OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-233-367-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury within the course and scope of her employment on November 22, 2022.

II. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to receive temporary disability benefits.

III. If Claimant has proven a compensable injury, whether Respondents have established by a preponderance of the evidence that Claimant was responsible for her termination from employment on April 4, 2023, under sections 8-42-105(4) & 8-42-103(1)(g), C.R.S. (collectively "termination statutes"), and is thus precluded from receiving temporary disability benefits.

IV. If Claimant has proven a compensable injury, the determination of her average weekly wage (AWW).

STIPULATIONS

The parties stipulated that if the claim is found compensable, Claimant will be entitled to a general award of reasonable, necessary, and related medical benefits.

FINDINGS OF FACT

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

1. Employer is an automobile parts supply company.
2. Claimant started working for Employer in June 2022 as a customer service representative at their Broomfield, Colorado location. As a customer service representative, Claimant had many responsibilities. Her responsibilities included pulling parts from the warehouse for customers. The parts included radiators, light housing units, and other automobile parts. She was also responsible for delivering parts and shipping parts.
3. The physical requirements of her job involved going to the warehouse and pulling parts. Most parts weighed up to 15 or 20 pounds. There were, however, other parts, such a large radiators, that weighed up to 70 pounds or more. She would sometimes have to climb a ladder or use an electric lift to get certain parts. Her job also required bending to pick up parts.
4. A few months after she was hired as a customer service representative, and before the automobile accident, Claimant was promoted to branch manager – since the prior branch

manager passed away unexpectedly.

5. As branch manager, Claimant was paid $20.00 an hour and worked Monday through Friday, from 8:00 a.m. to 5:00 p.m. Although the number of hours she worked each week varied, as documented in her wage records, she was expected to work 40 hours per week. She was also provided with a company vehicle to drive to and from work.
6. After being promoted to branch manager, Claimant continued performing duties of a customer service representative, but also performed additional managerial tasks, which included payroll, running the shop, making sure employees were doing their jobs, and various types of paperwork.
7. The Broomfield location was to be staffed with a branch manager, a customer service representative, and two drivers who would deliver parts. However, the Broomfield location where Claimant worked was often understaffed.
8. [Redacted, hereinafter TR] is the regional manager. He oversees multiple locations, including the Broomfield office, and works mainly out of the Denver office. Because he works out of another office, TR[Redacted] is rarely at the Broomfield location. Before Claimant's automobile accident, he was at the Broomfield location about one day per month.
9. After Claimant's promotion to branch manager, Claimant's mother, [Redacted, hereinafter BS], filled the vacant customer service position for a brief period until BS[Redacted] termination. In addition to BS[Redacted], there was only one full-time driver, [Redacted, hereinafter RZ] (no relation to Claimant). The other driver's position had a high turnover rate, leaving the customer service representative and branch manager to carry out the responsibilities of those positions that were not staffed at the time. Once BS[Redacted] was terminated, however, RZ[Redacted] would be out making deliveries during the day, leaving Claimant alone at the Broomfield location with no one else to help her pull parts for customer orders throughout the day.
10. Furthermore, depending on the customer and the time the order comes in, an employee might deliver the order on their way home from work or on their way to work. It was an accepted practice for Claimant and other employees to drive to customer locations before or after their regularly scheduled shift to deliver parts. Even prior to Claimant becoming a branch manager, she would drive to customer locations on her way home from work and this practice was something that other employees also regularly engaged in at the time she was hired. As a result, employees like Claimant delivering parts to customers on the way home from work, or on the way to work, was an accepted and regular business practice of Employer. Besides delivering purchased parts, Claimant would also take parts that had yet to be purchased to customers for them to determine whether the part matched the part they were replacing. This added level of service–of delivering parts before and after business hours-was a benefit to Employer.
11. Employees, like Claimant, could ask their supervisor to adjust their timecard for any time spent delivering parts after hours in order to be paid for their time. But the supervisors did not always add the time to each employee's timecard. Therefore, some employees, like Claimant, stopped asking to have their time adjusted for deliveries made after hours.
12. On November 22, 2022, Claimant clocked out and left the Broomfield location at the end

of her regularly scheduled shift, which was 5:00 p.m., to deliver a part to a customer, [Redacted, hereinafter LT], on her way home. She was driving the company truck provided to her. Although she had clocked out for the day, Claimant was driving to LT[Redacted] with a part for them to see whether it would work. While driving to LT[Redacted], on the same route she would take to drive home, she was involved in an automobile accident. The accident occurred while Claimant was stopped at a red light and a truck rear-ended her while going about 30 mph. The accident occurred around 5:20 p.m.

13. After the accident, and on the same day, Claimant emailed her supervisor, TR[Redacted], and indicated that she was in an accident with the company vehicle. TR[Redacted] responded and directed Claimant to go to Urgent Care, if necessary.

14. Initially following the accident, Claimant felt little pain. The next day, however, when she began to feel symptoms, she got dizzy. Besides feeling dizzy, her neck, back and legs hurt, it also felt like her foot had fallen asleep and her hands would give out.

15. On November 23, 2022, the day after the accident, Claimant sought medical treatment at Advanced Urgent Care. The notes from this visit indicate Claimant was involved in an automobile accident. The notes also indicate that Claimant was rear ended "at work" 24 hours ago and was suffering from neck pain, headaches, dizziness, and nausea. Based on Claimant's presentation, the physician referred Claimant to Health Images of North Denver for a CT scan. The physician also completed a Colorado Department of Labor and Employment, Division of Workers' Compensation, Physician's Report of Workers' Compensation Injury. He also restricted Claimant from crawling, kneeling, squatting, or climbing. Lastly, he advised Claimant to follow up with a workers' compensation physician within 3 days. Based on this report, and the information contained in the report, the ALJ finds that Claimant told the physician that she was injured while working.

16. On December 12, 2022, Joshua Bailey, M.D. at Salud Family Health Center saw Claimant. At this appointment, Claimant complained of lower back and hip pain. She also complained of ongoing intermittent dizziness with standing or walking. The report also notes that Claimant "was driving for her work at the time and was told she could go to any doc for workman's comp but no forms given to complete." After evaluating Claimant, Dr. Bailey's assessment included 1) concussion without loss of consciousness, 2) whiplash injury to neck, 3) acute left-sided low back pain with left sided sciatica, and 4) left SI joint pain. As a result of his assessment, he prescribed various medications and referred Claimant to physical therapy. Again, this report demonstrates that Claimant stated the accident occurred while working.

17. On January 4, 2023, and at the direction of her supervisor, TR[Redacted], Claimant went to UC Health for additional treatment. At this appointment, Claimant was seen by Jennie Lynn Miller, PAC (PAC Miller). Claimant told PAC Miller that she was provided work restrictions but was still working full duty–and having difficulty with lifting, bending, and climbing ladders. After assessing Claimant, PAC Miller provided work restrictions that included no lifting, pushing, or pulling greater than 15 pounds, no kneeling, squatting, avoid repetitive bending and twisting, and to allow seated breaks as needed. These restrictions precluded Claimant from performing her regular job duties.

18. On January 24, 2023, Claimant returned to PAC Miller. At this appointment, Claimant still

complained of symptoms due to her automobile accident. She also indicated that although she was working with restrictions, she still had to exceed her restrictions at times because no one else was available to help her at work. Based on her assessment, PAC Miller increased Claimant's work restrictions and limited her lifting, pushing, and pulling to no more than 10 pounds. These restrictions also precluded Claimant from performing her regular job duties.

19. On February 9, 2023, Claimant returned to UC Health. At this appointment, Claimant completed a Workers' Compensation Follow-up Visit Questionnaire. In the questionnaire, Claimant noted ongoing pain. She also indicated that she was working full duty – despite having work restrictions. At this appointment, Nathanial Myles Cope, M.D. evaluated Claimant. Claimant told Dr. Cope that Employer was not following her work restrictions and that she has been climbing ladders at work, as well as twisting and bending at work. Due to ongoing pain complaints, and based on his physical assessment, Dr. Cope ordered a lumbar MRI and continued the restrictions, which limited Claimant to no lifting, pulling, or pushing over 10 pounds as well as no bending, squatting, twisting, or climbing.

20. On February 21, 2023, Claimant returned to Dr. Cope. Dr. Cope went over Claimant's MRI results with her and told her that he did not think she was a surgical candidate. They also discussed her physical therapy, and it appeared Dr. Cope did not know what Claimant was doing in physical therapy. Claimant thought she was getting different recommendations from Dr. Cope and her physical therapist. She also thought Dr. Cope treated her differently when her significant other was not with her. Thus, she wanted to get a second opinion about her condition. Claimant also told Dr. Cope that her Employer was not honoring her work restrictions. As a result, Dr. Cope called her Employer's HR department to speak with [Redacted, hereinafter SF] but did not speak with her. Therefore, he left a message and indicated that he was taking Claimant off work because Claimant's work restrictions were not being honored. Thus, Dr. Cope took Claimant off work. At the same time, Dr. Cope also indicated that due to the issues raised by Claimant at the appointment, he did not know if Claimant would be returning to him. In any event, he scheduled her for a follow up visit for February 28, 2023.

21. After being taken off work on February 21, 2023, Claimant stopped working and then missed more than three shifts of work due to the injuries she sustained in the automobile accident.

22. On February 22, 2023, Dr. Cope spoke with SF[Redacted] in the HR Department regarding Claimant's contention that the employer was not honoring her restrictions because they were understaffed – and this caused Claimant to work beyond her restrictions. Dr. Cope noted that SF[Redacted] told him "that while it may or may not be true that there was understaffing, nobody was directing [Claimant] to work outside the restrictions and any work done outside of the restrictions was done at her own accord." He also noted that SF[Redacted] said that Claimant had not mentioned any issues regarding her restrictions to her boss, TR[Redacted], and that Claimant had not mentioned any issues to SF[Redacted]. Despite this conversation with Dr. Cope, it does not appear SF[Redacted], who is the HR Department, tried to resolve the issue with Claimant working beyond her restrictions. Instead, she appeared to disregard the matter and blamed Claimant for exceeding her restrictions to get the work done, for the benefit of Employer. Moreover, the fact that SF[Redacted] would not admit to Dr. Cope that they

were understaffed tends to establish that she knew they were understaffed and that she was being evasive regarding Employer accommodating Claimant's restrictions because they were shorthanded.

23. On February 28, 2023, Claimant called Dr. Cope's office and indicated that she would not be coming to her appointment that day. Thus, Claimant failed to appear at her appointment. Despite not attending her appointment, Dr. Cope issued a report that indicated Claimant did not show up for her appointment. The rest of the report was blank. Thus, he did not change her no-work status in his report and Claimant remained off work.

24. On March 9, 2023, Claimant underwent eye surgery for a non-work-related eye condition. Her eye doctor first took Claimant completely off work until March 20, 2023.

25. On March 14, 2023, Claimant returned to see Dr. Cope. At this appointment, he evaluated Claimant and decreased her restrictions to no lifting, pushing, or pulling greater than 10 pounds. He also precluded her from bending, kneeling, twisting, crawling, or climbing.

26. On March 17, 2023, Claimant's eye doctor, Dr. Murri, took her off work completely until March 31, 2023 – a Friday. He also limited her lifting to 10 pounds and stated that Claimant would be reevaluated in 2 weeks. Claimant was thus taken off work, due to her eye condition, until she was reevaluated by Dr. Murri. Moreover, the March 17, 2023, report was provided to Employer.

27. On March 28, 2023, Claimant returned to Dr. Cope and he increased her work restrictions. Although he kept in place Claimant's prior restrictions and limitations, which limited her lifting, pushing, or pulling to no more than 10 pounds, and no crawling or climbing, he limited her working to no more than 4 hours per day.

28. On March 31, 2023, and based on Dr. Murri's March 17, 2023, report, Employer expected Claimant to return to work. Claimant, on the other hand, did not think she could return to work until she was evaluated and released by Dr. Murri. Based on the March 17, 2023, report, the ALJ finds that both the Employer's and Claimant's interpretation and understanding of the March 17, 2023, report is reasonable. Thus, it was reasonable for Employer to think Claimant could return to work due to her eye condition on or after March 31, 2023, and it was reasonable for Claimant to think she could not return to work, due to her eye condition, until after she was seen again by her eye doctor.

29. Adding to the confusion is that Claimant's doctor for the automobile accident, Dr. Cope, had recently restricted Claimant from performing her regular job duties and limited her working to no more than 4 hours per day. Further confusing the matter, is that it does not appear Employer received the updated work restrictions, due to the automobile accident, that restricted Claimant from working more than 4 hours per day, until after they terminated Claimant.

30. Before March 31, 2023, Employer did not confirm and speak with Claimant and tell her that they expected her to return to work on March 31, 2023, and that she was placed on the schedule for that day. The Employer also failed to confirm and speak with Claimant and tell her that they expected her to return to work, and was placed on the schedule, for Monday April 3rd and Tuesday, April 4th, 2023.

31. On March 31, 2023, a Friday, Claimant did not show up for work. Claimant also did not go to work on Monday, April 3rd or Tuesday, April 4th, 2023. Nor did she contact her

employer and let them know that she was not returning to any type of modified work on those days because she reasonably did not think she had to work those days and reasonably believed she did not have to follow up with them at that time.

32. Because Claimant did not show up for work, or call in, for three consecutive days, Claimant was terminated for "job abandonment."

33. The Respondents allege Claimant was terminated for cause because she failed to report to work for three consecutive shifts without contacting her supervisor or Human Resources, in violation of company policy. According to the company manual:

> All employees are expected to arrive on time, ready to work, every day they are scheduled to work. If unable to arrive at work on time, or if an employee will be absent for an entire day, the employee must contact the supervisor as soon as possible. Failure to show up or call in for a scheduled shift without prior approval may result in termination. If an employee fails to report to work or call in to inform the supervisor of the absence for 3 consecutive days or more, the employee will be considered to have voluntarily resigned from employment.

34. At no time in March or April, and before Claimant was terminated, did Employer provide Claimant a modified job offer or formally put her on the schedule starting March 31, 2023, and discuss the matter with Claimant. In essence, there was a breakdown of communication between Employer and Claimant regarding Claimant's ability to work, Employer's expectation for her to return to work on March 31, 2023, and Claimant's understanding as to when she had to report back to work. Thus, Claimant did not volitionally decide to not go to work – on a scheduled workday. In other words, she did not know she was expected to return to work on March 31st, April 3rd, or April 4th. Thus, the ALJ finds that Claimant did not volitionally violate a company policy regarding her attendance. Therefore, Claimant is not at-fault for her termination.

35. At the time of the accident, Claimant was delivering a part for a customer on behalf of, and for the benefit of, the employer. Although it was after hours, and she had clocked out, it was an accepted practice, allowed by Employer. Moreover, delivering the part to the customer – after hours – was a benefit to the Employer. The customer would be happy and it would be one less item to deliver the following day, freeing up Claimant and others to deliver other parts and perform other tasks. Thus, the ALJ finds that the automobile accident arose out of and occurred within the course and scope of her employment.

36. Claimant was injured in the automobile accident and the accident resulting in physical restrictions and physical limitations that precluded Claimant from performing her regular job duties. Therefore, as a result of her work injury, Claimant was taken completely off work by her physician, and stopped working on February 21, 2023, then subsequently missed more than three work shifts and suffered an actual wage loss.

37. After Claimant was off work, Employer expected Claimant to return to work on March 31, 2023. Claimant, however, was never formally placed back on the schedule. Moreover, Claimant reasonably believed she did not have to return to work until after her eye doctor released her to return to work and after her employer agreed to accommodate her work

restrictions. As found, Claimant's actions of not showing up for work on March 31st, April 3rd, and April 4th was reasonable under the circumstances. Thus, her actions of not calling in on March 31st, April 3rd, and April 4th were not volitional violations of Employer's attendance policy. Thus, claimant is not at-fault for her wage loss after Employer terminated her on April 4, 2023.

38. After Claimant's termination, she has remained off work, except for a brief period when she worked at 7-11 and Subway. However, there is insufficient evidence to determine the exact dates of employment and wages earned while working for these subsequent employers. In addition, Claimant also received unemployment benefits. There is, however, also a lack of evidence regarding the duration and amount of unemployment benefits received by Claimant.

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 Claimant established by a preponderance of the evidence that she sustained a compensable injury within the course and scope of her employment on November 22, 2022.

An injury may be compensable if, at the time of the injury, the employee was performing services arising out of and in the course of the worker's employment. § 8-41-301(1)(b), C.R.S. 2020. "For an injury to occur 'in the course of' employment, the claimant must demonstrate that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions." *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1999). To establish that an injury arose out of employment, "the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Id.*

"In general, a claimant who is injured while going to or coming from work does not qualify for recovery because such travel is not considered to be performance of services arising out of and in the course of employment." *Id.* This doctrine is commonly called the "going to and from work" rule. *Id.* However, in some cases an accident that occurs while an employee is driving to or from work can be compensable.

The manner to determine whether certain circumstances exist, which can make an accident that occurs while driving to or from work compensable, is set forth in the *Madden* case. The *Madden* court held that:

> The proper approach is to consider a number of variables when determining whether special circumstances warrant recovery under the Act.
>
> These variables include but are not limited to:
>
> (1) whether the travel occurred during working hours,
>
> (2) whether the travel occurred on or off the employer's premises,
>
> (3) whether the travel was contemplated by the employment contract, and
>
> (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

Madden at 864.

The Court further explained that the third variable has the potential to encompass many situations. The Court explained that the common link among compensable situations is when travel is a substantial part of the service to the employer. The Court explained that the examples can be summarized as follows:

> (a) when a particular journey is assigned or directed by the employer,

> (b) when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work,[1] and
>
> (c) when travel is singled out for special treatment as an inducement to employment, such as when the employer provides transportation or pays the cost of the employee's travel to and from work.

Id. at 865.

Then, the Court went on to explain the fourth variable, the zone of special danger. The Court explained that:

> the zone of special danger variable refers to injuries that occur off an employer's premises but so close to the zone, environment, or hazards of such premises as to warrant recovery under the Act. The court went on to explain that they have allowed recovery when an employee is injured on the premises of someone other than his employer. *See Martin K. Eby Constr. Co. v. Industrial Comm'n*, 151 Colo. 320, 323-24, 377 P.2d 745, 747 (1963) (affirming award to an employee who was injured in an automobile accident sixteen miles inside a missile site, while driving to a construction job). The Court also noted that they have allowed recovery for accidents occurring on public streets that must be crossed in the course of travel from employer-provided parking to the place of employment. *See State Compensation Ins. Fund v. Walter*, 143 Colo. 549, 555-56, 354 P.2d 591, 594 (1960).

Id. at 865.

In this case, it was customary for employees such as Claimant, and allowed by Employer, to deliver parts to customers after work and while driving home. In essence, it was at the express and implied request of Employer. Thus, it was part of Claimant's job duties. Moreover, delivering parts to customers after business hours conferred a benefit to the employer - the customer got the part they needed as soon as possible – and it was one less part that had to be delivered the following day. The fact that Claimant was clocked out at the time of the accident is not relevant in this case because had Claimant asked to be paid for the time spent delivering the part – the employer would have paid her. Claimant was also driving a company truck at the time of the accident. Thus, Employer was paying for the transportation costs associated with delivering the part.

Employer contends that the part Claimant says she was delivering had already been delivered earlier in the day. The ALJ, however, does not find such contention to be credible or persuasive. In this case, the ALJ finds Claimant's testimony to be credible. Employer also contends that because the accident occurred on the same route Claimant

[1] According to the Colorado Supreme Court, "[s]uch travel by an employee, i.e., that at the express or implied request of the employer or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work, has been labeled as 'travel status." *Madden v. Mountain West Fabricators*, 977 P.2d 861, 865 (Colo. 1999).

would take to go home – the claim is not compensable because it would have happened anyway and at the same location. The ALJ, however, does not find such argument to be persuasive. In this case, Claimant was involved in an accident while delivering a part to a customer in a manner and time authorized by Employer.

Based on the totality of the evidence, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that the automobile accident arose out of and occurred within the course and scope of her employment. Thus, the accident is compensable.

II. If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to receive temporary disability benefits.

To prove entitlement to temporary disability benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). 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. *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). 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). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Off., supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

In this case, Claimant's job required her to commonly lift 15-20 pounds, and sometimes more. Plus, Claimant also had to climb ladders to pull parts off shelves. After her work accident, Claimant came under the care of Dr. Cope. Because of the work accident, and Claimant's injuries, Dr. Cope issued work restrictions that precluded Claimant from performing her regular job duties. Moreover, on February 21, 2023, Dr. Cope completely removed Claimant from work-and Claimant did not work for Employer after that date. Thereafter, she subsequently missed more than three days of work and suffered an actual wage loss due to her work injury. Therefore, the ALJ finds and concludes Claimant established by a preponderance of the evidence that she is entitled to temporary disability benefits starting February 21, 2023.

III. If Claimant has proven a compensable injury, whether Respondents have established by a preponderance of the evidence that Claimant was responsible for her termination from employment on April 4, 2023, under sections 8-42-105(4) & 8-42-103(1)(g), C.R.S. (collectively "termination statutes"), and is thus precluded from receiving temporary disability benefits.

Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for TTD benefits, the respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Off.,* 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.,* W.C. No. 4-551-844 (ICAO. July 18, 2003). 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).

In *Colorado Springs Disposal v. Industrial Claim Appeals Off.*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood prior to the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Consequently, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equip. Corp.,* 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp., supra.*

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Comm'n,* 740 P.2d 999 (Colo. 1987). However, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office, supra*. This is true even if the claimant is not specifically 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. *Gilmore v. Industrial Claim Appeals Off., supra.*

As found, Claimant reasonably believed that she was still precluded from working March 31st, April 3rd, and April 4th of 2023. Therefore, she did not report to work and such decision was reasonable under the circumstances. Moreover, at no time did Employer speak with Claimant and advise her that she was placed on the schedule and expected to work those days. Claimant thus did not volitionally violate Employer's attendance policy and did not abandon her job. Thus, the ALJ finds and concludes that Respondents failed to establish by a preponderance of the evidence that Claimant is at-fault for her termination and subsequent wage loss and not entitled to temporary disability benefits.

IV. If Claimant has proven a compensable injury, the determination of her average weekly wage (AWW).

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). Specifically, § 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra*. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based on the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Avalanche Industries, Inc. v. Clark, supra; Campbell v. IBM Corp., supra*.

In this case, Claimant was earning $20.00 per-hour as a branch manager. Although the hours she worked varied each week, with some weeks including overtime and some weeks working less than 40 hours, she was expected to work 40 hours per week. As a result, the ALJ finds and concludes that a fair approximation of Claimant's AWW is $800.00 per-week.

ORDER

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

1. Claimant's claim is compensable.
2. Claimant is entitled to temporary disability benefits.[2]
3. Claimant is not at-fault for her termination and subsequent wage loss.
4. Claimant's AWW at the time of the accident and injury is $800.00.
5. Pursuant to the stipulation of the parties, Respondents shall provide reasonable and necessary medical treatment to cure and relieve Claimant from the effects of her work injury.
6. Issues not expressly decided herein are reserved to the parties for future determination.

[2] Because the record is insufficient to determine when Claimant worked for 7-11 and Subway, the ALJ is unable to order the payment of TTD for specific time periods and TPD for specific time periods. The ALJ is also unable to determine the unemployment offset. Therefore, the parties are encouraged to attempt to resolve the amount of temporary disability benefits payable and any offsets. If the parties are unable to resolve the TTD, TPD, and offset issues, either party may file an application for hearing to resolve those issues.

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 3, 2024.

/s/ Glen Goldman

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

ISSUES

- Did Claimant prove his average weekly wage should be increased to account for a hazard pay bonus received in July 2023, or other factors?
- Did Claimant prove Respondent should be penalized for failing to timely provide a copy of the claim file?
- Disfigurement.

FINDINGS OF FACT

1. Claimant worked for Employer as a Mechanic II. Claimant received guaranteed annual "step" raises on the anniversary of his hire date. The step raises were in addition to any cost-of-living raises.

2. Claimant suffered admitted industrial injuries on September 2, 2020, while working on a vehicle transmission. He received conservative treatment for his cervical and lumbar spine under the direction of Dr. Peterson at Concentra.

3. In October 2022, Claimant transferred to a new position as Solid Waste Coordinator in Employer's Recycle Works department. The change was necessitated by restrictions and limitations caused by Claimant's industrial injury. Claimant was still working in Solid Waste Coordinator position as of the hearing.

4. The Solid Waste Coordinator pays more than the Mechanic II position. However, Claimant testified that had he remained in the Mechanic position, he might have been promoted to Mechanic IV or Lead Mechanic, which would have paid the same or possibly one grade higher than the Solid Waste Coordinator position.

5. Claimant continued to receive step raises and cost-of-living adjustments after the job change.

6. Claimant lost no wages because of the injury and received no temporary disability benefits.

7. Dr. Peterson placed Claimant at MMI on July 5, 2023, with a 34% whole person impairment rating.

8. Respondent filed a Final Admission of Liability (FAL) on August 8, 2023, based on Dr. Peterson's rating. The FAL admitted for an average weekly wage (AWW) of $869.82, based on Claimant's earnings at the time of injury.

9. On September 1, 2023, Claimant's counsel requested that Respondent increase the AWW to $1,536.30, to account for pay raises Claimant had received since the work accident. Claimant calculated the AWW using wages from June 1, 2023 through July 31, 2023. This included a one-time "hazard pay" bonus of $2,824.96 on July 31, 2023, which was intended to compensate essential workers such as Claimant who were required to continue working on-site during the COVID-19 pandemic. Although the exact period covered by the bonus is unclear, the most reasonable inference is that it was for work in 2020 and 2021, before vaccines became widely available and COVID-related restrictions were substantially relaxed.

10. Respondent agreed that an adjustment to the original admitted AWW was appropriate but disagreed with Claimant's computation. Respondent filed an Amended FAL on September 13, 2023, with an AWW of $1,179.44. Respondent's calculation is based on $15,332.68 Claimant earned in the 13 weeks before MMI ($15,332.68 ÷ 13 = $1,179.44). Respondent did not include the one-time hazard bonus in the computation.

11. In his post-hearing position statement, Claimant proposed an alternate calculation of AWW based on his earnings from October 1, 2022 through July 31, 2023.

12. Claimant is paid 1.5x his hourly wage for overtime work. The amount of overtime varies significantly; some months he works a great deal of overtime, and other months he works none. Wage records show the following overtime hours from October 2022 through July 2023:

Month	**OT Hrs**
Oct-22	57
Nov-22	19
Dec-22	14
Jan-23	10
Feb-23	8
Mar-23	8
Apr-23	12
May-23	0
Jun-23	0
Jul-23	16

13. The period of April 1, 2023 through June 30, 2023, utilized by Respondent to calculate Claimant's AWW coincidentally includes the least amount of overtime of any three-month period since Claimant's last raise on October 1, 2022.[1] Considering the fluctuations in Claimant's overtime, it is appropriate to average over a longer period. The period of October 1, 2022 through July 31, 2023 proposed by Claimant is reasonable.

[1] This is not to suggest that Respondent purposefully selected this period with the intention of minimizing the consideration of overtime. A 13-week "lookback" period is a well-established convention in the workers' compensation system, and frequently provides an adequate measure of an employee's earnings. However, in this case, a departure from that convention is warranted to accurately capture Claimant's overtime earnings.

14. Claimant's AWW is $1,267.16, calculated as follows:

Pay date	Gross Pay
10/31/2022	$6,920.51
11/30/2022	$5,399.42
12/30/2022	$5,626.25
1/31/2023	$5,566.68
2/28/2023	$5,281.42
3/31/2023	$5,281.42
4/30/2023	$5,451.94
5/31/2023	$4,940.37
6/30/2023	$4,940.37
7/31/2023	$5,622.47
TOTAL:	$55,030.85
No. weeks	43.429
AWW	**$1,267.16**

15. The one-time hazard pay bonus Claimant received in July 2023 should not be included in the AWW calculation because (1) it compensated Claimant for work performed long before October 2022, and (2) there is no reasonable expectation the unique circumstances giving rise to the bonus will be repeated in the future.

16. Claimant proved his AWW is $1,267.16, effective July 5, 2023.

17. Claimant's counsel requested and received a copy of Respondent's claim file in February 2022, pursuant to § 8-43-203(4).

18. On August 1, 2023, Claimant's counsel requested "an updated copy" of the claim file from February 1, 2022 forward. Claimant's counsel sent a follow up request to Respondent's counsel on August 22, 2023.

19. Respondent provided the updated claim file on August 22, 2023, five days after the statutory deadline. No explanation was offered at hearing for the tardy response. But given Respondent's counsel's prompt reply after the follow up request, the delay was most likely inadvertent.

20. Claimant suffered no harm from the six-day delay in receiving the updated claim file.

21. Claimant has cervical range of motion deficits because of the work injury, which was a component of the admitted impairment rating. Nevertheless, limited cervical range of motion was not apparent while watching Claimant testify or move about the courtroom.

22. Claimant experiences injury-related numbness and tingling in his right leg. This causes an observable limp. The ALJ finds that Claimant should be awarded $1,200 for disfigurement related to the alteration of gait.

CONCLUSIONS OF LAW

A. Average weekly wage

Section 8-42-102(2) provides that 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. *Avalanche Industries v. Clark*, 198 P.3d 589 (Colo. 2008). 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).

The "discretionary exception" is frequently invoked to account for post-injury wage increases when calculating temporary disability benefits. *E.g., Campbell v. IBM Corp*., *supra; Romero v. Cub Foods*, W.C. No. 4-218-823 (September 28, 2000). This is because of the direct correlation between the claimant's "actual wage loss" during a period of temporary disability and "a salary a claimant was actually earning when forced to stop working." *Avalanche Industries, supra*, at 596.

Here, Claimant suffered no periods of temporary disability, and seeks an increased AWW solely purposes of calculating PPD benefits. The discretionary authority to deviate from the "default" AWW formula also extends to PPD benefits, which compensate a claimant for a permanent loss of "future earning capacity." *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001).

Respondent conceded that Claimant's AWW should be increased to reflect pay raises he received after the date of injury but disagrees with Claimant's proposed calculation.

As found, the most appropriate AWW is $1,267.16. This is based on Claimant's wages from October 1, 2022 through July 31, 2023, excluding the one-time, COVID-related "hazard bonus" in July 2023. This period adequately accounts for fluctuations in Claimant's overtime earnings.

B. "Hazard bonus"

Section 8-40-201(19)(a) defines "wages" as "the money rate at which the services rendered are to be recompensed under the contract of hire in force at the time of the injury." The term "wages" excludes "fringe benefits" other than a small handful of items specifically enumerated in § 8-40-201(19)(b). Whether to include cash bonuses when calculating AWW is a fact-dependent determination based on the circumstances in a particular case. *E.g*., Yex v. ABC Supply Company, W.C. No. 4-910-373-01 (ICAO, May 16, 2014); *Cowland-Feeley v. Century Communications, Inc*., W.C. No. 4-393-063 (ICAO, April 5, 2000). The primary considerations when evaluating whether cash bonuses constitute "wages" or a non-includable "fringe benefit" are whether the employee has reasonable access to the benefit on a day-to-day basis, or an immediate expectation

interest in receiving the benefit under appropriate, reasonable circumstances. *Meeker v. Provenant Health Partners*, 929 P.3d 26 (Colo. App. 1996).

The one-time hazard bonus is not includable in the AWW, for several reasons. First, it covered work performed long before the October 2022 pay raise or the July 5, 2023 date of MMI. Second, and more important, the COVID-related bonus was a "one off" occurrence in response to a unique set of circumstances, with no reasonable expectation that it will be repeated in the future.

C. Penalties

Section 8-43-304(1) requires the imposition of penalties up to $1,000 per day when any insurer or its agent "fails, neglects, or refuses to obey any lawful order of the director or panel." An order of an ALJ is equivalent to an order of the director for purposes of § 8-43-301(1). *Giddings v. Industrial Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001).

The assessment of penalties is governed by an objective standard of negligence and involves a multi-step analysis. First, the ALJ must determine whether the insurer or employer violated an order. If so, the ALJ must determine whether the violation was objectively reasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003). An insurer acts unreasonably if it fails to take action a reasonable insurer would take to comply with a statute, rule or order. *Pioneers Hospital, supra*. To be objectively reasonable, an insurer's actions (or inaction) must be predicated on "a rational argument based in law or fact." *Diversified Veterans Corporate Center v. Hewuse, supra*.

A party establishes a *prima facie* showing of unreasonable conduct by proving that an insurer violated a statue, a rule of procedure, or an order. If the claimant makes such a *prima facie* showing, the burden shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*; *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999). To prove a rational basis in law or fact, a party must present admissible evidence, and cannot simply rely on arguments or statements of counsel. *E.g. Kelly v. Kaiser-Hill Company LLC*, W.C. No. 4-332-063 (ICAO, August 11, 2000).

Section 8-43-203(4) provides,

> Within fifteen days after the mailing of a written request for a copy of the claim file, the employer or, if insured, the employer's insurance carrier or third-party administrator shall provide to the claimant or his or her representative a complete copy of the claim file that includes all medical records, pleadings, correspondence, investigation files, investigation reports, witness statements, information addressing designation of the authorized treating physician, and wage and fringe benefit information for the twelve months leading up to the date of injury and thereafter, regardless of the format.

Although Claimant had previously received a copy of the claim file in 2022, nothing in § 8-43-203(4) suggests that a claimant is limited to a single request for the claim file. *Housley v. Circle K Stores, Inc.*, W.C. No. 5-143-923 (ICAO, February 27, 2023). Although one can imagine an abusive scenario involving serial requests for the claim file, that is not the case here. Accordingly, Respondents were obligated to respond no later than August 16, 2023.

Statutory or rule violations resulting from "clerical errors" or "inadvertent mistakes" are generally not objectively reasonable when there is no ambiguity or uncertainty regarding the requirements of the statute or rule in question and the circumstances were within the carrier's control. *E.g.*, *Kerr v. Costco Wholesale, Inc.*, W.C. No. 5-076-601-002 (ICAO, June 1, 2021) (penalty required even though the violation was due to "inadvertent" mistake "based on clerical error"); *Arnhold v. UPS*, W.C. No. 4-979-208-02 (ICAO, February 24, 2017) (penalty required even though violation was "unintentional" and the result of "human error in the calculation of two days").

D. Cure

Section 8-43-304(4) provides if the alleged violator cures the violation within 20 days of the mailing of an application for hearing seeking penalties, no penalty shall be assessed unless the party seeking the penalty proves by clear and convincing evidence that the alleged violator knew or should reasonably have known they were in violation.

The Panels in *Kerr* and *Arnhold* held the cure provision was irrelevant because the evidence was undisputed that the respondents violated known rules. In *Kerr*, the Panel stated,

> [W]hen the facts demonstrating the violation are undisputed . . . it is of little consequence whether the circumstances are reviewed as a preponderance of the evidence or as clear and convincing evidence. The findings indicate the respondent reasonably should have known that by sending the claimant's check to the wrong law office, it was not paying the claimant as required by Rule 5-6(C). The undisputed facts constituted the entirety of the evidence on the issue. Thus, the cure provision in § 8-43-304(4), is of no consequence.

The same logic applies here. Respondent reasonably should have known that by sending the file 21 days after the request, it failed to comply with the requirement to provide the file within 15 days. Accordingly, the cure provision "is of no consequence."

E. Amount of the penalty

It is undisputed that Respondent did not provide the updated claim file within 15 days of Claimant's August 1, 2023 request. Accordingly, Claimant proved Respondent should be penalized for violation of § 8-43-203(4).

