel's sign (*i.e.*, the centralized portion of her scar and her antebrachial sensory area). Claimant received no relief from the injection, and Dr. Daniali determined Claimant was "a poor candidate for surgical exploration to locate a specific neuroma for surgical intervention." She recommended continued non-surgical symptom management and that Claimant see a pain specialist. She also noted that due to the significant allodynia, Claimant was not a good candidate for laser scar treatment. (Ex. K).

10. On July 13, 2020, Dr. Sanders opined that Claimant was not a candidate for scar revision or reconstruction, and recommended Claimant complete pain management. (Ex. I).

11. On July 14, 2020, Claimant underwent an independent medical examination (IME) with Marc Steinmetz, M.D., at Respondents' request. Dr. Steinmetz opined that Claimant was physically at maximum medical improvement (MMI). As part of his examination, Dr. Steinmetz noted Claimant had a negative Tinel's "at the wrist" and diagnosed Claimant with residual forearm scar from a frost-bite type burn with secondary residual pain. Dr. Steinmetz agreed that Claimant should see a pain specialist if Dr. Sanders concurred. (Ex. D).

12. On September 30, 2020, Dr. Sanders responded to a letter from Respondents' counsel indicating Claimant was not at MMI, and recommended Claimant have an initial

evaluation with pain management to formulate a treatment plan for maintenance care. He further noted "I anticipate she will be at MMI shortly after this appointment." (Ex. J).

13. On October 8, 2020, Claimant began treatment at Colorado Pain Care, for pain management. Over the following two years, she was under the care of various providers at Colorado Pain Care for medication management of her pain, including opioid medications, and gabapentin. Claimant consistently reported her pain levels as between 7/10 and 10/10. At her initial visit, the treating provider, Hortense Ngoe, N.P., suspected Claimant may have had complex regional pain syndrome (CRPS) of her right arm, noting her pain was out of proportion to the inciting incident. (Ex. M).

14. Claimant returned to Dr. Sanders and discussed potential diagnostic and therapeutic options for her potential CPRS, including stellate ganglion blocks. Dr. Sanders noted that if Claimant elected not to pursue invasive procedures, she would be approaching MMI. (Ex. I).

15. Claimant returned to Colorado Pain Care on January 7, 2021. Ms. Ngoe recommended Claimant undergo two ulnar nerve blocks to determine if a potential radiofrequency nerve ablation (RFA) procedure would be beneficial. (Ex. M).

16. On February 15, 2021 and March 8, 2021, Robert Moghim, M.D., at Colorado Pain Care, performed right ulnar nerve blocks. After the February 15, 2021 injection, Claimant reported an initial 80% reduction in pain intensity, and a 60% reduction that remained until March 8, 2021. She reported the second block, performed on March 8, 2021, provided almost complete resolution of pain. However, this reduction in pain was temporary. Dr. Moghim opined that Claimant could have a potential entrapment of the medial antebrachial cutaneous (MABC) nerve and the ulnar nerve, related to Claimant's scarring. Dr. Moghim recommended that Claimant consult with Dr. Daniali to consider possible surgical options. (Ex. M).

17. At Claimant's March 22, 2021 visit with Dr. Sanders, he noted Claimant did not have a diagnostic response to the March 8, 2021 ulnar nerve block, opined that Claimant did not demonstrate evidence of an ulnar neuropathy at the elbow, and agreed it was reasonable to be evaluated by Dr. Daniali for potential surgical treatment of any nerve entrapment caused by her burn scarring. He also recommended that Claimant continue pain management. Dr. Sanders opined that if Dr. Daniali did not recommend surgical intervention, Claimant would be at MMI. (Ex. I).

18. On April 20, 2021, Claimant saw Ryan Endress, M.D., a physician in Dr. Daniali's practice at Swedish. Dr. Endress recommended a diagnostic nerve block of the more proximal MABC to simulate the effects of a neurectomy. (Ex. K).

19. On June 7, 2021, Claimant then underwent an ultrasound of the right arm, which was interpreted as unremarkable. (Ex. U). Dr. Sanders reviewed the ultrasound on June 9, 2021, and indicated it was normal without evidence of nerve entrapment. He also indicated that if Dr. Daniali did not recommend surgery, it would be reasonable to proceed with a CRPS evaluation. (Ex. I).

20. On June 29, 2021, Dr. Endress reviewed Claimant's ultrasound and indicated there were no signs of a neuroma, and performed the MABC block. Claimant indicated she had an anesthesia effect in the appropriate nerve distribution (*i.e.*, MABC), but did not have significant relief of the pain. Dr. Endress opined that the lack of pain relief indicated it was unlikely that MABC surgery would improve her symptoms. (Ex. K).

21. Dr. Sanders then referred Claimant to Gregory Reichhardt, M.D., to evaluate Claimant for CRPS. Claimant saw Dr. Reichhardt on July 21, 2021. Dr. Reichhardt noted that Claimant's pain was limited to the area of her scarring and that she did not have sensory changes in a specific peripheral nerve or dermatome distribution. He diagnosed Claimant with allodynia, etiology unclear, and referred Claimant to George Schakaraschwili, M.D., to conduct further testing for CRPS. (Ex. N).

22. On August 21, 2021, Claimant saw Kathie McCranie, M.D., for an independent medical examination at Respondents' request. Dr. McCranie opined that Claimant had reached MMI. She found that Claimant likely did not have CRPS because Claimant did not meet the Budapest criteria and did not have signs and symptoms consistent with CRPS. She further opined that Claimant would be a poor surgical candidate

23. On October 7, 2021, Dr. Schakaraschwili performed QSART, thermogram and autonomic testing to evaluate Claimant for potential CRPS. Based on the results of the testing, he opined that Claimant did not likely have CRPS, and that she likely had neuropathic pain potentially due to damage to the cutaneous nerve in the forearm. He noted that Claimant may have entrapment of a nerve, but no EMG testing had been performed. (Ex. O).

24. In December 2021, Dr. Reichhardt and Dr. Sanders referred Claimant to Timo Quickert, M.D., to perform a stellate ganglion block of her right arm. (Ex. N).

25. In January 2021, Dr. Sanders indicated Claimant would not be at MMI until after the stellate ganglion block was performed. (Ex. I). Similarly, on March 1, 2022, Dr. Reichhardt indicated that if Claimant did not have improvement with the stellate ganglion blocks, she would likely be approaching MMI. (Ex. N).

26. On March 28, 2022, Dr. Quickert performed the stellate ganglion block. (Ex. P). At a follow up with Dr. Reichhardt on March 31, 2022, Claimant reported that her pain initially increased following the injection, then decreased to her baseline pain. Dr. Reichhardt characterized Claimant's response to the injection as non-diagnostic and non-therapeutic. He recommended Claimant focus on an independent exercise program, desensitization and medical management, and discharged Claimant from his care. (Ex. N)

27. On April 7, 2022, Claimant attended a 24-month Division-sponsored independent medical examination (DIME) with Stanley Ginsburg, M.D., at Respondent's request. He noted that Claimant was hypersensitive in the right arm to her shoulder, but had no evidence of weakness. He also indicated that Claimant was tender to touch over the ulnar area at the elbow but not he could not elicit a Tinel's sign. Dr. Ginsburg placed Claimant

at MMI effective April 7, 2022, and assigned Claimant a 15% right upper extremity impairment rating and 6% psychological impairment rating. The ratings combine to a whole person rating of 20%. (Ex. C).

28. On May 24, 2022, Claimant saw Dr. Sanders who opened that Claimant was stable and additional treatment was unlikely to improve her condition. He placed Claimant at MMI, and noted that Claimant was not taking pain medications at that time. Dr. Sanders recommended maintenance care to include periodic follow up with occupational health and pain management for two years, and coverage of medications and labs for two years. (Ex. I).

29. On June 14, 2022, Respondents filed a final admission of liability (FAL) consistent with Dr. Ginsburg's DIME report. Respondents also admitted for maintenance care recommended by Dr. Sanders on May 24, 2022, temporary total disability benefits in the amount of $88,994.92 and permanent partial disability in the amount of $5,335.27. The FAL further noted that Claimant had reached the statutory benefits cap for ratings under 25%. (Ex. 12).

30. Approximately one month later, on July 19, 2022, Claimant returned to Dr. Sanders reporting increased pain in the central area of her scar (*i.e.*, the same location where her pain and hypersensitivity had been previously reported). Claimant denied neck pain or numbness in the right arm, and had no additional allodynia to the right arm. He noted that her motion was limited by pain, as opposed to true weakness. Dr. Sanders opined that Claimant had likely experienced an exacerbation of her pain after discontinuation of her medications. He recommended she continue taking her pain medications, and start a short course of physical therapy. He opined that she was no longer at MMI. Dr. Sanders did not document any change in Claimant's physical condition, other than her subjective reports of increased pain. (Ex. J).

31. Over the next few months, Claimant attended physical therapy, and followed up with Colorado Pain Care and Dr. Sanders. During this time, Claimant reported no substantial improvement in her symptoms. Ultimately, on September 6, 2022, Dr. Sanders referred Claimant back to Dr. Daniali for evaluation.

32. Claimant saw Dr. Daniali on October 10, 2022. Dr. Daniali noted that Claimant was reporting increased pain, indicating her pain was exacerbated by any movement or even the slightest touch (consistent with Claimant's reports to health care providers since her date of injury). On examination, Dr. Daniali found a positive Tinel's throughout the right upper extremity and opined that Claimant had a "sensitive nerve that appears encased in scar." Based on her examination, Dr. Daniali recommended Claimant undergo surgical "exploration of the right upper extremity with neurolysis vs TMR vs nerve burial." Dr. Daniali did not order any further diagnostic studies, or document any change in Claimant's physical condition. Dr. Daniali offered no cogent explanation for the rational for her opinion that Claimant has a nerve encased in scar, the significance of Claimant's positive Tinel's sign, or why her previously-expressed opinion that Claimant was not a surgical candidate was no longer valid.

33. Dr. McCranie was admitted as an expert in occupational medicine and testified at hearing. She opined that Dr. Sanders' evaluations of the Claimant after MMI did not document examinations which showed an objective change in Claimant's physical condition, or function. Dr. McCranie further testified that the medial antebrachial cutaneous (MABC) nerve is the nerve that provides sensation to the forearm, and that the injection performed by Dr. Endress demonstrated that surgery for that nerve would not be helpful. She also credibly opined that no other diagnostic tests have been performed to indicate that surgery would be helpful. Thus, she opined that there is no indication for exploratory surgery. Dr. McCranie's testimony was credible.

34. Claimant testified at hearing that over the past nine to ten months, she has been having a lot of pain in her right arm which has prevented her from performing activities of daily living. She also testified that her sleep is affected by her right arm pain. While Claimant's testimony is credible, her contemporaneous medical records document the same pain and limitations she described in her testimony. Claimant testified that the surgery recommended by Dr. Daniali is to address a problem with a vein in her arm, which is inconsistent with the recommended surgery. Claimant testified that she wishes to have the surgery recommended by Dr. Daniali because she believes it will help her. Claimant also testified that she has had difficulty obtaining medications prescribed for her injury when she attempts to obtain them from the pharmacy, although it was not clear that Respondents have denied authorization for Claimant's medications. Claimant has not worked or earned income since her date of injury.

35. Claimant's brother, [Redacted, hereinafter SI] testified at hearing. SI[Redacted] testified that he sees Claimant every day, and that she does not sleep much, and often wakes up crying and in pain. He testified that he assists Claimant with activities of daily living and when possible, attends her medical appointments with her. SI[Redacted] testified that he has attempted to help obtain Claimant's medications prescribed by Colorado Pain Care, and at times has had to pay co-pays for medications, or been informed that medications are not authorized.

CONCLUSIONS OF LAW

Generally

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

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

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

REOPENING FOR CHANGE IN CONDITION

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving her condition has changed and that she is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Indus. Comm'n*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO Oct. 25, 2006). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Constr. Co.,* 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO July 19, 2004).

Claimant has failed to establish by a preponderance of the evidence that she sustained a post-MMI change in condition causally connected to her original work injury. Claimant's claim was closed pursuant to the FAL filed on June 14, 2022. Approximately five weeks after the FAL was filed, Claimant returned to Dr. Sanders reporting increased pain in the location of her burn scar. Although Claimant reported increased pain, no

physician credibly opined that Claimant's physical condition had changed, or credibly identified any objective basis for the increase in pain. The fact that Claimant has experienced an increase or exacerbation of symptoms is not credible evidence that Claimant's physical condition changed after being placed at MMI on April 7, 2022.

Claimant has also failed to establish that her claim should be opened to obtain the surgery recommended by Dr. Daniali. The record contains no credible evidence to explain the reasonableness and necessity of Dr. Daniali's surgical recommendation. Dr. Daniali examined Claimant in July 2020. At that examination, Claimant had a positive Tinel's sign in her right upper extremity, and reported significant hypersensitivity in the area of her scar. Dr. Daniali evaluated Claimant for potential surgery at that time by performing a lidocaine block which proved non-diagnostic. Based on that, Dr. Daniali opined that Claimant was a poor candidate for surgery. Subsequently, Claimant received additional diagnostic injections from Dr. Endress, Dr. Moghim, and Dr. Quickert, each of which were non-diagnostic. None of Claimant's ATPs recommended surgery.

Dr. Daniali's October 10, 2022 examination of Claimant was substantively identical to her examination in July 2020. At both visits, Claimant had a positive Tinel's sign in her right upper extremity, and reported significant hypersensitivity in the area of her scar. In October 2022, Dr. Daniali commented that Claimant had a "sensitive nerve that appears encased in scar," but offered no further explanation for this opinion. Unlike July 2020, Dr. Daniali did not order or perform any diagnostic tests in October 2022 to evaluate Claimant for an encased nerve or to determine the potential efficacy of surgery. Despite the lack of diagnostic testing or new objective findings, Dr. Daniali recommended exploratory surgery. Dr. Daniali's records contain no cogent, credible explanation for the new surgical recommendation and do not credibly explain how Claimant's physical condition changed since MMI, such that surgery is now warranted. The ALJ finds more persuasive Dr. McCranie's opinion that Claimant has not had a change in her physical condition, and that no diagnostic tests have indicated that the requested surgery would be helpful to Claimant.

AUTHORIZATION OF SPECIFIC MEDICAL BENEFITS

Surgery

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

entitlement to the benefits. *Martin v. El Paso School Dist.*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

As discussed above, Claimant has failed to establish that the surgery recommended by Dr. Daniali is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. Claimant's request for authorization of the exploratory surgery recommended by Dr. Daniali is denied and dismissed.

Medications

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

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Fin. Serv.,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

In the June 14, 2022 FAL, Respondents admitted for maintenance medical care including the recommendations set forth in Dr. Sanders' May 24, 2022 report. Dr. Sanders' recommendations included coverage of medications for two years. Respondents do not contend and have not offered credible evidence indicating that Claimant's maintenance medications are no longer reasonable, necessary or related to her admitted work injury. Claimant and SI[Redacted] credibly testified that Claimant has had difficulty obtaining her medications due to co-pays and delayed authorizations, although the evidence is unclear that Claimant's medications prescribed by any of her ATPs have been denied by Respondents. Because Respondents have admitted for maintenance medical care, including medications, and have not challenged the request for authorization of medications recommended by Dr. Sanders, Respondents are liable for such medications.

Entitlement To TTD Benefits

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

loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). TTD benefits continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Claimant was placed at MMI effective April 7, 2022, and remains at MMI. Because Claimant has failed to establish grounds to reopen her claim, and remains at MMI, Claimant has failed to establish an entitlement to temporary total disability benefits. Claimant's request for reinstatement of TTD benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen her claim for change in condition is denied and dismissed.

2. Claimant's request for authorization of the surgery recommended by Dr. Daniali is denied and dismissed.

3. Claimant's request for reinstatement of temporary total disability benefits is denied and dismissed.

4. Respondents shall pay for all authorized, reasonable and necessary medications related to Claimant's industrial injury.
5. All matters not determined herein are reserved for future determination.

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

DATED: June 13, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-161-225-002

ISSUES

I. Whether the claimant established by a preponderance of the evidence that he is permanently and totally disabled.

FINDINGS OF FACT

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

1. On December 30, 2020, the claimant was working for the employer and suffered a compensable back injury.
2. The claimant testified that he was working on an older Mercury Mountaineer to change the inner seals on the rear drive shaft. To do so, the outside "knuckles" need to be removed which are affixed with big bolts. The bolts proved difficult to remove, leading the claimant to heat the bolt with a torch and then pull on the bolt to loosen it. In doing so, the bolt suddenly released while the claimant had his full weight pulling down on the bolt. The claimant also testified that he immediately felt pain and dropped to his knees in agony and screamed. Transcript. p.18, ll. 3-p.19, l.9.
3. The claimant also testified that after the injury, he crawled to the bay next to where he was working and rolled around in pain. Transcript p.20, ll.2-9.
4. The claimant added that his supervisor, [Redacted, hereinafter TD], responded to the claimant's screams. Transcript p.19 l. 22-p. 20, l.1.
5. The claimant's testimony in this regard is corroborated by the video clips played by the claimant in his rebuttal presentation (Exhibit 15) and the audio recording of the employer's manager, TD[Redacted] (Exhibit 16). The claimant's testimony describing the work-related injury is considered to be credible and accurate.
6. The claimant went to Good Samaritan Hospital on the day of the incident, December 30, 2020. He complained of back pain which began suddenly while working with a breaker bar at work. His pain was described as localized to right low lumbar back, non-radiating and severe. Exhibit R, p.327.
7. The Good Samaritan emergency room physician noted: "Suspect bulging disc causing pain". Exhibit R, p.328.
8. The Good Samaritan emergency room physician recommended the claimant follow up with his PCP/pain specialist as soon as possible for advanced imaging and further pain relief. Exhibit R, p.329.
9. The claimant saw Dr. Tracey following his December 30, 2020, work-related injury on January 5, 2021. The claimant was concerned about the nature of his low back symptoms which Dr. Tracey recorded as:

> The patient rates his pain at a 7 out of 10 located to his low back and bending to radiation down both his legs but primarily his right also with episodes of weakness, stating that his pain and radicular symptoms worsen significantly after his visit to Good Samaritan Hospital on 12/30. He states his pain as aching and squeezing in nature stating that is improved with medication, muscle relaxers, and reset while worsened with any activity. The patient is very concerned about his pain stating he has not experienced pain and weakness like this before and is very concerned. Exhibit 4, p.40.

10. On October 6, 2020 (about 7 weeks before the work-related injury) the claimant established medical care with Dr. Tracey at Integrated Sport and Spine. Dr. Tracey noted that the claimant had been on a narcotic pain treatment program for failed neck syndrome associated with an injury that occurred 13 years before. He was seeking a transfer of care to Dr. Tracey's office since he had recently moved to Colorado from North Carolina. Exhibit 4, p.23.

11. The claimant saw Dr. Tracey on January 5, 2021, complaining of work-related low back pain. Dr. Tracey ordered an MRI of the claimant's lumbar spine, noting the suggestion in the Good Samaritan records of possible bulging disc. He also prescribed the claimant additional oxycodone. Exhibit 4, p.39.

12. The claimant underwent an MRI on January 11, 2021, which revealed: 1) a right paracentral disc protrusion and annular fissure at L5-S1, 2) facet arthropathy producing mild-to-moderate neural foraminal narrowing and 3) multilevel disc degeneration. Exhibit 1, p.27-28.

13. On January 14, 2021, the claimant returned to Dr. Tracey to go over the MRI results. At this appointment the claimant rated his back pain at 7/10 and with occasional radiation down his right leg. Based on the claimant's symptoms and the MRI findings, Dr. Tracey referred the claimant to Dr. Feldman for bilateral L5-S1 TF epidural steroid injections. Exhibit 4, p. 43.

14. On March 3, 2021, the claimant returned to Dr. Tracey. At this appointment, the claimant indicated that his low back pain was 6/10. But he also indicated that his pain medication regimen allowed him to be 90% functional. Exhibit 4, p. 50.

15. On October 9, 2021, the claimant underwent right sided L4-5 and L5-S1 facet joint injections. Exhibit 4, p. 79. The injections reduced the claimant's pain by about 50% for about three days, but then his back pain returned. Exhibit 4, p. 82. Based on the return of his back pain, Dr. Tracey recommended the claimant undergo right sided L4-5 and L5-S1 medial branch blocks to help diagnose the claimant's pain generator. Exhibit 4, p. 82. The claimant underwent the medial branch blocks on December 10, 2021. Ex. 4, p. 88.

16. On December 21, 2021, the claimant returned to Dr. Tracey and indicated that the medial branch blocks did not provide any pain relief to the posterior elements of his spine. Exhibit 4, p. 90. Thus, Dr. Tracey thought the pain was coming from the musculature of the claimant's back. Other than prescribing additional medication, he

did not have any more treatment recommendations. But, based on his assessment, he did not think the claimant could return to full duty and work in the heavy-duty category. Instead, he thought the claimant might be able to work in the moderate work category. But to help determine the claimant's work capacity and final restrictions, he ordered a functional capacity evaluation (FCE). Exhibit 4, p. 90.

17. The FCE was performed by Sherry Young. Ms. Young testified at the hearing and was accepted as an expert in occupational therapy and functional capacity evaluations.

18. Ms. Young testified that Dr. Tracey referred the claimant to her for an FCE. Transcript p. 69, ll.13-16. Exhibit 5 is a prescription from Dr. Tracey for an FCE. That said, Ms. Young's report indicates that the referral came from the claimant's attorney. In any event, Ms. Young conducted an FCE of the claimant on May 18, 2022, and set forth her findings and conclusions in a detailed report dated June 20, 2022. Exhibit 7.

19. The FCE included testing to determine the claimant's level of effort. As set forth in her report, the claimant scored 20 out of 20, which is indicative of full effort. Exhibit 7, p.109 and Exhibit 7, pp.117-118.

20. The FCE also included testing to determine whether the claimant was engaging in symptom exaggeration. According to Ms. Young, the claimant did not demonstrate any behaviors suggestive of symptom magnification. Exhibit 7, p.109 and Exhibit 7, pp.119-122.

21. Following a 3.5-hour evaluation, Ms. Young concluded, in part:

> [Redacted, hereinafter MP] demonstrated the ability to safely lift 20 pounds from floor to waist, 20 pounds from waist to shoulder, and 20 pounds overhead on an "occasional" basis. MP[Redacted] should avoid frequent or repetitive lifting as much as possible due to the quick and severe elevation in pain with all lifting activities, especially lifting from floor level and to overhead. These abilities best suit the light work category as defined by the U.S. Department of Labor with restrictions of no frequent lifting. While MP[Redacted] may be able to lift more weight in isolated instances, it would be at the cost of elevated symptoms that would impact functional abilities during subsequent activities. Please refer to Appendix D for more information. Positional tolerances were poor throughout the FCE. As with most people with chronic spinal pain, tolerances fluctuate from day to day and hour to hour. MP[Redacted] is most comfortable when he can switch between sitting and standing/walking frequently. Sitting can be performed on a frequent basis in 20-30-minute increments (on average). Standing can be performed on an occasional basis in 10-20-minute increments (on average). Walking can be performed on an occasional basis in 10-20-minute increments (on average). Low-level positional tolerances such as squatting, kneeling, bending, and crouching are very

> limited. MP[Redacted] could sustain low- level work for 4-minute intervals and is limited to the low end of the "occasional" definition…. His lifting abilities meet the light work category, but future employment will require limitations including the ability to change positions every 10-30 minutes which could prove very challenging given his lack of skilled work experience…. He required frequent rest breaks during this 3.5-hour FCE for an average of 6 minutes totaling 21% of testing time. Exhibit 7, p.109.

22. Ms. Young also concluded that:

> MP[Redacted] demonstrated the ability to safely lift 20 pounds from floor to waist, 20 pounds from waist to shoulder, and 20 pounds overhead on an "occasional" basis. MP[Redacted] should avoid frequent or repetitive lifting as much as possible due to the quick and severe elevation in pain with all lifting activities, especially lifting from floor level and to overhead. 7, 109. This lifting is limited to an "occasional" basis which is defined as being from 1-33% of the day and involving reps of 1-12 times per hour. Exhibit 7, p.125.

23. Ms. Young clarified in her testimony that this does not mean that the claimant can always lift 12 times per hour but that it can vary. Transcript, p.56, ll.8-10. She concluded that the claimant would most likely be able to engage in such lifting a maximum of two-five reps per hour. Transcript, p.56, ll.17-20.
24. Ms. Young also stated that her restriction of no frequent or repetitive lifting was for weights above five pounds, not all weights. Transcript, p.56, l.21- p. 57, l.6.
25. Ms. Young's report does indicate that the claimant may be able to lift more weight in isolated instances, but it would be at the cost of elevated symptoms that would impact functional abilities during other activities. Exhibit 7, p.109.
26. Her report also concluded that the claimant is most comfortable when he can switch between sitting and standing/walking frequently. Sitting can be performed on a frequent basis in 20–30-minute increments (on average). Standing can be performed on an occasional basis in 10-20-minute increments (on average). Walking can be performed on an occasional basis in 10-20-minute increments (on average). Low-level positional tolerances such as squatting, kneeling, bending, and crouching are very limited. Moreover, the claimant could sustain low-level work for four-minute intervals and is limited to the low end of the "occasional" definition. Exhibit 7, pp.109-110.
27. Ms. Young explained that there is a difference between sitting while engaged in work activities and sitting when one is simply relaxing, such as when one is watching a movie at home. Her sitting limitations are based on observations of the claimant sitting and engaged in work-like activity such writing or using his arms or hands. Transcript, p.59, l.18- p.60, l.13.

28. Future employment will require limitations including the ability to change positions every 10-30 minutes. Exhibit 7, p.110.

29. Ms. Young testified that she always gives a range for limitations because people's pain tends to increase as the course of the day proceeds. Transcript, p.58, ll.9-12.

30. She also stated that the claimant required frequent rest breaks during the 3.5-hour FCE for an average of six minutes totaling 21% of testing time. Exhibit 7, p.110.

31. She also performed "Inclinometry and Balance" testing. She stated that the results of that testing led her to conclude that "This client's abilities indicate a moderate balance deficit when standing on each leg individually." Exhibit 7, p.123. Ms. Young explained that the claimant's "Inclinometry and Balance" testing indicates that when he must balance on one leg, he becomes a moderate risk for falls. As a result, he should not be on ladders. Another example of one leg balancing occurs when one is in an environment with obstacles where you must walk around such quickly or stop over objects. Transcript, p.63, l.16- p.64, l.3.

32. Ms. Young noted that the hazard of navigating objects would be present in an automotive repair shop or different types of production jobs. Transcript, p.64, ll.17-21.

33. Ms. Young also noted that he should avoid uneven walking surfaces such as lawns that are not even. Transcript, p.64, ll.12-16.

34. Ms. Young testified that the claimant was slow and cautious when he was observed climbing stairs, relying on the handrail, making sure each foot was fully on the step. Transcript, p.65, ll.2-11.

35. Ms. Young testified that it is her recommendation that the claimant is restricted to using a handrail when climbing stairs and should only carry items on stairs with one hand, not bilaterally. Weight bearing on stairs should be limited to 1-10 lbs. Transcript, p.65, ll.18-25.

36. Ms. Young's report set forth more detailed opinions about lifting restrictions to which the claimant should adhere. These are documented in "Appendix D: Functional Lift Test", Exhibit 7, p.125. Such section expands on Ms. Young's opinions on "Frequent Lifting" stating in relevant part:

> Due to the quick and severe onset of back pain during lifting activities, MP[Redacted] should avoid frequent or repetitive lifting (bilaterally or unilaterally) entirely. It will greatly increase symptoms and decrease his ability to perform any type of subsequent activity, even sedentary activities. Exhibit 7, p.125.

37. Ms. Young's report set forth more detailed opinions about postural and positional tolerance to which the claimant should adhere. These are documented in "Appendix E: Postural and Positional Tolerances". Exhibit 7, p.126-128. Such section provided more detailed information of the claimant's postural and positional restrictions.

38. With regard to sitting (20-30 minutes), standing (10-20 minutes) and walking (10-20 minutes) restrictions, Ms. Young also noted: “Tolerance may be unpredictable and fluctuate”. Exhibit 7, p.126.

39. Ms. Young also noted that the claimant is “most comfortable when he can change positions frequently: sitting and then standing and/or walking combined. He reports that he lies down once a day for an hour or more to control pain.” Exhibit 7, p.126.

40. Ms. Young recommended that the claimant limit bending (full as in reaching downward toward one knee), crouching, squatting, kneeling, crawling, climbing stairs, twisting of trunk, reaching above shoulders to “minimal” which the report defines as “limited to 1–3-minute increments, less than 10% of a workday.” Exhibit 7, pp.126-127.

41. Ms. Young limited slight bending (slight as in when reaching forward) and reaching to chest level to occasionally which his defined as 1-33% of the day. Exhibit 7, pp.126-127.

42. Ms. Young testified that the claimant required aggregate resting of 44 minutes during 3.5 hours of testing which was 21% of the time. Transcript, p.67, ll.11-24. This is also documented in Ms. Young’s report, Exhibit 7, pp.113-116.

43. Ms. Young’s report set forth climbing ladders, poles and scaffolding was described as activities to “Avoid, Safety Issues”. Exhibit 7, p.127.

44. Ms. Young testified that her recommended and observed limitations of the claimant’s activities should be considered the maximum that he would be capable of performing. Transcript, p.76, l.23 – p.77, l.2.

45. Overall, the ALJ finds Ms. Young’s report and testimony to be credible and persuasive. Her report is supported by both the claimant’s testimony and his medical records. Plus, her findings and conclusions were adopted by the claimant’s treating physician, Dr. Tracey, and the Division Examiner, Dr. Green.

46. On June 28, 2022, Dr. Tracey noted that he had reviewed the FCE results, specifically reciting the limitations set forth therein as being:

> The patient demonstrated the ability to safely lift 20 pounds from floor to waist, 20 pounds from waist to shoulder and 20 pounds overhead on an occasional basis. Frequent lifting and repetitive lifting should be avoided as much as possible due to the quick and severe elevation in pain with all lifting activities…. Sitting can be performed on a frequent basis in 20–30-minute increments. Standing can be performed on an occasional basis in 10–20-minute increments. Walking can be performed on an occasional basis in 10–20-minute increments. Low level positional tolerances such as squatting kneeling bending and crouching are very limited. The patient could sustain a level work for 4-minute intervals and is limited to the low end of the occasional definition. Exhibit 4, p.94.

47. On June 28, 2022, Dr. Tracy adopted the limitations and restrictions identified by Ms. Young. Most importantly, Dr. Tracy specifically noted that he reviewed the entire 27-page Functional Capacity Evaluation performed by Ms. Sherry Young. Thus, he did not blindly adopt the restrictions and limitations found by Ms. Young. Dr. Tracy stated that MP[Redacted] was putting forth full effort and that the FCE should be considered a valid representation of [the claimant's] functional limits and abilities. Dr. Tracy stated that it was his interpretation that [the claimant] could do light duty and potentially part-time employment based on his position changes. Exhibit 4, p. 94-95.

48. Dr. Tracey ultimately provided an impairment rating based, in part, upon his finding that the claimant qualified for a rating under Table 53, II B of the Impairment Guidelines which assigns impairment for an unoperated disc with 6 months or more of pain and rigidity. Exhibit 6, p.103. He rendered a specific diagnosis of "protrusion of lumbar intervertebral disc". Exhibit 6, p.104.

49. While treating the claimant, Dr. Tracey did not suggest there were signs and symptoms of symptom magnification or that the claimant's underlying back condition did not support his pain complaints and the restrictions set forth by Ms. Young and adopted by him.

50. On November 8, 2022, the claimant underwent a Division Independent Medical Examination with Dr. Justin Green. Dr. Green reviewed the claimant's medical records and conducted a physical exam. Dr. Green's clinical diagnosis was "Status post, reported 12/30/2020 acute L5-S1 discogenic pain syndrome/protrusion, more likely than not work-related." Exhibit 3, pp.14-19.

51. Dr. Green noted that "… there is a notation of lumbar diagnoses and symptomatology documented prior to the 12/30/2020 reported work-related date of injury. Nonetheless, based upon the Division Guidelines, regarding apportionment, I do not have enough information to establish or believe, at this time, that I can determine that the presence of prior low back pain complaints and/or impairment was independently disabling at the time of the 12/30/20 date of injury." Exhibit 3, p.18.

52. Dr. Green concurred with Dr. Tracey's restrictions and the FCE's assignment of restrictions. Exhibit 3, p.19.

53. Dr. Green assigned the claimant an impairment rating of 10% whole person, assigning 5% for a specific disorder of the lumbar spine and 5% for loss of range of motion. Exhibit 3, p.22.

54. Thus, the restrictions set forth in the FCE have been reviewed and adopted by the claimant's treating physician as well as the DIME physician.

55. Respondents filed a Final Admission of Liability and accepted the impairment rating provided by Dr. Green. Exhibit C, pp.5-15.

56. The claimant testified that he is only able to sit for about 20-30 minutes at a time before he starts experiencing a "jammed" feeling, a sensation of pressure, in his low back which is painful which he feels he cannot escape. The pain requires him to get up and "move around and stretch." Transcript, p.23, ll.6-15.

57. The claimant stated that he likes to stretch by laying on his back and drawing his knees up to his chest, but that is not always practical. He will typically do this for three to five

minutes. Transcript, p.24, l.22 – p.25, l.15. If possible, like when he is at home, he will do this three to four times per day. Transcript, p.32, ll.17-22.

58. In addition to laying down to stretch, the claimant indicated that he would lay down every day, usually around noon for 20-30 minutes. Transcript, p.33, ll.5-16.

59. The claimant indicated that he now is prescribed more pain medication than before the December 30, 2020, injury at work and his contention is consistent with the medical record. Transcript, p.24, ll.1-7; Exhibit 4.

60. The claimant testified that he is limited when walking to 10-15 minutes of walking, after which he experiences increased sensation of weakness in his left leg. Transcript, p.25, ll.16-20. The claimant stated that the sensation of weakness affects his walking and makes him walk very systematically. Transcript, p.26, l.20- p.26, l.5. He also indicated that he has difficulty with stairs and uses a handrail if one is present. Transcript, p.27, ll.8-13. He also stated that he experiences increased pain in his lower back and exhaustion after 10-15 minutes of walking. Transcript, p.27, ll.20-24.

61. The claimant also stated that he has issues bending. He can bend forward but has trouble getting back up. He alleges that he has trouble bending backwards and trouble bending side to side. He described his level of discomfort as “huge”. Transcript, p.28, ll.11-17.

62. The claimant also testified that he has exacerbated his back engaging in simple activities. For example, he stated that on one occasion he was attempting to get a pizza out of the oven and that resulted in his back “going out” and incapacitating him for two weeks. Transcript, p.29, ll.8-15. He also contends that he has had similar experiences with vacuuming for as little as five minutes. Transcript, p.29, l.16- p 30, l. 12

63. The claimant also testified that twisting is extremely painful and that he tries to avoid it whenever possible. Transcript, p.31- p.32, l.6.

64. The claimant also indicated that he can only stand for 15-20 minutes at a time before he needs to sit down because he gets a weak feeling and pain. Transcript, p.32, ll.9-12.

65. The ALJ finds that the claimant’s testimony about his physical restrictions and his ongoing symptomology to be consistent with the findings of the functional capacity evaluator, Ms. Young, as well as the findings and conclusions of Drs. Tracey and Green. Thus, the ALJ finds the claimant’s testimony about his limitations at this time to be credible.

66. Based on his testimony, the ALJ finds that the claimant has these restrictions:

    a. He can stand for 15-20 minutes before he needs to sit down due to pain and develops a weak feeling.

    b. He can walk for 10-15 minutes before he becomes weak and exhausted, which then makes him walk very systematically.

    c. He can sit for 20-30 minutes at a time until the pain requires him to get up and move around and stretch.

    d. He struggles with stairs and will use a handrail if one is present.

67. The claimant has a chronic neck condition that dates back to 2006. Transcript, p.21. ll.5-12. The claimant treats his chronic neck pain with pain medication. Transcript, p.21, ll.11-

19. The claimant had no limitation to his activities from his neck condition while taking his pain medications. He managed to work in various positions, including driving a truck and auto mechanics. Transcript, p.21, l.23- p.22, l.11.

68. The claimant did have intermittent low back issues in the years before the December 30, 2020, work injury, but did not remember specifically when it started. That said, his prior low back issues did not keep him from working and he was not told to restrict his activities by any medical professional for his prior back issues. Transcript, p.22, ll.12-24.

69. The claimant described his prior work duties as a Catastrophic Insurance Adjustor requiring him to carry a ladder and to climb a ladder to inspect siding and roofs. Transcript, p.44, l.23-p.45, l.4.

70. Surveillance video of the claimant was obtained. The video shows the claimant sweeping up some debris in front of his house and placing it in a large trash bin. The video also shows the claimant walking, moving the trash bin, and driving. The claimant does not appear to have any physical limitations during the surveillance video. That said, the video is only about 11 minutes long, and he does not appear to be working in excess of his restrictions.

71. Ms. Young reviewed the surveillance video taken of the claimant. She testified that the video revealed no activity that was inconsistent with her observations during the FCE. Transcript, p.68, ll.7-15.

72. The claimant was also evaluated by Ms. Cynthia Bartmann, a vocational expert. After interviewing the claimant, reviewing his medical records, and the FCE, Ms. Bartmann concluded that the claimant is limited to work in the sedentary work category. She also concluded that positions in the sedentary work category such as customer service, telemarketer, front desk, receptionist, and other types of office work would require the ability to sit for long periods of time. She also concluded that the claimant's need to constantly change positions could not be accommodated in the workplace. Ex. 8, p. 144. This portion of her report is supported by the evidence contained in the record, which includes the claimant's testimony, the FCE and Drs. Tracey and Green adoption of such FCE and is therefore found to be persuasive.

73. In her report, Ms. Bartmann also concluded that the claimant would also be precluded from performing the sedentary jobs outlined above because the claimant lacked computer experience and could not use a keyboard. Ex. 8, p. 145. However, as noted by the claimant, and Ms. Montoya, he did have prior computer and keyboard experience and the ALJ finds it hard to believe that the claimant cannot use a keyboard. Therefore, this portion of her report is not found to be supported by the evidence and is not found to be persuasive.

74. Ms. Bartmann also testified at the hearing. She was accepted as an expert in vocational evaluations. Following her initial report, Ms. Bartmann reviewed additional material consisting of the report of the respondents' vocation evaluator, Katie Montoya (Exhibit H), surveillance video (Exhibit J) and Dr. Green's DIME report (Exhibit 3). Ms. Bartmann's review of the additional material did not change her opinions set forth in her report. Transcript, p.81, ll.4-12.

75. Ms. Bartmann recounted the job history provided to her by the claimant. She began by acknowledging that the claimant had trouble recalling his remote job history. In the remote past, the claimant engaged in work that Mr. Bartmann generally described as "production worker", construction and utility-line labor positions. She also stated that the claimant's more recent work history consisted of truck driving and auto mechanics. Transcript, p.81, l. 22- p.82, l.7.

76. Ms. Bartmann indicated that the claimant had not told her of his brief work as a Catastrophic Insurance Adjustor but learned of such from Ms. Montoya's report and from the claimant's hearing testimony. Transcript, p.82, ll.8-11. Based on such, Ms. Bartmann said that such work was about 18 years earlier, that the claimant apparently struggled learning the computer program required by the job and that the claimant worked at such position for only a short time. Thus, she concluded that the claimant did not appear to have gained the skills necessary to succeed in this field of employment. Transcript, p.82 ll. 11-16.

77. Having considered the restrictions outlined in Ms. Young's report and reiterated in her testimony, Ms. Bartmann said that the claimant could not perform any of his past work. Transcript, p.83, ll.l3-14, Exhibit 8, p.144. Ms. Bartmann also indicated that the claimant did not acquire any skills in his past employment that are transferable to work in the light or sedentary categories. Exhibit 8, p.144, Transcript, p.84, ll.4-6.

78. In light of his physical restrictions and his lack of transferable skills, she concluded that the claimant is only vocationally qualified to work in jobs that are unskilled. Transcript, p.84, ll.10-13.

79. Ms. Bartmann stated that due to the claimant's restrictions - as set forth by the FCE and adopted by Drs. Tracy and Green - there are no unskilled jobs that the claimant can perform. Transcript, p.84, l.23- p.85, l.4.

80. Ms. Bartmann did indicate that the claimant's 20 lb. lifting restriction would allow access to the "light work" category of jobs, but that this category also requires the ability to stand or walk six out of eight hours each day or work at an assembly pace. Transcript, p.85, ll.14-19. However, she also noted that the inability to lift more than five pounds frequently or repetitively would relegate the claimant to the "sedentary" work category. Transcript, p.102, l.23- p.103, l.8.

81. Ms. Bartmann also explained that the claimant's need to change positions, as outlined by Ms. Young, would prohibit work in the "light" category. She noted that some "production work" allows for occasionally changing positions, but that a worker is still required to maintain production pace. It is the standard in the industry to have to maintain a position for 30-45 minutes to keep working at production pace. Ms. Bartmann does not believe that there are any production-type jobs that exist which would allow the claimant to change positions as frequently as outlined by the FCE. Transcript, p.86, ll.5-19.

82. Ms. Bartmann also noted that jobs not requiring the stand/walk requirement of light duty would fall under the "sedentary work" category, but that such category required the claimant to sit six out of eight hours per day. Because of his need to change positions, Ms. Bartmann stated that it would be impossible for the claimant to work in this category. Transcript, p.85, l.20- p.86, l.1.

83. Ms. Bartmann explained that the lifting restrictions and the need to change positions frequently, when combined with the lack of transferrable job skills, render the claimant unable to do any work. Transcript, p.86, ll.20-25.

84. Ms. Bartmann testified that in 30 years of doing vocational market research, she has never found a manufacturing plant that will allow someone to change positions as often as needed by the claimant. Transcript, p.98, ll.15-20.

85. Ms. Bartmann also noted that the FCE revealed that the claimant required rest 21% of the time. Ms. Bartmann said that no employer could accommodate such. Transcript, p.87, ll.11-16.

86. Ms. Bartmann also testified that the claimant's need to lay down and stretch would not be tolerated by most employers. Transcript, p.88, l.24.

87. Ms. Bartmann said that the claimant's need to lay down for 30 minutes during the workday would be tolerated only if such could be done during the regularly scheduled 30-minute lunch break, and if the employer had a break room. The need to lay down for 30 minutes would not be tolerated if it occurred outside the scheduled lunch break. Transcript, p.88, ll.13-20.

88. Ms. Bartmann addressed Ms. Montoya's suggestion that the claimant may be able to work in the food delivery industry. She noted that the need to climb stairs and carry with only one extremity would not be possible. Transcript, p.89, ll.20-25. Ms. Bartmann also noted that Dr. Raschbacher did not believe the claimant should drive given the claimant's use of prescription narcotics, which would also independently prevent access to any delivery job. Transcript, p.89, ll.15-18. Finally, Ms. Bartmann expressed doubt that a food delivery position would allow for the required frequency to change positions needed by the claimant. Nor did she believe that claimant's restrictions would allow him to work at an acceptable production pace in this industry. Transcript, p.90, ll.1-9.

89. Ms. Bartmann stated that employers generally will only tolerate absences of one day per month or 12 days per year. If a worker misses more than that on average, they will be unable to maintain employment. She added that an "absence" does not mean missing an entire workday. Missing two hours in a day will be considered an absence. Transcript, p.90, l.18- p.93, l.17.

