OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-281-773-001

STIPULATIONS

At the outset of the hearing, the parties stipulated that Claimant's Average Weekly Wage (AWW) was $980.00 at the time of his alleged injury. This stipulation is approved.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he suffered a compensable right upper extremity injury in the form of a methicillin resistant staphylococcus aureus (MRSA) infected upper arm abscess following a slip and fall on July 8, 2024.

II. If Claimant proved that he suffered a compensable right upper extremity abscess, whether he also established, by a preponderance of the evidence, that he is entitled to reasonable, necessary and related medical benefits to cure and relieve him from the effects of that abscess.

III. Whether Claimant established, by a preponderance of the evidence, that Respondent-Employer is subject to penalties pursuant to C.R.S. § 8-43-408(1) for failing to carry workers' compensation insurance coverage at the time of Claimant's alleged July 8, 2024, injury.

FINDINGS OF FACT

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

Claimant's Alleged July 8, 2024, Injury

1. Employer is a home healthcare agency that provides in-home care and essential services to ill and disabled customers. The company is owned and operated by Kerian Nnabuife. Mr. Nnabuife hires care providers to deliver care/services to the company's customers and matches these providers to clients of the company based on the client's specific needs. Claimant was hired by Mr. Nnabuife on February 23, 2023, to provide, housekeeping services and other care to [redacted] who is a client of Employer and also Claimant's wife.

2. Claimant testified that he injured his right shoulder on July 8, 2024, while mopping the kitchen floor. Per Claimant, he slipped on the wet floor, lost his footing and fell backwards towards the right side of his body. Claimant testified that he instinctively extended his right arm away from his body to help break his fall. Claimant described falling onto his buttocks and right arm/hand, which reportedly caused a "little" popping sensation in his upper right arm just below the shoulder. Claimant described the sensation as "nothing major" but noted immediate redness in the arm. Claimant did not believe he had suffered a serious injury. Rather, he thought that he might have pulled a muscle.

3. Claimant testified that his right arm was sore after his fall, but he returned to light duty activities that did not require the use of his shoulder the next day. He noted that in the days after his slip and fall he developed a "welt" that continued to swell and turn colors. According to Claimant, the welt developed a "ball" on it, so he began to watch it carefully. After 3-4 days of additional close observation and about a week total after his slip and fall, Claimant concluded that he needed to have the welt "looked at".

4. [redacted] testified that Respondent-Employer provides caregiving services to her through Medicaid and that Claimant, who works for Employer, was approved to provide housekeeping and other essential services to her. [redacted] testified that on July 8, 2024, she witnessed Claimant slip and fall while mopping the kitchen floor. [redacted] testified that after the fall, Claimant's right shoulder was painful. Accordingly, [redacted] testified they went to tell Mr. Nnabuife that it was getting worse, and he needed to see a doctor.

5. Claimant testified that he went to Employer's office (before he sought treatment) where he explained to Kerian Nnabuife what had happened. After discussing the asserted injury, Claimant testified that Mr. Nnabuife directed him to see his (Nnabuife's) doctor. Claimant expressly refused, testifying, "I am not going to go to your doctor. I'm gonna just go somewhere else". Claimant added that he would go through Medicaid because he did not want to see Employer's doctor.

The Testimony of Kerian Nnabuife

6. Kerian Nnabuife testified that he owns Tender Hands, LLC. Mr. Nnabuife is a native of Nigeria who came to the United States in 2011, approximately three years after earning his degree from the University of Lagos. Mr. Nnabuife admitted Respondent-Employer did not have workers' compensation insurance on the date of Claimant's alleged injury for a variety of reasons, including the assertion that Nigeria did not have a workers' compensation system, that he had not had any workers' compensation claims in the seven years he worked in Colorado before founding

Respondent-Employer in 2018 and because his insurance broker did not notify him he needed workers' compensation insurance when he purchased other insurance for the business.

7. Based upon the evidence presented, the ALJ finds that Respondent-Employer did not have a valid workers compensation insurance policy in effect that the time of Claimant's alleged July 8, 2024 work related injury.

8. Mr. Nnabuife testified that he first heard that Claimant alleged a work-related injury to his right arm when he received a phone call from Claimant's wife on July 23, 2024, over two weeks after the alleged injury occurred. Mr. Nnabuife testified that he requested to speak to Claimant, but [redacted] refused to put Claimant on the phone. Therefore, Mr. Nnabuife informed [redacted] that Claimant needed to come to Employer's office to discuss the injury in person.

9. Mr. Nnabuife testified that Claimant presented to the office at which time, he requested that Claimant complete a written statement of the incident. This handwritten statement was admitted into evidence as Respondents' Hearing Exhibit H. The statement is dated July 23, 2024, and states:

> On 7-8-2024, I [redacted] was working for [redacted] through Tender Hand. I was cleaning a spill of some sort of liquid that [redacted] spilled when I accidentally slipped and fell and pulled a muscle on my right arm shoulder area which formed a blood clot which got infected and formed an abssess (sic). These are the words from the doctor that took x-ray MRI at St. Anthony Emergency Hospital on 7-21-2024. They told me that they were going to clean it out and put me on antibiotics but the next day the (sic) decided not to do nothing because they said it was a workman's comp case.

(RHE H, Bates p. 1645) (emphasis in original).

10. Claimant's written statement is not consistent with his hearing testimony or the medical records from the St. Anthony's Hospital Emergency Department on July 21, 2024. Indeed, Claimant testified that he reported the injury to Mr. Nnabuife before seeking any medical treatment. However, the St. Anthony Hospital medical records establish that Claimant sought medical care on July 21, 2024, while the statement written by Claimant on the day he reported the alleged injury to Employer is dated July 23, 2024. Consequently, the ALJ is convinced that Claimant sought medical care from

St. Anthony's Hospital prior to reporting the alleged work-related injury and before presenting to the University of Colorado Hospital (UCHealth) emergency department (ED) on July 29, 2024. Furthermore, Claimant's written statement is not consistent with the medical records. Claimant's written statement indicates that St. Anthony's Hospital refused to provide medical care because "they said it was a workman's comp case." However, careful review of the medical records associated with Claimant's treatment at the time he presented to the ED at St. Anthony's Hospital on July 21, 2024, reveals no reference to a work-related incident. Instead, the records repeatedly document only that "Patient slipped and fell on wet ground 2 weeks ago" without any reference to a fall at work. (RHE A, Bates pp. 64, 66, 91, 93, 99). Finally, there is nothing in the St. Anthony's chart that indicates that the medical personnel there were unwilling to provide care to Claimant. On the contrary, the medical records document that Claimant had an established relationship with the orthopedic team at UCHealth and preferred to be seen there, probably because he was scheduled to have an orthopedic procedure through those providers in the near future.[1]

11. Mr. Nnabuife testified that he offered to provide Claimant medical care at a clinic just down the street from Employer's office and that Claimant agreed to follow Mr. Nnabuife to the clinic, but when Mr. Nnabuife arrived, Claimant had apparently chosen not to follow him to the clinic for treatment there. Claimant also refused to appear at the clinic the next morning as well.

Claimant's Right Arm/Shoulder Treatment

12. Claimant presented to the ED at St. Anthony's on July 21, 2024, where he was evaluated by Certified Physician Assistant (PA-C) Nathan Rud. Claimant testified that by the time he presented to the ED the "ball" on his arm had gotten bigger and looked like it was going to have to be cut.

13. Records from Claimant's July 21, 2024, ED visit at St. Anthony's documents the following, "History of Present Illness (HPI): 59-year-old male with history of type 2 diabetes, chronic left shoulder hardware infection presents to ER for evaluation of pain and swelling to right arm. Patient slipped and fell on wet ground 2 weeks ago, notes that he hyperextended his right arm behind TMs, noted a large amount of bruising and swelling in the upper part of his right arm, has now subsequently gotten more swollen, red and now pointed, pain worse with flexing his shoulder and arm. No fever or chills. Patient is concerned for possible infection. (RHE A, Bates p. 57). Examination of the right upper arm was suggestive for cellulitis and possible abscess. *Id.* at Bates 58.

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[1] Explant of the surgical hardware in Claimant's chronically infected left shoulder.

14. Bilateral x-rays of the shoulders were ordered. The x-ray of the left shoulder revealed "[r]esorptive changes in the region of the humeral component of the left shoulder arthroplasty which could indicate loosing" along with "[o]steoarthropathy of the acromioclavicular joint.[2] X-rays of the right shoulder demonstrated similar findings including: "Anterior subluxation of the humeral component" along with "[r]esorptive change around the glenoid component that could indicate loosing.[3] (RHE A, Bates pp. 60-61).

15. In addition to x-rays, magnetic resonance imaging (MRI), with and without contrast, of the right shoulder was obtained. This imaging demonstrated two focal enhancing fluid collections involving the right shoulder, including the deltoid, pectoralis and subscapularis musculature. Both areas were suspicious for abscess formation. (RHE A, Bates p. 61). Also noted was a small amount of glenohumeral joint effusion suggestive of synovitis and possible septic arthritis. *Id.* at 62. CT was recommended for better delineation but not performed because Claimant's poor kidney function and a high creatinine level rendered him unable to tolerate the contrast bolus necessary to complete this diagnostic test. (RHE A, Bates p. 63). Accordingly, an ultrasound (US) of the soft tissue of the right upper arm was obtained which revealed a "large multiloculated (14.7 x 4 x 3.7 cm) area of fluid collection that was concerning for extension into the adjacent musculature. (RHE A, Bates p. 62). According to the report, the US findings could represent a hematoma or an abscess. *Id.*

16. PA Rud noted that Claimant presented with findings consistent with a soft tissue abscess, which he suspected was caused by a secondarily infected hematoma based upon Claimant's report of bruising from his fall. However, PA Rud noted that Claimant had an elevated CRP test result making it "unclear whether this (his elevated CRP) was related to infection or a chronic MRSA infection in [Claimant's] left shoulder. (RHE A, Bates p. 63). Because there was concern for an abscess extending underneath the deltoid to the subscapularis and the anterior portion of the shoulder joint along with possible septic arthritis in the right shoulder complicated by the presence of surgical hardware, PA Rud admitted Claimant to the general medicine service and requested an orthopedic consult. *Id.*

17. Claimant was evaluated by the orthopedic service at St. Anthony's Hospital at 11:15 p.m. on July 21, 2024. (RHE A, Bates p. 106). A follow-up discussion with Claimant regarding additional treatment was conducted by the orthopedic service

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[2] As set froth below, Claimant has a significant pre-existing history of injury and surgery with subsequent post-surgical infection involving the left shoulder.

[3] As with the left shoulder, Claimant has a prior history of injury and subsequent surgery involving the right shoulder.

on July 22, 2024, after his overnight stay. The potential for surgical intervention was raised during this discussion. *Id.* at 112. However, because Claimant's regular orthopedic surgeon was at UCHealth, the orthopedic team at St. Anthony's preferred that Claimant be seen there. (RHE A, Bates p. 99). Claimant also expressed a desire to see his regular orthopedic team who had previously scheduled him for additional surgery on his chronically infected left shoulder. *Id.* Indeed, Claimant noted that "he would rather just go to their (UCHealth's) ED and be seen by his regular ortho team". *Id.* Because Claimant was not septic and preferred to be seen at UCHealth, he was discharged to their care on July 22, 2024. *Id.*, see also, RHE A, Bates p. 111.

18. Claimant presented to the University of Colorado Hospital ED seven days later on July 29, 2024. (RHE B, Bates p. 914). It was noted that Claimant had an "arm wound concerning for an abscess versus deeper space infection versus osteomyelitis". *Id.* Claimant reported a crown being placed the week prior and that his dentist wanted him to start antibiotics. At the time of his July 29, 2024 ED admission, Claimant had no mouth pain. A physical exam of Claimant's mouth showed no "erythema or swelling" on the gum around the tooth where the temporary crown was placed. (CHE 7, Bates p. 669, 714, 717).

19. The condition of Claimant's right shoulder/upper arm at the time he presented to the hospital on July 29, 2024, was captured by photography obtained in the ED. *Id.* at 987. A bedside ultrasound revealed a "very complex right upper extremity fluid collection". *Id.* at 982. Accordingly, additional imaging (x-ray, CT and MRI) was requested. A CT of the right humerus with contrast revealed evidence of a previous right total shoulder arthroplasty with "bone erosion and loosing of the glenoid component with surrounding sclerosis concerning for septic osteolysis and osteomyelitis, new from most recent prior radiographs of 12/4/2022. *Id.* at 989. Also noted was "[p]ossible early erosion along the proximal medial stem of the humeral component . . . without overt bone erosion or destruction elsewhere in the humerus. *Id.* A large pseudocapsular effusion with a "contiguous collection" of fluid extending into the anterior deltoid and proximal anterolateral arm and chest musculature was observed. This fluid collection was contiguous with the skin surface and suggestive of a draining sinus tract. *Id.* Based upon CT imaging findings, the following diagnostic impression was reached:

> Status post right total shoulder arthroplasty with likely septic arthritis of the pseudocapsule. Loosening of the glenoid component and possibly early loosening of the humeral component due to erosive change.

> Associated large abscess collection along the anterior/anterolateral right arm and anterolateral right chest wall superiorly/proximally. The extent of the collection may be further assessed with contrast-enhanced MRI, as long as the MRI is tailored for evaluation near orthopedic hardware.

(RHE B, Bates p. 990).

20. The recommended MRI of the chest/right arm was obtained and revealed multiple abnormal findings in the right shoulder/chest resulting in the following diagnostic impressions:

> 1. Total shoulder prosthesis with complex fluid signal at the periphery of the joint prosthesis. These findings likely reflect the presence of septic arthritis as the joint appears to communicate with additional complex, peripherally enhancing fluid collections which extend distally between the deltoid and pectoralis major muscle and communicate with a more distal superficial collection at the anterior upper extremity associated with distal deltoid muscle fibers.
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> 2. Equivocal scapular marrow edema may be reactive or reflective of infection. Mild atrophy of the rotator cuff musculature is demonstrated. An ovoid fluid collection at the deep margin of the supraspinatus muscle may represent abscess.
>
> 3. Right axillary adenopathy.

(RHE B, Bates p. 1003). Following his MRI, Claimant was admitted to the hospital and scheduled to undergo an excisional irrigation and debridement (I&D) to address his right shoulder abscess.

21. Claimant underwent I&D to include skin, subcutaneous tissue, and muscle on July 31, 2024. (RHE B, Bates pp. 1016-1018). The surgery was performed by Dr. Melissa Gorman. In addition to the I&D procedure, Dr. Gorman performed a "deep soft tissue biopsy from the right shoulder synovium". *Id.* According to Dr. Gorman, the right shoulder joint appeared "chronically infected". *Id.* Various samples of fluid and tissue, obtained during surgery, were sent to the lab for culture. *Id.* While waiting for the culture test results, Claimant was initiated on broad-spectrum antibiotics, including Linezolid, Ceftriaxone, and Flagyl. (RHE B, Bates pp. 1070, 1074). Claimant was then

readmitted to the hospital under the care of the orthopedic service. (RHE B, Bates p. 1018).