Although penalties are mandatory when the statutory criteria are met, the ALJ has wide discretion in determining the amount of any penalty. *Crowell v. Industrial Claim*

Appeals Office, 298 P.3d 1014 (Colo. App. 2012). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). In setting the amount of the penalty, the ALJ can consider factors such as the reprehensibility of the conduct, the extent of harm or potential harm caused by the violation, the duration and type of violation, the insurer's motivation for the violation, any efforts at mitigation, and whether the misconduct is representative of a pattern of misconduct. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005); *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996); *Kerr v. Costco Wholesale, Inc*., W.C. No. 5-076-601-002 (ICAO, June 1, 2021).

Respondent provided the updated claim file on August 22, 2023. No explanation was offered at hearing for the tardy response. But given Respondent's counsel's prompt reply after the follow up request, the delay was probably inadvertent. Furthermore, Claimant suffered no harm from the six-day delay in receiving the updated claim file.

Considering the inadvertent nature of the violation and the lack of harm to Claimant, no more than a nominal penalty is warranted. Respondent's proposal of $25 per day is reasonable and appropriate. The period of violation lasted five days, from August 17, 2022 through August 21, 2022. Accordingly, Respondent shall pay penalties in the aggregate amount of $125 ($25 x 5 = $125).

F. Apportionment of penalties

Penalties must be apportioned between the aggrieved party and the Colorado Uninsured Employer Fund (CUE Fund) at the discretion of the ALJ, with the caveat that the aggrieved party must receive at least 25% of any penalty assessed. Section 8-43-304(1). Because Respondent's brief delay in sending the claim file caused Claimant no actual harm, the penalties awarded herein primarily serve the public purpose of encouraging compliance with the Act. Accordingly, the penalties shall be apportioned 25% to Claimant and 75% to the CUE Fund.

G. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained noticeable disfigurement as a direct and proximate result of his industrial injury. The ALJ concludes Claimant should be awarded $1,200 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $1,267.16, effective July 5, 2023.

2. Claimant's request to include the $2,824.96 "hazard bonus" in the average weekly wage is denied and dismissed.

3. Respondent shall pay Claimant $1,200 for disfigurement.

4. Respondent shall pay $125 in penalties for 5 daily violations of § 8-43-203(4), from August 17, 2023 through August 21, 2023. The penalties shall be apportioned 25% ($31.25) to Claimant and 75% ($93.75) to the Colorado Uninsured Employer Fund.

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

DATED: June 4, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUE

Whether Claimant has presented substantial evidence to support a determination that future medical treatment in the form of chiropractic and acupuncture care as well as opioid prescriptions recommended by John T. Sacha, M.D. will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition.

FINDINGS OF FACT

1. Claimant is a 60-year-old male with a history of a cervical fusion at C5-7 and a lumbar fusion at L5-S1. He sustained an admitted industrial injury to his thoracic spine on January 15, 2018.

2. Claimant received conservative care through Concentra Medical Centers. Claimant. Modalities included physical therapy, dry needling, and medications. A thoracic x-ray on February 26, 2018 was negative for acute findings. Authorized Treating Physician (ATP) John T. Sacha performed a medial branch block and later a rhizotomy at T6-9 in February 2018. A thoracic MRI on June 12, 2018 revealed mild degenerative changes and chronic healed fractures.

3. On March 27, 2019 Dr. Sacha, M.D. determined Claimant had reached Maximum Medical Improvement (MMI). He recommended post-MMI care of 6-8 sessions of physical therapy and follow-up visits for medical maintenance.

4. On March 27, 2019 ATP Kathryn Bird, D.O. also placed Claimant at MMI. Her closing diagnosis was a thoracic myofascial strain. Dr. Bird assigned a total 7% whole person impairment. She recommended permanent restrictions of no lifting, pushing or pulling greater than 25 pounds. Dr. Bird awarded maintenance care of eight sessions of physical therapy with dry needling and follow-up appointments with Dr. Sacha for one year.

5. On April 25, 2019 Respondents filed a Final Admission of Liability (FAL). The FAL acknowledged that Claimant had suffered a 10% whole person impairment and was entitled to receive maintenance care of eight sessions of physical therapy with dry needling and one year of follow-up evaluations with Dr. Sacha.

6. Claimant underwent 21 sessions of chiropractic care with Donald Aspegren, D.C. from June 5, 2019, through January 29, 2020.

7. On July 26, 2019 Dr. Sacha noted Claimant was not a candidate for continued controlled substances and was using chiropractic and acupuncture treatment once or twice a month for symptom control. Claimant continued to work full duty.

8. On June 28, 2019 Dr. Sacha noted that Claimant had suffered a separate lower back work injury on May 6, 2019.

9. On January 10, 2020 Dr. Sacha commented Claimant was "doing great" with chiropractic and acupuncture treatment because they had decreased his thoracolumbar symptoms. He recommended an additional eight sessions of chiropractic and acupuncture treatment.

10. On January 27, 2020 John Raschbacher, M.D. performed a medical records review. Dr. Raschbacher reasoned that Claimant's recommended maintenance care had already been completed. Further care was unnecessary to maintain Claimant's current or prior level of function.

11. On February 3, 2020 Dr. Sacha issued a letter explaining his recommendation for additional treatment. He remarked that Claimant's chiropractic and acupuncture treatment was an alternative to controlled substances. The treatment was safer and more appropriate for pain control, and consistent with the Colorado Division of Workers' Compensation Medical Treatment Guidelines (MTGs) as well as Colorado Medical Board policies on controlled substances. Dr. Sacha reasoned the chiropractic and acupuncture care permitted Claimant to use fewer controlled substances and maintain function in performing activities of daily living. It was reasonable to continue with chiropractic and acupuncture treatment for symptom control and recommended an additional 6-8 sessions.

12. Dr. Raschbacher performed a second medical records review on February 24, 2020. He explained that treatment had not benefitted Claimant. Dr. Raschbacher specified that the MTGs do not contemplate lifelong or permanent provision of passive modalities. Instead, the MTGs expect claimants to progress to a self-care program.

13. After Respondents denied additional maintenance care, the parties proceeded to a hearing on August 25, 2020 before Administrative Law Judge Kara Cayce. In an Order dated October 12, 2020 ALJ Cayce determined that Respondents continued to be liable for causally related chiropractic and acupuncture maintenance medical treatment as recommended by ATP Dr. Sacha. She explained that Dr. Sacha's recommendation for chiropractic and acupuncture treatment was a reasonable and appropriate alternative to controlled substances for symptom control. The modalities relieved Claimant's symptoms and improved his function.

14. Claimant visited Kyle Stengel, D.C. for 81 visits of chiropractic treatment for the period November 9, 2020 through December 13, 2023.

15. On February 4, 2022 Dr. Sacha noted Claimant was doing poorly from a medical standpoint. On June 16, 2023 Dr. Sacha documented that Claimant was on social security disability.

16. On April 7, 2023 Claimant underwent an Independent Medical Examination (IME) with Dr. Raschbacher. Dr. Raschbacher reviewed Claimant's medical records and performed a physical examination. Claimant reported chronic thoracic and lumbar pain. Dr. Raschbacher reasoned that Claimant's spinal condition is likely to progressively deteriorate. He determined Claimant's continued post-MMI chiropractic treatment was neither reasonable, necessary nor related to his industrial injuries. The MTGs simply do not anticipate the provision of passive treatment modalities for an indefinite period of time. Notably, treatment had not improved Claimant's function.

17. On January 19, 2024 Dr. Sacha diagnosed Claimant with lumbosacral radiculopathy and thoracic radiculopathy. He recommended chiropractic treatment and dry needling. Dr. Sacha also prescribed ongoing opioid medications with a follow-up every two months. He explained that Claimant suffers "ongoing radicular pain and the medications and chiropractic need to keep going on." Dr. Sacha noted that Claimant's function has improved with the preceding treatment and has worsened without it.

18. On March 8, 2024 Dr. Sacha stated that Claimant was not receiving any maintenance care for His Workers' Compensation claim based on Insurer's denial. He was receiving medications from Kaiser. Dr. Sacha thus discharged Claimant from care.

19. Claimant testified at the hearing in this matter. He explained that he suffers reoccurring pain in the mid-back area. When trying to perform various activities of daily living such as yard work, cleaning, or shoveling snow, he experiences tightness and soreness in his mid-back region. Maintenance therapy and medications allow him to function and the denial of ongoing benefits has negatively impacted his daily functional abilities. His ability to engage in a home exercise program is greatly limited by his diagnosis of COPD. He seeks continued treatment and prescriptions from Dr. Sacha.

20. Dr. Raschbacher also testified at the hearing. He determined that the natural history of Claimant's back symptoms constitutes a degenerative condition that will likely deteriorate over time. Dr. Raschbacher recounted that maintenance care when Claimant reached MMI included a few sessions of chiropractic and massage therapy. However, Claimant's treatment has far exceeded the recommendations and no additional modalities are reasonable. He first explained that the MTGs do not contemplate permanent passive care and recommend transition to a home exercise program. Although Claimant contended he was unable to engage in a home exercise program, Dr. Raschbacher commented that his inability was inconsistent with receiving chiropractic care. Importantly, Claimant has not achieved functional gains and his treatment has not allowed him to discontinue chronic narcotics or return to work. Dr. Raschbacher thus concluded that chiropractic and acupuncture treatment as well as a

discontinuation of opioid medications is no longer necessary to maintain Claimant at MMI.

21. Although Respondents filed an FAL acknowledging Claimant was entitled to receive medical maintenance benefits, they do not seek to withdraw the admission. Importantly, the FAL specifically awarded eight sessions of physical therapy with dry needling and one year of follow-up evaluations with Dr. Sacha. Respondents now seek to terminate specific medical benefits in the form of chiropractic, acupuncture and opioid treatment that has exceeded the scope of the FAL. Because Respondents seek to terminate specific medical maintenance benefits, Claimant bears the burden of presenting substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition.

22. Claimant has failed to present substantial evidence to support a determination that future medical treatment in the form of chiropractic, acupuncture and opioid treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. The record reveals that Claimant has a complex medical history involving cervical and lumbar fusions. His current admitted injury is limited to the thoracic spine and does not involve the cervical or lumbar spines. Claimant may require treatment for his baseline pain and deterioration of his pre-existing conditions due to their natural progression. However, the degenerative conditions are unrelated to his admitted January 15, 2018 work injury.

23. Claimant received medical treatment for over one year for his thoracic spine until he reached MMI. Respondents' FAL acknowledged Claimant had suffered a 10% whole person impairment and was entitled to receive maintenance care of eight sessions of physical therapy with dry needling and one year of follow-up evaluations with Dr. Sacha. Claimant has completed over 100 visits of chiropractic/acupuncture care and his maintenance care has continued for over five years. Despite continuous care, Claimant went from working full duty, when he was initially placed at MMI, to receiving social security disability benefits. The evidence does not support that Claimant's limitations and need for treatment are related to the work incident of January 15, 2018. Rather, it is likely that his treatment is directed to the natural progression of degenerative disc diseases that are expected to deteriorate over time.

24. On October 12, 2020 ALJ Cayce determined that Respondents continued to be liable for causally related chiropractic and acupuncture maintenance medical treatment as recommended by ATP Dr. Sacha. She explained that Dr. Sacha's recommendation was a reasonable and appropriate alternative to controlled substances for symptom control. Chiropractic and acupuncture treatment has relieved Claimant's symptoms and improved his function. On January 19, 2024 Dr. Sacha recommended additional chiropractic treatment and dry needling. He also suggested ongoing medications with a follow-up every two months. Dr. Sacha noted that Claimant's function has improved with the preceding treatment and has worsened without it.

25. Despite Dr. Sacha's opinion, the medical records and persuasive opinion of Dr. Raschbacher reveal that the chiropractic and acupuncture treatment as well as opioid medications is no longer reasonable, necessary, or causally related to Claimant's admitted thoracic sprain injury. Dr. Raschbacher commented that passive maintenance treatment has not improved Claimant's function. Claimant's degenerative disc conditions will likely continue to progressively deteriorate. Dr. Raschbacher testified that Claimant's treatment has far exceeded the recommended maintenance care and no additional treatment is reasonable. He first explained that the MTGs do not contemplate permanent passive care and recommend transition to a home exercise program. Although Claimant contended he was unable to engage in a home exercise program, Dr. Raschbacher commented that his inability was inconsistent with receiving chiropractic care. Importantly, Claimant has not achieved functional gains that have allowed him to discontinue chronic narcotics or return to work. Dr. Raschbacher thus concluded that no further maintenance care is necessary to maintain Claimant at MMI.

26. The MTGs recommend up to 10 therapy visits in the first year of maintenance care only if functional improvement is documented. Claimant underwent over a 100 visits and did not demonstrate objective functional improvement. Moreover, therapy has not permitted Claimant to discontinue opioid medications. The MTGs disfavor passive modalities for the management of chronic pain. Self-administered treatments, such as a home exercise program, are preferable. The record reveals that Claimant suffers from numerous pre-existing conditions and he has failed to prove that the requested medical maintenance treatment recommended by Dr. Sacha is designed to address his January 15, 2018 admitted thoracic spine injury. He has not demonstrated that a cessation of chiropractic and acupuncture treatment as well as a discontinuation of opioid medications will likely cause his condition to deteriorate. Based on the extensive medical records and persuasive opinion of Dr. Raschbacher, Claimant has failed to present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition. Accordingly, Claimant's request for chiropractic, acupuncture and opioid treatment is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). An award for *Grover*-type medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Indus. Claim Appeals Off.,* 992 P.2d 701, 704 (Colo. App. 1999); *Stollmeyer v. Indus. Claim Appeals Off.,* 916 P.2d 609 (Colo. App. 1995). Nonetheless, the claimant must show medical record evidence demonstrating the "reasonable necessity for future medical treatment." *Milco Constr. v. Cowan,* 860 P.2d 539, 542 (Cob. App. 1992). The care becomes reasonably necessary where the evidence establishes that, but for a particular course of medical treatment, the claimant's condition can reasonably be expected to deteriorate so that he or she will suffer a greater disability. *Id.;* see *Hanna v, Print Expediters Inc.,* 77 P.3d 863, 865 (Colo. App. 2003). Once a claimant has established the probable need for future treatment, he or she "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna,* 77 P.3d at 866. Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center,* 992 P.2d at 704.

5. When determining whether proposed medical treatment is reasonable and necessary, the ALJ may consider the provisions and treatment protocols of the MTGs because they represent the accepted standards of practice in Workers' Compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTGs is not dispositive of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTGs such weight as is warranted under the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO Jan. 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO Apr. 27, 2009).

6. Section 2.I. of Rule 17, Exhibit 1 of the MTGs is entitled “Post Maximum Medical Improvement (MMI) Care” The section specifies that MMI

> should be declared when a patient’s condition has plateaued to the point where the authorized treating physician no longer believes further medical intervention is likely to result in improved function. However, some patients may require treatment after MMI has been declared in order to maintain their functional state. The recommendations in these guidelines are for pre-MMI care and are not intended to limit post-MMI treatment.

7. Rule 17, Exhibit 9 of the MTGs addresses chronic pain disorder. In §D, chronic pain is defined as "pain that persists for at least 30 days beyond the usual course of an acute disease or a reasonable time for an injury to heal or that is associated with a chronic pathological process that causes continuous pain." Notably, the MTGs specify that “[t]he very definition of chronic pain describes a delay or outright failure to increase function and relieve pain associated with some specific illness or accident.” Rule 17, Exhibit 9, §D.

8. The management of chronic pain “is based on principles of self-management,” such as a home exercise program. Rule 17, Exhibit 9, §I. Chiropractic care or acupuncture would only be indicated as maintenance treatment if the therapy maintains objective function. *Id.* at §I(7). A home exercise program and self-management is favored, and if no functional improvement is documented after 6-8 visits, no further therapy should be pursued. *Id*. Finally, if a claimant obtains functional improvement, the MTGs recommend 10 visits during the first year and five visits each year thereafter. *Id*.

9. As found, although Respondents filed an FAL acknowledging Claimant was entitled to receive medical maintenance benefits, they do not seek to withdraw the admission. Importantly, the FAL specifically awarded eight sessions of physical therapy with dry needling and one year of follow-up evaluations with Dr. Sacha. Respondents now seek to terminate specific medical benefits in the form of chiropractic, acupuncture and opioid treatment that has exceeded the scope of the FAL. Because Respondents seek to terminate specific medical maintenance benefits, Claimant bears the burden of presenting substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition.

10. As found, Claimant has failed to present substantial evidence to support a determination that future medical treatment in the form of chiropractic, acupuncture and opioid treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. The record reveals that Claimant has a complex medical history involving cervical and lumbar fusions. His current admitted injury is limited to the thoracic spine and does not involve the cervical or lumbar spines. Claimant may require treatment for his baseline pain and deterioration of his pre-existing conditions due to their natural progression. However, the degenerative conditions are unrelated to his admitted January 15, 2018 work injury.

11. As found, Claimant received medical treatment for over one year for his thoracic spine until he reached MMI. Respondents' FAL acknowledged Claimant had suffered a 10% whole person impairment and was entitled to receive maintenance care of eight sessions of physical therapy with dry needling and one year of follow-up evaluations with Dr. Sacha. Claimant has completed over 100 visits of chiropractic/acupuncture care and his maintenance care has continued for over five years. Despite continuous care, Claimant went from working full duty, when he was initially placed at MMI, to receiving social security disability benefits. The evidence does not support that Claimant's limitations and need for treatment are related to the work incident of January 15, 2018. Rather, it is likely that his treatment is directed to the natural progression of degenerative disc diseases that are expected to deteriorate over time.

12. As found, on October 12, 2020 ALJ Cayce determined that Respondents continued to be liable for causally related chiropractic and acupuncture maintenance medical treatment as recommended by ATP Dr. Sacha. She explained that Dr. Sacha's recommendation was a reasonable and appropriate alternative to controlled substances for symptom control. Chiropractic and acupuncture treatment has relieved Claimant's symptoms and improved his function. On January 19, 2024 Dr. Sacha recommended additional chiropractic treatment and dry needling. He also suggested ongoing medications with a follow-up every two months. Dr. Sacha noted that Claimant's function has improved with the preceding treatment and has worsened without it.

13. As found, despite Dr. Sacha's opinion, the medical records and persuasive opinion of Dr. Raschbacher reveal that the chiropractic and acupuncture treatment as well as opioid medications is no longer reasonable, necessary, or causally related to Claimant's admitted thoracic sprain injury. Dr. Raschbacher commented that passive maintenance treatment has not improved Claimant's function. Claimant's degenerative disc conditions will likely continue to progressively deteriorate. Dr. Raschbacher testified that Claimant's treatment has far exceeded the recommended maintenance care and no additional treatment is reasonable. He first explained that the MTGs do not contemplate permanent passive care and recommend transition to a home exercise program. Although Claimant contended he was unable to engage in a home exercise program, Dr. Raschbacher commented that his inability was inconsistent with receiving chiropractic care. Importantly, Claimant has not achieved functional gains that have allowed him to discontinue chronic narcotics or return to work. Dr. Raschbacher thus concluded that no further maintenance care is necessary to maintain Claimant at MMI.

14. As found, the MTGs recommend up to 10 therapy visits in the first year of maintenance care only if functional improvement is documented. Claimant underwent over a 100 visits and did not demonstrate objective functional improvement. Moreover, therapy has not permitted Claimant to discontinue opioid medications. The MTGs disfavor passive modalities for the management of chronic pain. Self-administered treatments, such as a home exercise program, are preferable. The record reveals that

Claimant suffers from numerous pre-existing conditions and he has failed to prove that the requested medical maintenance treatment recommended by Dr. Sacha is designed to address his January 15, 2018 admitted thoracic spine injury. He has not demonstrated that a cessation of chiropractic and acupuncture treatment as well as a discontinuation of opioid medications will likely cause his condition to deteriorate. Based on the extensive medical records and persuasive opinion of Dr. Raschbacher, Claimant has failed to present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of his industrial injury or prevent further deterioration of his condition. Accordingly, Claimant's request for chiropractic, acupuncture and opioid treatment is denied and dismissed.

ORDER

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

1. Claimant's request for chiropractic, acupuncture and opioid treatment is denied and dismissed.

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

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, 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. (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 4, 2024.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury on August 7, 2023, arising out of and in the course of his employment with Respondent-Employer.

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical benefits reasonably necessary to cure and relieve him of the effects of his alleged August 7, 2023 injury.

FINDINGS OF FACT

1. On August 7, 2023, Claimant was working for Respondent-Employer repairing drywall. He was assigned work at the home of BK and AK. There was an area in the living room on the main floor, and an area in the upstairs master bedroom that he had been assigned to repair. He arrived at about 8:00 A.M. He worked in the living room for about an hour and a half. He then went to the main master bedroom and also worked for about an hour and a half.

2. BK testified that she met with Claimant, went over the work to be done on the main floor and in the bedroom, and instructed Claimant that she would show him additional work to be done in the basement, but that he should wait for her to take him to the basement after he was finished with his other work. After the work discussed above had been done, Claimant instead opened the door to the basement and started down on his own.

3. Video and photos of the stairs in question showed that the stairs consist of three flights with two landings with ninety-degree turns to the right when descending. Coming up the stairs, there are six steps to the landing from the basement, five more steps to the second landing, and five steps to the top of the stairs. The video walking down the stairs at a slow pace takes twelve to fourteen seconds from top to bottom.

4. Claimant testified that he was nearing the bottom of the stairs and he saw AK sitting in the corner of the basement with a dog at his side. Claimant testified that the dog chased him and grabbed his left heel, causing him to fall backwards on his right side on the stairs, landing on his back, hitting his left knee and his right shoulder on the section of the stairs closest to the top of the stairs: "the first section looking downward" in the video of the stairs. He testified that he went up the stairs as fast as he could. He testified that the dog pulled off both of his shoes as he ran

up the stairs. Claimant also testified that the dog chewed a very large hole in the heel of his nearly-new sock on the left. He testified that "when the owner of the dog came over to take the dog off of me the sock was caught in the dog's fang." He did not testify that the sock was removed from his foot. He testified that the male homeowner pulled the dog off his foot when the sock was hanging on the fang of the dog. He testified that he had fallen and gotten back up by the time the homeowner took the dog off him, all while defending himself from the dog, and having his shoes bitten off. He testified he was almost to the top of the stairs at that point.

5. Claimant testified that when he reached the main floor, he leaned against a wall, massaging his ankle for a "few seconds." At hearing, he demonstrated that he was leaned against the wall, leaning on the right side of his body with his right shoulder against the wall, picking up his left leg in a figure-four and massaging from his knee down to his ankle. He testified that AK went downstairs and BK went upstairs. Within a minute of the event, he testified, he had gone to his car. At that time, he testified, he was feeling pain in his left foot, left knee, and left ankle. He was in his car for a few minutes. He testified that during this time BK came twice to talk to him. He then unloaded material to finish the drywall texture he was working on. He decided, however, not to finish the job because he was in too much pain, and instead gathered his tools and equipment and left.

6. Claimant testified that he had pain in his left ankle and knee at the time of the hearing, claiming injury to his left ankle, left knee, right shoulder, and low back.

7. The homeowners, BK and AK testified at hearing. AK showed two Ring videos taken during the time that Claimant was preparing to leave the house after the incident with the dog. In those videos, Claimant is seen carrying a power tool, sponge, and a wire tool to the side of the house where a five-gallon bucket is. He then unwinds the cord from the power tool and leans forward with all of his weight on his left leg, picking up his right leg off the ground, to place the tool on the ground, and then plugs it into the wall. In the video taken at 11:36 A.M., that bucket and those tools are no longer by the house, and there are four objects, including a five-gallon bucket, placed on the ground behind Claimant's car, which had its hatchback open. Claimant then carries a yellow and grey generator to the car in his left arm with his right arm out for balance and something in his right hand that looks like a rag. The video then shows him lifting the generator into the car and positioning it with both the right and left arms while twisting and bending at the waist. He then pulls it out of the back of the car and brings it to the side of the car, placing it on the ground. In neither of these videos does Claimant hesitate, limp, or demonstrate pain behavior.

8. Claimant appeared for medical treatment at 2:34 p.m. the same day, August 7, 2023, with Dr. Nazia Javed. At that time, Claimant reported that he sustained an injury after falling off four steps in the basement and which made him unable to walk and unable to lift his right arm. Claimant described the alleged injury to Dr.

Javed as that “he was working in a basement when he was attacked by a pitbull. He tried to run away from the dog and as he was going up on stairs the dog tried to grab his L foot and tore his pants but no bite wounds but as he was trying to push him away he fell off bottom 3-4 steps twisting on L knee, L ankle. And falling on R low back and R shoulder. The owners of the dog came and helped him get up.”

9. AK testified that on the day in question, he was working in the basement with the dog beside him. The door to the basement was closed. He heard the basement door open, and assumed it was his wife, BK. A few seconds later, his dog barked. He turned and he saw Claimant in the stairwell and tried to grab the dog, but the dog started to chase Claimant up the stairs. AK ran up the stairs in pursuit of the dog. AK testified that he saw the dog and Claimant on the bottom flight of the stairs before he lost sight of them until he reached the second landing. Upon AK reaching the second landing, Claimant was out of the stairwell and BK was holding the dog. Running up the stairs took AK two to three seconds. He did not hear or see Claimant fall, did not see him get up, did not hear him say anything indicating the dog was biting him, and did not hear anything that sounded like the dog was taking off Claimant’s shoe. He did not encounter Claimant on the ground. He did not have to pull the dog off Claimant. He did not see the dog with the sock stuck in his fang. AK testified that, at the top of the stairs, Claimant leaned against the wall for several minutes. AK testified that he and BK asked Claimant if he was okay, to which Claimant responded that the dog got the back of the shoe, that he was not bitten, that there was no blood, and that he was okay. Claimant did not indicate that he had fallen on the stairs. He did not indicate that he injured either of his shoulders. AK testified that Claimant did not indicate that he had injured either of his knees.

10. BK testified that she was at the refrigerator when she heard the basement door open, and assumed it was her husband. Then she heard the dog bark and her husband saying, “no.” BK heard another bark and the sound of running up the stairs. She dropped what she had in her hands onto the counter and sprinted toward the basement door, which was open, taking eight large steps. When she reached the top of the stairs, Claimant was running out of the stairs and the dog was about a step behind him. Claimant ran past her and turned right. BK scooped up the dog at that time. She estimated the time from the first bark to when she saw Claimant as being five seconds. BK testified that she did not see or hear Claimant fall, she did not have to pull her dog off him, and she did not see a big hole in his sock. She testified that the sock was not hanging off the dog’s fang. She took the dog upstairs and came back down, seeing Claimant leaning against the wall. BK testified that Claimant was there a couple of minutes. He was holding his leg up. She asked if the dog got him, to which he responded, “No, just my shoe.” She watched him put on his shoes, which he did without difficulty bending from a standing position. BK testified that Claimant told her that he was not injured. As she observed him, he did not appear injured.

11. Dr. Elizabeth Bisgard testified as well. Dr. Bisgard testified regarding her independent medical examination of Claimant on November 6, 2023. Her conclusion was that Claimant did not sustain a work injury on August 7, 2023. She testified that during her evaluation of Claimant, she was provided four different stories of what happened, and that Claimant's testimony provided a fifth. She discussed the initial complaints reported to Dr. Javed on August 7, 2023, and compared those with the Ring videos after the incident and just a few hours before the appointment. She observed no limping and she observed Claimant carrying an air compressor she knew to weigh about thirty pounds. She pointed out several actions seen on the videos that were inconsistent with the reports of pain and dysfunction given to Dr. Javed.

12. Dr. Bisgard did agree that an MRI of the right shoulder was done and showed a partial tear in the right shoulder. Based upon her evaluation and the material she reviewed, she opined that this tear did not occur at the time of the incident with the dog on August 7, 2023. There is nothing to indicate this was an acute tear. She opined that it is very common for people in Claimant's age group to have tears in the shoulder that are asymptomatic. There was no mechanism of injury to explain a tear in the shoulder and the video immediately after the incident did not show behavior consistent with an acute rotator cuff tear. Regarding the knee, although there is an MRI that shows a medial meniscus tear in the left knee, Dr. Bisgard noted that if Claimant had an acute injury to his left knee, he would not have been pulling up his knee in a flexed figure-four position to access his ankle to rub it, notwithstanding Claimant's testimony. Dr. Bisgard also testified that the video shows that there was no acute meniscal injury, as it shows Claimant standing with all of his weight on his left leg, leaning forward. In her opinion, Claimant would not be able to do that if he had just torn his meniscus.

13. The Court finds the testimony of AK, BK, and Dr. Bisgard more credible than the testimony of Claimant. Claimant's testimony is inconsistent with the security footage showing him walking around and loading an air compressor into his car, bending, twisting, and bearing weight on his left leg without signs of pain. Furthermore, the Court finds Claimant's testimony that his sock was caught in the dog's fang to be implausible. Dr. Javed noted no bite wounds on Claimant's heel, despite the incident occurring that same day. The Court finds it implausible that the dog would manage to puncture a hole in Claimant's sock without causing some visible wound to Claimant's ankle. Furthermore, BK credibly testified that Claimant made no mention of an injury after the incident, and that Claimant instead told her that he was okay.

14. The Court finds that the dog did chase Claimant up the stairs and that he did fall during the pursuit, but the Court also finds that Claimant was not in fact bitten.

15. The Court finds that although Claimant experienced an accident at work, no injury necessitating medical treatment or causing disability resulted. Therefore, Claimant has not met his burden of proving that he sustained a compensable injury.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

A claimant is required to prove by a preponderance of the evidence that at the time of the alleged injury he was performing service arising out of and in the course of employment and the alleged injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b)&(c), C.R.S.

The Act distinguishes between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause, and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01 (Aug. 25, 2014).

As found above, Claimant was in fact chased up the stairs by the dog, and Claimant did in fact fall on his way up, but he was not bitten. Also, as found, Claimant did not sustain any injury resulting from the fall so as to necessitate medical treatment or result in disability. Therefore, Claimant has not proven that it is more likely than not that on August 7, 2023, he sustained a compensable injury arising out of and in the course of his employment with Respondent-Employer.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation based on the August 7, 2023 accident is denied and dismissed.

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

DATED: June 5, 2024

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

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that on January 25, 2022, he suffered an injury arising out of and in the course and scope of his employment with Respondent?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment he has received to his right eye constitutes authorized medical treatment that was reasonable and necessary to cure and relieve Claimant from the effects of the work injury?

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

4. If the claim is found compensable, did Respondent have workers' compensation insurance coverage on January 25, 2022?

FINDINGS OF FACT

1. Claimant worked for Respondent as a mechanic. Claimant's job duties included working on trucks and trailers. Claimant worked 40 hours per week, and was paid $20.00 per hour.

2. On January 25, 2022, Claimant was at work and was assigned, the work task of filling a trailer tire. While Claimant was in the process of checking the air pressure on the tire, the tire exploded. Claimant's right eye and face were struck by pieces of the exploded tire.

3. A member of Respondent's office staff immediately contacted the company owner, [Redacted, hereinafter DG] regarding the incident. DG[Redacted] instructed that employee to take Claimant to obtain medical treatment.

4. Claimant was first seen at an urgent care clinic. The staff at the clinic referred Claimant to the emergency department (ED). Claimant was then seen in the ED at Banner Health. While in the ED, Claimant underwent computed tomography (CT) scans of his head and body. Claimant was also given pain medication while in the ED. ED staff referred Claimant to an eye doctor, Dr. Matthew Uyemura, for further treatment.

5. Claimant testified that it is his understanding that a vein in the back of his right eye was ruptured.

6. Thereafter, Claimant was seen at Welch Eye Center by ophthalmologists Dr. Uyemura and Dr. Rochelle Brotsky. Claimant testified that Ors. Uyemura and Brotsky examined his eye, did additional imaging, and prescribed eye drops.

7. Dr. Uyemura also referred Claimant for treatment with a specialist, Dr. Justin Kanoff with Eye Care Center of Northern Colorado. Dr. Kanoff also did imaging to ascertain the location of Claimant's blurred vision.

8. Claimant testified that although he continues to have vision issues, there is no additional treatment recommended to treat his right eye injury. Claimant further testified that there is no surgical option available to correct his vision issues.

9. DG[Redacted] testified that following the January 25, 2022 incident, he learned that Respondent's workers' compensation coverage had lapsed. As a result, on the date of Claimant's eye injury (January 25, 2022), Respondent did not have workers' compensation coverage.

10. In March 2023, the parties entered into a stipulation in which Respondent admitted to liability for the January 25, 2022 injury to Claimant's right eye. Respondent also agreed to pay a number of medical bills related to the injury. On March 17, 2023, ALJ Kara Cayce issued an order in which the stipulation was approved.

11. The ALJ credits the medical records and the testimony of Claimant and DG[Redacted]. The ALJ finds that Claimant has successfully demonstrated that it is more likely than not that on January 25, 2022, he suffered an injury arising out of and in the course and scope of his employment with Respondent.

12. The ALJ further credits the medical records and Claimant's testimony and finds that Claimant has successfully demonstrated that it is more likely than not that the treatment he received for his right eye (including treatment at Banner Health and from Ors. Uyemura, Brotsky, and Kanoff) was authorized medical treatment that was reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

13. The ALJ credits Claimant's testimony and finds that at the time of the January 25, 2022 injury, Claimant was working 40 hours per week and paid $20.00 per hour; which equates to earnings of $800.00 per week.

14. The ALJ credits DG[Redacted] testimony and finds that on January 25, 2022, Respondent did not have workers' compensation coverage.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201,

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

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

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

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a 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.*

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 {Colo. App. 1990). "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)(0), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.,* W.C. No. 4-304-437 (January 3, 2008).

6. Section 8-43-404(5)(8), C.R.S. grants employers the initial authority to select the claimant's authorized treating physician **(ATP).** However, in a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant,* W.C. No. 4-586-030 (ICAP, Sept. 17, 2004). Because there is no precise legal test for determining the

existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* W.C. No. 3-969-031 (ICAP, June 29, 2005). Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Office of State of Colorado,* 148 P.3d 381, 384 (Colo. App. 2006); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

7. Section 8-42-102(2), C.R.S. requires the ALJ to base a claimant's AWW on their earnings at the time of the injury. Under some circumstances, the ALJ may determine a claimant's TT□ rate based upon an AWW on a date other than the date of the injury. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid* & *Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food* & *Commercial Workers Local* No. *7,* W.C. No. 4-240-475 (ICAO, May 7, 2007).

8. Finally, the ALJ notes that Section 8-42-101(4), C.R.S. specifically provides:

> Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

9. As found, Claimant has demonstrated, by a preponderance of the evidence, that on January 25, 2022, he suffered an injury arising out of and in the course and scope of his employment with Respondent. As found, the medical records and the testimony of Claimant and DG[Redacted] are credible and persuasive on this issue.

10. As found, Claimant has demonstrated, by a preponderance of the evidence, that treatment he has received to his right eye (including treatment at Banner Health and from Ors. Uyemura, Brotsky, and Kanoff) constitutes authorized medical treatment that was reasonable and necessary to cure and relieve Claimant from the effects of the work injury. The medical records and Claimant's testimony are credible and persuasive on this issue.

11. As found, Claimant's AWW at the time of his injury was $800.00. As found, Claimant's testimony is credible and persuasive on this issue.

12. As found, Respondent did not have workers' compensation insurance coverage on January 25, 2022. DG[Redacted] testimony is credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. On January 25, 2022, Claimant suffered an injury arising out of and in the course and scope of his employment with Respondent.

2. Medical treatment Claimant received at Banner Health and from Ors. Uyemura, Brotsky, and Kanoff was authorized medical treatment that was reasonable, and necessary to cure and relieve Claimant from the effects of the work injury.