90. Ms. Bartmann's testimony is found to be credible and her opinions, as stated in her report and testimony, are considered to be persuasive, since they are supported the underlying medical records and the claimant's testimony.

91. The respondents called Dr. John Raschbacher as an expert witness. It was stipulated that he is an expert in occupational medicine.

92. On March 23, 2021, the claimant attended an IME with Dr. Raschbacher. Exhibit 9, p.147. During the IME with Dr. Raschbacher, the claimant provided a description of the event of the injury which Dr. Raschbacher recorded as follows:

> Specifically, the mechanism of injury or purported injury, was reviewed. It was in the morning at about 8:15 a.m. or 8:30 a.m., and he was under a truck changing the differential seals. To do this, he had to break loose the knuckle and was using

> a torch to heat the bolts and then he used a 22 mm piece that was on a breaker bar. He was straining at this, and he felt that he had discomfort at the lower back. He states that he was "screaming in agony." He crawled for a while. He states there were others in the shop, but nobody attended him. He states everything is on video. The shop is covered with CC TV. The vehicle he was working on was on a lift, overhead. It was a Mercury Mountaineer. The breaker bar was about 36 inches long. He was standing with the piece at his neck or head level and pulling towards him with the bar when the injury occurred. He states that he never felt anything like that. He states that his legs went out and he collapsed. Exhibit 9, p.149.

93. As part of the March 23, 2021, IME, Dr. Raschbacher reviewed video of the workplace. Dr. Raschbacher described two video clips of the interior workplace that he viewed as follows:

> There is a second video clip, in which the workplace is shown. MP[Redacted] appears to be working at the left side of the video, walking around the Bay with a vehicle on a lift. Shop noises can be heard. He puts the lift down a little bit and then works on the vehicle using what appears to be an impact wrench or some similar tool. It appears that about five minutes into the video that there is an exclamation, which very short, which sounds like "oh." MP[Redacted] continues to work on the vehicle. One is able to hear voices of other workers in the shop. In one short clip, MP[Redacted] is seen to be working under a vehicle, which is on a lift. There is a short verbal outburst and then he walks off screen and then after a few seconds reappears. Other workers, next to the bay in which he was working, do not seem to notice this occurrence. Exhibit 9, p.155.

94. Dr. Raschbacher noted that the video clips he reviewed were inconsistent with the claimant's description of events. Dr. Raschbacher's report stated:

> At the time of the IME, with this Examiner, MP[Redacted] described a mechanism of injury as per the body of the report. He stated that his legs went out and that he collapsed. He stated that he was "**screaming in agony**," and that he crawled for a while. This does not appear to be an accurate description of the events recorded on the video tape or CC TV. There is no evidence of him screaming in agony or crawling or having his legs go out or collapsing. It, therefore, appears that he has not provided an accurate medical history and, therefore, there is no reason to assume that further history that he provides will be any more accurate. If he did have an episode in which he had discomfort temporarily from pulling on cheater bar or the wrench, it appears that resolved

> quite quickly and was not nearly as severe as the fairly dramatic presentation he described as having in his history. His coworkers did not even notice that anything had happened, and they were in reasonably close proximity. MP[Redacted] returned to work almost immediately. (Emphasis in original) Exhibit 9, p.157.

95. A portion of Exhibit 15, a video clip entitled "Clip of possible injury" was played during the hearing and viewed by Dr. Raschbacher.

96. Dr. Raschbacher could not state that this was the video of the incident he had previously viewed but acknowledged that the video clip was consistent with his description of the video clip set forth in his report of March 23, 2021. Transcript, p.147, l.8- p.151, l.13, Exhibit 9, p.155.

97. Based on Dr. Raschbacher's perception that the claimant had grossly exaggerated the events of the work incident, Dr. Raschbacher stated that "It is not clear that he (Claimant) actually suffered an injury on December 30, 2020…. There is no objective support for such and his subjective reports do not appear to be reliable…." Exhibit 9, p.156.

98. Dr. Raschbacher stopped believing the claimant because the video of the alleged incident he reviewed did not comport with the claimant's description of the incident. Transcript, p.147, ll.1 -6.

99. Dr. Raschbacher did not receive from the respondents any audio tape to consider. Transcript, p.151, ll.18-20.

100. Dr. Raschbacher is unaware of any preexisting issues to the lumber spine specifically. Transcript, p.121, ll.5-7.

101. Dr. Raschbacher does not believe that there is any basis for limiting the claimant's physical activity based on his lumber spine. Transcript, p.129, ll.14-16.

102. Dr. Raschbacher testified that it is his opinion that a disc protrusion not impinging on a nerve root is unlikely to cause pain but cannot absolutely be discounted as a source of pain. Transcript, p.136, ll.11-17.

103. On the other hand, Dr. Raschbacher acknowledged that annular tears can be symptomatic. Transcript, p.143, ll.23-25. The symptoms generally include difficulty with forward flexion bending and low back pain. Transcript, p.144, ll.13-19.

104. Dr. Raschbacher disagrees with Dr. Tracey, the claimant's treating physician, that there was a ratable impairment and does not believe any of the medical treatment provided by Dr. Tracey was supported by a good basis. Transcript, p.151, l.21- p.153, ll.17.

105. Dr. Raschbacher disagrees with DIME physician, Dr. Green, that there was a ratable impairment or that the claimant needs restrictions. Transcript, p.153, ll.21-23.

106. Dr. Raschbacher does not believe that the FCE performed by Ms. Young has much merit. Transcript, p.154, ll.7-10. He did not, however, sufficiently explain why the FCE did not have much merit – in his opinion.

107. Based on Dr. Raschbacher's perception that the claimant had grossly exaggerated the events of the work incident, Dr. Raschbacher stated that: "It is not clear that he (Claimant) actually suffered an injury on December 30, 2020…. There is no objective support for such and his subjective reports do not appear to be reliable…." Exhibit 9, p.156.

108. As part of the March 23, 2021, IME, Dr. Raschbacher also concluded that the claimant was taking significant doses of narcotics and that it is inappropriate for him to drive. Exhibit 9, pp.157-158.

109. On February 28, 2023, the claimant was once again required to attend a IME with Dr. Raschbacher.

110. Dr. Raschbacher summarized his prior IME by stating:

> April 5, 2021: This is an IME done for [Redacted, hereinafter MK] by this examiner. Inconsistencies in MP's[Redacted] history were described, particularly one in which MP[Redacted] did not apparently show any evidence of his report that he was **screaming in agony.** There was no evidence on the video of him crawling." (Emphasis in original) Exhibit U, p.358.

111. In the report of the February 28, 2023, IME, Dr. Raschbacher once again reiterated his opinion that it is unclear that there ever was an injury:

> I am in agreement that he has reached MMI, as per Dr. Tracy and as per Dr. Green. More likely than not, he reached MMI quite some time before that, if one makes the assumption that there has actually been an injury, and it is not clear that there ever was an injury, particularly given the reports he gave during the IME done in 2021 with this examiner in which he did not appear to give a truthful or likely truthful history. Exhibit U, p.359, ¶#3.

112. Similarly, Dr. Raschbacher stated that he would not assign the claimant any impairment rating stating:

> There are difficulties, however, with using the diagnosis of annular ligament tear as a pain generator, particularly after this much time has passed and with the consideration of the history he gave to this examiner in 2021, it is not clear that there is any ratable impairment. In any event, Dr. Green's opinion was that there was impairment, was based on annular ligament tear, and he pursued the correct methodology. This examiner would not assign any impairment, no. Table 53 diagnosis, to MP[Redacted]. Exhibit U, p.359, ¶#4.

113. Dr. Raschbacher further concluded that the claimant had no work restrictions that he did not have before the December 30, 2020, event. Exhibit U, p.360, ¶#6.

114. The claimant testified in rebuttal. The claimant testified that the video clip of the alleged injury played during the hearing testimony of Dr. Raschbacher was not a video recording of the moment of injury but that there was instead different video footage of the actual moment of injury. Portions of Exhibit 15 video clips were then displayed. The first was a video clip labeled December 30, 2020 6:55 am from 28 minute, 38 second mark until 31 minute, 10-second mark. The claimant identified himself in the video and stated this clip was the moment of injury. Transcript, p.182, l.23- p.183, l.5. Similarly, a second video clip was played labeled December 30, 2020 6:53 am from 31 minute, 38-second mark until 37 minute, 46-second mark. This video showed the same scene from a different camera angle. Generally, these videos show the claimant pulling down with a bar on the wheel of a car. The bar drops suddenly, the claimant appears to shout out in pain, and ultimately drops to the floor. The claimant moves to the bay next to where he was working and lays on the ground for several minutes. The claimant is ultimately approached by another person, who the claimant identified as his supervisor TD[Redacted]. Transcript, p.183, ll.8-10.

115. The ALJ finds that these two video clips are fairly consistent with the description of events that the claimant provided to Dr. Raschbacher and with the claimant's testimony at hearing. Thus, the ALJ finds that this video corroborates the claimant's version of events surrounding his injury and demonstrates that he did suffer an injury.

116. The ALJ finds that Dr. Raschbacher did not have (or did not acknowledge having viewed) either of these clips. It appears he relied on an irrelevant video clip which he incorrectly represented to be of the moment of injury. The ALJ further finds that Dr. Raschbacher based the majority of his opinions and conclusions regarding whether the claimant sustained an injury and whether he has any restrictions that flow from his work injury on the wrong video. Moreover, the ALJ finds that such a critical error formed the foundation of his opinions and conclusions and that his reliance on such video calls into question all of his opinions and conclusions. As a result, the ALJ does not find his opinions and conclusions regarding the extent of the claimant's injuries and his restrictions, or lack thereof, to be reliable or persuasive. That being said, the only opinion of Dr. Raschbacher that the ALJ does credit, is that the claimant should not be driving while using narcotics.

117. The claimant testified on rebuttal that he has listened to an audio tape, Exhibit 16. The claimant identified the male voice as belong to his supervisor TD[Redacted]. Counsel for the respondents objected to the admissibility of Exhibit 16 as being hearsay. The ALJ could not hear the recording when played remotely so deferred ruling on the admissibility of the exhibit until the ALJ had the opportunity to play the recording directly on a local device.

118. Having listened to Exhibit 16, the ALJ finds that such is admissible. The claimant identified the voice of his supervisor, TD[Redacted]. The ALJ notes that TD[Redacted] is a representative of the employer and his statement about the events would not constitute hearsay as such are the admission of a party opponent. Having listened to the tape, the ALJ concludes that the recording is relevant and admissible.

119. TD[Redacted] recites the events of the day of the injury. The interview was acknowledged as having occurred on January 11, 2021, 12 days after the injury.

TD[Redacted] acknowledges that he is a service manager of the Employer's business. He states that he was aware of the claimant's injury on December 30, 2020. He heard the claimant yelp. TD[Redacted] looked over and saw the claimant squat and then lay down on the ground. TD[Redacted] relayed that he approached the claimant and asked him if he was hurt. The claimant told him he experienced pain like an electrical bolt going down his back. The claimant told him that he would attempt to keep working but eventually came back to TD[Redacted] and told him he would need to go to the doctor. Exhibit 16.

120. The ALJ finds that TD's[Redacted] statements in Exhibit 16 are substantially similar to the description the claimant provided at the hearing as well as the history the claimant provided to Dr. Raschbacher.

121. Katie Montoya testified on behalf of the respondents. She was accepted by the ALJ as a vocational expert. She generated a report dated March 13, 2023. (Exhibit H).

122. Ms. Montoya stated that the claimant can use a computer, but he is not a skilled computer user and is not capable of working as an administrative assistant or other work requiring a skilled computer user. Transcript, p.161, ll.4-12.

123. Ms. Montoya acknowledged that the claimant would not have access to a full range of light duty jobs because he cannot tolerate prolonged standing or walking. Transcript, p.163, ll.10-14.

124. Ms. Montoya testified that when she did her report, she pulled postings of employers that might have sedentary jobs that would allow sitting and standing options. She believes that she reviewed postings of Advantage Security and Park 'N Fly but did not testify in detail as to any other details. Transcript, p.167, l.25- p168, l.6. Ms. Montoya did not relate the specific nature of the jobs offered by these two employers, the physical requirements of each job, and how such positions could accommodate the claimant's restrictions.

125. Ms. Montoya suggested in her testimony that being off task for three to five minutes every 30 minutes could affect the ability to maintain employment but stated that "it would depend on the work if that became a hindrance". Transcript, p.171, l.19- p.172, l.2. Ms. Montoya did not identify any jobs that would allow an employee to be off task for the described amount of time as shown by the FCE.

126. Ms. Montoya reported that the claimant has limited transferable skills, though her report does not state with specificity the claimant's transferable skills. Exhibit H, p.32.

127. Ms. Montoya set forth in her report that the claimant is relegated to unskilled work and "possibly" semi-skilled work. Exhibit H, p.32. Ms. Montoya did not, however, explain in detail what constitutes "semi-skilled work" or if the claimant possessed such skills.

128. Ms. Montoya concluded in her report that the claimant would "continue to have the opportunity to perform some driving positions (most food delivery where he has the chance to vary positions more often). Exhibit H, p. 32. On the other hand, she also acknowledged that his medications may impact his ability to hold such positions. Exhibit H, p.32.

129. Ms. Montoya concluded in her report that the claimant can perform customer service type work and cashier type alternatives, though she noted that he cannot stand and walk to the degree needed for all light work. She also stated that he could perform some production-type work. Exhibit H, pp.32-33.

130. Ms. Montoya's report does not set forth any specific employers or detailed contact with potential employers. Ms. Montoya's report does not address having considered the claimant's balance issues as stated in the FCE. Ms. Montoya's report does not refer to having considered the effects of the claimant resting or being off-task up to 21% of the day as outlined in the FCE. Exhibit H, generally.

131. In her report, Ms. Montoya did consider the claimant's potential absenteeism and its effect on his employability. She noted that his absentee rate (as described by the claimant) would be "an issue with maintaining employment". Exhibit H, p.33. She did not make or provide any standards of the amount of absenteeism that would generally tolerated by employers and did not dispute Ms. Bartmann's testimony that: employers generally will only tolerate absences of one day per month or 12 days per year; that an "absence" does not mean missing an entire workday but that missing two hours in a day will be considered an absence; and that if a worker misses more than on average, they will be unable to maintain employment.

132. The claimant has established that it is more true than not that his restrictions regarding weight, balance, and positional tolerances, which includes severe limitations on sitting and standing, render him unable to find and maintain employment.

133. The claimant has established that it is more true than not that his being off task to a degree of up to 21% of the day or more also renders him unable to find and maintain employment.

134. The claimant has established that it is more true than not that his anticipated level of absenteeism also renders him unable to find and maintain employment.

135. The claimant did have a preexisting neck condition and was on medication for his neck pain. However, his prior neck condition did not preclude the claimant from working – as demonstrated by his work history after his neck injury.

136. The claimant has established that his work related back injury – which caused his physical restrictions and limitations - is a significant causative factor of his inability to obtain and maintain employment and earn any wages. Therefore, based on his current restrictions, his work injury is the direct cause of his permanent and total disability.

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). The

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

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

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

I. Whether the claimant established by a preponderance of the evidence that he is permanently and totally disabled.

To prove permanent total disability, the claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. §§8-40-201(16.5)(a) and 8-43-201, C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53 ¶ 26. The term "any wages" means more than zero wages. *See Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997); *McKinney v. Industrial Claim Appeals Office,* 894 P.2d 42 (Colo. App. 1995).

The claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Grant v. WalMart Associates, Inc.,* WC 4-905-009 (ICAO, Mar. 18, 2019). In weighing whether a claimant is able to earn any wages, the ALJ may consider various human factors, including the claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Yeutter* 2019 COA 53 ¶ 26. The ALJ can also

consider whether the claimant is physically able to sustain or maintain employment. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

The critical test is whether employment exists that is reasonably available to claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Blocker v. Express Personnel* WC 4-622-069-04 (ICAO, July 1, 2013.).

The question of whether the claimant proved the inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995); *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53 (reasoning that DIME opinion held no special weight in a subsequent hearing where claimant sought permanent total disability benefits).

The ALJ has evaluated the entire record. In this case, after the claimant was placed at MMI, and due to the claimant's ongoing pain complaints, his ATP, Dr. Tracey, requested an FCE to help determine the claimant's work restrictions. Thereafter, Ms. Young performed an FCE and set forth her opinion on the claimant's work restrictions. After the FCE was completed Dr. Tracey reviewed the FCE and adopted the restrictions set forth by Ms. Young. At no time did Dr. Tracey state that the claimant's pain complaints and work restrictions were inconsistent with the claimant's underlying work injury.

After Dr. Tracey adopted the findings of the FCE and set forth the claimant's work restrictions, the claimant underwent a Division IME with Dr. Green. Dr. Green evaluated the claimant, provided an impairment rating, and agreed with the restrictions set forth by Ms. Young and Dr. Tracey.

The claimant then underwent two vocational evaluations. Each vocational expert based their opinions on the restrictions set forth in the FCE which were adopted by Dr. Tracey. Ms. Bartmann issued a report on behalf of the claimant. She concluded that based on the claimant's restrictions, he would be unable to obtain and maintain any employment. The ALJ credited her opinion since it was consistent with the claimant's testimony as well as the restrictions set forth by Ms. Young and adopted by Dr. Tracey.

The second evaluation was performed by Ms. Montoya. While Ms. Montoya did not think the claimant was unable to earn any wages, she admitted that the claimant may have problems obtaining and maintaining employment when considering all of the claimant's restrictions and limitations, including those described by the claimant. She also indicated that his ability to obtain and maintain employment delivering food would also be difficult due to his narcotic use, as indicated by Dr. Raschbacher, which may prohibit him from obtaining such jobs.

The respondents provided the opinion of Dr. Raschbacher regarding the extent of the claimant's work injury and the restrictions which flow from the injury. In essence, Dr. Raschbacher did not credit the claimant's contention as to how he got injured based on his review of some of the employer's surveillance video of the workplace that allegedly covered the time the claimant was injured at work. The video he watched did not show the claimant getting injured. Since he did not credit the claimant's contention as to how he got hurt, he

did not believe the claimant's ongoing pain complaints and the extent of his claimed disability and restrictions.

However, during the hearing, the claimant presented additional surveillance video from the employer that covered the time the claimant was injured. This video showed the claimant getting injured and reacting in a similar way to the manner in which the claimant described to the doctors involved here as well as his testimony.

Therefore, since Dr. Raschbacher's opinions were based on the wrong surveillance video, the ALJ did not find his opinions to be persuasive regarding the extent of the claimant's injury and the restrictions that flow from the injury.

The ALJ has considered the reliability of the FCE and while Ms. Young provided opinions about the claimant's effort, and lack of symptom magnification, the ALJ believes that evaluating the claimant's effort, and possible symptom magnification, with a high degree of confidence is not possible. But, on the other hand, there was a lack of credible and persuasive evidence presented that negated her findings and conclusions, as well as those of Dr. Tracey.

While there was some surveillance of the claimant, it did not appear that the claimant was exceeding the restrictions set forth by Ms. Young and Dr. Tracey. In the end, the ALJ has credited the claimant's testimony regarding the effects of his work injury and his resulting disability. As a result, the ALJ finds and concludes that the claimant has proven by a preponderance of the evidence that he is unable to obtain and maintain employment and earn any wages because of his low back injury and his physical restrictions that flow from such injury.

ORDER

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

1. The claimant is permanently and totally disabled. The respondents shall pay claimant permanent total disability benefits-less any offsets and/or credits.
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: June 16, 2023.

/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. 5-186-177-002

ISSUES

- Did Respondents overcome the DIME's determination that Claimant is not at MMI?
- If Respondents overcame the DIME, the following issues will be addressed:
- What is Claimant's scheduled impairment rating?
- Did Respondents prove apportionment is applicable?
- Overpayment.
- If Respondents failed to overcome the DIME, did Claimant prove entitlement to reinstatement of TTD benefits commencing March 31, 2022?
- The parties stipulated to an increased average weekly wage (AWW) of $957.21, effective February 1, 2022.

FINDINGS OF FACT

1. Claimant worked for Employer as an HVAC sheet metal fabricator and installer. The job was physically demanding and required lifting and carrying heavy materials, frequent crawling, ascending and descending ladders and stairs, and walking on pitched roofs. Claimant had no limitations or difficulty performing any work tasks before his admitted injury on October 25, 2021.

2. Claimant injured his left knee on October 25, 2021 when he fell in an uncovered sump pump hole. Claimant's right leg went into the hole and his left leg bent awkwardly behind him. Claimant felt immediate, severe pain in his left knee and leg. He remained stuck in that position for approximately 15-20 minutes, until a plumber working on the project pulled him out of the hole. Claimant had difficulty bearing weight on the left knee, so the plumber helped him to his vehicle. Claimant returned to Employer's office and reported the injury to his supervisor.

3. Claimant has a lengthy pre-injury medical history regarding his left knee. He suffered a work-related injury in 1996 when he was kicked in the left knee while breaking up a fight among patrons at the [Redacted, hereinafter CF]. He had surgery on October 5, 1996 to repair the ACL, MCL, and meniscus. Claimant continued to have problems with the left knee and underwent two additional surgeries, first to revise the initial procedure and later to remove scar tissue. Claimant was eventually put at MMI on January 6, 1998, with a 22% lower extremity impairment rating. He was released to full duty with no permanent restrictions.

4. Claimant continued to have left knee symptoms and periodic flares thereafter. X-rays of the left knee were taken in 2009, although no corresponding report is in evidence. A treatment record in April 2015 for a back strain after lifting a 100-pound piece of concrete contains an incidental reference to "chronic left knee issues and limited range of motion from 0-90 degrees after multiple surgeries." No treatment for the left knee was recommended and Claimant was cleared for full duty at work. A left knee x-ray on August 3, 2015 showed severe tricompartmental osteoarthritis.

5. Claimant saw PA-C Franklin Sloan on March 3, 2016 for left knee pain. Claimant recounted his surgical history and described gradually increasing pain over the years with weightbearing and range of motion. He had previously received cortisone injections and seen a couple of orthopedists. Claimant was observed to walk with a "mild" limp. ACL testing was positive, and the knee was "slightly" unstable. Mr. Sloan diagnosed advanced posttraumatic arthritis and opined Claimant was a candidate for a knee replacement. He advised Claimant to follow up with Dr. Danylchuk to further discuss his surgical options. There is no persuasive evidence Claimant ever saw Dr. Danylchuk or sought any additional treatment for his left knee around that time.

6. Claimant credibly testified to periods of "working excessively" on construction projects, during which time he worked several months with no days off. Those activities aggravated his knee pain, but he "never missed a day of work." His knee pain subsequently improved when his workload reduced. Although Claimant could not recall exact dates of projects he worked on, he believes the March 3, 2016 evaluation with Mr. Sloan probably coincided with a period when he "overworked" his knee. No persuasive evidence was presented to contradict Claimant's testimony in this regard.

7. There is no persuasive evidence Claimant received any additional evaluations for treatment for his left knee for five years, between March 2016 and March 2021. The only record in that interval is a June 23, 2019 general health checkup, which makes no mention of any knee issues.

8. Claimant saw his PCP, Dr. Aaron Fields, on March 14, 2021 for a general primary care evaluation. Among other things, he reported "continuous" bilateral knee and foot pain. The report states Claimant reported "12/10" pain in the left knee and 6/10 in the right knee.[1] Dr. Fields administered steroid injections to both of Claimant's knees and referred Claimant for an orthopedic evaluation. The injections helped for only "about two weeks." Claimant continued working and did not pursue the orthopedic evaluation. Claimant knew he would probably need a knee replacement at some point but planned to delay the procedure as long as possible.

[1] The notation of "12/10" pain is puzzling, because there are no other instances of exaggerated "off the chart" pain reports, including immediately after Claimant's October 2021 work accident when he reported 7/10 pain despite being "unable to bear weight" on the knee. Claimant credibly testified he did not recall reporting his pain was 12 out of 10.

9. Claimant followed up with Dr. Fields two additional times before the October 25, 2021 accident regarding general health issues. Neither report contains any mention of left knee issues.

10. Claimant worked two periods for Employer, from approximately September 2018 through December 2020, and from July 2021 until the work accident on October 25, 2021. Claimant also performed more than 20 years of physically demanding work in the construction trades. There is no persuasive evidence Claimant's left knee limited his ability to work before October 2021.

11. Employer referred Claimant to Dr. Thomas Centi for the October 25, 2021 work accident. At the initial evaluation, Dr. Centi documented moderate edema, moderate effusion, tenderness to palpation, and severely reduced range of motion. Claimant reported 7/10 left knee pain. Dr. Centi ordered a hinged knee brace and an MRI. He gave Claimant work restrictions of no lifting more than five pounds and only seated work 95% of each shift.

12. The MRI was completed on October 30, 2021. It showed a large joint effusion, consistent with Dr. Centi's post-injury clinical exam findings. It also showed chronic severe degenerative osteoarthritis, a tear of the previously repaired ACL, and a large loose body.

13. Claimant saw Dr. David Walden for an orthopedic evaluation on November 9, 2021. He was still non-weightbearing and using crutches. Claimant described the work accident and his pre-injury history of left knee problems. Dr. Walden reviewed the MRI and obtained x-rays in the office, which showed "end-stage tricompartmental osteoarthritis." Dr. Walden noted it was "difficult to know exactly" what, if any, pathology shown on the imaging was caused by the work accident. He opined an ACL repair was not indicated given the severe degenerative changes, and the only reasonable surgical option would be a total knee arthroplasty. His assessment included "left knee acute irritation of underlying end-stage osteoarthritis." Dr. Walden injected Claimant's knee, referred him to physical therapy, and recommended he start weaning off the crutches.

14. Claimant followed up with Dr. Walden on December 7, 2021. He still could not bear weight on the left leg. Dr. Walden documented, "I explained to the patient that a good deal of his pathology is not due to a work-related injury, however, it does seem as though the function of his knee has changed significantly. He was able to do a vigorous job doing HVAC for his company and now is on crutches and barely able to bear weight." Dr. Walden opined the injury may have caused the pre-existing loose body to become symptomatic, either by changing its position or setting off a reaction in the joint. He acknowledged the procedure would not fix all of Claimant's problems with the knee but thought it could provide some relief.

15. Dr. Walden performed arthroscopic surgery on December 20, 2021. He removed multiple large loose bodies, debrided the remaining medial meniscus, and performed a synovectomy.

16. Claimant's pain improved somewhat with post-surgical therapy, but the knee remained symptomatic and disabling.

17. Dr. Centi put Claimant at MMI on March 31, 2022. He noted Claimant had completed his post-surgical therapy and the only remaining option was a knee replacement. Because Dr. Centi did not believe a knee replacement was related to the work injury, he concluded Claimant was at MMI. Dr. Centi assigned a 23% lower extremity scheduled rating, including 5% under Table 40 for degenerative arthritis, combined with range of motion. He gave Claimant permanent work restrictions of no lifting more than 10 pounds, no ladders, minimal stairs, no kneeling or squatting, and must be sitting 50% of a shift. The permanent restrictions are incompatible with Claimant's pre-injury job for Employer, or his past work in the construction trades.

18. Insurer filed a Final Admission of Liability based on Dr. Centi's rating. Claimant objected and requested a DIME.

19. Dr. Mark Failinger performed an IME for Respondents on June 17, 2022. Dr. Failinger noted Claimant's left knee was severely arthritic before the October 25, 2021 accident. He saw no objective evidence in imaging studies or other medical data that the work injury caused any new pathology in Claimant's left knee. Despite acknowledging that Claimant suffered a significant sprain when he fell in the sump pump hole, Dr. Failinger opined the accident did not aggravate or accelerate the pre-existing condition. He agreed a knee replacement is reasonable given Claimant's severe, end-stage degenerative osteoarthritis. However, he believes a knee replacement is solely related to the pre-existing condition, and not to treat address any pathology created by the injury. Therefore, he agreed with Dr. Centi's determination of MMI.

20. Dr. John Bissell performed the DIME on November 7, 2022. Dr. Bissell was provided a voluminous packet of records. Although he reviewed the records, he considered it unnecessary to discuss each record individually in his report. He also reviewed Dr. Failinger's IME report, including the "comprehensive history . . . and record review" documented therein. Dr. Bissell noted Claimant's 1996 knee injury required three surgeries and resulted in a 22% lower extremity impairment rating. He experienced episodic knee pain thereafter. Dr. Bissell acknowledged that Claimant "was not asymptomatic" before the October 25, 2021 work accident and had received steroid injections in both knees in March 2021. He noted imaging studies after the October 25, 2021 injury confirmed severe degenerative changes. Nevertheless, Dr. Bissell emphasized that Claimant "was working full duty . . . had no permanent restrictions and was not independently disabled at the time of his October 25, 2021 work injury." Dr. Bissell concluded Claimant would probably still be working full duty "but for" the work accident. Dr. Bissell concluded the October 25, 2021 accident "resulted in permanent aggravation of his known pre-existing severe left knee osteoarthritis, and the only remaining remedy for this condition is total knee replacement. Therefore, the work injury is the proximate cause of his need for a total knee replacement." Accordingly, Dr. Bissell determined Claimant is not at MMI.

21. Dr. Failinger testified at hearing to elaborate on the opinions expressed in his report. He thoroughly explained the basis for his conclusion that the October 2021 injury caused no "new pathology" or identifiable structural change in Claimant's underlying anatomy. He reiterated that a knee replacement is reasonable to address Claimant's end-stage osteoarthritis but is not causally related to the work accident. He disagreed with Dr. Bissell's determination regarding MMI, because "everything that was claim-related has been treated."

22. Respondents failed to overcome Dr. Bissell's determination of MMI by clear and convincing evidence. Everyone agrees Claimant had severe, pre-existing degenerative arthritis and a knee replacement is reasonable. The fundamental disagreement involves causation. Dr. Failinger's opinions, while well-reasoned and eloquently presented, do not prove that Dr. Bissell's causation determination was highly probably incorrect.

23. Insurer was paying Claimant admitted TTD benefits immediately before Dr. Centi placed him at MMI. Insurer terminated Claimant's TTD benefits effective March 31, based on the determination of MMI. The record establishes no other basis for termination of TTD benefits, such as a full-duty release or return to work. Because Claimant has been determined not at MMI, he is entitled to reinstatement of TTD benefits as of March 31, 2022.

24. The endorsed issues of PPD, apportionment, and overpayment are premature and rendered moot by the failure to overcome the DIME.

CONCLUSIONS OF LAW

A. Respondents failed to overcome the DIME regarding MMI

A DIME's determination of MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The party challenging the DIME's conclusions must show it is "highly probable" the determination of MMI 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).

The existence of a pre-existing condition does not disqualify a claim for compensation or medical benefits if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The assessment of MMI "inherently" includes a determination what conditions, if any, are causally related to the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

Therefore, in this context, Respondents must overcome Dr. Bissell's conclusion that the injury aggravated Claimant's condition by clear and convincing evidence.

As found, Respondents failed to overcome the DIME's MMI determination by clear and convincing evidence. Dr. Bissell's conclusion that the work accident aggravated Claimant's pre-existing condition and proximately caused the current need for a knee replacement is a reasonable interpretation of the available evidence. The argument that Dr. Bissell performed an inadequate review of medical records and failed to appreciate the extent of Claimant's underlying pre-existing condition is not persuasive. Dr. Bissell knew Claimant had advanced osteoarthritis affecting his knee before the work accident. He knew Claimant's knee was "not asymptomatic" and required episodic treatment, including injections seven months before the injury. However, Dr. Bissell concluded the symptoms became worse and Claimant's functional status declined significantly after the work accident. Those were the critical factors informing Dr. Bissell's determination that the injury aggravated and combined with Claimant's pre-existing condition to accelerate his need for a knee replacement. There is no clear and convincing evidence that these determinations were incorrect.

Dr. Failinger and Dr. Bissell are looking at this case from fundamentally different perspectives. Dr. Failinger considered "aggravation" from a pathologic and anatomical perspective, whereas Dr. Bissell focused on the alteration of Claimant's symptomology and functional status. These competing approaches produce very different conclusions, because even if the injury caused no objective structural change to Claimant's knee, it dramatically altered his level of symptoms and, more important, his functional capacity. Claimant had a severely degenerated left knee immediately before October 25, 2021, but performed physically demanding work without difficulty and required only infrequent treatment. Dr. Bissell's characterization of Claimant's pre-injury flares as "episodic" is consistent with the sporadic nature of treatment before the work accident. Although reasonable physicians may disagree about the meaning of the term "aggravation" from a medical standpoint, Dr. Bissell's analysis is consistent with applicable legal standards. An injury need not cause any identifiable structural change to a claimant's underlying anatomy to cause a compensable aggravation. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment they would not otherwise have required. *Id*. Dr. Bissell was reasonably persuaded those criteria were met, and the evidence to the contrary does not rise to the level of clear and convincing.

B. Reinstatement of TTD effective March 31, 2022

Once commenced, TTD benefits "shall continue" until the occurrence of a terminating event enumerated in § 8-42-105(3)(a)-(d). Insurer was paying admitted TTD benefits when Dr. Centi placed Claimant at MMI on March 31, 2021. Although Insurer was entitled to terminate TTD at that time under Rule 6-1(A)(1), the determination that Claimant is not at MMI entitles him to reinstatement of TTD benefits.

ORDER

It is therefore ordered that:

1. Respondents' request to overcome the DIME regarding MMI is denied and dismissed.

2. As stipulated by the parties, Claimant's average weekly wage is $957.21, with a corresponding TTD rate of $638.14, effective February 1, 2022.

3. Insurer shall pay Claimant TTD benefits, at the rate of $638.14 per week, commencing March 31, 2022 and continuing until terminated by law.

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

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

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

DATED: June 16, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-228-965-001

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that she suffered an occupational disease arising out of and in the course and scope of her employment with Respondent?

FINDINGS OF FACT

1. Claimant is a registered nurse (RN). She has most recently been employed with Respondent since 2017. At the time she returned to employment with Respondent in 2017, Claimant was hired as Valve Clinic Coordinator. In that position, Claimant oversaw the creation and development of the valve clinic portion of the Cardiovascular Department.

2. Claimant's job duties included all aspects of starting the clinic, including undergoing training and marketing the clinic. Once the clinic began seeing patients, Claimant's job duties included reviewing charts, determining if a patient meets specific criteria, reviewing imaging such as echocardiograms, meeting with patients, educating patients, preparing and giving presentations to the clinical staff, doing rounds, and performing research.

3. Claimant testified that she began to notice pain in her hands in August 2022. At that time, she believed she was experiencing general body aches or pain caused by a ganglion cyst on her wrist. Claimant further testified that her pain symptoms worsened and began to include numbness and tingling. These symptoms occurred both at work and at home. However, at work the symptoms became more severe. Claimant began using a brace on her right wrist while at work.

4. Claimant testified that overtime her pain continued to worsen and ultimately she sought treatment at an urgent care practice. Claimant testified that the provider she saw at that facility believed Claimant was suffering a stroke and did not provide treatment modalities for Claimant's hands and wrists.

5. Thereafter, Claimant elected to seek treatment with an orthopedic specialist. On December 5, 2022, Claimant was seen by orthopedic surgeon, Dr. James Treadwell. At that time, Clamant reported symptoms that included numbness in her bilateral hands, with radiation into her forearm and elbow, and occasional tingling into her shoulder. Claimant also reported wrist pain and swelling. On December 5, 2022, x-rays of Claimant's bilateral wrists showed mild degenerative changes at the basilar joints of both thumbs, and mild degenerative changes between the scapholunate

interval. Based on his examination and the x-ray findings, Dr. Treadwell ordered electromyography nerve conduction studies {EMG/NCS).

6. On January 23, 2023, Dr. Robert Frahzo performed bilateral EMG/NCS. Dr. Frahzo's report of that date notes that the studies showed evidence of bilateral carpal tunnel syndrome. He noted that it is moderate to severe on the right, and moderate on the left.

7. On February 6, 2023, Claimant returned to Dr. Treadwell. At that time, Dr Treadwell discussed treatment options, including surgical intervention. In the medical record of that date Dr. Treadwell noted "[p]atient having difficulty with quality of life this is work related." Claimant elected to proceed with bilateral endoscopic carpal tunnel release surgery.

8. On January 26, 2023, Claimant notified her supervisor of Dr. Treadwell's recommendations. Claimant's supervisor referred Claimant to human resources. On January 26, 2023, Claimant was instructed to complete an Injury or Illness Recap Report. In that report, Claimant was quoted as stating "I started having pain to both wrists about 6 months ago. I have already been to Urgent Care and the [emergency department], a [doctor] at Rocky Mountain Ortho on 12/5/22, and a nerve [doctor] on 1/23/23. I got diagnosed with carpal tunnel to bilat[eral] wrists but continue to have pain to both wrists while I work (Repetitive movements causing pain)." At that same time, a Workers' Compensation - First Report of Injury or Illness was prepared by Respondent.

9. On January 26, 2023, Claimant was seen by Dr. Spencer Olsen as her authorized treating physician (ATP) for this claim. At that time, Claimant reported a date of injury of August 1, 2022. Dr. Olsen noted that Claimant had several months of bilateral hand pain and numbness, with numbness and tingling into the whole arm. Dr. Olsen opined that Claimant's condition is not work related. Specifically, Dr. Olsen noted "[e]vidence is weak for relatively light, repetitive tasks as a cause of carpal tunnel syndrome. Whereas there is strong evidence for age, gender and diabetes." Dr. Olsen recommended that Claimant pursue treatment through her private insurance. Claimant has not returned to Dr. Olsen.

10. On March 10, 2023, Torrey Beil, Vocational Consultant, authored a Job Demands Analysis and Risk Factors Analysis. Although Ms. Beil was unable to observe Claimant in the performance of her job duties, she was able to gather information regarding Claimant's position. In her report, Ms. Beil noted that Claimants work activity was sedentary, with computer based activity of approximately one half of any shift. In addition, Claimant was estimated to attend meetings approximately four times per week. Ms. Beil opined that Claimant's job functions do not include any risk factors for carpal tunnel.

11. Dr. Olsen testified via deposition and was accepted as an expert in occupational medicine. Dr. Olsen testified that Claimant presented to him with severe bilateral hand pain and numbness. Dr. Olsen further testified that Claimant attributed the cause of her symptoms to repetitive work activities. Dr. Olsen reiterated his opinion that

Claimant's diagnosis of carpal tunnel is not work related. In support of this opinion, Dr. Olsen noted that Claimant does not have workplace risk factors for carpal tunnel syndrome. In addition, Claimant has other risk factors that are stronger; including her age, gender, and Type 2 diabetes.

12. Claimant testified that her diabetes is well controlled and her A1C level is under 6. Claimant testified that Dr. Treadwell performed the right carpal tunnel release in early March 2023, and the left carpal tunnel release in late March 2023.

13. Claimant also testified that she disagrees with Ms. Beil's report, as it does not accurately reflect her job duties. Claimant testified that she spends approximately 80 percent of any shift performing computer work. This includes research, reviewing patient charts, and writing letters summarizing her conversations with patients. In addition, Claimant would use her computer to ensure necessary testing was being completed. Claimant further testified that her job duties included interviewing patients via telephone, entering data, and and at times she wrote things down. Claimant testified that she varied her activities between typing and mousing and she took breaks throughout the day.

14. The ALJ takes administrative notice of the Colorado Medical Treatment Guidelines (MTG), specifically WCRP 17 Exhibit 5 which addresses the guidelines for cumulative trauma. WCRP 17 Exhibit 5(0)(3) sets forth the General Principles of Medical Causation assessment. That rule states that legal causation is based on the totality of medical and non-medical evidence, which may include, age, gender, pregnancy, BMI, diabetes, wrist depth/ratios, and other factors based on epidemiologic literature. Regarding keyboarding, the MTG notes that most of the studies rely on self-report, which appears to approximately double the actual time spent using the keyboard. The MTG also notes that group studies provide good evidence that keyboarding in a reasonable ergonomic posture[1], up to 7 hours per day under usual conditions is very unlikely to cause carpal tunnel syndrome. The MTG lists risk factors for carpal tunnel syndrome as: combination of repetition and force for six hours; combination repetition and forceful tool use with awkward posture for six hours; combination of two pound pinch or ten pound hand force three times or more per minute for three hours.

15. The ALJ credits the Claimant's testimony regarding her work duties. The ALJ finds that although Claimant did perform computer work throughout her work day, those activities were varied and not continuous data entry for seven straight hours without a break. The ALJ also credits the medical records, the MTG regarding cumulative trauma, the opinions of Ms. Beil, and the testimony and opinions of Dr. Olsen. The ALJ finds that Claimant has failed to demonstrate that it is more likely than not that she suffered an occupational disease while employed with Respondent.

[1] Wrist with 30 degrees or less of extension, and 15 degrees or less of radial deviation.

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. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

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

5. A claimant is required to prove, by a preponderance of the evidence, that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with thevocation must

be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff,* 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Gotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.,* W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

7. The Colorado Workers' Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG "set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

8. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. *See Jones v. T.T.C. Illinois,* Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive); see *also Burchard v. Preferred Machining,* W.C. No. 4-652-824 (July 23, 2008) (declining to require application of the MTG for carpal tunnel syndrome in determining issue of PTO); see a/so Stamey *v. C2 Utility Contractors* et *al,* W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the MTG were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

9. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered an occupational disease while working for Respondent. As found, Claimant's testimony regarding her job duties, the medical records, the MTG, and the opinions of Dr. Olsen and Ms. Beil are credible and persuasive.

ORDER

It is therefore ordered that Claimant's workers' compensation claim is denied and dismissed.

Dated June 20, 2023.

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 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she is entitled to attendant care companion services and/or a long term care facility or an independent living facility.

STIPULATIONS OF THE PARTIES

Claimant stipulated that the attendant/companion care services they are requesting do not include essential services such as cleaning, cooking, or personal care as Claimant is able to take care of her activities of daily living.

The parties also stipulated that Exhibits 10 and 11 no longer required a foundation and could be admitted into evidence.

This ALJ approves the stipulations of the parties, and the stipulations are incorporated into this Order.

FINDINGS OF FACT

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

1. This matter involves an adjudicated permanently and totally disabled worker who was injured in the course and scope of her employment. She was held up at gunpoint two different times. Claimant was able to recover and return to work after the April 18, 2007 robbery where she was held up by four men while working alone at a gas station on the 10 p.m. to 7 a.m. shift at a gas station, though she experienced some anxiety, and became more vigilant. On March 8, 2008 Claimant was held up at gunpoint to the head by two men that accosted her. Claimant became more angry and frightened by this event. Claimant was unable to recover from the diagnosed post-traumatic stress disorder (PTSD), due to the resultant anxiety, panic attacks, chronic fear, and depression.

2. Claimant was evaluated by Dr. Gutterman at Respondent's request and he issued a report dated February 20, 2009.[1] He took a history and noted that Claimant suffered from post-traumatic stress disorder (PTSD) as a result of the March 8, 2008 robbery. Dr. Gutterman believe Claimant was at Maximum Medical Improvement from a psychiatric perspective, had persisting PTSD symptoms that "may gradually lessen both with continuing supportive treatment by Dr. Kenneally, as well as the tincture of time." He noted that Claimant had clearly .improved from a psychiatric/psychological perspective;

[1] Claimant had been previously evaluated by Dr. Gutterman, who recommended an impairment rating related to the April, 2007 claim.

however, many of her symptoms persisted. He provided an impairment rating and recommended Claimant return to work but not as a cashier. He stated that she should continue on medication for another 12 months and with Dr. Kenneally in outpatient therapy for another six months to a year.