22. Cultures from Claimant's fluid and tissue samples collected during the 7/31/2024 I&D procedure tested positive for MRSA. (RHE B, pp. 1109-1133). Following receipt of Claimant's culture results, he was diagnosed with "Staph aureus Right shoulder septic arthritis, PJI[4] and abscess s/p I&D 7/31" and his antibiotic was narrowed to Daptomycin per the infectious disease service on August 2, 2024. (RHE B, Bates p. 1054).

23. Claimant was reevaluated by both the infectious disease service and the Orthopedic Infectious Disease team on August 5, 2024. (RHE B, Bates pp. 1019-1024). At that time, a plan was formulated to discharge Claimant with continued outpatient antibiotic treatment consisting of two infusions of Dalbavancin with Minocycline as a "bridge" antibiotic until the first infusion of Dalbavancin was administered. *Id.* Claimant would then be placed on suppressive therapy at his one moth follow-up appointment. *Id.* at 1019.

24. Claimant was then discharged from the hospital and a lengthy summary outlining the course of Claimant's care and hospitalization was prepared which provided a final diagnosis of "right anterior arm abscess and right shoulder periprosthetic joint infection. (RHE B, Bates pp. 992-1016 at p. 993).

Claimant's History of Bilateral Shoulder Injury, Shoulder Treatment and Subsequent MRSA Infection

25. Claimant has a complicated history of upper extremity injury resulting in surgery to both his right and left shoulder. Indeed, the voluminous medical records admitted into evidence support a finding that Claimant has undergone bilateral total shoulder arthroplasty (TSA) surgery. (See generally, RHEs A, B and D). Following his left TSA, Claimant developed a MRSA infection that progressed to bacteremia[5] and seeding, i.e. spreading through the blood stream to other areas of Claimant's body including his spine, which infection caused epidural abscesses and osteomyelitis. *Id.* Indeed, Claimant was hospitalized with MRSA bacteremia with spread from the left shoulder to the spine causing C3-5 discitis, osteomyelitis, L2-4 discitis, epidural abscess, T8-T11 vertebral body osteomyelitis, multi facet spinal septic arthritis from May 13, 2022 to July 2, 2022, (RHE D, Bates pp. 1489-1491; RHE B, Bates 1064). Findings from an MRI of the cervical, thoracic and lumbar spine obtained May 17, 2022,

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[4] Periprosthetic joint infection.

[5] Described by Dr. Burris as the presence of staphylococcus bacteria in the blood.

resulted in the following pertinent diagnostic impressions:

> 1. Diskitis osteomyelitis at C3-C5 with ventral epidural collection compatible with a phlegmon vs epidural abscess, resulting in severe canal stenosis and cord compression most pronounced at C3-4. No abnormal cord signal.
>
> 2. Diskitis osteomyelitis at L2-L4 with ventral epidural enhancing tissue compatible with phlegmon resulting in severe narrowing of the spinal canal without compression of the cauda quinine nerve roots.
>
> 3. Facet enhancement and erosion involving the left C2/C3, left T10/T11, left T11/T12, and bilateral L2/L3 facet joints compatible with septic joint. Additional enhancement present at the right C3/C4, right L1-L2 and L3-L4 facets also likely represents septic arthropathy.
>
> 4. Right T8, bilateral T9, and left T11 enhancement at the costovertebral junction with corresponding osseous erosion at T9 on recent CT chest. Findings likely represent additional sites of infection.
>
> 5. Edema and phlegmonous change within the paraspinal musculature primarily at the superior cervical and inferior lumbar levels with small abscesses in the left psoas at the L4 level.

(RHE D, Bates p. 1490). While hospitalized, Claimant was treated with IV antibiotics to be followed by Bactrim suppression. (RHE B, Bates p. 1019).

26. The history obtained in the ED at the time of Claimant's 7/29/2024 presentation to UCHealth notes that following his discharge from the hospital in July 2022, Claimant returned to the ED at St. Anthony's hospital for complaints of neck pain in September 2022. (RHE B, Bates p.1064). Imaging of the cervical spine revealed ongoing signs of infection including C3-6 and L3-4 discitis/osteomyelitis. *Id.* Antibiotic treatment, including vancomycin was started and surgery for an unstable cervical spine was recommended. *Id.* Claimant refused surgery and left the hospital against medical advice. *Id.* Claimant would return to the ED in October 2022, with complaints of progressive 4-extremity numbness. He would subsequently undergo a C3-6 corpectomy with surgically instrumented anterior spinal column reconstruction. *Id.*

27. On March 15, 2023, Claimant presented to the ED at St. Anthony's hospital for evaluation of a large "fluctuant swelling over the anterior left shoulder"[6] that had gradually worsened over the past two weeks.[7] (RHE A, Bates p. 540). During this encounter, Claimant reported that he had been on multiple antibiotics for infections and was most recently worked up for infected hardware in his neck. *Id.* CT imaging with contrast revealed findings consistent with a 3.3 cm abscess that was subsequently incised and drained. *Id.* at 561. Fluid samples were collected and sent to the lab for analysis. A positive test result was confirmed for MRSA bacteria. *Id.* at 573. Claimant was started on antibiotics and advised to follow-up with his infectious disease provider and discharged from the ED.

28. Claimant presented to the outpatient wound care center at St. Antony's Hospital on April 12, 2023. (RHE A, Bates p. 527). The report from this date of visit notes that following his treatment in the ED on March 15, 2023, Claimant had completed a course of Bactrim and Keflex but that his open left shoulder wound had failed to heal. Accordingly, Claimant was referred to the wound center. *Id.* Although there was no obvious sign of infection at the time of this treatment encounter, Claimant reported "moderate" amounts of drainage. *Id.* at 530. Moreover, while no further debridement was indicated, there was hyper granulated tissue hanging from the ulcer base of the wound that required chemical cauterization with a silver nitrate stick. The wound was then dressed, and Claimant was advised to return for a follow-up visit around 4/19/2023. *Id.* at 525.

29. Claimant returned to the wound center on April 19, 2023, at which appointment it was noted that his ulcer was still hyper granulated and red raising concern for persistent MRSA infection. Additional excisional debridement was performed and tissue samples collected for lab analysis. Claimant was instructed to start taking previously prescribed Bactrim and change his wound dressing daily due to excessive drainage. (RHE A, Bates p. 500).

30. During a follow-up appointment at the wound care center on May 17, 2023 (incorrectly documented as 5/15/2023 in the narrative report), it was noted that Claimant was not taking his antibiotics and was reporting ongoing drainage from his left shoulder wound. Additional granulated tissue was excised to the depth of the muscle and silver nitrate was used for hemostasis. Persistent underlying chronic infection of the left total

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[6] Similar to his presentation to the ED on July 29, 2024, the area in question was red and painful. (RHE A, Bates p. 541).

[7] Based upon the description documented in the March 15, 2023 ED report, the ALJ finds the details surrounding Claimant's March 15, 2023 and July 21st and 29th, 2024 ED admissions strikingly similar to one another. Indeed, both admissions outline Claimant's decision to present to the ED for evaluation of what would be identified as a large MRSA positive abscess on the anterior aspect of the shoulder that had gradually worsened over 1-2 weeks.

shoulder prosthesis was suspected. Claimant was again instructed to restart Bactrim and make an appointment with his orthopedist "ASAP". (RHE A, Bates p. 463).

31. During a follow-up appointment in the wound center on June 7, 2023, Claimant's left shoulder wound (incorrectly identified as a left neck ulcer) was showing signs of healing. Indeed, the wound was smaller than on previous visits and it was noted that Claimant had restarted Bactrim as prescribed by Dr. Cullinan. (RHE A, Bates p. 438).

32. Claimant returned to the wound care center on June 14, 2023, where it was noted that his left shoulder ulceration continued to drain with hyper-granulated tissue despite multiple rounds of antibiotics. (RHE A, Bates p. 413). Because Claimant had retained surgical hardware in the shoulder, an MRI was recommended to rule out osteomyelitis. *Id.* Claimant was unable to follow-through with the recommended MRI because of an unexpected death in the family that required him to leave town abruptly. (RHE A, Bates p. 396). During a June 28, 2023, appointment at the wound care center, it was noted that Claimant's left shoulder ulceration continued to hyper-granulate and there was increased drainage. Additional debridement was performed during this encounter and Claimant was advised to return to the clinic in 1 week. *Id.*

33. By his July 5, 2023, wound care appointment, Claimant still had not followed through in completing his requested lab work or the recommended MRI. (RHE A, Bates p. 379).

34. Claimant was able to complete his MRI on August 11, 2023. He returned to the wound care center on August 16, 2023. (RHE A, Bates p. 348). During this appointment there was no meaningful improvement in the size of Claimant's left shoulder ulcer. Concerning the results of Claimant's MRI, the following notation was made:

> He did finally get his MRI done and unfortunately there was so much artifact from his previous hardware that there were they are now recommending a CT scan of the area. It is obvious he is going to need some type of surgical about (sic) evaluation due to the fact that he is (sic) hardware in this area and it is likely colonized with MRSA. They do not want to go back to the original surgeon and so I have sent a referral over to [P]anorama for surgical evaluation. He may need further imaging but I figured it would be best if they were able to determine what CT is warranted.

(RHE A, Bates 348).

35. Claimant was treated in the wound care center on 8/23/2023, 8/30/2023 and 9/20/2023; during which appointments, it was noted that his left shoulder ulcer was larger with more granulated tissue and increased drainage. (RHE A, Bates pp. 310-311). Discussion was had about getting a referral from Claimant's PCP or going to the emergency room for treatment of his suspected infected left shoulder surgical hardware. *Id.* at 311.

36. Claimant presented to the ED at St. Anthony's Hospital on October 11, 2023. (RHE A, Bates p. 282). The following brief history was noted by triage nurse Lloyd Benedict: "Pt arrives w/ co lt (left) arm abscess from a MRSA infection for 5 months that won't heal. Hx of lt shoulder replacement and his wound care specialist believes his hardware may be compromised". (RHE A, Bates p. 285). The orthopedic service was consulted and Claimant was evaluated by Certified Physician Assistant (PA-C) Maeve Kathrine Lyons. (RHE A, Bates pp. 292-295). Claimant was ultimately seen by Dr. Lisa B. Patel who placed him on a short course of antibiotics and instructed him to "follow-up with the surgeon that performed [his] initial surgery". *Id.* at 296. Dr. Patel provided Claimant with the number to the surgeon and subsequently discharged Claimant from the ED. *Id.*

37. Claimant returned to the wound care center at St. Anthony's on December 14, 2023, where he was evaluated by Dr. Katherine Mirro Johnson, DO. Dr. Johnson documented a detailed history of Claimant's complex shoulder condition and post-surgical infection, including the course of care following the initial multifocal MRSA infection in his cervical, thoracic and lumbar spine in 2022. (RHE A, Bates pp. 256-258). Dr. Johnson noted specifically that at the time Claimant presented to the hospital in September-October 2022, following inpatient treatment for his spinal infection, he was to receive 6-8 weeks of IV vancomycin and thereafter lifelong oral Bactrim for suppression. *Id.* at 257. She also noted that Claimant was "off his Bactrim from December 2022 through February 2023", but this medication was subsequently restarted. *Id.* After treating and dressing Claimant's wound, Dr. Johnson noted: "The patient likely needs a shoulder debridement with additional treatment with IV antibiotics and lifelong suppression". *Id.*

38. Claimant returned to the wound care center on December 21, 2023, at which time his wound was similar in appearance to prior visits. It was noted that Claimant was scheduled for an appointment with Panorama Orthopedics. Concern was raised that Claimant was not taking his medication for oral suppression. (RHE A, Bates, p. 243). Dr. Johnson also addressed concerns regarding medication interactions and potential impacts on Claimant's kidney function in view of his need to treat both his pre-existing hypertension and his persistent left shoulder infection with Bactrim. *Id.* Finally,

Dr. Johnson noted, "I discussed with patient that he likely needs a left shoulder explant (hardware removal) and spacer with six weeks of IV antibiotics and continued suppression thereafter due to C (cervical) spine HW (hardware). *Id.*

39. Claimant returned to the wound care center on January 11, 2024, where he was once again seen by Dr. Johnson who noted that Claimant had not been seen by orthopedics and that Claimant had not started taking Bactrim as prescribed. (RHE A, Bates p. 223). Dr. Johnson reiterated her opinion that the Claimant needed the hardware in his infected shoulder joint removed and an antibiotic spacer placed. *Id.*

40. Before Claimant could arrange for explant of the hardware in his infected left shoulder, he developed the right arm abscess which required the above outlined treatment.

The Medical Records Review and Testimony of Dr. John Burris

41. Respondent retained John R. Burris, M.D., to perform a review of Claimant's medical records. Dr. Burris also testified as an expert in occupational medicine. In his medical records review report dated February 28, 2025, Dr. Burris opined that Claimant's right shoulder/arm abscess was not related to the July 8, 2024, slip and fall. Indeed, Dr. Burris noted:

> [Claimant] has a long history of diffuse systemic MRSA infection with multiple comorbidities and has frequently been noncompliant with treatment for the systemic infection. He has a prothesis in his right shoulder which serves as a site for seeding his systemic infection. Any infection he has in or around the right shoulder is more likely than not a direct consequence of his systemic bacteremia and is independent and unrelated to a reported slip and fall musculoskeletal injury.

(RHE D, Bates 1497).

42. At hearing, Dr. Burris testified that individuals who undergo instrumented joint replacement surgery are at an increased risk of developing infection at the joint replacement site because the surgical hardware acts as a foreign body which readily colonizes bacteria that infects the surrounding tissue. According to Dr. Burris, the MRSA bacteria associated with these infections ultimately invades the bloodstream causing bacteremia that then seeds other areas of the body effectively spreading the original infection.

43. According to Dr. Burris, Claimant was non-compliant with the antibiotic

regimen necessary to treat his bacteremia by killing the MRSA in his blood, which led to his right shoulder infection that in turn caused his right arm abscess. Indeed, Dr. Burris testified that the most likely cause of Claimant's right shoulder abscess was the systemic spread (seeding) of MRSA bacteria present in Claimant's blood (from his chronically infected left shoulder) to the surgically altered right shoulder causing active infection in the joint. According to Dr. Burris, this infection then naturally progressed over time to cause the pathologic changes noted on the July 29, 2024, CT scan and further soft tissue abscess, just as this MRSA had previously spread to Claimant's spine causing epidural abscess in 2022.[8]

44. Careful review of the medical records supports a finding that other providers who have treated Claimant share Dr. Burris' opinions. Indeed, in her July 29, 2024, medical note, Dr. Caitlin Dietsche, M.D. noted that Claimant's "MRSA may not be eradicated from prior infections given intermittently (sic) non-compliance with chronic Bactrim". (RHE B, Bates p. 1080). Moreover, in a progress note dated 8/5/2024, PA-C Leigh Victoria Espinoza noted: "I suspect MRSA is (sic) infected his R (right) shoulder as it has his L (left) shoulder and spine". (RHE B, Bates p. 1020). Finally, the diagnostic impression from Claimant's July 29, 2024 CT scan provides that Claimant had a large abscess "associated", i.e. related to "likely septic arthritis of the pseudocapsule". (See Finding of Fact ¶ 19).