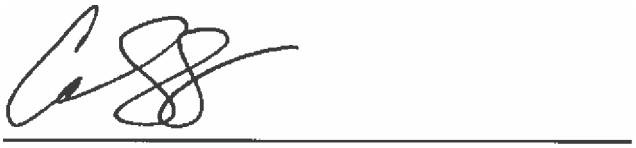
3. Respondent is liable for payment of the reasonable, necessary, and related medical treatment Claimant received.

4. Claimant's average weekly wage (AWW) for this claim is $800.00.

5. On January 25, 2022, Respondent did not have workers' compensation insurance.

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

Dated June 6, 2024.



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

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

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20} days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts.** You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us.** If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 27(A)

and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **It is recommended that you send a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that on September 12, 2023 he suffered an injury arising out of and in the course and scope of his employment with Respondent?

If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment he received at Denver Health Medical Center was reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury?

If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning September 12, 2023, and ongoing until terminated by law?

FINDINGS OF FACT

1. Claimant began working for Respondent on September 5, 2023. Claimant was hired to work as a painter. Claimant was paid $200.00 per day and worked five days per week; (resulting in weekly pay of $1,000.00). Claimant was paid in cash.

2. On September 12, 2023, Claimant was working with another individual painting a residence. To reach the highest areas to be painted, Claimant and his fellow worker set up scaffolding. This scaffolding collapsed while both Claimant and the fellow worker were standing on the scaffolding. Claimant and the other worker both fell to the ground.

3. Claimant testified that he immediately had pain throughout his body, and was bleeding from his nose and mouth. Claimant specifically noted injuries to his head, left hand, left knee, and left shoulder. Due to the nature of Claimant's injuries another worker at the job site called emergency services and Claimant was transported to Denver Health Medical Center by ambulance. Claimant further testified that it is his understanding that while emergency services were contacted, [Redacted, hereinafter LA] was also notified of the incident.

4. Upon arrival at Denver Health Medical Center, Claimant lost consciousness. Claimant testified that he was unconscious for 24 to 36 hours.

5. The ALJ has reviewed the medical records admitted into evidence and makes the following findings. Claimant was initially hospitalized from September 12 to September 15, 2023. During that time a number of imaging studies were performed, including x-rays and computed tomography (CT) scans. After imaging, Claimant's

diagnoses included a left distal radius fracture, a left tibial plateau depression fracture, a scalp hematoma, and a frontal bone fracture.

6. Claimant's head CT was reviewed by both Dr. Kaled Campa and Dr. Vincent Eusterman. Dr. Campa noted that there was no evidence of a CSF (cerebrospinal fluid) leak and the frontal bone fracture was non-displaced. Therefore, surgical intervention was not indicated.

7. Surgical intervention to address the Claimant's left arm was scheduled with Dr. Alexander Lauder. Claimant was provided a brace for his left knee. In addition, Claimant was prescribed pain medications.

8. On September 21, 2023, Claimant was readmitted to the hospital for surgery. On that date, Dr. Lauder performed an open reduction and internal fixation (ORIF) of the distal radius fracture and extended open left carpal tunnel release. The ORIF procedure involved placing hardware in Claimant's left upper extremity. That hardware included a volar locking plate, a dorsal locking plate, and allograft bone spanning plate.

9. Claimant testified that he underwent a second left arm surgery in December 2023. The purpose of this procedure was to remove the hardware.

10. After each surgery, Claimant attended physical therapy. Claimant estimates that he attended over 30 physical therapy appointments. Claimant's last physical therapy appointment was on April 26, 2024.

11. Claimant testified that between his fall on September 12, 2023 and the date of the hearing, he has not returned to work for Respondent, or for any employer. Claimant testified that he has been released to return to work. Claimant also testified that he was recently offered and has accepted new employment. Claimant testified that he would begin new employment "this Friday".[1]

12. LA[Redacted] testified that at the time of Claimant's September 12, 2023 fall Claimant had worked six days at that specific job location. On September 12, 2023, LA[Redacted] was out of the country and he was contacted about the incident by another worker. LA[Redacted] remained in communication with Claimant's spouse throughout Claimant's hospitalization. LA[Redacted] attempted to assist Claimant and his family by providing Claimant's spouse with work and transportation.

13. On September 12, 2023, Respondent did not have workers' compensation insurance. LA[Redacted] testified that after Claimant's fall on September 12, 2023, he learned that the company's workers' compensation insurance had lapsed.

[1] The ALJ notes that the hearing was held on Wednesday, May 8, 2024. Therefore, the ALJ infers that Claimant was to begin his new job on Friday, May 10, 2024.

14. The ALJ credits the medical records and the testimony of Claimant and LA[Redacted]. The ALJ finds that Claimant provided services to Respondent as a painter. Respondent paid Claimant for these painting services. Therefore, Claimant is presumed to be an employee of Respondent. The ALJ finds no persuasive evidence on the record to rebut this presumption. The ALJ specifically finds that on September 12, 2023, Claimant was an employee of Respondent.

15. The ALJ finds that on September 12, 2023, Claimant was performing his normal job duties as a painter in his employment with Respondent. The Claimant fell and was injured while performing these duties. Therefore, the ALJ finds that Claimant has demonstrated that it is more likely than not that on September 12, 2023 he suffered an injury arising out of and in the course and scope of his employment with Respondent.

16. The ALJ also finds that Claimant has successfully demonstrated that it is more likely than not that treatment he received to treat his September 12, 2023 injury (including treatment received at Denver Health Medical Center) was reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury. The ALJ also finds that due to the emergent nature of Claimant's injuries, Claimant had the right to obtain immediate treatment without the delay of notifying Respondent to obtain a referral or approval.

17. The ALJ also finds that Claimant has successfully demonstrated that it is more likely than not that as a result of his September 12, 2023 work injury he suffered a wage loss. The ALJ credits Claimant's testimony that he did not earn any wages between the date of his injury and the date of the hearing.

18. The ALJ specifically finds that on the date of Claimant's compensable injury, Respondent did not have workers' compensation insurance coverage.

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. 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."

5. 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.*

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

7. Section 8-43-404(5)(a), C.R.S. grants employers the initial authority to select the claimant's authorized treating physician (ATP). However, in a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant,* W.C. No. 4-586-030 (ICAP, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and

circumstances of the claim. *In re Timko,* W.C. No. 3-969-031 (ICAP, June 29, 2005). Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Office of State of Colorado,* 148 P.3d 381, 384 (Colo. App. 2006); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

8. 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. *Lymburn 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).

9. Finally, the ALJ notes that Section 8-42-101(4), C.R.S. specifically provides:

> Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

10. As found, Claimant provided services to Respondent as a painter. Respondent paid Claimant for these painting services. As found, on September 12, 2023, Claimant was an employee of Respondent.

11. As found, Claimant has successfully demonstrated, by a preponderance of the evidence, that on September 12, 2023, he suffered an injury arising out of and in the course and scope of his employment with Respondent.

12. As found, on the date of Claimant's compensable work injury, Respondent did not have workers' compensation insurance coverage.

13. As found, Claimant has successfully demonstrated, by a preponderance of the evidence, that treatment he received to treat his September 12, 2023 injury (including treatment received at Denver Health Medical Center) was reasonable medical

treatment necessary to cure and relieve Claimant from the effects of the work injury. As found, this treatment was authorized medical treatment due to the emergent nature of Claimant's injuries. As found, Claimant had the right to obtain immediate treatment without the delay of notifying Respondent to obtain a referral or approval.

14. As found, Claimant has successfully demonstrated, by a preponderance of the evidence, that as a result of his September 12, 2023 work injury he suffered a wage loss. Therefore, Claimant is entitled to temporary total disability (TTD) benefits beginning September 12, 2023 and ongoing until terminated by law.

ORDER

It is therefore ordered:

1. On September 12, 2023, Claimant was an employee of Respondent.

2. On September 12, 2023, Claimant suffered an injury arising out of and in the course and scope of his employment with Respondent.

3. On September 12, 2023, Respondent did not have workers' compensation insurance coverage.

4. Respondent is responsible for payment of medical treatment that is reasonable, necessary, and related to the September 12, 2023 work injury (including treatment provided at Denver Health Medical Center)

5. Claimant is entitled to temporary total disability (TTD) benefits beginning September 12, 2023 and ongoing until terminated by law.

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

Dated June 11, 2024.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

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

ISSUES

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

- If Claimant has proven that he sustained a compensable injury, whether Respondent has proven by a preponderance of the evidence that Claimant's injuries arose out of "horseplay" that would take the injuries outside the course and scope of his employment with Employer?

- If Claimant has proven that he sustained a compensable injury, whether Respondent has proven that Claimant's injury occurred during a deviation that took Claimant outside the course and scope of his employment so as the render the injury not compensable under the Colorado Workers' Compensation Act.

- If Claimant has proven that he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of May 19, 2022 and ongoing?

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

- If Claimant has proven that he sustained a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment he received was authorized?

- If Claimant has proven that he sustained a compensable injury, what is Claimant's average weekly wage ("AWW")?

- If Claimant has proven that he sustained a compensable injury, whether Respondents have proven that Claimant's indemnity benefits should be reduced by 50% pursuant to Section 8-42-112.5(1), C.R.S. due to the Claimant being intoxicated?

FINDINGS OF FACT

1. Claimant testified he was employed with Employer as an account manager. Claimant testified that through his employment with Employer, he was offered a trip by a client of Employer to travel with other employees of Employer to the client's offices in Napa, California to receive training with regard to the products manufactured by the client. Claimant testified that this trip began on May 17, 2022 and

included airfare from Denver to Napa. Claimant testified he traveled to California with [Redacted, hereinafter FN], N.S., C.J., and T.T[1]. Claimant testified that he knew FN[Redacted] as an assistant manager for Employer, and had recently met N.S. and C.J through work. Claimant testified that T.T. worked at Employer's store in Avon and he had not met her before the trip.

2. Claimant testified that as part of the trip, he and the other employees were provided with accommodations at the [Redacted, hereinafter ME] in Napa. Claimant testified that when they arrived on May 17, 2022 they were provided with cheese and crackers along with wine at the resort.

3. Claimant testified the next day, the training was set up by the client that included a breakfast where chefs prepared breakfast for the employees on ovens that were manufactured by the client. During the breakfast, Claimant and the other employees were provided with an alcoholic beverage. Claimant was then provided with lunch by the client at a winery where the employees were provided with wine. Claimant and the other employees were then taken to a second winery where additional wine was provided for Claimant and the other employees. Finally, Claimant and the other employees were provided with dinner where additional alcohol was provided. After dinner, Claimant and the other employees were taken back to the ME[Redacted]. Claimant testified that they arrived back at the resort at approximately 8:00 p.m. After arriving back at the resort, some of the employees went to the pool and some of the employees went to the bowling alley that was on the resort and contained a bar.

4. FN[Redacted] testified on behalf of the defense at the hearing. FN[Redacted] confirmed that drinks were provided to Claimant and the employees during the day and estimated his total alcohol consumption for the entire day to be 8 alcoholic beverages. FN[Redacted] testified that on the bus ride back from dinner, some of the employees were dancing on the bus. FN[Redacted] testified that when he got back to the resort, he went to the pool and, when the pool was beginning to shut down, went to the bar where he saw Claimant. FN[Redacted] testified that when he got to the bar, he had a beer and then went back to his room.

5. Claimant testified that during the course of the day, he had partaken in the alcoholic beverages that were offered, including the drink at breakfast, the wine offered at both wineries, and at dinner. Claimant testified that after getting back the resort, he went to the bar area where N.S. and T.T. were present. Claimant testified he started talking to N.S. and T.T. and another resort guest who was a former professional athlete. Claimant testified that T.T. and the former professional athlete began flirting and were planning to go back to the athlete's room at the resort and he was concerned for T.T. because she had been drinking.

---

[1] FN[Redacted] testified at hearing in this case and will be referred to in the Order by name. The remaining co-employees did not testify at hearing in this matter and will be referred to by initials for purposes of confidentiality.

6. Claimant testified he then went and talked to FN[Redacted] about T.T. going off when a person they did not know after she had been drinking. Claimant testified that FN[Redacted] then went over and spoke to T.T. and both FN[Redacted] and T.T. came back to the group of employees. Claimant testified that FN[Redacted] then left and he was at the bar with T.T., A.S., N.J. and an employee that was from a different company that was also going through the training named [Redacted, hereinafter JF]. Claimant did not remember JF[Redacted] left name.

7. FN[Redacted] testified consisting with Claimant's testimony regarding this portion of the evening. FN[Redacted] testified that after he arrived at the bar from the pool area, he observed the employees at the bar and described their actions as "letting loose a little bit," and "it was turning into a little bit of a party". FN[Redacted] testified he spoke to T.T. at the bar and told her that even though he had just met her on this trip, he knew she was a good person and encouraged her to make good decisions. FN[Redacted] testified he believed Claimant was inebriated when FN[Redacted] witnessed him in the bar because Claimant was quiet.

8. FN[Redacted] testified that if he had seen any kind of behavior that would have affected the relationship between Employer and the manufacturer, he would have stepped in and said something. FN[Redacted] testified that he did not observe any behavior that would have required him to say anything to the employees that were on the trip.

9. FN[Redacted] testified that he then had his fill for the night, left the bar and ran into a couple of people and hung out by the fire pit for approximately 30 minutes before returning to his room. FN[Redacted] testified that when he got back to his room, he had numerous messages on his cell phone indicating that he needed to come back downstairs immediately. FN[Redacted] testified that he did not witness the incident that led to Claimant's injuries.

10. Claimant testified that after FN[Redacted] left, he, N.J., and T.T. went outside. Claimant testified while outside on the patio, out of nowhere, T.T. put him into a choke hold. Claimant testified that he tried to pull away from T.T., but she stepped on his foot. Claimant testified he attempted to pull away from T.T., but could not pull away. Claimant testified he then fell, but did not remember hitting the gournd.

11. FN[Redacted] testified that after he returned downstairs he spoke to N.J., T.T. and C.J. and the representative from the manufacturer to try to figure out what was going on and after speaking to N.J., his primary concern was Claimant's health. FN[Redacted] further testified that T.T. was upset by the incident and requested to leave the work trip and return to Colorado the next day, which he allowed.

12. On direct examination, FN[Redacted] testified that it was his understanding "that horseplay took place". FN[Redacted] further testified that it was his understanding that Claimant had engaged in the horseplay voluntarily. FN[Redacted] testified on cross-examination that he never saw Claimant engage in horseplay.

13. Claimant was subsequently taken to the hospital by ambulance and diagnosed with a fractured skull, hematomas, a brain hemorrhage and a ruptured left eardrum. The hospital records indicate that Claimant's blood alcohol content was .256. The medical records report an injury that was caused by wrestling with a female when Claimant fell back and hit the back of his head.

14. Claimant was admitted into the hospital on May 18, 2024 and remained there for six days before being released to the Antioch Medical Center where he remained until on or about May 26, 2022. Claimant was then treated at a Kaiser Permanente facility. After release from the hospitals, Claimant underwent therapy for a traumatic brain injury which included speech therapy and post concussive therapy.

15. Claimant testified that he returned to work on August 1, 2023 for a new employer.

16. Respondents presented the testimony of [Redacted, hereinafter CE] at hearing. CE[Redacted] testified he is the Vice President of Sales for Employer and his job duties included managing relationships between Employer and vendors and manufacturers. CE[Redacted] testified he had been on the training trip to Napa held by the manufacturer in previous years but was not on the trip with Claimant in 2022. CE[Redacted] confirmed in his testimony that the trip to Napa was a work trip for employees of Employer.

17. CE[Redacted] testified that the trip to Napa was offered to employees who were advancing within the company. CE[Redacted] testified that the purpose of the trip was to learn the luxury appliances that are sold by Employer. CE[Redacted] testified that another component of the trip was for the employees to represent Employer and present to the manufacturer that Employer was serious about growing sales with the manufacturer's brand and growing the luxury sales overall. CE[Redacted] testified that by going on the trip, the employees could build their relationship with the manufacturer "because there is a lot of problems in the appliance industry, and we eventually need their support". CE[Redacted] explained in his testimony that if appliances break down, they may need help from the manufacturer, or if an appliance is damaged when it is delivered, they need to have a relationship with the manufacturer to resolve these problems. CE[Redacted] further testified that the employees that go to Napa on this trip are expected to bring the knowledge they receive through the training and share that knowledge with other employees as the employees that go through that training now have particularized knowledge regarding these products. CE[Redacted] testified that there is an aspect of team building that is involved in the trip, but more so with the manufacturer.

18. CE[Redacted] testified that it was the expectation that the employees would act responsibly and professionally on the trip as they were representing Employer. CE[Redacted] testified that the trips to Napa were part work and part play for

the employees, but he did not have an expectation that employees would get heavily intoxicated.

19. The ALJ credits the testimony of Claimant, CE[Redacted] and FN[Redacted] and finds that Claimant was in travel status during the time that he was in Napa as part of the work trip. The ALJ credits the testimony of Claimant regarding the events of the day and finds that Claimant proceeding to the bar after dinner with other employees was part of the business trip and finds that Claimant has established that it is more probable than not that he sustained an injury arising out of and in the course of his employment with Employer.

20. The ALJ further credits the testimony of Claimant at hearing regarding the incident at the bar where T.T. grabbed him in a choke hold and finds that this action is what led to Claimant's injuries. The ALJ credits Claimant's testimony and finds that T.T. put Claimant in the choke hold without provocation from Claimant. The ALJ notes that the only testimony that was presented at hearing by someone who witnessed the incident occur was the testimony of Claimant.

21. The ALJ does not credit the testimony of CE[Redacted] or FN[Redacted] regarding the actions that led up to Claimant's fall as neither CE[Redacted] nor FN[Redacted] was present when the fall occurred. In crediting the testimony of Claimant regarding what led up to Claimant's fall, the ALJ finds that Respondents have failed to establish that the injury occurred as a result of horseplay. Notably, Claimant testified that the incident occurred when T.T. put Claimant in a choke hold. Claimant testified that this action occurred "out of nowhere" and was not invited by Claimant. The testimony of Claimant was not contradicted by any other witness to the event and the ancillary evidence, including the medical records, do not refute the testimony of Claimant.

22. Because the injury arose out of Claimant being put in a choke hold by a co-employee, the injury resulted from a work place assault. The ALJ credits the testimony of Claimant and finds that Claimant has established that T.T. put Claimant in a choke hold out of nowhere and without provocation. The ALJ therefore determines that the assault in this case was from a neutral force and was not based off of an inherently private dispute between Claimant and T.T.

23. Based on the finding that Claimant's injury arose out of a work place assault that was not precipitated by Claimant's actions, the ALJ finds that Respondents have failed to establish that Claimant's injury arose out of "horseplay" that would take the injury outside the course and scope of the employment. In support of this finding, the ALJ credits the testimony of Claimant at hearing regarding the events that led up to T.T. putting him in a choke hold on the patio at the resort.

24. The ALJ credits the testimony of the Claimant and finds that the injury occurred on the resort property where the employees were staying during the work trip. The ALJ credits the testimony of Claimant and finds that the injury occurred on the patio

next to a bar on the property after Claimant and several other employees had gone down to the bar to get drinks and socialize. The ALJ finds that Respondents have failed to establish that it is more likely than not that Claimant's injury occurred during a deviation from his employment.

25. While Respondents also argue that Claimant's actions of getting intoxicated represent a deviation of employment, the ALJ is not persuaded that Claimant's actions in this case are so outside the expected work behavior that it would represent a deviation that took Claimant outside the course and scope of his employment. Notably, in this case, the alcohol that was provided to Claimant during the trip was provided as part of the work trip. When Claimant was participating in the training in the morning, he was provided with an alcoholic beverage by the manufacturer. Claimant was then taken, as part of the work trip, to two wineries and provided with alcohol. Claimant was later provided with alcohol at the dinner. Moreover, Claimant was not the only employee imbibing in alcohol during the trip. FN[Redacted] testified that he was consuming alcoholic beverages during the day along with Claimant during the training. Testimony was presented at the hearing that other employees were inebriated on the trip, but no credible evidence was presented that the Claimant or other employees were advised at any point that their alcohol consumption was problematic prior to the incident. Under the circumstances of this case, the ALJ does not find that Claimant's use of alcohol while on the work trip represented a deviation from his employment.

26. At the commencement of the hearing, Respondents raised the issue regarding intoxication. Respondents did not argue the intoxication issue in their position statement, but it was still preserved by raising the issue at the commencement of the hearing.

27. As noted above, Claimant's blood alcohol content was reported in the ER to be .256 when Claimant was admitted to the hospital. However, in order for an injured worker's nonmedical benefits to be reduced based on the injured worker being intoxicated, a duplicate sample from the test must be preserved and made available to the worker for purposes of a second test to be conducted. In this case, there was no credible evidence presented at hearing that a second sample was preserved in order to allow Respondents to reduce Claimant's nonmedical benefits based on his intoxication.

28. The ALJ credits Claimant's testimony at hearing along with the medical records entered into evidence and finds that the treatment Claimant received at the hospital in Napa and the Kaiser hospital represent reasonable medical treatment necessary to cure and relieve Claimant from the effects of his industrial injury.

29. The ALJ credits Claimant's testimony at hearing along with the medical records and finds that the treatment Claimant received from St. Joseph Queen of the Valley Hospital in Napa represented emergency medical treatment and is therefore authorized medical treatment. The ALJ further finds that the remaining medical

treatment, including Claimant's treatment at Antioch Medical Center and Kaiser Permanente and Claimant's therapy is within the authorized chain of referral.

30. The ALJ credits the medical records entered into evidence along with the testimony of the Claimant and finds that Claimant has proven that it is more likely true than not that he was incapacitated from working

31. The ALJ credits the testimony of Claimant at hearing and the medical records entered into evidence and find that Claimant has established that it is more likely than not that he is entitled to an award of temporary total disability ("TTD") benefits for the period of May 19, 2022 through August 1, 2023.

32. The ALJ notes that Claimant argues in his post-hearing position statement that Claimant is entitled to an award of wage benefits until he is placed at maximum medical improvement. Claimant may be entitled to temporary partial disability benefits after August 1, 2023. However, Claimant's TTD benefits terminate as of August 1, 2023 when he returned to work for a new employer pursuant to the Act.

33. The employment records entered into evidence by Claimant establish that Claimant was paid $22,522.25 in the 18 6/7 weeks from January 1, 2022 through May 12, 2022. This equates to an average weekly wage ("AWW") of $1,194.36.

34. Respondents note that Claimant was paid $6,733.48 following his injury until September 29, 2023. Respondents further argue that temporary partial disability benefits were not endorsed for hearing, and therefore, Claimant's award of TTD benefits should not start until September 29, 2023. The ALJ is not persuaded.

35. As an initial matter, at the commencement of the hearing, Claimant's counsel identified the issues to be decided at hearing as including temporary total and temporary partial disability. No objection was made to the issue of temporary partial disability benefits being addressed at the hearing as Claimant's counsel agreed that those issues were properly before that court. Therefore, if temporary partial disability benefits were to be ordered, the issue was properly raised by Claimant at the hearing and Respondents agreed to litigate the issue.

36. More importantly, however, Claimant testified at hearing that his wages included commissions on his sales. Claimant explained that those payments were for commissions Claimant had earned by selling product prior to his injury. The mere fact that Claimant was not paid the commissions until after the injury does not allow Respondents to make a claim that Claimant is not entitled to TTD benefits for a period of time after the injury when Claimant was incapacitated from working. Moreover, Respondents do not get an offset for the $6,733.48 that Claimant was paid after the injury, as this money represents compensation Claimant had earned prior to the injury.

37. Temporary total disability benefits are designed to compensate an injured worker for his loss of earning capacity after an industrial injury. The mere fact that

Claimant was paid following the injury for wages he had already earned through his commissions does not preclude Claimant from obtaining TTD benefits during this period of time following his injury.

38. The ALJ further notes that the $6,733.48 could be included in the calculation of the Claimant's AWW. The ALJ does not include these payments in the AWW calculation due to the fact that the period of time the ALJ is using for the calculation of the AWW is from January 1, 2022 through May 12, 2022, and that period of time could include commissions that Claimant earned prior to January 1, 2022 that were not paid until after January 1, 2022. Therefore, the ALJ uses the wages that were paid to Claimant during that period of time as representing the most fair way to calculate the AWW.

39. Claimant testified he received unemployment benefits following his injury in the amount of $17,500. Respondents are allowed to offset the unemployment benefits against temporary disability benefits as allowed by statute.

CONCLUSIONS OF LAW

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

2. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2022. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

4. To receive workers' compensation benefits, an injured worker must establish, by a preponderance of the evidence, that he has sustained a compensable injury or death "proximately caused by an injury ... arising out of and in the course of the employee's employment ...." § 8-41-301(1)(c), C.R.S. 2019; see *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's

employment contract. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *Id.*

5. Under the tests set forth by the Colorado Supreme Court involving willful assaults by co-employees, injuries are broken down into three categories: (1) those assaults that have an inherent connection with the employment; (2) those assaults that are inherently private; and (3) those assaults that are neutral. *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); see also *In re Question, supra*. Both the first and third categories of assaults are held to arise out of the employment for the purposes of the Workers' Compensation Act and therefore prevent an employee from suing his or her employer in tort for injuries based on such assaults. Only the second category of injuries, inherently private assaults, does not arise out of employment.

6. Injuries occurring while an employee is away from home or work for a business purpose may arise out of and be within the course of employment and thus be covered under the Act. As relevant here, under the "travel status" doctrine, if the employee's job duties require travel, that travel is considered to be a part of the job, and any injury occurring during such travel will be compensable. *Skywest Airlines, Inc. V. Industrial Claim Appeals Office,* 487 P.3d 1267, 1271 (Colo. App. 2020) citing *Mountain W. Fabricators v. Madden*, 958 P.2d 482, 484 (Colo. App. 1997), aff'd , 977 P.2d 861 (Colo. 1999). And "if the employee is sent away from home for an extended period to attend upon the employer's business, the employee will be considered to be in the course and scope of employment during virtually all of such period." *Id.* at 1271. The risks associated with the necessities of eating, sleeping, and ministering to personal needs away from home are considered incidental to and within the scope of a traveling employee's employment. *Id.*

7. A traveling employee's injuries are not compensable, however, if the injury occurred while the employee was engaged in a "personal deviation." *Id.* at 1272. When considering whether an employee was engaged in a personal deviation, "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship." *Id.* citing *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9 at 11 (Colo. App. 1995). "However, when the employee's personal errand is concluded, the deviation ends and the employee is again covered for workers' compensation." *Id.*

8. Notably, the burden of proof is on the employer to show that the employee made a distinct departure from the scope of employment while on travel status. *See Skywest Airlines*, 487 P.2d at 1272. If employer establishes that the employee has deviated from his employment, the burden of proof is on the injured worker to show a return to the course and scope of employment. *Id.*

9. As found, Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with Employer when he was put in a choke hold by his co-worker while in

travel status and lost consciousness, resulting in Claimant sustaining a fractured skull among other injuries.

10. There is a four part test that is utilized to determine whether an act of horseplay constitutes a substantial deviation: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, i.e. whether it was commingled with the performance of a duty or involved an abandonment of a duty; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be exposed to include some horseplay. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715, 718 (Colo. App. 1995). The essential issue in the analysis boils down whether the claimant's conduct constituted such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing the activity for his sole benefit. *Panera Bread, L.L.C. v. Industrial Claim Appeals Office*, 144 P.3d 970, 972 (Colo. App. 2006).

11. As found, the injuries arising from the assault were not the result of horseplay as Claimant did not invite the altercation with T.T. that led to the injuries. As found, Claimant's testimony regarding the actions leading up the choke hold being put on Claimant are credited in coming to this conclusion. Because the testimony establishes that Claimant was not a willing participant in the altercation, and Claimant's conduct did not constitute such a deviation from the circumstances and conditions of his employment as it existed on the training trip, Claimant's injuries do not arise out of a horseplay incident.

12. As found, Respondent has failed to prove that Claimant's injuries arose out of a deviation from his employment based on his consumption of alcohol. Claimant was at the resort where the employees were staying when the injury occurred and consuming alcohol with co-employees as part of the business trip. As found, consumption of alcohol was not a substantial deviation while on of the business trip as alcohol was served in connection with the training activities Claimant participated in during the trip. Moreover, evidence established that the employees on the trip, including FN[Redacted], continued to consume alcohol after returning to the resort. Under these circumstances, the ALJ does not find that Claimant's actions of consuming alcohol on the business trip represented a deviation from his employment with Employer.

13. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. *See Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

14. "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*, 701 P.2d 168 (Colo. App. 1985), *citing*, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

15. As fond, Claimant has proven by a preponderance of the evidence that the medical treatment he received from the St. Joseph Queen of the Valley Hospital, Kaiser Permanente and Antioch Medical Center reasonable medical treatment necessary to cure and relieve Claimant from the effects of the work injury. The ALJ further finds that the medical treatment from each of the facilities is authorized medical treatment within the chain of referrals that Claimant received following the work injury. Respondents are therefore liable for the medical treatment rendered to Claimant from St. Joseph Queen of the Valley Hospital, Kaiser Permanente and Antioch Medical Center.

16. 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, 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).

17. As found, Claimant has proven by a preponderance of the evidence that he is entitled to an award of TTD benefits commencing May 19, 2022 and continuing to August 1, 2023. As found, Claimant was incapacitated from working when he was unconscious and admitted to the hospital. As found, Claimant continued to remain off of work due to the work injury until he returned to work on August 1, 2023. Respondents

are allowed to terminate TTD benefits after August 1, 2023 pursuant to Section 8-42-105(3)(b), C.R.S.

18. Respondents argument that Claimant is not entitled to TTD benefits for the period of time after his injury until September 29, 2022 when he stopped receiving payment for commissions made by Claimant for sales prior to the injury is rejected. The ALJ finds that the statute does not allow for TTD benefits to be denied or offset by compensation earned by an injured worker for performance of a duty that was completed prior to the injury.

19. Under the intoxication statute set forth at § 8-42-112.5(1), C.R.S., a claimant who has a blood alcohol level at or above 0.10 percent, as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests, may have his non-medical benefits reduced by fifty percent. This section of the statute also requires that a duplicate sample must be preserved in order to take the reduction of benefits.

20. The Colorado Court of Appeals has held that where a second sample was not preserved, the claimant's toxicology results cannot be admitted for purpose of imposing a 50% reduction of benefits under Section 8-42-112.5, C.R.S. *See Skywest Airlines* at 1277.

21. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

22. Section 8-42-102(2) sets forth the computation methods for determining an injured workers AWW.

23. Section 8-42-103 states in pertinent part:

> Where the foregoing methods of computing the average weekly wage of the employee, by reason of the nature of the employment or the fact that the injured employee has not worked a sufficient length of time to enable earnings to be fairly computed thereunder or has been ill or has been self-employed or for any other reason, will not fairly compute the average weekly wage, the division, in each particular case, may compute the average weekly wage of said employee in such other manner and by such method as will, in the opinion of the director based on the facts presented, fairly determine such employee's average weekly wage.

24. As found, Claimant $22,522.25 in the 18 6/7 weeks from January 1, 2022 through May 12, 2022. The ALJ recognizes that Claimant's wages in this case involved Claimant earning compensation for commissions based on his selling of product. The ALJ further notes that Claimant continued to receive commissions following his injury for sales that were made prior to his injury. The ALJ utilizes his discretion under Section 8-

42-103 C.R.S. to use the wages earned from January 1, 2022 through May 12, 2022 to calculate the most fair AWW in this case, noting that Claimant's earning from his commissions for sales before May 18, 2022 are not taken into account in determining the AWW. As found, this equates to an average weekly wage ("AWW") of $1,194.36.

25. Section 8-42-103(1)(f) allows for an offset of unemployment insurance benefits against TTD benefits awarded. As found, Claimant testified he received $17,500 in unemployment be3neits after his injury. As found, Respondents are allowed a statutory offset for the unemployment benefits.

ORDER

It is therefore ordered that:

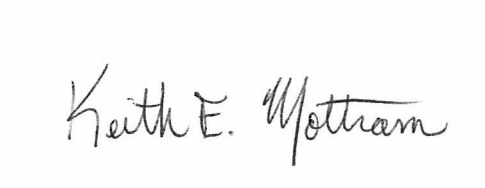
1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of the industrial injury including the treatment from the St. Joseph Queen of the Valley Hospital, Kaiser Permanente and Antioch Medical Center I.

2. Respondents shall pay Claimant TTD benefits based on an AWW of $1,194.36 for the period of May 19, 2022 through August 1, 2023. Respondents are entitled to the statutory offset of the TTD benefits against any unemployment benefits Claimant received.

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

DATED: June 13, 2024



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-248-933-001

ISSUE

The issue presented for determination:

Whether the Claimant proved by a preponderance of the evidence that the cervical medial branch blocks recommended by Dr. Finn are reasonable, necessary and related to Claimant's work injury of August 24, 2023?

FINDINGS OF FACT

1. The Claimant was injured in an admitted injury when he was driving a bus for the employer and he was rear-ended by another vehicle. His injuries included head, neck, right knee, back, right shoulder and right arm. Claimant was taken by ambulance to the emergency room.

2. Claimant next saw Dr. Peterson at Concentra. Dr. Peterson referred Claimant to Front Range Spine for evaluation. Claimant was determined not to be a surgical candidate for his low back by Dr. Rauzzino. Dr. Peterson then referred Claimant to Dr. Finn for further evaluation based upon his theory that the Claimant's neck pain and upper extremity pain were generated by his facet joints.

3. Claimant also saw Dr. Ricci, a psychologist, to address some of his frustration with being unable to obtain medical care. In his testimony, Claimant denied that the treatment he received from Dr. Ricci was for depression.

4. Dr. Finn recommended cervical medial branch blocks. This procedure was reviewed by Dr. Polanco at the request of Respondents. Dr. Polanco opined that the procedure was not reasonable and necessary since it did not comply with the medical treatment guidelines. Specifically, manual therapy had not been completed and there were some psychosocial confounders that needed to be addressed. The procedure was denied by Respondents based on Dr. Polanco's opinion.

5. A second opinion was requested by Dr. Peterson and [Redacted, hereinafter PL] requested that Dr. Fall perform a utilization review. In her report dated December 21, 2023, she said the procedure was not reasonable and necessary since there were psychosocial confounders that needed to be addressed. Initially she noted that the rehab psychology report notes significant adjustment reaction with depression and anxiety for which treatment recommendation have been made. She also did not see consistent objective findings supporting facetogenic origin of his pain complaints.

6. After the branch blocks were denied a second time, Dr. Peterson recommended an occipital nerve block. This nerve block was authorized and was administered by Dr. Finn on April 8, 2024. Subsequent to the nerve block, the Claimant did experience some improvement above the base of skull. However, the block did not alleviate the pain below the base of the skull.

7. Claimant returned to Dr. Finn and Dr. Finn again requested the medial branch blocks on April 10, 2024.

8. After the request for medial branch blocks was again made by Dr. Finn, Dr. Fall reviewed the case again and recommended that the medial branch blocks be denied as not reasonable or necessary. After Dr. Fall reviewed the procedure a second time, PL[Redacted] received additional reports from Dr. Ricci, a psychologist, and PL[Redacted] asked Dr. Fall to review these additional records and issue an addendum report. After review of these records, Dr. Fall's recommendation against the medial branch blocks remained unchanged. She stated that the focus on a fix or cure would be a negative prognostic indicator. She also indicated that there wasn't a consistent objective finding related to facet origin of pain. Finally, Dr. Fall emphasized that the knee injection was reported to have helped with the upper extremity neuropathy issue. Dr. Fall pointed out that this response was nonphysiologic.