3. Claimant was seen for a psychological evaluation by Dr. Walter J. Torres at Claimant's request on August 15, 2009. He disagreed with Dr. Gutterman's recommendations finding as follows:

> The degree of posttraumatic symptomatology that [Redacted, hereinafter MM] manifests, especially as registered by the nonnegotiable concreteness of her belief in the reality of the dangers that afflict her, strongly signals that with reasonable probability, her Posttraumatic Stress Disorder can be expected to be of a chronic nature. Accordingly, it is psychologically reasonable to expect that her condition will linger beyond a year and that she will be in need of psychopharmacological treatment significantly beyond one year. Given the kind of particularly malignant forms of trauma that she underwent, i.e. repealed traumas of a malicious nature, it would not be at all surprising that her need for treatment will be of indeterminate duration.

4. Dr. Torres recommended increasing her Lexapro, and providing her with medication to assist with her sleep disruptions related to nightmares. He stated that since her medication regimen had not stabilized that she was not at MMI. He also provided an impairment rating.

5. On December 23, 2010 Dr. Ann Sartori, Psy.D., recommended desensitization involving the workplace, having her children drive her by the workplace with her and going in with her if possible. Her providers were recommending accompaniment all the way back then, while Claimant had not yet reached MMI and was still under active psychological treatment. Dr. Sartori noted that Claimant had avoidance behaviors and was limiting her social interactions.

6. Authorized treating physician, Dr. Howard J. Entin, M.D. a Medical Director for Colorado PsychCare, attended Claimant on March 6, 2012, noting residual PTSD, agoraphobia, nightmares, avoidance of triggers, decreased interest, hyperarousal, insomnia, and hypervigilance. He noted that despite the years of treatment and time, claimant had no change of symptoms and stated that it was unlikely further treatment will have any effect.

7. Dr. Entin placed Claimant at MMI from psychiatric standpoint on October 15, 2012**,** stating that psychosocial status did not appear to have changed. He reported she was spending all her days with various friends, never alone, she never drives because she was too anxious, though she could go to public places, but was still fearful. She was still obsessed and ruminated at times.

8. Dr. Gutterman issued a follow up IME on December 11, 2012. He documented that Claimant's "problems have become her children's problem." He documented that her three children got frustrated with her and noted that Claimant called her son frequently and he would tell her, "Momma, you call all of the time." Dr. Gutterman also documented that she felt like the nightmares would not leave her alone.

9. On January 23, 2013 Dr. Sartori noted that her children were concerned that Claimant would become easily agitated and angry. She was too dependent upon them. The children reported that they had lost their mother as they knew her. On February 23, 2013 Dr. Sartori noted that Claimant continued to suffer from severe PTSD though had parts of her days where she was less afraid. She did not stay in the house alone, day or night, she was not driving, she saw shadows of people that terrified her, she continued to experience nightmares of the trauma with the gun at her head, was easily startled, experienced helplessness and anxious states with severe depression, anxiety and mood instability.

10. Dr. Robert Kleinman performed a Division of Workers' Compensation IME on February 5, 2013. He documented review of Dr. Sartori's treatment records which included struggles with family, health and continued insomnia, exaggerated startle, hypervigilance, depression, and hopelessness, continued PTSD and major depression, and noted that Claimant would have anxiety attacks that would prevent her from working. Dr. Kleinman provided an apportioned impairment of 9% whole person.[2]

11. On April 29, 2014 ALJ Margot W. Jones issued a Summary Order granting permanent total disability benefits.

12. Respondents filed a Final Admission of Liability on June 19, 2014 noting that they were authorizing continuing maintenance care that was reasonably necessary and related to the injury by an authorized treating physician. The also admitted to Claimant's permanent total disability beginning as of her MMI date of October 15, 2012. This was based on ALJ Jones' Summary Order

13. Dr. Entin issued a report on June 20, 2022. He noted that he had first seen Claimant on April 14, 2009, about a year after her injury for purposes of determining maximum medical improvement (MMI) and assigning a permanent impairment rating. Dr. Entin noted that he had been treating Claimant for the last 13+ years to provide maintenance care. He noted that Claimant still had PTSD symptoms, was avoidant and vigilant in public, and relied on the presence of others to make her feel safe. He opined that, within a reasonable degree of medical probability that part of her need to be with others was as a result of these two robberies. He also opined that Claimant would continue to require her current medications for an indefinite period of time and would need visits with him every 4-6 months for refills. He stated she no longer required further counselling.

14. Dr. Torres issued a report on August 22, 2022. Dr. Torres took a history that Claimant was Ethiopian, divorced, had three children in their 30s and that her youngest daughter stayed with her and could not move out because Claimant could not stay by herself, and that when the last robbery happened all three children lived with her. He noted that medication usage was as follows:

> She reported using Lunesta 3 mg on a nightly basis and Lexapro 20 mg on a daily basis. When she gets more acutely depressed or anxious she takes two Lexapro. She believes that she does that about twice per month. (She acknowledges that Dr. Entin has advised against this practice.) She takes Klonopin, as needed for

[2] Dr. Kleinman noted that 5% whole person impairment was provided for PTSD resulting from the first assault of April 18, 2007.

> panic symptoms. She almost always, if not always, lakes half the Klonopin tablet when she goes out. If she goes to the mall and she sees someone wearing a hoodie "that is the worst ... or scary things, a lot of things scare me"--she takes a whole tablet.

15. Dr. Torres noted that she felt restricted with respect to independent action and intolerance of aloneness was understood as a primary concern. He noted that Claimant could not tolerate being home alone greater than two hours. If her children were unavailable, then she would rely on friends to pick her up as aloneness was plainly intolerable. She also relies on other family members, like her nephew to keep her company. She has physical limitations due to an unrelated cancer, a hip replacement that caused limited motion and she has family come clean the bathroom, twice per week, and to other activities for which they are paid as home health care aids.

16. Dr. Torres explained he administered the gold standard testing pursuant to the DSM-5 for PTSD, which required Claimant meet specific criteria in five domains, which include A) experience of an event that meets criteria as a traumatic stressor; B) intrusive ideation (e.g. intrusive thoughts, memories, and nightmares), C) avoidance of reminders of traumatic incidents (whether emotional, physical, or interpersonal), D) marked alterations in cognitions or mood (loss of memory of aspects of the traumatic event, negative beliefs or expectations about oneself and the world, diminished interest or pleasure), and E) physiological hyper-arousal (e.g. poor sleep, hypervigilance, and overly reactive startle response).

17. Dr. Torres noted that the incidents in Claimant's case clearly meet criteria as traumatic event. She has intrusive thoughts about the woman that requested to use of the bathroom as well as the man that pointed the gun at her head and the gun clicking. She frequently remembers these events either triggered by events or in her dreams, specifically the clicking of the gun and visions of the man in the hoodie that are triggered by the sight of any man in a hoodie. She reacts with increasing stress and attempts to ameliorate the symptoms by taking additional medications. The intrusive memories also generate a feeling of panic. These intrusive and unwanted recollections occur four to five times per week. Claimant has disturbing dreams associated with the trauma about three times per week and sometimes stays up for long periods and others she sleep the remainder of the night with her daughter. Dr. Torres documented that Claimant has acute reaction to reminders of the trauma which occur once or twice per week. He also noted that Claimant has a physiological response, panic attacks, when she sees someone in a hoodie, scarf or if she is startled by someone.

18. Dr. Torres documented that Claimant consciously avoids being quiet or alone for too long because she is prone to become immersed in thoughts or feelings associated with the traumatic event and she begins to cry. She also avoids going out. She engages in avoidance efforts on a daily basis.

19. She has developed a distrust of the world, with the exception of family and close friends. She frequently has bad feelings about the world and frequently ruminates about them. She engages in self-recrimination, she has persistent negative emotions like discouragement, demoralization, irritability, anger, with loss of quality of life and marked diminished interest in engaging in socializing independently or being independent. Dr. Torres opined that this loss of ability is extreme and disabling.

20. Dr. Torres noted that Claimant is frequently irritable, has an exaggerated startle reaction that occurs on a regular basis, even to an unexpected knock on the door. This occurs approximately twice a week. She has problems with concentration, hypervigilance, and sleep disturbance including nightmares, which cause her to frequently cry at night or disrupt her daughters slumber, though she had none of these problems prior to the traumatic event. Claimant has been suffering from these problems for over 13 years and she continues to suffer from them. She is no longer able to drive as it causes un-elicited panic, she does not socialize or go to movies and is unable to tolerate aloneness.

21. Finally, Dr. Torres opined that Claimant has a diagnosis of chronic PTSD and adjustment disorder with depressed mood. The findings of the interviews convincingly depicted Claimant as presently suffering from severe and disabling Posttraumatic Stress Disorder. The rigors that her family must engage in to manage her impairments, especially her intolerance of aloneness and her periods of overwhelming distress, attest to this. Further, and important to note in this context, is that by pre-injury history, Claimant was far from dependent or needy in temperament. She never had been a dependent personality. She very much enjoyed a highly independent, social, and assertive disposition. Accordingly, she presently hates and laments that she cannot engage in the routinely rewarding actions and way of life of her former (pre-injury) self. Dr. Torres opined that Claimant requires a companion for at least seven to nine hours a day and ongoing maintenance medications that may be need indefinitely.

22. Claimant's daughter, R.N., provided a statement describing her relationship with her mother on August 27, 2022. She stated that she had to accommodate her mother's increasing need caused by her fears and limitations, including in providing her assistance with shopping by driving her, providing company and verbal support by calls and video chats. She frequently would accompany her mother after work due to her fear of being alone. When she and her siblings were not available, she would take her mother to a friend's house for company throughout the day, which occurred most days. She stated that her mother was fearful of being alone. She stated Claimant was uncomfortable handling money following her trauma and must assist with her finances. She assists with handling bank matters and transactions at the stores. She stated she received a large amount of calls during the day, which were difficult to always answer because she was at work but would because her mother was always fearful and anxious. She stated that she spent approximately 20 or more hours during any week providing care to her mother with different tasks and companionship as she has a consistent need for people around her at all times due to the trauma of being robbed at gunpoint.

23. On August 28, 2022, her other daughter, I.N., noted that she had helped her mother due to her PTSD. She has had to take her to appointments, dropping her off at a friend's house, getting her out of the house, for walks at the mall of the park, taking her to doctor appointments and spending time with her when she feels anxious and nervous. She stated "[S]ince my mother battles with PTSD, I have seen it take a toll on her everyday life. She can't be alone for too long because she gets scared and is worried that something might happen." She stated that when she works, her mother is with friends or other family. I.N. stated that she spends approximately 40 to 50 hours with her mother a week. She stated that "Overall my mother's trauma is still present and affects her

everyday life. We as a family and friends try to help her with her depression and try to understand her emotions to the best of our ability."

24. F.N., Claimant's son wrote a statement on August 31, 2022. He said that he is always with his mother when his sisters, family or friends were not available. He stated that his mother asks him to stay until someone else is there. He stated that he is there to assist her and so she does not feel alone, going on walks with her, run errands and accompanies her to get out of the house. He stated that he spent between 40 to 60 hours making sure her needs are met. He stated that his mother never travelled alone and that she does not drive due to the possibility that she might experience a panic attack while driving. He stated that, as a family, they coordinated their schedules and made arrangements so that Claimant was never alone. He stated that Monday through Wednesdays are his days to take care of his mother at night from 6 p.m. to 6 a.m., when he goes to work.

25. On September 14, 2022 Dr. Torres wrote an addendum report after reviewing Claimant's children's affidavits. He noted that their descriptions of Claimant's inability to tolerate aloneness, to drive, to be out alone on her own, to be quiet and disengaged for too long or to engage in financial transactions were fully consistent with Dr. Torres' findings in the psychological evaluation as well as his belief that the Claimant's deficits are entirely caused by the work injury related PTSD. Dr. Torres opined that Claimant required unskilled essential services as her children had been devoting extraordinary time allotments that "grossly strain their work and independent lives." He specifically stated:

> Tending to [Claimant]'s needs seriously restricts her youngest daughter's ability to tend to essential developmental needs of her own life. Further, even when available to be with her and able to accommodate her need for accompaniment, [Claimant] needs specific assistance with engagement and conversation, transportation for errands, socialization, financial transactions, and company to simply be able to be outdoors.

26. Dr. Torres revised the amount of time Claimant currently requires a companion or unskilled essential services to ten to twelve hours a day for an indefinite amount of time. Dr. Torres further stated that while age is not a factor as Claimant is unlikely to change, he stated that without the needed essential services Claimant's daughter is "on route to deeply sacrificing her own personal development" as well as her two other children to a lesser degree. He stated that as they continue to tend to their personal lives, relationships, vocations and families, Claimant will require the provision of more essential services.

27. On October 26, 2022 Dr. Entin authored a report stating his agreement that Claimant needs essential services in order to unburden her children but that they would still be responsible for the other 12 hours, which is not sustainable or reasonable in the long term. He stated that given Claimant's ongoing needs he opined that "she would be much better served moving into an Independent Living Facility where she could have daily meals prepared and people available and around her 24 hours a day." Dr. Entin also opined that "were it not for these robberies, and the development of her current emotional state and behaviors, it is unlikely she would have needed this level of care and intervention that she currently claims she needs."

28. Claimant was evaluated by Dr. Timothy Shea, a clinical psychologist and neuropsychologist on January 17, 2023 and produced an independent medical evaluation (IME) at Respondents' request dated January 30, 2023. He reviewed the medical records listed in his report, summarizing what he thought pertinent to his evaluation. He summarized Claimant's background, educational history, work history, family history, current home life, activities of daily living (ADLs), acculturation, social environment, substance use as well as medical history, sleep, treatments, psychiatric functioning, and stated that Claimant's appropriate diagnosis was post-traumatic stress disorder (PTSD). He noted that the two incidents of robbery that occurred in 2007 and 2008 negatively impacted Claimant. However, he did not recommend attendant care services in the form of a companion as Claimant needed to become less dependent. He recommended Claimant be more active, less isolationist and dependent on her children. That companionship was a preference and not a necessity, and not clinically indicated.

29. On February 10, 2023 Dr. Torres issued a letter noting that Claimant's current condition cannot be apportioned and are solely the result cause by the robbery events though other factors have been identified, they are still as a consequence of these events on Claimant. He also noted that Claimant and her family should seriously consider the Independent Living Facility option.

30. Claimant credibly testified she never had problems going out on her own, going to medical appointments, going to work, shopping or doing other activities of daily living prior to the assaults. Neither was she afraid of people, nor did she require having someone with her at all times.

31. Since the March 8, 2008 traumatic event she has problems being alone. Her daughter, who is about 31 years of age, lives with her. Claimant frequently gets panic attacks when she is alone, as well as anxiety. She cannot live by herself. When she is left by herself, she has anxiety at the highest level, especially if someone knocks on the door, or if someone refers to guns, when she hears sirens, or if she simply hears any violent words or noises.

32. Claimant also suffers from depression especially if she is alone in the house, and sometimes just being alone in her bedroom. She suffers from panic attacks when she is alone in the house, when she sees somebody with a hoodies, from violent things that she hears on the television, like the news, or if she hears someone was robbed, which are the worst things. People with hoodies or scarves remind her of the robbers when she was attacked.

33. When Claimant is alone she gets panic attacks, becomes depressed, will cry, be very sad and she will frequently stay in bed. However, she does her best to never be alone. When she is alone, maybe for two or three hours, but only during the day, she will become depressed, cry and get panic attacks. She will constantly call her kids or friends during the time when she is alone because of the panic attacks or her kids will call her to make sure she is okay. She never feels safe when she is alone. She is never alone during the night. When there is no one to be with her, she will go to a friend's house so that she is not alone at night.

34. Even when she goes out in public she is never alone. Since her traumatic event she has tried going out alone but is unable to do it because she becomes very

scared and panicky. She needs someone to stay with her every day during the day. If her daughter cannot be there during the night, then she simply goes to a friend's house. When another person is with her, her anxiety, fear, panic attacks and depression seem to be less controlled. Every Friday night, she will normally go to a friend's house because her children want to go out, and afterwards they pick her up.

35. A long time ago Claimant attempted to travel to California alone, and she became panicky, scared and uncomfortable. She has also travelled back home to Africa. She travelled once with two of her daughters for one of her daughter's wedding. She stayed for about a month or a little longer. She flew from Denver, to Chicago and then to Djibouti, West Africa. She did not go out after the wedding. The wedding was mostly family, though there were some people on the groom's side that she did not know. Otherwise, she stayed at her mother-in-law's house. The other time she travelled to Africa she travelled to Ethiopia for her uncle's funeral. She travelled with her friend and stayed there for about two and one half to three months. She stayed there so long because she was sick, she needed family, and she was very depressed. She stated that she would have been unable to attend the events if she had not travelled with someone she trusted. When she was there, a family member or a friend she trusted was with her at all times. She only recalled going out when she was accompanied by her cousins.

36. Claimant stated that Dr. Howard Entin was her provider to treat her for her ongoing conditions and he is the one who prescribes her all of the medication. She takes her medications regularly, every day as he prescribes them. She is willing to follow the recommendations that Dr. Entin made, for the short term for someone to stay with her, and in the long run to go into an assisted living situation.

37. Claimant admitted that she walked with a cane due to cancer of her leg, which caused her to have a hip replacement and surgery on part of her thigh.

38. Her children do help her with some chores around the house, such as cleaning, cooking and laundry. They do not help her with feeding, dressing or with her self-care like bathroom, bathing/showering. For the most part, her children are there to keep her company and to go out with her when needed.

39. Claimant's daughter, R.N., also testified at hearing. She is a case manager for a health care center. She identified Exhibit 9 as a true and correct statement she made in August 2022. She testified that she supported her mother with companionship either in person or by phone. While she does not live with her mother, she only lives 5 minutes away. She generally has to devote at least 20 hours or more a week typically, especially if her siblings are not available. If it were not for Claimant's current status, she would not be likely to spend as much time with her. She does it because her mother gets scared of being alone and she does not wish her mother to have so many panic attacks. When she and her siblings are not available, she relies on her friends to stay with her or they will pick her up. She stated that her mother has a good community of friends. She stated that otherwise, there are a lot of phone calls and they support her mother that way. She often drives her to her friends, especially if she and her siblings have things to do, they will drop her mom off at friends and pick her up when they are done. She stated that her mother no longer drives.

40. Ms. R.N. stated that her mother is scared all the time. Chores that seem mundane to her and her siblings, her mother can just not do, for example, going to collect the mail. She cannot do it by herself because she gets too scared. She stated Claimant does not go anywhere by herself, not even the grocery store. She is always accompanied by someone. She stated that at night she gets very, very scared and that it was not possible to leave her on her own. She noticed that, so long as her mother is with someone, she is less fearful, less depressed, less anxious and overall calmer. Ms. R.N. stated that she prefers that her mother never be alone because her mother is better when accompanied. However, when they have no choice but to leave her alone, she is constantly calling one of them, Claimant's children, or finding a friend.

41. Claimant's daughter, R.N., stated that she and her siblings do their best to always have a schedule that prevents her mother from being alone, always covering for each other. She and her siblings have been managing this kind of schedule for approximately thirteen years.

42. Claimant's other daughter, Y.N., also testified at hearing. She is a banker. She is 31 years old. She lives with her mother and has done so her whole life but it became crucial since her traumatic event happened. She helps her mother cope with her PTSD symptoms by talking to her when she gets anxious or nervous, takes her on outings to distract her, or keeps her company while watching TV or a movie. Sometimes Claimant gets so stuck in her head that the distractions are needed. She works varied days, though mostly weekdays, but when she is not working, she keeps her mother company. She makes arrangements for her cousins or friends to stay with her mother when she is working and her siblings are not available. Ms. Y.N. stated that her mother needed the help most during the nighttime, after the sun starts setting, as her anxiety starts going up then, and she sees a shift in her mother's mood. It doesn't happen daily but it is the majority of the time.

43. Ms. Y.N. stated that, if it had not been for the fact that Claimant has PTSD, she would likely not live with her mother at this stage in her life, since she really needs her own space. She only lives with her because her mother needs her help. She is with her mother over 40 hours a week, not counting when she is sleeping. Sometimes they are getting ready to go somewhere, then her mother will all of a sudden become more depressed, she will not go out and will go to bed and lie down all day long. When she is in a better mood, she will joke around, laughing, especially if Y.N. is with her, Claimant is able to relax and express herself, be more herself. On the other hand, sometimes when Y.N. is with Claimant and Claimant hears some noise outside, she becomes very fearful and "freaks out." But most of the time Y.N. is with Claimant, she seems to keep calm, less anxious, panicky and fearful. She specifically stated as follows:

> Q. I know this is just for the record: Why does she live with you? Or why do you live with her?
>
> A. Because my mom needs someone. She is dependent on us. Like she can't do things for herself. Like she is the not the same. Like she used to be able to drive before all of this happened. She used to like (sic.) take care of herself. But she can't do any of that anymore. She gets too freaked out. ...

44. Claimant's son, Mr. F.N., also testified. He was 34 years old at the time of the hearing and was working in construction. He also provides help and support for his mother as it relates to her PTSD, taking her places she needs to go, any chores she needs help with, and overall to keep her company when no one else is available. The times are variable but some weeks it is 40 to 60 hours a week, sometimes less. He will typically take over on the weekends because he works during the week. The siblings make a schedule to make sure that Claimant has someone available, including friends and cousins. They are continuously in communication about who is available and can keep her company. This has been the case for over ten years. If they have to drop her off at someone's house, then they schedule who is to pick her up, including himself. Sometimes he does grocery shopping with Claimant and sometimes Claimant will give him a list for him to pick up groceries for her. It is pretty typical that Mr. F.N. is with his mother most weekends, taking his mother to run errands.

45. Mr. F.N. stated that the PTSD has taken a toll on his mother's life, because she easily gets stressed, especially when she is not directly with someone else. It prevents her from having an independent life, as she is constantly needing somebody around that she can trust. Mr. F.N. believed that being present with his mother helped her with her symptoms, to calm down and be happy and less focused on her depression. She has less panic attacks, less stress, less depression. In fact, if she has people she trusts around and keeping her busy, she rarely has a full blown panic attack.

46. Dr. Walter J. Torres testified at hearing as Claimant's witness. Dr. Torres has a Ph.D. in clinical psychology and in forensic psychology, and has been treating patients since 1980. He was treating post-traumatic stress disorder (PTSD) since before the condition was recognized as such in the later 1980s, which was around the time it was written into the DSM III. Claimant was first referred to Dr. Torres in August 2009 and he diagnosed Claimant with PTSD. He also issued a report in August 2022 after having evaluated her, and after having reviewed Dr. Entin's notes as well as the statements of Claimant's children. Dr. Torres' current diagnosis is posttraumatic stress disorder, chronic, and adjustment disorder with depressed mood. He diagnosed PTSD after administering a clinician administered PTSD scale for DSM-V which is the gold standard for the assessment of PTSD. This was based on her re-experiencing that was severe, avoidance, negative changes in feelings and in cognition, beliefs regarding the world, high arousal in various forms, increase startle, increase re-activity to stimuli associated with the trauma, and nightmares.

47. Dr. Torres stated that he generally agreed with Dr. Entin's letter dated June 20, 2022, wherein he stated that Claimant continued to be anxious, especially when in public, that she did not like to be alone and was usually accompanied by family or friends. Dr. Torres stated that the word "like" suggested a preference. In Claimant's case, it is a "need" to not be alone, a profound intolerance of being alone. One of the key factors of PTSD is re-experiencing, and Claimant's re-experiencing comes with terror. And when she is with someone she trusts, she does not re-experience the terror, which is consistent with the testimony of Claimant and her family, that Claimant is experiencing less fear, has less anxiety and depression when not alone. One of the triggers of Claimant's re-experience is that she was alone when the trauma occurred. So removing that trigger

takes away the terror to a certain degree. The presence of the other trusted person, takes her out of the sphere of the trauma and away from the terror of the re-experience.

48. When questioned about the source of the need for the recommendation for companion care services, Dr. Torres stated that the driver for the referral and need for companion care services was the work-related PTSD, which was the only source because the work-related injury was the source of her intolerance of aloneness. Dr. Torres recommended that Claimant be provided company, because companionship relieved her of her aloneness, as being alone triggers her increased symptoms of PTSD, specifically terror in the re-experiencing. Further, Claimant's children's statements supported his initial assessment that Claimant was experiencing an intolerance of aloneness and the recommendation that Claimant requires companion care. He specifically noted that she required companion care for 10-12 hours as he did not think it was feasible to have another person during the night. But during the night she experiences nightmares and she frequently migrates to her daughter's bed to the extent that they had been discussing getting another bed for the daughter's bedroom. In the alternative, he would recommend 24 hour companion care. Dr. Torres concurred with Dr. Entin that Claimant continued to require maintenance care visit and medication refills.

49. Dr. Torres also reviewed Dr. Entin's recommendation for a 24 hour facility, where there would be staff attending to Claimant either during the day or during the night. As Dr. Torres explained, Claimant's current schedule of companion care being provided by her children is not sustainable. He stated that Claimant's children will develop lives of their own and it is unlikely that Claimant will be able to continue to sleep with her daughter if her daughter moves on with her life. Dr. Torres agreed that the 24 hour care was the answer to Claimant's long term needs, which he stated was reasonably necessary care that is solely related to the occupational trauma.

50. Dr. Torres opined that the companionship provided by her children has continued to prevent her deterioration and maintained her at MMI, as would the recommended 24 hour facility that both he and Dr. Entin are recommending for the long term, which would keep claimant from worsening. Dr. Torres explained that if Claimant is not provided with the reasonably necessary attendant care or company, she will continue to experience terror, decompensate, become disorganized and overwhelmed, all of which are stressful emotionally and physically.

51. Claimant is also not able to drive herself, because she will develop panic when driving, which was evident in the record since at least 2012 or 2013 when she was under Dr. Sartori's care. Dr. Sartori gave a very good description of her condition, her needs, and the attempt that Dr. Sartori made to activate her and to get her desensitized to some circumstances. At that time, they had Claimant attempt to drive but the resulting circumstances were untenable because Claimant would develop panic and then swerve in reaction to something that she would perceive as overwhelmingly dangerous, so she was not a safe driver after the second trauma. She needs someone driving her to where she needs to go as she cannot drive herself.

52. Dr. Torres also reviewed Dr. Timothy Shea's report, which endorses the diagnosis of PTSD but stated that essential services were not necessary by way of criticizing Dr. Torres' recommendations. But Dr. Torres never made a recommendation

for someone to clean, cook and bathe Claimant, but to provide companionship and take her to perform her chores and attend medical appointments because those are all things that the traumatic effect of the attach caused her to need, in order to fight the aloneness and panic attacks, and only due to the effects of the psychological work related condition and not for her physical needs caused by any physical disability.

53. While Claimant is behaviorally limiting herself, she has no other options. The core symptom of PTSD is avoidance and when a person chooses to avoid something they are making a choice not to participate in a domain. Dr. Torres explained though, that Claimant's choices were taken away from her by the PTSD causing trauma, which caused her unavoidable dread and fear therefore causing the unavoidable limiting behavior. Dr. Torres stated that he disagreed with Dr. Shea's opinion and rationale that Claimant does not need companion attendant care services.

54. Dr. Torres explained that it was just not feasible to provide Claimant with care that would make her less avoidant as no one has identified that kind of care or that the condition would not be responsive to any such care. He explained that the intolerance of aloneness and avoidance behavior has existed since Claimant's traumatic event. These symptoms were not generated by an overly solicitous family but by the trauma itself. Dr. Torres explained that Dr. Sartori and the prior psychologist tried to establish some limits. But at the time, the family was very young and the adolescent children could not manage their mother. Dr. Sartori tried but it just did not work as the anxiety became too high, her terror was too high and her avoidance was very strong. He further stated that the children are not professional therapists and have done their best for their mother. And none of her providers prescribed a therapist to work with them to try to deal with the situation and extend the hours she could tolerate alone.

55. Considering that Claimant has suffered with these symptoms for over 13 years, Dr. Torres opined that it was very likely that she would continue to suffer with the symptoms for the rest of her life. He stated that as far back as 2009 the profile suggested that her condition would likely be chronic. This is also supported by Dr. Entin's opinion that Claimant would continue to need care indefinitely. Dr. Torres opined that the kind of attendant care services that he was recommending need not be provided by skilled professionals as the record demonstrated that none of Claimant's children were skilled in nursing but that they have been providing the services, nonetheless.

56. Dr. Torres noted that he only initially recommended up to 12 hours of companion care because Claimant does have family. However, had she not had family, she would require 24 hour attendant care because she is not safe on her own. It is but for the significant sacrifice of her family that she has been able to handle her PTSD.

57. Dr. Torres explained that prior to the traumatic event, Claimant was a highly functioning independent, vital and assertive woman, who took care of her family and frequently took on two jobs. The proof being that Claimant was working a night job at a gas station when she was attacked and threatened with a gun. That kind of job demonstrated that she was independent and tolerant of aloneness prior to her injury.

58. He also discussed what may or may not be available in the market in terms of 24 hour companion care, discussing that he was not aware of 24 hour at home attendant care but was aware that there was independent care living facility available for

her. Despite what may or not be available or feasible, what he did absolutely know is that she requires access to company, whether at home or an independent living facility.

59. Dr. Timothy P. Shea testified at the second hearing on May 5, 2023. He is an expert in clinical psychology and a practicing neuropsychologist for the last 10 years. Dr. Shea issued a report on January 30, 2023. Dr. Shea agreed with the diagnosis of chronic PTSD as diagnosed by Claimant's medical team. He disagreed that Claimant required an assisted living facility because Claimant does not require any help with her activities of daily living (ADLs) as a result of the work related claim, and if she did need ADLs assistance, it is not due to the PTSD. The company Claimant requires does not need special training or medical experience. He explained that Claimant has required company since the initial trauma but definitely the second trauma and well over 15 years.

60. He explained that the

> …core belief of someone who has PTSD is that the world is an unsafe place. And so because of that it is very common for them to then isolate at home and not go out. And so the challenge is kind of the longer this goes on it becomes more reinforcing because they don't have stimuli to then challenge that held belief. So if they only stay inside they are going to reinforce the believe that the world is an unsafe place which can then increase symptom response and cause greater distress because there isn't any other information to challenge to say, oh, maybe the world isn't so unsafe. And that is a core part of the treatment in counseling and therapy for PTSD is that in vivo exposure. Is that going out into the community and having experiences and challenging kind of the disordered thought that occur because of the trauma.

61. The symptoms of chronic PTSD include panicking when reminded of the trauma, panic attacks, anxiety, being easily upset or angered, being short with emotion, disturbed sleep or lack of sleep, irritability or aggressive behavior, jumpy or easily startled, vivid flashbacks, nightmares, self-isolation, depression, emotional avoidance or scary situations, and insomnia. Dr. Shea agreed that Claimant has had and continues to have each one of these conditions either as evaluated by Dr. Shea or reported to him. Further, he stated that being alone does or can exacerbate her PTSD symptoms. He also stated that the majority of these problems are either relieved or helped with not being alone but cause increased symptoms by being alone.

62. Dr. Shea noted that Claimant has practiced and reinforced behavior avoidance for the last 15 years since the last trauma of March 8, 2008. He stated that talk therapy was recommended and that more aggressive types of treatment were recommended. Part of her avoidance is actually avoiding being alone or going outside without someone present, which is an aspect of her PTSD. Part of that is also Claimant's thoughts and beliefs that the world is a dangerous place, which is one of the main reasons being alone is so hard for her.

63. Dr. Shea opined that due to unresolved symptoms of anxiety that continue to be present in her day-to-day life, it makes sense that her preference is to be around her family. He stated that she currently needed assistance to drive places, including to shops, medical appointments, grocery stores and to friend's houses.

64. Dr. Shea recommended another try at therapy to treat Claimant's PTSD and differed from Dr. Entin's opinion that Claimant had chronic untreatable PTSD. He further continued to opine that having a companion for Claimant was not clinically indicated despite Claimant's symptoms. He felt that Claimant having a companion would reinforce her belief that the world is not safe and therapy would give Claimant an opportunity for improvement. By not treating the PTSD there was risk of things getting worse with untreated stressors and also reinforcing believes because she would not be able to challenge them sufficiently.

65. Dr. Shea also agreed that Claimant continued to have all the symptoms of PTSD and that a companion would relieve her symptoms of PTSD including panic attacks, anxiety, being jumpy and easily startled, nightmares, depression and emotional avoidance, and possibly her disturbed sleep, vivid flashbacks, and insomnia.

66. This ALJ reviewed the video surveillance submitted as part of the Exhibit packet for Claimant. They revealed a person that was busy going places, but considering that there were less than an hour and a half of video and over one hundred sixteen hours of surveillance, this is not particularly indicative of a busy person. However, nothing on the video indicates violation of her work restrictions or contrary to testimony or other statements. They also reveal that Claimant has almost constant company from someone. It was clear that individuals visiting Claimant's home called by phone before knocking on the door, which was also consistent with testimony at hearing. Lastly, medical records indicated that surveillance taken prior to MMI where one person which was originally identified as Claimant turned out not to be Claimant. This also indicated that there was more than the surveillance documented at this hearing.

67. As found, Claimant clearly continues with significant symptoms of PTSD, anxiety, startle response, panic attacks, disturbed sleep and nightmares, self-isolation, which providers tried to treat without success for many years, emotional and situational avoidance and depression. Dr. Torres was persuasive in his testimony that Claimant is unable to be left alone for long periods of time and requires a companion in order for her PTSD not to be exacerbated or aggravated, including increasing the symptoms as mentioned above. Dr. Torres and Entin's opinions are more credible over the contrary opinion of Dr. Shea. Claimant's children served in this role while they were younger an able to do so but are now adults and can no longer act in that role without significant sacrifices. Claimant's children's testimony were credible in this matter as well as in the fact that Claimant cannot be left alone for significant periods of time without significant exacerbation of her symptoms.

68. Claimant has proven by a preponderance of the evidence that she is entitled to attendant care services as recommended by Dr. Torres for companion care in order for Claimant's PTSD symptoms to be controlled and kept at MMI. Claimant is entitled to up to 12 hours of companion services to be provided by Respondents either through medical providers, the community or through Claimant's family and friends, if available.

69. While both Dr. Torres and Dr. Entin indicated that the long term goal may be a 24 hour care facility, it is premature to address this at this time, while Claimant continues to live with a family member who would be able to attend to Claimant during nighttime hours.

70. Testimony and evidence inconsistent with the above findings is not relevant, credible and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

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

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

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

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

B. Authorized Medical Benefits

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *In re Claim of Foust*, I.C.A.O, WC, 5-113-596 (COWC October 21, 2020).

Therefore, in a dispute over medical benefits that arises after the filing of an admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the work injury and the need for medical treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A panel of the ICAO also addressed these issues in *Maestas v. O'Reilly Auto Parts*, ICAO, W.C. No. 4-856-563-01 (August. 31, 2012). The panel stated:

> [The *Snyder*] principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury.

As found, Claimant has proven that it is more probable than not the attendant care services of a companion as recommended by Dr. Torres is reasonably necessary and causally related medical treatment to prevent further exacerbations and flare up from Claimant's continuing chronic severe PTSD. This care is clearly part of her maintenance treatment in order to maintain maximum medical improvement and prevent flare-ups or aggravation of her PTSD.

Respondents' rely on medical opinions from a decade ago and Dr. Shea to support a denial of attendant care companion services. These opinions are not persuasive in this matter. The medical records show a significant effort to desensitize Claimant to the traumatic events for approximately five years without success, and Claimant continues to have significant symptoms of anxiety, distress and re-trauma when hearing noises, hearing news of violence and being in public, seeing shadows, individuals with hoodies and the like. Claimant continues to have nightmares that continue to affect and disrupt both Claimant and the daughter that lives with her. Claimant's children and friends have continued to have to provide Claimant with companion care to prevent panic attacks and increased anxiety.

Respondents cite to *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995), for the proposition that the Court of Appeals put weight on the severity of the Claimant's injuries and the extent the injuries limited the scope of the Claimant's ability to undertake ADLs. However, Claimant is not requesting attendant care to address non-work related ADLs. In this case, Claimant has significant PTSD which has caused her to be permanently and totally disabled. The treatment recommended by Dr. Torres is to treat her symptoms causally related to the trauma and her subsequent PTSD. Based on the totality of the evidence, Claimant has met her burden to prove that companion care services up to 12 hours a day as recommended by Dr. Torres is reasonable, necessary and causally related to the medical treatment needed to continue maintaining Claimant's ongoing and present PTSD, fifteen years after the work related injury in this permanently and totally disabled Claimant.

Claimant has failed to show that a 24 hour in patient facility is reasonably necessary at this time as Claimant continues to live with her daughter, though may become necessary when that living arrangement terminates.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall authorize and pay for attendant care services up to 12 hours a day as recommended by Dr. Torres and Dr. Entin to provide Claimant appropriate reasonably necessary maintenance treatment in the form of companionship for her work related PTSD.

2. Claimant's request for 24 hour care is denied and dismissed at this time as premature.

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

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

DATED this 20th day of June, 2023.

Digital Signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-214-953-001

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on July 18, 2022.

2. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for her termination from employment on October 27, 2022 under §§8-42-105(4) & 8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving Temporary Total Disability (TTD) benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a Cashier. She testified that on July 18, 2022 she was carrying heavy boxes of water and juice while performing stocking duties for Employer. Claimant remarked that, while carrying a box, she felt a crack/pop in her back and could not move. She then called her husband and he finished carrying the boxes. Claimant subsequently completed her work shift.

2. Because of her back pain, Claimant visited Denver Health Urgent Care on July 18, 2022. Claimant reported right lower back pain and urinary symptoms. The medical note states that "yesterday tweaked her back lifting juice boxes at work and now has pain in her right low back." The medical record also reflects that Claimant had dysuria with mild suprapubic pain. Claimant was able to walk with pain, but there was no radiation down her legs. After a physical examination and a urinalysis, Claimant was diagnosed with a back strain as well as acute cystitis without hematuria.

3. Claimant did not report her July 18, 2022 injury to Respondents until July 29, 2022. On July 29, 2022 Claimant visited Kathy Okamatsu, FNP at Authorized Treating Provider (ATP) Concentra Medical Centers. The report noted Claimant had a Worker's Compensation injury on July 18, 2022 with "right lower back pain radiating to right posterior thigh after lifting at work." NP Okamatsu recounted that Claimant's job duties involved stocking cases of water, juice, and soda. Each case weighed approximately 50 pounds. The report specified that "[u]pon completion, [Claimant] started having vaginal pain, pain with urination, and muscular pain in the right lower back with radiation to the mid posterior aspect of the right thigh." NP Okamatsu assessed Claimant with a lumbar strain, provided medications, referred Claimant to physical therapy and assigned temporary work restrictions. She concluded that her objective findings were consistent with a work-related mechanism of injury. However, NP Okamatsu noted that "treatment of vaginal pain and urinary tract infection" was not work related.

4. On August 2, 2022 Claimant underwent an MRI of her lumbar spine at Denver Health. The MRI revealed L4-5 "moderate right and severe left foraminal

narrowing with flattening of the exiting left L4 nerve at L4-5 due to central disc bulge, facet arthropathy, and thickening of the ligamentum flavum." At L5-S1 Claimant had a paracentral disc extrusion with "7 mm inferior migration compressing the left S1 nerve root."

5. On August 12, 2022 Claimant visited Cynthia Rubio, M.D. at Concentra. Claimant reported continued lower back pain as a result of lifting heavy cases of water, juice and soda on July 18, 2022. Dr. Rubio diagnosed Claimant with a lumbar strain and probable herniated disc. She continued Claimant's work restrictions. Dr. Rubio concluded that her objective findings were consistent with a work-related mechanism of injury.

6. On September 8, 2022 Claimant visited Robert Kawasaki, M.D. at Concentra. Claimant reported that, while lifting heavy boxes at work, she felt something ripping in her back. Claimant developed a sharp, burning sensation in her lower back and down her right leg. She initially visited Denver Health and was diagnosed with a urinary tract infection and a lumbar strain. Dr. Kawasaki reviewed the August 2, 2022 lumbar MRI and noted it revealed an L5-S1 disc extrusion with compression of the left S1 nerve root. However, he commented that Claimant's symptoms were on the right side. Nevertheless, Dr. Kawasaki summarized that Claimant had an extrusion that had broken off from the disc. He remarked that there could have been migration of the disc that was compressing the right S1 nerve root and thus would account for Claimant's symptoms. After conducting a physical examination, Dr. Kawasaki diagnosed Claimant with the following: (1) severe lower back complaints with right leg radicular symptoms in an S1 distribution; (2) adjustment disorder with significant pain responses; and (3) "poor coping ability for her pain with very dramatic presentation."

7. Later on September 8, 2022 Claimant returned to Concentra for a follow-up visit with Rebecca Blatt, M.D. After conducting a physical examination and reviewing Claimant's medical records, Dr. Blatt determined the Claimant was able to return to modified duty with temporary restrictions of no lifting, repetitive lifting and carrying not to exceed 10 pounds, and remaining seated for 75% of the time or 45 minutes each hour. She also remarked that Claimant was prohibited from bending, twisting, squatting and climbing and might "need to be off work from 9/8/22 to 9/10/22 to get used to new medications." Dr. Blatt concluded that her objective findings were consistent with a work-related mechanism of injury.

8. On October 13, 2022 Claimant returned to Concentra and visited Stephen Danahey, M.D. Claimant reported that her lower back pain worsened and she wanted to be taken off work. She specified that she was experiencing symptoms in the left lower back that radiated down the left leg. There was also pain in the right gluteal area. Dr. Danahey noted that Claimant had undergone a second MRI on October 6, 2022 that revealed a left paracentral disc herniation with caudal extrusion at L5-S1, impingement of the S1 nerve and moderate spinal stenosis. The MRI also reflected exaggerated left foraminal impingement at L4-5 and multilevel degenerative changes. Dr. Danahey concluded that his objective findings were consistent with a work-related mechanism of injury. He also continued Claimant's work restrictions and remarked "no work with assistant manager."

9. On October 19, 2022 Claimant visited Jesus Sanchez, PhD for a psychological assessment. Claimant reported that medication was ineffective in dealing with the pain, and she did not identify any effective coping strategies to manage her symptoms. She commented that she continued to work 32 hours per week, in 8-hour shifts, four days per week. Claimant remarked that her work restrictions were not respected and being off work was necessary for improvement. Dr. Sanchez determined Claimant's presentation was "remarkable for expressive distress related to pain, fear of re-injury while at work and feeling unfairly treated there, limited coping skills to manage pain, catastrophic thoughts of the future, and feelings of loss of value and diminished self-concept…." He diagnosed Claimant with adjustment disorder including anxiety and depressed mood.

10. On October 25, 2022 Claimant underwent an examination with Michael J. Rauzzino, M.D. based on a referral from Dr. Danahey. After reviewing Claimant's medical records, Dr. Rauzzino remarked that Claimant initially reported right lower back and right leg pain after lifting heavy boxes at work. However, after an MRI revealed a large, left-sided disc herniation, her symptoms changed more toward her left leg. Nevertheless, Dr. Rauzzino determined Claimant's symptoms were consistent with her mechanism of injury. He remarked that there was a strong emotional overlay in Claimant's presentation and she exhibited significant pain behaviors. Noting Claimant's large left-sided disc herniation, Dr. Rauzzino explained she could benefit from a minimally invasive L5-S1 discectomy. However, he was concerned about Claimant's prognosis and recovery based on psychological factors. Dr. Rauzzino stated that he first wanted to consult with Dr. Sanchez to determine if Claimant would be a good surgical candidate. In an addendum he noted that he discussed the matter with Dr. Sanchez who noted concerns about her surgical candidacy.