45. Based on the evidence presented, the ALJ credits the opinions and testimony of Dr. Burris to find that Claimant's right shoulder abscess probably represents the extension (seeding) of his pre-existing MRSA infection via the blood stream to the right shoulder joint causing an infection that then naturally progressed, as it had in the left shoulder and spine, to cause abscess formation on the anterior aspect of the upper right arm. Indeed, the evidence presented, including Dr. Burris' testimony

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[8] Dr. Burris testified that there were three potential causes for Claimant's right arm/shoulder abscess. First the natural progression (seeding) of MRSA bacteria present in Claimant's blood to the right shoulder. Second, the dental procedure involving placement of a temporary crown (because of the potential to stir up bacteria in the mouth) and third, the July 8, 2024 slip and fall. Because the slip and fall may only have strained the soft tissues of the shoulder joint and did not involve a cut or any penetrating type wound, Dr. Burris testified that it, i.e. the fall would not cause an infection. Thus, Dr. Burris excluded it as the cause of Claimant's right shoulder abscess. Of the remaining potential causes for Claimant's right arm abscess, Dr. Burris testified that Claimant's right shoulder had likely been infected for months based upon the presence of bone erosion and the loosening of the glenoid component of Claimant's right total shoulder replacement hardware with surrounding sclerosis concerning for septic osteolysis and osteomyelitis as seen on the CT scan from July 29, 2024. Simply put, because of the hardware present in the right shoulder, the MRSA bacteria in Claimant's blood readily seeded the joint causing infection and the subsequent development of an abscess much the same as Claimant experienced with the left shoulder in 2023. Accordingly, Dr. Burris testified that the most probable cause for the development of Claimant's right arm abscess was the natural extension of MRSA to the right shoulder causing infection months before Claimant's July 8, 2024 fall and then subsequent progression of this infection causing the right arm abscess.

and Claimant's medical records outlining his past medical history, persuades the ALJ that MRSA from Claimant's chronic left shoulder infection probably spread via the blood stream, in part because Claimant was non-complaint with his outpatient antibiotic treatment, to the right shoulder where this MRSA bacteria colonized on and around the total shoulder surgical hardware causing infection in the right shoulder joint prior to Claimant's July 8, 2024 slip and fall. Based upon the totality of the evidence presented, the ALJ is also convinced that once the right shoulder joint was infected with MRSA, this infection progressed naturally over time resulting in the development of PJI and secondary abscess formation via a sinus track to the anterior aspect of the right arm, similar to that Claimant experienced with regard to the left arm/shoulder in March 2023. The ALJ has considered Claimant's contrary theories regarding the cause of Claimant's right arm abscess, including the suggestion that trauma to the joint from Claimant's fall could have stirred up bacteria that had colonized in the prosthetic joint to cause Claimant's abscess.[9] The ALJ has also considered PA-C Rud's suspicion that Claimant's abscess was caused by a secondarily infected hematoma based upon Claimant's report of bruising from his fall. Based upon Claimant's medical history, including the spread of MRSA bacteria to his spine, which caused significant abscess formation combined with the decidedly similar presentation of abscess in the left arm, both in the absence of trauma or hematoma, the ALJ finds PA-C Rud's causation suspicion that an infected hematoma explains Claimant's right arm abscess theoretical and unconvincing.

46. Based upon the evidence presented, Claimant has failed to establish a causal connection between his July 8, 2024, slip and fall and the development of his anterior upper arm abscess requiring I&D and hospitalization.

CONCLUSIONS OF LAW

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

General Legal Principals

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

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[9] Dr. Burris specifically rejected this suggestion noting that it was not likely.

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

C. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. In this case, the following inconsistencies raise concerns about the reliability of Claimant's testimony:

- Claimant has filed three Worker's Claims for Compensation prior to his July 8, 2024, alleged injury. (RHE G, Bates pp. 1640 – 1642). In each of those claims, Claimant reported the injury to the employer on the day the injury occurred. Thus, the evidence supports a conclusion that Claimant was aware that (1) he needed to report work-related injuries to his employer on or shortly after the alleged injury occurred; and (2) Claimant would receive employer-paid medical treatment for an injury caused by work. However, in the present case, Claimant did not report the alleged injury until July 23, 2024, and only then after he had been to the ED on July 21, 2024, for treatment without telling anyone at St. Anthony's that the fall occurred at work.

- Claimant testified that he reported the injury to his employer prior to seeking medical care, but the medical records establish that he did not report the injury until July 23, 2024, after he sought medical care from St. Anthony's on July 21, 2024, rendering Claimant's testimony on this point incredible.

- Claimant's written statement (RHE H) indicates that St. Anthony's refused to provide medical care on July 21, 2024, because "they said it was a workman's comp case" but the medical records from the Emergency Department visit do not indicate Claimant ever stated the injury occurred at work and clearly establish that Claimant expressed a desire to treat through UCHealth.

- During his testimony, Claimant admitted to having a poor memory noting that he is in the beginning stages of Alzheimer's disease and yet he

testified in great detail regarding the position of his body, including his arms while mopping and falling to the floor.

Compensability

D. Under the Workers' Compensation Act, an employee is entitled to compensation where an injury or death is proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment. Section 8-41-301(1), C.R.S.*; Horodyskyj v. Karanian* 32 P.3d 470 (Colo. 2001). The phrases "in the course of" and "arising out of" are not synonymous and a claimant must meet both requirements for an alleged work-related injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The "in the course of" requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo.App. 48, 51, 552 P.2d 1033, 1036 (1976). In this case, there is little question that Claimant's alleged injuries occurred within the time and place limits of his employment relationship with Respondent-Employer and during an activity associated with his duties as a caregiver providing essential services to [redacted] namely mopping a kitchen floor. While the evidence presented supports a conclusion that Claimant's alleged injuries occurred in the course of his employment, he must, as noted above, also establish that his alleged injuries arose out of that employment before his asserted claim can be found compensable.

E. The term "arises out of" refers to the origin or cause of an injury or occupational disease. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* 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. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957)(mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact, which the ALJ must determine based on the totality of the circumstances presented. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead*

Machinery & Boiler Co. v. Del Valle, 934 P.2d 861 (Colo. App. 1996). Despite the inconsistencies between Claimant's medical records and his testimony, the ALJ is convinced that Claimant probably slipped and fell while mopping a floor on July 8, 2024. Nonetheless, the evidence fails to convince the ALJ that Claimant's MRSA infection or his right arm abscess is causality related to this fall.

G. In this case, Claimant contends that his July 8, 2024 slip and fall caused an injury to his right shoulder, which in turn "placed his shoulder in a weakened condition" and that this weakened condition "proximately caused an abscess which [then] developed MRSA". (Claimant's Proposed Findings of Fact, Conclusions of Law and Order, ¶2, p. 9). Accordingly, Claimant contends that he "proved" that his MRSA infection is a compensable consequence of [that] original industrial injury". *Id.* at ¶4, p. 8. In support of this position, Claimant relies on the "chain of causation analysis" announced in *Price Mine Service, Inc. v. Indus. Claim Appeals Office,* 64 P.3d 936 (Colo. App. 2003) and *Lanuto v. Amerigas Propane, Inc.*, W.C. No. 4-818-912, (July 20, 2011), which holds that industrial injuries which leave the body in a weakened condition, where that weakened condition proximately causes a new injury, this new injury is a compensable consequence of the original industrial injury. See, *Price Mine Service, Inc. v. Indus. Claim Appeals Office,* 64 P.3d 936 (Colo. App. 2003); *Lanuto v. Amerigas Propane, Inc.*, W.C. No. 4-818-912, (July 20, 2011). However, for such injuries to be compensable, a claimant's weakened condition must play a causative role in the subsequent injury. *Fessler v. United Airlines,* W.C. No. 4-654-034 (Dec. 19, 2007). As noted, Claimant contends that he suffered an original injury to his right arm when he slipped and fell while mopping on July 8, 2024.[10] Claimant contends further that this injury weakened the condition of his right shoulder which led to the development of an abscess which then became infected with MRSA. Thus, Claimant contends that his abscess and subsequent need for treatment are compensable components of the original injury arising out of his July 8, 2024 slip and fall. As additional support for his contention, Claimant cites to the holding announced in the claim of *Martinez v. City of Colorado Springs,* W.C. No. 5-073-295-002, (ICAO, Sept. 12, 2019).

H. In *Martinez,* the claimant suffered a spine injury while at work, and seven weeks later, a blood culture showed the presence of a staph infection. *Martinez v. City of Colorado Springs, supra.* The claimant's medical expert determined that the claimant had a transient blood infection that landed or seeded in his back. *Id.* The medical expert also opined that the infection was not present at the time of the work injury because staph causing infection was an aggressive bacteria that typically becomes symptomatic very early and the claimant had no pain, fever or chills prior to his spine injury. *Id.* The ALJ concluded that had claimant not have suffered the work injury, the odds of him developing a staph infection would have been substantially less likely. *Id.*

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[10] Its not clear what index injury Claimant is contending he sustained in the fall and the medical records from his early treatment fail do not delineate what injury he may have suffered, only that he fell and was presenting for worsening redness and pain, which the ALJ finds from the evidence presented was probably related to Claimant's developing abscess. While it is possible that Claimant may have suffered a soft tissue injury based on his claims of bruising, this assertion was not able to be verified due to the delay in seeking treatment. Moreover, the ALJ finds any claims of color changes likely related to the development of the abscess itself.

In affirming the ALJ's order that the injury and resultant infection were compensable, the Industrial Claims Appeals Panel reasoned that the ALJ's legal analysis was consistent with applicable standards where a claimant's weakened condition from an initial injury caused the subsequent staph infection, i.e. the subsequent injury. *Id.* Claimant asserts that like the claimant in *Martinez,* he too was asymptomatic of a staph infection until a week after his injury, when he developed fever, chills, right shoulder pain, redness and swelling about his upper right arm. Because the courts concluded that the staph infection was causally related to the claimant's original injury and therefore compensable in *Martinez*, Claimant urges this ALJ to conclude that his right arm abscess and MRSA infection is likewise related to an injury arising out of his July 8, 2024 slip and fall.

I. Claimant's assertion that he was "asymptomatic" of a staph infection until a week after his slip and fall is unconvincing. Indeed, the persuasive evidence supports a conclusion that Claimant had a persistent and active MRSA infection in his left shoulder that had invaded his blood previously leading to the spread of MRSA to his spine causing the development of epidural abscesses. Moreover, the evidence supports a conclusion that that Claimant's persistent left shoulder infection and resulting bacteremia were inadequately treated for a number of months and that the failure to aggressively treat this infection probably resulted in the spread of MRSA via the blood stream to the right shoulder months before Claimant's July 8, 2024 slip and fall.[11] Any suggestion that MRSA did not spread to the right shoulder from a previous infection because Claimant showed no signs of an active spinal infection is unpersuasive as it ignores the fact that Claimant's blood was infected with staph and he had a poorly treated open, draining infection from an abscess on the left shoulder from March 2023 through his admission to the hospital on July 29, 2024, which repeatedly tested positive for MRSA.

J. 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.
Indeed, under the Workers' Compensation Act (hereinafter Act) there is a distinction between the terms "accident" and "injury." An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident.

[11] Based on the results of Claimant's 2024 imaging studies.

City of Boulder v. Payne, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201(2) (injury includes disability resulting from accident).

K. Given the distinction between the terms "accident" and "injury" an employee can experience symptoms, including pain from an incident occurring at work without sustaining a compensable "injury." This is true, as in the instant case, even when the employee is clearly in the course and scope of employment performing a job duty. See *Aragon*, supra, ("ample evidence" supported the ultimate finding that no injury occurred where a claimant experienced pain after being struck by a bed she was moving as part of her job duties). In this case, the totality of the evidence presented persuades the ALJ that while Claimant may have had an accident involving a slip and fall, he has failed to prove it more likely than not that he suffered an injury or that his right shoulder abscess (which tested positive for the presence of MRSA) was caused by his alleged fall at work. Indeed, the medical records from July 2024 and forward do not document evidence of traumatic or acute injury to the arm or shoulder; however, they do document an indurated furuncle. Even if Claimant did fall at work on July 8, 2024, his testimony cannot be relied upon to establish a temporal relationship between that fall and the development of the abscess, since he testified that he has an extremely poor memory and his testimony as to the timeline of events is not credible. Furthermore, Dr. Burris credibly testified that the alleged fall on July 8, 2024, is so unlikely to have been the cause of Claimant's abscess formation that he would not even list it as a potential cause. Finally, Claimant's July 29, 2024, CT scan objectively establishes that Claimant's long-standing MRSA infection had probably spread to his right shoulder hardware months before July 8, 2024, and that even if Claimant did fall while working on July 8, 2024, it is far more likely than not, that the infection process in Claimant's right shoulder had already begun and was naturally progressing prior to his fall which only brought additional attention to the area secondary to Claimant's reports of persistent pain. Accordingly, the ALJ concludes that Claimant has failed to establish a causal connection between his July 8, 2024, slip and fall and his right shoulder infection and abscess requiring hospitalization and subsequent I&D.

L. Because Claimant has failed to carry his burden to establish that he sustained a compensable injury to his right shoulder, his remaining claims regarding entitlement to medical and penalties pursuant to §8-43-408 and §8-43-409, C.R.S. for Respondent-Employer's failure to carry workers' compensation insurance need not be addressed.

ORDER

It is therefore ordered that:

1. Claimant's claim for compensation and benefits arising out of an alleged July 8, 2024, slip and fall is denied and dismissed.

DATED: June 5, 2025

/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 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 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 need not 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://oac.colorado.gov/resources/oac-forms

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable work injury on June 15, 2023.

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to medical benefits reasonable and necessary to cure and relieve him of the effects of his June 15, 2023 injury.

3. Whether Claimant was entitled to select his own authorized treating physician.

4. The amount of Claimant's average weekly wage.

5. Whether Claimant is entitled to an award for disfigurement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Claimant worked as a flooring installer for Employer. He was paid $200.00 per day, and would cut and install floorboards. The Employer would determine the dates, times, and locations for Claimant to work, and provide all equipment needed to perform the work.

2. On June 15, 2023, Claimant was tasked by Employer to cut floorboards using a table saw for a flooring project. While cutting the floorboards, the Claimant accidentally cut his hand on the sawblade, severing his thumb, partially amputating his left ring finger, and lacerating his middle and index finger. Employer was working at the job site with the Claimant, installing the floorboards cut by the Claimant. Employer had actual knowledge of Claimant's injury immediately after the injury occurred.

3. Claimant called emergency services himself, and was initially treated by South Metro Fire Rescue. Claimant was transported to AdventHealth Littleton where he presented to the Emergency Department for further treatment. Claimant was evaluated by Dr. Carlton Clinkscales, who advised Claimant of the complex surgery, the need for 3 to 12 months rehabilitation, and performed the surgery. Surgery included closure of Claimant's traumatic thumb amputation, nerve and tendon repair in his lacerated fingers, and treatment of the partial amputation of his left ring finger. Claimant was discharged early the next day, with referral to physical therapy.

4. Claimant subsequently received physical therapy at the Orthopedic Centers of Colorado from June 19, 2023 through April 11, 2024.