9. Dr. Finn testified that according to relevant medical literature, patients with chronic head and neck pain, post-whiplash injury may have facet mediated pain and that given those facts, along with physical finding consistent with facet pain looking up or rotating to the side, more than three months of pain that was unresponsive to nearly two months of conservative therapy and Claimant denied any mental health issues such as depression or anxiety, Dr. Finn opined that Claimant met the guidelines by the state of Colorado to proceed with cervical facet joint medial branch blocks. At the hearing, Dr. Finn was asked about Dr. Ricci's psychological treatment of the Claimant. This information did not change his recommendation for the medial branch blocks.

10. Dr. Finn testified that because of Claimant's ongoing upper cervical pain, mechanism of injury, presentation, imaging and structural testing and previous completion of months of physical therapy and conservative treatment, he believes that it is reasonable to try a medial branch block. This block is diagnostic and will help determine if the Claimant has cervical facet joint pain.

11. On January 10, 2024, Dr. Ricci wrote in a letter to Claimant's counsel that in his opinion, the Claimant is cleared and not psychologically precluded from any medically indicated procedure.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (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. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

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); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

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

The Division's Medical Treatment Guidelines, which are contained in Dep't of Labor & Employment Rule XVII, 7 Code Colo. Regs. 1101-3, were established by the director pursuant to an express grant of statutory authority. *See* § 8-42-101(3.5)(a)(II). The Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. Section 8-42-101(3)(b), C.R.S.2002. Thus, the Division's Medical Treatment Guidelines are to be regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hall v. Industrial Claim Appeals Office of State*, 74 P.3d 459 (Colo. App. 2003); *Rook v. Industrial Claim Appeals Office of State*, 111 P.3d 549 (Colo. App. 2005). However, the Division also recognizes that acceptable medical practice may include deviations from these guidelines. *Hall* at p. 461. Moreover, while the Medical Treatment Guidelines are a reasonable source for identifying diagnostic criteria, nothing in the Guidelines requires an ALJ to make determinations based on the Guidelines. *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (I.C.A.O. April 27, 2009). Determinations as to a claimant's industrial injury are not controlled by the application of the Guidelines. Indeed, in making determinations regarding a claim, an ALJ is not bound by any medical opinion, even if it is unrefuted. *Cahill v. Patty Jewett Golf Course and City of*

Colorado Springs, W.C. No. 4-729-518 (February 23, 2009), citing, *Indus. Commission v. Riley, 165* Colo. 586, 591, 441 P.2d 3, 5 (1968); *Davison v. Industrial Claim Appeals Office of State* 84 P.3d 1023 (Colo. 2004).

Medical Benefits–Reasonably Necessary and Causally Related

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo.App.2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo.App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado, 717 P.2d 1000 (Colo. App. 1986).*

The weight and credibility to be assigned expert testimony on the issue of causation 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); *Robinson v. Youth Track*, 4-649-298 (ICAO May 15, 2007).

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. Industrial 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). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim,* 804 P.2d 250 (Colo. App. 1990). Factual determinations related to this issue must be

supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411, 415 (Colo. App. 1995).

In this case, I am more persuaded by Dr. Finn's opinion that the cervical medial branch blocks are reasonable, necessary and related to the injury. Although there are opinions from Respondents' expert witnesses that the blocks are not reasonable since the recommendations are not within the medical treatment guidelines, I do not find those opinions to be as persuasive as Dr. Finn's opinions based on his personal examinations of the Claimant as a treating physician. The Claimant has sustained his burden of proof that the proposed treatment by Dr. Finn is reasonable, necessary and related to his work injury.

ORDER

It is therefore ordered that:

1. The Claimant proved by a preponderance of the evidence that the proposed cervical medial branch blocks are reasonable, necessary and related. As such, the branch block procedure proposed by Dr. Finn is granted.

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

DATED: June 13, 2024

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service;

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-222-868-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable left hip/thigh injury during the course and scope of employment with Employer on November 14, 2022.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable and necessary medical benefits that are causally related to his November 14, 2022 left hip/thigh injury.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to Temporary Total Disability (TTD) for the period November 15, 2022 until terminated by statute.

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

FINDINGS OF FACT

1. Claimant worked for Employer as a Delivery Driver. His hours were Monday through Friday from 6:00 a.m. until his deliveries were completed. Claimant earned $21.99 per hour.

2. Claimant explained that on November 14, 2022 he arrived at Employer's facility at 6:00 a.m. and was assigned to make a delivery in Boulder County or Longmont, Colorado. Claimant used truck number 318 to deliver product. Employer provided Claimant with an older flip-phone. Claimant testified that either Plant Manager, [Redacted, hereinafter AR] or Logistics Manager [Redacted, hereinafter DA] clocked him into the system at the time he showed up for work. He further commented they always input his time because he had a flip phone and couldn't clock in himself.

3. Claimant drove his 26-foot long truck to the job site and parked on a hill in which the back of the truck was higher than the front. He testified that, when he grabbed the bar to pull up into the back of his box truck, he felt pain in his left thigh. Claimant commented that he reported his injury to DA[Redacted] and AR[Redacted]. They directed him to Authorized Treating Provider (ATP) Concentra Medical Centers for treatment.

4. On November 14, 2022 DA[Redacted] completed a work-related injury report. He recounted that Claimant "parked on a hill so the truck sat higher." When Claimant stretched out his leg he felt like he pulled something.

5. On November 14, 2022, Claimant presented to Concentra Medical Centers with complaints of pain in his left thigh and hip. Stephen Danahey, M.D. diagnosed Claimant with strains of the left hip and thigh. Dr. Danahey recounted that Claimant's truck was parked on a hill and made the step even higher. He felt a pull in his left thigh after getting into the truck. Dr. Danahey determined Claimant's objective findings were consistent with a work-related mechanism of injury. He assigned work restrictions including walking a maximum of four hours per day as well as no squatting or climbing. He referred Claimant for physical therapy.

6. On November 15, 2022 Claimant underwent a left hip x-ray. The imaging did not reveal any fracture or dislocation.

7. On November 16, 2022 Claimant visited Physician's Assistant Eric Anderson, PA-C at Concentra. He determined that objective findings were consistent with a work-related mechanism of injury and continued Claimant's work restrictions.

8. On November 22, 2022 Claimant visited Physician's Assistant Michael Pete at Concentra. He continued Claimant's medications and referred him for an MRI of the left hip. PA Pete noted that Claimant's objective findings were consistent with a work-related mechanism of injury.

9. On December 5, 2022 Claimant returned to Concentra and was evaluated by Amanda Cava, M.D. She diagnosed Claimant with a strain of the left hip and thigh. Dr. Cava determined that Claimant's objective findings were consistent with a work-related mechanism of injury. She continued Claimant's work restrictions including walking a maximum of four hours per day as well as no squatting or climbing.

10. On December 28, 2022 DA[Redacted] completed a statement regarding Claimant's November 14, 2022 work injury. He recounted that Claimant called him from the job site and reported the incident. Claimant was driving truck number 318. DA[Redacted] explained that he was with AR[Redacted] when Claimant reported the injury. He commented that Claimant had parked his truck on an incline and overextended his left lower extremity. Claimant had not returned to work as of the date of the statement.

11. On January 6, 2023 AR[Redacted] completed a statement regarding Claimant's November 14, 2022 work injury. She was present in DA[Redacted]office when Claimant called to explain he had injured himself while on the job site on November 14, 2022. AR[Redacted] also spoke to Claimant about the incident when he returned to the office. She commented that the accident occurred while Claimant was making a delivery and she coached DA[Redacted] on how to file a report. AR[Redacted] specified that Claimant's vehicle was on an incline and he strained his left hip/leg during the delivery. Claimant had not returned to work.

12. Claimant returned to Dr. Danahey for a final time on February 9, 2023 He reiterated his initial opinion that objective findings were consistent with work-related mechanism of injury. He determined Claimant could return to modified duty with work restrictions of no lifting in excess of 10 pounds and no pushing/pulling in excess of 20 pounds. Dr. Danahey remarked that Claimant visited John Schwappach, M.D. on January 18, 2023. Dr. Schwappach had diagnosed Claimant with a likely quadriceps tendon strain and recommended an MRI to

determine the extent of the tear.

13. On March 31, 2023 Claimant underwent MRIs of his left thigh and hip. The MRI of the left thigh did not show any acute findings. The MRI of the left hip revealed moderate to severe osteoarthritis and chondromalacia of the joint. Secondary findings were consistent with internal impingement as well as a degenerative-type superior labral tear.

14. Employer's former Human Resources Manager [Redacted, hereinafter CA] testified through an evidentiary deposition on April 25, 2024. She recounted that DA[Redacted] e-mailed her around 8:30 a.m. on November 14, 2022 to report Claimant's injury. On November 17, 2022 CA[Redacted] received another e-mail from DA[Redacted] stating Claimant suffered the injury while making a delivery to [Redacted, hereinafter SE]. DA[Redacted] further remarked that Claimant "called [him] from the [site and] that he felt like he pulled something and was in pain."

15. Insurer's Adjuster [Redacted, hereinafter PS] testified that part of her job duties were to investigate claims and make contact with the employer, employee and treating physician. On November 28, 2022 PS[Redacted] spoke with Claimant over the phone about his injury. Claimant advised M PS[Redacted] he was in the back of his truck unloading product weighing between 20-60 pounds when he felt pain in his left thigh/hip area. PS[Redacted] confirmed three times he was inside the back of the truck and picking up [product] when he noticed pain in his left hip/front of thigh. Claimant acknowledged his supervisor offered him light duty work, but he was suffering too much pain to perform his duties. On December 1, 2022 PS[Redacted] filed a Notice of Contest stating Claimant's injury was not work-related.

16. CA[Redacted] testified that, following a conversation with PS[Redacted], she began to question Claimant's claim and conducted further investigation. She determined through Employer's timekeeping system Netchex that Claimant did not clock in or out on the date of injury. His time was entered on November 21, 2024 by Plant Administrator [Redacted, hereinaf AA]. CA[Redacted] testified AA[Redacted] should not have been able to input time into the system. She specified that Employer has a geofence system around the warehouse so that employees can only input their time when within the facility to pick up their delivery loads. The system exists to prevent employees from attempting to clock in from home when they are absent or running late.

17. CA[Redacted] also reviewed phone records and noted the first call made from Claimant's phone to DA[Redacted] did not occur until 1:22 p.m. on November 14, 2022. Because of her concerns, CA[Redacted] reviewed the actual delivery that was made on the date of injury under ticket number ([Redacted, hereinafter XF]). Upon review of the shipping ticket, CA[Redacted] noted the initials J.O. at the bottom of the document time-stamped with a date of November 14, 2022. She noticed the initials were not for Claimant but for driver [Redacted, hereinafter JA]. JA[Redacted] confirmed in his testimony, as well as a written statement dated February 16, 2023, that he delivered the product on behalf of Employer to the Longmont location on November 14, 2022. However, he acknowledged that he had seen Claimant on the date of the injury.

18. Employer sent Claimant a termination notice on March 14, 2023 informing him

that he had been terminated for cause on March 13, 2023. CA[Redacted] detailed Claimant was terminated due to concerns about filing a false Workers' Compensation claim, falsifying attendance time records for not working on the date of injury, no call no show for one day of work and inconsistent statements in relation to how he injured himself at work. She noted Claimant's actions were in direct violation of Employer's written policies and handbook.

19. Employer's March 13, 2023 Termination of Employment Form also stated Claimant was discharged for a violation of Employer's "Recording Time" rule 4.0. The rule requires employees to record their time when they "begin and end their work period." Claimant testified he did not clock in when he began his work period. Instead, he had either AR[Redacted] or DA[Redacted] clock him into the system when he showed up for work. Employer's records reveal that on November 14, 2022 Claimant's clock in time was not recorded until November 21, 2022 when AA[Redacted] completed the time record.

20 Although Claimant stated he was unable to use his phone to clock-in, CA[Redacted] testified the time clocks were fully functional and while an employee could clock in through the use of their phone, they could only do so when the phone was physically located in Employer's facility. CA[Redacted] explained that Claimant was terminated for not cooperating with his Workers' Compensation case and falsifying time records. She detailed that Claimant also had attendance issues and was written up based on a no call/no show on a scheduled work day.

21. Claimant testified at the hearing that he has not worked for Employer since November 14, 2022. His condition is improving and he attempted to work for two other employers, but was unsuccessful. Claimant has worked a total of six days for the other companies but was unable to perform his job duties because of his industrial injuries.

22. On February 22, 2024 John Raschbacher, M.D. performed an Independent Medical Examination (IME) of Claimant. Claimant reported he was pulling himself up on his truck when he felt pain in the left upper front of thigh. Dr. Raschbacher determined that, if the incident occurred, Claimant may have suffered a work-related thigh strain. Claimant did not require further treatment and was at Maximum Medical Improvement (MMI) as of February 22, 2024 with no permanent impairment.

23. Dr. Raschbacher also testified at the hearing in this matter. After hearing Claimant's testimony, Dr. Raschbacher determined that, because the injury did not occur in the manner Claimant stated in the IME, he did not suffer a work-related injury. After reviewing the March 31, 2023 left thigh MRI, Dr. Raschbacher determined Claimant reached MMI as of that date because there were no objective findings supporting his subjective complaints. He further commented there was no injury to the left hip.

24. Claimant has established it is more probably true than not that he suffered a compensable left hip/thigh strain during the course and scope of employment with Employer on November 14, 2022. Initially, Claimant testified that he drove his delivery truck to a job site and parked on a hill in which the back of the truck was higher than the front. He explained that, when he grabbed the bar to pull up into the back of his box truck, he felt pain in his left thigh. Claimant commented that he immediately reported his injury to DA[Redacted] and

AR[Redacted]. They corroborated his testimony. Notably, on December 28, 2022 DA[Redacted] completed a statement recounting that Claimant called him from the job site and reported the incident. Claimant had parked his truck on an incline and overextended his left lower extremity. Furthermore, on January 6, 2023 AR[Redacted] completed a statement stating she was present in DA[Redacted] office when Claimant called to explain he had injured himself while on the job site on November 14, 2022. AR[Redacted] also spoke to Claimant about the incident when he returned to the office. She commented that the incident occurred while Claimant was making a delivery and she coached DA[Redacted] on how to file a report. AR[Redacted] specified that Claimant's vehicle was on an incline and he strained his left hip/leg during the delivery.

25. The medical records also reveal that Claimant sustained a left hip/thigh strain while delivering product for Employer on November 14, 2022. After Claimant reported his injury to DA[Redacted] and AR[Redacted], he obtained medical care at ATP Concentra. On November 14, 2022 Dr. Danahey diagnosed Claimant with strains of the left hip and thigh. He recounted that Claimant's truck was parked on a hill and made the step even higher. He felt a pull in his left thigh after getting into the truck. Dr. Danahey determined Claimant's objective findings were consistent with a work-related mechanism of injury. Claimant continued to receive conservative medical treatment through Concentra. Providers regularly maintained that objective findings were consistent with a work-related mechanism of injury. Furthermore, Claimant reported to IME physician Dr. Raschbacher that he was pulling himself up on his truck when he felt pain in the left upper front of thigh. Dr. Raschbacher determined that, if the incident occurred, Claimant may have suffered a work-related thigh strain.

26. Despite the preceding medical records, Respondents assert Claimant did not suffer a compensable injury on November 14, 2022 because he provided inconsistent statements on how he injured himself on Employer's truck. Furthermore, Claimant's time was entered over one week after the date of injury by unauthorized Plant Administrator AA[Redacted] and was not consistent with the hours he testified he worked on November 14, 2022. CA[Redacted] also explained the only truck delivery to a Longmont/Boulder location on the morning of the alleged work injury was truck number 246 driven by JA[Redacted]. JA[Redacted] confirmed he was the driver who delivered Employer's product to the only Longmont/Boulder location on November 14, 2022. Finally, CA[Redacted] commented that phone records show Claimant never telephoned DA[Redacted] at any point on the morning of the incident to report an injury.

27. Although the record reflects inconsistencies in Claimant's testimony, he maintained that he suffered an injury to his left thigh/hip while maneuvering in his truck to deliver product for Employer on November 14, 2022. Furthermore, Respondents correctly note that there are discrepancies regarding Claimant's time card and his delivery schedule on the date of the injury. However, the bulk of the evidence demonstrates that Claimant injured his left hip/thigh area while working for Employer on November 14, 2022 and providers regularly remarked that objective findings were consistent with a work-related mechanism of injury. Furthermore, Claimant's supervisors DA[Redacted] and AR[Redacted] explained that Claimant informed them he had been injured on November 14, 2022 and described the mechanism of injury. The persuasive evidence thus supports a conclusion that Claimant suffered an injury that necessitated evaluation and medical care when he injured his left hip/thigh area while in

the course and scope of employment. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable left hip/thigh strains while performing his job duties on November 14, 2022.

28. Claimant has demonstrated it is more probably true than not that he is entitled to receive reasonable, necessary and causally related medical benefits for his November 14, 2022 industrial injuries. Initially, Dr. Danahey diagnosed Claimant with strains of the left hip and thigh. He determined objective findings were consistent with a work-related mechanism of injury. Claimant then continued to receive reasonable conservative medical treatment through Concentra, and providers regularly maintained that objective findings were consistent with a work-related mechanism of injury. Claimant's medical treatment including medications, physical therapy and diagnostic testing was reasonable, necessary and causally related to his November 14, 2022 work-related hip/thigh strain. Because he has not yet reached MMI, Claimant is entitled to receive additional reasonable, necessary and causally related medical care for his industrial injury.

29. Claimant has demonstrated it is more probably true than not that he is entitled to TTD benefits beginning November 15, 2022. Claimant's testimony and the Concentra medical records demonstrate that he was either unable to work or under restrictions from the day of his injury that rendered him unable to perform his job duties and impaired his earning capacity. Importantly, Dr. Danahey initially assigned work restrictions including walking a maximum of four hours per day as well as no squatting or climbing. Authorized providers maintained Claimant's restrictions. On February 9, 2022 Dr. Danahey determined Claimant could return to modified duty with work restrictions of no lifting in excess of 10 pounds and no pushing/pulling in excess of 20 pounds. Claimant continues to be under medical care and has not reached MMI. He explained that he has not worked for Employer since November 14, 2022. His condition is improving and he attempted to work for two other employers, but was unsuccessful. Claimant has worked a total of six days for the other companies but was unable to perform his job duties because of his industrial injuries. The record thus reflects that Claimant's 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. Accordingly, Claimant has proven that that he is entitled to receive TTD benefits from November 15, 2022 until terminated by statute.

30. However, the record reveals that Employer sent Claimant a termination notice on March 14, 2023 informing him that he had been terminated for cause effective March 13, 2023. CA[Redacted] detailed Claimant was terminated due to concerns of filing a false Workers' Compensation claim, falsifying attendance time records, not working on the date of injury, a no call no show for one day of work, and inconsistent statements in relation to how he injured himself at work. She noted Claimant's actions were in direct violation of Employer's written policies and handbook.

31. The record reveals that Employer has policies and procedures that it relies upon to conduct its business and guide its employees. They are known as "Employee Guidelines." Violation of the policies and procedures can lead to disciplinary actions up to and including termination. Employer's Employee Guidelines effective June 1, 2022 specify in section 5.6 that

there is no set standard for the number of oral warnings that are required prior to issuing an employee a written warning, or how many written warnings must precede termination. Serious offenses include violation of employment policies and falsification of records. Termination may be the first and only disciplinary action taken. Claimant was aware of the policies and procedures requiring him to record his time by clocking in when he began and ended his work shift. Claimant's termination was predicated in part on his failure to abide by Employer's job performance standards involving the need to timely clock in and out through his phone. Notably, Employer's March 13, 2023 Termination of Employment Form states Claimant was discharged for a violation of Employer's "Recording Time" rule 4.0. The rule requires employees to record their time when they "begin and end their work period." Furthermore, "Attendance" rule 4.1 specifies that employees are expected to work as scheduled and remain for the duration of their shifts. The inability to report to work as scheduled may lead to disciplinary action including termination.

32. Initially, the record reveals that on May 5, 2022 Claimant received a Disciplinary Action Form from DA[Redacted] detailing that he had an unexcused work absence. CA[Redacted]commented that Claimant was a "no call no show." The Form specified that the failure to correct work performance issues could lead to additional disciplinary action including termination. Claimant also testified he did not typically clock in when he began his work period. Instead, he had either AR[Redacted] or DA[Redacted] clock him into the system. Claimant specified that Employer previously had a physical clock for recording time, but switched to a phone-based system that he was unable to use because he had a flip phone and was not technologically sophisticated. Moreover, Claimant acknowledged there were errors in his time recording because he always began work at 6:00 a.m. and his time entry for November 14, 2022 showed he clocked in at 6:30 a.m. Notably, Employer's records reveal that on November 14, 2022 Claimant's clock in time was not recorded until November 21, 2022 when AA[Redacted] completed the time record.

33. Claimant's actions in failing to adhere to Employer's attendance and time recording policies demonstrate that he exercised some control over his March 13, 2023 termination under the totality of the circumstances. He acknowledged that he did not regularly input his time using his phone and demonstrate that he was physically present in Employer's facility. As CA[Redacted] noted, Employer has a geofence system around the warehouse so that employees can only input their time when within the facility to pick up their delivery loads. By regularly violating Employer's policy regarding the recording of time, Claimant precipitated his employment termination by volitional acts that he would reasonably expect to cause the loss of employment. Accordingly, Respondents have demonstrated that Claimant is precluded from receiving TTD benefits subsequent to his March 13, 2023 termination from employment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more

probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

Compensability

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

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

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

7. The provision of medical care based on a claimant's report of symptoms does not

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

8. As found, Claimant has established by a preponderance of the evidence that he suffered a compensable left hip/thigh strain during the course and scope of employment with Employer on November 14, 2022. Initially, Claimant testified that he drove his delivery truck to a job site and parked on a hill in which the back of the truck was higher than the front. He explained that, when he grabbed the bar to pull up into the back of his box truck, he felt pain in his left thigh. Claimant commented that he immediately reported his injury to DA[Redacted] and AR[Redacted]. They corroborated his testimony. Notably, on December 28, 2022 DA[Redacted] completed a statement recounting that Claimant called him from the job site and reported the incident. Claimant had parked his truck on an incline and overextended his left lower extremity. Furthermore, on January 6, 2023 AR[Redacted]completed a statement stating she was present in DA[Redacted] office when Claimant called to explain he had injured himself while on the job site on November 14, 2022. AR[Redacted] also spoke to Claimant about the incident when he returned to the office. She commented that the incident occurred while Claimant was making a delivery and she coached DA[Redacted] on how to file a report. AR[Redacted] specified that Claimant's vehicle was on an incline and he strained his left hip/leg during the delivery.

9. As found, the medical records also reveal that Claimant sustained a left hip/thigh strain while delivering product for Employer on November 14, 2022. After Claimant reported his injury to DA[Redacted] and AR[Redacted], he obtained medical care at ATP Concentra. On November 14, 2022 Dr. Danahey diagnosed Claimant with strains of the left hip and thigh. He recounted that Claimant's truck was parked on a hill and made the step even higher. He felt a pull in his left thigh after getting into the truck. Dr. Danahey determined Claimant's objective findings were consistent with a work-related mechanism of injury. Claimant continued to receive conservative medical treatment through Concentra. Providers regularly maintained that objective findings were consistent with a work-related mechanism of injury. Furthermore, Claimant reported to IME physician Dr. Raschbacher that he was pulling himself up on his truck when he felt pain in the left upper front of thigh. Dr. Raschbacher determined that, if the incident occurred, Claimant may have suffered a work-related thigh strain.

10. As found, despite the preceding medical records, Respondents assert Claimant

did not suffer a compensable injury on November 14, 2022 because he provided inconsistent statements on how he injured himself on Employer's truck. Furthermore, Claimant's time was entered over one week after the date of injury by unauthorized Plant Administrator AA[Redacted] and was not consistent with the hours he testified he worked on November 14, 2022. CA[Redacted] also explained the only truck delivery to a Longmont/Boulder location on the morning of the alleged work injury was truck number 246 driven by JA[Redacted]. JA[Redacted] confirmed he was the driver who delivered Employer's product to the only Longmont/Boulder location on November 14, 2022. Finally, CA[Redacted] commented that phone records show Claimant never telephoned DA[Redacted] at any point on the morning of the incident to report an injury.

11. As found, although the record reflects inconsistencies in Claimant's testimony, he maintained that he suffered an injury to his left thigh/hip while maneuvering in his truck to deliver product for Employer on November 14, 2022. Furthermore, Respondents correctly note that there are discrepancies regarding Claimant's time card and his delivery schedule on the date of the injury. However, the bulk of the evidence demonstrates that Claimant injured his left hip/thigh area while working for Employer on November 14, 2022 and providers regularly remarked that objective findings were consistent with a work-related mechanism of injury. Furthermore, Claimant's supervisors DA[Redacted] and AR[Redacted] explained that Claimant informed them he had been injured on November 14, 2022 and described the mechanism of injury. The persuasive evidence thus supports a conclusion that Claimant suffered an injury that necessitated evaluation and medical care when he injured his left hip/thigh area while in the course and scope of employment. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant thus suffered a compensable left hip/thigh strains while performing his job duties on November 14, 2022.

Medical Benefits

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

13. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, 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).

14. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his November 14, 2022 industrial injuries. Initially, Dr. Danahey diagnosed Claimant with strains of the left hip and thigh. He determined objective findings were consistent with a work-related mechanism of injury. Claimant then continued to receive reasonable conservative medical treatment through Concentra, and providers regularly maintained that objective findings were consistent with a work-related mechanism of injury. Claimant's medical treatment including medications, physical therapy and diagnostic testing was reasonable, necessary and causally related to his November 14, 2022 work-related hip/thigh strain. Because he has not yet reached MMI, Claimant is entitled to receive additional reasonable, necessary and causally related medical care for his industrial injury.

Temporary Total Disability Benefits/Responsible for Termination

15. To prove entitlement to TTD benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability to effectively and properly perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Off.*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

16. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Indus. Claim Appeals Off.*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant

does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that a claimant was responsible for her termination, the respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

17. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to TTD benefits beginning November 15, 2022. Claimant's testimony and the Concentra medical records demonstrate that he was either unable to work or under restrictions from the day of his injury that rendered him unable to perform his job duties and impaired his earning capacity. Importantly, Dr. Danahey initially assigned work restrictions including walking a maximum of four hours per day as well as no squatting or climbing. Authorized providers maintained Claimant's restrictions. On February 9, 2022 Dr. Danahey determined Claimant could return to modified duty with work restrictions of no lifting in excess of 10 pounds and no pushing/pulling in excess of 20 pounds. Claimant continues to be under medical care and has not reached MMI. He explained that he has not worked for Employer since November 14, 2022. His condition is improving and he attempted to work for two other employers, but was unsuccessful. Claimant has worked a total of six days for the other companies but was unable to perform his job duties because of his industrial injuries. The record thus reflects that Claimant's 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. Accordingly, Claimant has proven that that he is entitled to receive TTD benefits from November 15, 2022 until terminated by statute.

18. As found, however, the record reveals that Employer sent Claimant a termination notice on March 14, 2023 informing him that he had been terminated for cause effective March 13, 2023. CA[Redacted] detailed Claimant was terminated due to concerns of filing a false Workers' Compensation claim, falsifying attendance time records, not working on the date of injury, a no call no show for one day of work, and inconsistent statements in relation to how he injured himself at work. She noted Claimant's actions were in direct violation of Employer's written policies and handbook.

19. As found, the record reveals that Employer has policies and procedures that it relies upon to conduct its business and guide its employees. They are known as "Employee Guidelines." Violation of the policies and procedures can lead to disciplinary actions up to and including termination. Employer's Employee Guidelines effective June 1, 2022 specify in section 5.6 that there is no set standard for the number of oral warnings that are required prior to issuing an employee a written warning, or how many written warnings must precede termination. Serious offenses include violation of employment policies and falsification of records. Termination may be the first and only disciplinary action taken. Claimant was aware of the policies and procedures requiring him to record his time by clocking in when he began and ended his work shift. Claimant's termination was predicated in part on his failure to abide by

Employer's job performance standards involving the need to timely clock in and out through his phone. Notably, Employer's March 13, 2023 Termination of Employment Form states Claimant was discharged for a violation of Employer's "Recording Time" rule 4.0. The rule requires employees to record their time when they "begin and end their work period." Furthermore, "Attendance" rule 4.1 specifies that employees are expected to work as scheduled and remain for the duration of their shifts. The inability to report to work as scheduled may lead to disciplinary action including termination.

20. As found, initially, the record reveals that on May 5, 2022 Claimant received a Disciplinary Action Form from DA[Redacted] detailing that he had an unexcused work absence. CA[Redacted] commented that Claimant was a "no call no show." The Form specified that the failure to correct work performance issues could lead to additional disciplinary action including termination. Claimant also testified he did not typically clock in when he began his work period. Instead, he had either AR[Redacted] or DA[Redacted] clock him into the system. Claimant specified that Employer previously had a physical clock for recording time, but switched to a phone-based system that he was unable to use because he had a flip phone and was not technologically sophisticated. Moreover, Claimant acknowledged there were errors in his time recording because he always began work at 6:00 a.m. and his time entry for November 14, 2022 showed he clocked in at 6:30 a.m. Notably, Employer's records reveal that on November 14, 2022 Claimant's clock in time was not recorded until November 21, 2022 when AA[Redacted] completed the time record.

21. As found, Claimant's actions in failing to adhere to Employer's attendance and time recording policies demonstrate that he exercised some control over his March 13, 2023 termination under the totality of the circumstances. He acknowledged that he did not regularly input his time using his phone and demonstrate that he was physically present in Employer's facility. As CA[Redacted] noted, Employer has a geofence system around the warehouse so that employees can only input their time when within the facility to pick up their delivery loads. By regularly violating Employer's policy regarding the recording of time, Claimant precipitated his employment termination by volitional acts that he would reasonably expect to cause the loss of employment. Accordingly, Respondents have demonstrated that Claimant is precluded from receiving TTD benefits subsequent to his March 13, 2023 termination from employment.

ORDER

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

1. Claimant suffered a compensable strain of the left hip/thigh during the course and scope of his employment on November 14, 2022.

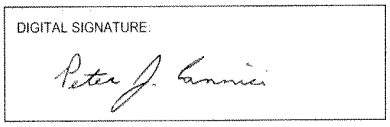
2. Claimant shall receive reasonable, necessary and causally related medical care for his left hip/thigh strain.

3. Claimant shall receive TTD benefits for the period November 15, 2022 until his termination from employment on March 13, 2023.

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, 2024.



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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-222-866-002

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer.

2. Whether Claimant established an entitlement to temporary total disability benefits.

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

FINDINGS OF FACT

1. Claimant is an HVAC installer and technician Claimant, who was employed by Employer beginning the week of September 18, 2022. (Ex. H). Employer is a temporary staffing company.

2. In September and October 2022, Claimant was working on a project assigned by Employer installing large ductwork in a jail for a contractor – [Redacted, hereinafter DH]. Claimant testified that his job duties involved installing heavy HVAC ductwork. Claimant testified that the work required him to move and place ductwork using a duct jack, and as a result, he was required to twist, lift, and secure the ductwork while standing on a ladder. Claimant testified that he initially reported his alleged injury to [Redacted, hereinafter CW], an employee of DH[Redacted], but that his report was ignored. Claimant was unclear as to the exact date of injury. While he testified that the injury occurred on October 23, 2022, he also reported to medical providers that the injury occurred in September 2022.

3. Claimant testified that he was terminated by Employer in November 2022 because he had to stop work to stretch. Claimant's payroll records demonstrate that Claimant's last worked for Employer the week ending November 5, 2022. (Ex. H).

4. Claimant testified that after he was terminated by Employer, his back pain worsened, and he went to the emergency department. Although the emergency department record was not offered into evidence, Claimant's other medical records indicate he was seen at NCMC (*i.e.*, Banner North Colorado Medical Center). Physician assistant Mara O'Mara, P.A., referred Claimant for a lumbar MRI, which was performed on November 8, 2022, for reports of severe pain radiating into both legs. The MRI showed a L3-4 paracentral disc extrusion and facet arthropathy with severe central canal and lateral recess stenosis; degenerative disc disease and facet arthropathy at L4-5 and L5-S1; and degenerative foraminal narrowing at L3-4 and L4-5 without root impingement. It was also noted that Claimant had developmentally short pedicles. (Ex. E).

5. At some point after going to the emergency department, Claimant reported an injury to Employer and was provided a list of providers, from which he chose Workwell Occupational Medicine for treatment.

6. On December 1, 2022, Respondents filed a Notice of Contest, indicating that further investigation was needed to determine relatedness of Claimant's claimed injury. The Notice of Contest lists the date of injury as November 14, 2022. (Ex. A).

7. On December 2, 2022, Claimant saw Lloyd Luke, M.D., at Workwell. He reported that he noticed an onset of lower back pain in September 2022, but continued working. Claimant described his work as requiring squatting, crawling, lifting, and contorting into positions to install HVAC ductwork, but did not report a specific incident causing lower back pain. Claimant reported that he sought chiropractic care on October 8, 2022 and received little improvement, and then went to the emergency room on November 8, 2022. Dr. Luke diagnosed Claimant with a lumbar sprain, and referred Claimant to physical therapy, and for an orthopedic consult. He also placed Claimant on restricted duty, with a maximum lifting restriction of 10 pounds. Dr. Luke indicated that Claimant's findings were consistent with a work-related mechanism of injury, but offered no further explanation opinion. (Ex. 3).

8. Also on December 2, 2022, Claimant began physical therapy through Workwell. Between December 2, 2022, and February 9, 2023, Claimant attended 15 physical therapy visits. Claimant reported to his physical therapy providers that he had an insidious onset of back pain beginning in September 2022, and that he attempted to work through it until October 2022, when the pain progressed. At his last documented physical therapy visit, Claimant reported that he had improved approximately 60%.(Ex. 4)

9. Claimant continued to report central lumbar pain radiating into his legs throughout December 2022. In January 2023, Dr. Bates referred Claimant for massage therapy, and for an interventional pain evaluation. (Ex. D, G).

10. On January 11, 2023, Claimant saw interventional pain physician Allen Swanson, M.D., on referral from Dr. Bates. Claimant reported that his lower back pain started in September 2022 without an inciting event, and worsened until November. Dr. Swanson opined that Claimant's pain was likely neurogenic and may have a component of facet arthropathy, and recommended Claimant undergo a lumbar epidural steroid injection (ESI). (Ex. G). Dr. Swanson performed a lumbar ESI at L3-4 on February 1, 2023. (Ex. D).

11. On February 15, 2023, Claimant returned to Dr. Bates, and reported no improvement with the lumbar ESI. (Ex. 9). Claimant was then referred to William Biggs, M.D., at Orthopaedic & Spine Center of the Rockies for a surgical consultation. Dr. Biggs reviewed Claimant's MRI films and noted that Claimant had a congenitally narrow canal with a disc herniation at L3-4 causing severe stenosis at that level, although the remaining discs appeared normal. Based on Claimant's failure of conservative treatment, he recommended an L3-4 decompression, partial laminectomy and possible discectomy. (Ex. F).

12. Ultimately, on June 14, 2023, Dr. Biggs performed surgery, which included a partial laminectomy at L3-4 with bilateral recess decompression on left side. His post-operative diagnosis was disc degeneration, stenosis, and neurogenic claudication and

radiculopathy at L3-4. (Ex. F). After recovery from surgery, he recommended an additional ESI at the L4-5 level, and noted that Claimant had severe facet degeneration from L3 to S1, which may warrant facet blocks and an eventual rhizotomy. (Ex. D).