11. On October 27, 2022 Employer terminated Claimant's employment. Specifically, Human Resources Generalist [Redacted, hereinafter LF] sent a letter to Claimant appraising her that she had been absent from work from October 23-25, 2022. He explained that, based on Employer's attendance policy, "missing two consecutive shifts on 10/23/2022, 10/24/2022 without notifying your manager is considered job abandonment. Due to your absence not being approved and not receiving any communication from you, we have determined that you have abandoned your position." LF[Redacted] noted that Claimant's termination was effective immediately.

12. The record reveals that Claimant has received escalating disciplinary violations during her employment. In step two of the process, Claimant obtained a written warning for dishonesty. Specifically, on October 18, 2022 Employer became aware of Claimant's allegations that Assistant Manager [Redacted, hereinafter DB] had struck her on the buttocks during her work shift on September 29, 2022. Employer commenced an investigation on the same day after Human Resources Generalist [Redacted, hereinafter AJ] received a doctor's note from Claimant stating that her injury had worsened due to unwanted physical touch. Claimant specified that, on September 29, 2022 between 2-3 pm MST, she was assisting a customer near the cash register when DB[Redacted] struck her on the buttocks. As part of the investigation, Employer obtained statements from other employees who were working during the shift including [Redacted, hereinafter LF],

[Redacted, hereinafter RM], [Redacted, hereinafter RG] and DB[Redacted]. Employer also reviewed store surveillance video from September 29, 2022. Although Claimant was visible in the video, the reported incident did not occur. The other employees stated that Claimant did not appear to be in any pain and left as she normally would at the end of the shift. The investigation concluded that there was no evidence of any unwanted physical touching. Employer thus determined Claimant was dishonest regarding the allegations. Based on the Employee Handbook that Claimant signed on April 19, 2022, Employer explained "this is a 'serious' offense 2. Dishonesty, intentional cash irregularities, and intentional miss-marking of merchandise may result in immediate dismissal."

13. In an e-mail dated October 19, 2022 LF[Redacted] and AJ[Redacted] contacted Claimant regarding the results of the investigation. LF[Redacted] and AJ[Redacted] explained to Claimant that they had reviewed video surveillance footage and verified that she was being dishonest in her report. The correspondence noted that AJ[Redacted] would be immediately returning to work. They emphasized that the dishonesty displayed by Claimant would not be tolerated by Employer and further infractions would lead to additional disciplinary action up to termination. LF[Redacted] explained that Claimant would physically receive the final written counseling from her District Manager on her return to work. Claimant responded that she would refuse to sign the document and "it is all a lie."

14. Employer also provided specific documentation in the form of a step four violation that recounted the reasons for Claimant's termination. The report detailed that on October 14, 2022 Claimant was contacted regarding her availability for the following week. Claimant reported additional back pain but failed to provide a medical report excusing her from work. On October 19, 2022 Employer contacted Claimant regarding an investigation for violating her medical restriction that she could not stand for over 20 minutes. Employer instructed Claimant to follow her medical recommendations and noted that a chair would be added to her workstation regardless of her shift. Finally, effective immediately Claimant would be added to the store schedule along with DB[Redacted]. On October 22, 2022 Claimant was informed through a group chat by her store manager about the upcoming weekly schedule. However, she failed to acknowledge the message and did not report to work on October 23-25, 2022. Claimant's absences constituted no call/no shows in violation of Employer's attendance policy that Claimant had acknowledged receiving on April 19, 2022. Notably, the attendance policy provided that upon receiving two no-call absences in a 12-month rolling period, the employee would be terminated.

15. AJ[Redacted] testified Employer's attendance policy provides that, if an employee is unable to work a scheduled shift, she must notify a manager as soon as possible. If an employee fails to show up for a scheduled shift and does not call, the employee will receive an automatic one-day suspension. If an employee fails to show up to work for a scheduled shift twice in a rolling 12-month period, the employee will be terminated. The record reflects that Claimant was aware of Employer's attendance policy as specified in the handbook. She acknowledged receipt of the handbook and attendance policy on April 19, 2022 and electronically signed off on the policies. Finally, Claimant

admitted at the hearing that she knew she could be fired if she did not show up for a scheduled work shift.

16. The record reveals that the work schedule for the week of October 23, 2022 was sent to employees and posted at Claimant's store on the Friday before October 21, 2022. The schedule was also sent by group chat on October 22, 2022. The preceding were the two customary methods for transmitting the work schedule to employees. Claimant was on the schedule and expected to work on October 23, 24 and 25, 2022. However, Claimant did not show up for her scheduled shifts or contact her manager. As evidenced by a series of angry text messages in the record, Claimant was aware that her employment had been terminated for failing to show up for scheduled work shifts.

17. On December 12, 2022 Claimant underwent an independent medical examination with J. Taschof Bernton, M.D. Dr. Bernton administered a Battery for Health Improvement 2 psychological test. After performing an extensive record review and physical examination, Dr. Bernton determined that the symptoms Claimant reported to medical providers on July 18, 2022 did not correlate with the MRI findings of Claimant's lumbar spine. However, he concluded that, based on all of the available information, it was probable that Claimant suffered a lumbar strain while carrying boxes on July 18, 2022. Dr. Bernton specified that "I would regard [Claimant's] condition as work related based on her acute presentation to the emergency room." Nevertheless, Claimant's urinary tract infection was not related to any work activities. Dr. Bernton concluded that Claimant was not a surgical candidate but a psychological evaluation to determine surgical candidacy was appropriate.

18. On April 22, 2023 Claimant visited Timothy Shea, PsyD for a psychological evaluation. Dr. Shea remarked that Claimant made it very clear her employment was a primary source of stress and she had problems with numerous people at work. She reported "the lies" from Employer were very frustrating. Dr. Shea reasoned that Claimant's hyper-focus on her job and associated stressors were clearly impacting her perception of actual events. After administering numerous psychological tests during the evaluation, Dr. Shea determined there was a clear disconnect between Claimant's behaviors, reports of pain and emotions. He explained that Claimant's much higher than expected pain reports were likely caused by expressing stressors, depression, and anxiety through increased pain experiences. Dr. Shea noted some concern for exaggeration of pain and likely misattribution of symptoms. He concluded "[t]here is bountiful evidence that there are multiple non-organic factors that may be further exacerbating her reported pain experience over what would be expected based upon the reviewed documentation." Dr. Shea agreed with Dr. Sanchez that a diagnosis of adjustment disorder with anxiety and depressed mood was appropriate.

19. Dr. Bernton testified at the hearing in this matter. He considered the information he had available at the time of his examination as well as the subsequent psychological evaluations of Drs. Sanchez and Shea. Dr. Bernton emphasized his opinion had solidified regarding Claimant's condition at her July 18, 2022 medical visit to Denver Health Urgent Care. He concluded that Claimant had presented with only a non-work-related urinary tract infection.

20. Claimant has demonstrated that it is more probably true than not that she suffered compensable injuries during the course and scope of her employment with Employer. Initially, Claimant has maintained that she experienced lower back pain after carrying heavy boxes of juice and water at work on July 18, 2022. She visited Denver Health Urgent Care after her work shift, reported right lower back pain and was diagnosed with a back strain as well as acute cystitis without hematuria. On July 29, 2022 NP Okamatsu at ATP Concentra assessed Claimant with a lumbar strain, provided medications, referred her to physical therapy and assigned temporary work restrictions. NP Okamatsu concluded that her objective findings were consistent with a work-related mechanism of injury. A subsequent MRI of Claimant's lumbar spine revealed a paracentral disc extrusion at L5-S1 that was compressing the left S1 nerve root. Dr. Rubio then diagnosed Claimant with a lumbar strain and probable herniated disc. She also concluded that her objective findings were consistent with a work-related mechanism of injury.

21. On September 8, 2022 Dr. Kawasaki reviewed the August 2, 2022 lumbar MRI and noted it revealed an L5-S1 disc extrusion with compression of the left L1 nerve root. However, he commented that Claimant's reported symptoms were on the right side in an S1 distribution. Nevertheless, Dr. Kawasaki remarked that there could have been migration of the disc that was compressing the right S1 nerve root to account for Claimant's right-sided symptoms. On the same date, Dr. Blatt determined that Claimant's objective findings were consistent with a work-related mechanism of injury. Dr. Danahey subsequently noted that Claimant had undergone a second lumbar MRI on October 6, 2022 that revealed a left paracentral disc herniation with caudal extrusion at L5-S1 with impingement of the S1 nerve and moderate spinal stenosis. He also concluded that his objective findings were consistent with a work-related mechanism of injury. After noting concerns about the migration of Claimant's pain, Dr. Rauzzino also determined her symptoms were consistent with the reported mechanism of injury. Noting Claimant's large left-sided disc herniation, Dr. Rauzzino explained she could benefit from a minimally invasive L5-S1 discectomy. However, based on psychological factors, Dr. Rauzzino expressed trepidation about Claimant's surgical candidacy.

22. In contrast to the opinions of the Concentra physicians, Dr. Bernton determined that the symptoms Claimant reported to medical providers on July 18, 2022 did not correlate with her lumbar MRI findings. However, he concluded that it was probable Claimant suffered a lumbar strain while carrying boxes on July 18, 2022. Nevertheless, Claimant's urinary tract infection was not related to any work activities. In addition to Dr. Bernton's opinion, the migration of Claimant's symptoms from the right to left side of her lower back casts doubt on the veracity of her complaints. Importantly, psychological assessments reflected a disconnect between Claimant's behaviors, reports of pain and emotions. Notably, Dr. Shea expressed concern for exaggeration of pain and likely misattribution of symptoms. He concluded "[t]here is bountiful evidence that there are multiple non-organic factors that may be further exacerbating her reported pain experience, over what would be expected based upon the reviewed documentation." Dr.

Shea agreed with Dr. Sanchez that a diagnosis of adjustment disorder with anxiety and depressed mood was appropriate.

23. Despite Dr. Bernton's opinion and concerns about Claimant's reported symptoms based on psychological factors, the record reveals that Claimant likely suffered an industrial injury at work on July 18, 2022. Lumbar MRIs revealed a L5-S1 disc extrusion that is compressing the left S1 nerve root. Furthermore, the record is replete with opinions from Concentra physicians that Claimant's objective findings were consistent with a work-related mechanism of injury. Claimant's work activities thus aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered an industrial injury while working for Employer on July 18, 2022.

24. Respondents have proven it is more probably true than not that Claimant was responsible for her termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on October 27, 2022 Claimant was terminated from employment based on the violation of Employer's attendance policy for missing two consecutive work shifts on October 23-24, 2022 without notifying her manager. Employer considered Claimant's actions to constitute job abandonment.

25. The record reveals that Claimant has received escalating disciplinary violations during her employment. Employer also provided specific documentation in the form of a step four violation that recounted the reasons for Claimant's termination. AJ[Redacted] credibly explained that Employer's attendance policy specifies that, if an employee is unable to work a scheduled shift, she must notify a manager as soon as possible. If an employee fails to show up for a scheduled shift and has not called, the employee receives an automatic one-day suspension. If an employee fails to show up to work for a scheduled shift twice in a rolling 12-month period, the employee is terminated. Claimant was aware of Employer's policies as reflected by her acknowledgment of receiving the handbook and attendance policy on April 19, 2022 and electronically signing off on the policies. Claimant also admitted at hearing that she knew if she did not show up to work she could be fired.

26. The record reveals that the work schedule for the week of October 23, 2022 was sent to employees and posted at Claimant's store on the Friday before October 21, 2022. The schedule was also sent by group chat on October 22, 2022. The preceding were the two customary ways the work schedule was communicated to employees. Claimant was on the schedule and able to work October 23, 24 and 25, 2022. However, Claimant did not show up for her scheduled shifts or contact her manager. As evidenced by a series of angry text messages in the record, Claimant was aware that her employment had been terminated for failing to show up for scheduled work shifts.

27. The record reflects that Claimant failed to report for her scheduled work shifts on October 23, 24 and 25, 2022 and was aware that termination could result. To the extent Claimant argues that her attendance issues were related to her work injury, her contention is not credible. The weight of the evidence establishes that Claimant simply

violated known and well-communicated attendance policies. She thus precipitated her employment termination by a volitional act that she would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over her termination from employment. She is thus precluded from receiving TTD benefits after October 27, 2022.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to

produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).; *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

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

8. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer. Initially, Claimant has maintained that she experienced lower back pain after carrying heavy boxes of juice and water at work on July 18, 2022. She visited Denver Health Urgent Care after her work shift, reported right lower back pain and was diagnosed with a back strain as well as acute cystitis without hematuria. On July 29, 2022 NP Okamatsu at ATP Concentra assessed Claimant with a lumbar strain, provided medications, referred her to physical therapy and assigned temporary work restrictions. NP Okamatsu concluded that her objective findings were consistent with a work-related mechanism of injury. A subsequent MRI of Claimant's lumbar spine revealed a

paracentral disc extrusion at L5-S1 that was compressing the left S1 nerve root. Dr. Rubio then diagnosed Claimant with a lumbar strain and probable herniated disc. She also concluded that her objective findings were consistent with a work-related mechanism of injury.

9. As found, on September 8, 2022 Dr. Kawasaki reviewed the August 2, 2022 lumbar MRI and noted it revealed an L5-S1 disc extrusion with compression of the left L1 nerve root. However, he commented that Claimant's reported symptoms were on the right side in an S1 distribution. Nevertheless, Dr. Kawasaki remarked that there could have been migration of the disc that was compressing the right S1 nerve root to account for Claimant's right-sided symptoms. On the same date, Dr. Blatt determined that Claimant's objective findings were consistent with a work-related mechanism of injury. Dr. Danahey subsequently noted that Claimant had undergone a second lumbar MRI on October 6, 2022 that revealed a left paracentral disc herniation with caudal extrusion at L5-S1 with impingement of the S1 nerve and moderate spinal stenosis. He also concluded that his objective findings were consistent with a work-related mechanism of injury. After noting concerns about the migration of Claimant's pain, Dr. Rauzzino also determined her symptoms were consistent with the reported mechanism of injury. Noting Claimant's large left-sided disc herniation, Dr. Rauzzino explained she could benefit from a minimally invasive L5-S1 discectomy. However, based on psychological factors, Dr. Rauzzino expressed trepidation about Claimant's surgical candidacy.

10. As found, in contrast to the opinions of the Concentra physicians, Dr. Bernton determined that the symptoms Claimant reported to medical providers on July 18, 2022 did not correlate with her lumbar MRI findings. However, he concluded that it was probable Claimant suffered a lumbar strain while carrying boxes on July 18, 2022. Nevertheless, Claimant's urinary tract infection was not related to any work activities. In addition to Dr. Bernton's opinion, the migration of Claimant's symptoms from the right to left side of her lower back casts doubt on the veracity of her complaints. Importantly, psychological assessments reflected a disconnect between Claimant's behaviors, reports of pain and emotions. Notably, Dr. Shea expressed concern for exaggeration of pain and likely misattribution of symptoms. He concluded "[t]here is bountiful evidence that there are multiple non-organic factors that may be further exacerbating her reported pain experience, over what would be expected based upon the reviewed documentation." Dr. Shea agreed with Dr. Sanchez that a diagnosis of adjustment disorder with anxiety and depressed mood was appropriate.

11. As found, despite Dr. Bernton's opinion and concerns about Claimant's reported symptoms based on psychological factors, the record reveals that Claimant likely suffered an industrial injury at work on July 18, 2022. Lumbar MRIs revealed a L5-S1 disc extrusion that is compressing the left S1 nerve root. Furthermore, the record is replete with opinions from Concentra physicians that Claimant's objective findings were consistent with a work-related mechanism of injury. Claimant's work activities thus aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered an industrial injury while working for Employer on July 18, 2022.

Responsible for Termination

12. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Off.*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that the claimant was responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAO, Sept. 27, 2001).

13. As found, Respondents have proven by a preponderance of the evidence that Claimant was responsible for her termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on October 27, 2022 Claimant was terminated from employment based on the violation of Employer's attendance policy for missing two consecutive work shifts on October 23-24, 2022 without notifying her manager. Employer considered Claimant's actions to constitute job abandonment.

14. As found, the record reveals that Claimant has received escalating disciplinary violations during her employment. Employer also provided specific documentation in the form of a step four violation that recounted the reasons for Claimant's termination. AJ[Redacted] credibly explained that Employer's attendance policy specifies that, if an employee is unable to work a scheduled shift, she must notify a manager as soon as possible. If an employee fails to show up for a scheduled shift and has not called, the employee receives an automatic one-day suspension. If an employee fails to show up to work for a scheduled shift twice in a rolling 12-month period, the employee is terminated. Claimant was aware of Employer's policies as reflected by her acknowledgment of receiving the handbook and attendance policy on April 19, 2022 and electronically signing off on the policies. Claimant also admitted at hearing that she knew if she did not show up to work she could be fired.

15. As found, the record reveals that the work schedule for the week of October 23, 2022 was sent to employees and posted at Claimant's store on the Friday before October 21, 2022. The schedule was also sent by group chat on October 22, 2022. The

preceding were the two customary ways the work schedule was communicated to employees. Claimant was on the schedule and able to work October 23, 24 and 25, 2022. However, Claimant did not show up for her scheduled shifts or contact her manager. As evidenced by a series of angry text messages in the record, Claimant was aware that her employment had been terminated for failing to show up for scheduled work shifts.

16. As found, the record reflects that Claimant failed to report for her scheduled work shifts on October 23, 24 and 25, 2022 and was aware that termination could result. To the extent Claimant argues that her attendance issues were related to her work injury, her contention is not credible. The weight of the evidence establishes that Claimant simply violated known and well-communicated attendance policies. She thus precipitated her employment termination by a volitional act that she would have reasonably expected to cause the loss of employment. Accordingly, under the totality of the circumstances Claimant committed a volitional act or exercised some control over her termination from employment. She is thus precluded from receiving TTD benefits after October 27, 2022.

ORDER

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

1. Claimant suffered compensable injuries during the course and scope of her employment with Employer on July 18, 2022.

2. Claimant was responsible for her termination from employment on October 27, 2022 and is thus precluded from receiving TTD benefits.

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

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

DATED: June 20, 2023.

DIGITAL SIGNATURE:
Peter J. Cannici

_____

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

ISSUES

I. The amount that most fairly constitutes Claimant's average weekly wage (AWW).

II. Whether temporary disability benefits should be modified based on a changed AWW.

FINDINGS OF FACT

1. This is an admitted claim involving a November 19, 2021 low back injury.

2. Claimant earned a gross salary of $2,578.00 per month in June 2021. That figure corresponds with an AWW of $594.92.

3. Claimant earned $2,655.00 per month from July 2021 through June 2022, the period of time that corresponded with Claimant's date of injury. That figure corresponds with an AWW of $612.69.

4. Claimant also received a one-time $1,000.00 yearly stipend in July 2021, as well as a $1,274.00 cost-of-living adjustment payment in June 2022. The Court finds that neither of these payments were of the type that would have been affected by disability.

5. In July 2022, Claimant's monthly salary increased to $2,734.67, an AWW of $631.08, and remained at that level until January 2023, when his monthly salary again increased to $3,133.00, an AWW of $723.00, coinciding with a job reallocation to "Structural Trades I."

6. In February, 2023, Claimant earned $3,424.73, corresponding with an AWW of $790.32.

7. On May 4, 2023, the [Employer] issued a letter to all [Redacted] employees announcing that all employees would receive a 5% pay increase effective July 1, 2023.

8. Respondent filed a General Admission of Liability (GAL) on August 18, 2022. The GAL admitted to an AWW of $808.04.

9. Respondent filed two more GALs on November 16, 2022, and March 14, 2023, admitting for intermittent temporary partial disability (TPD) benefits. The TPD benefits were calculated based upon the admitted AWW of $808.04.

10. The GALs documented lost time (in hours) on the following dates:

DATE	LOST TIME	DATE	LOST TIME	DATE	LOST TIME	DATE	LOST TIME	DATE	LOST TIME	DATE	LOST TIME	DATE	LOST TIME	DATE	LOST TIME
11/22/2021	2.5	1/17/2022	2	3/7/2022	1	4/20/2022	1.5	6/13/2022	2	7/20/2022	3	8/31/2022	2	12/14/2022	3.75
11/23/2021	8	1/18/2022	2	3/9/2022	2	4/21/2022	2	6/16/2022	2.5	7/22/2022	3	9/12/2022	6	1/18/2023	0.25
11/29/2021	3	1/19/2022	2	3/14/2022	1	4/25/2022	2	6/23/2022	3	7/27/2022	3	9/13/2022	0.5	1/23/2023	2.5
12/1/2021	2.75	1/21/2022	1.25	3/16/2022	1.5	4/27/2022	2	6/24/2022	3	7/28/2022	2	9/15/2022	2	1/26/2023	1
12/6/2021	1.5	1/26/2022	2	3/21/2022	3	5/2/2022	2	6/27/2022	3	7/29/2022	3	9/16/2022	8	2/1/2023	1
12/9/2021	2	1/27/2022	4.25	3/23/2022	1.5	5/3/2022	4	6/28/2022	2	8/1/2022	3	9/26/2022	8	2/6/2023	2
12/14/2021	2	1/28/2022	2.75	3/28/2022	1	5/4/2022	1.5	6/30/2022	3	8/2/2022	2	9/30/2022	8	2/9/2023	1
12/17/2021	1.5	2/3/2022	2.25	3/29/2022	2	5/6/2022	2	7/3/2022	3	8/4/2022	3	10/17/2022	2	2/13/2023	1
12/22/2021	3.25	2/7/2022	6.5	3/30/2022	1.5	5/13/2022	1.5	7/5/2022	3	8/15/2022	3	10/21/2022	8	2/23/2023	3
1/3/2022	1.75	2/9/2022	2	3/31/2022	8	5/18/2022	2	7/7/2022	4	8/16/2022	2	10/26/2022	5.5	2/28/2023	2.5
1/4/2022	2	2/10/2022	2	4/4/2022	2	5/20/2022	1.5	7/8/2022	3	8/17/2022	5	10/28/2022	1		
1/5/2022	2	2/11/2022	2.5	4/6/2022	1.5	5/26/2022	2	7/11/2022	5	8/18/2022	8	10/31/2022	2		
1/7/2022	4.5	2/17/2022	4	4/7/2022	2.5	5/27/2022	1.5	7/13/2022	3	8/22/2022	3	11/1/2022	2.5		
1/12/2022	1.25	2/24/2022	1.5	4/12/2022	2	6/3/2022	2	7/14/2022	3	8/23/2022	8	11/7/2022	2		
1/13/2022	2	3/2/2022	3.5	4/13/2022	1.5	6/7/2022	4	7/18/2022	3	8/24/2022	2	11/28/2022	1		
1/14/2022	1.5	3/3/2022	2.5	4/18/2022	4	6/8/2022	2	7/19/2022	2	8/26/2022	4	12/7/2022	8		

11. The parties stipulated at a post-hearing conference on June 12, 2023 to the following facts:

    a. Claimant's authorized treating physician placed him at maximum medical improvement (MMI) on April 14, 2023.

    b. Respondent has requested a Division independent medical examination (DIME), which is currently pending.

12. At hearing, Respondent presented the testimony of Z.M.[Redacted], an HR specialist for Respondent.

13. Ms. Z.M.[Redacted] testified about Claimant's earnings and explained the line items on Claimant's pay records. Regarding the $1,000.00 stipend payment in July 2021, Ms. Z.M.[Redacted] testified that it was an across-the-board payment for all [Redacted] classified employees. Although it was labeled as "extra duty" on the pay record, she testified that the categorization was simply due to the categories available on the software used for pay records.

14. Ms. Z.M.[Redacted] also explained that the June 2022 payment of $1,274.00 was a one-time lump sum "across-the-board" payment to compensate employees for the absence of a cost-of-living adjustment that year.

15. Regarding Claimant's raise in January 2023, which corresponded with Claimant's position reallocation from "Labor I" to "Structural Trades I," Ms. Z.M.[Redacted] testified that the reallocation resulted in an increased salary, but that the raise was not merit-based. Ms. Z.M.[Redacted] also testified on cross examination that there had been discussions of [Redacted] raises for July 2023, but that that information had not yet been released.

16. The Court finds Ms. Z.M.[Redacted]'s testimony credible, except insofar as she testified that the July 2023 raise had not yet been announced.

17. Claimant testified on his own behalf at hearing. Claimant testified consistently with the pay records regarding his raises. Additionally, Claimant testified that he was supposed to receive a 3.5% raise in 2022, but instead received the [Redacted] standard raise.

18. Regarding his reallocation to "Structural Trades I," Claimant testified that the reallocation was based on his skill set, including building walls, building ramps, and running machines. Claimant also testified that he developed a key system to track keys as part of his new position, worked with a COVID task force for testing students, performed some camera work of different structures, and built a ramp for motorcycles. Claimant denied that any doctor ever took him off work.

19. The Court finds Claimant's testimony credible.

20. Respondent presented rebuttal testimony of Ms. Z.M.[Redacted] regarding Claimant's new duties. Specifically, she testified that the new duties simply constituted modified duty to accommodate Claimant's work restrictions. To the extent this testimony conflicts with Claimant's, the Court credits Claimant's testimony.

CONCLUSIONS OF LAW

Generally

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

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

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

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

AWW

The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM*, 867 P.2d 77, 82 (Colo. App. 1993. In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury. *See* § 8-42-102(2), C.R.S. (2021).

Where the prescribed methods will not result in a fair calculation of a claimant's AWW in the particular circumstances, section C.R.S. § 8-42-102(3) grants an ALJ discretion to determine AWW "in such other manner and by such other method as will, in the opinion of the director *based upon the facts presented*, fairly determine such employee's average weekly wage." Section 8-42-102(3), C.R.S. (emphasis added).

Here, the parties have agreed that the AWW of $808.04 is incorrect. Each party has argued as to what they believe the correct AWW to be.

Respondent argues that Claimant's AWW should be calculated as $612.69 based on Claimant's earnings at the time of Claimant's injury. Respondent argues that the "default method" of calculating AWW as of the date of injury would fairly compute the AWW in this case and that it would be inappropriate for the Court to apply the discretionary provisions of § 8-42-102(3), C.R.S. Respondent distinguished the cases of *Campbell v. IBM* and *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo.App.2007), on the basis that those cases involved claimants who sustained injuries at a lower paying job only to later lose wages at a different, higher-paying job. Respondent further distinguished *Pizza Hut v. ICAO*, 18 P.3d 867 (Colo.App.2001), as that case involved a claimant who began a new, much higher-paying employment only two weeks after his date of injury, whereas Claimant continued to earn his date-of-injury wages for seven months following his date of injury. Last, Respondent argues that none of Claimant's wage increases were merit-based.

Claimant argues that it would be "manifestly unjust" for the Court to base Claimant's AWW on the earnings in effect at the time of injury given that Claimant experienced subsequent increases in wages during the course of his entitlement to temporary disability benefits. He cited *Campbell* for that proposition.

Respondent argued persuasively at hearing that application of the discretionary provision to all cases where claimants receive wage increases during periods of disability would be an exception that swallows the rule. Although ALJs have found similar such arguments persuasive in the past in cases analogous to this one, *Campbell* remains good law and binds this Court.

For example, in *Romero v. Liberty Mutual Ins. Co.*, W.C. No. 4-218-823 (2000), an ALJ declined to apply the discretionary standard and calculated the AWW based on the date of injury, despite the claimant receiving pay increases during the months after his injury, which included periods of disability. The ALJ cited policy reasons for why the discretionary provision should not be applied. The ICAO set aside the ALJ's order and remanded the matter, noting:

> "We do not disagree with the ALJ's observation that the redetermination of AWW to include a post-injury wage increase is inconsistent with determining AWW based on the "remuneration which the injured or deceased employee was receiving at the time of the injury," as provided by § 8-42-102(2) . . . . As noted by the ALJ, it arguably also undermines the 'predictability and certainty' of the respondents' liability. . . . However, these consequences are expressly contemplated by *Campbell*, and *Campbell* represents the current state of the law on the issue."

Id.

Therefore, because the facts in this case are sufficiently analogous to those in *Romero* and *Campbell*, the Court must apply the discretionary provision of § 8-42-102(3), C.R.S.

Were the Court to use Claimant's AWW effective as of the date of injury, Claimant would be undercompensated during later periods when his earning capacity increased. Conversely, were the Court to base the AWW on the highest, most recent earnings, Claimant would receive a windfall at Respondent's expense during earlier periods of disability. The Court could adopt a variable AWW which would adjust for different periods of temporary disability. Although this practice achieves fair AWW calculations for periods of temporary disability, it raises an obvious issue as to which of the various AWWs to use once permanent disability benefits come due. One party might plausibly argue that the AWW as of the date of injury would result in the most appropriate calculation permanent disability benefits. The opposing party might make an equally plausible argument that permanent partial disability should be based on the AWW at the time of MMI. *See, e.g.*, *Waalkes v. The Salvation Army*, W.C. No. 4-533-879 (September 30, 2003); *Porter v. Wal-Mart Stores*, W.C. No. 4-392-507 (August 12, 2002).

Therefore, the Court in this case determines a single AWW based on the weighted averages of Claimant's earnings during periods of temporary disability. The AWW is weighted based on the number of hours of lost time during each period. Admittedly, this will result in Claimant being both overcompensated for early temporary disability and overcompensated for later periods of disability. But, in the aggregate, it will ensure that Claimant is neither overcompensated nor undercompensated, and will achieve the fairest outcome for the parties.

During the course of this claim, Claimant has lost wages corresponding to 343 lost hours. Those periods of disability can be broken down as follows:

- From Claimant's date of injury through June 2022, while earning an average weekly wage of $612.69,[1] Claimant had 172.5 hours of lost time, representing 50% of the total lost time.
- From July 2022 through December 2022, while earning an average weekly wage of $631.08,[2] Claimant had a total of 156.25 hours of lost time, representing 46% of the total lost time.
- In January 2023, while earning an average weekly wage of $722.89,[3] Claimant had a total of 3.75 hours of lost time, representing 1% of the total lost time.
- From February 2023 until the March 14, 2023 GAL, while earning $790.32 per month,[4] Claimant had 10.5 hours of lost time, representing 3% of the total lost time in this matter.

Claimant has since been placed at MMI effective April 14, 2023, and Respondent has requested a DIME.

Claimant cites to *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (May 7, 1997), for the proposition that Claimant's July 1, 2023 pending raise should be factored in to calculate Claimant's AWW. However, the facts here do not support inclusion of Claimant's prospective July 1 raise in the calculation of AWW.

In *Ebersbach*, the ICAO held that the claimant was entitled as a matter of law to have her AWW adjusted to account for post-injury pay raises she was eligible to receive under a union contract. The Panel stated:

> [T]he facts in this case cannot be meaningfully distinguished from those in *Campbell*. Here, at the time of the injury, the claimant had a contractual right to an increase in her hourly earnings as of May 7, 1995. This right was not contingent on performance evaluations or other subjective factors. Thus, the undisputed evidence establishes that the claimant would have been earning an additional twenty-five cents per hour subsequent to that date but for the intervention of the

[1] This is based on $2,655.00 per month.
[2] This is based on $2,734.67 per month.
[3] This is based on $3,132.53 per month.
[4] This is based on $3,424.73 per month.

industrial injury. The claimant's right to receive the increase was sufficiently definite that it would be manifestly unjust to deprive her of the benefit of the increase when calculating her average weekly wage.

Id.

Here, unlike in *Ebersbach*, the Court does not find that Claimant is more likely than not to have sustained lost wages due to temporary disability after the July 1, 2023 raise.

While it is possible that Claimant will be entitled to temporary disability benefits beyond those which were admitted on the March 14, 2023 GAL, entitlement to such benefits at this time is speculative. Although imperfect, using the existing dates of disability currently admitted on the March 14, 2023 GAL is the Court's best approximation of Claimant's total lost time in this matter. Therefore, the Court does not include the July 1, 2023 raise in its calculation, and instead weighs wages based on the amount of lost time during each period during which Claimant earned those wages.

Period	November 19, 2021, through June 2022	July 22 through December 22	January 2023	February 2023 to March 14, 2023	TOTAL
Hours	172.5	156.25	3.75	10.5	343
Monthly Gross Pay	$2,655	$2,734.67	$3,132.53	$3,424.73	
AWW	$612.69	$631.08	$722.89	$790.32	
Weight	50%	46%	1%	3%	1
AWW x Weight	$308.13	$287.48	$7.90	$24.19	**$627.71**

Based on the above, and weighing the AWWs for each period of lost time based on that period's share of the total lost time, the Court calculates an AWW of $627.71.

ORDER

1. Respondent proved by a preponderance of the evidence that the admitted AWW was incorrect. Respondent shall file an amended general admission of liability or a Final Admission of Liability within twenty-one days of this Order admitting for benefits consistent with an AWW of $627.71.

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

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

DATED: June 20, 2023.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-153-666-006

ISSUES

1. Whether Claimant established by a preponderance of the evidence grounds for reopening his claim.

2. If Claimant's claim is reopened, whether Claimant established entitlement to temporary disability benefits.

3. If Claimant's claim is reopened, whether Claimant established an entitlement to additional reasonable and necessary medical benefits.

FINDINGS OF FACT

1. On November 12, 2020, Claimant sustained an admitted injury to his left knee arising out of the course of his employment with Employer. On that date, Claimant sustained a fracture of the left tibia while delivering a package for Employer.

2. Claimant was initially seen at St. Joseph Hospital and was hospitalized for approximately two weeks and then transferred to Vibra Rehab Hospital of Denver where he remained for until December 4, 2020. (Ex. E).

3. On January 27, 2021, Claimant saw authorized treating physician (ATP) Matthew Lugliani, M.D., at COMP. Dr. Lugliani ordered a CT scan of Claimant's left knee and referred Claimant to Rajesh Bazaz, M.D., an orthopedic surgeon. (Ex. F).

4. The CT scan was performed on February 4, 2021, and showed a partially-healed non-displaced fracture of the anterior and medial tibial plateau, without soft tissue pathology. (Ex. 15 & H).

5. On February 12, 2021, Claimant saw Dr. Bazaz at Western Orthopaedics for evaluation of his left knee. Dr. Bazaz indicated Claimant did not require surgery, and ordered an MRI of Claimant's left knee. (Ex. G & 13).

6. On February 16, 2021, Claimant saw Dr. Lugliani and reported 10% improvement of his left knee. Claimant also reported new complaints of low back and neck pain. On examination, Dr. Lugliani noted decreased range of motion and tenderness to palpation of Claimant's back, but an otherwise normal examination. Dr. Lugliani referred Claimant for chiropractic care and massage therapy. (Ex. 19).

7. On March 2, 2021, Claimant had MRIs performed of his left knee ordered by Dr. Bazaz. The left knee MRI showed moderate bone marrow edema of the left tibia, consistent with subacute healing of the fracture, and intact menisci and anterior cruciate ligament. (Ex. H).

8. Also on March 2, 2021, Claimant had cervical, thoracic, and lumbar spine MRIs on that date. Although the imaging reports indicate Claimant was referred by Dr. Lugliani, Dr. Lugliani's medical records do not reflect that he referred Claimant for the MRI. The cervical MRI showed multilevel disc bulges and protrusions with mild thecal sac narrowing at C4-5 and C5-6, and a C5-6 posterior annular fissure. (Ex. 16). The lumbar MRI showed disc bulges at L4-5, L5-S1 and L5-S1 with mild neuroforaminal narrowing at L4-5 and L5-S1. (Ex. 18). Claimant's thoracic MRI showed only mild to moderate disc desiccation. (Ex. 17). No credible evidence was admitted indicating any provider has opined that the pathology shown on the cervical, thoracic, or lumbar MRIs was causally-related to Claimant's November 12, 2020 work injury.

9. Dr. Bazaz reviewed Claimant's left knee MRI on March 5, 2021. He opined that Claimant's fractur had healed appropriately, and that Claimant needed to start physical therapy. Claimant requested that Dr. Bazaz treat his back complaints, but Dr. Bazaz indicated he did not order Claimant's cervical, thoracic, or lumbar MRI and would not be the appropriate physician to treat his back complaints. (Ex. 14 & G).

10. Claimant returned to Dr. Bazaz on April 16, 2021. Claimant had not begun physical therapy, and had not returned to Dr. Lugliani. Dr. Bazaz again indicated that Claimant should be in physical therapy for his knee, but was unclear why this had not occurred. (Ex. G).

11. Claimant's next documented medical visit was with Lawrence Lesnak, D.O., on July 7, 2021. (Dr. Lesnak indicated that he had now been designated as Claimant's ATP). Claimant reported left knee pain, and lumbar pain. He also reported to Dr. Lesnak that he had a different work-related low back injury in October 2020 while working for a different employer, and was treated at Concentra for approximately one month. (No records of this injury were admitted into evidence). Dr. Lesnak examined Claimant and recommended a trial of physical therapy. (Ex. E). Dr. Lesnak also ordered a CT of Claimant's left knee, which was performed on August 6, 20212, and showed a healed proximal tibial stress fracture. Dr. Lesnak further opined that Claimant did not sustain spinal injuries as a result of his November 12, 2020 work injury. (Ex. H).

12. Claimant began physical therapy for his left knee on August 31, 2021, at Select Physical Therapy. Claimant attended four sessions before he was discharged for non-compliance on September 17, 2021. (Ex. I).

13. On November 4, 2021, Claimant saw Dr. Lesnak again. Dr. Lesnak noted that the only recommended treatment for Claimant was aggressive physical therapy, and although Claimant had previously been discharged from physical therapy, he was willing to provide a new physical therapy prescription. If Claimant elected not to pursue further physical therapy, Dr. Lesnak indicated he would place Claimant at maximum medical improvement (MMI). (Ex. E). No credible evidence was admitted indicating Claimant followed through with additional physical therapy.

14. On March 10, 2022, Dr. Lesnak placed Claimant at maximum medical improvement (MMI) effective January 10, 2022 for his November 12, 2020 injury. Dr.

Lesnak assigned Claimant a 2% left lower extremity impairment rating, and opined that Claimant did not require work restrictions or maintenance care, unless he continued to have symptoms. Dr. Lesnak opined that Claimant' reported neck and back symptoms were unrelated to his November 12, 2020 injury. (Ex. E).

15. On March 29, 2022, Respondents filed a final admission of liability (FAL) for Claimant's November 12, 2020 injury, admitting for a 2% left lower extremity impairment rating. (Ex. B).

16. Claimant did not request a Division-sponsored independent medical examination (DIME), file an objection to the FAL, or file an Application for Hearing within thirty days of the March 29, 2022 FAL. Consequently, Claimant's claim closed on April 29, 2022 pursuant to § 8-42-107.2, C.R.S.

17. After being placed at MMI, Claimant apparently sought treatment for his left knee from providers in [Redacted hereinafter PT]. On May 16, 2022, Claimant had a left knee x-ray ordered by Parham Pezeshk, M.D. The x-ray showed no joint effusion or degenerative changes. On July 27, 2022, Claimant had another left knee x-ray at the same facility, which was interpreted as showing no significant changes from the May 16, 2022 x-ray. (Ex. H). No additional records from these providers were offered into evidence.

18. In addition to Claimant's November 12, 2020 knee injury, Claimant sustained two additional work-related injuries. On August 25, 2020, Claimant sustained a lower back injury while unloading a container working for a different employer. Claimant was released to full duty from his August 25, 2020 injury on September 22, 2020.[1] On April 1, 2021, Claimant was evaluated by Kathy McCranie, M.D., for an independent medical examination related to the August 25, 2020 injury. Dr. McCranie opined that Claimant was at maximum medical improvement by early October 2020, and had no permanent impairment from that injury. (Ex. D).

19. On February 23, 2022, Claimant reported he sustained an injury to his low back, including the lumbar and lumbosacral spine while working for Employer. A First Report of Injury was filed on March 2, 2022. Respondents filed a Notice of Contest on March 18, 2022. (Ex. C).

20. Claimant's submitted exhibits demonstrate Claimant has been evaluated for issues involving his lower back since reaching MMI for the November 12, 2020 knee injury. This includes undergoing a lumbar MRI on September 15, 2022 which demonstrated mild lateral foraminal narrowing due to a disc bulge at the L5-S1 level. No credible evidence was admitted indicating that the lower back treatment Claimant has received is causally related to his November 12, 2020 knee injury. The ALJ makes no findings as to whether Claimant's lower back condition is causally related to any other industrial injury.

[1] The ALJ infers that the August 2020 injury is the same injury Claimant reported to Dr. Lesnak as occurring in October 2020.

21. At hearing, Claimant testified that both Dr. Lesnak and Dr. Bazaz verbally told him that he had a spinal injury as a result of the November 12, 2020 work injury. Dr. Lesnak indicated he was unable to treat Claimant's spine because the treatment was not authorized by Insurer. Claimant testified that he was in a wheelchair for two years following the November 12, 2020 injury, and that he was provided a brace for his knee. He indicated that except for a brief period where he attempted to return to Employer, he has not been able to obtain work.

22. Claimant testified that Dr. Lesnak was the last physician he saw in Colorado for his November 12, 2020 injury, and he was not able to complete treatment with him. Claimant indicated Dr. Lesnak told him he would not be able to work as a driver due to the injury to his back, and that he could not perform a job where he was constantly standing because of his knee. He also indicated Dr. Lesnak informed him he could work with restrictions, including sitting for 30 minutes every two to three hours. Claimant testified that at his last visit with Dr. Lesnak, he indicated Claimant's leg had been affected by 15%, and that he was surprised to see a 2% impairment rating.

23. Sometime between March 10, 2022 and May 16, 2022, Claimant moved to PT[Redacted] where he sought treatment from new providers, including Dr. Tse Wong, and Dr. Ahmoud, both of whom were orthopedists. (Ex. 24). Claimant had another lumbar spine MRI which Claimant testified the same as his previous lumbar MRI. (The ALJ infers that the MRI Claimant referenced was the undated lumbar MRI taken in PT[Redacted], and submitted as Exhibit 21). Claimant testified he also saw a family doctor, who recommended spinal injections. Claimant testified that the physician in PT[Redacted] informed him that if he did not improve, he would require spinal surgery, but that he was advised that an operation could paralyze him. Claimant was then referred to "Workforce" in PT[Redacted], for training that would help him get a job working on a computer, but he was not able to complete the training because he left PT[Redacted].

24. Claimant then moved to [Redacted, hereinafter PM], where he saw another physician, who recommended a spine specialist and a pain management clinic. Claimant then moved to [Redacted, hereinafter LK], where he now resides. Claimant indicated that he was unable to receive pain management treatment because he has no insurance.

25. Claimant testified that he continues to have swelling and pain in his knee and leg, and issues with his spine, which Claimant believes could cause him to be paralyzed.

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 CLAIM

Claimant seeks to reopen his claim for the purpose of obtaining additional medical benefits and temporary disability benefits, but has not articulated a statutory basis for reopening. The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. The party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO, Mar. 7, 2012). An otherwise final award of benefits may be reopened under § 8-43-303, C.R.S., which provides, in relevant part:

> At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition ….