5. The Employer did not provide Claimant with a designated provider list.

6. Employer did not have workers' compensation insurance coverage on June 15, 2023.

7. Claimant was unable to find work from June 15, 2023 to the present, due to disabilities arising from his injury.

8. Claimant is unable to fully utilize his left hand, remaining unable to fully close or open his left hand. Claimant also avoids appearing in public due to feelings of shame and embarrassment over the appearance of his hand, including his amputated thumb, partially amputated ring finger, scarring, and inability to manipulate his hand. ALJ examined Claimant's left hand at the hearing. Claimant has visible disfigurement to the body consisting of the following:
   (1) Amputation of the left thumb.
   (2) Partial amputation of the left ring finger.
   (3) Scarring of the left index and ring fingers.
   (4) Inability to fully close and open his hands.

9. Claimant has sustained a serious permanent and extensive disfigurement to areas of the body normally exposed to public view.

10. Claimant proved by a preponderance of the evidence that he sustained a compensable injury on June 15, 2023, arising out of and in the course of his employment with Employer.

11. Claimant proved by a preponderance of the evidence that his average weekly wage is $1000.00.

12. Claimant proved by a preponderance of the evidence that he is entitled to medical benefits reasonable and necessary to cure and relieve him of the effects of his work injury, including reimbursement for expenses incurred for emergency medical services provided by first responders, emergency treatment and surgery received at AdventHealth Littleton, and for physical therapy received at the Orthopedic Centers of Colorado.

13. Claimant proved by a preponderance of the evidence that the right of selection of an ATP passed to Claimant.

14. Claimant has proved by a preponderance of the evidence that he is entitled to disfigurement benefits.

ORDER

It is therefore ordered:

1. Claimant sustained a compensable injury on June 15, 2023, arising out of and in the course of his employment with Employer.

2. Respondent shall pay Claimant for medical treatment reasonable and necessary to cure and relieve Claimant of his June 15, 2023, injury, including, but not limited to, costs already incurred for medical treatment from South Metro Fire Rescue, AdventHealth Littleton, and Orthopedic Centers of Colorado.

3. Claimant is entitled to select his own ATP.

4. Claimant's AWW is $1000.00.

5. Respondent shall pay Claimant $10,500.00 for his disfigurement.

6. In lieu of payment of the above compensation and benefits to Claimant, Respondent shall deposit a sum equal to the total amount of medical benefits owed and disfigurement, plus 4% per annum, with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Trustee. Alternatively, Respondent, within ten days after the date of this Order, shall file a bond with the Director, guaranteeing payment of the compensation and benefits awarded, and signed by two or more responsible sureties who have received prior approval by the Division of Workers' Compensation, or with any other surety company authorized to do business within the state of Colorado. Respondent shall immediately notify the Division of Workers' Compensation and Claimant of payments made pursuant to this Order.

7. All other issues are reserved for later determination.

DATED: June 5, 2025.

Office of Administrative Courts

_____

Stephen Abbott
Administrative Law Judge

This decision is final and not subject to appeal unless a full order is requested. The Request shall be made at the Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203, within seven working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

If a Request for Specific Findings of Fact and Conclusions of Law is made, opposing counsel shall submit proposed Specific Findings of Fact, Conclusions of Law, and Order within five working days from the date of the Request. The proposed order must be submitted by e-mail in Word or Rich Text format to OAC-DVR@state.co.us. The proposed order shall also be submitted to opposing counsel and unrepresented parties by e-mail, facsimile, or same day or next day delivery.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-285-761-001

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Respondent-Employer on September 27, 2024.

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits for his wage loss beginning on his date of injury until October 21, 2024.

3. 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 September 27, 2024 injury.

STIPULATIONS

1. The parties stipulate that as of the date of the hearing all the treatment Claimant had received in the medical records provided would be reasonable, necessary, and related to the alleged work injury if found compensable.

2. Claimant's average weekly wage is $857.53 as of the date of hearing. Once the COBRA benefits have been determined this will be added to the AWW.

FINDINGS OF FACT

1. Claimant is a bicycle salesperson who had been working for Respondent-Employer for two and a half years as of September 27, 2024, the date of his workplace injury.

2. On that date, Claimant was performing his usual work of attending to customers when the sales director, Adam Johnson, asked Claimant to follow him out back behind the store. Claimant and Mr. Johnson stepped outside behind the store and Mr. Johnson informed Claimant that he was being fired. Mr. Johnson handed Claimant his final paycheck. Claimant, surprised by the news, looked down at the check, fainted, and fell face-first onto the asphalt, sustaining a neck strain and lacerations to his right eye, upper lip, right shoulder, right knee, and right elbow. Claimant later credibly testified that he had been expecting a promotion, not a termination, and that he was blindsided by the news, resulting in him fainting.

3. Claimant sought treatment at the emergency room at Swedish Medical Center for his injuries and followed up several days later on November 2 at AdventHealth West Littleton Emergency Room for a suture removal and cervical spine CT scan as well as with NextCare where he was attended by Dr. Alphonse Gordano. Claimant had right shoulder tenderness and facial swelling and lacerations. Imaging of Claimant's head and neck were unremarkable. Dr. Gordano recommended physical therapy and massage therapy but did not opine on the need for temporary work restrictions.

4. Several weeks later, on October 21, 2024, Claimant obtained new employment with Vail Resorts.

5. Claimant continued to have persistent neck pain and later followed up with Dr. Erick Gomer at NextCare on November 13 who assigned Claimant work restrictions of no lifting or carrying more than fifty pounds and no repetitive lifting of more than forty pounds. Claimant's diagnosis was that of a vasovagal syncope with associated fall.

6. Claimant underwent an independent medical examination (IME) with Dr. John Hughes on February 20, 2025. Claimant reported his history as documented above and denied any history of fainting, syncope, or loss of consciousness. Dr. Hughes opined that it was a "fairly straightforward history of vasovagal syncope or neurocardiogenic syncope" leading to additional injuries when Claimant fell. He further noted that the syncope was precipitated by being confronted with termination rather than a promotion and that the sequence of events would be a common etiology. Although Dr. Hughes noted that Claimant had anemia, which may have played a role, the proximate cause of Claimant's syncope was vasovagal or neurocardiogenic in nature.

7. Dr. Hughes felt that Claimant's treatment thus far had been reasonably necessary to cure and relieve him of the effects of his work injury and that Claimant needed continued physical and massage therapy.

8. At hearing, both Claimant and Mr. Johnson credibly testified consistently with the above. Additionally, Claimant credibly testified that he was paid for one more week after he was terminated and was paid a $300 bonus. Mr. Johnson credibly testified that Respondent-Employer could have accommodated Claimant's temporary work restrictions if his employment had not been terminated. He stated there were always other coworkers there when Claimant was working that could help with any scenario where he needed assistance. However, the Court finds no credible evidence in the record that Respondents did in fact offer Claimant modified employment.

9. The Court finds that Claimant proved by a preponderance of the evidence his mental stress arose from his job termination, that the mental stress resulted in the physical manifestation of a loss of consciousness which, in turn, caused Claimant

to fall to the ground, sustaining physical injuries to his neck, face, right shoulder, and right knee, and that he sustained a compensable injury arising out of and in the course of his employment on September 27, 2024.

10. The Court finds that Claimant was paid his full wages through October 5, 2024, and that Claimant sustained a total wage loss from October 6 to October 20, 2024, for a total of fifteen days. During that time Claimant was recovering from his injuries, which included facial and shoulder lacerations, swelling, right shoulder pain, and neck pain. Although he did not receive temporary work restrictions until later, the Court finds that Claimant's disability arising from his injury likely impaired to some degree his ability to effectively and properly perform regular employment with a new employer.

11. The Court finds that Claimant proved by a preponderance of the evidence that his disability impaired his ability to obtain gainful employment from October 6 through October 20, 2024, and that his wage loss resulted from his work injury and resulting disability.

12. Claimant's average weekly wage, as stipulated by the parties, is $857.53.[1] His temporary total disability (TTD) rate is $571.69. Claimant is entitled to fifteen days of TTD at a rate of $571.69 from October 6 through October 20, 2024, totaling $1,225.04.

13. The parties further stipulated, and the Court accepts as a finding, that upon a finding of a compensable injury all treatment Claimant received for his work injury as documented in the medical records submitted as evidence was reasonably necessary to cure and relieve Claimant of the effects of his work injury.

CONCLUSIONS OF LAW

Generally

1. 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.

[1] The parties reserve the right to amend the stipulated average weekly wage based on COBRA.

2. 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).

3. 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

4. An injury must “arise out of and occur in the course of” employment to be compensable, and it is the claimant's burden to prove these requirements by a preponderance of evidence. Section 8-41-301, C.R.S.; *see also Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). An injury “arises out of” the employment when it is sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions to be considered part of the service provided to the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury is said to have arisen in the course of employment if the injury occurred while the employee was acting within the time, place, and circumstances of the employment. *Id*.

5. Respondents argue that because Claimant’s injuries arose from mental stress, the Court must apply the mental-impairment statutes. Because Claimant’s mental stress arose from a termination taken in good faith by Respondent-Employer, Respondents argue, and because Claimant’s mental stress arose from a hazard to all forms of employment—that is, termination—Claimant’s mental-stress did not constitute an “injury” under the statute and its consequences shall not be

considered to arise out of and in the course of employment, thus barring Claimant's claim for benefits.

6. Claimant argues, in turn, that this case does not involve a mental impairment. Claimant's injuries, he argues, are just to his neck, face, right shoulder, and right knee as a result of his impact with the pavement. Claimant does not allege PTSD, anxiety, depression, or any other mental impairment. Claimant further argues that the Act's definition of "mental impairment" at § 8-41-301(3)(a) specifically excludes accidents involving physical injuries.

7. Section 8-41-301(3)(a), C.R.S., defines "mental impairment" as follows:

> "'Mental impairment' means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves *no physical injury* and consists of a psychologically traumatic event. 'Mental impairment' also includes a disability arising from an accidental physical injury that leads to a recognized permanent psychological disability."

(Emphasis added.)

8. Section 8-41-301(2)(a), C.R.S., provides in relevant part that "[a] mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer." Additionally, subsection -301(2)(c) further excludes mental impairments that are based in whole or in part upon facts and circumstances "common to all fields of employment." The intent of the heightened burden for purely mental injuries is to eliminate frivolous claims. *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004).

9. Additionally, § 8-41-302(1), C.R.S., excludes from the definitions of "accident", "injury", and "occupational disease" any "disability or death caused by or resulting from mental or emotional stress unless it is shown by competent evidence that such mental or emotional stress is proximately caused solely by hazards to which the worker would not have been equally exposed outside the employment."

10. Several cases address whether mental-stress claims resulting in physical manifestations are subject to the heightened proof requirements of the mental-impairment statutes.

11. In *Esser v. Indus. Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), a claimant experienced a panic attack and developed several physical symptoms arising from her stress at work, including a racing heart, numbness in her arms, high blood pressure, and severe chest pains. *Id.* at 1219-20. The Court of Appeals held that Claimant's claim was subject to the heightened proof standards of -301(2)(a)

because, “even if these conditions could reasonably be described as physical injuries, they were the results, not the causes, of the mental stimuli to which claimant was subjected.” *Id.* at 1221(rev’d on other grounds by *State Dep’t of Labor & Emp’t v. Esser*, 30 P.3d 189 (Colo. 2001)).

12. Prior to *Esser*, several ICAO panels had addressed cases involving emotional stimuli resulting in physical injury.

13. In *DuShane v. Beneficial Colorado, Inc.*, W.C. No. 4-218-217 (July 17, 1998), a claimant suffered from nausea and diarrhea resulting from intimidating and degrading conduct by his supervisor. Similarly, in *Faulkner v. Alexander Dawson School*, W.C. No. 4-294-162 (1999), a claimant suffered respiratory issues and vocal cord dysfunction resulting solely from a psychological reaction to carpet glue fumes.

14. In both *DuShane* and *Faulkner*, the panels held that an “emotional stimulus” causing a “physical injury” falls within the ambit of -301(2)(a), reasoning that such cases are far less subject to direct proof than cases in which the physical component occurs simultaneously to or in conjunction with the psychologically traumatic event.

15. As found, Claimant’s mental stress arose from his job termination. Also, as found, the mental stress resulted in the physical manifestation of a loss of consciousness which, in turn, caused Claimant to fall to the ground, sustaining physical injuries to his neck, face, right shoulder, and right knee.

16. Like the claimants in *Esser*, *DuShane*, and *Faulkner*, Claimant suffered a physical manifestation of his mental stress—namely, syncope. However, unlike the claimants in *Esser*, *DuShane*, and *Faulkner*, Claimant sustained contemporaneous physical injuries beyond physical manifestations of his mental stress when he fell to the ground.

17. Section 8-41-302(2)(a) applies only to those cases where the injury involves “no physical injury,” such as *Esser*, *DuShane*, and *Faulkner*, in which the claimants merely experienced physical manifestations of a psychological injury without a contemporaneous physical injury. Claimant’s injury, however, while arising from a psychologically traumatic event, involved a contemporaneous physical injury. Therefore, the Court agrees with Claimant that Claimant’s injury is not a “mental impairment” as defined by -301(3)(a), and therefore the heightened standards of -301(1) and -301(2)(a) do not apply.

18. Nevertheless, Claimant’s claim is still subject to § 8-41-302(1), C.R.S., which excludes from the definitions of “accident", "injury", and "occupational disease", any disability or death caused by or resulting from mental or emotional stress, absent competent evidence that his “mental or emotional stress is proximately caused solely by hazards to which [he] would not have been equally exposed

outside the employment." As found, Claimant's physical injuries did result from mental or emotional stress mediated by Claimant's syncope. Therefore, Claimant is required to prove by competent evidence that his "mental or emotional stress is proximately caused solely by hazards to which [he] would not have been equally exposed outside the employment." That is, for a mental condition to be compensable under the Act, the hazards causing the stress must be more attributable to the workplace than to a claimant's personal problems. *Young v. Indus. Claim Appeals Office of State of Colo.*, 860 P.2d 591, 593 (Colo. App. 1993).

19. As found, Claimant's mental or emotional stress was solely the result of his supervisor's delivery of the news that he was being fired, a hazard to which Claimant would not have been exposed outside of his employment. The Court therefore concludes that Claimant's injury is not excluded under § 8-41-302(1).

20. The Court concludes, as found, that Claimant proved by a preponderance of the evidence that he sustained a compensable injury to his neck, face, right shoulder, and right knee on September 27, 2024, arising out of and in the course of his employment.

TTD

21. If the injury or occupational disease causes temporary total disability, a disability indemnity shall be payable as wages at a rate of 66 2/3% of the claimant's average weekly wage. Sections 8-42-103(1) and 8-42-105(1), C.R.S.

22. TTD benefits are designed to compensate an injured worker for wage loss while the injured worker recovers from a work-related injury. *Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson,* 938 P.2d 504 (Colo. 1997). Claimant bears the burden of establishing three conditions before qualifying for TTD benefits: (1) that the industrial injury caused the disability; (2) that Claimant left work because of the injury; and (3) that the disability is total and last more than three working days. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo.App.1997).