13. On June 30, 2023, Dr. Biggs released Claimant to work full duty.

14. On January 25, 2024, Jeffrey Wunder, M.D., performed an independent medical examination (IME) at Respondents' request. Dr. Wunder was admitted as an expert in physical medicine and rehabilitation, and testified at hearing. Dr. Wunder opined that Claimant's symptoms are related to underlying degenerative changes in his spine, as demonstrated by Claimant's MRI films. He noted that Claimant had not reported a specific mechanism of injury, and instead reported to multiple providers that he woke up with pain in his back in either September or October 2022. Dr. Wunder testified that if Claimant had sustained an acute lower back injury, one would expect pain at the onset of the injury. He opined that Claimant's treatment to date has been reasonable, but he does not believe Claimant's condition is related to a work injury.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting

interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. § 8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). 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. *Streeb*, *supra*; *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable lower back injury arising out of the course of his employment with Employer. Claimant had a disc protrusion at the L3-4 level that required surgery. Although Claimant reported to multiple providers that he began experiencing symptoms in September 2022, the evidence does not establish a specific mechanism of injury related to his employment. Neither Claimant's testimony nor his medical records offered a credible explanation as to how his lower back condition was caused by installing ductwork, or otherwise related to his employment. Although Dr. Luke indicated that Claimant's condition was likely work-related, he offered no explanation for this opinion, and did not explain the mechanism of injury causing Claimant's condition. The ALJ finds credible Dr. Wunder's opinion that had Claimant sustained an acute disc injury in the course of his employment, symptoms would have started immediately at the time of injury, rather than emerging insidiously, as Claimant reported to other providers. The evidence is insufficient to establish prove by a preponderance of the evidence that Claimant's lower back condition was causally-related to his employment with Employer.

Medical Benefits and Temporary Total Disability Benefits

Because Claimant has failed to establish that he sustained a compensable injury arising out of the course of his employment with Employer, he has failed to establish an entitlement to medical benefits or temporary total disability benefits.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits id denied and dismissed.

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

DATED: June 13, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-178-532-001

ISSUES

- Did [Redacted, hereinafter HD] prove by a preponderance of the evidence that the claim should be reopened based on error of mistake and that [Redacted, hereinafter CB] should be ordered to reimburse all indemnity and medical benefits paid by HD[Redacted]?

- Did CB[Redacted] prove that HD[Redacted] request for reopening and reimbursement is barred by the doctrine of waiver?

FINDINGS OF FACT

1. Claimant worked for [Redacted, hereinafter PP] as a certified veterinary technician. On July 21, 2021, Claimant fractured her ankle while searching for a dog that had gotten loose.

2. HD[Redacted] provided workers' compensation insurance coverage to PP[Redacted] until July 2021.

3. Claimant sent a First Report of Injury form ("WC1") to HD[Redacted] on July 21, 2021.

4. On August 17, 2021, PP[Redacted] submitted a policy cancellation request to HD[Redacted] because the business had been sold. The effective date of the cancellation was July 15, 2021. But because the cancellation request was not submitted until August 17, 2021, HD[Redacted] system still showed the PP[Redacted] policy as active on July 21, 2021 when Claimant filed her claim.

5. [Redacted, hereinafter SL] is a senior claims handler for HD[Redacted]. SL[Redacted] was assigned to Claimant's claim on August 3, 2021. At that time, the claim had already been set up in the HD[Redacted] system.

6. SL[Redacted] attempted unsuccessfully to contact PP[Redacted] by telephone on August 3, 2021.

7. SL[Redacted] spoke with Claimant on August 3 regarding the accident. The fracture was confirmed by an MRI. Claimant was non-weightbearing and off work.

8. SL[Redacted] filed a General Admission of Liability ("GAL") on August 8, 2021, admitting for medical benefits and TTD.

9. On October 4, 2021, SL[Redacted] received a report from the ATP indicating Claimant was progressing well and had been released to work with restrictions. SL[Redacted] emailed PP[Redacted] and asked if Claimant had returned to light duty.

There is no indication in the claim notes that the employer replied. However, Claimant emailed SL[Redacted] on October 5 that she had returned to part-time work. SL[Redacted] emailed Claimant a Supplemental Report of Return to Work form. Claimant completed and returned to the form on October 15, 2021, indicating she had returned to work at reduced wages on September 27, 2021.

10. SL[Redacted] filed an Amended GAL on October 18, 2021, terminating TTD effective September 26, and commencing TPD.

11. On October 21, 2021, SL[Redacted] received a system message from HD[Redacted] policy review team indicating that PP[Redacted] workers' compensation policy had been cancelled, effective July 15, 2021, because the business had been sold. The policy review team attached a new policy to the claim. The named insured on the policy was identified as "[Redacted, hereinafter PA]." PA[Redacted] policy was in effect on July 21, 2021 when Claimant was injured.

12. Because PA[Redacted] is a veterinary-related business and had the same mailing address as PP[Redacted], SL[Redacted] inferred that PA[Redacted] had purchased PP[Redacted]. Therefore, SL[Redacted] noted in the claim log: "Prior policy of the employer was cancelled on 8/17 due to business being sold. However, the new employer is covered with us and the policy is active for the DOI."

13. Claimant was put at MMI on November 8, 2021 with no impairment, no restrictions, and no maintenance care. SL[Redacted] filed a Final Admission of Liability ("FAL") on December 9, 2021.

14. Claimant did not object to the FAL and the claim closed.

15. On July 28, 2022, SL[Redacted] received a telephone call from the owner of PA[Redacted]. The owner had been reviewing old paperwork and came across the FAL. The owner indicated PA[Redacted] had never employed Claimant, that Claimant had been employed by PP[Redacted], and that PP[Redacted] had been sold in July 2021 to an unrelated company. The owner also stated PP[Redacted] and PA[Redacted] had shared office space at the time of Claimant's injury but had no common ownership.

16. Upon receiving this information, SL[Redacted] immediately accessed the coverage verification tool on the DOWC website and saw that CB[Redacted] was listed as the insurer of PP[Redacted] on Claimant's date of injury.[1] That same day, SL[Redacted] emailed CB[Redacted] a copy of the WC1 form. CB[Redacted] did not respond.

17. SL[Redacted] then investigated further and identified [Redacted, hereinafter CL] as the third-party administrator ("TPA") for Indemnity Insurance. On October 19, 2022, SL[Redacted] sent the WC1 form to CL[Redacted] claim reporting email address.

[1] CB[Redacted] did not dispute at hearing it was the workers' compensation carrier for PP[Redacted] on July 21, 2021.

18. Later that day, [Redacted, hereinafter CK] from CL[Redacted] responded and confirmed receipt of the WC1 form. CK[Redacted] stated:

> I appreciate you sending a copy of the first report of injury. CL[Redacted] will handle this on behalf of CB[Redacted] as the TPA of record. Would you kindly forward us the payment history, claim notes and medicals when you have a moment? We will validate the benefit payments and proceed with reimbursement once confirmed.

19. SL[Redacted] provided the requested documentation to CK[Redacted] on December 6, 2022, and requested reimbursement.

20. SL[Redacted] received no further communication from CK[Redacted] or anyone else at CL[Redacted]. She followed up with him by email of January 17, 2023, with no response.

21. SL[Redacted] requested legal assistance on July 12, 2023. Respondents' counsel emailed CL[Redacted] that same day requesting they contact her regarding the claim. No response was received.

22. On January 8, 2024, HD[Redacted] filed an Application for Hearing seeking to reopen the claim and obtain reimbursement from CB[Redacted].

23. HD[Redacted] paid temporary disability and medical benefits in the total amount of $11,628.49:

TTD:	$5,619.10
TPD:	$1,027.90
Medical:	$4,981.49
Total:	**$11,628.49**

24. HD[Redacted] claim payment history also shows $1,580 for "Defense Attorney Fees" and $369.37 for unidentified "Other Expenses."

25. HD[Redacted] proved the claim should be reopened based on error or mistake.

26. HD[Redacted] proved that CB[Redacted] was the workers' compensation carrier on the risk at the time of Claimant's injury.

27. HD[Redacted] proved it paid $11,628.49 in medical and temporary disability benefits for Claimant's injury that should have been covered by CB[Redacted].

28. CB[Redacted] failed to prove HD[Redacted] waived its right to reimbursement.

CONCLUSIONS OF LAW

A. CB[Redacted] is the proper insurer

In cases involving accidental injuries, the insurance carrier that covers the employer on the date of injury is liable for workers' compensation benefits. *Great American Indemnity Co. v. State Compensation Insurance Fund*, 116 P.2d 919 (Colo. 1941). It is undisputed that HD[Redacted] coverage ceased on July 15, 2021, and CB[Redacted] insured Claimant's employer on the date of injury. Accordingly, CB[Redacted] should have paid the benefits in this claim instead of HD[Redacted].

B. Reopening

Insurers are generally entitled to reimbursement of benefits they paid that should have been paid by a different carrier. *E.g*., *Ehrsam v. Bonneville Foods Corporation*, W.C. No. 3-070-937 (May 7, 2009).

Section 8-43-303(1)(a) authorizes an ALJ to reopen an award on the grounds of error, or mistake of law or fact. The authority to reopen a claim is "permissive," and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. Industrial Commission v. Cutshall, 433 P.2d 765 (Colo. 1967). The reopening authority reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). In determining whether to reopen a claim due to "mistake or error," the ALJ must determine whether a mistake or error was made, and if so, whether it was the type of mistake that justifies reopening the claim. *Travelers Insurance Co. v. Industrial Commission*, 646 P.2d 399 (Colo. App. 1989). Where the ALJ finds an error or mistake, the ALJ may consider whether the mistake could have been avoided by the exercise of due diligence. *Klosterman v. Industrial Commission*, 694 P.2d 873 (Colo. App. 1984). However, the failure to exercise a procedural right is not fatal and is only one factor to be considered. *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). The ALJ may also consider other factors, such as whether perpetuating the mistake circumvents the objectives of the Workers' Compensation Act.

As found, HD[Redacted] proved the claim should be reopened based on error or mistake. There were several errors that caused HD[Redacted] to improperly pay benefits for an employer it no longer insured. These errors resulted from unfortunate coincidences of timing, coupled with oversights and faulty assumptions by HD[Redacted] employees. Claimant's injury occurred shortly after PP[Redacted] had been sold, but before HD[Redacted]was notified of any ownership or policy change. Claimant reported the injury to what she believed was the employer's carrier. HD[Redacted] duly opened the claim, having received no information that the business had been sold and that a retroactive cancellation was forthcoming. When SL[Redacted] was assigned the claim, she attempted to contact PP[Redacted] but received no response. Therefore, SL[Redacted] communicated with Claimant, who said nothing about an ownership change. Claimant explained she fractured her ankle at work, the fracture was verified by an MRI, and she was missing work because of the injury. As a result, SL[Redacted] appropriately filed a GAL accepting the claim and commenced payment of TTD benefits.

By the time the HD[Redacted] policy was retroactively cancelled, HD[Redacted] had already admitted liability and was paying benefits. HD[Redacted] policy team then processed the cancellation, but mistakenly assumed PA[Redacted], which was also a veterinary-related company with the same address as PP[Redacted], was the successor employer. SL[Redacted] made the same incorrect assumption and therefore did not double-check the apparent conclusion of the policy team. At the time, SL[Redacted] had no reason to question or doubt that the policy had been correctly linked to the claim. It is also significant that SL[Redacted] had attempted to contact the policyholder twice but received no response that could have alerted her to the coverage problem.

Thereafter, there was no reason to revisit the coverage issue until PA[Redacted] owner contacted HD[Redacted] in July 2022. When SL[Redacted] learned that PA[Redacted] was not the same entity as PP[Redacted], she promptly researched the Division website and identified the error. She then took immediate steps to first notify CB[Redacted] directly and then CB[Redacted] TPA CL[Redacted]. CB[Redacted] has been on notice of this claim since July 28, 2022. CB[Redacted] initially indicated it would verify coverage and reimburse HD[Redacted]. However, CB[Redacted] stopped responding after being provided with the necessary information.

Reopening is warranted under these circumstances. Indeed, the authority to reopen a claim would be of dubious value if it could not be invoked to remedy the sorts of honest mistakes and human error that occurred here. In making this determination, it is also significant that CB[Redacted] made no persuasive showing or suggestion that it will be prejudiced by having to reimburse HD[Redacted] for benefits CB[Redacted] should have covered in the first place.

C. Waiver

CB[Redacted] does not deny that it covered PP[Redacted] on the date of Claimant's injury, and by extension essentially acknowledges that HD[Redacted] provided benefits in error. Nevertheless, CB[Redacted] argues the Petition to Reopen should be denied because HD[Redacted] waived its right to reimbursement.

Waiver is the intentional relinquishment of a known right, which may be express or implied. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1998). An implied waiver must be free from ambiguity and clearly manifest the intent not to assert the benefit or right. *Burman v. Richmond Homes Ltd*., 821 P.2d 913 (Colo. App. 1991).

CB[Redacted] cites *Siebold v. T.H. Inc*., W.C No. 4-250-049 (ICAO, August 19, 1999) and *Safeway v. ICAO*, 968 P.2d 162 (Colo. App. 1998) in support of its argument that HD[Redacted] waived its right to reimbursement. In *Siebold*, the [Redacted, hereinafter CA] admitted liability for temporary disability and medical benefits for an occupational disease. The claimant later suffered a substantial permanent aggravation in November 1994, at which time a different carrier, [Redacted, hereinafter MY], was on the risk. MY[Redacted] filed a GAL admitting for medical benefits commencing November 1994. However, CA[Redacted] subsequently filed GALs in 1996 and 1997 for additional temporary disability benefits. CA[Redacted] then filed an uncontested FAL in December

1997 for PPD and future medical benefits. Several months after the claim closed, CA[Redacted] applied for a hearing, seeking to withdraw its FAL and recover previously paid benefits from MY[Redacted]. The ALJ denied the request because CA[Redacted] "knew or should have known" it was no longer on the risk after November 1994, and yet paid benefits for an additional three years. Therefore, the ALJ determined CA[Redacted] waived its right to recover previously paid benefits from MY[Redacted]. The Panel affirmed, noting that once a claim is closed by an uncontested FAL, admitted liability cannot be changed unless the claim is reopened pursuant to § 8-43-303. The Panel further held that substantial evidence supported the ALJ's determination that CA[Redacted] FAL was a "voluntary, knowing, and intelligent waiver" of its claim for reimbursement from MY[Redacted].

The ALJ and Panel in *Siebold* relied on *Safeway v. ICAO*, *supra*, which upheld denial of an offset to the Subsequent Injury Fund ("SIF") after the respondent filed multiple uncontested FALs admitting for PTD benefits without claiming an offset. In *Safeway*, the SIF had been formally joined as a party to the claim, so it was undisputed that the respondent knew of the potential offset. The court emphasized that once a claim is closed by an FAL, the employer must seek reopening under § 8-43-303 to obtain relief from the FAL. The court was also concerned that imposing liability on the SIF after the filing of an uncontested FAL would foreclose the SIF's ability to contest the admitted issue of PTD or potentially require the claimant to relitigate the issue.

Safeway and *Siebold* are distinguishable in several important respects. First, there is no indication that the respondents in *Safeway* or *Siebold* had petitioned to reopen the claim, which is a prerequisite to changing admitted liability. Second, the respondents in *Safeway* and *Siebold* continued filing admissions and paying significant benefits for *several years* after they knew or should have known another entity was liable for some or all benefits. By contrast, HD[Redacted] immediately sought reimbursement from CB[Redacted] once it learned it had paid benefits in error. Finally, this case does not implicate the policy concerns referenced by the court in *Safeway*. Ordering CB[Redacted] to reimburse HD[Redacted] will not cause Claimant any financial hardship or require her to litigate a controversial issue that has already been resolved in her favor by admission. Nor is CB[Redacted] unduly harmed by the lost opportunity to contest the claim. Considering the straightforward and objective nature of Claimant's injury, which caused a closed period of disability and healed without residual impairment, there is no persuasive reason to believe CB[Redacted] would have adjusted the claim any differently than did HD[Redacted].

CB[Redacted] failed to prove that HD[Redacted] expressly or impliedly waived its claim to repayment. To the contrary, HD[Redacted] actions upon learning of CB[Redacted] coverage demonstrate an intent to exercise its rights and recover payments made by HD[Redacted].

D. Amount of reimbursement

HD[Redacted] is entitled to reimbursement of workers' compensation benefits paid to Claimant or on her behalf. It is not entitled to reimbursement of legal fees or unidentified

"other expenses." As found, HD[Redacted] paid indemnity and medical benefits in the total amount of $11,628.49. Therefore, CB[Redacted] is liable to reimburse HD[Redacted] $11,628.49.

ORDER

It is therefore ordered that:

1. HD[Redacted] Petition to Reopen this claim based on error or mistake is granted.

2. CB[Redacted] shall reimburse HD[Redacted] $11,628.49 for medical and temporary disability benefits HD[Redacted] paid on this claim.

3. HD[Redacted] request for reimbursement greater than $11,628.49 is denied and dismissed.

4. HD[Redacted] is dismissed as a party to this claim.

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

DATED: June 14, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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

ISSUES

I. Whether Respondents established, by a preponderance of the evidence, that Claimant's injury resulted from her willful failure to follow a reasonable safety rule in contravention of C.R.S. § 8-42-112(1)(b), thus entitling Respondents to reduce her compensation benefits by fifty percent (50%).

FINDINGS OF FACT

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

Claimant's September 15, 2023 Work Related Left Knee Injury

1. Claimant sustained an admitted injury to her left knee while working for Employer on September 15, 2023. (*See* CHE 1, 2, 4). The injury occurred during an altercation in the store involving two female shoplifters. On the date of her admitted injury, Claimant had arrived early for work. She was sitting in her truck preparing for her shift when she observed two young women enter the store and walk back to the freezer where the store's ice cream products were kept. Claimant watched as the two women took ice cream from the freezer and conceal it in their clothing.

2. Claimant exited her truck and quickly entered the store. She informed her manager/supervisor ([Redacted, hereinafter FN]) that the women were stealing. FN[Redacted] immediately confronted the suspects and an argument ensued. According to Claimant, one of the suspects ran past her and fled the store. FN[Redacted] continued to argue with the remaining suspect telling her that she was not leaving the store until the police arrive.

3. While FN[Redacted] was arguing with the suspect inside the store, Claimant noticed that the other culprit, who had fled earlier, had turned around and was walking back toward the doors as if she were going to reenter store. Claimant proceeded to hold the doors shut as the second suspect approached the store. Claimant testified that she was attempting to prevent this individual from reentering, while also assisting her supervisor in keeping the other perpetrator inside the store until the police arrived.

4. Claimant was injured as she struggled to keep the suspect inside the store from leaving the business. Claimant explained that she had her back to FN[Redacted] as he and the suspect inside the store sparred over her leaving the building. As the ruckus behind her escalated, Claimant testified she was abruptly "hit" on the knee as she held the doors closed. During a medical appointment with Nurse Practitioner (NP)

Theresa Kuhn on September 25, 2023, the following history regarding the mechanism of injury (MOI) was documented:

> Was holding the door closed when one of the individuals "hit my left knee with her legs twice."

(CHE 3, p. 18)(The "individual" being the suspect fighting to exit the store).

5. As referenced, liability for Claimant's injury has been admitted and she is currently receiving temporary total disability (TTD) benefits albeit at a reduced rate due to an alleged safety rule violation of Employer's shoplifting prevention policies.[1] Claimant contested the reduction in her TTD benefits and the May 7, 2024 hearing followed. As noted, the question for determination is whether Claimant's action of holding the business doors shut constitutes a violation of Employer's shoplifting prevention policies, which would entitle Respondents to reduce Claimant's compensation benefits by 50%.

The Testimony of [Redacted, hereinafter RE]

6. RE[Redacted] testified as a manager of the store where Claimant worked. RE[Redacted] knows Claimant and has worked with her in the past. As a manager, RE[Redacted] job duties included customer service, stocking and completing tasks associated with running the store. She also functions as a training manager for Employer, meaning she trains new managers on best practices to effectively operate other stores. These trainings include how to make coffee, clean the bathrooms, ring up customers and prevent theft.

7. RE[Redacted] testified that she is familiar with Employer's policies regarding theft prevention. She has taken and taught Employer's theft prevention curriculum. RE[Redacted] explained that Employer's theft prevention policies make it clear that employees cannot touch, chase, take pictures of or follow shoplifters. Rather, employees can simply ask for any stolen product to be surrendered, but that is it and only then if the employee saw the merchandise being taken. According to RE[Redacted], these policies are enforced because there was nothing in Employer's stores that is worth the risk of suffering physical injury to recover.

8. RE[Redacted] testified that theft deterrence training involves instruction where employees are provided with suggestions/techniques on how to detect and manage shoplifters. The training includes keeping an eye on suspected thieves, walking around the store, greeting the customer and asking if they need help - basically practices that passively deter theft. The training stresses the importance of observation and monitoring of suspected shoplifters and prohibits employees from physically confronting, detaining or searching them. Training is provided by online computer

[1] Respondents filed a medical benefits only General Admission of Liability (GAL) on October 24, 2023. (CHE 2, p. 9). Respondents subsequently filed a GAL admitting to lost wage benefits on February 6, 2024. (CHE 1, p. 3; RHE B, p. 7). This admission claimed an asserted safety rule violation pursuant to C.R.S. § 8-42-112 and reduced Claimant's temporary total disability (TTD) benefits by 50%.

programs and employees have to acknowledge that they have reviewed the online materials and watched the training video. After acknowledging that they have reviewed the materials and completed the online training, employees process a certificate for printout from their computer. The certificate cannot be processed until the aforementioned acknowledgement is confirmed.

9. RE[Redacted] acknowledged that Claimant was injured on September 15, 2023 and that the incident leading to her injury was captured on video tape and reported by other employees. RE[Redacted] testified that she reviewed the video in question. According to RE[Redacted], the video tape depicted "one lady shoplifting and the doors were being held shut and they wouldn't let her out"; however, the video tape was not introduced into evidence. Consequently, RE[Redacted] testimony regarding what is depicted on the video tape cannot be corroborated.

10. RE[Redacted] submitted that by holding the door closed, which prevented the shoplifter in the store from leaving, Claimant failed to follow Employer's written policies/procedures because she effectively detained a suspected shoplifter in the store. RE[Redacted] testified that violating Employer's theft prevention policies after suspected shoplifting occurs could lead to disciplinary action; including termination and that, these policies are conscientiously enforced.

11. RE[Redacted] testified that she did not know who approached the shoplifters first, but an investigation into the matter established that FN[Redacted], Claimant and two other employees, i.e. [Redacted, hereinafter CS] and [Redacted, hereinafter JN] (last name unknown) detained a suspected shoplifter in the store. Following the investigation into the matter, all involved were deemed to have violated company policy. Accordingly, RE[Redacted] testified that FN[Redacted], CS[Redacted] and JN[Redacted] were terminated. In contrast, RE[Redacted] testified that Claimant has not been terminated because she has not been back to the store since she is "out on workers compensation."

Claimant's Testimony

12. Claimant testified that she was injured on September 15, 2023. She added that she tried to return to work on September 18, 2023, but that it was "too much" for her so she returned to her physician and "has not been back to work since", i.e. not since 9/18/2023.

13. During her testimony, Claimant emphasized the abrupt nature of the confrontation with the alleged shoplifters after her manager was informed about the suspected theft. Indeed, Claimant testified that everything happened so fast she barely noticed that both FN[Redacted] and the shoplifter inside the store were behind her as she held the doors shut to keep the other suspect outside. Because her manager was telling the suspect inside the store she could not leave, Claimant testified she "did not let go of the door." Although FN[Redacted] did not specifically say so, Claimant inferred that he wanted her to continue holding the door shut because he did not want the

suspect to leave the store.[2] Regardless, Claimant made it clear that in addition to keeping a perpetrator outside, she had consciously decided to help her manager keep the other shoplifter inside the store. Indeed, Claimant testified: "He's my boss, my manager – if he says they're not leaving, they're not leaving.

14. During additional questioning, Claimant testified that FN[Redacted] made initial contact with the suspects and that the entire confrontation was caught on video tape. Contrary to RE[Redacted] testimony, Claimant testified that the video tape shows her holding the door shut to keep one shoplifter from reentering the store. As noted, neither party submitted the video tape to the ALJ for review. Based upon the evidence presented, the ALJ is convinced that the melee leading to Claimant's injury ensued immediately after FN[Redacted] confronted the suspects and Claimant intentionally decided to hold the doors of the store shut. The evidence presented also supports a finding that the violence associated with this incident escalated rapidly and that Claimant was probably kicked on the knee by the suspect inside the store as she fought to exit the premises.

15. Claimant testified to her understanding of the policy at issue. According to Claimant, she understood that persons observed to be shoplifting could be stopped in the store. Claimant added that if a shoplifter left the store with stolen goods, they could not be chased once outside the store. In short, Claimant claimed she understood Employer's policies permitted store personnel to confront and hold shoplifters caught in the store but any shoplifter who managed to leave the store could not be pursued.

16. During cross-examination, Claimant testified that she did not recall receiving a physical copy of Employer's handbooks. After it was pointed out that she would have reviewed these materials on the computer, Claimant acknowledged receiving and reading the employee handbooks. Claimant also admitted that she completed the online theft deterrence course addressing Employer's policies regarding shoplifting. Indeed, the evidence presented supports a finding that Claimant acknowledged that she completed the following training and received/read the following materials:

- RTO Robbery Deterrence Training, completed and certified by [Redacted, hereinafter SR], Director of Retail Training on July 10, 2023;
- Team Member Policy and Procedure Handbook 2023, as acknowledged on July 14, 2023;
- Retail Team Member Operations Manual 2023, as acknowledged on July 14, 2023.

[2] RE[Redacted] suggested that even if FN[Redacted] had specifically instructed Claimant to hold the door shut, doing so would be a violation of the safety rules because employees are not supposed to follow any directive of their managers that violates company policy.

(RHE C, pp. 16-18).

17. While Claimant acknowledged that she successfully completed Employer's theft deterrence training and fully understood the "policies, rules and procedures" contained in the employee handbooks, she testified that she did not recall the specifics of that training or the aforementioned manuals.

Employer's Shoplifting Prevention Policies

18. As noted above, Employer has adopted a Retail Operations Manual that contains information about shoplifting prevention techniques and procedures to follow in the event that theft occurs. (RHE C, pp. 10-11). The manual provides:

- Never fight, argue, or attempt to physically search or detain a suspected shoplifter.

- If you suspect that someone is a shoplifter, do NOT attempt to accuse them of shoplifting or try to detain them. You may try to deter them by using the shoplifting prevention techniques described above.

- If you suspect a person has stolen merchandise, write down their description, an itemized list of the products believed to be stolen, a vehicle description and a license plate number, and other details that might be helpful. Give the information to the Store Manager or District Manager.

- **NEVER UNDER ANY CIRCUMSTANCES ATTEMPT TO PHYSICALLY DETAIN, CHASE, SEARCH OR ASK TO SEARCH THE SHOPLIFTER.**

- Do not initiate a criminal complaint against a shoplifter without first discussing the situation with your Store Manager, District Manager, or Retail Asset Protection.

- **ABOVE ALL ELSE, NEVER RISK YOUR OWN SAFETY!**

(RHE C, p. 11)(Emphasis in original).

19. The evidence presented supports a finding that Employer has adopted safety rules regarding interactions with suspected shoplifters. The ALJ finds these rules reasonable and intended to promote/protect the safety of Employer's staff. Employer's shoplifting policies specifically provide, in relevant part, that employees should never fight, argue (with), search, chase or under "**ANY CIRCUMSTANCES ATTEMPT TO PHYSICALLY DETAIN**" a suspected shoplifter (emphasis in original). RE[Redacted] persuasively testified that Employer's shoplifting policies emphasize passive deterrence based on observation and monitoring and prohibit employees from any kind of

confrontation with shoplifters. RE[Redacted] testified that these policies/rules are imparted to employees through online training and required review of Employer's operations (policies/procedures) manuals that are also kept online. Furthermore, RE[Redacted] testified that these policies/rules are diligently enforced.[3] Based upon the evidence presented, the ALJ finds Employer's safety rules to be clear, concise, definite, unambiguous and non-conflicting.

CONCLUSIONS OF LAW

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

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

B. Section 8-42-112(1)(b), C.R.S. 2023, provides for a 50% reduction in compensation benefits if an employee is injured due to his/her willful failure to obey any reasonable safety rule adopted by the employer for the safety of the employee. The term "willful" connotes deliberate intent. See *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App 1990). Mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968). Respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995); *Johnson v. Denver Tramway Corp.*, 171 P.2d 410, 414(Colo.1946).

C. The elements of proving a violation under C.R.S. § 8-42-112(1)(b) include the following: 1). There must be a safety rule adopted by the employer. 2). The safety rule must be reasonable. 3). The safety rule must be known by the employee, i.e. "brought home" to the employee, and diligently enforced. *Pacific Employers Insurance Co. v Kirkpatrick*, 111 Colo. 470, 143 P.2d 267 (Colo. 1943). 4.) The meaning and content of the safety rule must be specific, unambiguous and definite, clear and non-conflicting. *Butland v. Industrial Claim Appeal Office*, 754 P.2d 422 (Colo. App 1988). 5). It is Respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule." *Horton v. JBS Swift and Company*, W.C. No. 4-779-078 (2010); *Strait v. Russell Stover Candies*, W.C. No. 4-843-592 (2011). The question of whether the respondents carried the burden of proof

[3] The record supports a finding that Employer enforces its safety rules as evidenced by the fact that FN[Redacted] along with two other employees involved in the incident with Claimant were terminated following an investigation, which supported a finding that they violated company policy by confronting and detaining a suspected shoplifter inside the store while waiting for the police to arrive.

was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990).

D. After careful consideration of the evidence presented, the ALJ concludes that Respondents have established that it is more probably true than not that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. during her interaction with two suspected shoplifters on September 15, 2023. The willful violation of a safety rule may be established without direct evidence of the claimant's state of mind at the time of the injury because "it is a rare case where the claimant admits that the conduct was the product of a willful violation of the employer's rule." *Gargano v. Metro Wastewater Reclamation District*, W.C. No. 4-335-104 (ICAO, Feb. 19, 1999). Instead, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Indus. Comm'n*, 165 Colo. 135, 437 P.2d 548, 550 (1968); *Miller v. City and County of Denver*. W.C. No. 4-658-496 (ICAO, Aug. 31, 2006). Here, Claimant's testimony and the balance of the persuasive evidence reflects that Claimant consciously considered her managers command to the suspect inside the store that she was not allowed to leave the store. Moreover, the evidence presented supports a conclusion that Claimant, independently and purposefully, acted upon this directive by refusing to let go of the doors so this suspect could depart.

E. Based upon the evidence presented, the ALJ is convinced that Claimant's actions were not simply impulsive, thoughtless (careless) or instinctive in nature. To the contrary, the evidence presented supports a conclusion that Claimant's actions were deliberately calculated to keep, i.e. detain the suspect inside the store until the police arrived. The ALJ is convinced that had Claimant simply allowed the suspect to leave the store, she probably would not have been injured, as it is likely that the second suspect was returning to the store in a determined effort to assist her accomplice escape her detention. Claimant's actions and subsequent injury demonstrate the basis for Employer's adoption of the above referenced theft deterrence policies. Indeed, the ALJ is convinced that the aforementioned policies exist to prevent the hazards associated with interactions involving shoplifters like that perpetuated by Claimant on September 15, 2023. Based upon the evidence presented, the ALJ is convinced that the policy barring employee's from detaining suspected shoplifters is both reasonable and designed to prevent the type of violent injury Claimant sustained by fighting to keep a suspected shoplifter from leaving the store. In short, the policy is specifically tailored for the safety of the employees working in Employer's stores. In this case, the ALJ is convinced that Claimant's injury and need for medical treatment arose out of her willful failure to obey Employer's prohibition against detaining shoplifters.

F. While Claimant testified that she did not recall Employer's shoplifting prevention rules, Employer's computer training records reflect that Claimant successfully completed Employer's RTO Robbery Deterrence course. She also acknowledged receiving and fully understanding the "rules, policies and procedures"

contained in Employer's Handbook as well as the Retail Team Members Operations Manual. Indeed, Claimant verified through her e-signature that she reviewed and understood these materials on July 14, 2023. The e-signature showing completion of the training/manual review required Claimant to log on to the system using her personal employee information and RE[Redacted] verified that the training certificate can only be processed after completing the training or reviewing the handbook/operations manuals. Despite Claimant's testimony, the record contains substantial evidence to support a conclusion that Employer's shoplifting policies/rules were sufficiently "brought home" to her and that she was aware of Employer's shoplifting guidelines. Nonetheless, Claimant deliberately detained a suspected shoplifter despite the obvious danger presented by holding the doors to the store shut and preventing the suspect from exiting the store. Claimant's suggestion that she could not recall the shoplifting prevention rules and that she had a fundamental misunderstanding of the policy in question is unpersuasive. The more persuasive evidence supports a conclusion that Claimant was probably aware of the policy against detaining shoplifters through her training and review of the operations manuals only two months prior and that she simply chose to violate the rule by holding the doors to the store shut because she heard her supervisor say the suspect could not leave. Claimant's suggestion that "she was not thinking about any policies when she was thrust into a chaotic situation due to the actions of her manager" is also unpersuasive because Claimant testified that her actions were calculated and intended to further the suspect's detention. As noted, Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alvarado,* W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* Finally, any suggestion that Claimant had a "plausible purpose" to explain her violation of Employer's rules against detaining shoplifters because she was following a directive of her supervisor to keep the suspect in the store is equally unconvincing. Generally, an employee's violation of a safety rule in an attempt to facilitate accomplishment of an employer's business or the employee's job-related tasks does not constitute willful misconduct. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1995); *Kaycene Hulbert v. Dillon Companies, Inc*., W.C. 4-330-587 (ICAO, March 20, 1998). Here however, Claimant's violation of the cited rule served no legitimate business purpose. Indeed, the violation did not further Employer's business related functions nor did it touch upon Claimant's required duties as a customer service representative. Rather, Claimant's actions were undertaken solely to detain a suspected shoplifter in the store, which is in direct contravention of Employer's theft deterrent policies.

G. Based upon the evidence presented, Respondent has satisfied its burden of proof to establish that Claimant acted with deliberate intent in violating Employer's adopted safety rules regarding interactions with suspected shoplifters. Under the circumstances, Claimant's purposeful detention of a suspected shoplifter by holding the doors to the store shut as the suspect attempted to exit directly violated Employer's unambiguous, definite and reasonable safety rule regarding theft prevention. As found, the ALJ is convinced that the rule against detaining suspected shoplifters is reasonable and was known to Claimant. Moreover, the evidence presented persuades the ALJ that the rule in question is clear, concise, unambiguous, non-conflicting and that Employer

uniformly and diligently enforces the rule against detaining suspected shoplifters. In this case, Claimant's conscious decision to hold the doors shut to prevent a suspected shoplifter inside the store from leaving detained the suspect and lead directly to the confrontation giving rise to her injuries. In other words, Claimant's willful failure to obey Employer's reasonable safety rule regarding detention of suspected shoplifters was the direct cause of her left knee injury and need for medical treatment. Because Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on September 15, 2023, the ALJ concludes that her non-medical benefits should be reduced by fifty percent.

ORDER

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

1. Respondents have proven, by a preponderance of the evidence, that Claimant willfully failed to obey a reasonable safety rule in violation of §8-42-112(1)(b) C.R.S. on September 15, 2023. Accordingly, Respondents are entitled to reduce Claimant's non-medical benefits by fifty percent.