Claimant's testimony demonstrates that he disagrees with Dr. Lesnak's impairment rating, lack of work restrictions, his opinion that Claimant does not require additional care for his knee, and his opinion that Claimant did not sustain a back injury on

November 12, 2020. Claimant's testimony that Dr. Lesnak informed him he had a spinal injury, and required additional care is not reflected in Dr. Lesnak's medical records. While Claimant's testimony that he continues to experience pain in his knee and lower back are credible, no credible evidence was presented to indicate that Claimant's lower back condition is causally related to his November 12, 2020 injury. Moreover, Claimant has not established that the physical condition of his left knee has changed since being placed at MMI. Claimant has not established that his claim should be reopened for any of the bases set forth in § 8-43-303, and no credible evidence was admitted upon which a finding that these factors exist could be reasonably based.

In substance, Claimant's claim seeks to challenge Dr. Lesnak's determination that he was at MMI on January 10, 2022, for his November 12, 2020 work-related left knee injury. However, the ALJ lacks authority to resolve that issue because Claimant did not seek a DIME and did not timely contest his MMI and impairment determinations. Under § 8-42-107 (8)(b)(I), an ATP makes the initial determination as to whether a Claimant has reached MMI. If a party disputes the ATP's MMI determination, the party may request an division independent medical examination ("DIME") in accordance with § 8-42-107.2, C.R.S., to resolve that dispute. Section 8-42-107.2 (2)(a)(I)(A), provides that when a claimant initiates an MMI dispute, the time for selection of a DIME commences with the date of mailing of an FAL that includes an impairment rating. Section 8-42-107.2 (2)(b) provides that the party seeking an IME to dispute an ATP's determination must provide written notice and propose candidates to perform the IME within thirty days after the date of mailing of the FAL. If no notice is submitted within 30 days, the "authorized treating physician's findings and determinations shall be binding on all parties and on the division." *Id*. "A DIME is a prerequisite to any hearing concerning the validity of an authorized treating physician's finding of MMI, and, absent such a DIME, an ALJ lacks jurisdiction to resolve a dispute concerning that determination." *Town of Ignacio v. Indus. Claim Appeals Office*, 70 P.3d 513, 515 (Colo. App. 2002), *citing Story v. Indus. Claim Appeals Office*, 910 P.2d 80, 82 (Colo. App. 1995).

Respondent mailed its FAL on March 29, 2022. To challenge the FAL and the finding of MMI, Claimant was obligated to request a DIME on or before April 29, 2020. No evidence was admitted indicating that Claimant requested a DIME within 30 days of the mailing of the FAL or thereafter. Consequently, pursuant to § 8-42-107.2 (2)(b), C.R.S., Dr. Lesnak's MMI determination is binding on the parties, and the ALJ lacks authority to resolve any dispute concerning that determination. The ALJ finds that Claimant has failed to establish by a preponderance of the evidence grounds for reopening his claim.

TEMPORARY DISABILITY BENEFITS AND MEDICAL BENEFITS

Because Claimant has failed to establish grounds for reopening his claim, Claimant's claim for temporary disability benefits and medical benefits is denied and dismissed. The ALJ makes no conclusions as to whether Claimant requires additional treatment for alleged spinal injuries or whether any such treatment is causally related to any other alleged industrial injury.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his November 12, 2020 worker's compensation claim is denied and dismissed.

2. Claimant's request for temporary disability benefits and additional medical benefits related to his November 12, 2020 worker's compensation claim is denied and dismissed.

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

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

DATED: June 21, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-147-151-004

PROCEDURAL HISTORY

On July 19, 2022 Respondent filed an Application for Hearing on issues which included overcoming the DIME physician's opinions by clear and convincing evidence, causation, failure to comply with modified job offer and unauthorized medical care, as well as offsets, overpayment and credits.

Claimant filed a Response to Application for Hearing on August 18, 2022 listing the issues of medical benefits that were authorized, reasonable and necessary, temporary total and temporary partial disability benefits, and defense of the DIME physician's opinion and defense to failure to comply with modified job offer.

The parties submitted the Stipulation of Facts on March 29, 2023. The Stipulation of Facts are accepted and approved. The Stipulation of Facts are the official transcript for the November 15, 2022 hearing.

On April 6, 2023 this ALJ issued Findings of Fact, Conclusions of Law and Order, which specified that Respondents were ordered to pay temporary disability benefits from March 29, 2021 through July 8, 2021. This ALJ stated as follows: Respondents shall provide Claimant an accounting of the wages paid to Claimant and the exact dates paid. Should the parties be unable to calculate the amount, the parties may provide the information within 10 days of this order and this ALJ may issue a Supplemental Order.

Respondents' filed an Uncontested Motion for Extension of Time to Complete Exchange of Additional Wage Records and/or to Request Supplemental Order Re Retro TTD/TPD. This motion was granted on April 21, 2023.

Respondents filed a Request for Supplemental Order and Submission of the Additional Wage Information on May 8, 2023. The motion was accompanied by wage records previously admitted as Exhibit P and not the records requested by this ALJ in order to issue a supplemental order. An order was issued by ALJ Peter J. Cannici on May 24, 2023 granting the motion. However, Judge Cannici's order was not brought to the attention of this ALJ.

Claimant's Petition to Review filed on April 26, 2023 and a Briefing Scheduled was issued by the OAC on April 28, 2023. As no transcript was available, the official transcript of the hearing is the Stipulation file by the parties. Claimant failed to file a Brief in Support of the Petition to Review. Respondents filed a Brief in Opposition of the Petition to Review on

This Supplemental Order is issued pursuant to the above order and the petition to review.

ISSUES

I. Whether Respondent proved by clear and convincing evidence that the Division of Workers' Compensation Independent Medical Examination (DIME) physician, Dr. Ranee Shenoi, was incorrect in her findings of causation, maximum medical improvement (MMI), and permanent partial impairment.

II. What were Claimant's permanent partial impairments related to the work injury, if any.

III. Whether Claimant has shown by a preponderance of the evidence that she sustained a loss of wages from March 29, 2021 through MMI.

IV. Whether Respondent has shown by a preponderance of the evidence that Claimant was responsible for her wage loss and Respondent entitled to recoup an overpayment.

FINDINGS OF FACT

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

A. Generally:

1. Claimant worked for Employer as a bus driver since approximately 2018. As part of her job, she conducted a pre-trip inspections of the bus. She had to open the hood of the bus, check oil and everything under the hood to make sure it was in working order. She had to do a break test, check windows and seats, check the First Aid kits, the tires, bolts, lights, dings or damage to the bus. The pre-trip inspection allotted time was 12 minutes but sometimes it took more time to complete it. Then she would be ready to proceed with her route. She would pick up elementary, middle school and high school children on her route. The preschoolers had paraprofessionals sometimes ride with them during the noon time. She never really had any problems with the kids, and she did not normally have do much lifting other than the heavy bus hood. The job required her to lift 50 lbs. minimum to qualify for the job. Claimant did not have any problems doing her day to day activities related to the job before her accident. She stated that she liked the summers off because it gave her time to recoup and recharge.

2. On a snowy day, on November 11, 2019, she slipped on ice when stepping up onto a curb. She had a bag in her left hand and a purse in her other hand. She slipped in a split with each leg going opposite ways. Another coworker went to grab her on her way down. She fell onto her big bag and her left leg, hitting the ground, but not all of her body fell to the ground. She did not specifically hit her head or her shoulder. One of her hands did hit the ground. She jarred her body but she did finish her bus route. She reported it to her supervisor and was seen by Dr. Matus on the date of her accident.

3. Claimant stated that she had no prior problems or injuries prior to the November 11, 2019 event. This ALJ does not find this particularly credible since Claimant injured her left lower extremity, specifically had a bone spur in her left heel in 2000,

including a surgery to her left heel,[1] and had a neck whiplash injury in the 1980s, as documented in the medical records.

B. <u>Medical records</u>:

4. Claimant was evaluated by Dr. Brenden Matus at WorkWell on March 10, 2020.[2] Dr. Matus noted the patient was feeling a bit better. She had a flare with a particular stretch. Claimant had pain present in the mid-to-low back and left foot. Her pain rating was 7/10. She had "upper back neck tension and paresthesias in the right ulnar nerve distribution since her last massage." Dr. Matus stated he would monitor this problem. He further stated that if she continued to have left foot pain, he would order an MRI of the left foot and ankle as well as refer her to Dr. Myers.

5. On May 15, 2020 Claimant was evaluated by Dr. Bruce Cazden at WorkWell. He noted the mechanism of injury of November 11, 2019 when Claimant slipped on ice while stepping up on a curb with her left leg. She reported right mid to low back pain from slipping and left foot and ankle pain. He specifically noted that "[S]he has new symptoms of neck pain with numbness and tingling in both upper extremities. It does not appear that this is related to her work comp claim." He did not diagnose the neck condition as work related.

6. An MRI[3] of the cervical spine from July 14, 2020 showed degenerative disc and joint changes with mild dural sac indentation and multilevel bilateral foraminal narrowing.

7. Samuel Chan, M.D. evaluated Claimant on July 24, 2020. He took a history consistent with that described by Claimant and other providers. He specifically noted that claimant had landed on her left foot and continued to have problems with the left foot, low back, interscapular area and cervical spine. Claimant reported that her treatment plan was somewhat interrupted because of the COVID pandemic. He documented that Dr. Myers was treating her for the left foot pain and recommended she obtain HOKA shoes. He reviewed all of Dr. Matus' records. He reviewed both the x-rays of the foot and the MRI of the ankle and foot. They showed moderate anterior talofibular and mild deltoid ligament sprains as well as suspected hammertoe deformities but were otherwise normal. Dr. Chan documented that Dr. Matus continued to cite to Claimant's ongoing cervical spine complaints. On exam he noted that Claimant was tender to palpation of right greater and lesser occipital nerve insertion areas. There was also tenderness to palpation of right trapezius, levator scapulae, and splenius capitis muscles, with active trigger points noted. Tenderness to the bilateral AC joints but otherwise a normal cervical spine exam. He noted negative lumbar spine exam but tenderness to palpation of the calcaneus, sinus tarsi and downgoing toes bilaterally. He diagnosed bilateral occipital neuralgia, migraine

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[1] See Dr. McCranie's, Dr. Chan's and Dr. Shenoi's past medical history and surgery sections on Exhibit F, bate 031; Exh. M, bate 90, and Exh. N. bate 99.

[2] Records between November 11, 2019 and March 10, 2020, where not in evidence, only other providers' summaries of the visits, including physical therapy and massage therapy visits. This ALJ chose to rely on the descriptions from those records.

[3] Description taken from multiple medical records, including Dr. Ogin's March 11, 2021 report, as the original report was not in evidence.

syndrome and myalgia. He recommended trigger point injections for the occipital neuralgia, which he proceeded to perform.

8. The initial visit with Dr. Barry Ogin was on November 9, 2020 when Dr. Ogin took a fairly long history. Claimant was referred to Dr. Ogin by Dr. Matus with ongoing complaints of neck and cervicogenic headaches. He noted that Claimant had a comprehensive course of conservative care including physical therapy, massage therapy, dry needling and trigger point injections, and medications. Claimant reported that her low back pain only gave her occasional problems. He noted that Claimant's chief complaint was her neck, including aching and stiffness centrally but worse on the left hand than on the right side. She reported daily headaches and radiation into her shoulders and upper back centrally. Claimant had full shoulder range of motion without pain, scapular retraction and protraction was symmetric, she had full active range of motion of the cervical spine including with flexion, extension, right and left rotation, right and left lateral flexion. She was not reporting any numbness and tingling at that time. Dr. Ogin recommended medial branch block to the cervical spine given the MRI indications and, per the guidelines p. 28, physical examination findings consistent with facet origin pain, at least 3 months of pain, unresponsive to conservative care, including manual therapy, and has a positive psychosocial screen without aberrant concerns.

9. Dr. Ogin also documented that on December 10, 2020 she had a 100% relief following a cervical facet injection at the C2-5 bilateral MBB.

10. Dr. Ogin's report noted responses for December 18, 2020 that Claimant was three days post medial branch block (MMB) and her neck and headaches were feeling better with a good diagnostic response though the pain was gradually returning. She also complained of tingling and numbness down her left arm and into her left fourth and fifth fingers of the left hand.

11. On March 11, 2021 Dr. Ogin took a history that Claimant had increasing pain along her parascapular region, with severe pain in her right upper shoulder, down her medial arm to her hand, along the ulnar distribution. She also complained of pain in her sternum. She denied any new injuries other that the fact that she had returned to driving and had to hold out her arms to hold the steering wheel. His diagnosis and assessment was sprain of the ligaments of the cervical spine, including cervical facet joint syndrome, cervical pain, myalgia, cervical stenosis and cervical disc disorder with radiculopathy of mid-cervical region. He noted that the upper neck and headaches had responded to treatment but that, following performing an EMG which revealed a right C8-T1 radiculopathy. After a re-review of the MRI, the multi-level degenerative disc with spinal stenosis was more prevalent in the C5-C7. With that in mind, he recommended a C7-T1 epidural steroid injection.

12. On April 11, 2021, Dr. Paul Ogden responded to a request to approve a modified job offer, which included assembling and bagging hoagie sandwiches, assisting administrative personnel, and watching videos. Dr. Ogden added that "[B]ased on the restrictions of March 29, 2021 of avoiding reaching out or overhead" as well as allowing "position changes sit/stand/walk every 20-30 minutes" that Claimant was able to perform the tasks listed.

13. Respondent scheduled Claimant for an Independent Medical Evaluation (IME) with Dr. Kathy McCranie which took place on June 15, 2021. She took a history, which included the event of November 11, 2019 as well as an incident where she was cleaning out a closet and had an immediate onset of symptoms into her upper extremities and neck. She noted Claimant's recall of her medical treatment including that she did not have any benefit from the trigger point injections but had 100% immediate relief from the epidural steroid injections, though they lasted for a fairly short time before symptoms started to return. She also reviewed the medical records. Dr. McCranie opined that Claimant sustained both a lumbar strain and a strain of the foot and ankle, both of which resolved. She opined that Claimant's continuing complaints involving the cervical spine and the right greater than left upper extremity paresthesias, which were not documented until March 10, 2020, were not work related conditions. Lastly, Dr. McCranie opined that the right shoulder labral tear was not related to the November 11, 2019, injury, as an acute labral tear would cause immediate, severe pain in the shoulder and Claimant did not report shoulder pain for approximately seven months post-accident. Dr. McCranie further stated that, while the treatment for the cervical spine and shoulder were reasonably necessary, they were not causally related to the November 11, 2019 work injury.

14. Dr. McCranie stated as follows:

> It is my impression that the cervical spine is not accident related, making an impairment rating non-applicable. If, however, this condition is deemed to be accident related for administrative purposes, an impairment rating was performed as it is my opinion that she is at MMI for the cervical spine regardless of causality. For degenerative changes in the cervical spine, she would receive a 6% impairment with a 4% impairment for range of motion as her sensory examination was normal. Motor examination revealed some weakness in the ulnar distribution, more likely related to findings of peripheral neuropathy. If the cervical spine is deemed to be accident related, impairment would be 10% whole person. As noted previously, it is my opinion, however, that this impairment is not accident related. Regarding the right shoulder, it is my opinion that this impairment is not accident related. She is currently involved in ongoing workup of the right shoulder and if this is deemed accident related, this is not yet at MMI. However, it is my opinion, this should be treated outside of the worker's compensation arena for the reasons outlined above.

15. On June 21, 2021 Dr. Matus issued a report which included a description of Claimant's treatment to date. He noted his diagnosis as a work related fall injury with a strain of the low back and other muscle spasms, and strain of the muscles and tendons of the ankle and foot and the objective findings of those injuries were consistent with the history and mechanism of injury.[4] His physical exam revealed full range of motion of the cervical spine though Claimant reported tenderness on palpation of the right paraspinous muscles and trapezius muscles on the right, but no midline cervical spine tenderness. Back pain was causing minimal to some difficulty in daily life and left ankle had very minimal pain. Dr. Matus provided restrictions of limited use of the right upper extremity,

[4] As found, the section in Dr. Matus' June 21, 2021 and July 9, 2021 reports under "Case Summary" (Exh. H, bates 054-055; Exh. I, bate 065-066) are summaries of other providers' diagnosis, opinions and recommendations for treatment and were not necessarily adopted by Dr. Matus.

avoid repetitive reaching out or overhead; limited lift, push and pull of 5 pounds maximum, and should be allowed to change positions regularly between sit/stand/walk at least every 20-30 minutes; and referred her to Dr. Primack for a final evaluation and impairment rating.[5]

16. Claimant was placed at maximum medical improvement on July 9, 2021 by Dr. Matus without restrictions or impairment. Dr. Matus agreed with the IME examiner, Dr. McCranie that the cervical spine, headaches and shoulder conditions were not work related injuries and should be treated by Claimant's PCP, if Claimant continued to have ongoing complaints regarding those problems. He did not provide a diagnosis for the neck, nor did he show in his report that he performed an impairment rating for the related low back or left lower extremity. Yet he continued to document that back pain was causing minimal to some difficulty in daily life and left ankle had very minimal pain. Dr. Matus stated "[W]e have agreed to target Maximum medical improvement status, Injury related symptoms resolved, ongoing non related symptoms." As found, Dr. Matus placed Claimant at MMI as of July 9, 2021 noting that only the low back and left lower extremity injuries were related to the November 11, 2019 work injury. As further found, he did not perform an impairment rating with regard to either condition but considered them resolved.

17. On July 22, 2021 Respondent filed a Final Admission of Liability. Claimant objected and requested a Division Independent Medical Evaluation (DIME). The FAL admitted to an average weekly wage of $622.50.

18. Dr. Ranee Shenoi was selected as the DIME physician. She evaluated Claimant on October 12, 2021 and issued her report on October 12, 2022. She opined that Claimant reached MMI on July 9, 2021 and had a 7% whole person impairment related to the cervical spine, including 4% for specific disorder of the spine (Table 53 IIB), a 2% for loss of range of motion, and 1% for neurologic system (loss of strength). Dr. Shenoi stated that she was asked to evaluate the cervical, thoracic and lumbar spine as well as the left foot. She stated "[A]s the DIME Examiner, I will address MMI and impairment. I will not address causation."

19. Dr. Shenoi stated that the DIME application did not request she address the bilateral shoulder problems and she believed that the thoracic spine issues were coming directly from the shoulder pathology. Based on the *AMA Guides* she opined that the left foot injury provided a 1.25% impairment of the lower extremity which converted to 0% whole person impairment of the foot based on the peroneal nerve injury for altered sensation.

20. Dr. Shenoi asked Claimant what complaints were related to the work injury and she related sleep problems, pain in her right shoulder, arm, elbow and hand, including burning in the right axillary line and that her hand would get cold. She reported multiple neck complaints, going across her shoulders, which radiated into her chest and sternum as well as the right upper extremity. She reported headaches that were only intermittent. She also reported low back and left foot pain as well as ringing in her ears. As found,

[5] The evaluation with Dr. Primack did not take place, according to the medical records and the parties statements at hearing.

Dr. Shenoi only provided an impairment rating for the neck and foot, without providing a causation analysis of the body parts for which she was providing impairment ratings. Further, she did not rate the lumbar spine or go through the process to assess the lumbar spine range of motion.

21. Dr. McCranie issued a supplemental report on November 5, 2021. Dr. McCranie specifically commented regarding the DIME physician's report. She noted that Dr. Shenoi had specifically erred by failing to perform a causation analysis. She noted as follows:

> A causation analysis is necessary in order to determine if the body part to be rated is applicable for a work-related impairment rating. By stating that she made no causation analysis, Dr. Shenoi is indicating that she is not making an opinion as to whether the rating provided is applicable to the work injury. The rating itself was otherwise technically correct. However, without any causation analysis, there is no indication that the impairment rating is applicable to the work injury of November 11, 2019. According to Desk Aid 11 impairment rating tips number 7, division independent medical examiner may declare that a condition is not work related. This may occur despite the fact the payer has accepted a body part or a diagnosis as part of the claim. In [Claimant]'s case, treatment has occurred and MMI has been declared by an authorized provider. Considering the late onset of [Claimant]'s cervical symptoms, and a new non-accident-related event that caused the onset of these symptoms in April of 2020, it was essential that Dr. Shenoi perform a causation analysis in order to opine as to the relatedness of the cervical impairment.

C. <u>Dr. McCranie's Deposition:</u>

22. Dr. McCranie testified by deposition on June 1, 2022 as a board certified physiatrist and pain medicine specialist, with a Level II accreditation. She noted that she continued to see both private patients, including at Concentra twice a week, and patients for medicolegal evaluations with approximately 30 years of experience. Dr. McCranie indicated she was familiar with the *AMA Guides to the Evaluation of Permanent Impairment,* Third Edition (*Revised*), WCRP and the Impairment Rating Tips of the Colorado Division of Workers Compensation.[6] She specifically noted that Rule 11-3(K) required that each DIME physician make "all relevant findings regarding MMI, permanent impairment, and apportionment of impairment, unless otherwise ordered by an ALJ." Dr. McCranie stated that a causation analysis was an integral part of conducting a determination of permanent impairment. She specified that physician were required to comply with the Rules, the Division materials and Level II accreditation coursework.

23. Dr. McCranie testified that following the review of the medical records and consideration of the history provided by Claimant, March 10, 2020 was the first medically documented problem, including some tension in her neck and some right upper extremity paresthesias. The first documented pain in her cervical spine/neck was on May 15, 2020. Dr. McCranie explained that in order to link a cervical injury to the original date of injury, there needed to be a temporal relationship between the onset of symptoms and the initial

[6] Division's Desk Aid No. 11, Impairment Rating Tips, Division of Workers Compensation Rules of Procedure.

accident, which was not present in this case. What was significant here is that Claimant reported to Dr. McCranie that she was cleaning out her closet in April of 2020, and she was reaching, lifting and moving some hair products, towels and sheets from her closet, and had an acute onset of neck pain and right shoulder pain at the point that brought on a lot of these symptoms, which was a more probable cause of Claimant's neck and shoulder pain.

24. Dr. McCranie specifically noted that Dr. Shenoi was aware that the medical records indicated Claimant had not reported any problems until the March 10, 2020 date when she reported tension in her upper back and neck, that Dr. Shenoi was aware of the "closet" incident, but that Claimant had stated that she had felt a pop in physical therapy as an explanation of when she started to have problems in her neck and upper back. Dr. McCranie explained that it was incorrect to simply rely on a Claimant's claim that any particular injured body part was caused by the injury but it was up to the DIME physician to make and explain the causation analysis. As a DIME physician, it is up to that physician to determine the injuries or body parts that are causally related to the work injury in question and the DIME physician cannot rely on the items check off on the Application for a DIME.

25. Finally, Dr. McCranie opined that Dr. Shenoi committed a clear error in addressing MMI and impairment and declining to address causation of the particular body parts, which rendered her opinions on impairment clearly incorrect under the *AMA Guides*, Third Edition, and the Division training material. Dr. McCranie stated that based on the Division's Rules of Procedures specifically dealing with DIMEs and Level II accreditation, the Division's Impairment Ratings Tips, the training for recertification, the requirement that physicians utilize the methodology in the *AMA Guides*, Third Edition, it is absolutely incumbent on a DIME physician to do a causation analysis.[7] Dr. McCranie also suggested that Dr. Shenoi relied on the fact that the ATPs had provided treatment which was paid for by Respondents. This ALJ agrees with Dr. McCranie's inference that in relying on the fact that Respondent paid for the treatment for the cervical spine that it justifies addressing impairment to that body part as related to the November 11, 2019 work injury, which is clearly incorrect.

26. Dr. McCranie cited to the Impairment Rating Tips. The Section on DIME Panel Physician Notes, under Section 7, the tips emphasize as follows:

> Declaring Condition is Not Related to Injury: Division Independent Medical Examiners may declare a condition is not work-related. This may occur despite the fact a payer has accepted a body part or diagnosis as part of the claim, treatment has occurred, and MMI has been declared by the authorized provider. If this situation arises, an impairment rating must be provided in the report or as an addendum to the DIME report. This information will often be used by the parties for further negotiations and/or settlement of the claim. However, only the work-related impairment ratings are to be recorded on the DIME Examiner's Summary Sheet.

[7] At hearing Dr. McCranie explained that the *AMA Guides to the Evaluation of Disease and Injury Causation* explains a somewhat different and more expansive methodology of causation determinations. However, This ALJ will only rely on the law and rules applicable in this matter.

D. Dr. McCranie's Hearing Testimony:

27. Dr. McCranie's testimony at hearing was consistent with her testimony during the deposition and her reports. She opined that, considering the degenerative disc disease in the spine as verified by the MRI report of the cervical spine and the evidence of acute injury sometime in April or May 2020, when she reported excruciating pain, the incident of the closet was the more likely cause of the neck injury. Further, Dr. McCranie did explain, that sometimes, ATPs take time to make a final causation analysis, which Dr. Matus provided in his MMI report. She opined that the fact that Claimant was sent to multiple providers, including Drs. Chan, Ogin, and Castro, for the neck injuries, was not a *de facto* determination of causation.

28. Dr. McCranie opined that Dr. Shenoi's failure to specifically address causation in her DIME report was clearly incorrect. She explained that, based upon her understanding of the Division of Worker's Compensation Rating Tips, the *AMA Guides to the Evaluation of Permanent Impairment*, Third Ed. (*Revised*), and other medical publications that the failure to perform or provide a causation analysis to support her cervical impairment rating rendered her opinion on medical impairment clearly incorrect because a DIME physician must do a causation analysis for every body part that is rated and that it is insufficient and contrary to the impairment rating tips simply because the claimant had received treatment for the body part to provide a rating. Dr. McCranie also explained that the causation analysis required both an explanation of the temporal relationship of when the symptoms manifested as well as an analysis of the mechanism of injury. Dr. McCranie opined that without this analysis regarding the initial causation, the entire rating process was defective.

E. Risk Manager's Testimony:

29. The Risk Manager for Employer (JO) testified at hearing in this matter. She stated that she handled the workers' compensation claims until the excess policy carrier was activated by large expenses. As the Risk Manager she managed, monitored, reviewed, and made decisions with regard to workers' compensation claims and liability. She was generally involved from day one of a claim. She was the one that issued the First Reports of Injury (FROI) and made sure she was getting the M-164 forms to determine a worker's work status. She commented that she stayed involved in a case until the end of the claim.

30. The Risk Manager explained that Employer saw claims from the perspective of getting workers back to work, so they may authorize medical care that may not necessarily be related to the particular work accident. Employer would frequently request that providers conduct diagnostic testing early on in the case instead of delaying the process, in the hope that conservative care would work and the worker would get back to work sooner.

31. [Redacted, hereinafter MJ] was involved in the case, however, a younger adjuster through the third party administrator, who may not have felt confident enough to question the ATP's causation analysis, was handling the day to day issues. MJ[Redacted] testified she might have handled this case differently but she had a wealth

of approximately 30 years' experience. It was clear that the adjuster continued to authorize care despite a lack of a good causation analysis, until she, as the Employer's Risk Manager, requested the IME with Dr. McCranie.

32. The Risk Manager was very familiar with the modified job offers made to Claimant and was involved in the process. The February 9, 2021 offer was for Claimant to perform some office work and watch safety videos (approximately 50 of them) in order to keep Claimant busy and engaged in work activities. Dr. Matus authorized this modified job offer on the same day and Employer sent the offer of modified work for Claimant to start on February 15, 2021. On March 28, 2021 Claimant advised her supervisor that she had completed the safety videos so modified duty was terminated.

33. Based on the FAL of July 22, 2021, Claimant was originally paid regular salary through December 12, 2019 (pursuant to Sec. 8-42-124, C.R.S.) at which time the Third Party Administrator paid TTD benefits beginning December 13, 2019 through January 27, 2021. Then Claimant was paid temporary partial disability (TPD) on January 28 for one day and TTD resumed as of February 1, 2021 through February 15, 2021. As of February 18, 2021[8] Claimant was paid TPD until March 28, 2021.

34. Then MJ[Redacted] worked with Nutrition Services because they were frequently understaffed. At that time they were making sandwiches for the lunch truck that was provided to the children and community. They were to have Claimant sitting at a conference room table, where other workers would bring the ingredients and Claimant could make the sandwiches.

35. MJ[Redacted] stated that Claimant never went back and that Dr. Matus had said that the job was within her restrictions. The Risk Manager stated that Claimant was not placed back on temporary total disability because Claimant was the one to violate the April 9, 2021 Rule 6 offer of modified employment and that the job was still available. Then school ended on May 27, 2021, and because the bus drivers were paid on a twelve month cycle despite summer time off, they restarted to pay regular wages, despite Claimant not working.

36. MJ[Redacted] stated that while the pay check periods showed payment at the end of the month, the period of payment was not correct because Employer's pay period was really from the middle of the month through the middle of the following month. This ALJ infers from this testimony that, for example, the March 31, 2021 pay check actually paid from February 15 through March 14, 2021. This was confirmed by Claimant.

37. MJ[Redacted] was on vacation through April 26, 2021 and prepared a letter to Dr. Matus, which was sent on May 13, 2021 with a job description of assembling and bagging hoagie sandwiches. On May 14, 2021 Dr. Matus answered stating that the prior restrictions provided by Dr. Ogden were still applicable, as long as the job did not require any work lifting greater than 10 lbs. and that Claimant be able to keep her arm close to her side. As found, this is a new restriction as of May 14, 2021.

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[8] There was no explanation as to why Claimant was not paid for February 16 and 17, 2021, but it does show on the time log that she worked 6 hours a day for both days and it is to be assumed that those hours were paid by Employer.

38. Respondent argued that Employer should be entitled to a reimbursement for overpayment to Employer of the 24 hours paid to Claimant at the rate of $20.75 per hour for a total of $498.00, if Claimant was entitled to temporary disability benefits. MJ[Redacted] stated that this was for the period of April 27, 2021 through April 30, 2021 paid by Employer.

39. MJ[Redacted] testified that Claimant returned to work as of March 29, 2021 and temporary partial disability benefits stopped per the Final Admission of Liability (FAL) dated July 22, 2021.

40. The statement of earnings showed that in March[9] 2021 Claimant was paid $2,033.49,[10] in April 2021 she was paid $1,523.67, in May she was not paid any wages, in June she was paid $814.44 and in July she was paid $814.44 as well.

41. The hours worked print out showed Claimant working from March 29, 2021 through April 9 2021. This is consistent with what the Risk Manager testified, with the exception that it did not seem that Claimant worked her full hours all days following March 29, 2021. In fact, there were some periods that were listed as "Leave Without Pay."

F. <u>Other Evidence:</u>

42. On May 21, 2021 Claimant secured the signature of the supervisor approving the note stating that Claimant had showed up for work on April 26, 2021 but spoke with both the Nutrition Services Manager (supervisor) and her assistant (JC), that she was unable to make the sandwiches because of the repetitive nature of the job. The supervisor confirmed that she took down Claimant's phone number and advised Claimant to go home. The Manager further confirmed that she would call Claimant "when she found out what they should do." Claimant's testimony in this matter is found credible and supported by the supervisor's signature on the note.

43. The note further stated that Claimant worked on April 22, 2021[11] and could punch the clock at Nutrition Services but the "[Redacted, hereinafter OE]" system would not take her badge number. The time clock report at Exhibit Q, bate 134 seems to indicate that Claimant did, in fact, work on April 22 as it reports "5 Trans_Bus Cleaning" and provides a rate of pay. It is also clear from this print out that Claimant's work was not logged into this system after April 22, 2021. However, Claimant reported working May 24, 25, and 27, 2021 and on June 1, 2021 she received instructions from the Risk Manager to enter May 28, 2021 as work injury leave.[12] Therefore the hourly payroll print

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[9] Pay periods were calculated on a monthly bases from the first to the last day of any given month and paid generally on the last day of the month.

[10] This ALJ was unable to reach the same calculation by Employer, at least with the March 31, 2021 Employee Statement of Earnings. Claimant's rate of pay was $20.75. The accrual wages showed 108 hours were paid at $1,960.88. However, 108 hours multiplied by $20.75 equals $2,241.00 not $1,960.88. Even if we deduct the leave without pay of 11.50 hours from the 108 hours, that would total 96.5 hours times $20.75 for $2,002.37. There may be something this ALJ is not aware of and certainly was not clarified during MJ's[Redacted] testimony or Claimant's testimony.

[11] The note showed the year 2020 but given the time line of work and when work was offered, this ALJ infers that the correct year was 2021.

[12] Exh. 8.

out is clearly erroneous. Also, no payroll was paid in May and the June payroll earnings statement does not include any hours worked.[13]

44. A second note dated May 24, 2021 stated that on April 23, 2021 Claimant showed up for her work shift but was in pain, feeling she needed to see her doctor, so she would not be working. The front desk receptionist agreed and noted that she would let "them" know.

45. The third note dated May 27, 2021 stated Claimant worked hours for May 24, 25, and 27, 2021. It noted Claimant was working without breaks, took May 26, 2021 off as a personal day, and on May 28, 2021, pursuant to the Assistant, JC, that she should not go into work. Claimant stated this document was signed by another supervisor (JCS-D). These dates and times were also sent to the Risk Manager, who confirmed that May 28, 2021 should be entered as work injury leave.[14]

G. <u>Claimant's Testimony:</u>

46. Claimant testified that she continued to suffer from the effects of the injury at the time of the hearing. She stated that the treatment she received, including physical therapy, massage therapy, and the different injections helped her, but when she returned to her job of injury, she continued to have the symptoms. She also stated that treatment was delayed during some period because of the COVID pandemic and most of 2020 she was off work. Treatment was also delayed because she was struck with pneumonia and was out for multiple weeks without the ability to attend any medical appointments.

47. Claimant stated that she was initially seen at the original WorkWell for her physical therapy but because of how busy they were, she changed over to get PT at the Parker WorkWell. Claimant testified that they treated her neck symptoms in PT from the beginning as well.

48. Claimant testified that she reported the neck complaints from the beginning of her injury to her providers. As found, this was not documented in the medical records provided as evidence in the matter, though there was a dearth of records from the time period of November 11, 2019 through March 9, 2020.

49. Claimant stated that when she returned to work on January 28, 2021, she spoke with the coordinator about having problems driving the bus. She was taken back off work and WC started paying her again. Eventually she receiving the modified duty offer.

50. The offer went to Claimant on April 9, 2021 to start as of April 15, 2021. Claimant testified she started with Nutrition Services on April 22, 2021. Claimant reported that she had concerns that the work was outside her restrictions and was too repetitive. On the following day, April 23, 2021 Claimant showed up to work but left work that day to go to the doctor. On April 26, 2021 she advised her supervisor that the work was violating

[13] Exh. P, bates 111-112.
[14] Exh. 8.

her restrictions. Nutrition Services did not know what to do so they sent her home. As found, Claimant is credible in this matter.

51. When she went to Nutrition Services she would have to reach for the items she needed, which was causing increased symptoms and problems for her. At one point she was delegated to just opening bags, and she had to open over two thousand baggies in one day and was in so much pain, she could not tolerate that work. She testified that she called the Risk Manager and she called Dr. Ogden without response. Claimant was frustrated by the fact that she could not clock in and out of Nutrition Services because officially, she was not one of their employees. Claimant testified that she went to WorkWell and was seen Dr. Ogden's PA on April 23, 2021.

52. She testified that she went to work on April 26, 2021. This was confirmed by signature of the supervisor. She reported that the work was outside of her restrictions. She stated that she never told the Manager or the supervisor that she could not do any of the work, only that she could not do the baggies all day, opening them. Nutrition Services did not know what to do with her. She was willing to do something other than opening the hoagies bags. Dr. Matus never took her off work completely but provided restrictions.

53. Claimant was then sent home by the Nutrition Services supervisor and was told by the supervisor that she would call Claimant when she knew something. Claimant testified that she never received any calls after April 26, 2021 from Nutrition Services, HR or from the Risk Manager. She stated that it really was not her choice to leave. She had, at one point been making cookies from boxes of frozen ones and put them on trays to bake them, something she could do. It was really not her choice to leave but the work of opening baggies repetitively, was too much.

54. She stated that she prepared, typed and took the note dated May 21, 2023 to the Nutrition Services Manager and had her sign it to confirm the statements. Claimant did confirm she did not work in either June or July, as school was out. She did work at the end of May, 2021, after which she was again sent home. Claimant stated that she had worked some days in April and in May, 2021 but did not recall which ones exactly, other than the ones mentioned on the notes that the supervisors signed.

H. <u>Ultimate Findings:</u>

55. As found, Respondents have shown by clear and convincing evidence that Dr. Shenoi was incorrect in her final assessment of Claimant's impairment for the cervical spine being caused to the work accident. Dr. Shenoi failed to accomplish one of the integral requirement of a DIME physician in that she declined to make causation assessments in this matter. While she issued an impairment rating for the cervical spine and the left lower extremity, this does not equate to a determination of causation. A determination of causation cannot be declined or evaded. It is a requirement established by the Act, case law, the AMA Guides, the WCRP, the Level II accreditation materials as well as the Division's Impairment Rating Tips.

56. As found, the lumbar spine and left lower extremities are causally related to the November 11, 2019 work related injury.

57. As found, Claimant reached MMI with regard to the work related medical conditions on July 9, 2021, as opined by both the ATP, Dr. Matus, and Dr. Shenoi.

58. As found, the cervical spine injury was not causally related to the November 11, 2019 work injury and, despite Dr. McCranie's and Dr. Shenoi's rating of the cervical spine, no benefits are indicated in this matter.

59. However, also as found, all providers who address the condition of the left lower extremity indicated that the left lower extremity injury was causally related. This is persuasive. The ATP provided no rating nor did he take any range of motion measurements as required by the *AMA Guides to the Evaluation of Permanent Impairment*. Dr. McCranie, while she mentions that Claimant had full range of motion testing, she did not provide a worksheets upon which to rely, nor did she address the Claimant's loss of sensation. Therefore, as found, Dr. Shenoi's lower extremity impairment is found to be persuasive in this matter. Claimant is entitled to a 1.25% impairment of the lower extremity related to the peroneal nerve loss of sensation.[15]

60. As found, Claimant was under restrictions from March 29, 2021 through July 8, 2021, after which she was placed at MMI by the ATP. Claimant has shown she was entitled to temporary disability benefits from March 29, 2021 through April 9, 2021 and April 22, 2021through July 8, 2021.

61. As found, Respondents failed to show Claimant was responsible for her wage loss. Dr. Ogden's restrictions were "avoiding reaching out or overhead" as well as allowing "position changes sit/stand/walk every 20-30 minutes." Dr. Matus agreed with these restrictions and added that as long as the job did not require any work lifting greater than 10 lbs. and that Claimant should keep her arm close to her side. Dr. Matus again confirmed these restrictions on June 21, 2021 stating Claimant should "Limit use right upper extremity, avoid repetitive reaching out or overhead. Limit lift, push and pull 5 pounds max. Must be able to change positions regularly between sit/stand/walk, recommend at least every 20-30 minutes."

62. As specifically found, Claimant never received a call between April 26, 2021 through the time she returned to work in May, 2021 due to poor communication between the assigned Manager of Nutrition Services and the Risk Manager or HR. Claimant was found to be credible in this matter. As found she was provided instructions to go home and await a phone call. The Manager of Nutrition Services specifically took down Claimant's phone number down and it was reasonable to assume, if Employer wanted Claimant to return to work that the Manager of Nutrition Services or another of Employer's delegated individual would call Claimant or communicate with her in some manner. This was confirmed in the note signed by the Manager on May 21, 2021. Even the note of May 27, 2021, when Claimant was working, showed that Claimant was not provided the required breaks pursuant to Dr. Ogden's and Dr. Matus' recommendations.

63. As found, Claimant is entitled to temporary disability from March 29, 2021 through April 14, 2021, when Claimant should have started work pursuant to the modified job offer dated April 9, 2021. This ALJ infers that Claimant did not stop working as of March 28, 2021 but April 9, 2021, as shown by the wage records, when she was working

[15] As this is an ankle and foot injury, the scheduled impairment is appropriate.

irregular hours. Claimant showed up for work on April 22, 2021 instead of April 15, 2021. Claimant is not entitled to indemnity benefits from April 15, 2021 through April 21, 2021.

64. As found, Claimant is entitled to temporary disability benefits from April 22, 2021 through July 8, 2021, after which Claimant was placed at MMI without restrictions. Claimant credibly testified that she believed the work was not within her restrictions as she was working without breaks and in a repetitive manner. On April 26, 2021 her supervisor at Nutrition Services sent Claimant home, advising Claimant that the supervisor of Nutrition Services would call her when she found out what to do. At no time was any credible evidence provided that Nutrition Services called Claimant back to report to work. Claimant returned to work on May 24, 2021, and worked the 24th, 25th and 27th, the last day the school was open. Claimant was instructed that she should not go into work on May 28, 2021 by the Nutrition Services assistant supervisor (JC). This was confirmed by another supervisor (JCS-D). He also confirmed that Claimant had no breaks, despite the restrictions imposed by Dr. Ogden for breaks every 20-30 minutes.

65. Claimant earned an AWW of $622.50 or a daily rate of $88.93. Since it is deduced from the evidence that wages were paid from mid-month to mid-month in any particular month, it is inferred that the April 2021 employee statement of earnings incorporated Claimant's earnings from March 16, 2021 through April 15, 2021, a period of 31 days. No credible evidence was provide that Claimant missed any other days other than March 29, 2021 through April 14, 2021 during this period. Claimant should have earned $2,756.83.[16] Claimant earned $1,960.88 for a difference of $795.95. As found, temporary disability benefits for this period are owed in the amount of $530.19.

66. As found, Claimant failed to appear to work on April 15, 2021 until April 22, 2021. This is a 7 day period. According to the May 2021 statement of earnings, wages earned from April 16 through May 15, 2021 (30 day period) were $0.00. Therefore, after deducting the 7 days that Claimant failed to appear to work pursuant to the offer of employment, for the remaining 23 days, Claimant should have earned $2,045.39. As found, Claimant is entitled to temporary disability in the amount of $1,363.59 for this period.

67. According to the June 2021 statement of earnings, wages for May 16, 2021 through June 15, 2021, a 31 day period, were $814.44. Claimant should have earned $2,756.83, minus the actual earnings of $814.44, a difference of $1,942.39. As found Claimant is entitled to temporary disability benefits in the amount of $1,294.93 for this period.

68. According to the July 8, 2021 statement of earnings, wages for June 15, 2021 through July 15, 2021 (30 day period) were also $814.44. Claimant was placed at MMI as of July 9, 2021. Claimant's last day of work was May 28, 2021. Therefore, any wages in this period is presumed to be for wages owed after July 8, 2021. For the period of June 15, 2021 through July 8, 2021, Claimant was owed $1,363.59.

69. Claimant has shown by a preponderance of the evidence that she is owed a total of $4,552.30 in temporary disability benefits.

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[16] Calculated by multiplying the $88.93

70. Testimony and evidence inconsistent with the above findings are not credible, significantly relevant and/or not persuasive.

CONCLUSIONS OF LAW

A. Generally

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

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

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

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

B. Overcoming the DIME Physician's determination of MMI and Impairment

Respondent argues that the DIME physician, Dr. Shenoi, was incorrect in multiple manners with regard to Claimant's MMI status and work related impairment ratings. The party challenging a DIME physician's opinions must prove that the DIME physician's determinations were incorrect by clear and convincing evidence. Section 8-42-107(8)(C), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003); *In re Claim of Lopez*, 102721 COWC, 5-118-981 (Colorado Workers' Compensation Decisions, 2021). Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the determination is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-Med*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician's opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002).