23. As found, Claimant has proved by a preponderance of the evidence that his disability impaired his ability to obtain gainful employment from October 6 through October 20, 2024, and that his wage loss resulted from his work injury and resulting disability.

24. Claimant's average weekly wage, as stipulated by the parties, is $857.53, subject to further revision for COBRA benefits. His TTD benefit rate is $571.69. Claimant is entitled to fifteen days of TTD at a rate of $571.69 from October 6 through October 20, 2024, totaling $1,225.04.

Medical Benefits

25. The Court accepts the parties' stipulation that upon a finding of a compensable injury all treatment Claimant received for his work injury as documented in the medical records submitted as evidence was reasonably necessary to cure and relieve Claimant of the effects of his work injury.

ORDER

It is therefore ordered that:

1. Claimant has proved by a preponderance of the evidence that he sustained a compensable injury on September 27, 2024.

2. Claimant has proved by a preponderance of the evidence that he is entitled to fifteen days of TTD at a rate of $571.69 from October 6 through October 20, 2024, totaling $1,225.04.

3. All treatment Claimant received for his work injury as documented in the medical records submitted as evidence in this case was reasonably necessary to cure and relieve Claimant of the effects of his work injury.

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

DATED: June 5, 2025.

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

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.

OFFICE OF ADMINISTRATIVE COURTS

STATE OF COLORADO

WORKERS' COMPENSATION NO. 5 283-681-001

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that on August 18, 2024 he suffered an injury arising out of and in the course and scope of his employment with Employer?

STIPULATION

The parties stipulate that if the claim is found compensable, Claimant's average weekly wage (AWW) is $851.38, (which results in a temporary total disability (TTD) rate of $567.59).

The parties further stipulate that if the claim is found compensable, Claimant is entitled to TTD benefits from August 19, 2024 through February 2, 2025.

FINDINGS OF FACT

1. Claimant is employed with Employer as a bus driver. Claimant testified regarding an incident that occurred during his work shift on August 18, 2024. On that date, Claimant completed his scheduled route and drove his assigned bus to his work location. Upon arrival, Claimant exited the bus and was walking quickly to the restroom. Claimant testified that while doing so, he was carrying his work bag which was heavy. As he walked swiftly, Claimant stepped onto a curb and tripped. Claimant further testified that although he did not fall to the ground, the momentum of attempting to stay upright caused him to twist. Claimant described the twisting motion to be "like whiplash".

2. Claimant testified that after using the restroom and upon exiting the building, he felt a sharp pain in his back. Claimant further testified that he had never experienced back pain like that prior August 18, 2024. Due to this back pain, Claimant was unable to walk to Employer's offices. Instead he obtained a ride on another bus to

reach the office. Claimant attempted to report the tripping incident, but was informed that the necessary "OJI"[1] form was not available.

Events and Medical Treatment Prior to August 18, 2024

3. Claimant testified that prior to August 18, 2024, he had no history of back problems, he never had any work restrictions related to his back, and he was able to perform all of his job duties.

4. In 2014, Claimant was diagnosed with prostate cancer. Claimant testified that his cancer went into remission in 2019, but metastases were found in his right scapula in 2020. Additional metastases were discovered in 2021 in his iliac crest.

5. Prior to August 18, 2024, Claimant was taking medication for cancer and seeing a doctor regarding cancer treatment and to monitor his PSA[2] levels. In April 2024, a positron emission tomography (PET) scan showed metastases in his L2-L4 spinal levels, L7-L8 ribs, and left iliac crest. Claimant testified that he underwent radiation treatment in May 2024 to address those metastases. Claimant further testified that he had no cancer related back issues immediately prior to the August 18, 2024 incident at work.

6. In April 2024, Claimant tripped and fell in front of his bus. Claimant testified that he fell onto his left arm and also experienced pain in other areas of his body. Following that injury, Claimant underwent physical therapy and massage. Claimant testified that this treatment focused on his ribs, with some treatment on his back. Claimant credibly testified that his symptoms from the April 2024 fall resolved completely prior to August 18, 2024.

Events and Medical Treatment After August 18, 2024

7. Following the August 18, 2024 tripping incident, on August 22, 2024, Claimant sought treatment at the Medical Center of Aurora for back pain. At that time, a computed tomography (CT) scan of Claimant's thoracic spine showed a pathologic fracture at the T9 level that involved the right lateral vertebral body and pedicle. Claimant was prescribed muscle relaxers and discharged.

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[1] On the job injury.

[2] Prostate-specific antigen.

8. Although he was unable to complete an OJI form, Claimant sent an email to Employer on August 23, 2024 that referenced his back symptoms. Specifically, the email stated, in pertinent part, "I informed dispatch had tweaked my lower back". This email also addressed Claimant's difficulty in obtaining an OJI form.

9. Due to his ongoing low back pain, Claimant contacted his primary care provider (PCP), Dr. Jesus Hermosillo Rodriguez. Dr. Hermosillo recommended Claimant seek treatment in the emergency department (ED).

10. On August 27, 2024, Claimant sought treatment at the ED at Saint Joseph Hospital. At that time, Claimant reported severe back pain and left sided pain. The medical record notes Claimant's belief "that the vertebral fracture is from driving over bumps in Colfax ... or from stepping off a curb unusually several weeks prior". Claimant also informed providers of his cancer diagnosis. Claimant testified that he did not tell any provider that he believed he injured his back driving on Colfax.

11. While at Saint Joseph Hospital on August 27, 2024, Claimant underwent magnetic resonance imaging (MRI) of his thoracic spine and his lumbar spine. The thoracic spine MRI showed diffuse osseous metastatic disease and a compression fracture at T9. Claimant also underwent a lumbar spine MRI, which showed osteoblastic metastatic disease throughout the lumbar spine.

12. On August 27, 2024, Claimant was admitted into the hospital. While hospitalized, on August 28, 2024, Claimant reported to providers that "he was doing well until he missed a step on the curb and twisted his body". Claimant was discharged from the hospital on August 29, 2024.

13. On September 4, 2024, Claimant completed an Employee Workers' Compensation Notice form. In that document, Claimant described losing his balance on a curb and twisting his back.

14. On September 9, 2024, Claimant was seen at Occupational Medical Partners, as his authorized treating provider (ATP). At that time, Claimant was seen by Tom Chau, PA. In the medical record, PA Chau noted Claimant's report that he "miss stepped *(sic)* and tripped on the curb causing him to twist and rotate his torso to the

RIGHT" (emphasis in original). PA Chau referred Claimant for consultation with an orthopedic spine specialist. In addition, PA Chau noted that it was difficult to determine whether Claimant's condition was work related.

15. On September 12, 2024, PA Chau authored an addendum to the September 9, 2024 record. Specifically, PA Chau noted Claimant's history of prostate cancer with metastatic disease. PA Chau opined that Claimant's mechanism of injury was minor and did not cause the vertebral fracture at T9. PA Chau further opined that the cause of the fracture was Claimant's metastatic prostate cancer.

16. On January 16, 2025, Claimant was seen at Kaiser Permanente by Dr. Crawford. In the medical record of that date, Dr. Crawford noted that the vertebral fracture was stable, and no further treatment was necessary. With regard to causation, Dr. Crawford opined that it was possible that Claimant tripping on a curb was sufficient to cause the fracture. Dr. Crawford also noted "[i]t is impossible to know whether the fracture was present prior to his injury or occurred as a consequence but his pain acutely worsened at that time and I think it is possible that the injury caused or at least contributed to the fracture."

17. On December 2, 2024, Claimant attended an independent medical examination (IME) with Dr. Carlos Cebrian. In connection with the IME, Dr. Cebrian reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. In an IME report dated December 19, 2024, Dr. Cebrian opined that Claimant did not suffer a work related injury on August 18, 2024. In support of this opinion, Dr. Cebrian noted Claimant's history of prostate cancer with metastases, with diagnoses of metastatic disease in the thoracic and lumbar spine. Dr. Cebrian also noted the August 27, 2024 medical record in which Claimant mentioned both driving on Colfax and stepping off a curb. Dr. Cebrian concluded that Claimant's multiple fractures in the spine are secondary to the diagnoses of metastatic prostate cancer and not the August 18, 2024 incident at work. Dr. Cebrian further opined that the August 18, 2024 incident did not have the requisite force to cause a vertebral fracture.

18. Dr. Cebrian's testimony was consistent with his IME report. Dr. Cebrian reiterated his opinion that Claimant did not suffer an injury to his spine on August 18, 2024. Dr. Cebrian further testified that in 2024, Claimant's metastatic prostate cancer had progressed resulting in lesions at T3, T4, T7, T9, T11, L2, L3, and L4. Dr. Cebrian explained that of those lesions, four would be considered fractures; specifically T9, T12, L1, and L2.

19. With regard to the fracture at T9, Dr. Cebrian explained that this is the largest fracture and is a vertical compression fracture. Regarding the cause of the T9 fracture, Dr. Cebrian opined that the mechanism of injury described by Claimant would not result in a vertical compression fracture, as the force is inconsistent with the fracture location (vertical, as opposed to a wedge fracture).

20. Dr. Cebrian also testified that it was unlikely that the twisting event on August 18, 2024 aggravated Claimant's pre-existing condition, Dr. Cebrian explained that, assuming a compression fracture at T9 was already present, an aggravation based on the mechanism described by Claimant would result in additional wedge fractures, not a vertical fracture with height loss. Dr. Cebrian noted Claimant's testimony that his pain only began after the alleged work incident on August 14, 2024, but explained that only an acute injury would result in immediate pain and the objective medical evidence did not show an acute injury.

21. The ALJ credits Claimant's testimony, the medical records, and the opinions of Drs. Hermosillo and Crawford over the contrary opinions of Dr. Cebrian. It is undisputed that Claimant had pre-existing metastatic prostate cancer, with lesions in his spine prior to August 18, 2024. The ALJ finds as credible Claimant's testimony that his back pain complaints began immediately after the August 18, 2024 tripping and twisting incident. The ALJ specifically finds that the August 18, 2024 incident in which Claimant tripped on a curb and twisted his body aggravated the pre-existing condition in his spine, resulting in pain symptoms and ultimately the need for treatment. Therefore, the ALJ finds that Claimant has demonstrated that it is more likely than not that on August

18, 2024, he suffered an injury arising out of and in the course and scope of his employment with Employer.

CONCLUSIONS OF LAW

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

5. Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Indus. Comm'n,* 21 0 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines,* W.C. No. 4-921-616-03 (September 9, 2016). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment they would not otherwise have required. *Cambria v. Flatiron Construction,* W.C. No. 5- 066-531-002 (May 7, 2019) *(citing Merriman v. Industrial Commission,* 210 P.2d 448 (Colo. 1949)). The mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Indus, Comm'n,* 437 P.2d 542 (Colo. 1968); *Catts v. Exempla,* W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company,* W.C. No. 4-177-843 (March 31, 2000).

6. As found, Claimant has demonstrated, by a preponderance of the evidence, that on August 18, 2024 he suffered an injury arising out of and in the course and scope of his employment with Employer. As found, the tripping and twisting incident that occurred at work on August 18, 2024 aggravated the pre-existing condition in Claimant's spine, resulting in pain symptoms and ultimately the need for treatment. As found, Claimant's testimony, the medical records, and the opinions of Drs. Hermosillo and Crawford are credible and persuasive on this issue.

ORDER

It is therefore ordered:

1. Claimant suffered a compensable work injury on August 18, 2024.

2. As stipulated, Claimant's average weekly wage (AWW) is $851.38.

3. As stipulated, Claimant is entitled to TTD benefits from August 19, 2024 through February 2, 2025.

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

Dated June 6, 2025.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

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

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

STIPULATION

At the outset of the hearing, the parties stipulated to an average weekly wage (AWW) of $771.62. These stipulations approved by the ALJ.

REMAINING ISSUES

I. Whether claimant established, by a preponderance of the evidence, that she suffered a compensable cumulative trauma injury to her right hand/wrist.

II. If Claimant established that she suffered a compensable injury to her right hand and wrist, whether she also established, by a preponderance of the evidence, that the right TFC and ECU tendon sheath reconstruction surgery recommended by Dr. Larsen is reasonable, necessary, and related to the work injury?

Based on the evidence presented at hearing, the ALJ orders as follows:

The Relatedness of Claimant's Carpal and Cubital Tunnel Syndrome to her Work Duties and her Entitlement to Medical Benefits

A. The Claimant bears the burden of establishing entitlement to medical treatment. See *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office, supra.* However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused, i.e. related to an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury.

B. The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 521 (Colo. App. 1999). Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is also one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

C. In this case, the totality of the evidence presented persuades the ALJ that Claimant likely suffers from a right TFC complex tear, a partial tear of the right ECU tendon with a moderate amount of inflammation in the surrounding soft tissue, a strain of the collateral ligaments at the base of the right thumb and pre-existing arthritic changes in the radiocarpal bones with radioulnar space effusion. (CHE 7, p. 112). Nonetheless, the question remains as to whether these conditions are related to Claimant's work duties. In concluding that Claimant has proven that these conditions are related to an occupational exposure, the ALJ has considered the Medical Treatment Guidelines, specifically Rule 17, Exhibit 5. The Medical Treatment Guidelines (MTG's) are regarded as the accepted professional standards for care under the Workers' Compensation Act. Hernandez v. University of Colorado Hospital, W.C. No. 4-714-372 (January 11, 2008); see also Rook v. Industrial Claim Appeals Office, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. See, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight and have been accepted in the assessment of the cause of Claimant's right hand/wrist conditions. carpal tunnel syndrome. See generally, W.C.R.P., Rule 17, Exhibit 5.

D. As noted, Rule 17 Exhibit 5 of the MTGs specifically addresses causation for many cumulative trauma conditions affecting the hand and wrist. Indeed, the MTG's provide: "General Principles of Medical Causation Assessment The clinician must determine if it is medically probable (greater than 50% likely or more likely than not) that the need for treatment in a case is due to a work-related exposure or injury. Treatment for a work-related condition is covered when: 1) the work exposure causes a new condition; or 2) the work exposure activates or exacerbates a previously asymptomatic latent medical condition; or 3) the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic condition; or 4) the work exposure combines with a pre-existing co-morbid condition, such as diabetes, to render the occurrence of a cumulative trauma condition more probable in combination with the work related exposure. In determining whether treatment for Claimant's specific disorders of the right hand/wrist are due to a work-related exposure or injury, the MTGs require that a provider identify "non-occupational" diagnosis/exposures as well as avocational activities in order to establish their contribution to symptoms and the need for treatment. According to the Guidelines the pertinent question to be answered is: "Is it medically probable that the patient would need the treatment that the clinician is recommending if the work exposure had not taken place? If the answer is "yes," then the condition is not work-related. If the answer is "no," then the condition is most likely work-related. Additional risk factors are to be considered when determining the occupational relationship regarding the need for treatment in cases involving cumulative trauma conditions, including age, sex, high BMI (obesity), the presence of other upper extremity musculoskeletal diagnosis, diabetes, rheumatologic diseases, hypothyroidism, smoking history and whether the patient is pregnant. Information regarding other "employment, sports, recreational, and avocational activities that might contribute to or be impacted by the cumulative trauma condition, including activities such as video gaming, smartphone

use, crocheting/needlepoint, baseball/softball, playing musical instruments, home computer operation, golf, tennis, and gardening" should also be obtained when considering the causal relationship between asserted cumulative trauma disorders and a claimant's work duties.