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

DATED: June 17, 2024

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

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

301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at https://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-238-880-001

ISSUES

- Did Respondents overcome the DIME's determination that the Claimant is not at MMI by clear and convincing evidence?
- In the event that Respondents overcame the determination that the Claimant is not at MMI, the amount of permanent impairment.
- Did Claimant prove by a preponderance of the evidence that he is entitled to medical treatment including shoulder treatment?

FINDINGS OF FACT

1. Claimant is a garage door installer. Claimant performed this kind of work for 20 years.

2. Claimant suffered admitted injury to his left shoulder while lifting a garage door section, made of glass, weighing approximately 100 to 200 pounds. He and a co-worker were lifting it into place for an installation.

3. Claimant received treatment at Concentra beginning on October 4, 2022. Claimant was initially seen by Physician's Assistant, (P.A.) Caroline Henne. Claimant was diagnosed with a strain of his left shoulder. Physical therapy and medication were ordered. Ms. Henne also noted a history of prior rotator cuff tear in the right shoulder.

4. Claimant started physical therapy on October 4, 2022, with physical therapist Nayla Alhajri, also at Concentra.

5. Claimant followed up with Nurse Practitioner Livingston on October 10, 2022. She noted that the Claimant felt a little better and was doing physical therapy with his nephew, who was a physical therapist. Claimant was able to move his shoulder up and little better. He had no numbness or tingling in his hand or fingers. A toradol injection was ordered, but it is unclear as to whether Clamant was given that injection.

6. On November 9, 2022, Claimant returned to Nurse Livingston. Claimant reported that the shoulder felt much better. He still had tenderness with certain movements but had full range of motion. The Claimant was released from care. He was returned to full duty work and placed at MMI without impairment.

7. Claimant had a MRI on March 29, 2023 at St. Mary Corwin Hospital. The MRI showed abnormalities with a large rotator cuff tear with fatty infiltration. There was also posterior subluxation of the glenoid and severe glenohumeral degeneration.

8. Dr. Culbertson reviewed the MRI findings on April 17, 2023 and made a referral to orthopedic surgery.

9. Claimant was seen by Dr. Caughfield, the Division Sponsored IME on December 12, 2023. Dr. Caughfield determined that the Claimant was not at MMI. He recommended a reverse total shoulder surgery. As to causation, Dr. Caughfield reasoned that since he was a manual laborer, it was unlikely that the rotator cuff tear was present prior to his injury of October 3, 2022. He also ruled out any injury subsequent to being placed at MMI. He states "Therefore, his current pain and loss of shoulder motion is more likely than not related to the work injury of 10/3/2022". As required, Dr. Caughfield provided a provisional rating of 14% of the upper extremity.

10. Subsequent to the DIME, Claimant was referred to Dr. Ciccone for an independent medical evaluation. After review of the medical records, taking a history and performing an examination, it was Dr. Ciccone's opinion that the Claimant's work injury was limited to a strain and did not cause the underlying degenerative condition, including the documented rotator cuff tear.

11. Part of Dr. Ciccone's analysis was based on medical records that were not reviewed by Dr. Caughfield. In his deposition testimony, Dr. Ciccone references a note wherein the note talks about a massive rotator cuff tear in the left shoulder. This was apparently in 2014.

12. In addition to his testimony, Dr. Ciccone also authored a report dated February 14, 2024. According to his report, the records he reviewed included an ER visit in January 11, 2021 that documented a past medical history consistent with rotator cuff rupture of the left shoulder. They also included visits in July and August of 2022 where he complained of left arm and shoulder pain and numbness. An orthopedic referral was discussed. However, Dr. Culbertson noted in the August 2, 2022 note that the symptoms in the shoulder were mild and improving.

CONCLUSIONS OF LAW

A. Burden of proof

Respondents must overcome the DIME's determination that the Claimant is not at MMI by clear and convincing evidence. This is based on his determination that the right shoulder needs further evaluation and treatment that is related to the work injury.

B. Respondent did not overcome the DIME determination that the Claimant is not at MMI.

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

Here it is clear that the treating medical providers and Dr. Ciccone's opinions that the need for shoulder surgery was not caused by the work injury. Both Dr. Ciccone and Nurse Livingston are of the opinion that Claimant's injury was limited to a shoulder strain and that the Claimant was appropriately placed at maximum medical improvement on November 9, 2022. Although these opinions create some doubt regarding Dr. Caufield's determination that the Claimant is not at MMI, they do not rise to the level that he is clearly incorrect as is required to overcome a DIME opinion as to MMI. As such, the Respondents have failed to overcome the DIME by the applicable standard of proof, namely clear and convincing evidence.

ORDER

It is therefore ordered that:

1. Respondents' request to overcome the DIME's determination that the Claimant is not at MMI is denied and dismissed.

2. The Claimant is entitled to medical treatment to cure and relieve his left shoulder condition.

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

DATED: June 18, 2024

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-207-925-001

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Douglas C. Scott, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) for his May 22, 2022 lower back injury.

2. Whether Claimant has proven by a preponderance of the evidence that the L4-L5 discectomy recommended by Michael J. Rauzzino, M.D. constitutes reasonable, necessary and causally related medical treatment to cure and relieve the effects of his May 22, 2022 lower back injury.

FINDINGS OF FACT

1. Claimant is a 53-year old male who worked as a Deputy Sheriff for Employer. On May 22, 2022 Claimant responded to a king-sized mattress obstructing I-25 in the middle lane. He dragged the mattress across three lanes of traffic. While bending down to push the mattress over a guardrail, he experienced a pop and hot pain in his lower back.

2. Claimant immediately presented to the emergency room. He was diagnosed with a muscle strain.

3. On May 23, 2022 Claimant began medical care with Authorized Treating Physician (ATP) Barry Nelson, D.O. at Concentra Medical Centers. Dr. Nelson diagnosed Claimant with a lumbar strain and sacroiliac (SI) joint dysfunction.

4. On May 23, 2022 Claimant also underwent an MRI of his lumbar spine. The imaging showed a right-sided, broad-based disc protrusion, at L4-L5. There was contact with the L5 transiting nerve root in the right lateral recess.

5. Dr. Nelson referred Claimant to Michael J. Rauzzino, M.D. On June 1, 2022 Dr. Rauzzino provided a surgical evaluation and recommended ongoing conservative care.

6. Dr. Nelson also referred Claimant to physiatrist John T. Sacha, M.D. On June 1, 2022 Dr. Sacha diagnosed Claimant with a lumbar radiculopathy. He recommended an L4-L5 transforaminal epidural injection/spinal block, continued physical therapy and medications.

7. On June 21, 2022 Dr. Sacha proceeded with bilateral L4-L5 transforaminal epidural injections/spinal blocks with fluoroscopic guidance and conscious sedation.

Claimant experienced a diagnostic response, with no lasting relief. Dr. Sacha repeated the lumbar epidural in Claimant's left side, but the injection failed to provide relief.

8. On August 31, 2022 John Aschberger, M.D. at Concentra performed EMG testing. He found a lumbar strain, with some symptoms of radiculitis, but a physical examination was not supportive of a radicular process. Dr. Aschberger noted "[a]bnormal potentials were identified in the lumbar paraspinal musculature bilateral, corresponding to L4 and L5, right worse than left." He commented that the findings implicated axonopathy and were supportive of radiculopathy. Dr. Ashberger concluded that further clinical correlation was required.

9. Based on the EMG testing, Dr. Sacha recommended an L4-L5 laminectomy and discectomy. He subsequently maintained that the laminectomy and discectomy was the best option, but stated that fusion surgery was not unreasonable or outside the Colorado Division of Workers' Compensation Medical Treatment Guidelines (MTGs).

10. On October 11, 2022 Dr. Rauzzino suggested fusion surgery to address Claimant's nerve pain and stabilize his spine. Dr. Rauzzino specifically found Claimant had maximized his conservative treatment and noted that Dr. Sacha agreed.

11. On October 18, 2022 B. Andrew Castro, M.D. performed a records review. Dr. Castro noted intermittent radicular complaints, a positive EMG as well as the disc bulge at the L4-L5 level on MRI. After considering Claimant's medical records, he assessed Claimant with an L5 lumbar radiculopathy. However, he determined that Dr. Rauzzino's request for surgery should be denied because a more appropriate procedure was a simple microdiscectomy and decompression at the L4-L5 level.

12. Dr. Nelson referred Claimant to Stephen Pehler, M.D. for a third surgical opinion. In his report dated December 16, 2022, Dr. Pehler noted, "[t]here is significant compression of his existing L4 nerve root and of his descending L5 nerve root on the right-hand side." He agreed with Dr. Rauzzino that a decompression/fusion was the correct procedure.

13. Claimant asked Dr. Sacha to release him from care so he could proceed with a Division Independent Medical Examination (DIME). On March 29, 2023 Dr. Sacha determined Claimant had reached Maximum Medical Improvement (MMI) and issued a 13% impairment rating for a herniated disc and range of motion deficits. He noted a diagnosis of lumbar radiculopathy and lumbar spinal stenosis.

14. On April 17, 2023 Dr. Nelson determined Claimant had reached MMI with a 13% whole person impairment rating. He released Claimant to return to work without restrictions.

15. On May 2, 2023 Respondents filed a Final Admission of Liability (FAL) acknowledging that Claimant had reached MMI on April 17, 2023 with a 13% whole

person impairment rating based on Dr. Nelson's report. The document also admitted Claimant was entitled to receive medical maintenance benefits.

16. On May 22, 2023 Claimant underwent an Independent Medical Examination (IME) with L. Barton Goldman, M.D. Dr. Goldman diagnosed Claimant with a chronic lumbosacral strain with SI regional dysfunction perpetuated by core deconditioning that was likely mild secondary to L4-S1 facet dysfunction. He also noted symptoms suggestive of mild intermittent right S1 radiculitis. Dr. Goldman determined Claimant had not reached MMI and suggested repeat electro-diagnostics for both lower limbs to pinpoint Claimant's pain generators. He did not recommend surgical intervention. Dr. Goldman suggested repeat EMG testing by Dr. Aschberger and noted a psychological evaluation was also necessary.

17. Claimant underwent a DIME with Douglas C. Scott, M.D. on September 6, 2023. Dr. Scott assessed Claimant with a resolved lumbar strain. He also noted non-work related lumbar spondylosis and facet arthrosis. Because Dr. Scott was unsure of Claimant's diagnosis, he did not place Claimant at MMI. He declined to render an opinion regarding the proposed surgery, but provided the following recommendations: laboratory studies to rule out inflammatory spondyloaropathy; referral to a rheumatologist to review lab studies and imaging; continued therapy as suggested by Dr. Goldman; and a psychological evaluation if surgery was authorized. He also commented that Claimant's condition had worsened since Dr. Sacha had placed him at MMI on March 29, 2023. Dr. Scott did not specify an impairment rating because there had not been a specific diagnosis and no objective pathology had been identified.

18. Dr. Scott subsequently received an Incomplete Notice from the DIME Unit of the DOWC. He was advised to clarify further treatment necessary for Claimant to reach MMI and provide a provisional impairment rating. In response to the Incomplete Notice, Dr. Scott assigned a provisional 13% whole person impairment rating for Claimant's lumbar spine. He did not change any of his treatment recommendations and maintained that Claimant had not reached MMI.

19. On January 16, 2024 Brent Van Dorsten, Ph.D. concluded that "[f]rom a behavioral standpoint, and according to published risk factors for functional outcome associated with lumbar surgery or spinal stimulation treatment, [Claimant] would initially be considered a good medical and psychological candidate to produce functional improvement with lumbar surgery."

20. Dr. Rauzzino's most recent request for surgery on February 27, 2024 was for an L4-L5 discectomy. He determined it was in Claimant's best interest to obtain surgical authorization even if it was not the originally requested discectomy and fusion. Insurer denied the surgical request based on the IME report of Dr. Goldman.

21. Dr. Scott testified at the hearing in this matter. He remarked that Claimant's reason for requesting the DIME was to obtain an opinion concerning the proposed one-level lumbar fusion to improve his function and decrease his pain. However, Dr. Scott

acknowledged that the issue was outside his area of expertise and he was not qualified to determine the appropriate surgery to address Claimant's lower back condition. Moreover, he was uncertain whether Claimant required surgical intervention. Dr. Scott maintained Claimant had not reached MMI because he was uncertain whether Claimant had an appropriate diagnosis. Moreover, Dr. Scott agreed with Dr. Goldman that Claimant required additional conservative treatment.

22. Dr. Goldman testified at the hearing and through a post-hearing evidentiary deposition on May 24, 2024. Addressing the DIME, Dr. Goldman explained that Dr. Scott's failure to perform his own examination and measurements were inconsistent with the Level II training course and did not meet the standards of the MTGs. He explained that, because Claimant was not a surgical candidate and was not enthusiastic about a progressive rehabilitation program, he had reached MMI.

23. Dr. Goldman also disagreed with Dr. Sacha and Dr. Rauzzino that Claimant had an L5 radiculopathy because Claimant's EMG and pain diagrams revealed an S1 distribution. Thus, a single level fusion was unlikely to solve Claimant's problems. Dr. Goldman stressed the need for a bilateral lower extremity electro-diagnostic evaluation to determine the pain generator prior to any surgery.

24. Dr. Goldman further explained that considering Claimant's other issues of degenerative scoliosis and retrolisthesis, as well as the uncertainty of a pain generator, the rate of failure in a fusion surgery increases to over 50%. He determined Claimant requires at least one or two rounds of progressive physical therapy in the form of the egoscue program. He did not believe Claimant's condition had changed since Dr. Sacha determined he had reached MMI. Dr. Goldman ultimately diagnosed Claimant with a predominately-muscular, myogenic lumbosacral strain impacting an underlying spinal pathology that was not work-related. He reasoned that, if Claimant or his providers did not support extensive rehabilitation, he had reached MMI.

25. On May 20, 2024 Dr. Rauzzino testified though an evidentiary deposition. He explained that Claimant exhibited clear, objective evidence of a right L5 radiculopathy. Claimant had a positive L5 radiculopathy on examination. Dr. Rauzzino also identified serial imaging that showed the disc protrusion compressing the L5 nerve root. Moreover, Claimant had a positive EMG that revealed injury to the right L5 nerve. Because Claimant's work-related disc herniation caused compression of the exiting L5 nerve root, he suffered from an L4-L5 radiculopathy. Dr. Rauzzino commented that he changed his surgical recommendation from an L4-L5 decompression and fusion to simply a L4-L5 decompression. He explained that an L4-L5 decompression was not has preferred surgery, but other physicians believed the procedure was reasonable and his initial request had been denied. An L4-L5 decompression would at least provide Claimant with some relief.

26. Dr. Rauzzino acknowledged that any L4-L5 nerve compression existed prior to the injury based on the size of the facet that would have caused the compression. However, Dr. Rauzzino maintained that the fusion was necessary because, in order to

repair Claimant's work-related disc herniation, he had to address his pre-existing nerve compression. He emphasized that Claimant's disc herniation produced 100% of Claimant's symptoms and required surgery.

27. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott that Claimant has not reached MMI for his May 22, 2022 lower back injury. Initially, on May 22, 2022 Claimant suffered a lumbar strain while working for Employer. He received conservative treatment including physical therapy, injections and medications through ATP Concentra. On October 11, 2022 Dr. Rauzzino recommended fusion surgery to address Claimant's nerve pain and stabilize his spine. He specifically found Claimant had maximized his conservative treatment. Because other surgeons disagreed with Dr. Rauzzino about appropriate surgical intervention, Insurer denied Dr. Rauzzino's request. Claimant thus requested that Dr. Sacha release him from care so he could proceed with a DIME. On March 29, 2023 Dr. Sacha determined Claimant had reached MMI and issued a 13% impairment rating for a herniated disc and range of motion deficits. He noted a diagnosis of lumbar radiculopathy and lumbar spinal stenosis. On April 17, 2023 Dr. Nelson agreed Claimant had reached MMI with a 13% whole person impairment rating. On May 22, 2023 Claimant underwent an IME with Dr. Goldman. He determined Claimant had not reached MMI and suggested repeat electro-diagnostics for both lower limbs to pinpoint Claimant's pain generators.

28. On September 6, 2023 DIME Dr. Scott assessed Claimant with a resolved lumbar strain. He also noted non-work-related lumbar spondylosis and facet arthrosis. Because Dr. Scott was unsure of Claimant's diagnosis, he did not place Claimant at MMI. He declined to render an opinion regarding the proposed surgery and enumerated the following diagnostic testing and treatment that would be necessary before placing Claimant at MMI: laboratory studies to rule out inflammatory spondyloaropathy; referral to a rheumatologist to review lab studies and imaging; therapy as suggested by Dr. Goldman; and a psychological evaluation if surgery was authorized. He also commented that Claimant's condition had worsened since Dr. Sacha placed him at MMI on March 29, 2023.

29. In contrast, Dr. Goldman testified that Dr. Scott's failure to perform his own examination and measurements were inconsistent with the Level II training course and did not meet the standards of the MTGs. He explained that, because Claimant was not a surgical candidate and was not enthusiastic about a progressive rehabilitation program, he had reached MMI. Dr. Goldman specified Claimant requires at least one or two rounds of progressive physical therapy in the form of the egoscue program. He also did not believe Claimant's condition had changed since Dr. Sacha determined he had reached MMI. Dr. Goldman concluded that, if Claimant or his providers did not support extensive rehabilitation, he has reached MMI.

30. Despite Dr. Goldman's opinion, Respondents have failed to demonstrate that it is highly probable that Dr. Scott's determination that Claimant has not reached MMI is incorrect. After Dr. Scott reviewed Claimant's medical records and conducted a physical examination, he was unsure of a diagnosis and commented that Claimant's condition had

worsened since reaching MMI. Dr. Scott also enumerated the additional diagnostic testing and treatment that was necessary before he placed Claimant at MMI. Although Dr. Goldman was critical of Dr. Scott's MMI determination, his comments constitute a mere difference of opinion. Dr. Goldman did not explain that Claimant's underlying condition causing the disability had become stable and no additional treatment would improve his condition. He failed to identify unmistakable evidence free from serious or substantial doubt that Dr. Scott's "not-at-MMI" determination was clearly erroneous. Accordingly, Claimant has not reached MMI for his May 22, 2022 lumbar spine injury.

31. Claimant has proven it is more probably true than not that the L4-L5 discectomy recommended by Dr. Rauzzino constitutes reasonable, necessary and causally related medical treatment to cure and relieve the effects of his May 22, 2022 lower back injury. All of Claimant's treating physicians, including Drs. Nelson, Sacha, Rauzzino, Aschberger, and Pehler believe that Claimant suffers from a radiculopathy as a result of his industrial injury. Notably, Dr. Rauzzino detailed that Claimant exhibited clear, objective evidence of a right L5 radiculopathy. Claimant had a positive L5 radiculopathy on examination. Dr. Rauzzino also identified serial imaging that showed a disc protrusion compressing the L5 nerve root. Moreover, Claimant had a positive EMG that revealed injury to the right L5 nerve. Because Claimant's work-related disc herniation caused compression of the exiting L5 nerve root, he suffers from an L4-L5 radiculopathy. Similarly, Dr. Castro noted intermittent radicular complaints, a positive EMG, and the disc bulge at L4-L5 on MRI. He assessed Claimant with an L5 lumbar radiculopathy. Finally, Dr. Pehler noted, "[t]here is significant compression of his exiting L4 nerve root and of his descending L5 nerve root on the right-hand side."

32. All three surgeons who have examined or evaluated Claimant believe he is a surgical candidate. The only debate between the surgeons was the extent of the surgical procedure. Dr. Rauzzino originally sought an L4-L5 decompression and fusion. However, Dr. Castro determined that Dr. Rauzzino's request for surgery should be denied because a more appropriate surgery was a simple microdiscectomy and decompression procedure at the L4-L5 level. Dr. Pehler agreed with Dr. Rauzzino that a decompression/fusion was the correct procedure. Dr. Rauzzino has now requested a simple L4-L5 decompression. Although not his preferred procedure, other physicians agree the surgery is reasonable and his initial request had been denied. An L4-L5 decompression would at least provide Claimant with some relief.

33. In contrast, Dr. Goldman determined that Claimant was not a surgical candidate. He also disagreed with treating physicians that Claimant has an L5 radiculopathy because Claimant's EMG and pain diagrams reveal an S1 distribution. Thus, a single level fusion is unlikely to solve Claimant's problems. Dr. Goldman stressed the need for bilateral lower extremity electro-diagnostic evaluation to determine the pain generator prior to any surgery. Moreover, Dr. Goldman recommended at least one or two rounds of progressive physical therapy in the form of the egoscue program.

34. Despite Dr. Goldman's opinion, there is now no debate remaining among the surgeons that an L4-L5 decompression is an appropriate surgical procedure. The

proposed surgery is consistent with the MTGs. Claimant has also been evaluated with regard to his psychological fitness to undergo surgery and has been found to be a good medical and psychological candidate to produce functional improvement. Accordingly, an L4-L5 discectomy as recommended by Dr. Rauzzino constitutes reasonable, necessary and causally related medical treatment to cure and relieve the effects of Claimant's May 22, 2022 lower back injury.

CONCLUSIONS OF LAW

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

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

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

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Indus. Claim Appeals Off.,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment includes his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Indus. Claim Appeals Off.,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S. *See Yeutter v. Indus. Claim Appeals Off.*, 487 P.3d 1007, 1012 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical

examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Off.*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on causation is also entitled to presumptive weight. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

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

7. "Maximum medical improvement" means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and no further treatment is reasonably expected to improve the condition. §8-40-201(11.5), C.R.S. MMI represents the optimal point at which the permanency of a disability can be discerned and the extent of any resulting impairment can be measured. *Paint Connection Pul v. Indus. Claim Appeals Off.*, 240 P.3d 429 (Colo. App. 2010). MMI exists when the underlying condition causing the disability has become stable and no additional treatment will improve the condition. *Golden Age Manor v. Indus. Comm'n*, 716 P.2d 153 (Colo.App.1985).

8. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott that Claimant has not reached MMI for his May 22, 2022 lower back injury. Initially, on May 22, 2022 Claimant suffered a lumbar strain while working for Employer. He received conservative treatment including physical therapy, injections and medications through ATP Concentra. On October 11, 2022 Dr. Rauzzino recommended fusion surgery to address Claimant's nerve pain and stabilize his spine. He specifically found Claimant had maximized his conservative treatment. Because other surgeons disagreed with Dr. Rauzzino about appropriate surgical intervention, Insurer denied Dr. Rauzzino's request. Claimant thus requested that Dr. Sacha release him from care so he could proceed with a DIME. On March 29, 2023 Dr. Sacha determined Claimant had reached MMI and issued a 13% impairment rating for a herniated disc and range of motion deficits. He noted a diagnosis of lumbar radiculopathy and lumbar spinal stenosis. On April 17, 2023 Dr. Nelson agreed Claimant had reached MMI with a 13% whole person impairment rating. On May 22, 2023 Claimant underwent an IME with Dr. Goldman. He determined Claimant had not reached MMI and

suggested repeat electro-diagnostics for both lower limbs to pinpoint Claimant's pain generators.

9. As found, on September 6, 2023 DIME Dr. Scott assessed Claimant with a resolved lumbar strain. He also noted non-work related lumbar spondylosis and facet arthrosis. Because Dr. Scott was unsure of Claimant's diagnosis, he did not place Claimant at MMI. He declined to render an opinion regarding the proposed surgery and enumerated the following diagnostic testing and treatment that would be necessary before placing Claimant at MMI: laboratory studies to rule out inflammatory spondyloaropathy; referral to a rheumatologist to review lab studies and imaging; therapy as suggested by Dr. Goldman; and a psychological evaluation if surgery was authorized. He also commented that Claimant's condition had worsened since Dr. Sacha placed him at MMI on March 29, 2023.

10. As found, in contrast, Dr. Goldman testified that Dr. Scott's failure to perform his own examination and measurements were inconsistent with the Level II training course and did not meet the standards of the MTGs. He explained that, because Claimant was not a surgical candidate and was not enthusiastic about a progressive rehabilitation program, he had reached MMI. Dr. Goldman specified Claimant requires at least one or two rounds of progressive physical therapy in the form of the egoscue program. He also did not believe Claimant's condition had changed since Dr. Sacha determined he had reached MMI. Dr. Goldman concluded that, if Claimant or his providers did not support extensive rehabilitation, he has reached MMI.

11. As found, despite Dr. Goldman's opinion, Respondents have failed to demonstrate that it is highly probable that Dr. Scott's determination that Claimant has not reached MMI is incorrect. After Dr. Scott reviewed Claimant's medical records and conducted a physical examination, he was unsure of a diagnosis and commented that Claimant's condition had worsened since reaching MMI. Dr. Scott also enumerated the additional diagnostic testing and treatment that was necessary before he placed Claimant at MMI. Although Dr. Goldman was critical of Dr. Scott's MMI determination, his comments constitute a mere difference of opinion. Dr. Goldman did not explain that Claimant's underlying condition causing the disability had become stable and no additional treatment would improve his condition. He failed to identify unmistakable evidence free from serious or substantial doubt that Dr. Scott's "not-at-MMI" determination was clearly erroneous. Accordingly, Claimant has not reached MMI for his May 22, 2022 lumbar spine injury.

Surgical Intervention

12. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural

progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

13. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, 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).

14. As found, Claimant has proven by a preponderance of the evidence that the L4-L5 discectomy recommended by Dr. Rauzzino constitutes reasonable, necessary and causally related medical treatment to cure and relieve the effects of his May 22, 2022 lower back injury. All of Claimant's treating physicians, including Drs. Nelson, Sacha, Rauzzino, Aschberger, and Pehler believe that Claimant suffers from a radiculopathy as a result of his industrial injury. Notably, Dr. Rauzzino detailed that Claimant exhibited clear, objective evidence of a right L5 radiculopathy. Claimant had a positive L5 radiculopathy on examination. Dr. Rauzzino also identified serial imaging that showed a disc protrusion compressing the L5 nerve root. Moreover, Claimant had a positive EMG that revealed injury to the right L5 nerve. Because Claimant's work-related disc herniation caused compression of the exiting L5 nerve root, he suffers from an L4-L5 radiculopathy. Similarly, Dr. Castro noted intermittent radicular complaints, a positive EMG, and the disc bulge at L4-L5 on MRI. He assessed Claimant with an L5 lumbar radiculopathy. Finally, Dr. Pehler noted, "[t]here is significant compression of his exiting L4 nerve root and of his descending L5 nerve root on the right-hand side."

15. As found, all three surgeons who have examined or evaluated Claimant believe he is a surgical candidate. The only debate between the surgeons was the extent of the surgical procedure. Dr. Rauzzino originally sought an L4-L5 decompression and fusion. However, Dr. Castro determined that Dr. Rauzzino's request for surgery should be denied because a more appropriate surgery was a simple microdiscectomy and decompression procedure at the L4-L5 level. Dr. Pehler agreed with Dr. Rauzzino that a decompression/fusion was the correct procedure. Dr. Rauzzino has now requested a simple L4-L5 decompression. Although not his preferred procedure, other physicians agree the surgery is reasonable and his initial request had been denied. An L4-L5 decompression would at least provide Claimant with some relief.

16. As found, in contrast, Dr. Goldman determined that Claimant was not a surgical candidate. He also disagreed with treating physicians that Claimant had an L5 radiculopathy because Claimant's EMG and pain diagrams reveal an S1 distribution. Thus, a single level fusion is unlikely to solve Claimant's problems. Dr. Goldman stressed

the need for bilateral lower extremity electro-diagnostic evaluation to determine the pain generator prior to any surgery. Moreover, Dr. Goldman recommended at least one or two rounds of progressive physical therapy in the form of the egoscue program.

17. As found, despite Dr. Goldman's opinion, there is now no debate remaining among the surgeons that an L4-L5 decompression is an appropriate surgical procedure. The proposed surgery is consistent with the MTGs. Claimant has also been evaluated with regard to his psychological fitness to undergo surgery and has been found to be a good medical and psychological candidate to produce functional improvement. Accordingly, an L4-L5 discectomy as recommended by Dr. Rauzzino constitutes reasonable, necessary and causally related medical treatment to cure and relieve the effects of Claimant's May 22, 2022 lower back injury.

ORDER

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

1. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Scott that Claimant has not reached MMI for his May 22, 2022 lower back injury.

2. Respondents are financially responsible for Claimant's L4-L5 discectomy as recommended by ATP Dr. Rauzzino.

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 18, 2024.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-250-769-001

ISSUES

1. Whether Claimant sustained a compensable injury arising out of the course of her employment with Respondent on June 19, 2023.

2. Whether Claimant is entitled to temporary total and partial disability benefits.

3. Determination of Claimant's average weekly wage.

4. Whether Dr. Huser is an authorized treating physician (ATP).

FINDINGS OF FACT

1. Claimant works for Respondent as a corrections officer at the [Redacted, hereinafter SG] correctional facility. On June 19, 2023, Claimant was responding to a call involving an offender in his cell. As Claimant approached the cell, the offender threatened to throw a cup of bodily fluid at the Claimant. Claimant approached the cell door, and the offender threw a cup of liquid at Claimant through an opening. Claimant recorded the incident using a hand-held video camera near her upper chest. (Ex. 11). The video demonstrates that the offender threw a cup of liquid through an opening in the cell door, and that the liquid contacted Claimant. Claimant testified that she was splashed with the liquid, and some of it went into her mouth. Claimant also testified that when the offender threw the liquid, she turned her head "violently" to the right, resulting in pain in her neck. The video, however, is inconsistent with Claimant's testimony that she violently turned after being struck with the liquid.

Claimant's Pre-Existing Conditions and Medical Treatment

2. Claimant has a history of bilateral thoracic outlet syndrome (TOS) dating to at least 2016, and has also been diagnosed with complex regional pain syndrome (CRPS). . Claimant treated with multiple providers, including Stephen Annest, M.D. at Vascular Institute of the Rockies, and Giancarlo Barolat, M.D. at Health One. Claimant had undergone multiple surgeries and procedures for TOS, and taken multiple medications including muscle relaxers and pain medication.

3. On September 16, 2021, Claimant had a cervical MRI, which showed an asymmetric right-sided disc bulge at C4-5 which indented the ventral thecal sac. (Ex. C).

4. In March 2022, Dr. Annest and Dr. Barolat recommended Claimant receive neuromodulation (and later a spinal cord stimulator) to address her symptoms. As of June 19, 2023, the recommendation for a spinal cord stimulator (or other neurostimulation device) had not been approved by Claimant's health insurer, although Claimant's providers were attempting to obtain authorization for the procedure.

5. On April 13, 2023, Dr. Barolat described Claimant's symptoms as follows: "The patient is in constant pain. The pain is much worse on the right side than on the left side. The worse part of the pain is in the right upper trapezius area, basically at the junction of the neck with the shoulder. The second area of pain is in the right clavicular area. On the left side, she has pain also in the left upper trapezius area but not in the upper chest area. She also has occasional pain radiating into the upper extremities, but that is not the worse part of the pain." He further indicated that Claimant had "no tenderness to palpation over the posterior cervical area." (Ex. G).

6. At hearing, Claimant testified that her typical TOS symptoms are "very electrical and burning" and feels like a "hot rod that goes through my skin." She indicated that the injury she attributes to the June 19, 2023 incident felt like a "kink" in her neck, and is distinctly different than her TOS symptoms, and she can tell the difference between the symptoms.

7. At hearing, [Redacted, hereinafter KR], a lieutenant who supervised Claimant testified that before June 19, 2023, Claimant would take pain medication and volunteer to work in the facility's control center, which was considered an easier job duty.

Claimant's Post-June 19, 2023 Medical Treatment

8. Claimant reported the June 19, 2023 incident to Employer, was provided a list of designated providers, and selected Banner Health Sterling Regional Medical Center (Banner) as her ATP. (Ex. K, p. 359). Lt. KR[Redacted] testified that she did not witness the incident, but spent approximately one hour with the Claimant. During that time, Claimant appeared upset, but did not report neck pain, or appear to be in pain or have difficulty using her neck. Claimant and Lt. KR[Redacted] completed a First Report of Injury, in which Claimant wrote in blue ink "offender threw the unknown liquid in face." (Ex. K, p. 357).

9. On June 19, 2023, Claimant was seen at Banner Health for evaluation. She reported mild right-sided neck pain after twisting rapidly when the cup of liquid was thrown on her. She was diagnosed with a neck myofascial strain and exposure to bodily fluids. Claimant's blood was drawn for a medical screening for potential exposure to bodily fluids, and Claimant was discharged with a prescription for cyclobenzaprine for a neck strain. (Ex. 5). The testing protocol for potential exposure to bodily fluid required Claimant to have multiple blood tests taken over several weeks. No evidence was admitted that Claimant contracted any illness, injury, or disease as a result of the liquid thrown on her.

10. After returning from Banner, Claimant completed an Incident Report. (Ex. 3, p. 48). In the Incident Report, Claimant did not report any pain in her neck, and reported only that an unknown liquid was thrown in her face.

11. Over the following months, Claimant saw various providers at Banner for her diagnosed neck strain and bodily fluid exposure. Claimant's also saw other providers at Banner, as well as Dr. Barolat, and others, for her pre-existing conditions outside the

workers' compensation system. No credible evidence was admitted indicating that Claimant was referred to Dr. Barolat by an ATP.

12. On June 30, 2023, Claimant saw Aniecia Hicks, P.A at Banner for her workers' compensation claim. Claimant reported that the incident caused a "terrible flare" of her pre-existing conditions, and that she had been in "agonizing pain." She reported that she could not rotate her neck, and indicated she could not work in the control center because she could not rotate her neck, and could not work with offenders. She reported she was unable to move or lay down, and had intolerable pain. On examination, Claimant had moderate limitations in neck range of motion. Claimant released to return to work on modified duty, with a 2-pound lifting, carrying, pushing pulling restriction, limited gripping with her hands, no handling/manipulating offenders, and "preferably no control center." Claimant was instructed to continue taking cyclobenzaprine and using lidocaine patches, and over-the-counter Voltaren gel, and to follow up in one month. (Ex. A).

13. On July 14, 2023, Claimant saw Adrian Miranda, M.D., at the Banner emergency department and reported right-sided shoulder, back and chest wall pain, which she indicated were her chronic pain symptoms from TOS. On examination, Claimant was noted to have midline neck pain. She was discharged with prescriptions for cyclobenzaprine, Norco, and prednisone for general back and neck pain. (Ex. A). Claimant testified that the treatment she received on July 14, 2023 was unrelated to her alleged work injury.

14. On July 17, 2023, Claimant saw Vanston Masri, D.O., at Colorado Interventional Health Services on referral from Dr. Barolat for evaluation for neurostimulation. Claimant reported CRPS symptoms worse on her right side, including pain in the right upper trapezius, at the junction with the neck. Claimant also reported deep and burning neck pain going down the right arm and shoulder, into her right hand. Dr. Masri did not address Claimant's work-related conditions, and was not in the chain of referrals from Claimant's ATP. (Ex. H).

15. On July 26, 2023, Dr. Barolat ordered cervical and thoracic MRIs to further evaluate Claimant for a spinal cord stimulator, and unrelated to the June 19, 2023 incident.. (Ex. A & G).

16. On July 27, 2023, Claimant saw Ms. Hicks again at Banner for her workers' compensation claim, and evaluated for right sided neck pain, and reported experiencing a "crunching" in her neck which was different than her pre-existing symptoms. She indicated that the "crunching" started after she was provided steroids on July 14, 2023 for her TOS symptoms. On examination, Claimant was noted to have moderate limitations with cervical range of motion, and reported pain at a level of 9/10. Conservative treatment was recommended, including rest, moist heat/ice, Epsom salt bath soaks, cervical spine stretches and over the counter medications. Claimant's work restrictions were unchanged. Claimant was instructed to follow up in one month, and if she was not improved, a different muscle relaxer (other than cyclobenzaprine) would be considered. It was noted that physical therapy may not be an option due to Claimant's pre-existing conditions. (Ex. 5).