The DIME physician must 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. 2002). Consequently, when a party challenges the DIME physician's opinion, the Colorado Court of Appeals has recognized that a DIME physician's determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning her opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Further, deviations from the *AMA Guides* do not mandate that the DIME physician's opinion is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to reach a particular determine is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008); *In re Claim of Pulliam*, 071221 COWC, 5-078-454-001 (Colorado Workers' Compensation Decisions, 2021). Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden

of proof by clear and convincing evidence to overcome that finding of the DIME physician's true opinion. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

The Act requires a DIME physician to comply with the *AMA Guides* in performing impairment rating evaluations. Sec. 8-42-101(3)(a)(I) & Sec. 8-42-101 (3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the *AMA Guides.* A determination of MMI requires the DIME physician to asses, as a matter of diagnosis, whether various components of the claimant's medical condition are casually related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). In determining whether the physician's rating is correct, the ALJ must consider whether the physician correctly applied the *AMA Guides* and other rating protocols. *Wilson v. Industrial Claim Appeals Office*, *supra*. The determination of whether the physician correctly applied the *AMA Guides* is a factual issue reserved for the ALJ. *McLane W., Inc. v. Indus. Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, *supra*. The question of whether the DIME physician's rating has been overcome is a question of fact for the ALJ to determine, including whether the physician correctly applied the *AMA Guides*. *Metro Moving and Storage Co. v. Gussert, supra*.

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals 11 Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Similarly, when a DIME physician's opinion is contrary to the Act, it is grounds for overcoming the DIME because the DIME report is legally incorrect. See *In re Claim of Lopez*, *supra*. Lastly, where an ALJ finds a claimant's description of her present symptoms credible, this is sufficient to overcome the DIME physician's opinion. *In re Claim of Conger*, 100521 COWC, 4-981-806-001 (Colorado Workers' Compensation Decisions, 2021).

It is clear from the evidence that Dr. Shenoi's true opinion is that, as a DIME physician, she need not address the issue of causality with regard to the different components of Claimant complaints of work related injuries. This is inconsistent with the law as established by the Act, the *AMA Guides*, the WCRP, the Division's teachings under Level II accreditation and the Impairment rating tips. Dr. McCranie is persuasive in this matter that the issue of causality is an integral part of the DIME process as well as the medical process of any physician in the workers' compensation system. She persuasively testified that a failure of a DIME physician to conduct a causation analysis before assigning an impairment rating violates the *AMA Guides* as to causation, multiple DOL

rules of procedure as well as recognized standards among level II physicians for performing impairment ratings.

Dr. McCranie's opinion that Dr. Shenoi's impairment rating is "clearly incorrect" is unrebutted in the medical records or in the hearing testimony. Unlike other situations wherein a Court has to interpret multiple or even conflicting opinions from a DIME; in this case there are no such conflicting opinions with regard to causation. In fact, there are no opinions from Dr. Shenoi on causation because she failed to provide one and specifically stated she declined to do so.

Claimant argues that since Dr. Shenoi provided a diagnosis for the neck, that it is to be assumed that it was related to the November 11, 2019 incident. However, Dr. Shenoi also lists upper extremity paresthesias as well as shoulder pain and did not perform an impairment evaluation on those body parts or explain sufficiently why she did not provide ratings for the shoulder injuries. Claimant also argued that it can be assume that Dr. Shenoi adopted a causation analysis because she was aware from the medical records that Claimant had received extensive authorized medical treatment for her cervical spine under this workers compensation claim. However, as testified to by Dr. McCranie, and as set out the Division's Impairment Rating Tips, Division has made it clear to Level II physicians and DIME physicians that simply because a specific condition is identified on a DIME application and/or simply because medical treatment has been voluntarily provided for a specific body part, causation is not to be assumed.

Here, as found, Dr. Shenoi made the assumption that, since treatment was authorized for the cervical spine, that Respondent was liable and therefore rated the cervical spine. As found, Dr. Shenoi was in error. This is further supported by the fact that she discussed Claimant's shoulder issues. She stated that, since the shoulder was not checked off on the Application for a DIME, that she need not address it. This is another assumption that is incorrect. A DIME physician has an obligation to consider all body parts and make causation determinations with regard to those body parts, whether they are or not related to the injury in question, and only then can a DIME physician make determinations whether Claimant has reached MMI for those related conditions and/or if the related conditions justify an impairment rating. Dr. McCranie's testimony in this regard is credible and persuasive. Respondents have shown by clear and convincing evidence that Dr. Shenoi was clearly incorrect and have overcome the DIME physician's opinions by clear and convincing evidence.

C. Maximum Medical Improvement

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

16, 2006). When the ALJ determines that the DIME has been overcome, the ALJ may independently determine the correct rating or date of MMI. *Lungu v. North Residence Inn*, WC 4-561-848 (ICAO, Mar. 19, 2004). An ALJ may thus determine whether a claimant has reached MMI and assign an impairment rating as a question of fact. *Destination Maternity and Liberty Mutual Insurance Company v. Burren*, 19SC298 (Colo. May 18, 2020); *see Niedzielski v. Target Corporation*, WC 5-036-773-001 (ICAO, Mar. 9, 2020) (when an ALJ determines that a DIME opinion has been overcome, the issue of the claimant's correct impairment rating becomes a question of fact and the ALJ may calculate the impairment based upon a preponderance of the evidence).

In this matter, Claimant's ATP, Dr. Matus, determined that Claimant was at MMI as of July 9, 2021. Claimant continued to have treatment, including therapy for the work related condition until that time. While Dr. McCranie identified an earlier date, based on her review of the medical records, this is only considered speculation as Dr. McCranie did not evaluate Claimant at that point in time. Once Dr. McCranie did evaluate Claimant and the report was provided to the ATP, the ATP had the option to make a determination of when Claimant reached MMI, and he did so by stating Claimant had reached MMI with regard to her lumbar spine and lower extremity injury on July 9, 2021. This opinion is more credible and persuasive than Dr. McCranie's speculative choice. Claimant has proven that she reached MMI as of July 9, 2021.

D. Permanent Impairment Ratings

Here, the parties must show by a preponderance of the evidence what the proper determination of impairment with regard to the work related conditions should be. But before this can be address, it is essential to have a determination of which injuries are causally related to the November 11, 2019 accident.

In this matter, it is found that the cervical spine is not a work related injury caused by the November 11, 2019 work related event. The medical records in evidence, supported the opinion of Dr. Cazden and Dr. McCranie, that Claimant did not have the cervical spine and shoulder complaints until sometime in March or April 2020, well over four months from the date of injury. While Claimant did state that the "closet" incident was not the cause of the neck and shoulder conditions, this was not persuasive. Dr. McCranie persuasively testified that it was more likely that the closet incident was the cause of those conditions and that, in order to link a cervical injury to the original date of injury, there needed to be a temporal relationship between the onset of symptoms and the initial accident, which was not present in this case. This is also true of the Claimant's continuing bilateral upper extremity symptoms. Dr. McCranie credibly opined that Claimant's continuing complaints involving the cervical spine and the right greater than left upper extremity paresthesias, which were not documented until March 10, 2020, were not work related conditions.

Lastly, Dr. McCranie credibly opined that the right shoulder labral tear was not related to the November 11, 2019, injury, as an acute labral tear would cause immediate, severe pain in the shoulder and Claimant did not report shoulder pain for approximately seven months post-accident. Dr. McCranie credibly explained that what was significant here is that Claimant reported to Dr. McCranie (and to Dr. Shenoi) that she was cleaning

out her closet in April of 2020, and she was reaching, lifting and moving some hair products, towels and sheets from her closet, and had an acute onset of neck pain and right shoulder pain at that point that brought on a lot of these symptoms, which was a more probable cause of Claimant's neck and shoulder pain. Respondents have shown that it was more likely than not that the cervical spine condition and the bilateral shoulder conditions are not related to the November 11, 2019 work related accident.

It is further found that Claimant has shown that the lumbar spine and the left lower extremity conditions are related to the claim by a preponderance of the evidence. This determination is supported by the medical records of Claimant's initial treatment records that are available. None of the rating physicians have provided a lumbar spine rating in this matter. Therefore, Claimant's lumbar spine rating is 0%.

Claimant has shown that the lower extremity condition continues to have an impairment cause by loss of sensation due to damage to the peroneal nerve. Dr. Shenoi persuasively rated Claimant's lower extremity impairment at 1.25% of the lower extremity in accordance with the *AMA Guides* to the Evaluation of Permanent Impairment, Third Edition (*Revised*). This was not addressed at all by Dr. McCranie. Therefore, Dr. Shenoi's determination of permanent impairment of the lower extremity cause by the damage to the peroneal nerve is more persuasive than any contrary determination. Claimant has shown by a preponderance of the evidence that it was more likely than not she has a 1.25% lower extremity impairment rating.

E. Temporary Disability Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *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. Sec. 8-42-105(3)(a)-(d), C.R.S.

As found, Claimant was under restrictions from March 29, 2021 through July 8, 2021, after which she was placed at MMI by the ATP. Here, Claimant was paid TTD through March 28, 2021. Claimant credibly testified that, when she completed watching the videos, she advised her supervisor that she had completed her assigned tasks. No further offers of employment were made by Employer between March 29, 2021 until April 9, 2021. As found, Claimant was not responsible for her wage loss. Claimant continued to be under restrictions due to the work related injury at this time. As found, Claimant has shown by a preponderance of the evidence that she was entitled to temporary disability benefits between March 29, 2021 through April 14, 2021,[17] in the amount of $530.19.

On April 9, 2021 Employer sent Claimant an offer of modified duty to begin April 15, 2021. This job offer was approved on April 11, 2021 by one of Claimant's ATPs, Dr. Paul Ogden. The job was to report to Nutrition Services by April 15, 2021. Claimant failed to report until April 22, 2021. Therefore, as found, Claimant was not entitled to temporary disability benefits from April 15, 2021 through April 21, 2021.

Claimant started work on April 22, 2021. On April 23, 2021 Claimant reported to work but was in significant pain due to the repetitive nature of the tasks assigned and went to her provider. On April 26, 2021 Claimant advised her supervisor that the work was violating her restrictions due to the repetitive nature of the job. Nutrition Services did not know what to do so they sent her home. As found, Claimant was credible in this matter and, as found, she was not responsible for her wage loss. While Employer consulted with Claimant's treating provider, Dr. Matus on May 13, 2021 to determine if Claimant's job with Nutrition Services complied with Claimant's restrictions. He stated that "presuming she can keep her arm close to her side this should not preclude assembling sandwiches and placing them in bags." However, Nutrition Services nor the HR manager communicated that new restriction to Claimant nor that they would accept Claimant back to work under those terms. Claimant was credible in this regard. As found, Claimant was not responsible for her wage loss and Claimant has shown by a preponderance of the evidence that she was entitled to temporary disability benefits from April 22, 2021 through July 8, 2021,[18] in the amount of $4,022.11.

ORDER

IT IS THEREFORE ORDERED:

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[17] The wage records at Respondent's Exhibit Q are specifically found not to be accurate or credible, because we know that Claimant worked on May 24, 25 and 27 and these records fail to show the hours worked. This was confirmed by a supervisor at Exhibit 7 bate 45, and Exhibit 8 email from the Risk Manager.

[18] Employer argued that Employer made a payment of $498.00 for wages paid from April 27, 2021 through April 30, 2021 which should be credited or offset from any benefits paid. However, this is beyond this ALJ's purview and jurisdiction to address. Only benefits under the Act may be determined in this venue. Furthermore, in the calculation of temporary disability above, pursuant to the statements of earnings, Respondents are credited with all benefits reported in the exhibits.

1. The Stipulation of Facts signed by the parties on March 29, 2023 are approved. The Stipulation of Facts is the official transcript of the November 15, 2022 hearing.

2. Respondent overcame Dr. Ranee Shenoi's DIME opinion by clear and convincing evidence.

3. Claimant was at MMI as of July 9, 2021.

4. Respondents shall pay permanent partial disability of 1.25% extremity impairment in accordance with Dr. Shenoi's impairment of the lower extremity for the peroneal nerve injury.

5. Respondents shall pay temporary partial disability benefits from March 29, 2021 through July 8, 2021 in the amount of $4,552.30.

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

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

DATED this 22nd day of June, 2023.

Digital Signature

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-175-654

ISSUES

I. Whether Claimant established by a preponderance of the evidence he is entitled to Temporary Total Disability ("TTD") benefits May 11, 2022, ongoing.

II. In the alternative, whether Claimant established by a preponderance of the evidence he is entitled Temporary Partial Disability ("TPD") benefits from May 11, 2022 through October 19, 2022 and TTD from October 20, 2022, ongoing.

III. Whether Respondents demonstrated by a preponderance of the evidence Claimant was responsible for his termination from employment.

FINDINGS OF FACT

1. Claimant sustained a work injury to his low back on June 14, 2021.

2. Respondents admitted liability for the work injury and began payment of TTD on June 18, 2021.

3. Claimant underwent treatment with authorized treating physicians ("ATPs") Jonathan Rudolf, M.D. and Maneula Ewing, M.D. at Animas Occupational Medicine.

4. On March 3, 2022, Dr. Rudolf imposed the following temporary work restrictions: lifting, carrying, pushing, pulling up to 25 lbs.; repetitive lifting up to 10 lbs.; walking, standing, and sitting 4 hours per day; and no crawling, kneeling, squatting or climbing. These restrictions were in effect as of March 15, 2022.

5. In a letter dated March 15, 2022, Respondents asked Dr. Rudolf to approve a modified duty position for Claimant. The letter stated, in relevant part:

> The position consists of: WILL ASSIST WITH LIGHT CLEAN UP, PHONES, REGISTER AND DAILY CLEANING TASKS. MAY LIFT, PUSH, PULL AND CARRY UP TO 25 LBS. ALTERNATE BETWEEN SITTING AND STANDING AS NEEDED, NO CRAWLING, KNEELING, SQUATTING OR CLIMBING.
>
> Location of job: 201 N. PINON DR. D, CO 81321
>
> The position is available for 37.5 hours per day and up to 5 days per week.

(Ex. G, p. 22).

6. The letter included a job description which stated "# of Hours Working" as "37.5". Dr. Ewing approved the modified duty position on April 25, 2022.

7. Employer sent Claimant a written offer of modified duty dated March 15, 2022. Employer notified Claimant that light duty was available for Claimant within the restrictions given by his physician. The letter stated: "Schedule: TUESDAY – SATURDAY 8:00AM TO 5:00PM" and "Job Description: will assist with like clean up, phones, register and daily cleaning tasks, may lift, push, pull, and carry up to 25 pounds. alternate between sitting and standing as needed. [N]o crawling, kneeling, squatting, or climbing." (Id. at p. 18). The rate of pay listed is $14.00 per hour. Under the section "Initial Meeting" it states "YOU ARE EXPECTED TO BEGIN YOUR FIRST SHIFT IMMEDIATELY FOLLOWING THE INITIAL MEETING." (Id.) No date is specified for the initial meeting.

8. The letter to Claimant further states "To accept this offer please report to the above scheduled meeting on. [sic]" (Id.) Again, no date for the scheduled meeting is identified. The letter notes that, while participating in the modified employment, Claimant was required to follow all of Employer's HR policies and "[f]ailure to report will be considered an unexcused absence, and you will not be paid for any days missed." (*Id*.) The letter includes the name and telephone number of the individual to contact with questions. The letter notes, "Please be advised that if you decline this offer of light duty work that is within your work restrictions, this may affect your right to receive ongoing Workers' Compensation benefits." (Id.)

9. Claimant checked that he accepted the offer and signed and dated the letter on April 25, 2022. Claimant testified he did so while at a follow-up evaluation with Dr. Ewing on April 25, 2022. On April 25, 2022 Dr. Ewing assigned temporary work restrictions of lifting, repetitive lifting, carrying, pushing, and pulling up 25 lbs.; no reaching over head; walking, standing and sitting 5 hours/day; and no crawling, kneeling, squatting, or climbing.

10. Claimant credibly testified at hearing. Claimant testified that, per his ATPs, he was restricted to working 4 or 5 hours per day at the time he signed the offer of modified employment on April 25, 2022. Claimant testified that, despite the number of hours detailed in the offer letter exceeding his restrictions, he signed the offer accepting the modified employment because he believed it was the only way to keep his workers' compensation benefits. Claimant testified he tried to call "workman's comp" to obtain clarification regarding the hours, but received no response. He did not attempt to contact Employer for clarification. Claimant testified it was his understanding that his attorney was going to address the issue with Respondents. Claimant testified he was not physically capable of working 40 hours per week.

11. No evidence was offered establishing that Claimant received clarification regarding the offer of modified employment or a corrected offer of modified employment.

12. Claimant did not begin the modified employment because the number of hours as detailed in the offer letter exceeded his work restrictions. Claimant has not since returned to work or had any other communication with Employer.

13. On September 7, 2022 Respondents filed a General Admission of Liability ("GAL") for TTD from 6/18/2021 through 5/10/2022 at a weekly rate of $373.33 based on an average weekly wage ("AWW") of $560.00. Under remarks, the adjuster noted Claimant accepted modified duty but did not report to work on 5/10/2022.

14. On October 20, 2022 Claimant called Dr. Rudolf to request modification of his work restrictions. Dr. Rudolf reduced Claimant's lifting limitation from 25 pounds to 20 pounds and the maximum hours worked from 5 to 4 hours per day.

15. [Redacted, hereinafter RW] owns a franchise of Employer, which is a temporary employment agency. RW[Redacted] credibly testified on behalf of Respondents at a post-hearing deposition. RW[Redacted] testified that the letter stating the modified duty position was for 37.5 hours per day was a typographical error. He explained that the offer was to work 3.75 hours per day. RW[Redacted] testified that the schedule of Tuesday to Saturday 8:00am to 5:00pm included in the offer letter represented a range of days and hours during which Claimant could work his 3.75 hours/day, not Claimant's actual work schedule. RW[Redacted] acknowledged that Employer did not communicate these clarifications to Claimant, nor communicate to Claimant the date on which he was to begin the modified employment.

16. RW[Redacted] testified that Employer considered Claimant's failure to begin the modified employment and to otherwise contact Employer as job abandonment, resulting in Claimant's termination:

> Q: So you said my client is listed as inactive. Was he ever formally terminated?
>
> A: Yes. So what we do in that situation where we inactivate an individual that we have not had contact with for some time, we give them a period of time that we try to reach out to them, or in their actual handbook they are supposed to contact us weekly to let us know that they're available or not available.
>
> And once the period of time goes by and we can't get ahold of them or we've had no contact, we inactivate them.

(RW[Redacted] Dep. Tr. 9:13-25).

17. The handbook referred to by RW[Redacted] was not offered as evidence. No evidence was offered indicating Employer attempted to reach out to Claimant after April 25, 2022. RW[Redacted] testified Claimant was not notified of his termination.

18. Claimant testified he was unaware that he was terminated by Employer. No evidence was offered establishing Claimant received the employee handbook or was

otherwise aware of any Employer policy requiring him to contact Employer on a weekly basis.

19. Claimant has not worked since the date of injury. As of the date of hearing, Claimant has not been released to full duty or been placed at maximum medical improvement ("MMI").

20. The ALJ finds that the offer of modified employment presented to Claimant exceeded the work restrictions imposed by Claimant's ATP and that Claimant's ultimate rejection of the offer and failure to begin the modified employment was reasonable under such circumstances. The preponderant evidence establishes Claimant is entitled to TTD benefits from May 11, 2022, ongoing.

21. Respondents failed to prove by a preponderance of the evidence Claimant was responsible for termination of his employment.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or

none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

TTD

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.

The term "modified employment" means employment within the restrictions established by the attending physician. *In re Claim of Willhoit*, W.C. No. 5-054-125-01 (ICAO, July 23, 2018). The modified employment must be reasonably available to the injured worker under an "objective standard*." Id.,* citing *Ragan v. Temp Force*, W.C. No. 4-216-578 (ICAO, June 7, 1996).

Claimant does not dispute the attending physician gave Claimant a written release to return to modified employment or that Claimant failed to begin modified employment. The crux of Claimant's argument is that the modified employment offered to him exceeded his work restrictions, rendering his failure to begin the modified employment reasonable. The ALJ agrees.

As of the date of the letters to the attending physicians and to Claimant, March 15, 2022, Claimant was restricted to working 4 hours per day. As of the date the attending physician Dr. Ewing approved the modified duty position and Claimant accepted the offer, April 25, 2022, Claimant was restricted to working 5 hours per day. RW[Redacted] testified that the actual modified duty position was for 3.75 hours per day, which would be within Claimant's work restrictions. However, such offer was not made to Claimant, nor is there sufficient evidence establishing Claimant knew or reasonably should have known the offer was to work 3.75 hours per day.

The description of modified employment approved by Dr. Ewing stated Claimant would be working 37.5 hours per day, up to five days per week. While a reasonable person would recognize 37.5 hours per day to be a typographical error, the documents provided to the attending physicians and to Claimant do not otherwise provide any context or basis upon which Claimant could reasonably infer the offer was for 3.75 hours per day. The job description notes the number of hours as 37.5 hours without specifying per day, per week, per month or some other computation. The offer letter sent to Claimant does not include any reference to number of hours, but lists a work schedule of 8:00 a.m. to 5:00 p.m., Tuesday through Saturday. Assuming a one-hour lunch period, this equates to working 8 hours per day, 40 hours per week. Such schedule exceeded the work restrictions imposed by Claimant's ATPs.

Although RW[Redacted] testified that the schedule listed in the offer letter was not Claimant's work shift but, rather, a range of days and hours during which Claimant could work 3.75 hours per day, such information was not communicated to Claimant nor was any evidence offered suggesting Claimant knew such information. Without further basis, expecting Claimant to infer that an offer letter denoting a schedule of 40 hours per week was actually an offer for modified employment of 3.75 hours per day is unreasonable. The offer, as proffered to Claimant and as reasonably understood by Claimant, exceeded Claimant's work restrictions.

Claimant credibly testified he signed to accept the offer based on the belief that he had to do so in order to keep his workers' compensation benefits, that he attempted to contact someone with "workman's comp" regarding clarification of the hours, and believed his attorney was addressing the issue with Respondents. No evidence was offered indicating Claimant received clarification or confirmation that the hours were within his restrictions. Claimant did not begin the modified employment because the offer, as presented to him, exceeded his work restrictions. Based on the totality of the circumstances, Claimant's failure to begin the modified employment was reasonable.

Employer did not make any subsequent offers of modified employment to Claimant. Claimant has not returned to modified or regular employment, been released to return to regular employment, or reached MMI. Claimant continues to sustain wage loss as a result of disability caused by the work injury. Accordingly, Claimant is entitled to TTD benefits from May 11, 2022, ongoing.

Responsibility for Termination

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As used in the termination statutes, the word "responsible" "does not refer to an employee's injury or injury-producing activity." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002). Therefore, Colorado termination statute §8-42-105(4)(a), C.R.S. is inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. *See Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Colorado Springs Disposal*, 58 P.3d at 1062. Notably, a separation from employment is not necessarily due to an injury simply because it occurs after the injury, and the injured employee need not be offered modified employment before discontinuation of benefits if his was responsible for the separation. *See Gilmore*, 187 P.3d 1129; *Ecke v. City of Walsenburg*, WC 5-002-020-02 (ICAO, May 5, 2017) (injury occurring one day before claimant's previously-announced retirement did not cause claimant's separation from

employment or loss of wages). However, if the injury also leads to wage loss at a claimant's secondary employment, she is eligible for compensation for those wages, even if the separation from primary employer was voluntary or for cause. *Id.*

Subparts (b) and (c) of §Section 8-42-105 C.R.S. provide:

> (b) The claimant's refusal to accept an offer of modified employment under either of the following conditions does not constitute responsibility for termination:
>
> (I) The offer of modified employment would require the claimant to travel a distance of greater than fifty miles one way more than the claimant's pre-injury commute; or
>
> (II) An administrative law judge determines that the claimant's rejection of the offer of modified employment was reasonable considering the totality of the claimant's circumstances, including accounting for:
>
> (A) The consequences of the industrial injury;
>
> (B) The financial hardship that would be imposed on the claimant in order to accept the offer of modified employment; or
>
> (C) Any other reasons that would, in the opinion of the administrative law judge, make it impracticable for the claimant to accept the offer of modified employment.
>
> (c) The circumstances described in paragraph (b) of this subsection (4) are not exhaustive.

As found, Respondents failed to prove it is more probable than not Claimant was responsible for his termination. Respondents contend Claimant was terminated for job abandonment due to Claimant's failure to appear for the modified employment and subsequent failure to contact Employer. As discussed, Claimant's ultimate rejection of the modified employment was reasonable based on the totality of the circumstances. Claimant did not begin the modified employment as the offer presented to Claimant exceeded his work restrictions in terms of the number of hours per day Claimant could work. Claimant credibly testified he initially accepted the offer due to his belief he was required to do so to keep his workers' compensation benefits, and that he believed his attorney would further address the issue with Respondents. No evidence was offered indicating Claimant was informed the modified duty position was for 3.75 hours per day. As Claimant's ultimate rejection of the modified duty position was reasonable, he was not responsible for termination of his employment based on such rejection.

Additionally, there is insufficient credible and persuasive evidence demonstrating that Claimant's failure to subsequently contact Employer as expected by Employer was volitional. RW[Redacted] testified that employees with whom Employer does not have contact for a period of time are terminated. He further testified that the employee

handbook provides that an employee is supposed to contact Employer weekly regarding their availability. No evidence was offered regarding the specific “period of time” referenced by RW[Redacted], whether Claimant received the employee handbook, or whether Claimant was otherwise aware of Employer’s expectation that he contact Employer on a weekly basis in Claimant’s specific circumstances. Additionally, while the offer letter to Claimant states Claimant was expected to begin modified employment immediately after the “initial meeting” and the “scheduled meeting”, the letter contains yet another clerical error by leaving the date of such meetings blank.

There is insufficient evidence Claimant was aware of and deliberately failed to comply with Employer’s expectations. His failure to begin the modified employment was based on the reasonable belief the employment exceeded his work restrictions, and his subsequent failure to contact Employer was based on the belief his attorney was addressing such issue with Respondents. The preponderant evidence does not establish Claimant precipitated his termination by a volitional act that he would reasonably expect to cause the loss of employment. Under the totality of the circumstances, Claimant is not responsible for his termination and thus entitled to TTD benefits.

ORDER

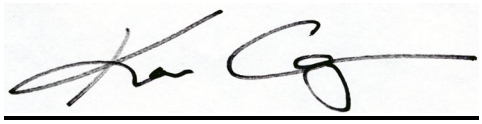
It is therefore ordered that:

1. Claimant is entitled to TTD benefits from May 11, 2022, ongoing until terminated by statute.

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

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

DATED: June 23, 2023



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

ISSUES

- Whether Claimant established, by clear and convincing evidence, that the maximum medical improvement (MMI) opinion of Dr. Karl Larsen, as the Division Independent Medical Examiner, is highly probably incorrect.

- If Claimant is at MMI, whether Claimant established, by clear and convincing evidence, that Dr. Larsen's impairment rating opinions are highly probably incorrect and if so, what is the correct impairment rating associated with Claimant's industrial injury.

- If Claimant established that he is not at MMI, whether treatment for complex regional pain syndrome (CRPS), vision loss, carpal tunnel syndrome, cervical and lumbar spine is reasonable, necessary or related to the injury as medical benefits.

- If Claimant failed to overcome Dr. Larsen's MMI determination, whether treatment for CRPS, vision loss, carpal tunnel syndrome, cervical and lumbar treatment is reasonable, necessary or related to the injury as maintenance medical benefits.

- Whether Respondents are liable for treatment by Fenix Health LLC, Colorado Springs Neurological Associates, Vision Institute and any of their referrals as authorized providers.

- Whether Claimant established, by a preponderance of the evidence, that he is entitlement to temporary disability benefits and if so, whether such benefits were properly terminated for failure to appear for a modified duty offer on July 31, 2020.

FINDINGS OF FACT

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

1. Claimant suffered an admitted work-related injury to his right pinkie finger on April 20, 2020 while using a jackhammer to break cement located close to an adjacent wall. As Claimant was operating the jackhammer, his right pinkie finger was caught and crushed between the wall and the handle on the jackhammer. *(Respondent's Exhibit (RE), C, p.41*). X-rays were obtained and revealed a comminuted crush fracture to the "distal tuft of the fifth distal phalanx with mild displacement of the fracture fragments. *Id*. *at p. 46, 54*. *See also, RE OO; RE J, p. 1593.*

2. Claimant was referred to orthopedics and was evaluated by their service on April 23, 2020. *(RE C, p. 1471).* Orthopedics recommended nonsurgical treatment and provided a fingertip protector with daily dressing changes. *Id*. Claimant was

released by orthopedics on April 30, 2020 and instructed to return to work as able using his fingertip protector. Id. at p. 1471-1472.

3. After his release from orthopedics Claimant continued to treat with Employers designated provider, UC Health and specifically Dr. Emily Burns as Claimant's authorized treating provider (ATP). Dr. Burns treated Claimant from April 27, 2020 through July 30, 2021. On August 6, 2021, Dr. Burns completed a narrative report outlining Claimant's impairment after she placed Claimant at MMI on July 30, 2021.[1] *(RE C, p. 1470-1477).* Claimant's medical history is complicated and the claim record is voluminous. Indeed, the parties have submitted in excess of 1000 pages of exhibits (including many duplicate documents) and the testimony of Claimant versus Drs. Burns and Mathwich can aptly be described as being at odds with each other. Nonetheless, the record submitted supports a finding that at the time Dr. Burns completed her August 8, 2021 MMI/impairment rating report, Claimant reported continued use of Cymbalta, Lyrica, trazodone, and propranolol. He was also complaining of persistent 10/10 pain with little functional improvement, informing Dr. Burns that he didn't feel like he could drive or return to work. *Id.*

4. Dr. Burns summarized the course of Claimant's treatment in her August 6, 2021 MMI/impairment rating report. According to Dr. Burns' August 6, 2021 report, Claimant had been seen several times via video by June, 2020, during which appointments he complained of "worsening and intense 10 out of 10 pain, with shooting pain up his arm from the right pinkie finger, giving him headaches and watering in his right eye". *(RE C, p. 1472).* Dr. Burns advised Claimant that the extent of his symptoms could not all be attributed to the laceration and fracture in his pinkie finger. *Id*. Accordingly, she advised him to follow up with his primary care provider. *Id.* Dr. Burns also noted that Claimant had returned to his orthopedist on July 23, 2020, who noted that Claimant had been ill at home for several weeks. *Id.* Claimant was apparently advised by his orthopedist that his injury had healed in acceptable alignment. *Id*. Therefore, he was instructed to discontinue the use of his splint and start hand therapy immediately. *Id.* Dr. Burns noted that Claimant had been evaluated by a pain management specialist, Dr. Meyer who was "not convinced" that there is a significant component of CRPS causing Claimant's symptoms and whom noted that Claimant had "significant psychological and stress related issues that cause dysfunction for him in general". *Id*. Regarding the potential of Claimant having CRPS, Dr. Burns noted that Claimant had seen three specialists over the course of his treatment and all three "assessed that his symptoms were not consistent with CRPS and advised no further intervention". *Id at p. 1476*. As noted, Dr. Burns placed Claimant at MMI and assigned a combined whole person impairment of 12%. She also recommended maintenance treatment to include 3 months of refills for Cymbalta and Lyrica to allow Claimant time to follow up with his PCP for discussion about continuing versus tapering these medications. *Id. at p. 1477*. Dr. Burns made it clear that because Claimant had not experienced any functional improvement with these medications that it was not "indicated" that he continue them through workers' compensation beyond the 3 months she recommended. *Id.*

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[1] *See RE C, pp. 1418-1420.*

5. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Burns' opinions regarding MMI/impairment on August 13, 2021. *(RE LL, pp. 1756-1758)*.[2]

6. Claimant requested a Division Independent Medical Examination which was performed by Dr. Karl Larsen on February 28, 2022. *(RE A, pp. 1-11)*. Dr. Larsen obtained a history surrounding Claimant's injury in addition to completing a records review[3] and a physical examination. *(RE A, pp. 1-2)*. Dr. Larsen's physical examination of the right hand revealed no obvious deformity and while the fingernail on the right pinkie finger was overgrown compared to the surrounding digits, there were no "trophic changes, abnormal hair distribution, or shiny skin changes suggestive of CRPS". *Id*. at p. 2. Claimant was noted to guard his finger making the sensory and vascular examination difficult. Nonetheless, Claimant did have capillary refill in all the digits and a 2+ symmetric radial pulse. *Id*. Although Claimant reported hypersensitivity to attempted light touch in the small finger, his sensation and range of motion in the remaining digits, wrist and elbow were within normal limits. *Id.* Dr. Larsen noted that Claimant had received "extensive" psychological and psychiatric treatment to include medications "directed" at treating anxiety and depression. *Id*. Accordingly, Dr. Larsen adopted (incorporated) the 6% mental health impairment rating into his overall impairment rating assigned to Claimant, noting that it was abundantly "clear that psychological factors [were] having a tremendous impact on [Claimant's] overall function". *Id.*

7. Dr. Larsen diagnosed Claimant with neuropathic pain and hypersensitivity with resultant stiffness and loss of motion in the right pinkie finger "due to disuse and guarding". *(RE A, p. 2).* He noted that Claimant had an "array of nonphysiologic complaints associated with this that [he could not] explain". *Id*. *at pp. 2-3*. Dr. Larsen did not provide a diagnosis of CRPS nor did he recommend CRPS testing, noting further that he could not ascribe "many of the disabilities [Claimant] describes . . . to his injury and hypersensitivity".[4] Consistent with Dr. Burns, Dr. Larsen assigned a combined physical and mental health impairment rating of 12% of the whole person. *Id*. *at p. 3*. Dr. Larsen also adopted Dr. Burns' 3 month recommendations for maintenance care. While Claimant was apparently not using his right hand for activities, Dr. Larsen opined that it was unlikely that he was at risk of re-injuring the right finger if he did so. *Id.* Accordingly, Dr. Larsen indicated he would "allow [Claimant] to perform any activity he feels he can accomplish without restrictions". *Id.* Dr. Burns has repeatedly opined that there are no work restrictions associated with the work injury.

8. After being placed at MMI by Dr. Larsen, Claimant sought treatment on his own from Colorado Springs Neurological Associates. *(RE F).* On March 15, 2022, Claimant was evaluated by Physician Assistant (PA) Chase Alexander Tucker. *(RE F,*

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[2] *See also, RE KK, pp. 1720-1722*.

[3] Dr. Larsen documented that he reviewed 468 pages of records. *(RE A, p. 1).*

[4] Specifically, Dr. Larsen noted that he could not physiologically related Claimant's reported eye pain/watering or the "twitching" events Claimant described to the April 20, 2020 injury.

p. 1544). PA Tucker noted that following the crush injury to Claimant's finger, he developed "shooting pain which radiates up his right arm into his neck" and down his right leg from the calf to the ankle and up from the ankle to the right knee. *Id*. *at p. 1544-1545.* PA Alexander opined that Claimant's neuropathic pain involving the right arm and leg might be related to CRPS "given the chronicity and onset following crush injury to his hand." *Id*. *at p. 1544*. PA Alexander referred Claimant for NCV/EMG testing of the right arm/leg and an MRI of the cervical spine to rule out other focal neuropathy and instructed Claimant to follow-up on completion of this testing. *Id.*

9. During a follow-up appointment with Dr. Gregory Ales, at Colorado Springs Neurological Associates, April 21, 2022, the mechanism of injury (MOI) was mistakenly identified as a "crush injury to his right hand . . ." rather than the right distal phalanx of the small finger. *(RE F, p. 1550).* Moreover, Dr. Ales indicated that Claimant "[had] been diagnosed with CRPS and was treated with neuropathic pain medications". *Id*. This appointment and the representations of Dr. Ales that the April 20, 2020 MOI was to the right hand and that Claimant was diagnosed with CRPS were after MMI from Dr. Burns and the DIME from Dr. Larsen. More importantly the ALJ is unable to find record support for the conclusion that Claimant crushed his hand and that he was diagnosed with CRPS. In this case, the record is replete with references that the injury was limited to the distal phalanx of the right small finger. Furthermore, there is there is no evidence that Claimant had been tested for or diagnosed with CRPS. As noted above, the authorized workers' compensation providers agree that Claimant did not demonstrate clinical signs of CRPS that would warrant CRPS testing or a diagnosis of CRPS. Indeed, Claimant has never undergone CRPS testing consistent with the Division Guidelines, because that has never been recommended or requested. *(Burns Depo. p. 30, 40, 42).*

10. Respondents filed a FAL adopting the opinions of Dr. Larsen regarding MMI and permanent impairment on May 6, 2022. *(RE HH, pp. 1697-1699).*

11. Claimant attended a follow-up appointment with Dr. Ales on June 30, 2022 after completion of the recommended EMG and cervical spine MRI. *(RE F, p. 1553; 1557).* Claimant's MRI revealed moderate to severe foraminal disease predominantly on the left side. *Id*. *at p. 1557*. EMG testing demonstrated "evidence of a right median sensorimotor neuropathy across the wrist supportive of moderate right CTS (carpal tunnel syndrome)". *Id*. The remainder of Claimant's EMG testing including conductions of the right arm and leg were interpreted as "normal". *Id*. Dr. Ales recommended that Claimant follow-up with pain management through Peak Vista as the neuropathic pain medications he was prescribing were not effective in controlling Claimant's pain. *Id. at p. 1553.*

12. After the representations regarding the Claimant crushing his hand and having been diagnosed with CRPS documented in Dr. Ales' initial April 21, 2022 visit, the other non-workers' compensation providers rendering care through Peak Vista seemingly have carried forward the diagnosis of CRPS. Indeed, during an August 24, 2022 appointment with his primary care provider (PCP) to formulate a treatment plan to

address Claimant's ongoing complaints of pain, Family Nurse Practitioner (FNP) Mark Lynch noted that Claimant's injury was to the right hand rather than the distal phalanx of the right small finger. (RE D, p. 1489). Moreover, without documenting any clinical/objective signs of CRPS on examination, FNP Lynch provided an assessment of "[c]omplex regional pain syndrome type 2 of right upper extremity" for which he prescribed opioid medication. *Id. at p. 1488-1489*. The records from Claimant's subsequent appointments with Nurse Practitioner Veronica Misko are largely unchanged in content[5] and simply adopt the examination findings and assessments of FNP Lynch. *Id. at pp. 1501-1507*. Like FNP Lynch, Ms. Misko also elected not to perform a "focused" physical examination, choosing instead to document that it was not needed. *Id. at pp. 1501, 1504, 1506*.

13. Dr. Brian Mathwich evaluated Claimant on December 13, 2022. He reviewed and summarized all of the medical records. He agreed with Dr. Larsen that Claimant was at MMI. *(RE B).* He agreed with the evaluators before him that there were no clinical signs of CRPS warranting CRPS testing under the Division Guidelines. Dr. Mathwich testified at hearing as a Level II Accredited, Board certified expert in Family Medicine. He described his evaluation of Claimant. Claimant told him he was in 8/10 pain at the time of the evaluation. However, upon distraction, Dr. Mathwich was able to hold the right hand and palpate it quite firmly including the pinkie, without eliciting increased complaints of pain. He did not observe atrophy in the hand or ecchymosis. There was good hair growth, consistent with the left. The hand was not excessively cold or warm, color was normal, capillary refill was normal, and there was no mottling or tight/shiny skin. He opined that Claimant did not meet the objective criteria for CRPS testing. Dr. Mathwich indicated that Claimant is receiving CRPS like treatment from his PCP based upon his subjective verbal reports of pain despite there being no objective findings to establish a diagnosis of CRPS. He noted that providers outside the workers compensation system are not constrained by the same rigors required by the Colorado Workers' Compensation Medical Treatment Guidelines, i.e. WCRP, Rule 17, Exhibit 7 when diagnosing and treating suspected cases of CRPS. He emphasized that subjective complaints alone are insufficient to establish a diagnosis of CRPS. Accordingly, he concluded that Claimant's CRPS treatment was/is not reasonable and necessary.

14. During cross-examination, Claimant confronted Dr. Mathwich with a record from NP Alesha Barker which declared that Claimant met the Budapest Criteria, for a diagnosis of CRPS within a short time of his evaluation of Claimant. *(See NP Barker's 12/16, 2022 report at Claimant Exhibit (CE) A).* Dr. Mathwich reiterated that, under the Medical Treatment Guidelines, both verbal reports of symptoms *and* objective clinical signs, i.e. findings of the clinician must be present to refer Claimant for testing and confirming a diagnosis of CRPS. According to Dr. Mathwich, Claimant does not meet Budapest Criteria, and therefore cannot be diagnosed with CRPS.

15. Careful review of NP Barker's 12/16/2022 report indicates that Claimant's

[5] Except for Claimant's complaints of ongoing severe and increasing pain for which NP Misko prescribed higher doses of narcotic medication.

history of injury is again inaccurately documented. According to NP Barker, Claimant sustained a "crushing injury to his right *hand/wrist* when he was using a 95 lb jackhammer and his *hand* became caught underneath it. (CE A, p. 5)(emphasis added). The report goes on to reflect that Claimant had been diagnosed with CRPS of the right upper extremity (probably from the records of NPs Lynch/Misko without support from objective clinical findings). While Claimant described color and temperature changes, NP Barker's report is devoid of any indication that she completed a physical examination. Consequently, there is no evidence that Claimant's verbal reports of color and temperature changes were independently verified by this clinician. *Id. at pp. 1-6 of the 12/16/2022 report*. Instead, NP Barker simply noted:

> [Claimant] has CRPS of his right upper extremity near his right hand and wrist. He does meet the Budapest Criteria with discoloration to the hand, numbness and burning, and temperature changes that are disproportionate to the rest of his body. . . . Regarding the CRPS, I believe [Claimant] would benefit from a set of 4 stellate ganglion blocks one week apart each.

16. Dr. Burns was deposed, and explained in her testimony that she did not suspect clinically that Claimant had CRPS, did not document or observe additional findings that would indicate CRPS, and did not believe that CRPS testing needed to be done in this case. (*Burns Depo, p. 25-27*). Indeed, Dr. Burns testified: "At the time I saw him, no, we didn't feel like [testing] was reasonable. And it wasn't just me, that was two orthopedic specialists and a pain management specialist." *Id, at p. 30; RE C, 1476.* Despite Claimant's suggestion to his treating psychologist (Sean Kelly) that his providers thought he might have CRPS *(See, RE B, p. 21),* the record evidence supports a finding that the balance of Claimant's treating providers were skeptical of the diagnosis and were in agreement with Dr. Burns that Claimant probably did not have CRPS as evidenced by the following statements of Dr. Mark Meyer: "I've examined it several times and I still am not convinced that there is significant component of CRPS." "I do not think the symptoms are related to his injury on the fifth digit". *(RE I, p. 1592, 1586; RE B, pp. 20-21)* and Dr. Wallace Larson: I do not see any evidence of CRPS. (RE B, p. 18).