E. The MTG's also contain a "Risk Factors Definitions Table" identifying the amount of time, force, duration and awkward posture spent in specific use of the hands/wrists as either a primary or secondary risk factor in the development of cumulative trauma disorders. See, W.C.R.P. Rule 17, Exhibit 5, p. 26. Furthermore, the MTGs contain an "Ergonomic Considerations Table." The Guidelines indicate that, "…This table is a generally accepted guide for identifying job duties which may pose ergonomic hazards…"[1] Here, Respondents', based primarily on the testimony of Dr. Mordick, contend that the condition of Claimant's right hand/wrist is not causally related to her work duties with Employer. Indeed, Respondents assert that MTGs have determined that there is "no evidence that a TFC is affected by employment" and that the best evidence that Claimant's partial TFC tearing is not causally related to her work duties comes from the job analysis report completed by Genex, which job duties Dr. Mordick opined failed to meet the required risk factors for the development of this diagnosis. The ALJ is not persuaded. While the MTGs indicate that "No Quality Evidence" is available, either for or against specific risk factors identified from work activity for the development of TFC tears, the MTGs note the following "Non-Evidence-Based Additional Risk Factors to consider[2]:

> Usually from traumatic hyperextension which may become symptomatic over time. Wrist posture in extension and repetitive supination of the forearm and/or elbow extension. For occupational, usually unilateral with ulnar wrist pain while supinating and extending the wrist as part of the regular work duty.

W.C.R.P., Rule 17, Exhibit 5, p. 33.

F. The evidence presented persuades the ALJ that Claimant's job required repetitive strenuous use of the fingers, hands and wrists. Indeed, Claimant described a position requiring her to move and manipulate boxes of files weighing 10-50 pounds from which she would process (digitize) 20-50 files or some 4,900 documents daily. The ALJ infers from Claimant's description of her work that she manipulated the files she digitized by gripping the file with her hand with her forearm supinated and the wrist in an extended position with the weight of the file on the wrist. Moreover, the evidence presented persuades the ALJ the job analysis (JA) completed by Genex is of limited value in determining causation in this case because the JA was completed after physical restrictions were imposed and Claimant was working modified duty.

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[1] The Table is described in the "Job Hazard Checklist" on page 141 of W.C.R.P. 17, Exhibit 5(H)(6)(c).
[2] These factors must be present for at least 4 hours of the workday and may not overlap evidence risk factors.

G. Regarding the evidence of hand/wrist pain due to aggravated osteoarthritis, Respondents advance a similar argument by asserting that the MTGs state that there is no quality evidence available to find causality between a diagnosis of aggravated osteoarthritis of the wrist and work activities. According to Respondents, the "Division of Workers' Compensation reviewed all literature related to arthritis of the wrist . . . and found it is not a work-related injury". (emphasis in original). Like the situation involving Claimant's TFC tear, the MTGs simply indicate that there is no quality evidence, i.e. studies (for or against) that connects specific risk factors associated with upper extremity work to aggravated osteoarthritis of the hand/wrist. To assert that the MTGs concluded that aggravated osteoarthritis of the hand/wrist is "not a work-related injury" is demonstrably incorrect. As with conditions affecting the TFC, the MTGs note that there are "non-evidenced-based risk factors to be considered when determining whether an injured workers hand/wrist pain may arise out of the aggravation of pre-existing osteoarthritis, including awkward posture of the joints involved, repetition of activities affecting the joint involved for 4 hours and prior injury. Based upon the totality of the evidence presented, the ALJ is convinced that prior to the imposition of work restrictions, Claimant was probably using her fingers, hands and wrists to repeatedly grab and manipulate (pinch/grip/grasp) heavy paper files for breakdown and digitization. As noted, the ALJ is convinced that Claimant handled and digitized 20-50 files or about 4900 documents per day, which activity probably resulted in sufficient time[3] being spent in repeated pinching, gripping and grasping with her wrists in an awkward posture[4] to aggravate the underlying, yet asymptomatic osteoarthritis in Claimant's right wrist. Based on the non-evidence-based risk factors of time and posture, as set forth in the MTGs combined with Claimant's testimony and the medical records in this case, the ALJ is convinced that Claimant's work duties played a causative role in the Claimant's hand/wrist pain by aggravating her pre-existing right radiocarpal (wrist) arthritis.

H. Regarding Claimant's ECU tendonitis and tear, Respondents concede that the MTGs indicate that ECU tendonitis and extensor tendon disorders of the wrist can be causally related to work activity if the thresholds regarding force and repetition are meet. Per the "Risk Factors Definitions Table" in the MTGs for hand/wrist activity to be identified as a primary risk factor for the development of an extensor tendon disorder there must be 6 hrs. of upper extremity (hand/wrist) activity involving 2 pounds pinch force or 10 pounds hand force 3 times or more per minute. See, W.C.R.P., Rule 17, Exhibit 5, p. 27. To qualify as a secondary risk factor, there must be 3 hrs. of hand/wrist use of 2 pounds pinch force or 10 pounds hand force 3 times or more per minute. In this case, Respondents rely heavily on the JA completed by Genex to assert that Claimant's job duties do not satisfy the minimum force, repetition and duration thresholds necessary under the MTGs to establish a causal connection between her work and her ECU tenonitis/tear and need for treatment. Indeed, Respondents note that per the Guidelines, a minimum of three (3) hours of activity involving 2 pounds pinch force or 10 pounds hand force 3 times or more per minute is necessary, and per the Job Analysis Claimant's job only involved 54 minutes of such activity a day. Hence,

[3] Four hours or more per day.
[4] Per Claimant's testimony, hyperextended supporting the weight of the file.

Respondents contend that this "confirms" that Claimant's ECU injury and need for treatment, i.e. surgery is not causally related to her work duties. Moreover, Respondents assert that because Dr. Mordick did not find tenderness over the ECU or instability of the wrist on examination, the ECU stabilization procedure is not reasonable or necessary.

I. The ALJ has considered the Medical Treatment Guidelines, Claimant's testimony and the testimony of Dr. Mordick. The ALJ has also considered the parties' hearing exhibits. Based upon the totality of the evidence presented, the ALJ concludes Claimant has proven that her right hand/wrist conditions, i.e. ECU tendonitis/tear, her TFC tear and aggravated wrist osteoarthritis are related to the work duties associated with her position as a real property support specialist. The ALJ is persuaded that these disorders resulted directly from the conditions under which Claimant's work was performed and can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of her employment. Moreover, they can be fairly traced to Claimant employment as a proximate cause. Finally, the conditions do not come from a hazard to which the Claimant would have been equally exposed outside of her employment. Consequently, the ALJ is convinced that these conditions are related to Claimant's work duties, and she likely would not have needed the treatment recommended by Dr. Larsen if her workplace exposure had not taken place.

J. Even if Claimant's job does not fall precisely within the primary or secondary risk factors outlined in the causation matrix of the MTGs as suggested by Dr. Mordick, the ALJ finds and concludes that the particular facts in this case still make it more likely than not that Claimant's right hand/wrist conditions were caused by her work. The ALJ is not bound by the MTGs in deciding individual cases. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

Moreover, the MTGs provide: "The medical causation assessment for cumulative trauma conditions is not a substitute for a legal determination of causation/compensability by an Administrative Law Judge. Legal causation is based on the totality of medical and non-medical evidence, which may include age, gender, pregnancy, BMI, diabetes, wrist depth/ratio, and other factors based on epidemiologic literature. W.C.R.P., Rule 17, Exhibit 5, p. 17. In this case, the ALJ concludes that Dr. Mordick and Respondents' causation argument is founded upon a rigid application of the MTGs' resting necessarily upon the assumption that the causation matrix is absolute and provides the only source of information to which we should turn to determine causation in this case. The ALJ is not convinced. The evidence presented in this case

persuades the ALJ that while Claimant had a history of right upper extremity problems before she began processing/digitizing 20-50 files involving up to 4,900 documents daily, her right hand/wrist was not symptomatic when she undertook the project in question. Furthermore, there is no alternate cause, which explains her symptoms more persuasively, i.e. equally or more likely than her work exposure. Indeed, the ALJ is not convinced that Claimant's involvement in playing cornhole or horseshoes at her company picnic is causative of her conditions, symptoms or need for treatment. Here, the medical reports outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Larsen to recommend surgery. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that this procedure is reasonable and necessary to cure and relieve Claimant from the ongoing effects of her compensable cumulative trauma conditions. As found, the contrary opinions expressed in the Genex JA, and the testimony of Dr. Mordick are unpersuasive.

ORDER

It is therefore ordered that:

1. Claimant has proven that her right hand/wrist conditions, as outlined above, are causally related to an occupational exposure occasioned by her work duties associated with manipulating, copying and digitizing files as a real property specialist for Employer.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her right hand/wrist conditions including but not limited to the right wrist reconstruction surgery recommended by Dr. Larsen.

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

DATED: June 10, 2025

/s/ Richard M. Lamphere

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

This decision is final and not subject to appeal unless a full order is requested. The request shall be made at the Office of Administrative Courts, 2864 S. Circle Drive, Suite 810, Colorado Springs, CO 80906 within ten working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

If a party makes a request for a full order both parties shall submit a proposed full order containing specific findings of fact and conclusions of law within five working days from the date of the request. The proposed full order must be submitted by e-mail in Word or Rich Text format to OAC-CSP@state.co.us. The proposed order shall also be submitted to opposing counsel and unrepresented parties by e-mail, facsimile, or same day or next day delivery.

ISSUES

1. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable injury on August 20, 2021, arising out of and in the course of her employment with Respondent.

2. Whether Respondent proved by a preponderance of the evidence that Claimant was an independent contractor.

3. Claimant's average weekly wage.

4. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability (TTD) from her date of injury through ongoing.

5. Whether Claimant proved by a preponderance of the evidence that she is entitled to disfigurement benefits.

FINDINGS OF FACT

1. Respondent, El Paso Produce, is a small business owned by Guadalupe Hernandez. The business was involved in the sale of various foods and involved a component that consisted of a food cart that sold roasted corn. Mr. Hernandez operated his business out of a warehouse, but he and his business were evicted.

2. At the time Respondent was evicted from the warehouse, Mr. Hernandez was involved in a romantic relationship with a woman named Gloria Enriquez. Ms. Enriquez's nephew was married to a woman who is the claimant in this matter.

3. As a favor to her husband's aunt, Claimant allowed Mr. Hernandez to keep his belongings at her home so that Mr. Hernandez could continue running his business. Mr. Hernandez agreed to pay Claimant's electricity bill in exchange for operating his cactus-peeling machines at her home. Claimant also assisted Mr. Hernandez in finding a new location to rent for his business and helped read and translate documents for Mr. Hernandez. To help secure a new lease and to placate the concerns of Respondent's new landlord, Claimant agreed to be involved with Mr. Hernandez's business. Consequently, Claimant decided to work for Mr. Hernandez.

4. Claimant's work for Mr. Hernandez was informal. Claimant's job never involved her completing an employment application or receiving an employee handbook, Claimant had no written work schedule, she never received any written reviews for her job performance, she never received any written job duties, and Mr. Hernandez was generally present during work and would review the quality of Claimant's work. Claimant testified that she would watch her own son as well as Mr. Hernandez's son while she was working. She denied that Mr. Hernandez ever provided her with any tax documents for her work. In expressing the informal nature of the work, she explained that it was not like working for Walmart or McDonalds.

5. Claimant worked for Mr. Hernandez for roughly three weeks[1] at $16 per hour, fifteen hours a day, seven days a week under a cash arrangement. Despite this, Claimant testified that Mr. Hernandez never actually paid her any money for her work because the business never generated profit.[2]

6. On August 20, 2021, while Claimant was operating Respondent's roasted corn cart, a propane flame flared up and burned her face and left arm. Claimant testified that Mr. Hernandez was present and witnessed the accident occur but did not help her.

7. Claimant initially sought treatment at North Suburban Hospital and was later transferred to a different hospital. Claimant was kept at the hospital for three or four days while she treated at a burn clinic and underwent skin grafts. Her doctors had instructed her to use sunscreen on her face for the rest of her life.

8. Claimant stated that she never returned to work for Mr. Hernandez due to the lack of payment and that she was ultimately evicted from her home for failing to pay rent. She did not return to work for more than a year after the accident until she obtained a different job cleaning houses in 2024.

9. Claimant testified that her initial burns involved 27% of her face as well as parts of her arm. At hearing, Claimant exhibited burn scars around the left elbow below a tattoo measuring approximately four inches by six inches with slight discoloration and texture change. Claimant denied any permanent disfigurement to her face.

10. Claimant testified at hearing consistently with the above findings. The Court finds Claimant's testimony plausible and unrebutted and finds no reason to disbelieve Claimant's testimony. The Court therefore finds Claimant's testimony credible.

11. The Court finds that Claimant has proved by a preponderance of the evidence that she was an employee of Respondent-Employer at the time of her work injury, as she performed services for pay for Respondent. Respondent has failed to prove

[1] Claimant testified that she worked for Mr. Hernandez for 329 hours, which when divided by fifteen hours a day and seven days a week corresponds with approximately twenty-two days of work.
[2] Claimant testified that Mr. Hernandez made a single payment to her of $439 on September 9, 2021, but the Court infers that this was more likely compensation for Claimant's medical bills following the injury.

by a preponderance of the evidence that Claimant was an independent contractor. Claimant worked exclusively for Respondent, was paid an hourly wage in cash, received direction and oversight from Respondent during her work, and did not operate under a separate business identity. Additionally, Respondent did not present evidence that Claimant had the autonomy or characteristics indicative of an independent contractor, such as setting her own hours, investing in tools or equipment, or offering similar services to the general public. The Court finds that Claimant was not customarily engaged in an independent trade or business. Accordingly, notwithstanding the many informalities of the employment relationship, the totality of the circumstances leads the Court to find that Claimant was an employee of Respondent at the time of the injury, not an independent contractor.

12. Furthermore, the Court finds that Claimant's injury arose out of and in the course of her employment with Respondent. Claimant was working for Respondent at the time the propane flame from the cart flared up and caused her burns.

13. Claimant's average weekly wage at the time of her injury was $1,680. This is based on her earning $16 per hour, fifteen hours per day, seven days a week. This corresponds with a weekly TTD rate of $1,120.

14. Claimant has proved that she is entitled to TTD benefits from August 20, 2021, through ongoing at a rate of $1,120, subject to termination as permitted by the Act. Claimant suffered a disability arising from her injury, including an extended hospital stay and restrictions to protect her skin from sunlight. Although Claimant testified that she began working another job in 2024, there is insufficient evidence for the Court to determine the date that Claimant returned to full duty or whether there was any other statutory basis for termination of Claimant's entitlement to TTD benefits.

CONCLUSIONS OF LAW

Generally

1. 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.

2. 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).

3. 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

4. Claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Workers' Compensation Act, he was performing service arising out of and in the course of his employment and the injury was proximately caused by the performance of such service. §§8-41-301(1)(a)-(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo.App.2000).