17. On August 16, 2023, Claimant had the cervical MRI ordered by Dr. Barolat. As relevant to the issues in this matter, the MRI showed an extruded disc at C4-5 lateralized to the right with effacement of the ventral spinal cord with neural foraminal encroachment on the right. (Ex. 5).

18. On August 17, 2023, Claimant returned to Banner and saw Nicole Suppes, NP for her workers' compensation claim, reporting continued neck symptoms, which had "loosened up a little." On examination, Claimant's neck was mildly tender to palpation, and she was experiencing neuropathy sensations. Claimant' reported that the prescribed muscle relaxers did not work, and she was given a trial prescription for nortriptyline. A referral was placed to "neuro spine" for further treatment recommendations. (Ex. A). (Later records indicate the referral was submitted to insurer on August 24, 2023 (Ex. 5)). Claimant was encouraged to sign medical record releases to evaluate if her prior MRI showed her current injuries, or if they were new and related to her worker's compensation claim. (Ex. A).

19. On August 22, 2023, Dr. Barolat reviewed Claimant's August 2023 MRI report and opined that Claimant had a C4-5 disc extrusion causing her neck symptoms, which was work-related. The record contains no information indicating that Dr. Barolat was aware of Claimant's September 16, 2021 MRI, or that Claimant's alleged mechanism of injury was limited to turning her head. (Ex. 5). Dr. Barolat offered no explanation as to how the Claimant turning her head in reaction to being doused with liquid was a sufficient mechanism to cause a disc extrusion.

20. On September 14, 2023, Dr. Barolat indicated that Claimant's spinal cord stimulator procedure would need to be postponed to address the disc extrusion at C4-5, and he recommended an epidural steroid injection to attempt to reduce the size of the extrusion. He further opined that "clearly the temporality of this disc extrusion and the new pain is directly related to an assault injury she suffered while at work, which had been evaluated as a neck sprain. Very likely, this herniation resulted from that injury, as symptomatology is concordant." (Ex. 5). Dr. Barolat's opinion that Claimant's C4-5 disc extrusion is causally-related to the June 19, 2023 work incident is not credible or persuasive, given that Claimant's September 16, 2021 MRI also showed a C4-5 disc bulge indenting the ventral thecal sac on the right.

21. On October 3, 2023, Claimant saw Ms. Suppes again at Banner for her workers compensation claim. On examination, Claimant had mild pain with flexion and left rotation of her neck, and moderate pain with extension. Ms. Suppes noted that Claimant had no pain with rotation to the right "if pressure applied to right neck." Claimant reported numbness and tingling radiating down her arms which she characterized as an "electrical sensation." It was also noted that Claimant's referral to "neuro spine" had not yet been authorized by Respondent. Claimant was prescribed Norco, and instructed to follow up in 2-3 weeks. (Ex. 5).

22. On October 19, 2023, Claimant saw Emily Lacount, D.O., at Banner for complaints of chronic pain in the cervical region and upper shoulders radiating into both arms, and intermittent swelling of the right arm. (Ex. A).

23. On October 26, 2023, Respondent filed a Notice of Contest, asserting that Claimant's injury was not work-related. (Ex. 1).

24. On October 27, 2023, Claimant returned to Banner and saw Catherine Egan, M.D. and Ms. Suppes. Claimant reported numbness and tingling in her right hand, and an electrical sensation down her arms, which Claimant characterized as new for her. She indicated that her neck would "freeze" at night, and she could not move it, although improved with medications. Claimant's previously issued work restrictions remained in place and were unchanged. Claimant was referred to Dr. Reichardt for further treatment recommendations, and instructed to return in one month. (Ex. 5). Claimant did not return to Banner after October 27, 2023, as instructed.

25. Claimant testified that she did not attend workers' compensation appointments at Banner after October 27, 2023 because they were cancelled by Banner's case worker for workers' compensation, [Redacted, hereinafter JF].

26. [Redacted, hereinafter WT] is employed by [Redacted, hereinafter BE], the third-party administrator for Respondent, is claims examiner for Claimant's claim, and testified at hearing. WT[Redacted] testified that Banner was the ATP for Claimant's claim. She indicated that Respondent denied liability for Claimant's claim and advised Banner of this on November 16, 2023, by sending a copy of Respondents' Notice of Contest. WT[Redacted] indicated that she denied authorization for a referral to a neurosurgeon. She indicated that she received an email from Banner on November 16, 2023 but did not receive any additional communications from Banner indicating that Banner would not treat Claimant for the claim. She testified that BE[Redacted] did not receive any certified mail from Banner, Claimant, or Claimant's counsel indicating that Banner Health refused to provide medical treatment for nonmedical reasons. She further testified that she has not received a request from Claimant to change ATPs.

27. On November 14, 2023, Claimant's counsel emailed Respondent's counsel indicating that JF[Redacted] advised Claimant that WT[Redacted] had called Banner and indicated that Claimant's future treatment had been denied and must be billed under private insurance or cancelled. (Ex. 6).

28. On November 16, 2023, WT[Redacted] and JF[Redacted] exchanged emails, in which WT[Redacted] provided JF[Redacted] with a "denial letter" (which is not in evidence) and the Notice of Contest. In response, JF[Redacted] wrote "The denial letter is only for the neurosurgeon, however you stated that the claim was denied. With a notice of contest we will continue to see her at the clinic." Both Claimant's counsel and Respondent's counsel were copied on both JF[Redacted] and Ms. WT[Redacted] email. (Ex. A).

29. After JF[Redacted] confirmed that Banner would continue to see Claimant, Claimant's counsel and Respondent's counsel continued to exchange email. Claimant's counsel demanded that Respondent provide Claimant with a treating physician willing to treat Claimant notwithstanding the notice of contest. Respondent's counsel responded indicating that Claimant had selected a provider willing to provide treatment, and that

Respondent “is not accepting liability for the claim, including medical care, at this time.” (Ex. 6).

30. Despite JF[Redacted] indication that Banner would continue to see Claimant, Claimant elected not to return to Banner. Subsequently, on December 19, 2023, Claimant began seeing Christopher Huser, M.D., on referral from Dr. Barolat. Dr. Huser indicate that Claimant now had a “superimposed issue of neck pain radiating down the right upper extremity” which Claimant described as “electrical spasms, aching, burning, and sharp tingling.” Dr. Huser recommended a C4-5 transforaminal epidural steroid injection (TESI) “to address her new cervical radiculitis symptoms caused by the work injury.” (Ex. 7). On January 9, 2024, Dr. Huser performed the TESI. On February 7, 2024, he released Claimant to full duty employment, without restrictions. (Ex. 7).

31. On January 25, 2024, Claimant underwent an independent medical examination at Respondent’s request with Anant Kumar, M.D. Dr. Kumar’s deposition was offered in lieu of live testimony. Dr. Kumar reviewed the images of both MRIs and opined that the Claimant’s C4-5 disc protrusion appeared larger on the 2023 MRI when compared to the 2021 MRI. Dr. Kumar opined that the increased size of the disc bulge could be related to the natural progress of the condition, rather than as a result of the June 19, 2023 work incident. He further indicated that Claimant’s complaints related to dropping objects and loss of strength in her hands are not explained by the findings on her MRI. In deposition, Dr. Kumar testified that the MRI from August 2023 did not show any evidence of trauma, such as edema in the soft tissues, and no evidence of fracture, dislocation, or instability. Finally, Dr. Kumar indicated that there was no evidence of a soft tissue injury associated with the June 19, 2023 incident.

32. Beginning on June 30, 2023, Claimant was subject to work restrictions which precluded her from performing her duties for Respondent until January 29, 2024, when she returned to work. Claimant was paid by Employer until December 31, 2023, and did not receive temporary total disability benefits during this time. Claimant testified that Employer later indicated that she should not have been paid, and stopped paying her after January 1, 2023 as a means to recoup the previously paid wages.

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

Claimant asserts that she sustained two injuries as a result of the June 19, 2023 incident – a cervical injury and exposure to potentially hazardous substances.

Cervical Spine

Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury to her cervical spine as a result of the June 19, 2023 incident. Claimant testified and reported to her health care providers that she turned "violently" to the right to avoid the liquid that was thrown toward her on June 19, 2023. The video footage of the incident, however, does not demonstrate any violent movement. Instead, it shows that Claimant may have turned slightly after the liquid was thrown in her direction. The ALJ finds the video evidence inconsistent with the Claimant's reported mechanism of injury.

Notwithstanding, the diagnosis of a cervical strain was based on Claimant's subjective reports of right-sided paraspinal muscle tenderness and her description of the incident, and not on objective findings. None of the providers who saw Claimant at Banner for her workers' compensation claim noted muscle spasms or other objective evidence consistent with a cervical strain. Claimant testified that the symptoms she related to the June 19, 2023 incident were different than her TOS symptoms, and were limited to a "kink" in her neck. However, throughout her medical records, Claimant reported different symptoms, such as radiating pain in her arms, and shoulder pain, which were similar to

symptoms she attributed to her TOS. The ALJ credits the opinion of Dr. Kumar that Claimant's symptoms are not explained by Claimant's MRI findings and that the MRI shows no evidence of soft tissue trauma.

Similarly, the evidence does not establish that Claimant sustained any cervical disc injury as a result of the June 19, 2023 incident. The ALJ does not find persuasive Dr. Barolat's opinion that Claimant's C4-5 disc protrusion is causally-related to the June 19, 2023 incident. Dr. Barolat's opinion was rendered without the benefit of Claimant's 2021 cervical MRI, and is thus speculative and unpersuasive. Moreover, no ATP has opined that the increase in the disc protrusion was causally-related to the June 19, 2023 incident. The ALJ finds persuasive Dr. Kumar's opinion that the increase in size of the disc protrusion could be attributed to the normal course of her condition.

Given the lack of a sufficient mechanism of injury and lack of objective findings, the ALJ finds that Claimant has failed to establish that it is more likely than not that she sustained a cervical injury as a result of the June 19, 2023 incident.

Exposure to Hazardous Substance

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

Based on the video evidence, it is more likely than not that Claimant was struck, in some way, by an unknown liquid thrown by the offender. Given the circumstances, it was reasonable for Claimant to be evaluated for exposure to bodily fluids. No evidence was admitted indicating Claimant was diagnosed with any condition related to the exposure and she did not undergo any medical treatment for the exposure, with the exception of testing to determine whether she sustained an injury. In short, the exposure did not cause any injury, disability, or need for medical treatment. Because Claimant suffered no disability or need for medical treatment, the exposure does not constitute a compensable injury.

Authorized Treating Physician

Because Claimant has failed to establish that she sustained a compensable injury, the issue of whether Dr. Huber is an authorized treating physician is moot.

TTD Benefits and Average Weekly Wage

Because Claimant has failed to establish that she sustained a compensable injury, the issues of TTD benefits and Average Weekly Wage are moot.

ORDER

It is therefore ordered that:

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

2. All matters are 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 21, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-150-530-003

ISSUES

1. Has Respondent demonstrated, by a preponderance of the evidence, that Claimant has been overpaid workers' compensation benefits?

2. If an overpayment has occurred, what is the amount of the overpayment?

3. If an overpayment has occurred, what is the rate at which Claimant shall repay the overpayment?

FINDINGS OF FACT

1. Respondent is self insured and utilizes the services of a third party administrator, [Redacted, hereinafter BE], in the handling of workers' compensation claims.

2. Claimant suffered a work related injury on October 13, 2020 while he was employed with Respondent.

3. Respondent admitted liability for the work injury and Claimant was paid indemnity benefits (lost wages).

4. Claimant was placed at maximum medical improvement (MMI) on July 13, 2022.

5. On November 9, 2022, Respondent filed a Final Admission of Liability (FAL) in which Claimant was assessed permanent impairment of 28 percent for his left upper extremity (this converted to a whole person impairment rating of 18 percent).

6. On June 21, 2023, Claimant attended a Division sponsored independent medical examination (DIME) with Dr. Brian Brodie. In his DIME report, Dr. Brodie found that Claimant reached MMI as of July 13, 2022. Dr. Brodie assessed a permanent impairment rating of zero.

7. Following the DIME report, on August 3, 2023, Respondent filed an FAL. This FAL included the MMI date of July 13, 2022, and the zero impairment rating assessed by Dr. Brodie. The August 3, 2023 FAL indicated an overpayment in the amount of $54,296.41.

8. The August 3, 2023 FAL included the following language:

> NOTICE TO CLAIMANT: This Final Admission of Liability is a legal document listing benefits that have been or will be paid. You have the right to disagree or object to benefits admitted or not admitted. If you do not object to this admission within 30 calendar days of the date of the final admission, your file will automatically close. Objection information is attached.

9. During this claim, Claimant has received a total of $127,602.69 in indemnity benefits. After the date of MMI (July 13, 2022), Claimant received indemnity benefits $54,300.04.

10. Respondent asserts that due to the zero impairment rating assigned by Dr. Brodie, any indemnity benefits Claimant received after he reached MMI on July 13, 2022 resulted in an overpayment.

11. During this claim, Claimant was represented by legal counsel. At some point, Claimant no longer had representation. As a result, on August 23, 2023, Respondent's counsel provided Claimant with a copy of the FAL via email.

12. Claimant did not object to the FAL.

13. On October 5, 2023, Respondent filed an Application for Hearing (AFH) on the issues of overpayment and repayment of the overpayment. A workers' compensation hearing was set for February 1, 2024. However, at the outset of the hearing, Claimant requested additional time to obtain counsel to represent him in this matter. ALJ Peter Cannici granted a 30 day continuance. The rescheduled hearing, set for February 29, 2024, was also continued by ALJ Glen Goldman to allow Claimant additional time to obtain counsel. The second rescheduled hearing, set for April 24, 2024, was again continued by ALJ Steven Kabler to allow Claimant one final continuance of up to 45 days to obtain counsel. The June 6, 2024 hearing held in the current matter was the rescheduled hearing to address the October 5, 2023 AFH.

14. Claimant testified that his only income is his monthly retirement payment from PERA. Claimant receives $2,556.68 each month. Claimant further testified that this amount does not include any tax withholdings. Claimant does not have a mortgage on his residence. At the time of the hearing, Claimant had $1,200.00 in a checking account, and $400.00 in a savings account.

15. Claimant does not believe that he has reached MMI. Claimant also disagrees with the impairment rating assigned by the DIME physician.

16. The ALJ finds that Respondent has successfully demonstrated that an overpayment has occurred in this case.

17. Although the FAL was filed on August 3, 2023, the ALJ recognizes that Claimant did not receive a copy of the FAL until August 23, 2023 because of issues with his legal representation. Therefore, the ALJ calculates 30 days from that date, and finds that Claimant had until September 23, 2023 to file an objection to the FAL. Claimant did not do so. Therefore, the FAL became final.

18. Based upon all evidence and testimony presented at hearing, the ALJ finds that Claimant was overpaid indemnity benefits in the amount of $54,300.04.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-43-207(1)(q), C.R.S., empowers an ALJ to require repayments of overpayments made in a workers' compensation claim.

5. On January 1, 2022, the Colorado General Assembly enacted legislation that changed the statutory definition of "overpayment." HB 21-1207[1]. Under Colorado law, however, "[a] statute is presumed to be prospective in its operation." Section 2-4-202, C.R.S.; *Martin Marietta Corp. v. Lorenz,* 823 P.2d 100 (Colo. 1992). The

[1] Specifically, the General Assembly amended section 8-40-201(15.S)'s definition of "overpayment" to exclude TTD benefits paid after the date of MMI. HB 21-1207.

Industrial Claims Appeals Office (ICAO) clarified this issue in workers' compensation proceedings in *Barnes v. City and County of Denver,* W.C. No. 5-063-493, (ICAO March 27, 2023). In that case, ICAO noted that the General Assembly did not express an intent for HB 21-1207 to have retroactive effect. *Id.* at 6. Therefore, because the claimant in *Barnes* sustained their injury prior to January 1, 2022, the definition of "overpayment" in effect before the enactment of HB 21-1207 governed.

6. In the present matter, Claimant's date of injury is October 13, 2020. As Claimant's injury is prior to the statutory change, HB 21-1207 does not apply. Therefore, the ALJ must apply the definition of "overpayment" prior to the enactment of HB **21-1207.**

7. On October 13, 2020, the date of injury for this claim, "overpayment" under Section 8-40-201(15.5), C.R.S., was defined as:

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

8. Section 8-42-105(3)(a), C.R.S. provides, in pertinent part, that "[t]emporary disability benefits shall continue until the first occurrence of any one of the following: (a) The employee reaches maximum medical improvement."

9. As found, Respondent has demonstrated, by a preponderance of the evidence, that Claimant received indemnity benefits that he was not entitled to receive after reaching MMI. This resulted in an overpayment in the amount of $54,300.04. Therefore, repayment of the $54,300.04 overpayment is appropriate in this matter.

10. The ALJ has considered the testimony of Claimant regarding his income and expenses and orders that he pay Respondent $150.00 per month until the overpayment is paid in full. No interest shall accrue during this repayment.

ORDER

It is therefore ordered:

1. Claimant was overpaid $54,300.04.

2. Claimant shall repay Respondent at total of $54,300.04 at the rate of $150.00 per month until the overpayment is paid in full. The first payment is due to Respondent on August 1, 2024. Subsequent payments are due on the first day of every month.

3. No interest shall accrue during this repayment.

Dated June 26, 2024.

Cassandra M.
Sidanycz Administrative Law
Judge Office of Administrative
Courts

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

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

ISSUES

- Did Claimant prove by a preponderance of the evidence that the left lower extremity rating should be "converted" to the 12% whole person equivalent?

- Disfigurement.

FINDINGS OF FACT

1. Claimant was employed by Respondent on January 24, 2023 when he attempted to restrain a combative patient at the [Redacted, hereinafter CE]. The patient kicked the Claimant's left knee. The claim was admitted.

2. Claimant had knee surgery on March 14, 2023. The surgery was performed by Dr. Simpson. Before the surgery Claimant utilized crutches and complained of back pain. When Cl;aimant saw Dr. Peterson on March 21, 2023, he reported that he was off crutches and his back was "okay". However, on July 13, 2023, the chart notes the Claimant was using crutches. On the next visit on July 17, 2023, the Claimant was again off crutches. Prior to MMI, Claimant had two PRP injections, which apparently improved the pain in his left knee. Claimant was released to full duty without restrictions on November 3, 2023.

3. Claimant was placed at MMI by Dr. Peterson on December 20, 2023 with a 31% lower extremity impairment rating for his left knee. This rating was admitted in the Final Admission of Liability. Claimant did not request a Division IME. The 31% scheduled rating converts to 12% whole person rating. Significantly, Dr. Peterson did not rate the Claimant's back, although he did note that the Claimant complained of low back and hip pain.

4. Surveillance was performed on May 13, 2024. Approximately 2 minutes of video surveillance was submitted which depicted Claimant standing and walking without any noticeable limp. (Exhibit F). That is different than how he presented in the courtroom on the day of the hearing.

5. Claimant testified that he had a prior back surgery in 2009 through the V.A. Hospital. After that surgery and prior to this work related injury, Claimant would occasionally "tweak" his back and would require medication for the pain. On May 20, 2021, Claimant was seen at Kaiser and gave a history of chronic low back pain with intermittent flairs.

6. After this work related injury Claimant has to take a muscle relaxer daily to help keep everything limbered up in his back. Now he has difficulty performing daily activities due to his back pain and fear of making the pain worse.

CONCLUSIONS OF LAW

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

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

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

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

In this case, the Claimant has failed to sustain his burden that his back pain is due to an altered gait or crutch usage steming from his knee injury. Although his back pain may be more frequently painful after the knee injury, there is no credible medical evidence that this back pain is due to his knee injury as opposed to the natural progression of his prior back injury and back surgery.

B. Disfigurement

Claimant has a visible disfigurement to the body consisting of two arthroscopic portal scars, which are discolored, compared to the surrounding skin and are less than ½ inch in diameter. Claimant also claims a limp as the result of an antalgic gate stemming from his admitted knee injury. Based on his presentation in the surveillance video, as

opposed to his walking in the courtroom, I do not find that his "limp" is permanent or related to his knee injury.

ORDER

It is therefore ordered that:

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

2. Insurer shall pay Claimant $300 for disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

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

DATED: June 26, 2024

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

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-657-899-001

ISSUES

1. Whether Respondent proved by a preponderance of the evidence grounds for withdrawal of its admission to maintenance medical benefits.

FINDINGS OF FACT

1. On July 29, 2005, Claimant sustained an admitted injury arising out of the course of her employment with Employer. Claimant was assisting a patient into a wheelchair when the patient became agitated and grabbed her neck. (Ex. 3). As a result, Claimant sustained injuries to her neck and shoulder, and underwent treatment with multiple providers for those injuries.

2. On January 26, 2007, Claimant was placed at maximum medical improvement (MMI) and assigned a 24% whole person impairment. (Ex. C).

3. On February 1, 2007, Respondents filed a Final Admission of Liability, admitting for the 24% whole person permanent impairment rating, and maintenance medical benefits after MMI that were related, reasonable, and necessary. (Ex. A).

4. After being placed at MMI, Claimant continued to receive treatment through various providers, and was referred to Michael Gesquiere, M.D., in November 2014. (Ex. B).

5. On January 15, 2016, Respondents filed an Application for Hearing, and Claimant filed a Response to the Application. The parties proceeded to a hearing before ALJ Nemechek in June 2017, under case number WC 4-657-899-13. As relevant to the present matter, the issues adjudicated included whether the Claimant was entitled to maintenance medical benefits recommended by Dr. Gesquiere. By agreement of the parties, the matter was held in abeyance. Ultimately, ALJ Nemechek issued a Final Order on February 10, 2022. In that Final Order, ALJ Nemechek ordered Respondents to "provide maintenance medical treatments to Claimant pursuant to the Colorado Workers' Compensation Fee Schedule, as recommended by Dr. Gesquiere and his referrals." (Ex. C).

6. On January 23, 2024, Respondents filed the Application for Hearing in this matter, seeking to withdraw its admission to maintenance medical benefits, and terminate Claimant's maintenance medical benefits.

7. At hearing, Claimant conceded the issue, and did not oppose the relief requested by Respondents. Specifically, Claimant conceded that Respondents may withdraw their admission to maintenance medical benefits, understanding that upon withdrawal of the admission, Respondents would no longer be responsible for payment of medical benefits,

unless the case was reopened. Based on the Claimant's concession, no witnesses were called at the hearing.

CONCLUSIONS OF LAW

Generally

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

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

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

Withdrawal Of Admission To Medical Maintenance Benefits

When respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School Dist.*, W.C. No. 4-702-144 (ICAO, June 5, 2012); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO, July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification."

Respondents bear the burden of establishing by a preponderance of the evidence that maintenance medical benefits are no longer reasonable, necessary or related to the Claimant's industrial injury. As found, Claimant conceded the issue, and did not opposed the Respondents' withdrawal of their admission to maintenance medical benefits. Accordingly, the ALJ finds that Respondents' admission to maintenance medical benefits is hereby withdrawn, and Respondents are not liable for further maintenance medical benefits.

ORDER

It is therefore ordered that:

1. Respondents' admission to maintenance medical benefits is withdrawn effective as of the date of this Order.

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

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

DATED: June 26, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-223-897-002

ISSUES

1. A determination of DIME physician Dr. Volz's true opinion regarding Claimant's permanent impairment.

2. Whether Claimant overcame Dr. Voltz's determination of impairment by clear and convincing evidence.

FINDINGS OF FACT

1. Claimant is a paramedic and firefighter for Respondent-Employer who would typically work forty-eight-hour shifts followed by ninety-six hours off. At the time of his admitted injury, he had been working as a firefighter for five years and had not had any smoke exposure that concerned him until December 31, 2021, while working on the [Redacted, hereinafter MF].

2. On December 31, 2021, Claimant was called up to work due to the MF[Redacted]. He reported to his station at the [Redacted, hereinafter RA]. Upon arrival, a fire engine that had been deployed to assist with the MF[Redacted] returned to the station. Claimant assisted in treating the firefighters who had been on the front line, cleaned them off, and cleaned the engine, which was covered in soot inside and out.

3. Around midnight, Claimant and his crew were called to the front line of the fire. They were assigned to a house that was partially burned and collapsed. They watched the house and continually extinguished the fire as it reignited.

4. During his time on the front line, Claimant was not wearing respiratory protection as the entire supply had been exhausted during the initial phases of the fire.

5. Claimant worked from 3:00 P.M. on December 31, 2021, to approximately noon the following day.

6. Several days later, sometime between January 4 and January 9, 2022, Claimant went skiing and began to notice that he had shortness of breath. Claimant later testified that this was the first time he experienced those symptoms and that it was the first time he exerted himself following the MF[Redacted]. Claimant was experiencing upper respiratory infection symptoms, including a productive cough.

7. Claimant initially went to the Urgent Care at National Jewish Hospital and was referred to their pulmonology department. On January 20, 2022, early after Claimant's date of injury, Claimant saw Dr Homi Kapadia. Claimant reported a longstanding feeling of decreased respiratory and, more recently, an onset of upper respiratory infection symptoms following the MF[Redacted].

8. Claimant has continued treatment at National Jewish ongoing. Claimant was diagnosed with a smoke inhalation injury with new asthma. Claimant had never previously been diagnosed with asthma. Claimant was prescribed medications that include Trelegy, Singular, and a rescue inhaler.

9. Respondents filed a General Admission of Liability admitting for Claimant's injury.

Prior lung function testing and medical history

10. Prior to his injury, Claimant had undergone several pulmonary function tests.

11. A pulmonary function test (PFT) involves expiration into a device called a spirometer. Several parameters are measured during the test, including FVC, FEV1, and FEV1/FVC. FVC stands for forced vital capacity, which measures the amount of air expelled from the lungs during a complete exhalation following a deep breath. FEV1 is the forced expiratory volume in one second. This measures the volume of air expelled in the first second of the exhalation process during the same maneuver used to measure FVC. Finally, FEV1/FVC is the ratio of the volume of air expelled in the first second (FEV1) to the total volume expelled during the entire breath (FVC).

12. On April 5, 2018, several years prior to Claimant's date of injury, Claimant underwent a PFT as part of his employment. The FEV1/FVC ratio was 70.5%. The evaluating physician, Dr. Sander Orent, noted that Claimant had "some mild reactive airway" and recommended an albuterol inhaler on hand "should you get a lung full of smoke, for self-rescue, or if you develop a respiratory infection or if you are going to exercise in cold weather." This would qualify for a class 1 impairment under Table 8, page 125, of the *AMA Guides to Permanent Impairment, Third Edition* Revised. The spirometer had been calibrated that same day.

13. Claimant again underwent a PFT as part of an employment physical on April 6, 2019. The PFT showed Claimant's FEV1 value was 4.61 liters. It also showed a FEV1/FVC ratio of 67.7%, somewhat worse from the prior year. This would qualify for a class 2 impairment under Table 8 of the *AMA Guides*. The spirometer had been calibrated that same day.

14. Claimant underwent another PFT on December 9, 2021, just a few weeks before his date of injury. The PFT showed a FEV1/FVC of 56%, which would correspond

with a class 3 impairment under Table 8 of the *AMA Guides*. Notably, the spirometer had not been calibrated since March 3, 2021.

Permanent Impairment

15. On December 4, 2022, Claimant's authorized treating physician, Dr. Mayer, evaluated Claimant for permanent impairment in conjunction with a maximum medical improvement determination. Dr. Mayer noted that Claimant had no history of asthma. She also noted that Claimant had been on high-dose Trelegy since July and had reported essential resolution of all symptoms, despite normal exercise and even on bad air quality days. Claimant was also working full duty at that time. Although Claimant reported continuing to use his inhaler once a week or less, he reported that his asthma did not keep him from getting as much done at work and at home, had not recently had any shortness of breath, and did not have any sleep disruption from his asthma in the past four weeks. Dr. Mayer also noted that Claimant was "back to his former physical activities without limitation."

16. Dr. Mayer determined that Claimant had a 25% whole-person impairment arising from asthma. She relied on Table 9, page 126, of the *AMA Guides*, which does not provide a specific methodology for impairment evaluation. Therefore, Dr. Mayer relied on her level II accreditation training and consulted the American Thoracic Society's 1993 publication, "Guidelines for the evaluation of impairment/disability in patients with asthma." Based on that publication, Dr. Mayer determined that Claimant had a total score of five, which corresponded with a whole-person impairment of 25%.

17. In her assessment, Dr. Mayer considered the December 9, 2021 PFT. However, Dr. Mayer declined to "apportion" Claimant's impairment due to "technical limitations" in that spirometry. Specifically, she cited the failure to plateau. Additionally, she noted that Claimant had no limitations on his activities at the time of the December 9, 2021 PFT. Dr. Mayer did not address the 2018 or 2019 spirometry results.

18. Respondents requested a Division independent medical examination (DIME) to evaluate Claimant for his impairment.

19. In the meantime, Respondents obtained an independent medical examination with Dr. Jeffrey Schwartz, which took place on February 27, 2023. At that IME, Claimant underwent a PFT, which showed an FEV1/FVC value of 70%. Claimant's FEV1 value was 5.26 liters, which was an improvement from the April 2019 PFT. Dr. Schwartz also took Claimant's history and reviewed Claimant's medical records.

20. Dr. Schwartz felt that the onset of symptoms following the MF[Redacted] was likely due to bacterial sinusitis rather than smoke exposure, as supported by the nature of his symptoms and lack of immediate respiratory issues following the fire. Dr.

Schwartz felt that the PFTs from 2018 and 2019 showed evidence of airflow obstruction, suggesting undiagnosed asthma.

21. Dr. Schwartz also disagreed with Dr. Mayer's diagnosis of Claimant with Restrictive Airways Dysfunction Syndrome. He noted that the criteria for RADS were not met, given the pre-existing airflow obstruction and absence of high-level irritant exposure. Dr. Schwartz pointed out that the asthma was pre-existing and not caused by the MF[Redacted], with Claimant's symptoms being an exacerbation rather than new onset.

22. Claimant underwent the DIME with Dr. Michael Volz on May 20, 2023. At the DIME appointment, Claimant reported that he was feeling better than the last few years now that he was taking Trelegy. Claimant denied any difficulty breathing at night or any limitation or reduction in his activity since being on the Trelegy.

23. Dr. Volz reviewed Claimant's prior history, including the prior PFTs. He opined that the "evolving reduction in lung function tests prior to the DOI would suggest the pre-existing state was slowly worsening and can be argued that manifestations would within a reasonable degree of Medical Probability would have occurred at some time no matter the circumstances related to work or not." He felt that Claimant developed acute bronchitis following the date of injury and that the condition resolved once Claimant began taking Trelegy. Dr. Volz opined that "Since the lung functions tests were suboptimal prior to the DOI, then and now within a reasonable degree of Medical probability, the claimant will require Trelegy or a similar medication . . . ."

24. Ultimately, Dr. Volz determined that Claimant had a 10%[1] whole-person impairment based on Tables 8 and 9. However, Dr. Volz felt that "[a]pportionment is appropriate," noting that Claimant's impairment prior to the injury would have been 30%. He opined that "there is no objectively measurable information to support Permanent Impairment."

25. Dr. Volz testified by deposition on December 13, 2023. In his testimony, Dr. Volz discussed his DIME and Claimant's progression from a class 1 pulmonary impairment in 2018 to a class 3 pulmonary impairment in December 2021, prior to his date of injury, as evidenced on Claimant's PFTs. Regarding the February 27, 2023 PFT, Dr. Volz noted that Claimant's condition had improved to that point such that it would have warranted a class 2 impairment by that point. Dr. Volz explained that he did not conduct further pulmonary function testing because post-injury PFTs showed improvement.

26. Dr. Volz acknowledged in his testimony that in assigning an impairment rating, he was aware that Claimant had prior to his date of injury never received any work

[1] Dr. Volz's report is ambiguous as to whether Claimant's unapportioned impairment would be 10% or 15%. However, based on the impairment rating worksheet, the Court finds that Dr. Volt's assessment of Claimant's impairment without regard to causation was 10%.

restrictions related to any pulmonary issues, that Claimant was able to perform the essential functions of his job without respiratory issues, and that Claimant was fully functional.

27. Dr. Volz referred to a Lifescan Wellness report from January 16, 2023, confirming Claimant had no ongoing respiratory symptoms close to reaching maximum medical improvement. Dr. Volz documented that Claimant felt healthier and could exercise more post-injury, suggesting an overall improvement. However, Dr. Volz pointed out that Claimant's medications could be masking an underlying permanent worsening of Claimant's pre-existing asthma, and that the degree to which it would have worsened but for the medication is impossible to determine without taking Claimant off medications. Furthermore, the extent to which any permanent worsening did exist, Dr. Volz expressed uncertainty as to whether it would have been due to the natural course of Claimant's pre-existing lung condition or whether there would be a component of permanent aggravation from the injury. Nevertheless, with the Trelegy, Dr. Volz noted that Claimant's lung function was better than it had been prior to the MF[Redacted], leading him to conclude that Claimant did not sustain a permanent pulmonary impairment of the lungs resulting from the MF[Redacted].

28. Dr. Volz was also questioned about the validity of the December 9, 2021 PFT, particularly with regard to the failure to plateau and the fact that the spirometer had not been recently calibrated. Dr. Volz acknowledged that this would affect the validity of the December 9, 2021 PFT. Nevertheless, he expressed that his ultimate opinion would not change even if the December 9, 2021 PFT was not valid. He explained that the 2019 PFT results would have likely yielded a higher impairment rating of around 15%, compared to the 10% derived from the 2023 results. This indicated an improvement in Claimant's pulmonary function between 2019 and 2023. Whether excluding the 2021 test results would affect his impairment rating opinion, Dr. Volz clarified that the unapportioned impairment rating would remain unchanged. For the "apportioned" rating, subtracting either the 2019 or 2021 impairment from the 2023 impairment both resulted in a 0% rating. Thus, in his opinion, there was no permanent worsening of Claimant's pulmonary function following the MF[Redacted] exposure.

29. Dr. Schwartz testified at hearing. Dr. Schwartz testified that the PFT from April 6, 2019, was not a normal PFT in that FEV1/FVC was 67.7%, which would correspond with a class 2 impairment. The PFT from December 9, 2021, showed an FEV1 substantially reduced from previously and a FEV1/FVC ratio of 56%, which would correspond with a class 3 impairment on Table 8 (or 30% impairment). Dr. Schwartz testified that FEV1/FVC being low is the hallmark sign of airway obstruction, and that 70% and above is normal.

30. Regarding the failure to timely calibrate the spirometer for the December 2021 PFT, Dr. Schwartz testified that the drift in calibration would result in inaccuracy of

the FVC and FEV1, but it would not affect the ratio since both the FVC and FEV1 would be affected proportionally.

31. Claimant also testified at hearing. Claimant's testimony was credible and consistent with the above findings.

32. The Court finds Dr. Schwartz and Dr. Volz's testimonies credible as well.

33. The Court also finds that Dr. Volz opinion regarding Claimant's impairment is that Claimant's total pulmonary impairment is 10% of the whole person, but that none of that impairment is attributable to Claimant's December 31, 2021 injury. Therefore, notwithstanding Dr. Volz's use of the word "apportionment" and his use of the apportionment worksheet as part of the DIME, Dr. Volz's opinion was that Claimant's permanent impairment arising from the December 31, 2021 injury was 0%.