17. As referenced above, Claimant has reported anxiety, depression and PTSD associated with his work injury. Claimant's records indicate that he experienced several stressors during the period of time he was treated for his right finger injury. These include two of his brothers having been diagnosed with cancer, one of these being sentenced to prison, Claimant's personal concerns that he may also have cancer, his brother being injured when his car caught on fire ("quite traumatizing to him."), and the very disturbing discovery of one of his brothers frozen to death in his back yard. *(RE H, p. 1573, RE. I, p. 932, 1587, 1592; RE B, p. 17).* Dr. Stephen Moe treated Claimant for anxiety and depression, placed him at MMI and provided a 6% mental impairment rating. *Id. at pp. 1579-1582*. He did not apportion or reduce the rating based upon the non-work causes. *Id*. At the time of his rating, he discussed the Claimant's mental health condition with Dr. Burns. His report says, "She also shared

her concerns, with which I agree, that non-injury factors have contributed to his reported symptoms and impairment, which we both recognize make it challenging to determine his work-related mental impairment." Id. at p. 1579. Dr. Meyer agreed, indicating: "[Claimant] continues to demonstrate a lot of pain behaviors and I do believe that there are some significant psychosocial and emotional issues that contribute to his pain complex." *(RE I, p. 1589).*

18. Respondents submitted surveillance video of Claimant at hearing that was shown to and discussed with Dr. Burns during her deposition. *(RE M; Burns Deposition).* After review of Claimant's activities on June 26, 2022, June 30, 2022, and July 2, 2022, Dr. Burns reiterated her opinion that Claimant can clearly use his right hand. The videos demonstrate Claimant engaged in daily activities using his right hand to carry bags, using his smart phone one handed on the right, place his sensitive right hand into his jeans pocket and walk for an extended period, and open car doors and other doors. Further, he is actively involved in a construction or maintenance job, going in and out of a particular building. He is seen spraying and drying off a window, wearing knee pads, which the ALJ reasonably infers to be for work on the floor, carrying drills, ladders, furniture, a vacuum, and a heavy bag and five gallon bucket with items weighty enough to alter his gait, all with his right hand and frequently with his left hand empty. Moreover, other people, including [Redacted, hereinafter MT], are present in the video with Claimant who are not carrying things, and who could assist if Claimant was incapable or having trouble using his right hand. There is no hesitation in movement, no overt pain behavior, and no sign that Claimant's right pinkie finger is fixed in an "extended position". *(See Disfigurement Award and Order, 11/8/2021, Ex. JJ).* Importantly, Claimant's reports to his PCP, i.e. his Medicaid providers during this same time period was of 10/10 of pain. (See e*.g. RE. D, p. 1489).*

19. Between Claimant's appearance before the court on April 6, 2022 and the May 10, 2023 hearing, additional surveillance was obtained of Claimant's activities. Similar to the June and July 2022 videos, Claimant appears to move without hesitation or signs of overt pain. *(RE M, April 19, 20, 26 & 30, 2023).* He wears a hand covering only on the day that he is being picked up by Medicaid transportation for a doctor's appointment on April 20, 2023. However, while waiting, he displays no difficulty with or sensitivity of the right hand as evidenced by using this hand to hold dog leashes, zip up his pants, manipulate his phone and thrusting that hand into the front pocket of his jeans. Accordingly, the ALJ finds Dr. Larsen's suggestion that Claimant is unable to use his right hand/finger or that his pinkie finger "remains in an extended position" as represented to Judge Cayce during his disfigurement hearing unpersuasive. Indeed, Claimant admitted that he could use the right hand per the 12/16/2022 report of NP Barker. (CE A, p. 6).

20. Of additional concern regarding Claimant's functionality are the conclusions of Dr. Albert Hattem who was asked to comment on Claimant's MMI status on June 4, 2021. As part of his physician advisor opinion, Dr. Hattem was provided Facebook postings which depicted that by November 25 and 29, 2020, approximately 7 months after his 4/20/2020 injury, Claimant was capable of jogging. He posted a picture

at a casino, with his girlfriend on November 2, 2020 and on August 3, 2020, he posted a picture from [Redacted, hereinafter TS] where he had traveled with his significant other. Again during the time of these postings, Claimant was reporting 10/10 pain and other associated symptoms including headaches, nausea, vision changes and severe anxiety he related to his industrial injury. Because Claimant's demonstrated activity level was inconsistent with his severe complaints/symptoms without supporting objective findings, Dr. Hattem concluded that Claimant had reached MMI as of June 4, 2021. *(See RE G; CE B).*

21. Dr. Burns testified that Claimant remains at MMI. (*Burns Deposition, p. 27, ll. 16-19*). She reiterated her opinion that Claimant was medically capable of working. *Id. at ll. 20-22*.

22. Claimant alleges that he suffers visual loss related to CRPS caused by his April 20, 2020 work-injury. Records from Vision Institute were submitted by both parties. There is no indication in these records or the records of any other medical provider that there is a causal link between Claimant's right pinkie finger injury and his vision loss. *(See generally RE E, p. 1525).* Claimant has been diagnosed with glaucoma.

23. Temporary benefits have never been paid under this claim. [Redacted, hereinafter RH] testified as Employer's Human Resources Manager. He testified that he managed the claim and assisted Claimant with return to work issue from the time of his work injury, forward. Claimant returned to work and was accommodated with a light duty position after his April 20, 2020 injury. According to RH[Redacted], Claimant was accommodated with one handed tasks, including computer work and predominately a flagging position where he earned regular wages.

24. Per RH[Redacted], Claimant was working in this modified duty position when he contacted Employer via test message on May 15, 2020 to report that he could not come to work because of COVID-like symptoms. Between May 15 and May 29, 2020, Claimant was provided with COVID pay. Beginning June 2020, RH[Redacted] testified that Claimant was required to provide the results of a COVID test. RH[Redacted] testified that testing results were requested 3 times in June but Claimant never responded. Although the evidence presented supports a finding that Claimant never took a COVID test, he instead provided successive recommendations for isolation from separate "Little Clinic" offices in Erie, Parker, and Westminster Colorado over the next several weeks. *(RE QQ).* The end of the last "self-isolation" period was July 2, 2020*. Id. at p. 1829.* Nonetheless, Claimant did not return to work and did not contact Employer. Employer then submitted a modified duty job description to Dr. Burns. This included the same one-handed job of flagging, and the duties of reviewing safety videos, that claimant was doing before he asserted COVID like symptoms on May 15, 2020. *(RE K, p. 1609).* Dr. Burns approved the position and signed off on this modified job duty letter on July 16, 2020 *(See, in contrast, text representation by claimant July 10, 2020, RE QQ, 1831).* Claimant was sent a modified duty offer on July 22, 2020. *Id at p. 1608.* Claimant's modified duty work was to commence on July 31, 2020. *(RE K).*

Claimant did not appear for work and did not begin that job. Indeed, the evidence presented supports a finding that Claimant did not appear for work at any time after May 15, 2020. Moreover, there is no persuasive evidence that Claimant's work related condition worsened after his failure to appear for modified duty on July 31, 2020. On August 5, 2020, Respondents filed a medical only General Admission of Liability (GAL). *(RE NN, p. 1768).* RH[Redacted] testified that Claimant was eventually terminated on September 30, 2020 after Employer gave Claimant ample time to appear for modified duty as his continued absence was affecting the companies missed work status with OSHA.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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

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

interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion). Generally, the ALJ finds the testimony of Claimant to be inconsistent with the more convincing medical records of Drs. Burns, Meyer, Larsen, Hattem and Mathwich. When considered in its totality, the evidence in this case supports a reasonable inference/conclusion that while Claimant suffers from persistent neuropathic pain, there is insufficient support for the conclusions of NPs Lynch, Misko and Barker that he suffers from CRPS and that the treatment he is receiving through these providers is reasonable, necessary and related to his April 20, 2020 industrial injury.

Overcoming Dr. Larsen's Determination of MMI and Impairment

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI and/or causation is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding MMI and/or the cause of a particular condition asserted to be related to Claimant's industrial injury, the party challenging the DIME must demonstrate that the physicians determinations in these regards are 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 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

E. 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. *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 ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998).

F. MMI is defined, in part, as the "the point in time . . . when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. Based primarily on NP Barker's 12/16/2022 report, Claimant alleges that he has a diagnosis of CRPS, is in need of additional treatment, and is therefore, not at MMI. While he suspects the same, the record evidence does not support such conclusion.

Indeed, careful review of the record supports a finding that none of Claimant's authorized treating physicians have diagnosed him with CRPS.

G. A diagnosis of CRPS is governed by Rule 17, Exhibit 7, of the Medical Treatment Guidelines. The Medical Treatment Guidelines (Guidelines) are regarded as the accepted professional standards for care under the Workers' Compensation Act and provide a vetted consensus regarding the diagnosis of CRPS. *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). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: "All health care providers shall use the Guidelines adopted by the Division". *Hall v. Industrial Claim Appeals Office, 74 P.3d 459 (Colo. App. 2003).* "Accordingly, compliance with the Guidelines is mandatory for medical providers." *Chrysler v. Dish Network*, W.C. No. 4-951-475-002 (ICAO, July 15, 2020). In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. Section 8-43-201(3)(C.R.S. 2020). Indeed, Rule 17-4 (A) acknowledges that "reasonable medical care may include deviations from the Guidelines in individual cases." *Chrysler v. Dish Network*, *supra.* Nonetheless, the Guidelines carry substantial weight and should be adhered to unless there is evidence justifying a deviation. *See Hall v. Industrial Claim Appeals Office, supra*; *See Logiudice v. Siemans Westinghouse*, W.C. No. 4- 665-873 (ICAO, January 25, 2011).

H. The ALJ may consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse, supra.* Guidelines concerning the assessment and treatment of complex regional pain syndrome and been prepared by the Colorado Department of Labor and Employment, Division of Worker's Compensation (Division) and are enforceable under the Division's Rules of Procedure. *See* 7 CCR 1101-3. The Medical Treatment Guidelines (MTGs) for Complex Regional Pain Syndrome are found at WCRP 17, Exhibit 7. These Guidelines are applicable regardless of the alleged inflicted extremity. Per Rule 17, Exhibit 7, the "[d]iagnosis of CRPS continues to be controversial and the clinical criteria used by the International Association for the Study of Pain is thought to be overly sensitive and unable to differentiate well between those patients with other pain complaints and those with actual CRPS. Pertinent sections of the CRPS guides provide:

- WCRP, Rule 17, Exhibit 7(G)(2): <u>DIAGNOSTIC COMPONENTS OF CLINICAL CRPS</u>: Patients who meet the following criteria for clinical CRPS, consistent with the Budapest criteria, may begin initial treatment with oral steroids and/or tricyclics, physical therapy, a diagnostic sympathetic block, and other treatments found in the Division's Chronic Pain Disorder Medical Treatment Guideline. All treatment should be periodically evaluated with validated functional measures. Patient completed functional questionnaires such as those recommended by the Division as part of Quality Performance and Outcomes Payments (QPOP, see Rule18-8) and/or the Patient Specific Functional Scale can provide

useful additional confirmation. Further invasive or complex treatment will require a confirmed diagnosis. (Emphasis added).

D. To meet the criteria for initial treatment, the patient must establish the following:

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

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

  - Sensory: reports of hyperesthesia and/or allodynia;

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

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

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

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

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

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

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

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

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

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

WCRP, Rule 17, Exhibit 7(G)(2)(a-e).

I. Because significant harm can beset patients by over-diagnosing CRPS, including physical harm caused by overreliance on invasive procedures, the MTGs strongly recommend that patients with suspected CRPS undergo "objective testing to verify their diagnosis. *(See WCRP, Rule 17, Exhibit 7 above)*. Simply because Claimant continues to experience pain of increased intensity in his right hand/arm neck and leg following his finger injury does not support a conclusion that she has CRPS or that it is related to his April 20, 2020 industrial injury. In this case, the objective tests to assist in confirming the likelihood of a diagnosis of CRPS have not been performed. Accordingly, the ALJ finds/concludes that the opinions expressed by Dr. Ales, and NPs Lynch, Misko and Barker regarding Claimant's CRPS diagnosis are premature and unconvincing. Their diagnostic impressions are unpersuasive because they doctors completely failed to employ the MTGs in their diagnosis and all failed to appropriately diagnose Claimant with CRPS through objective testing. Indeed, their diagnosis of CRPS, based solely upon Claimant's subjective complaints of pain runs afoul not only of the specific diagnostic requirements found in the CRPS MTG, but also ignores the warnings of premature CRPS diagnosis imbedded within the guideline itself. While Dr. Ales and NPs Lynch, Misko and Barker have strong opinions regarding Claimant's diagnosis, the ALJ finds that making a diagnosis of CRPS based solely on Claimant's subjective reports of pain, without objective testing data or justification for such deviation, contrary to the MTGs. The failure of Drs. Ales and/or NPs Lynch, Misko and Barker to properly utilize the MTGs to diagnose CRPS prior to recommending treatment supports this ALJ's conclusion that their diagnostic impressions are premature and probably incorrect. (*See Goff v. Schwan's Home Services, W.C. No. 947-921-01 (September 7, 2016)(affirming ALJ's denial of treatment for CRPS because MTG diagnostics were not met).*

J. Here, Dr. Burns has repeatedly addressed the question of whether Claimant might have CRPS during the course of her treatment. Indeed, on December 2, 2020, Claimant's wife and spokesperson, MT[Redacted], entered the examination room at the end of Claimant's visit and asked why Dr. Burns had not diagnosed CRPS. Dr. Burns documented that a variety of medications were tried to address the neuropathic symptoms and complaints, with no clear functional benefits from any of the medications. Dr. Burns discussed nerve pain in general and the additional symptoms seen in CRPS, "which the patient does not have at this point". (*RE C, p. 762).* Dr. Burns added that CRPS would not explain the symptoms Claimant was reporting in remote/unconnected parts of his body. *Id.* Six months later, on July 8, 2021, Dr. Burns participated in a Samms conference with Claimant's attorney and Respondents during which the issue/diagnosis of CRPS was raised. (RE C, p. 1360). Dr. Burns specifically addressed why testing for CRPS is not indicated. Indeed the stated reason why testing was not indicated was the lack of "objectively documented additional clinical characteristics"

observed/documented by multiple specialists and herself. Id. In addition, Dr. Burns noted that the "low chance" that such testing would be reliable with such a "minute area of involvement", i.e. the distal phalanx of the little finger in combination that testing would not change the management of Claimant's injury spoke against CRPS and testing. *Id*. Drs. Meyer, Larson (Wallace), Mathwich and Larsen (Karl) all agree with Dr. Burns that Claimant does not have clinical signs consistent with CRPS to warrant testing or a diagnosis of CRPS.

K. After considering the totality of the evidence presented, including the DIME report of Dr. Larsen, the reports of Dr. Burns, Dr. Meyer, Dr. Larson, Dr. Hattem, and Dr. Mathwich along with the balance of the medical record and contrasting them with the reports of Dr. Ales and NPs Lynch, Misko and Barker, the ALJ concludes that Claimant has failed to produce unmistakable evidence establishing that the Dr. Larsen's determination regarding causality and MMI is highly probably incorrect.[6] Rather, the ALJ concludes that the evidence presented regarding Claimant's medical diagnosis and recommendations raised by Dr. Ales and NPs Lynch, Misko and Barker are based upon Claimant's inaccurate and incomplete injury history provided to these providers. Thus, to the extent that the opinions of Dr. Ales and NPs Lynch, Misko and Barker diverge from those of Dr. Larsen, the ALJ concludes that these differences constitute a mere professional difference of opinion regarding whether Claimant has CRPS and if he does, whether it is related to the April 20, 2020 industrial injury. A difference of opinion does not rise to the level of clear and convincing evidence that is required to overcome Dr. Larsen'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); Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000). Consequently, Claimant has failed to meet his required legal burden to set Dr. Larsen's causality (diagnostic) and MMI determinations aside. As such, his request must be denied and dismissed.

Claimant's Entitlement to Treatment for CRPS, Vision Loss, Carpal Tunnel Syndrome, and/or Cervical, Lumbar or Leg Pain

L. A claimant is entitled to medical benefits that are 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. 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).

[6] Neither party presented evidence challenging Dr. Larsen's permanent impairment rating.

M. 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 that 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.* Based upon the evidence presented, the ALJ concludes that Claimant has failed to establish that the treatment rendered by the Vision Institute, Dr. Ales and NPs Lynch, Misko, Barker is reasonable, necessary and related to his April 20, 2020 industrial injury. As found, the evidence in the instant case persuades the ALJ that Claimant is at MMI for the effects related to his April 20, 2020 right finger injury, that he has not been tested for, but likely does not have CRPS or work related diagnostic or treatment needs for CRPS, that his visual disturbance is likely related to glaucoma and that he needs no further maintenance treatment to cure and relive the symptoms caused by his April 20, 2020 injury or prevent deterioration of his work-related condition. On these issues, the ALJ credits the opinions of Drs. Burns, Meyer, Mathwich and Larsen.

Claimant's Entitlement to Temporary Total Disability (TTD) Benefits

N. To receive temporary disability (TTD) benefits, Claimant must prove the injury caused a disability. In addition, the claimant must prove that the industrial disability lasted greater than three working days. Section 8-42-103(1), C.R.S. 2001; *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. 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 her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability to effectively and properly perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

O. In this case, the persuasive evidence supports a conclusion that Claimant has failed to establish his entitlement to temporary benefits, having failing to show that he missed work as a result of his work injury. Indeed, Claimant's restrictions were accommodated and he performed modified duty work at full wages following his April 20, 2020 injury to May 15, 2020 when he removed himself from work for an extensive length of time based upon COVID like symptoms. After presenting successive recommendations for isolation from separate "Little Clinic" offices in Erie, Parker, and Westminster Colorado over the next several weeks, Claimant failed to return to work on July 2, 2020, the date the last self-isolation period ran out. Consequently, Employer sent an approved modified job offer which provided that Claimant was to start modified duty on July 31, 2020. The evidence presented supports a conclusion that Claimant did

not contact the employer and did not appear for the modified duty position approved by his authorized treating physician. Consequently, he was terminated. Accordingly, Claimant's wage loss is not attributable to his industrial injury, but rather his conscious decision not to appear for modified duty. Under C.R.S. § 8-42-103(1)(g), Claimant has failed to establish his threshold entitlement to temporary benefits.

P. As noted above, Claimant returned to work for Employer but was subsequently terminated on September 30, 2020 after Employer gave Claimant ample time to appear for modified duty. Moreover, the evidence presented supports a conclusion that Claimant failed to establish that his condition objectively worsened after his termination date. It is well settled that a claimant who might otherwise be considered disabled is not eligible for TTD benefits if he/she was "responsible for termination of employment." *Kerstiens v. All American Four Wheel Drive*, W.C. No. 4-865-825-04 (August 1, 2013). Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). Here, the evidence presented persuades the ALJ that Claimant is responsible for his separation from employment and his resulting wage loss.

Q. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996) (unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008).

R. Considering the entire evidentiary record, the ALJ concludes that Claimant was responsible for the termination of his employment. Claimant exercised a degree of control over the circumstances resulting in his termination by repeatedly ignoring Employer's pleas to present COVID testing results and failing to report to modified duty on July 31, 2020 despite the position being approved by his authorized workers' compensation medical provider, Dr. Burns. The ALJ concludes that any employee would reasonably expect the failure to report for work to result in the loss of employment. Because his termination was not compelled by the natural consequence of the work injury and because he failed to establish a worsening of his condition, Claimant is "responsible" for his wage loss and is not entitled to TTD. Accordingly, the claim for such benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant's request to set the MMI and impairment rating determinations of Dr. Larsen is denied and dismissed.

2. Claimant's request for additional medical benefits following his release from care by Dr. Burns from Fenix Health LLC, Colorado Springs Neurological Associates, Vision Institute is denied and dismissed. Claimant has not met his burden to prove entitlement to additional reasonable, necessary or related maintenance benefits, including but not limited to treatment for CRPS, his vision, or any other conditions. Accordingly, Claimant's claim for maintenance medical benefits at this time is also denied and dismissed.

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

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

Dated: June 23, 2023

/s/ Richard M. Lamphere

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-212-530-001

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he sustained a compensable injury on May 10, 2022?

2. If Claimant sustained a compensable injury, did Claimant prove by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from December 6, 2022 to January 9, 2023?

3. If Claimant sustained a compensable injury, did Claimant prove by a preponderance of the evidence that medical care, including the neck surgery he underwent and the proposed elbow surgery, are reasonable, necessary and related?

Stipulations

The parties agreed to an average weekly wage (AWW) of $415.37.

FINDINGS OF FACT

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

1. Claimant is a 61 year-old man who worked for Employer as a driver. Claimant's primary responsibility included delivering vehicles to customers. (Tr. 18:14-20).

2. Claimant testified that on May 10, 2022, he and the commercial manager, [Redacted, hereinafter ZR], made a delivery to a customer in Delta, Colorado. Claimant was driving a high-profile vehicle that did not have running boards. Once the paperwork for the delivery was completed, Claimant was getting back into the vehicle and as he was doing so, he slipped and grabbed for the steering wheel with his right hand. He testified that felt a pop down his right shoulder and arm, and experienced some tingling and numbness. (Tr. 19:2-13).

3. Claimant further testified that after feeling the pop, his arms dropped onto the seat. He was able to get into the vehicle by crawling, and he drove back to Greeley. Claimant reported the incident to his manager [Redacted, hereinafter JM]. JM[Redacted] gave Claimant a list of medical providers to choose from to seek medical attention. (Tr. 20:1-19).

4. Claimant went to Workwell on May 13, 2022, and was evaluated by Lloyd Luke, M.D. Claimant told Dr. Luke he heard and felt a painful pop in his right upper extremity,

when pulling himself into the truck on May 10, 2022. He described experiencing a pop in his right shoulder area. (Ex. A). Claimant did not complain of neck or elbow pain.

5. Dr. Luke diagnosed Claimant with an injury to the brachial plexus. He ordered physical therapy, and restricted Claimant's work activities to no lifting, pushing, pulling or carrying more than five pounds with the right arm, and no climbing involving the right arm. (Ex. 6).

6. Claimant returned to see, ATP, Dr. Luke, on May 24, 2022. Claimant told Dr. Luke he felt worse. Specifically, Claimant reported experiencing more frequent and intense paresthesia and stinging pains down his right arm, and felt he was weaker in shoulder flexion and elbow supination and pronation. Dr. Luke ordered an EMG of Claimant's right upper extremity, an MRI of his right shoulder, and a physiatry consult with Greg Reichhardt, M.D. Claimant had been seeing Dr. Reichhardt, and he told Dr. Luke that Dr. Reichhardt was his pain specialist. (Ex. 5).

7. Dr. Reichhardt evaluated Claimant on June 29, 2022. Claimant explained he was pulling himself into a pick-up truck and felt a pop, but he was not sure where he felt the pop. Claimant also reported the onset of weakness and numbness in his right arm. Claimant did not report neck pain. Dr. Reichhardt noted Claimant's history of Poland syndrome with congenital hypoplasia of the right upper extremity, primarily in the forearm and hand, including the right pectoralis region. He noted treating Claimant for a prior injury and his forearm and hand did not look grossly different from Claimant's previous visits. Dr. Reichhardt diagnosed Claimant with ulnar neuropathy at the elbow, possible radial neuropathy at the elbow, and possible mild median neuropathy at the wrist. Dr. Reichhardt opined that Claimant's presentation was puzzling, particularly due to his "modest mechanism of injury." (Ex. B).

8. On July 8, 2022, Claimant saw Joshua Snyder, M.D., at Orthopaedic & Spine Center of the Rockies (OCR) for "right elbow pain."[1] Claimant told Dr. Snyder that on May 10, 2022, he was getting into a truck without a running board, and was reaching in with his left arm. He then reached over the steering wheel with his right arm to pull himself up when he "felt immediate pain in his elbow." Claimant reported the pain was "tolerable" but when he went to pick up a bottle of water, he experienced pain and weakness. According to the record, Claimant wanted Dr. Snyder to review the MRI of his right shoulder. The MRI of Claimant's right shoulder was normal, but he was to follow up with a hand and elbow specialist. Claimant did not report any neck pain. (Ex. E.).

9. Claimant told Dr. Luke he felt a pop in his right shoulder. He told Dr. Reichhardt he felt a pop, but was not sure where it was. Claimant told Dr. Snyder he felt immediate pain in his elbow. Claimant did not report neck pain to any of these doctors. The ALJ finds that the descriptions of his injury, which Claimant gave his medical providers, were inconsistent and not credible.

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[1] Dr. Snyder operated on Claimant in December 2020, performing a right shoulder arthroscopy with labral repair, biceps tenotomy and decompression of cyst and labral debridement. (Ex. E).

10. On July 28, 2022, Claimant returned to OCR and was examined by Bret Peterson, M.D. Claimant had a chief complaint of forearm weakness and stiffness. Claimant told Dr. Peterson he was injured when he pulled himself into his work truck, lost his balance and used his right arm to stabilize himself. He said he "felt some kind of pop and subsequently some pins and needles in his arm and hand." Claimant reported the thing he was upset about was the he could not play golf. Dr. Peterson opined "[w]hile there is electrodiagnostic evidence of median nerve entrapment at the wrist and elbow ulnar nerve entrapment, I am not convinced clinically that these are responsible for his predominant symptoms and certainly what may have occurred at his workplace injury." (Ex. E).

11. Claimant testified he received a Notice of Contest on or about August 18, 2022, and "everything stopped at that point." (Tr. 21:3-9). Claimant's personal physician, Stacy Garber, M.D., at Family Physicians of Greeley, ordered multiple MRIs and referred Claimant to Hans Coester, M.D., at U.C. Health. Dr. Coester was familiar with Claimant because he had performed multiple back surgeries on Claimant. (Ex. D).

12. Zachary Hitchcock, PAC, evaluated Claimant on November 15, 2022, because Claimant wanted an opinion about his cervical spine. Mr. Hitchcock noted in the record that Dr. Garber referred Claimant for evaluation of "cervical disc herniation" and that the cervical MRI that Dr. Garber ordered, showed cervical spondylosis C5-C6. (Ex. D). Claimant told Dr. Hitchcock that he injured himself at work when he "grabbed onto something with his right arm to avoid falling." Claimant reported having progressive issues with his right upper extremity, decreased strength, and altered sensation with occasional zingers down his right arm. Claimant never reported any popping, nor did he describe the mechanism of pulling himself into the truck.

13. There is no objective evidence in the record that Claimant reported experiencing cervical spine pain to either Dr. Luke or Dr. Reichhardt. The ALJ infers that Claimant never reported having cervical spine pain to Dr. Luke or Dr. Reichhardt.

14. Dr. Coester, diagnosed Claimant with C5-6 and C6-7 disk disease and cervical spondylosis with spinal cord impingement and nerve root compression with pain and weakness in the right upper extremity. Dr. Coester operated on Claimant on December 6, 2022. (Ex. 14).

15. Claimant testified that the surgery performed by Dr. Coester helped him restore some of his strength and that he regained movement in some of the fingers in his right hand. Claimant testified that his strength is about 60% better following the surgery as compared with his strength immediately following the work incident. (Tr. 23:9-16). Claimant testified he believed he returned to work January 8, 2023, after being off for about four and a half weeks. (Tr. 22:16-24).

16. Claimant testified he has Poland's Syndrome, and this affected the development of his right arm. Claimant testified that his right upper extremity has always been a little weaker than his left side, by 10-15%, but he has been able to compensate for his limitations his entire life has been able to participate in activities including collegiate baseball. (Tr. 24:12-25:12).

17. Claimant suffered a prior neck sprain while pulling weeds at work in 2016, which resulted in a Workers' Compensation claim. (Ex. H). On June 10, 2016, James Rafferty, D.O. evaluated Claimant and diagnosed him with a "contusion and strain of right shoulder, cervical strain and possible C6 radiculopathy." Dr. Rafferty placed Claimant on restrictions that included no forceful use of the right shoulder, no use of the right arm at or above shoulder level unless stretching. (Ex. C).

18. Claimant testified that this injury resolved and he got better. (Tr. 51:6-10). He testified that the injury did not require any extensive treatment. He did not have physical therapy, an MRI or surgery as a result of the neck sprain that was diagnosed by Dr. Rafferty in 2016. (Tr. 49:15-21). Claimant testified that his neck symptoms resolved and that the 2016 claim was primarily for his back and hip. He continued treatment with Dr. Reichhardt for the back and hip issues. He underwent back surgery and multiple hip surgeries as a result of the work injury of 2016. (Tr. 51:17-52:7).

19. On October 1, 2020, Claimant presented to Dr. Snyder for right shoulder pain after dismounting a stationary bike that began to tip over, and reaching forward with his right shoulder to grab the bike. Claimant complained of increasing soreness going into his neck as well as decreased strength, numbness and tingling down into his fingers. In February 2023, Claimant was still complaining of numbness, tingling and weakness in his fingers as documented in by Dr. Peterson. (Ex. E).

20. Despite Dr. Reichhardt's diagnosis and reference to C6 radiculopathy, Claimant did not disclose his prior neck conditions, or his seeking treatment for possible C6 radiculopathy with his providers. There is no objective evidence in the record that Claimant shared this information with Dr. Luke, Dr. Reichhardt, Mr. Hitchcock, Dr. Peterson, Dr. Snyder or Dr. Coester, who eventually performed the cervical surgery. (Tr. 38:8-21; 40:10-41:16; and 79:9-21).

21. The ALJ finds that Claimant failed to tell any of his providers in the instant claim about his prior neck complaints and possible C6 radiculopathy.

22. Claimant testified that prior to the May 10, 2022 work incident he did not have any neck or elbow pain. (Tr. 18:16-21). The ALJ does not find this testimony credible.

23. Claimant testified he needs additional treatment for his injuries, including treatment for a compressed nerve in his elbow. (Tr. 27:6-12). Dr. Peterson diagnosed Claimant with an ulnar nerve entrapment in the right elbow. (Ex. 17). And Dr. Reichhardt opined that it was reasonable for the claimant to consider ulnar transposition at the elbow with Dr. Peterson. (Ex. 7).

24. Respondents retained Lawrence Lesnak to perform an independent medical examination (IME). As a part of the IME, Dr. Lesnak asked Claimant about his medical conditions. Claimant told Dr. Lesnak he had been diagnosed with hypercholesterolemia and diffuse polyarthritis and depression. Dr. Lesnak asked about other medical conditions, and Claimant denied the same. When Dr. Lesnak asked Claimant to remove his shirt for the examination, he noticed that Claimant's right chest musculature was

absent with atrophy of his right upper extremity. Claimant conceded he had Poland Syndrome after Dr. Lesnak commented on the condition. Claimant also failed to disclose any prior medical care for prior cervical radiculopathy, despite being seen for this condition. (Tr. 60:2-61:12).

25. Dr. Lesnak testified that some expected symptoms associated with Poland Syndrome included weakness and limited range of motion on the underdeveloped side of the body. (Tr. 64:16-24). Claimant had difficulty with supination and pronation and would have to adapt to do certain things. (Tr. 65:9-12). While Claimant testified he had difficulty with supination, Dr. Lesnak documented that Claimant had chronic difficulty with pronation and supination of his right forearm for many decades. (Ex. J).

26. Dr. Lesnak is the only physician who had access to Claimant's pertinent prior records, including those related to Claimant's neck issues and the cervical radiculopathy reports. Unlike the other providers, Dr. Lesnak was able to consider the prior conditions as part of his causation analysis.

27. Dr. Lesnak testified that Claimant's EMG results displayed chronic findings, which are indicative of at least six months or more of pathology. This is distinguishable from acute findings that are present up to several weeks after the accident. (Tr. 70:4-9). He also credibly testified that radiculopathy is an abnormality involving the nerve root and this is identified either through objective EMG findings or clinical findings such as muscle atrophy rather than subjective findings. Some symptoms associated with radiculopathies include weakness, tingling, numbness, and poor range of motion. (Tr. 72:4-20). Claimant told Dr. Lesnak he was experiencing ongoing diffuse weakness and numbness, which are symptoms consistent with radiculopathy. (Ex. J).

28. Dr. Lesnak testified that neuropathic pain-blocking agents, such as Gabapentin are typically prescribed for radiculopathy. Claimant had been taking 600 mg of Gabapentin for the last few years with no change in dosage. (Tr. 73:4-20) Claimant denied taking Gabapentin for radiculopathy, and testified he took it for nerve damage in his right hip. (Tr. 51:11-14).

29. Dr. Lesnak credibly testified that the October 13, 2022 cervical spine MRI showed chronic age-related findings that included multilevel degenerative disc changes, bone spurs, and arthritis with no evidence of any acute findings. (Tr. 74:17-21). He opined that there was no evidence on any diagnostic testing of any signs of injury, trauma, or aggravation of pre-existing conditions. (Tr. 80:22-24). He credibly testified that the May 10, 2022 incident did not result in any disability. (Tr. 81:9-18).

30. Dr. Lesnak credibly testified that the cervical spine surgery Claimant underwent on December 6, 2022 was not reasonable, necessary, or work-related. Specifically, there was no indication Claimant injured his neck in this claim or aggravated any preexisting pathology. Instead, it was the result of chronic conditions. (Tr. 77:2-15). Dr. Lesnak also credibly testified that the elbow surgery recommended by Dr. Peterson is not reasonable, necessary or work-related. Dr. Lesnak explained that the two EMGs showed mild to moderate ulnar neuropathy that was chronic. Lastly, he opined there was no objective

evidence that Claimant injured his elbow and developed or aggravated the chronic nerve pathology. (Tr. 76:18-79:8).

31. The ALJ finds Dr. Lesnak's opinions, specifically those that the alleged incident did not cause the need for medical care or disability, and that neither the elbow surgery nor the neck surgery were reasonable, necessary or causally related to the alleged work injury, are credible and persuasive.

32. The ALJ finds that Claimant's failure to provide his other medical providers recited herein with a complete picture of his medical history ultimately undermines the credibility and persuasiveness of opinions that are contrary to those Dr. Lesnak's.

33. As found Claimant's description of the incident is inconsistent and not persuasive. Based on the totality of the evidence, the ALJ finds that Claimant did not prove by a preponderance of the evidence that he suffered a compensable injury on October 10, 2022.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict

by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

Compensability

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

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

The mere occurrence, however, of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dep't Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *Boulder*, 706 P.2d at 791; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

It is undisputed that Claimant was working on May 10, 2022, when the incident occurred. Claimant, however, failed to prove by a preponderance of the evidence that he suffered a compensable injury. As found, Claimant was neither credible nor persuasive. He reported differing sources of pain and failed to disclose his prior neck injury for which he underwent some treatment and received a diagnosis of possible C6 radiculopathy to his providers. The medical records also contradict Claimant's testimony that his neck condition resolved, as there was documentation of ongoing neck pain with numbness and tingling in 2020.

Dr. Lesnak reviewed Claimant's prior records, including those documenting pre-existing arm and neck symptoms, and he made a causality determination based on a comprehensive understanding of the extent of Claimant's condition. Dr. Lesnak credibly opined that it is not medically probable that the Claimant sustained an injury requiring medical care or causing disability. He also credibly testified that there was no medical evidence to support aggravation of any preexisting condition either. Dr. Lesnak's opinion supports that any incident of May 10, 2022 did not result in a compensable injury. The totality and weight of the evidence supports that even if an incident did occur on May 10, 2022, Claimant did not sustain a compensable injury.

Claimant Failed to Prove Entitlement to an Award of Medical Benefits

In the event of a compensable injury, an employer must provide an injured employee with reasonable and necessary medical treatment to cure and relieve the effects of the injury. § 8-42-101(1)(a) C.R.S. The employee, however, must prove a causal relationship between the injury and the medical treatment for which he is seeking benefits. *Snyder v. ICAO*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002). Because Claimant has failed to establish a compensable work injury for the reasons set forth above, he has also failed to prove that he is entitled to reasonable and necessary medical benefits related to this claim.

Further, even had Claimant met his burden of proof, as found, the ALJ finds the opinions of Dr. Lesnak to be credible and persuasive that neither the elbow surgery nor the neck surgery are reasonable, necessary, or related to the May 10, 2022 claim. The treatment that Claimant underwent, such as the cervical spine surgery, and the proposed elbow surgery are related to chronic conditions that are unrelated to the May 10, 2022 claim.

Claimant Failed to Prove Entitlement to an Award of TTD Benefits

An award of TTD benefits is payable if the following conditions exist: (1) the injury or occupational disease causes disability, (2) the injured employee leaves work as a result of the injury, and (3) the temporary disability is total and lasts more than 3 regular working days. *PDM Molding, Inc. v. Stanberg*, 989 P.2d 542, 546 (Colo. 1995). TTD continues until the employee returns to regular or modified employment. § 8-42-105(3), C.R.S. Because Claimant has failed to establish a compensable work injury for the reason as set

forth above, he has also failed to prove that he is entitled to temporary total disability benefits related to the claimed industrial condition. Specifically, any time off work following the surgical procedure is not work-related.

ORDER

It is therefore ordered that:

1. Claimant's request for medical benefits is denied and dismissed.

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

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

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

DATED: June 28, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-176-104-002

ISSUES

- Respondents are challenging the determination of the Division IME (DIME) doctor that the Claimant is not at MMI.

- Claimant requests additional medical care to cure and relieve the Claimant for his injuries to his neck, left upper extremity and knees.

- Whether the DIME opinions on MMI and Impairment are void for Claimant's violation of Rule 11-4(B)(2).

FINDINGS OF FACT

1. Claimant was employed as a truck driver for the employer driving a vehicle that removes lane stripes on the highway when he was injured in a motor vehicle accident. On June 21, 2021, he was driving south bound on Interstate 25 approaching University Boulevard in the dark and in heavy rain when he encountered a concrete barrier on the highway that was not readily visible under the conditions. He did not see the barrier prior to impact and collided with the concrete "jersey" barrier. Claimant does not recall the collision, but the incident was recorded on a "dash-cam" and that video was submitted into evidence.

2. After the collision occurred, Claimant exited the vehicle and walked around to assess the situation including whether any other vehicles were involved in the collision. Claimant called his supervisor and his supervisor came to the scene and drove him to Aurora Medical Center. Claimant underwent treatment at Aurora Medical Center and received treatment for his left shoulder and left knee.

3. On June 22, 2021 Claimant presented to UCHealth where he was seen by Scott Rinehart, PAC. At that visit Claimant had soreness in his left shoulder, left knee, and down his head. He also had a contusion on his left bicep and abrasions on both forearms and scalp. Claimant was provided with work restrictions of carrying or lifting of no more than 25 pounds from floor to waist, no overhead reaching, no kneeling, no squatting, and no driving.

4. On July 1, 2021 Claimant returned to UCHealth and was seen by P.A. Payton. Contained in the records is a questionnaire filled out by Claimant. In that questionnaire, Claimant is asked to list any specific concerns or issues he would like to address during that day's visit. He hand wrote "Shoulder and arm hurting a lot. Difficulty sleeping because of pain. Pain comes and goes but never fades completely. Radiates from my shoulder down my arm and up my neck". Similarly, the follow up questionnaire has a review of systems and under the musculoskeletal section Claimant checked neck pain both now and in the past. Despite the Claimant's identification of the neck as a

concern, there is no mention in the narrative portion of the chart note of the neck as being injured, evaluated or requiring treatment.

5. Claimant continued to treat at UCHealth in July and August for left shoulder pain and left knee pain. Claimant was seen by Dr. Larimore via telehealth on September 30, 2021 with ongoing complaints of pain in the left shoulder and left knee. Dr. Larimore refilled Claimant's medications and referred him to Dr. Michael Simpson for an orthopedic evaluation.

6. Dr. Simpson saw Claimant on October 11, 2021. Claimant was complaining of left shoulder and left knee pain. Dr. Simpson recommended an MRI arthrogram for the left shoulder and a corticosteroid injection for the left knee.

7. The MRI was reviewed with Claimant on November 10, 2021. Claimant was seen on that date by P.A. Eathough. The MRI showed articular sided fraying of the supraspinatus, labral tearing with biceps involvement and some AC joint arthritis. Mr. Eathough recommended arthroscopic surgery for Claimant's left shoulder. Mr. Eathough also noted that the Claimant reported some left-sided lateral neck pain. Mr. Eathough was not sure if the neck pain would be alleviated by the shoulder surgery.

8. Dr. Simpson performed arthroscopic shoulder surgery on Claimant's left shoulder on December 9, 2021. Surgery consisted of an arthroscopic biceps tenodesis left shoulder, arthroscopic inferior and anterior - inferior capsulorrhaphy, arthroscopic subacromial decompression, and arthroscopy left shoulder with extensive debridement including debridement of posterior-inferior labrum and anterior rotator interval.

9. On December 12, 2021 Claimant was seen by Dr. Larimore for post-surgical follow-up of the left shoulder and recheck of the left knee. Dr. Larimore noted that Claimant was having some right knee difficulty and explained to Claimant that the right knee "would not be covered under this claim."

10. At a follow-up visit with P.A. Eatough on January 10, 2022 it was noted that Claimant's left shoulder was doing well. Mr. Eatough went on to note that Claimant was still having some neck tenderness and encouraged him to bring this up to his authorized treating physician and "work comp" for further evaluation and workup if warranted.

11. Claimant was seen by Elizabeth Bisgard, MD on April 7, 2022. At this visit Claimant gave Dr. Bisgard a detailed history of how he was injured. Furthermore, Claimant showed Dr. Bisgard the dash cam video of the accident. Dr. Bisgard noted that the video showed Claimant striking a jersey barrier. According to the office note of this visit, Claimant told Dr. Bisgard that as he progressed in rehab, his shoulder improved but that cervical spine pain has not. Claimant also told Dr. Bisgard that on some mornings he wakens with no pain but more often than not he awakens with 1-2/10 cervical pain which worsens as the day progresses going up to a 7/10 pain. Claimant related that driving his work truck, manipulating tools, bilateral cervical rotation and flexion extension increase his neck pain. Claimant also related his migraine headaches are more frequent going from one to two a month to 2-3/week. Dr. Bisgard performed a physical examination which

revealed tenderness to palpitation in the bilateral cervical spine without spasm along with decreased range of motion.

12. Dr. Bisgard requested an MRI of the cervical spine due to the chronicity of the symptoms and the mechanism of the injury. Dr. Bisgard opined that her exam is most consistent with cervical facet symptomatology.

13. In a Rule 16 record review dated April 8, 2022 concerning the causality of Claimant's cervical neck syndrome Dr. Gary Zuehlsdorff opined that there is "limited causality" and that Claimant's shoulder surgery could have caused pulling of the cervical spine musculature causing pain and spasm. Dr. Zuehlsdorff wrote that 4-6 chiropractic treatments would be a reasonable treatment modality for the neck.

14. The MRI of the cervical spine taken on April 26, 2022 showed the follow findings:

> 1. At C7-T1 there is stenosis secondary to complex disc bulging and congenital factors with left C8 nerve impingement of the cord.
>
> 2) At C6-7 there is spinal cord compression on the left side secondary to disc protrusion with associated crowding impingement of the proximal left C7 nerve.
>
> 3) At C5-6 there is combined left sided disc protrusion with left ventral cord impingement and probable impingement of the left C6 nerve. There's crowding of the right side of the cord secondary to the disc bulging.
>
> 4) At C4-5 there is disc bulging with moderate left foraminal stenosis and mild left lateral recess stenosis.
>
> 5) At C3-4 there is mild cord impingement and moderate left foraminal stenosis and mild left lateral recess stenosis.

(Claimant's Exhibit 42, p. 348).

15. In her June 1, 2022 note, Dr. Bisgard discussed with Claimant the PT he was receiving in April 2021 for a pre-existing work-related left shoulder injury. Claimant told Dr. Bisgard that in the past he had experienced cervical discomfort and occasional numbness in his hands but it did not limit his function. Dr. Bisgard wrote that she reviewed the PT records from April 26, 2021 through June 18, 2021 and noted that while Claimant was having some neck stiffness and bilateral hand numbness in the beginning of his PT sessions that by May 21, 2021 he was reporting significant improvement and his symptoms from that day up to June 21st was located in the left shoulder. Dr. Bisgard also disagreed that the medical records don't reflect cervical spine problems until 4 months post-accident. Dr. Bisgard reviewed the July 5, 2021 intake paperwork which according to her "clearly documented" that Claimant had neck pain. In addition, Dr. Bisgard noted that Claimant also reported neck pain on September 10, 2021 which was described as stabbing with a dull ache. Dr. Bisgard's opinion regarding causation was that while

Claimant had some cervical symptoms prior to his injury he had a "substantial worsening" following the motor vehicle accident which has not returned to baseline and therefore "meets the definition of permanent aggravation." Dr. Bisgard noted that Claimant has unresolved issues with his cervical spine that need treatment.