5. As found above, Claimant sustained an injury on August 20, 2021, when the propane flame flared up from the cart and burned Claimant on her face and left arm.

6. Respondent contests, however, that Claimant was an independent contractor.

7. The term "employer" is defined to include every person, firm or corporation "who has one or more persons engaged in the same business or employment, except as expressly provided in articles 40 to 47 of this title, in service under any contract

of hire, express or implied." §8-40-203(1)(b), C.R.S. The term "employee" is defined as any person in the service of any person or corporation "under any contract of hire, express or implied." §8-40-202(1)(b), C.R.S.

8. An employer-employee relationship is established when the parties enter into a "contract of hire." §8-40-202(1)(b), C.R.S.; *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991). A contract of hire may be express or implied, and it is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo.App.1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement and mutuality of obligation. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994); *Martinez Caldamez v. Schneider Farm*, W.C. No. 4-853-602 (July 16, 2012). A contract of hire may be formed even in the absence of every formality attending commercial contracts. *Rocky Mountain Dairy Products v. Pease*, 422 P.2d 630 (1966).

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

10. Section 8-40-202(2)(b)(II), C.R.S., enumerates nine factors to be considered in evaluating whether an individual is deemed an employee or independent contractor. However, the test considered by the Colorado Supreme Court in the unemployment insurance case of *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014) concerning whether a worker is an employee or an independent contractor applies to workers' compensation claims. The test requires the analysis of not only the nine factors enumerated in § 8-40-202(2)(b)(II), C.R.S. but also the nature of the working relationship and any other relevant factors. *Pella Windows & Doors, Inc. v. Indus. Claim Appeals Office*, 458 P.3d 128 (Colo.App.2020). The *Softrock* decision noted indicia that would normally accompany the performance of an ongoing separate business in the field and included whether: the worker used an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance. *Softrock Geological Services*, 325 P.3d at 565.

11. As found, the Court concludes that Respondent has failed to prove by a preponderance of the evidence that Claimant was an independent contractor. Claimant worked exclusively for Respondent, was paid an hourly wage in cash, received direction and oversight from Respondent during her work, and did not operate under a separate business identity. Additionally, Respondent did not present evidence that Claimant had the autonomy or characteristics indicative of an independent contractor, such as setting her own hours, investing in tools or

equipment, or offering similar services to the general public. As found, Claimant was not customarily engaged in an independent trade or business. Accordingly, notwithstanding the many informalities of the employment relationship, the Court concludes that Claimant proved by a preponderance of the evidence that she was an employee of Respondent, and Respondent failed to prove by a preponderance of the evidence that Claimant was an independent contractor.

Average Weekly Wage

12. The entire objective of wage calculation is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corporation*, 867 P.2d 77, 82 (Colo.App.1993); *Loofbourrow v. Indus. Claims Office of State*, 321 P.3d 548, 555 (Colo. App. 2011) *aff'd sub nom Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327; *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (May 7, 1997). In general, an ALJ is to compute a claimant's AWW based on the claimant's earnings at the time of injury.

13. As found, the Court concludes that Claimant's average weekly wage at the time of her injury was $1,680. This is based on her earning $16 per hour, fifteen hours per day, seven days a week. This corresponds with a weekly TTD rate of $1,120.

Temporary Total Disability

14. Temporary total disability benefits are designed to compensate an injured worker for wage loss while the injured worker recovers from a work-related injury. *Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson,* 938 P.2d 504 (Colo. 1997). Claimant bears the burden of establishing three conditions before qualifying for TTD benefits: (1) that the industrial injury caused the disability; (2) that Claimant left work because of the injury; and (3) that the disability is total and last more than three working days. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997).

15. As found, the Court concludes that Claimant has proved that she is entitled to TTD benefits from August 20, 2021, through ongoing at a rate of $1,120, subject to termination as permitted by the Act. Claimant suffered a disability arising from her injury, including an extended hospital stay and restrictions to protect her skin from sunlight. Although Claimant testified that she began working another job in 2024, there is insufficient evidence for the Court to determine the date that Claimant returned to full duty.

Disfigurement

16. Claimant has a visible disfigurement to the body consisting of burn scars on her left arm. As found, Claimant exhibited at hearing burn scars around the left elbow below a tattoo, measuring approximately four inches by six inches with slight discoloration and texture change. Claimant denied any permanent disfigurement to her face.

17. Claimant has sustained a serious, permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108(1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant has proved by a preponderance of the evidence that she sustained an injury on August 20, 2021, arising out of and in the course of her employment with Respondent.

2. Respondent has not proved by a preponderance of the evidence that Claimant was an independent contractor at the time of the injury.

3. Claimant's average weekly wage at the time of her injury was $1,680.

4. Claimant proved by a preponderance of the evidence that she is entitled to TTD benefits at a weekly rate of $1,120 from August 20, 2021, subject to termination as provided by the Act.

5. Claimant has proved by a preponderance of the evidence that she is entitled to a disfigurement award of $4,600.

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

DATED: June 13, 2025.

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

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.

ISSUES

1. Has Claimant demonstrated, by a preponderance of the evidence, that in June 2024, he suffered an injury arising out of and in the course and scope of his employment with Employer?

2. If the claim is found compensable, has Claimant demonstrated, by a preponderance of the evidence, that treatment of his left shoulder (including treatment from Dr. Wallach, and Dr. Wallach's subsequent referrals for left shoulder treatment) constitutes reasonable medical treatment 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. At the hearing, the parties agreed to reserve the issues of temporary total disability (TTD) and temporary permanent disability (TPD) benefits for future determination, if necessary.

FINDINGS OF FACT

1. Claimant began working for Employer on April 25, 2022. Initially, Claimant worked in Employer's warehouse as a material handler. At that time his job duties included operating a walking stacker and a fork lift, and general oversight of the organization of the warehouse. On September 21, 2022, Claimant suffered a work related injury to his low back. Thereafter, Claimant suffered injury to his right shoulder. Respondents have admitted liability for the September 21, 2022 injury and treatment of Claimant's low back and right shoulder.

2. The prior September 21, 2022 claim (WC 5-239-314) is not at issue in this order. However, as a result of the 2022 admitted work injury, Claimant was assigned work restrictions. Specifically, Claimant was restricted from the use of his right upper extremity.

3. Due to these work restrictions, in the spring and summer of 2024, Claimant was assigned to work in the "e-comm" area. This job assignment involves determining pricing for more valuable items that are ultimately posted on Employer's online store. These items are housed in cubbies until processed by an employee. This process involves removing an item from a cubby, then researching the item for pricing, and ultimately wrapping the item for shipment.

4. Claimant's typical shift in e-comm was four hours and he remained seated most of that time. Claimant testified that due to his work restrictions for his prior injury, he used only his left hand/arm in completing his e-comm duties. Claimant testified that while working an e-comm shift, he would remove items from cubbies at both table height and above table height. Claimant further testified that the higher cubbies were at his eye level, with a two to three inch lip that prevented items from falling out of the cubby. Claimant testified that to reach items in these higher cubbies, he would stand on tip-toes to see over the lip and into the cubby, and would then have to reach above eye level to reach into the cubby.

5. Claimant testified that on Friday, June 14, 2024, he was performing these duties in e-comm. Claimant testified that as he was reaching to remove a porcelain tea pot from one of the higher cubbies, he felt and heard a pop in his left shoulder, and experienced numbness down his left arm. Claimant estimates that the item weighed between five and ten pounds.

6. Claimant testified that on that same date, he verbally reported the incident to the then acting store manager, Justin White. Claimant further testified that he completed his shift on Friday, June 14, 2024. His next scheduled shift was the following Monday, June 16, 2024.

7. Claimant further testified that over the weekend, the pain in his left shoulder worsened. Claimant testified that at that time it was painful to pick up a cup of coffee with his left upper extremity. When he returned for his scheduled shift on Monday, Claimant again spoke with Mr. White. Claimant further testified that Mr. White instructed him to see his "work comp doctor".

8. Dr. Wallach is Claimant's authorized treating physician (ATP), for the 2022 work injury. Claimant contacted Dr. Wallach's practice regarding his left shoulder symptoms. At that time, Dr. Wallach was out of the office, and Claimant instead sought treatment with his primary care provider (PCP), Dr. Daniel Shaefer. Claimant testified that he reached out to Dr. Wallach at the direction of Mr. White.

9. On June 19, 2024, Claimant was seen by Dr. Shaefer. At that time, Claimant reported one to one and one-half weeks of left shoulder pain. The medical record notes Claimant's report that he woke with symptoms. Dr. Shaefer also recorded Claimant's report of no new injury, "but [Claimant) was doing a lot of pulling at work the day before". Dr. Schaefer diagnosed bursitis or tendonitis in Claimant's left shoulder. He recommended the use of ice, anti-inflammatories, and use of a sling. Dr. Schaefer noted that Claimant's left shoulder symptoms were "potentially due to repetitive use activities at work".

10. Mr. White testified at the hearing. Mr. White testified that Claimant did not inform him of a specific incident or shoulder "pop" on June 14, 2024. Mr. White testified that he interacted with Claimant during that week and at some time Claimant had mentioned pain in his shoulder. Mr. White further testified that it was his understanding that this was "normal pain" and he instructed Claimant to "stretch it out". Mr. White

testified that he received a text message from Claimant on June 19, 2024. That text message was admitted into evidence and states "Just to let you know, I messed up my left shoulder at work last week. Just saw my primary doctor. He said to take it easy for [two) weeks. I also told the [workers'] comp doctor".

11. On August 2, 2024, Claimant was seen by Dr. Wallach regarding his 2022 injury. At that time, Claimant reported his left shoulder symptoms. Dr. Wallach noted that Claimant's report of "increased left shoulder pain due to using his left arm to reach and grab objects off shelves because he is favoring his right arm with a rotator cuff tear. He felt a pop and pain. He says the shoulder pain has been bothering him since then .... He says although he reported the pain to a manager via text he did not fill out any paperwork."

12. Also on August 2, 2024, Dr. Wallach emailed counsel for both the parties and Respondents' insurance adjustor. That email stated, in part:

> At the end of the visit [today) ... [Claimant] brought up [the] left shoulder issue. He had contacted us in mid June wondering if left shoulder pain was work related. I had no context at that time and we told him it probably was not. Today, he says he notified supervisor on June 19 that he had a pop and pain in his left shoulder following reaching for an object and pulling it off the shelf .... He says that he has been doing a lot of reaching and repetitive activities with the left shoulder because of the rotator cuff tear on the right. He says that the shoulder problem is not getting any better.

13. Subsequently, on August 9, 2024, Claimant completed a First Report of Injury form regarding the June 16, 2024 incident. Claimant did so at the direction of Kasey Klippert, Assistant Manager. On that form, Claimant identified the date of the incident as June 19, 2024 and described the mechanism of injury as "lifting item out of cubby, felt a pop and my left shoulder went numb".

14. Ms. Klippert testified at the hearing. Ms. Klippert testified that she first learned that Claimant was alleging a June 2024 work injury on August 9, 2024. Ms. Klippert further testified that she was contacted by Laura Rigney and instructed to complete documentation with Claimant regarding a work injury and refer Claimant for treatment.

15. Thereafter, Employer initiated a workers' compensation claim and Claimant was referred to Dr. Jonathan Rudolf with Animas Occupational Medicine as his ATP for the present claim. Claimant was first seen by Dr. Rudolf on August 13, 2024 in the urgent care department at Animas Surgical Hospital. The medical record of that date identifies the appointment as an initial occupational medicine visit. At that time, Claimant reported injuring his left shoulder on June 14, 2024. Claimant described lifting a ten pound item and feeling a pop, followed by pain and numbness in his left shoulder. Claimant also reported ongoing left shoulder pain.

16. Dr. Rudolf ordered x-rays of Claimant's left shoulder. Those x-rays showed no fracture, dislocation, or abnormality. Dr. Rudolf opined that Claimant likely had a ligamentous injury of his left shoulder. Dr. Rudolf recommended magnetic resonance imaging (MRI) of Claimant's left arm, physical therapy, and a referral to Dr. Kane Anderson.

17. Claimant returned to Animas Occupational Medicine on September 13, 2024, and was seen by Dr. Robert Hill. At that time, Claimant reported constant left shoulder pain. Dr. Hill opined that Claimant's presentation was of possible internal derangement or the shoulder, or a rotator cuff tear.

18. On November 25, 2024, Claimant attended an independent medical examination (IME) with Dr. Robert Messenbaugh. In connection with the IME Dr. Messenbaugh reviewed Claimant's medical records, obtained a history from Claimant, and performed a physical examination. Dr. Messenbaugh recorded Claimant's description of the June 2024 incident at work as follows: "he reached up into a cubby hole grasping an object that weighed 5 pounds or less when he experienced a pop and pain in and about his left shoulder". In the IME report, Dr. Messenbaugh opined that the June 19, 2024 lifting incident was not a work related injury. In support of this opinion, Dr. Messenbaugh noted that lifting a five pound object would be insufficient to injure his left shoulder.

19. Dr. Messenbaugh's testimony was consistent with his written report. During his testimony, Dr. Messenbaugh reiterated his opinion that Claimant did not suffer a work-related left shoulder injury in June 2024. Dr. Messenbaugh testified that when he examined Claimant's left shoulder at the IME, he noted some limited range of motion, but "remarkable" left shoulder strength.

20. For the prior September 21, 2022 claim (WC 5-239-314), Respondents have admitted to an average weekly wage (AWW) of $514.83. This amount was calculated based upon an hourly rate of $16.65. On January 5, 2025, Claimant's hourly rate was increased to $17.15. Claimant asserts that his AWW for the current claim should be $514.83 beginning June 14, 2024, and increased to $530.29 as of January 5, 2025.

21. The ALJ does not find Claimant's testimony regarding the onset of his left shoulder symptoms to be credible or persuasive. The ALJ credits the testimony of Mr. White and Ms. Klippert regarding the events leading up to the initiation of an incident report in August 2024. The ALJ also credits the medical records and the opinions of Dr. Messenbaugh over the contrary opinions of Dr. Wallach. The ALJ specifically credits the June 19, 2024, medical record in which Claimant reported one and one-half weeks of left shoulder pain, there was no new injury, and that he "woke with" symptoms. Therefore, the ALJ finds that Claimant has failed to demonstrate that it is more likely than not that in June 2024, he suffered an injury arising out of and in the course and scope of his employment with Employer. All remaining endorsed issues are dismissed as moot.

ORDER

It is therefore ordered that Claimant's claim regarding a June 2024 date of injury involving his left shoulder is denied and dismissed. All remaining endorsed issues are dismissed as moot.

Dated June 16, 2025.