34. The Court finds that Claimant has not proved by clear and convincing evidence that Dr. Volz erred in assigning Claimant a 0% whole-person impairment for the December 31, 2021 injury. Dr. Volz's determination that Claimant has a whole-person impairment of 10% for his pulmonary dysfunction is based on a correct reading of the *AMA Guides* and neither party has presented credible evidence that Dr. Volz's application of the *AMA Guides* was incorrect or that the February 27, 2023 PFT was erroneous. Furthermore, Dr. Volz's rationale for declining to attribute any of the impairment to Claimant's December 31, 2021 injury is based on sound reasoning. That is, Dr. Volz reasonably opined that Claimant's pulmonary function was progressively declining beginning in 2018 such that, as of December 2021, prior to the injury, Claimant's pulmonary function was worse than it was when Claimant reached MMI. Dr. Volz relied on the progressively worsening PFTs, including those from 2018, 2019, and 2021. Claimant's improved pulmonary function following treatment for the injury revealed a level of function that was improved from prior to the date of injury. Therefore, any residual pulmonary impairment would not be the result of the December 31, 2021 injury.

35. Claimant did present evidence that the December 9, 2021 PFT was unreliable due to the spirometer being uncalibrated. However, Dr. Schwartz credibly testified that the lack of calibration would affect both the numerator (FEV1) and the denominator (FVC) such that the resulting FEV1/FVC ratio would have been no better had there been no error. Additionally, the Court finds credible Dr. Volz's testimony that he would have reached the same conclusion using Claimant's April 2019 PFT as a baseline. That is, Claimant's level of function at MMI was no worse than it had been in April 2019, and that no permanent impairment should be assigned for Claimant's December 31, 2021 injury.

36. Claimant also argued that the fact that Claimant required Trelegy as part of his maintenance care evidenced that there was a new impairment that Claimant had sustained that Claimant did not have before the December 31, 2021 injury.

However, as opined by Dr. Volz, Claimant likely needed Trelegy even prior to his date of injury.

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming the DIME re Impairment

A DIME physician's opinions concerning impairment carry presumptive weight pursuant to § 8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Indus. Claim Appeals Office of Colo.*, 487 P.3d 1007 (Colo.App.2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.

Here, Claimant seeks to overcome Dr. Volz's opinion that Claimant had no permanent impairment arising from his December 31, 2021 injury. Claimant bears the burden to prove that it is "highly probable" that Dr. Volz erred with regard to his determination of Claimant's impairment.

In support of his burden, Claimant argues in part that Dr. Volz inappropriately apportioned Claimant's impairment. Specifically, Claimant cites § 8-42-104(5)(a), C.R.S.,[2] which provides:

> *When an employee has a nonwork-related previous permanent medical impairment to the same body part that has been identified, treated, and, at the time of the subsequent compensable injury, is independently disabling. The percentage of the nonwork-related permanent medical impairment existing at the time of the subsequent injury to the same body part shall be deducted* ***from the permanent medical impairment rating for the subsequent compensable injury****.*

(Emphasis added.)

Claimant argues that Dr. Volz did not cite to any records to establish that the prior condition was identified and treated. Claimant argues that, in fact, his condition was not disabling prior to his date of injury and that apportionment was therefore inappropriate under the statute.

The Court does not read § 8-42-104(5)(a), C.R.S., to prohibit apportionment in the absence of a prior impairment that was identified, treated, and independently disabling at the time of the work injury. Rather, that statute only mandates apportionment under those circumstances. Under the Act, a claimant may be compensated for only that disability fairly attributable to the injury. *Fisher v. State of Colo.*, W.C. No. 5-068-151 (March 25, 2020). Therefore, apportionment should be applied only against an impairment that is otherwise causally related to the injury.

Dr. Volz determined that there was not any permanent impairment from the work injury in the first instance before considering apportionment. In other words, there was no permanent impairment caused by the industrial injury from which to apportion.

---

[2] Claimant also cites WCRP 12-3(B).

The DIME physician's findings that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo.App.2002).

Here, Dr. Volz relied on Claimant's prior PFTs to determine what portion of Claimant's ratable impairment demonstrated on the February 27, 2022 PFT was attributable to the December 31, 2021 work injury. It was well within Dr. Volz's discretion to rely on Claimant's pre-injury medical history in determining that none of Claimant's residual impairment was attributable to Claimant's injury. Therefore, regardless of whether he were to apply apportionment or not, there was no work-related impairment from which to apportion.

Claimant also argues that Dr. Volz erred in relying on the December 9, 2021 PFT as a baseline for impairment given the invalidity of the December 9, 2021 PFT. However, Dr. Volz credibly testified that he would have reached the same conclusion using Claimant's April 2019 PFT as a baseline, a PFT whose validity was not challenged. That is, Dr. Volz credibly opined that Claimant's level of function at MMI was no worse than it had been in April 2019, and that no permanent impairment should be assigned for Claimant's December 31, 2021 injury even on that basis.

Therefore, as found above, Claimant has not proved by clear and convincing evidence that Dr. Volz erred in assigning Claimant no permanent impairment for his December 31, 2021 injury.

ORDER

It is therefore ordered that:

1. Claimant has not overcome the DIME physician's opinion that Claimant sustained no permanent impairment as the result of his December 31, 2021 injury.

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

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

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

DATED: June 27, 2024.

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

ISSUES

1. Whether Claimant established by a preponderance of the evidence that his 5% right upper extremity impairment rating should be converted to a 3% whole person impairment.

FINDINGS OF FACT

1. Claimant has been employed by Respondent as a lieutenant in the [Redacted, hereinafter DE] since 1999. On September 23, 2022, Claimant sustained an admitted injury after falling through a floor while working in an abandoned building.

2. Claimant was initially seen at the Denver Health emergency department on September 23, 2022, and evaluated for injuries to his left hip and knee. (Ex. C).

3. On September 26, 2022, Claimant began treatment at the Denver Health Occupational Health Clinic with John Diehl, M.D., and reported problems with his right shoulder, in addition to his left leg. Claimant reported that his right shoulder pain began the morning after the initial injury when he woke with tenderness in the right shoulder. Dr. Diehl diagnosed Claimant with a strain of the right shoulder/upper arm. After September 26, 2022, treatment and evaluation of Claimant's shoulder was primarily provided by Jennifer Pula, M.D., at Denver Health. Claimant was also referred to Dr. Haber at Panorama for his knee issues, although, as discussed below, Dr. Haber later evaluated and treated Claimant for his right shoulder condition. (Ex. D).

4. From October 4, 2022 through August 21, 2023, Claimant saw Dr. Pula approximately fifteen times. On December 13, 2022, Claimant had a right shoulder MRI which showed a moderate grade partial thickness tear of the supraspinatus tendon with secondary findings consistent with internal impingement. (Ex. E).

5. On December 15, 2022, Dr. Haber reviewed Claimant's MRI films and examined Claimant. Dr. Haber stated: "For the right shoulder, he has a high grade 70 to 80% tear with significant tendinopathy in this region." He diagnosed Claimant with a sprain of the right rotator cuff capsule, bursitis, osteophytes, and articular cartilage disorder of the right shoulder. Dr. Haber then recommended a platelet rich plasma (PRP) injection with physical therapy for the right shoulder. (Ex. F). On January 13, 2023, Michael Lersten, M.D., (also of Panorama) performed the PRP injection on Dr. Haber's referral. (Ex. F).

6. From December 20, 2022 through April 25, 2023, Claimant attended 14 physical therapy visits. At his April 25, 2023 visit, Claimant reported significant improvement in his shoulder and that he was pain free. (Ex. G).

7. On August 21, 2023, Dr. Pula placed Claimant at maximum medical improvement, and discharged him from care. For Claimant's right shoulder condition, she assigned

Claimant a 5% upper extremity permanent impairment rating for range of motion deficits, which corresponds to a 3% whole person medical impairment. She also assigned Claimant a 7% permanent impairment rating for his left knee. Dr. Pula released Claimant to full duty without restrictions as of August 21, 2023. (Ex. D).

8. On October 4, 2023, Respondents filed a Final Admission of Liability admitting to the 5% right upper extremity impairment rating, and the 7% lower extremity impairment rating. (Ex. B).

9. After being placed at MMI, Claimant returned to Dr. Pula in January and 2024, reporting continued right shoulder pain and progressing symptoms. In February 2024, he reported that after returning to work, his right arm became stiffer and more sore, with a loss of range of motion. He reported a sore spot in the anterior shoulder radiating into his armpit, and a clicking sensation in his shoulder. (Ex. D).

10. A repeat right shoulder MRI was performed on February 9, 2024, which showed supraspinatus tendinopathy with a small low-grade interstitial tear, mild infraspinatus tendinopathy, mild acromioclavicular joint osteoarthritis, and mild subacromial subdeltoid bursitis. (Ex. E). Based on the results, Dr. Haber recommended a repeat PRP injection and additional physical therapy. The PRP injection was performed on March 8, 2024. (Ex. F).

11. In January 2024, Claimant re-initiated physical therapy and attended four visits through April 19, 2024. At his last documented physical therapy visit, Claimant reported full range of motion of the right shoulder with crepitus and “popping” in the joint with movement, as well as tenderness and pain in the supraspinatus, biceps, and deltoids. Claimant was encouraged to perform a home exercise program to strengthen the right shoulder. The physical therapist noted that Claimant had the strength and mobility necessary to participate in all job-based tasks without restrictions. (Ex. G).

12. At hearing, Claimant testified that he continues to experience pain on the front and outside of his shoulder, occasionally radiating into his armpit, and that when he raises his right shoulder, he feels a “pinch point” in the shoulder. He indicated that his shoulder condition interferes with his ability to put on his firefighting jacket, and that he has had to modify the way he puts on the jacket. He also indicated that he feels his right shoulder is weaker than the left, and interferes with his ability perform swimming exercises for his job. Notwithstanding the limitations, Claimant testified that he is able to perform all of the functions for his job, including breaching doors, using a sledge hammer, Halligan bar, and pike pole, , dragging a person, and other requirements for firefighting.

13. Rondal Swarsen, M.D., was admitted as an expert in occupational medicine and testified at hearing.[1] Dr. Swarsen testified that the location of Claimant’s injury is not his right arm, as the location of the injury was above the glenohumeral joint, and involves the muscles of the shoulder girdle. He further opined that Claimant’s impairment rating is a

[1] At hearing, Respondent moved to strike Dr. Swarsen as a witness. The ALJ reserved ruling on the issue and instructed the parties to address the issue in position statements. Neither party addressed the issue, and therefore the ALJ denies the motion to strike.

functional loss of the shoulder. Dr. Swarsen's testimony as to whether Claimant's impairment rating should be converted is a legal opinion outside his expertise and is therefore of no evidentiary value.

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).

Conversion of Scheduled Impairment to Whole Person Impairment

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* § 8-42-107(8)(c), C.R.S. Whether a claimant has suffered the loss

of an arm at the shoulder under § 8-42-107(2)(a), C.R.S., or a whole-person medical impairment compensable under § 8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO Dec. 28, 2006).

In the case of a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora*, W.C. 4-452-408 (ICAO Oct. 9, 2002.) Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Indus. Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). *In re Claim of Barnes*, 042420 COWC, 5-063-493 (ICAO April 24, 2020).

With respect to his right shoulder, Claimant has established by a preponderance of the evidence an impairment of anatomical structures beyond the arm at the shoulder. Claimant's MRI and diagnosis from Dr. Haber demonstrate that Claimant has sustained injuries to the shoulder joint, which is beyond the arm. The injury has resulted in decreased range of motion of the shoulder joint, which limits Claimant's ability to lift his right arm. The limitation in range of motion is more probable than not, a manifestation of a functional impairment of Claimant's shoulder joint above the glenohumeral joint.

Respondent's contention that Claimant's ability to perform his job functions demonstrates that his functional impairment is not significant enough to warrant a conversion to a whole-person impairment is not availing. The determination of whether to convert a scheduled impairment rating is not based on the significance or severity of the impairment, but rather on the situs of the impairment. As discussed above, Claimant sustained an injury to the structures above the arm affecting the function of Claimant's shoulder. These limitations, which include the decreased range of motion documented in his assigned impairment rating, are the result of decreased ability of the shoulder joint to function properly.

Accordingly, Claimant's 5% left upper extremity impairment rating related to his shoulder range of motion is converted from an 5% scheduled impairment to a whole-

person impairment. The ALJ takes judicial notice of the AMA Guides, which provide for the appropriate conversion of scheduled impairment to whole person impairment. *See In re Claim of Serena*, 120115 W.C. No. 4-922-344-01 (ICAO Dec. 1, 2015). Pursuant to Table 3, p. 16 of the AMA Guides, entitled "Relationship of Impairment of the Upper Extremity to Impairment of the Whole Person," a 5% upper extremity impairment converts to a 3% whole person impairment. Claimant's upper extremity impairment for his right shoulder range of motion deficits is therefore converted to a 3% whole person impairment.

ORDER

It is therefore ordered that:

1. Claimant's 5% scheduled upper extremity impairment for range of motion deficits of his right shoulder is converted to a 3% whole person impairment.

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 27, 2024

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-225-184-001

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the surgeries recommended by Dr. Martyn represent reasonable, necessary medical treatment related to Claimant's work injury with Employer?

FINDINGS OF FACT

1. Claimant testified he was employed by Employer as a service technician and installer. Claimant was hired by Employer in 2004. Claimant testified his job duties included going out into the field and installing new garage doors which involved lifting between 40 to 150 pounds. Claimant testified that on June 30, 2022, he was lifting a heavy eighteen (18) foot garage door to get ready for a job, when the panel he grabbed got jammed up as he was stepping back and Claimant twisted his back. Claimant testified he felt a sharp pain on his right lower back that remained sore throughout the day. Claimant testified that after the injury, he continued to work throughout the day. Claimant eventually reported the injury to Employer on July 5, 2022.

2. Claimant testified that prior to June 30, 2022, he had pre-existing issues with his low back. Claimant testified his pre-existing issues involved low back pain and muscle spasms that he would treat by seeking regular chiropractic treatment. Claimant testified after getting chiropractic treatment he would be good for a week to a week and a half. Claimant testified that his pain after the June 30, 2022 injury was different in that the pain was more in his lumbar region and into his hip and down his legs.. Claimant testified that prior to June 30, 2022 he did not have shooting pain down his legs.

3. Claimant had a prior motor vehicle accident in 2018 that resulted in Claimant receiving treatment for his neck, mid-back and low back.

4. Claimant's medical records from prior to his work injury document consistent chiropractic treatment in the years leading up to the work injury. The chiropractic treatment focused on Claimant's low back with general mention of the cervical and thoracic spine and occasionally specific reference to the neck.

5. Prior to reporting the injury to Employer, Claimant sought medical treatment at Mercy Family Medicine on July 4, 2022. Claimant reported complaints of abdominal pain after a lifting incident at work on June 30. Treatment during this visit focused on Claimant's complaints of abdominal pain and not on Claimant's low back.

6. Claimant was evaluated on July 14, 2022 at La Plata Family Medicine by Dr. Lyons. The records note Claimant complained of low back pain at a level of 7 out of 10. Claimant reported he injured his low back on June 30, 2022 when he was carrying

large garage door panels. Claimant denied radicular pain, but reported diffuse right paraspinal pain from L1 to L5. Claimant was referred for physical therapy, provided with work restrictions, and instructed to return in two weeks.

7. Claimant was next evaluated by Dr. Lyons on July 28, 2022 at which time Claimant reported his symptoms included numbness and tingling down his legs. Claimant was again encouraged to begin physical therapy.

8. Claimant started physical therapy on August 3, 2022.

9. Claimant returned to Dr. Lyons on August 16, 2022 and reported minimal improvement with physical therapy. Dr. Lyons noted Claimant continued to complain of sharp right sided back pain that radiated down his leg. Dr. Lyons recommended Claimant undergo a magnetic resonance image ("MRI") of his low back and prescribed Gabapentin. Dr. Lyons referred Claimant to an orthopedic surgeon for a surgical consultation.

10. The MRI was performed on August 25, 2022 and showed moderate degenerative disc space narrowing and desiccation with moderate left paracentral disc protrusion, hypertrophic facet joint degeneration and associated ligamentum flavum hypertrophy at the L3-4 level. The MRI also showed mild to moderate degenerative disc desiccation and degeneration with a moderately large left paracentral disc protrusion that filled the lateral recess and effaced the anterior thecal sac.

11. Claimant returned to Dr. Lyons on September 6, 2022. Dr. Lyons noted the results of Claimant's MRI and noted Claimant had not been seen yet by the surgeon.

12. Claimant was examined at Spine Colorado on September 20, 2022 by physicians' assistant ("PA") Baumchen. Claimant reported to PA Baumchen that he injured his back at work when he twisted his back while lifting garage door panels. PA Baumchen diagnosed Claimant with lumbar radiculopathy and recommended a bilateral L4 transforaminal epidural steroid injection ("TFESI").

13. Claimant underwent the bilateral L4 TFESI on October 3, 2022. Claimant was evaluated by Dr. Lyons on October 11, 2022 and reported relief of his pain to 0 out of 10 for several days before the pain returned. Dr. Lyons recommended that Claimant continue physical therapy.

14. Claimant returned to PA Baumchen on October 27, 2022. PA Baumchen noted Claimant reported good relief of his pain with the TFESI before the pain returned. PA Baumchen further noted that Claimant's reported radicular pain appeared to be in an L5 distribution. PA Baumchen recommended Claimant undergo a right sided L5 TFESI.

15. Claimant underwent the right sided L5 TFESI on November 10, 2022. Claimant returned to Dr. Lyons on December 6, 2022 and noted he had reduced pain and radicular symptoms following the L5 TFESI, but the symptoms returned. Claimant reported he had good days and bad days and complained of radicular pain to his right ankle with heavy lifting or after a long day.

16. Claimant was evaluated by Dr. Martyn at Spine Colorado on February 7, 2023. Dr. Martyn noted Claimant's treatment including the TFESI's and diagnosed Claimant with a lumbar right lower extremity radiculopathy with disc herniation along with L4 stenosis, L5 stenosis, and low back pain. Dr. Martyn reviewed the MRI and opined that Claimant had lateral recess stenosis at L4 and L5 encroaching upon the exiting L4 and traversing L5 nerve root. Dr. Martyn noted that Claimant's disc herniation was more to the left and offered Claimant an L4 and L5 hemilaminectomy to help alleviate pressure and the nerves.

17. Respondents obtained a physician advisor review from Dr. Janssen on March 29, 2023 that Claimant's treatment to date were palliative measures for the lumbar spine and the pathology seen on the MRI was not necessarily from a traumatic condition. Dr. Janssen recommended a repeat MRI be obtained before any consideration for surgery.

18. Claimant returned to Spine Colorado on May 25, 2023 and reported his back pain was worsening with complaints of difficulty with mobility and signs of foot drop.

19. Another MRI was eventually obtained on July 16, 2023. The new MRI continued to show a left paracentral disc protrusion with narrowing of the thecal sac at L3-4. The MRI also showed a left paracentral disc protrusion at the L4-5 level extending into the lateral recess with narrowing of the thecal sac.

20. Claimant returned to Dr. Lyons on August 24, 2023. Dr. Lyons noted Claimant complained that his symptoms were worsening and took Claimant off of work completely.

21. Claimant returned to La Plata Family Medicine on September 7 and September 28, 2023 and reported that he had complaints of pain and weakness in his left low extremity.

22. Claimant returned to Dr. Martyn on September 19, 2023. Dr. Martyn noted Claimant was experiencing bilateral lower extremity pain that started in his buttock and went down both legs and into his feet. Dr. Martyn diagnosed Claimant with neurogenic claudication, bilateral lower extremity radiculopathy in the L4 and L5 nerve distribution, L3-L4 paracentral disc protrusion with significant stenosis and left lateral recess stenosis at L4 and L5. Dr. Martyn noted Claimant had some relief with injections, but those only lasted for a short amount of time. Dr. Martyn again recommended Claimant undergo surgery consisting of an L3-L4 discectomy and L4-L5 laminectomy.

23. Respondents obtain another physician advisor review from Dr. Eskay-Auerbach on October 23, 2023. Dr. Eskay-Auerbach reviewed Claimant's medical records and opined that the surgery recommended by Dr. Martyn was not medically necessary or causally related to Claimant's work injury. Dr. Eskay-Auerbach opined that Claimant's reports of bilateral radicular symptoms, particularly the right sided symptoms, were not supported by the pathology shown on the MRI films. Dr. Eskay-

Auerbach opined that the symptoms were consistent with spinal stenosis as opposed to the left sided disc herniations based on Claimant's complaints of symptoms involving his right lower extremities.

24. Respondents obtained an independent medical examination ("IME") with Dr. Rauzzino on February 27, 2024. Dr. Rauzzino reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Rauzzino opined in his medical report that the surgery recommended by Dr. Martyn was reasonable and necessary, but was not related to Claimant's work injury. Dr. Rauzzino noted Claimant's long history of chronic low back pain that was treated prior to the injury with regular chiropractic treatment. Dr. Rauzzino noted that the proposed surgery was necessary to treat Claimant's degenerative spinal stenosis, but opined that the mechanism of injury was not sufficient to have caused a structural change to Claimant's spine. Dr. Rauzzino further opined that the lumbar spine MRI films showed chronic degenerative changes which were contralateral to Claimant's report of symptoms following the injury.

25. Dr. Rauzzino testified at hearing consistent with his IME report. Dr. Rauzzino testified at hearing that the recommended surgery was designed for treatment related to Claimant's spinal stenosis which was causing pressure on the spinal canal in the L3-L5 area. Dr. Rauzzino testified that it was his opinion that it was not medically probable that Claimant's mechanism of injury would have permanently altered Claimant's spinal condition. Dr. Rauzzino testified that it was his opinion that the injury would not injure the annular fibers based on Claimant's reported mechanism of injury and Claimant's presentation after the injury. Dr. Rauzzino further opined that the MRI that was obtained post-injury did not suggest that the pathology was caused by the June 30, 2022 work injury. Dr. Rauzzino further testified that the delay in the presentation of the symptoms into Claimant's legs proves that the injury did not cause Claimant's symptoms. Dr. Rauzzino therefore opined that the progression of Claimant's symptomology was more likely related to the natural progression of Claimant's preexisting condition.

26. Claimant obtained an IME with Dr. Rook on April 29, 2024. Dr. Rook issued a report and opined that Claimant had significant central stenosis at the L3-L4 and L4-L5 levels. Dr. Rook noted that spinal stenosis could cause cauda equina compression which could affect both lower extremities. Dr. Rook opined that Claimant sustained a permanent aggravation to his lumbar spine when he injured his back at work on June 30, 2022.

27. Claimant testified at hearing that he continues to experience symptoms in his low back including a lot of sciatic pain, weakness in his ankle and burning into his feet. Claimant testified that although his pain started on his right side, he now experiences pain the same on both sides.

28. The ALJ credits Claimant's testimony at hearing along with the reports and opinions expressed by Dr. Lyons, PA Baumchen, and Dr. Martyn and finds that Claimant has established that it is more probable than not that the surgery

recommended by Dr. Martyn is reasonable medical treatment necessary to cure and relieve Claimant from the effects of his work injury.

29. The ALJ credits Claimant's testimony with regard to his low back symptoms that existed prior to his June 30, 2022 work injury and finds that this testimony is supported by the medical records entered into evidence in this case. The ALJ further credits Claimant's testimony that these symptoms changed after the June 30, 2022 work injury and finds that Claimant has established that his injury aggravated, accelerated or combined with Claimant's pre-existing condition to cause the need for medical treatment including the recommended L3-L4 discectomy and L4-L5 laminectomy.

CONCLUSIONS OF LAW

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

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

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

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

5. 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 pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing 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).

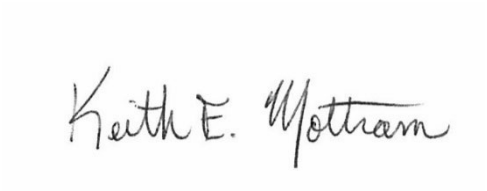
6. As found, Claimant has proven by a preponderance of the evidence that the work injury of June 30, 2022 aggravated, accelerated or combined with his pre-existing condition to cause the need for medical treatment including the recommended L3-L4 discectomy and L4-L5 laminectomy.

ORDER

1. Respondents are liable for medical treatment reasonably necessary to cure and relieve Claimant from the effects of the work injury including the L3-L4 discectomy and L4-L5 laminectomy recommended by Dr. Martyn.

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

DATED: June 28, 2024



Keith E. Mottram
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.**

ISSUES

- Did Claimant prove he suffered a compensable injury on February 10, 2021?
- Did Respondents prove the claim is barred by the statute of limitations?
- Did Claimant prove he suffered a compensable psychological injury?
- Did Claimant prove entitlement to TTD benefits?
- If there is a compensable injury, the parties stipulated to an average weekly wage of $815.76, which may be modified in the future based on the continuation cost of Claimant's health insurance.

FINDINGS OF FACT

1. Claimant worked for Employer as a security guard. On February 10, 2021, he was involved in an incident involving the restraint of a belligerent patient. The situation escalated and the patient became physically combative. The patient was quite large, so it took several guards, including Claimant, to restrain him. During the melee, the patient became unresponsive and stopped breathing. Claimant and the other guards lifted the patient onto a gurney, and he was admitted to the hospital for urgent treatment.

2. Claimant had pain in his right shoulder, right elbow, and right wrist immediately after the incident. He reported the symptoms to his supervisor and was referred to CCOM.

3. Claimant saw Buddy Leckie, PA-C at CCOM on February 10, 2021. He reported pain and stiffness in the right shoulder and right elbow after restraining and lifting a 300-pound patient. Physical examination showed tenderness, swelling, and pain with movement of the right elbow and right shoulder. Claimant's mental status exam was normal, with no indication of anxiety, depression, or other mental health issues. Claimant was diagnosed with shoulder, elbow, and wrist strains. He was advised to use OTC medication for pain, apply ice and heat, and wear an elbow compression sleeve. No work restrictions were imposed, and Claimant returned to his regular duties.

4. The patient who was involved in the incident subsequently died on or about February 18, 2021. Claimant was put on administrative leave for seven days while Employer investigated the incident. Claimant conceded at hearing the missed time was unrelated to the injuries suffered on February 10, 2021.

5. Claimant testified that he saw a counselor through the workplace Employee Assistance Program (EAP) approximately a week after the incident. Claimant told

Respondents' IME that he attended five to eight appointments. No corresponding treatment records were submitted to substantiate this testimony.

6. Claimant returned to CCOM on February 19, 2021. Mr. Leckie noted Claimant was off work "due to other circumstances." His right shoulder was "way better," but his elbow was still painful. Claimant's mental status was again described as normal, with no signs of depression or anxiety. Claimant was referred to PT. No work restrictions were assigned.

7. Claimant's care was transferred to Concentra in April 2021, and he started seeing Brandon Madrid, NP. He was given no work restrictions by any provider at Concentra.

8. Claimant attended approximately 10 sessions of PT. His last session was on April 26, 2021, at which time he reported he was "doing well" with 0/10 pain.

9. Claimant followed up with Mr. Madrid on April 30, 2021. Claimant reported he was "feeling better. Therapy complete. He feels he is ready to go." Claimant was put at MMI with no impairment, no restrictions, and no need for further treatment. The MMI report was countersigned by a supervising physician at Concentra.

10. Claimant missed no time from work because of the February 10, 2021 accident, and suffered no injury-related wage loss.

11. Respondents covered all treatment with CCOM and Concentra through MMI. The claim was properly handled as a "medical only" claim because Claimant suffered no disability or permanent impairment.

12. Claimant's mental status examinations were consistently unremarkable during his treatment at CCOM and Concentra.

13. In November 2021, Claimant and the other security guards involved in the February 10, 2021 incident were arrested and charged with homicide. Claimant's name was "all over" the news and social media, and he felt "eaten up" by the media. Claimant was also verbally attacked by the family of the deceased patient. Claimant became anxious about the charges, and remained anxious while the charges were pending. His symptoms included inability to sit still, pacing, and irritability. He had difficulty dealing with people at work. During that time, Claimant was on paid administrative leave.

14. The criminal charges were dropped in July 2022. Thereafter, Claimant's anxiety improved, and he returned to work without limitation.

15. On November 30, 2022, the family of the deceased patient filed a civil wrongful death lawsuit against Employer and the security guards involved in the incident, including Claimant. The civil suit triggered a recurrence of Claimant's anxiety. Claimant worried that he would be held financially liable for the patient's death, which he believed would not be covered by Employer. Claimant's anxiety over the litigation worsened in July 2023 after attending the deposition of the deceased patient's spouse.

16. Claimant received mental health treatment through his primary care providers at Southern Colorado Family Medicine for anxiety related to the pending lawsuit. On August 18, 2023, Elizabeth Ellen Skeen, NP, documented that Claimant was "stressed with a civil case against the hospital involving patient and 3 other officers. . . . He is considering a leave from work because of stress and worried about future ramifications." Claimant had scheduled a therapy session with the Employee Assistance Program (EAP). Ms. Skeen diagnosed an adjustment disorder with mixed anxiety and depressed mood.

17. On September 7, 2023, Claimant told Ms. Skeen he was experiencing high anxiety and stress that was "triggered by a recent announcement of civil lawsuit against hospital for an event that patient was involved in." Claimant did not think he could work "until the case [was] resolved." Ms. Skeen completed a form for Short Term Disability benefits stating Claimant could not perform the essential functions of his job for six months. The reason for Claimant's disability was described as, "civil lawsuit for case pt. was involved in has triggered high anxiety and stress."

18. Claimant filed a Workers' Claim for Compensation on October 22, 2023. He described the injury as "stress and anxiety." Claimant identified the basis for the claim as, "I was arrested and charged with criminal negligent homicide. I was defamed by the news and social media on 7/31/2023 after the announcement of the civil suit. The stress and anxiety once again began to consume me." The claim form does not reference any physical injuries, just a "mental health" injury. Claimant indicated he had been off work since September 6, 2023.

19. Dr. Robert Kleinman, a psychiatrist, performed an IME for Respondents on February 12, 2024. Dr. Kleinman diagnosed an adjustment disorder with anxiety. He opined Claimant does not have PTSD. Dr. Kleinman concluded that the psychiatric conditions are solely related to legal issues of being charged with murder and subsequently being a named defendant in the pending civil suit. They are unrelated to the physical injuries Claimant suffered, the altercation with the deceased patient, the patient's death, or any other events occurring at work on February 10, 2021.

20. Dr. Kleinman offered no opinion that Claimant's psychological condition resulted from "a psychologically traumatic event" arising out of and in the course of his employment. No psychiatrist or psychologist besides Dr. Kleinman has evaluated or treated Claimant or offered opinions or other evidence regarding his condition.

21. Respondents failed to prove Claimant's claim is barred by the statute of limitations. Claimant's physical injuries caused no disability or wage loss at any time. And Claimant's mental health issues did not impact his work capacity until November 2021 at the earliest, less than two years before he filed the Workers' Claim for Compensation.

22. Claimant suffered minor physical injuries on February 10, 2021, which reasonably required medical treatment. However, Respondents covered all treatment from authorized providers until Claimant was put at MMI on April 30, 2021, with no

impairment, no restrictions, and no need for maintenance care. Claimant is not seeking treatment for physical injuries at present. His claim relates solely to psychological issues.

23. Claimant failed to prove he suffered a compensable mental impairment.

24. Claimant failed to prove he suffered a compensable wage loss at any time on or after February 10, 2021.

CONCLUSIONS OF LAW

A. Statute of Limitations

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

As found, Respondents failed to prove Claimant's claim is barred by the two-year statute of limitations. Although Claimant suffered physical injuries on February 10, 2021, they were nondisabling and caused no wage loss. The October 22, 2023 Workers' Claim for Compensation requests benefits solely related to mental health issues rather than Claimant's physical injuries. Claimant's mental health issues did not impact his work capacity until November 2021 at the earliest, less than two years before he filed the Workers' Claim for Compensation in October 2023.

B. Compensability, more broadly

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

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *see, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to benefits by a preponderance of the evidence.

As found, Claimant suffered compensable physical injuries on February 10, 2021, for which he required medical treatment. However, no benefits can be awarded for those injuries, for several reasons. Respondents covered all treatment from authorized providers and there is no persuasive evidence that any authorized provider has recommended additional treatment for Claimant's physical injuries. Furthermore, Claimant was put at MMI and released from care, and the ALJ lacks jurisdiction to award medical benefits to cure and relieve the effects of Claimant's injuries absent a completed DIME or a subsequent change of condition. *E.g., McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (January 27, 2006); *Eby v. Wal-Mart Stores Inc.*, W.C. No. 4-350-176 (February 14, 2001); *Cass v. Mesa County Valley School District*, W.C. No. 4-69-69 (August 26, 2005).

C. Mental impairment

The Workers' Compensation Act imposes additional conditions for compensability of a claim for "mental impairment," beyond those applicable to other types of injuries. Among those conditions is a requirement that the claim be "supported by the testimony of a licensed psychiatrist or psychologist." Section 8-41-301(2)(a). The requirement for "testimony" includes the "work product" of a psychiatrist or psychologist, which may include "letters, reports, affidavits, depositions, documents, an/or oral testimony." *Colorado Dept. of Labor & Empl. v. Esser*, 30 P.3d 189, 196 (Colo. 2001).

The term "mental impairment" means a disability resulting from an accidental injury "when the accidental injury involves no physical injury and consists of a psychologically traumatic event." Section 8-41-301(3)(a). The statute defines the term "psychologically traumatic event" as (1) an event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances, or (2) an event within the workers' usual experience that causes PTSD, diagnosed by a licensed psychiatrist or psychologist. Section 8-41-301(3)(b). The claimant is not required to present expert testimony to support every element of the mental impairment statute. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). Expert evidence must prove that the claimant suffered a recognized, permanent disability from a psychologically traumatic event. But other competent evidence is admissible to prove that the injury was outside the workers usual experience, and that similarly situated workers would have reacted similarly. *Id*. at 1028-29.

This claim is somewhat unique, because even though Claimant suffered physical injuries on February 10, 2021, those injuries resolved, and the Workers' Claim for Compensation only references a "mental health" injury arising from "stress and anxiety."

There is no persuasive evidence that Claimant's mental health issues are related to his physical injuries, the altercation with the patient, or the patient's death. In fact, the claim filed in October 2023 is only tangentially related to the events of February 10, 2021 at all, merely in the sense that those events later resulted in criminal charges and a civil lawsuit, which in turn allegedly caused Claimant to develop an adjustment disorder and anxiety. Because the stimulus for Claimant's psychological symptoms was purely mental*, i.e.*, stress from criminal charges and civil lawsuits, I agree with Respondents that the mental impairment statute applies.

As found, Claimant failed to prove he suffered a compensable mental impairment. Dr. Kleinman is the only psychiatrist or psychologist who has provided any information regarding Claimant's mental health issues, and therefore his report is the only source of competent evidence for the elements of a mental impairment claim that must be "supported by" a psychiatrist or psychologist. Dr. Kleinman offered no opinion that Claimant's mental issues were caused by a "psychologically traumatic event," and specifically opined Claimant does not have PTSD. Additionally, Claimant offered no persuasive lay or expert evidence that the murder charges and lawsuit were outside his usual experience or would evoke symptoms of distress in other similarly situated worker.

ORDER

It is therefore ordered that:

1. Claimant's claim for medical or indemnity benefits related to mental health issues is denied and dismissed.

2. Claimant's claim for temporary disability benefits on or after February 10, 2021 is denied and dismissed.

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

DATED: June 25, 2024

DIGITAL SIGNATURE

Patrick C.H. Spencer II

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