16. Following the denial of treatment for the cervical spine, Dr. Bisgard placed the Claimant at maximum medical improvement and assigned a 4% impairment rating of his left upper extremity, after apportionment.

17. As of the date of the hearing, Claimant has not received any treatment for his neck other than physical therapy, primarily for his shoulder, but also therapeutic for his neck.

18. Respondents filed a Final Admission of Liability for the rating and Claimant then timely requested a Division IME (DIME). The DIME was performed by Dr. Rook. Dr. Rook determined that the Claimant was not at MMI since he required curative care for his cervical spine and the need for this treatment was work related. Specifically, he recommended diagnostic and potentially therapeutic spinal injection therapy, which could include an epidural steroid injection versus facet or medial branch block or selective nerve root blocks. He also recommended an electrical study of Claimant's left arm. Finally, He recommended an orthopedic evaluation for both of his knees.

19. Dr. Rook opined that both knees were symptomatic due to motor vehicle accident. He testified that "immediately after the motor vehicle accident, he had severe left-knee pain, because his left knee had struck and penetrated through the dashboard and he was limping. And because of the alteration of his gait, he was bearing more weight on his right leg. And states that within a month of the accident, he was having right knee pain; therefore I believe the worsening of his right knee condition is associated with the alteration of his gait due to the left injury - - left knee injury, which is from the accident. And with that in mind, I chose to provide an impairment rating for range-of motion loss of the right knee. So that was my reasoning why to rate it. I thought it wasn't a direct result of the initial accident, but was an indirect result of sequela from the original accident"." (Rook transcript 4/3/2023, p. 24).

20. Following the DIME with Dr. Rook, Dr. Brian Mathwich performed an IME at the request of Respondents on March 6, 2023. With respect to his cervical spine, Dr. Mathwich opined that Claimant had a temporary exacerbation of a preexisting issue that had resolved and Claimant was back to his baseline. With respect to Claimant's right knee, Dr. Mathwich also testified that "limping for a short time on a - - on an injured extremity is not going to cause impairment in the opposite extremity. And that's why I did not include that as a claim-related injury". (Hearing transcript p. 47).

CONCLUSIONS OF LAW

A. Respondents did not overcome the DIME determination that the Claimant is not at maximum medical improvement.

A DIME's determination regarding Maximum Medical Improvement 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).

Respondents failed to overcome the DIME's determination that the Claimant is not at MMI due to the need for cervical treatment which is causally related to the compensable work injury rating by clear and convincing evidence. Dr. Mathwich's testimony and report constitutes a difference of opinion as to the causal connection of Claimant's cervical spine problems and that of the DIME opinion from Dr. Rook. Additionally, the authorized treating physician, Dr. Bisgard is also of the opinion that the Claimant's cervical spine symptoms are due to a work related aggravation of the Claimant's preexisting cervical condition and requires treatment. Unfortunately, that treatment was denied based on a Rule 16 review. Since the carrier denied authorization of any treatment for the neck, Dr. Bisgard placed the Claimant at MMI.

I find the opinions as to causation of the cervical spine symptoms offered by Dr. Rook and Dr. Bisgard, in this case, to be credible and persuasive. Furthermore, Respondents' IME, Dr. Mathwich does not deny that the Claimant sustained a cervical spine injury, but his opinion is that the injury sustained was a temporary exacerbation rather than a permanent injury. This is a difference of opinion and I conclude that it is not sufficient to overcome Dr. Rook's causation opinion by clear and convincing evidence.

B. Causal relationship of Claimant's right knee

There is no dispute that the Clamant sustained an injury to his left knee in the motor vehicle accident. What is in dispute is whether Claimant's right knee symptoms are work related due to an altered gate. Initially, a determination as to whether the right knee injury is a scheduled or non-scheduled injury must be made in order to determine the appropriate burden of proof. If the injury is a scheduled impairment, the DIME doctor's determination carries no added weight and Respondents are not required to overcome

that causation opinion by clear and convincing evidence. *See, Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). I determine that the right knee is a scheduled injury and Claimant has the burden of proof by a preponderance of the evidence to prove that the right knee is compensable. I conclude that Dr. Mathwich's opinion that the right knee is not related to the work injury is more persuasive than Dr. Rook's opinion that the right knee is work related due to altered gait. Claimant has failed to sustain his burden of proof by a preponderance of the evidence that the right knee is work related.

C. Violation of WCRP 11-4(2)(B)

Respondents argue that Claimant's showing of the video depicting the accident from the vehicle to the DIME physician is a violation of 11-4(2)(B) such that the DIME report should be stricken. However, such a drastic remedy is not mandated by Rule 11. WCRP 11-11 provides that "Non-compliance with this rule may be addressed thought the Dispute Resolution process described in Rule 16 or through any other mechanism of dispute resolution provided for in rule or statute." I conclude that it is not necessary to strike the DIME report of Dr. Rook since the video did not change the opinions of Dr. Rook as to causation of the neck injury but served only to reinforce his preliminary opinions as to causation. In his deposition transcript from April 3, 2023 the following question and answer were obtained.

"Q. And in viewing it then, do you think that you would have been able to have such a clear understanding of those - - that mechanism of injury and the incident itself without viewing that video? For instance, if you hadn't had that video and just reviewed the medical records?

A. Well, I think I would have came (sic) up with the same conclusion. But I think the video was a powerful reinforcement." (Rook Transcript 4/3/23 p. 20).

Based on this testimony, the ALJ concludes that Claimant's showing of the video to the DIME doctor had minimal effect on the conclusions of Dr. Rook that the Claimant is not at MMI and requires treatment for the neck and evaluation of the Claimant's left knee complaints. Furthermore, Respondents are not prejudiced by Claimant showing the dash cam video to Dr. Rook since their IME was given the opportunity to view it and ultimately, Dr. Rook should have also had the opportunity to view the video in order to address Dr. Mathwich's opinions based on his review of that video.

ORDER

It is therefore ordered that:

1. Respondent's request to overcome the DIME's determination that the Claimant is not at MMI is denied and dismissed.

2. Claimant is entitled to medical treatment to cure and relieve him from the effects of his compensable cervical spine injury.

3. Claimant's right knee symptoms are not work related. Claimant's left knee symptoms are work related and Claimant is entitled to an evaluation recommended by Dr. Rook for the left knee.

4. Respondents' request to invalidate the DIME opinions as to causation of the Claimant's cervical spine for a violation of the rules is denied and dismissed.

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

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

DATED: June 28, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-086-844-004

A hearing in the above captioned matter was held before Administrative Law Judge (ALJ), Richard M. Lamphere on April 26, 2023. By agreement of the parties, the proceeding was conducted virtually via video/teleconference and digitally recorded on the Google Meets platform between 1:00 and approximately 3:51 p.m. Claimant was present by video as was his attorney, Sean E. Goodbody, Esq. Paul Kruger, Esq. appeared via video on behalf of Respondents.

Hearing testimony was taken from Claimant and Dr. Jeffrey Schwartz. In addition to the aforementioned hearing testimony, the ALJ admitted the following exhibits into evidence: Claimant's Hearing Exhibits 1-14 and Respondent's Hearing Exhibits A-JJJ. The ALJ also took administrative notice of the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment*, Third Edition (*Revised*).

On June 15, 2023, the undersigned ALJ issued a Summary Order. As part of his June 15, 2023 Summary Order, the ALJ determined that Claimant overcame the Division Independent Medical Examination (DIME) opinion of Dr. Linda Mitchell regarding MMI, but did not overcome her opinion regarding permanent impairment. The ALJ also determined that Respondents failed to establish that they were entitled to collect an asserted $89,595.44 overpayment in temporary total disability (TTD) benefits because of Dr. Mitchell's backdating of Claimant's maximum medical improvement (MMI) date. Indeed, the ALJ concluded that, "[b]ecause the alleged over payment arises from the backdating of Claimant's MMI date to November 28, 2018 and because the ALJ concludes that Claimant reached MMI on June 29, 2021 (a date past the May 16, 2021, last payment of TTD per Respondent's FAL), the ALJ concludes that Respondents have failed to prove, by a preponderance of the evidence, that they are entitled to collect the asserted ($85,595.44) overpayment in TTD benefits.

On June 21, 2023, Respondents filed an uncontested motion for a corrected order, asserting that $4,077.04 of the asserted $85,595.44 overpayment arose, not from the backdating of Claimant's MMI date, but because TTD benefits were paid beyond the date of Claimant's return to full wage work. Respondents request repayment of the asserted $4,077.04 overpayment in TTD paid while Claimant earned full wages between May 17, 2021 and June 26, 2021. Review of Respondent's motion and the evidence presented at the April 26, 2023 hearing, including Respondent's Hearing Exhibit B[1] and E[2], persuades the ALJ that the overpayment asserted by Employer did not arise completely from the backdated MMI date. Rather, the ALJ is convinced that

[1] Respondent Exhibit B is the General Admission of Liability dated July 6, 2021, which documents TTD termination on May 16, 2021, based on Claimant's return to full wages. The GAL documents a TTD overpayment of $4,749.23.

[2] Respondent Exhibit E is the indemnity log, which establishes that after Claimant's return to full wages, he received TTD benefits totaling $4,077.04 (May 17, 2021 – June 26, 2021).

$4,077.04 of the asserted $85,595.44 overpayment resulted from Claimant receiving TTD while simultaneously earning full wages. Accordingly, the ALJ agrees with Respondents that the portion of the June 15, 2023 Summary Order, which determined that the asserted overpayment resulted entirely from the backdated MMI date is erroneous and constitutes an inadvertent, but nonetheless, material mistake for which correction is warranted.

Accordingly, for good cause shown, the ALJ GRANTS Respondents' June 21, 2023, motion and issues this CORRECTED SUMMARY ORDER to reflect the following additional findings of fact, conclusions of law concerning the alleged overpayment in this case.

FINDINGS OF FACT

1. Claimant testified that he earns $52,000.00 per year working as a sales manager for a firearms optics company. He is married and his wife works outside the home earning approximately $55,000.00 annually.

2. Claimant and his wife share household expenses including a mortgage of $2,400.00/month. They do not have car payments but spend approximately $350.00/month on utilities, $90.00/month on internet services and $178.00/month for cell phone services. Claimant was unable to estimate a monthly cost for food but did indicate that he has approximately $60,000.00 in student loan debt for which he has a $700.00/month payment obligation; although he testified that he has only been able to make $100.00 to $200.00/month payments towards this loan.

3. Claimant testified that he has not recently been able to set any money aside to contribute to his savings account, which he estimated has a balance of approximately $2,500.00. He testified that his checking account has a balance of approximately $300.00 and that he has a retirement account with Employer that has an approximate value of $5,000.00, but only roughly $2,000.00 if he cashes it out.

4. Based upon the evidence presented, Claimant's household expenses total $3,718.00 assuming a student loan repayment obligation of $700.00 rather than the $100.00 - $200.00/ monthly payments he has been making. Conversely, Claimant and his spouse have a combined income of $107,000.00 annually or $8,916.67/month. Despite Claimant's protestations otherwise, the ALJ is convinced that Claimant's finances support a finding that he has the ability to repay the proven overpayment in TTD benefits of $4,077.04, even assuming additional expenses not testified to by Claimant including food and fuel costs. Indeed, ascribing an addition $1,000.00 in expenses to the household for such things as food and fuel leaves $4,198.67 in income from which a portion can be used to repay the proven overpayment in TTD benefits.

5. In this case, Respondents request repayment of the established overpayment at a rate of $500.00 per month or $125.00/week. Here the established overpaid benefits were paid out over a period of approximately six weeks. In order to

repay the overpaid benefits in a similar time frame, Claimant would need to remit $679.50 week to expunge the proven overpayment. Given that a reduction of $500.00/month from the balance of $4,198.67 would still leave Claimant $3,698.67/month in disposable income to meet additional living expenses combined with the fact that the requested $500.00/month payment is substantially ($554.50/month) less than the $679.50/week payment Claimant would need to remit in order to repay the overpayment in a similar time it took to pay out the TTD in question, the ALJ finds Respondents request for a repayment amount of $500.00/month reasonable. At $500.00/month or $125.00/week, it will take in excess of 8 months to repay an overpayment that took a mere six weeks to create. Simply put the ALJ finds Respondents proposed payment of $500.00 unlikely to create an undue financial hardship on the Claimant.

CONCLUSIONS OF LAW

A. When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(1) C.R.S. to conduct a hearing to "[r]equire repayment of overpayments. In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo.App. 2009) rev'd on other grounds, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 210), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy concerning repayment. This includes the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. See *Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo.App. 1994).

ORDER

IT IS THEREFORE, ORDERED THAT:

1. Claimant shall repay Respondents a total of $4077.04 at a rate of $500.00/month. Claimant's first payment to Respondents is due the first of the month after this order becomes final and subsequent payments of $500.00 are due the first of every month thereafter until the overpayment is extinguished. Claimant's counsel shall contact Respondents' counsel to obtain the necessary details regarding where payments are to be sent.

2. Any and all issues not decided herein are reserved for future determination

DATED: June 30, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-176-637-001

ISSUE

1. Did Claimant proven by a preponderance of the evidence that he is entitled to maintenance treatment in the form of acupuncture and chiropractic treatment?

FINDINGS OF FACT

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

1. Claimant is a 63-year old man who works for Employer as a dock worker, and has worked for Employer since July 2003.

2. On May 12, 2021, Claimant suffered an admitted work-related injury. Claimant injured his neck, left elbow and shoulder. He received treatment from doctors at Concentra, including Stephen Danahey, M.D., who referred Claimant to specialist, John Sacha, M.D., for additional care. (Ex. A).

3. Dr. Sacha performed radiofrequency neurotomies bilaterally at C2-C3 and C3-C4 on Claimant. He also managed Claimant's medications. (Ex. 4).

4. In the September 26, 2022, Physician Progress Report, Dr. Sacha recorded Claimant was 20-30% better, but also noted Claimant was "such a poor historian" it was somewhat difficult to say how he was doing. Dr. Sacha recommended "physical therapy x8 post radiofrequency with strengthening, conditioning and posturing." He did not mention, nor recommend, acupuncture or chiropractic care. (Ex. B)

5. Dr. Sacha saw Claimant for a follow-up appointment on October 10, 2022. Dr. Sacha stated he wanted Claimant to finish physical therapy, and then he would be at maximal improvement. Dr. Sacha again did not discuss, nor did he recommend, chiropractic care and/or acupuncture as treatment recommendations. (Ex. B).

6. On November 21, 2022, Dr. Sacha saw Claimant for an impairment rating. Dr. Sacha noted Claimant had completed all care "without any improvement whatsoever," and Claimant had a "long complex and very sophisticated workup and treatment, but [had] no improvement whatsoever". He further reported that with Claimant there was a "high risk of over utilization of medical resources." Dr. Sacha placed Claimant at maximum medical improvement (MMI) and he recommended maintenance care consisting of eight physical therapy visits, a gym membership with pool pass for six to twelve months and a couple of follow-up visits. He made no mention of chiropractic care or acupuncture. (Ex. B).

7. Claimant saw Dr. Sacha again on December 5, 2022. Dr. Sacha noted in the medical record that Claimant "has completed all care, is at maximum medical improvement, appropriate for case closure and impairment rating." Claimant told Dr. Sacha that he "needs surgery" but could not articulate why he felt he needed surgery. Dr. Sacha explained that cervical facet syndromes are not surgical problems, and Claimant was not a candidate "for further aggressive care." According to Dr. Sacha, Claimant had "progressively become more and more nonphysiologic as time has gone and has progressively gotten to the point where [Dr. Sacha] feel[s] there is a nonmedical component to his ongoing complaints." Dr. Sacha reported an impression of nonphysiologic presentation and physical findings "not consistent with someone who has been having true pain." He found Claimant to have an "extremely high risk for overutilization of medical resources." Dr. Sacha recommended continuation of post-MMI maintenance care, but he did not recommend or discuss chiropractic care or acupuncture. (Ex. B).

8. ATP, Dr. Danahey placed Claimant at MMI on December 9, 2022. Dr. Danahey noted Claimant reported "some ongoing discomfort," but he did not prescribe Claimant any medication. In addressing the need for medical care after MMI, Dr. Danahey noted "N/A" or not applicable. (Ex. A).

9. Claimant returned to see Dr. Sacha on December 23, 2022. Dr. Sacha noted that there had been a "trial of some chiro and acupuncture", but Claimant did "not want to move forward with that." Dr. Sacha, however, without explanation, referred Claimant for chiropractic care and acupuncture with Dr. Aspegren. (Ex. B).

10. Dr. Sacha saw Claimant on January 19, 2023 and February 17, 2023. At both appointments, Dr. Sacha noted that all care had been declined, so they were taking a "wait and see approach." He noted the presence of cervical facet syndrome and that Claimant's conditions were stable. There was no mention as to the necessity of either chiropractic care or acupuncture.

11. Claimant testified he previously received acupuncture and chiropractic care, and his last care of this type was in the summer of 2021. Claimant testified, the acupuncture gave him some relief, but his last treatment was problematic. He further testified that the chiropractic care only gave him temporary relief.

12. There is no objective evidence in the record as to the amount of acupuncture and chiropractic care Claimant received, the dates of such treatment, or the overall efficacy of the treatment.

13. Claimant testified he still has pain at the base of his neck and on his trapezius from the May 12, 2021, admitted work injury. Claimant credibly testified that he would like to receive acupuncture and chiropractic treatment.

14. Dr. Sacha's prescription for chiropractic care and acupuncture was reviewed at Respondent's request by Eddie Sassoon, M.D. In a March 6, 2023 report, Dr. Sassoon

stated that the requested sessions of chiropractic care and acupuncture were not medically necessary. (Ex. C)

15. The ALJ finds that there is no objective evidence in the record as to why Dr. Sacha ordered chiropractic care and acupuncture.

16. The ALJ finds that Claimant failed to prove by a preponderance of the evidence that acupuncture and chiropractic care is medically necessary.

CONCLUSIONS OF LAW

Generally

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

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

The 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).

Post-MMI Medical Care

Claimant was placed at MMI on December 9, 2022, and Claimant's ATP, Dr. Danahey, noted that maintenance medical care after MMI was "N/A." There is no objective evidence in the record that Claimant's placement at MMI has been rescinded or

challenged. Thus, the appropriate legal standards for determining Claimant's entitlement to medical benefits are those applicable to post-MMI medical treatment. Generally, medical treatment that is reasonable and necessary to cure and relieve the effects of an industrial injury may be awarded. § 8-42-101(1)(a)(I), C.R.S. As Claimant has been placed at MMI, no additional treatment is necessary to "cure" the effects of his May 12, 2021, admitted work injury.

Claimant is seeking post-MMI medical treatment in the form of acupuncture and chiropractic care as recommended by Dr. Sacha. Dr. Danahey, Claimant's ATP, specifically found that post-MMI medical care was not necessary, and he did not recommend chiropractic care or acupuncture for Claimant.

Claimant credibly testified that he experienced some unquantified relief from chiropractic care, and that that acupuncture improved his condition with the exception of the final session. Claimant testified that the last time he received acupuncture and chiropractic care was in the summer of 2021, nearly two years ago. As found, there is no objective evidence in record as to the amount of acupuncture and chiropractic care Claimant received, the dates he received the treatment, or the efficacy of the treatment. Claimant credibly testified that he wants chiropractic care and acupuncture. But at his December 23, 2022 appointment with Dr. Sacha, Claimant said he did not want to move forward with acupuncture and chiropractic treatments. Despite Claimant's position, Dr. Sacha prescribed chiropractic care and acupuncture for Claimant. Dr. Sacha, however, provided absolutely no basis or rationale for his recommendation.

An ALJ can order ongoing medical treatment post MMI if a claimant's condition can reasonably be expected to deteriorate so that a greater disability results without the ongoing care. *Milco Constr. v. Cowan*, 860 P.2d 539, 542 (Colo. App. 1990). "[S]uch medical treatment, irrespective of its nature, must be looked upon as treatment designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." *Id.* The record must reflect the medical necessity of any requested treatment. *Public Serv. v. Indus. Claim Appeals Office*, 979 P.2d 584, 585 (Colo. App. 1999); *see also Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609, 611 (Colo. App. 1995) (there must be substantial evidence in the record to support a determination of future medical treatment). Here, there is no objective or persuasive evidence in the record that Claimant's condition can be reasonably expected to deteriorate in the absence of chiropractic care and/or acupuncture.

As found, Claimant has failed to prove, by a preponderance of credible evidence, that he is entitled to chiropractic care or acupuncture.

ORDER

It is therefore ordered that:

1. Claimant's request for chiropractic care and acupuncture is denied and dismissed.

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

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

DATED: June 30, 2023

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-213-399-002

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on February 27, 2023 on issues of compensability, medical benefits that are authorized, reasonably necessary and related to the alleged August 5, 2022 work injury, as well as average weekly wage, temporary total disability from August 6, 2022 and continuing and penalties for failure to insure and failure to admit or deny. Claimant listed permanent partial disability benefits, however, withdrew this issue as premature since her providers have not yet released her from care.

The Notice of Hearing was sent to the employer on March 17, 2023. The NOH sent to employer by the OAC was sent by mail and was not returned to the OAC. This ALJ makes the inference that Employer received notice of the hearing. Claimant also indicated that she forwarded the NOH by email and it was not returned to her either.

Claimant was provided with a pro se advisement. Claimant elected to proceed without counsel.

Claimant filed a Case Information Sheet dated May 17, 2023.

Claimant informed the court that she had been in contact with the Division and the Colorado Uninsured Employer's Fund through the third party administrator, Corvel.

Claimant also informed the court that she had been in contact with the liability insurer for the vehicle she drove and was advised that she was not covered as the vehicle had not been involved in an accident.

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she was injured in the course and scope of her employment with Employer on August 5, 2022.

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are authorized, reasonably necessary and related to the alleged injury of August 5, 2022.

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

IV. Whether Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from August 6, 2022 and continuing until terminated by law.

V. Whether Claimant has proven by a preponderance of the evidence that she is entitled to a penalty for Employer's failure to carry workers' compensation insurance.

VI. Whether Claimant has proven by a preponderance of the evidence that she is entitled to a penalty for Employer's failure to admit or deny the claim.

FINDINGS OF FACT

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

1. Claimant is 44 years old at the time of the hearing. She worked as a truck driver for 20 years, since 2001 with different employers, driving flatbeds, reefers (refrigerated trailers), pneumatic trucks (concrete powder containers), 53 foot eighteen wheelers, extended trailers and others.

2. Claimant worked for Employer as a Class A delivery driver beginning the week after July 4, 2022. Employer was a subcontractor of [Redacted, hereinafter XL] Logistics in Henderson, CO, but other than picking up loads from XL[Redacted], Claimant had no contract with XL[Redacted]. Employer required Claimant to send the bills of lading to Employer directly by email at the same email she use to email the Application for Hearing and the Notice of Hearing. Claimant was never provided with a physical address for Employer other than the one on Fraser Way in Denver CO, where Employer would keep his trucks, and trailers and Claimant would pick up the truck from that location. She conducted all her deliveries within the local areas close to Denver.

3. Employer provided the equipment, and always provided her with a specific schedule of delivery from which she was not to deviate. The only thing Claimant provided in order to carry out her work were her personal gloves and the reflective vest. Everything else Employer provided. Employer provided the truck, the trailer, tools, and paid for the fuel with his company card. Employer directed Claimant where to put gas in the truck, and Employer would meet Claimant at the gas station where he had a contract and could use his EFS Fuel Card. Claimant explained that when the driver fuels the truck, at the diesel pump they were required to put in the truck number, the trailer number, the mileage of the truck, and driver ID number and, if needed, any additives to the fuel. In her case, Employer would meet her and he would input the information because he had not issued Claimant her own card at that time like previous employers had done.

4. At the beginning of their relationship, Employer was very professional until her injury when he became very evasive. Later, Employer became unresponsive. Employer did not pay her for the last week of work and Claimant resorted to filing with the Division of Labor Standards and Statistics who advised her she was not an independent contractor and was entitled to wages and needed to file her claim with the Division of Workers Compensation, a separate entity within the Colorado Department of Labor and Employment.

5. On August 5, 2022 Claimant picked up the truck on Fraser Stree, which was white, with a green sign with Employer's logo on the truck, with the DOT matching the one she was assigned. There was a trailer on sight that belonged to Employer as well (with the same logo), but she was advised that it was not her assigned trailer. She did a pre-trip on the tractor truck, which every truck driver is required to do, checking the oil, the fuel, the tires, brakes, and everything else required in order to make sure the truck was safe to drive.

6. Claimant drove to XL[Redacted], located in Henderson, CO, a 25 minutes' drive. She was went to her assigned door, one of probably 100 freight doors, where her trailer No.[Redacted, hereinafter 123], was being loaded. Claimant parked in front of her trailer with the tractor truck, as if to hook up but she got out and locked up, went into the XL[Redacted] office where she was advised that they were finishing up loading the trailer. She located her pallet jack to use on the pallets, which was Employer's equipment. Once they closed up the back of the trailer, Claimant hooked up to the trailer.

7. Claimant again did a pre-trip on the trailer then pulled up to the outbound office to obtain the bill of lading. She looked at the bill of lading for the customer's address, she filled out her portion as the driver receiving product for delivery. (The customer would sign the bill of lading when they received the product being delivered.) Claimant opened up the trailer and compared her bill of lading with the freight that was loaded. Before she left the yard, she texted Employer and the XL[Redacted] representative that she had the load and was leaving the yard.

8. On August 5, 2022, she was driving a day cab with a 28 foot pup trailer, once she arrived at the place of deliver, she found that the freight to be unloaded was behind another pallet that was for a different delivery. She was using a pallet jack, the manual kind that was assigned to her, moved the load to the left, and then went to take the pallet and crate that she needed to deliver at this particular location. There was wood surrounding the pallet and freight, to protect it, going up to above Claimant's height. As she was moving the pallet jack, the wheels got caught and would not come out. She readjusted the pallet jack a little, then attempted to move it, while holding on to the top piece of wood that surrounded the freight. The wood broke, and the momentum of pulling the pallet jack and the wood breaking, sent her flying out of the back of the trailer. She attempted to catch herself on the way out but failed to grab onto the side of the trailer. She fell out of the back of the trailer, about 3 and one half to four feet, to the ground onto her left side.

9. She lost consciousness for some undefined amount of time and came to, noticing that the concrete was hot, and that she was laying on the ground. She hit the whole left side of her body, including her head, her left arm, shoulder, left wrist (which was swollen), ribs, left hip and left leg. No one came to her rescue. No one was there. She tried to get up, noting that she was very weak. When she did get up using the ICC bar (the rear impact bar or bumper), she noticed that the pallet jack and freight on the pallet were only about one foot away from falling off the rear of the truck. She did not see any individuals, so she made her way to the drivers' side door of the tractor. She normally used three point contact to get up into the truck, but because her left side was hurting so much, she was only able to grab onto the bar on the right to pull herself up. She dialed 911 to come get her. She also called Employer to let him know what was going on and so that he could come pick up the truck and trailer with the rest of the load. He must have been in the immediate area, because Employer, I.W. whom Claimant knew to be the owner, arrived before the ambulance.

10. When the EMTs arrived, they assessed her and they administered Fentanyl which helped her with the pain. She asked the ambulance driver to give her boss, I.W. the truck keys. Employer stated that he "hoped she was OK." And that was the last time

Claimant saw her employer. The ambulance took her to UCH Hospital Emergency despite Claimant asking to be taken to St. Joseph Hospital. She was evaluated, they took x-rays, and after a couple of hours of attention and care she was released.

11. Claimant contacted Employer multiple times, speaking with I.W. on the phone. Employer failed to provide Claimant with insurance information or a designated provider list. They discussed it on the phone but he was very vague and evaded her questions. Claimant later found out from the Division that Employer did not have workers' compensation insurance, which explained Employer's attitude and his breaking off all communications with her. Employer did request her ETF information. Claimant completed a Direct Deposit form for the [Redacted, hereinafter WA] and sent it to employer on August 15, 2022. Claimant spoke with multiple individuals at Division, who provided her guidance with regard to where to look for steps to take in proceeding with her claim. Division advised Claimant that Employer had not responded to their inquiries regarding Claimant's claim.

12. Claimant earned a base wage of $250.00 a day, $1,250.00 a week. Claimant was never able to speak with Employer about why her checks were short, after she was hired.

13. Claimant was seen at the UCH Hospital Emergency Care at the Anschutz Medical Campus on August 5, 2022. The ordered x-rays of her left wrist and chest. Claimant was diagnosed with a fall, initial encounter, with a closed nondisplaced fracture of scaphoid of left wrist, unspecified portion of scaphoid, initial encounter, closed fracture of one rib of left side, initial encounter. She was advised to continue to wear a splint until follow-up with either a primary care physician or sports medicine provider for repeat x-rays of her left wrist to evaluate for fracture. She was also advised that failure to wear the left wrist splint could lead to long-term arthritis. They provided acetaminophen and a Lidoderm patch while at the ER and prescribed Tylenol, 1000 mg every 6 hours for pain. Dr. Andra Farcas wrote that Claimant was unable to return to work until follow up on August 12, 2022.

14. Claimant was seen by Hayley Roberson, F.N.P.-C at UC Health Primary Care, Green Valley Ranch on August 10, 2022. Ms. Roberson stated that Claimant was under her care and took Claimant off work from August 10, 2022 through August 19, 2022. In a follow up on August 17, 2022 Ms. Roberson stated that Claimant continued to be off work.

15. On October 6, 2022 Ms. Roberson stated that Claimant she was able to return to work on a reduced schedule, with frequent breaks and a 20 lbs. restriction for lifting, pushing and pulling.

16. A chest CT on November 3, 2022, as read by Scott Loomis, M.D, showed an incompletely healed, nondisplaced fracture of the left anterolateral eighth rib. The CT also revealed some unrelated benign lung nodules on her liver and unrelated nodules in the right lung also believed to be benign. A nurse informed Claimant of the results on November 21, 2022.

17. Claimant was attended again by Nurse Hayley Roberson on May 25, 2023. She noted Claimant was a long time patient with work related accident on August 5, 2022

and was diagnosed with a left rib fracture. She stated that Claimant progressively improved and was able to start working. She stated that Claimant was likely to completely improve from the injury but that she continued with mild discomfort in the left side.

18. Claimant testified that she continued to have pain in the left knee, 8th left rib and left wrist that are related to the work related accident. She further stated that when she was seen initially she advised that her employer did not provide her with insurance information, and UCH took her Medicaid information. She stated that it was likely medical providers had been paid by Medicaid as neither UCH nor Medicaid had sought reimbursement from Claimant for her medical care.

19. Claimant stated that Employer failed to admit or deny her claim. In fact, Claimant had not heard from her employer again after he told her "let it be clear there will be no payment for your work." Claimant did not know how to interpret that information. She stated that Employer had not formally or explicitly made any admission or denial with regard to her claim for compensation.

20. Claimant testified that the lack of payments and Employer's failure to admit or deny the claim has been devastating to her to the point that she had to resort to living in a shelter, which has been very bad. She lost her car, by selling it very cheap in order to get money to live on. She stated she was depressed, stressed and financially strapped, and the lack of ability to care for herself had been horrible for her. She was accustomed to paying her bills and living off of her earnings but her inability to work, and her Employer's failure respond to her communications and to pay her while she was disabled, was extremely hard for her. She also had to resort to getting food stamps. Even now, she only has a temporary living arrangement. She was very confused by the fact that Employer did not have insurance, stating she was unaware that an employer could operate without insurance.

21. As found, Claimant has proven that it was more likely than not she was injured in the course and scope of her employment with Employer on August 5, 2023 when she fell off the back of a trailer while working for Employer injuring her left side, including her head, left shoulder, left wrist, ribs, left hip and left lower extremity.

22. As found, Claimant has shown she is entitled to medical benefits that are reasonably necessary and related including the emergent care she received and the follow up care at UCH.

23. As found, Employer failed to provide a designated provider list pursuant to statute and selection of a provider passed to Claimant. Claimant selected UCHealth and they are deemed authorized.

24. Claimant credibly testified that she earned $1,250.00 per week. As found, Claimant's average weekly wage is determined to be $1,250.00.

25. As found, Claimant has proven by a preponderance of the evidence that she was taken off work as of August 5, 2022 by the emergency physician and that status continued when she went under the care of Nurse Roberson until Claimant was release to return to work on May 25, 2023. Claimant is entitled to temporary total disability benefits from August 5, 2022 through May 2, 2023.

26. As found, the medical records are inconclusive regarding whether Claimant was placed at maximum medical improvement on May 25, 2023, was simply released to return to work or whether the release was to modified or her regular job of driving and delivering freight. The issue of TTD from May 25, 2023 and continuing is reserved.

27. Employer is found to be uninsured at the time of the work related accident of August 5, 2022 and Claimant is entitled to a penalty for failure to insure.

28. As found, Employer, to Claimant's significant detriment, failed to admit or deny the claim made by Claimant. Employer was at the site of the accident by the time the ambulance had arrived. Claimant has shown by a preponderance of the evidence that Employer knew or should have known his responsibility to admit or deny the claim within the statutory time period.

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

CONCLUSIONS OF LAW

A. Generally

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to

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

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

B. Compensability

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

Claimant has proven that it was more likely than not she was injured in the course and scope of her employment with Employer on August 5, 2023 when she fell off the back of a trailer while working for Employer injuring her left side, including her head, left shoulder, left wrist, ribs, left hip and left lower extremity. Claimant's claim is determined to be compensable.

C. Medical benefits

Employer is liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Claimant must establish the causal connection between the compensable event and the need for medical care with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 236 P.2d 293 (1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Jones*, 688 P.2d 1116

(Colo. 1984); Industrial Commission v. Royal Indemnity Co., supra, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

Authorization refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005).

Claimant has shown she is entitled to medical benefits that are reasonably necessary and related. Following Claimant fall from the trailer on August 5, 2022, Claimant immediately contacted 911 and was taken by ambulance to UCH Hospital for medical care. Claimant then selected UCH Primary Care, as Employer failed to provide her with a designated provider list. Claimant has proven by a preponderance of the evidence that Claimant's medical care through UCH was authorized, reasonably necessary medical treatment causally related to the August 5, 2022 accident.

23. In this matter, Employer failed to provide a designated list of providers pursuant to statute and selection of a provider passed to Claimant. Claimant selected UCHealth and they are deemed authorized. Further, Medicaid likely paid for Claimant's treatment at UCH Hospital and UCHealth Primary Care and otherwise financed Claimant's care. Employer is thus financially responsible for the payment of Claimant's medical expenses, including any outstanding lien from the Colorado Department of Health Care Policy & Financing due to payments made by Medicaid.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). Claimant credibly testified that she was contracted in July 2022 to work for $250.00 per day or $1,250.00 per week. As found, Claimant has proven that the fair approximation of her average weekly wage is $1,250.00.

E. Temporary Total Disability Benefits

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

The medical records from UCH Hospital and Nurse Roberson show that Claimant was unable to work from the day of her injury through May 24, 2023. On May 25, 2023 Nurse Roberson released Claimant to work. Claimant has clearly shown by a preponderance of the evidence that she is entitled to TTD benefits from August 6, 2022 through May 24, 2023 in the amount of $34,762.60. However, this ALJ cannot determine whether that release was to return to her to her full time job as a delivery driver or not. It intimates that Claimant continues to have limitations and Claimant credibly testified that she continued to have symptoms that limited her activities and ability to work. Claimant's claim for TTD benefits from May 25, 2023 and continuing are reserved.

F. Penalties

Insurance Coverage

Every employer subject to the provisions of the Workers' Compensation Act shall carry Workers' Compensation insurance. Sec. 8-44-101, C.R.S. Sec. 8-43-408(5), C.R.S.[1] in effect at the time of Claimant's August 5, 2022 work related injury provides,

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

[1] Due to statutory change as of July 1, 2017. The prior statutory provision of a 50% wage increase was paid to Claimant.

As found, Employer did not have Worker's Compensation insurance on or prior to Claimant's August 5, 2022 date of injury. Claimant spoke directly with her supervisor and boss on multiple occasions following the work injury of August 5, 2022. As found, Employer failed to disclose multiple times to Claimant whether he had workers' compensation insurance coverage. Claimant was informed by Division that no policy could be found for Employer, and that Employer had failed to respond to inquiries from Division. Employer knew or should have known about the accident and his obligations to carry insurance and or respond to Division inquiries regarding insurance and Claimant's claim. As found, it is determined that Employer failed to carry workers' compensation insurance. Neither did Employer file an admission or denial of the claim. Employer was given ample opportunity to respond to the claim and present a defense to these issues. Claimant emailed Employer copies of the Application for Hearing and the Notice of Hearing, the same email address which Claimant utilized to conduct her business with Employer. The Notice of Hearing was mailed to Employer by OAC to the mail address on record. None of the emails sent by Claimant nor the mail sent by the OAC were returned. Further, Employer failed to respond to Claimant's calls. As found, Employer was provided with notice of the hearing in this matter and failed to show. Claimant has shown by a preponderance of the evidence that a penalty is due for failure to insure.

As found, Respondent-Employer is liable for temporary total disability benefits and reasonable and necessary medical treatment related to the work injury. Based on Claimant's AWW of $1,250.00, Claimant's TTD rate is $833.33. Claimant is owed TTD benefits from August 6, 2022 through May 24, 2023, which is 292 days or 41 weeks and 5 days. Claimant is owed TTD benefits in the amount of $34,762.60. It is undisputed Respondent-Employer did not carry workers' compensation insurance at the time of Claimant's industrial injury. Accordingly, Respondent-Employer shall pay as a penalty an additional $8,690.65 (25% of $34,762.60) to the Colorado Uninsured Employer Fund.

Failure to Admit or Deny Liability

It if inferred by Claimant's statements at hearing that Employer knew of the work related injury as he was present when the ambulance arrived and spoke with Claimant about the accident. Employer did not respond to Claimant's filing of the claim, to her emails, to her calls, to Division's inquiries and demands, or to the Notice of Hearing sent by the Office of Administrative Courts. Claimant is entitled to penalties pursuant to the violations of Sec. 8-43-203(1)(a), C.R.S.

Section 8-43-203(1)(a) states that "The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee … within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested…"

Claimant seeks a penalty for failure to admit or deny liability. Pursuant under Sec. 8-43-203(2)(a), C.R.S. The employer must admit or deny liability within 20 days after it learns of an injury that results in "lost time from work for the injured employee in excess of three shifts or calendar days." An employer "may become liable" to the claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division. The maximum penalty for failure to admit or deny liability cannot

exceed “the aggregate amount of three hundred sixty-five days’ compensation.” Fifty percent of any penalty shall be paid to the claimant and fifty percent to the Subsequent Injury Fund. See Sec. 8-43-203(2)(a), C.R.S.

The phrase “may become liable” means the imposition of a penalty under Sec. 8-42-203(2)(a), C.R.S. is discretionary. *Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of the requirement to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer’s position so the Division can exercise administrative oversight over the claim process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colo. Civil Rights Comm’n*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Assoc. Bus. Prod. v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Indus. Claim Appeals Office*, 442 P.3d 94 (Colo. 2019). The claimant must prove circumstances justifying the imposition of a penalty under Sec. 8-43-203(2)(a), C.R.S. *Pioneer Hosp. v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

As found, Employer knew or should have known Claimant had a significant injury that occurred on August 5, 2022 after falling from the back of the trailer and had to call the ambulance. Employer was present before the ambulance arrived at the scene of the accident. Claimant was credible in testifying that she had multiple conversations with employer and that Employer was evasive, failed to answer Claimant’s question and eventually failed to answer her mail, emails or phone calls. Employer failed to file an Employer’s First Report and failed to notify the Division what employer’s position was with regard to Claimant’s claim for compensation. Claimant was injured on August 5, 2022 and Employer had 20 days to file an admission or denial, through August 26, 2022, which is 285 days counting through the date of the June 6, 2023 hearing.

Claimant has proven by a preponderance of the evidence that she is entitled to a penalty for failure to admit or deny. Employer was given an opportunity to put on a defense following receiving notice of the hearing and failed to appear at hearing. This ALJ has little information with regard to Employer’s ability to pay. However, given Claimant’s testimony that Employer had multiple drivers and vehicles as well as trailers, this ALJ declines to make any assumption with regard to Employer’s ability to pay. Claimant suffered humiliation, devastation and horror due to her inability to work caused to this August 5, 2022 work related injury, in addition to having to resort to giving up her home, having to sell her truck and having to live in a shelter. This has had a significant impact on Claimant. Therefore, it is determined that a daily penalty of $60.00 per day or $420.00 per week[2] beginning August 26, 2022 through June 6, 2023 is appropriate in this

[2] This constitutes little more than 50% of Claimant’s weekly compensation, which is much less than “up to one day’s compensation for each day’s failure to so notify.

matter for a penalty of $17,100.00, apportioned pursuant to statute, with $8,550.00 to Claimant and $8,550.00 to the subsequent injury fund.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant suffered compensable work related injuries to her head, left shoulder, left wrist, 8th left rib, left hip, and left lower extremity on August 5, 2022 in the course and scope of her employment with Employer.

2. Employer shall pay for all authorized, reasonably necessary treatment related to the August 5, 2022 injury from authorized providers to cure or relieve the effects of Claimant's compensable injury, including but not limited to the charges from UCH Hospital and UCH Primary Care including reimbursement to Medicaid (Colorado Department of Health Care Policy & Financing).

3. Claimant's average weekly wage is $1,250.00 and her temporary disability rate is $833.33.

4. Employer shall pay Claimant TTD benefits at the rate of $833.33 per week from August 6, 2022 through May 24, 2023 in the amount of $34,762.60. Claimant's claim for TTD benefits from May 25, 2023 and continuing are reserved.

5. Respondent-Employer shall pay $8,690.65 (25% of $34,762.60) to the Colorado Uninsured Employer Fund for failure to insure with payment mailed to DOWC Revenue Assessment Unit, 633 17th St. Suite 400, Denver, CO 80202.

6. Employer shall pay penalties to Claimant in the amount of $8,550.00 for failure to admit or deny the claim.

7. Employer shall pay penalties to the subsequent injury fund in the amount of $8,550.00 for failure to admit or deny the claim payable to DOWC Division Trustee and mailed to DOWC Division Trustee c/o Mariya Cassin 633 17th St. Suite 400 Denver, CO 80202.

8. In lieu of payment of the above compensation and benefits to Claimant, Employer shall:

a. Deposit the sum of $60.553.25, adding 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to DOWC Division Trustee, c/o Mariya Cassin, 633 17th St. Suite 400, Denver, CO 80202; cdle_revenueassess_dowc@state.co.us

or

b. File a bond in the sum of $60.553.25 with the Division of Workers' Compensation, which guarantees payment of the compensation and benefits awarded, within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation or

(2) Issued by a surety company authorized to do business in Colorado.

c. Employer shall notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

d. The filing of any appeal, including a petition for review, shall not relieve Employer of the obligation to pay the designated sum to the trustee or to file the bond. §8-43-408(2), C.R.S.

10. Employer shall pay statutory interest at the rate of 8% per annum on benefits not paid when due.

11. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or order authorizing distribution provides otherwise.

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

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

DATED this 28th day of June, 2023.

Digital Signature

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