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

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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. *Prudential Insurance* Co. *v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

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

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

5. As found, Claimant has failed to demonstrate, by a preponderance of the evidence, that in June 2024, he suffered an injury arising out of and in the course and scope of his employment with Employer. As found, the medical records, the opinions of Dr. Messenbaugh, and the testimony of Mr. White and Ms. Klippert are credible and persuasive.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-282-523-002

PROCEDURAL MATTERS

Claimant's Application for Hearing (AFH) filed 10/13/2024 endorsed compensability, medical benefits, authorized provider, reasonably necessary, average weekly wage (AWW), petition to reopen claim, temporary total disability (TTD) and temporary partial disability (TPD) from "TBD to ongoing." At the start of the hearing, the ALJ clarified the issues. Two days prior to the hearing in this matter Respondents filed a General Admission of Liability (GAL) admitting for medical benefits, TPD benefits from 09/08/2024 through 10/09/2024, and an AWW of $1,826.92. Based on the filing of the GAL, Claimant confirmed at hearing that the sole remaining issue for hearing was her entitlement to temporary disability benefits from the date of injury, ongoing.[1] The remaining issues endorsed in Claimant's AFH were withdrawn, without prejudice.

ISSUES

I. Whether Claimant is entitled to receive temporary disability benefits beginning August 18, 2024, ongoing.

FINDINGS OF FACT

1. Claimant is 40 years of age. Claimant worked for Employer as a Health and Wellness Director, whose primarily responsibility was "[m]anag[ing] the day-to-day clinical services of a more complex community to ensure residents' activities of daily living (ADLs) and healthcare needs are met." Ex. K, p. 190. In performing this job, Claimant's role essentially involved her coordinating the events of the shift, which was largely administrative and required consistent sitting.

2. Claimant sustained an admitted industrial injury to her low back on August 18, 2024. Claimant felt pain in her low back and left buttock after assisting a resident with a transfer from a wheelchair to a recliner.

3. Claimant reported the injury to Employer on August 20, 2024.

4. On August 21, 2024, Employer provided Claimant a list of four designated medical providers. Claimant selected from the list the Concentra Broomfield location.

[1] The pro se Claimant stated TTD benefits; however, Claimant endorsed both TTD and TPD in her AFH. Claimant and Respondents both offered evidence regarding TTD and TPD at hearing and addressed TTD and TPD in their position statements. Accordingly, the ALJ addresses the issue of both TTD and TPD from the date of injury, ongoing.

5. Claimant began treatment at authorized treating provider (ATP) Concentra Broomfield on August 21, 2024 with Kimberly Abernethy, D.O. Claimant complained of constant lower left side back pain down her left gluteal muscle and thigh. She reported that standing and laying supine and on her side hurt less than sitting. Dr. Abernethy documented an assessment of lumbar strain and left lumbar radiculitis. She prescribed Claimant medication and referred her for physical therapy. Dr. Abernethy released Claimant to modified duty with temporary work restrictions limiting lifting to 10 pounds maximum, and to allow for position changes (sit/stand) every 15 minutes.

6. On August 23, 2024, Dr. Abernethy noted Claimant had been working modified duty. She prescribed Claimant Gabapentin for radiculitis and ordered a lumbar spine MRI. Claimant remained released to modified duty, with the following temporary restrictions: work only 2 hours per day, must change positions every 15 minutes, allow for laying supine for at least 3 hours daily.

7. On August 27, 2024, Claimant reported to Dr. Abernethy making progress in physical therapy and feeling as though the Gabapentin was helping with some symptoms. Dr. Abernethy ordered additional physical therapy and adjusted Claimant's work restrictions. As of the date of this evaluation, Claimant had the following work restrictions: work only 4 hours a day and must change positions every 15 minutes.

8. Respondents denied Claimant's claim on September 3, 2024.

9. On September 10, 2024, Claimant saw Paul Plocek, M.D. at Concentra Broomfield reporting continued lumbar pain. Dr. Ploeck maintained Claimant's restrictions of only working a maximum of 4 hours a day and changing positions every 15 mins.

10. Claimant underwent a lumbar spine MRI on September 18, 2024, which revealed only mild degenerative changes.

11. Claimant subsequently elected to change her ATP to a Concentra Littleton location for her convenience. Claimant first presented to attending physician Kathryn Bird, D.O. at Concentra Littleton on September 19, 2024. Claimant reported experiencing back stiffness in the morning and pain radiating down her left leg. Claimant reported she had not been working, as no light duty was available. Dr. Bird referred Claimant for chiropractic treatment and additional physical therapy sessions. Dr. Bird maintained Claimant's modified duty restrictions of working only 4 hours per day and alternating positions every 15 minutes.

12. At a follow-up evaluation with Dr. Bird on October 10, 2024, Claimant reported continued back soreness into the left hip. Dr. Bird noted there were no acute findings on the lumbar MRI. Claimant reported that she was taking a leave of absence from work. Dr. Bird noted, "We discussed activity restrictions, and she did not think she should work if she was having pain. I offered to prescribe pain meds if needed." Ex. H, p. 122. Dr. Bird released Claimant to full duty work with no restrictions. She noted Claimant was

at her functional goal, but not at the end of healing. Claimant was to continue physical therapy and chiropractic treatment.

13. Later in the day on October 10, 2024, Claimant sought treatment at the emergency department of HCA HealthOne Swedish with a chief complaint of back pain. The HealthOne provider noted that Claimant presented to the emergency room "[f]rom her Workers' Comp. clinic due to concerns for ongoing pain from a lumbar strain as well as hypertension…" Ex. F, pp. 38-39. Claimant reported sustaining a lumbar strain at work, describing pain in the left lower paraspinal musculature with intermittent radiation into the upper glutes. The HealthOne provider noted, "Physical exam regarding back pain is reassuring with no red flag features or indication for imaging." Id. at p. 39. Claimant was discharged with a prescription for anti-inflammatory medication and recommended follow-up with the workers' compensation provider. There is no mention in this record of any work restrictions recommended or imposed by this provider.

14. Claimant subsequently sought treatment outside of ATP Concentra at SpineOne Spine & Sport Medical Center. Claimant saw Macey Collison, PA-C on December 9, 2024 with complaints of low back pain radiating into her left lower extremity. Claimant reported that the pain worsened primarily with sitting or squatting. PA-C Collison's assessment was lumbar spondylosis with radiculopathy and chronic pain syndrome. She recommended Claimant undergo a lumbar epidural steroid injection and referred Claimant for physical therapy. The section in the medical report titled "EDUCATION" states "Avoid heavy lifting, twisting, pushing, pulling or straining and allow pain to dictate activities." Ex. I, p. 182. PA-C Collison did not assign any work restrictions.

15. On January 13, 2025, Claimant returned to Dr. Bird for a follow-up evaluation reporting 7/10 back pain. Dr. Bird referred Claimant for additional sessions of chiropractic treatment to improve Claimant's lumbar extension and function. Claimant remained released to full duty work with no restrictions.

16. On February 11, 2025, Claimant reported to Dr. Bird slight improvement with her back pain. Claimant reported that she was still not working and was on "FMLA." Id. at 141. Dr. Bird continued Claimant's chiropractic treatment and requested additional physical therapy sessions. The medical record for this evaluation states that Claimant was able to return to modified duty but specifically states "no restrictions" and "patient may work their entire shift." Id. at 145. As nothing in the record indicates any work restrictions were otherwise imposed as of this evaluation, the ALJ infers the reference to "modified duty" instead of "full duty" is a typographical error. The ALJ finds Claimant continued to be released to full duty work with no restrictions as of this evaluation.

17. Claimant returned to Dr. Bird on February 25, 2025, reporting a flare up of back pain after her last chiropractic appointment. Claimant complained of shooting pain and numbness on the back of her left buttock and thigh. Claimant reported that she had not been working because no light duty was available. Dr. Bird referred Claimant for additional chiropractic treatment and to physiatrist Robert Kawasaki, M.D. for evaluation. As in the February 11, 2025 record, the record for this evaluation notes that Claimant was able to return to modified duty but again specifically states "no

restrictions" and "patient may work their entire shift." Id. at 164. As nothing in the record indicates any work restrictions were otherwise imposed as of this evaluation, the again ALJ infers the reference to "modified duty" instead of "full duty" is a typographical error. The ALJ finds Claimant continued to be released to full duty work with no restrictions as of this evaluation.

18. On the referral of Dr. Bird, Claimant presented to Dr. Kawasaki on February 28, 2025 for a physiatry evaluation. Claimant reported 5/10 pain in her left lower back into the left buttock and into the upper thigh region. She reported that the symptoms worsened with sitting and felt better walking. Dr. Kawasaki documented the following impression: lumbar strain injury with normal MRI with only minimal degenerative changes; left sacroiliac joint dysfunction, and left piriformis syndrome. He recommended Claimant continue conservative treatment and continue with her current work status.

19. On March 17, 2024, Respondents filed a GAL for the August 18, 2024 industrial injury, admitting for medical benefits, TPD from 09/08/2024 through 10/09/2024, and an AWW of $1,826.92.

20. Claimant testified that she was on a leave of absence with Employer from the date of injury through February 3, 2025 because Employer could not accommodate her need for modified work. Claimant testified that she was unable to sit. Claimant testified that she has worked as a nurse for 10 years. Claimant testified that, in addition to her work for Employer, for the last five years she has also worked as a traveling nurse performing contract work, including work for another company, ShiftKey. Claimant testified that the contract work involves constantly standing and moving as opposed to sitting at a desk. Claimant testified that the industrial injury has forced her back to more "manual labor" work as a nurse because she feels she cannot sit for extended periods. Claimant has yet to return to her regular employment for Employer because she believes she is unable to sit for extended periods of time.

21.. Subsequent to the industrial injury, Claimant has continued to perform contract work with ShiftKey.

22. Per Employer wage records in Exhibit O, Claimant received the following wages from Employer for the following periods:

Pay Period	Pay Date	Gross Pay
08/11/2024-08/24/2024	08/30/2024	$3,653.85
09/08/2024-09/21/2024	09/16/2024	$3,653.84
09/08/2024-09/21/2024	09/27/2024	$1,826.93
10/20/2024-11/02/2024	11/08/2024	$1,324.52
11/3/2024-11/16/2024	11/22/2024	$200 (bonus)

23. Claimant worked in a modified capacity for Employer for a period of time after the work injury. Based on the work logs and Employer wage records in evidence, Claimant did not sustain any wage loss between August 18, 2024 through September 7, 2024, as Claimant received earnings consistent with the admitted AWW of $1,826.92.

24. From September 8, 2024, through October 9, 2024, Claimant earned less than her AWW. Claimant did not have any earnings from Employer during that time period. Claimant earned $5,259.16 in gross wages from ShiftKey during this time period while she remained on work restrictions from her attending physician.

25. Claimant continued to earn less than her AWW subsequent to October 10, 2024.

26. The ALJ finds the opinion of the attending physician Dr. Bird, as supported by the medical records, more credible and persuasive than the testimony of Claimant.

27. The credible and persuasive evidence fails to demonstrate it is more probably true than not Claimant is entitled to TTD August 18, 2024, ongoing, or TPD for any period other than September 8, 2024 through October 9, 2024.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or

none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Temporary Disability Benefits

A claimant's entitlement to temporary disability benefits is dependent on proof that the claimant has suffered a "disability" as a result of an industrial injury, and that the "disability" has caused an actual wage loss. Section 8-42-103(1) C.R.S. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). A claimant is not required to prove both components to establish entitlement to disability benefits under the Act. *Montoya v. Industrial Claim Appeals Office*, 488 P.3d 314 (Colo. App. 2018). 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). Where the wage loss is total, the claimant is entitled to temporary total disability benefits, and where the wage loss is less than total, the claimant is entitled to temporary partial disability benefits. *University Park Holiday Inn v. Brien*, 868 P.2d 1164 (Colo. App. 1994).

Section 8-42-106(1), C.R.S. provides for an award of TPD benefits based on the difference between a claimant’s AWW at the time of injury and earnings during the continuance of the disability. Specifically, an employee shall receive 66.66% of the difference between his wages at the time of his injury and during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (TPD benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

As found, the preponderant evidence does not establish Claimant is entitled to TTD benefits August 18, 2024, ongoing. Since the date of injury, Claimant has continued to work and earn wages in some capacity, whether for Employer for a short period on modified duty, or with ShiftKey. A claimant, as a condition of receiving TTD benefits, may not be working. *Wolford v. Pinnacol Assurance*, 107 P.3d 947, (Colo. 2005); *Licata v. Vincenzo’s*, W.C. No. 4-772-778 (ICAO, Nov. 16, 2010). Entitlement to

TTD requires total wage loss. Between August 18, 2024 and September 7, 2024, Claimant did not sustain any actual total wage loss, as she continued to receive earnings consistent with her AWW during such time period. Claimant further failed to offer any evidence demonstrating she sustained any total wage loss as a result of the work injury for any subsequent period of time. Accordingly, Claimant failed to prove entitlement to TTD benefits for the requested time period.

As Claimant continued to receive earnings consistent with her AWW from August 18, 2024 through September 7, 2024, Claimant did not sustain partial wage loss entitling her to any TPD for such time period.

Respondents have filed a GAL admitting for TPD benefits from September 8, 2024 through October 9, 2024. By filing an admission of liability for the payment of temporary disability benefits, Respondent admits the claimant established her burden to prove a compensable disability. *See Macey v. DHL Express USA Inc.*, W.C. No. 5-183-433-002 (ICAO, Apr. 1, 2024). The courts have held that a final admission may constitute an "award." *See Hurtado v. City & County of Denver*, W.C. No. 5-141-704-002 (ICAO, Dec. 10, 2024) (*citing Safeway, Inc. v. Industrial Claim Appeals Office*, 968 P.2d 162 (Colo. App. 1998); *Lewis v. Scientific Supply Co. Inc.*, 897 P.2d 905 (Colo. App. 1995*); Brown & Root, Inc. v. Industrial Claim Appeals Office*, 833 P.2d 780 (Colo. App. 1991)). Admitted liability for temporary disability payments shall continue until terminated in accordance with WCRP 6-1, §8-42-106, or §8-42-105, C.R.S. *See Macey v. DHL Express, supra*; *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000).

There is a distinction between the factors to establish entitlement to temporary disability benefits versus termination of temporary disability benefits. *Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374, 378 (Colo. App. 2016); *Chavez v. Costco Wholesale, Inc.*, W.C. No. 5-096-055-003 (ICAO, Feb. 4, 2022) (noting that, where TTD benefits had not commenced, they could not be terminated based on the ATP's MMI determination).

Here, the GAL created a binding and enforcing obligation for Respondents to pay TPD benefits for the admitted period. The ALJ thus considers the filing of the GAL a legal commencement of benefits, thereby satisfying the threshold condition necessary for the application of the termination provisions regarding temporary disability benefits. This case is distinguishable from *Archuletta and Chavez*, in which no benefits had been paid, admitted, or awarded for a period prior to the termination event. In *Archuletta* and *Chavez*, it was held that a release to full duty or an MMI determination that preceded the commencement of benefits could not operate to terminate benefits under § 8-42-105(3) because no benefits had legally commenced. By contrast, in the present case, Respondents have expressly admitted to liability for a defined period of TPD, including a valid commencement date and a statutory basis for termination. Thus, unlike in *Archuletta* and *Chavez* where benefits had not commenced and the specific issue was entitlement to benefits, here benefits have commenced, satisfying the predicate for applying the termination statutes.

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. Section 8-42-106(2), C.R.S. provides that TPD benefits shall continue until the first occurrence of either of the following (1) The employee reaches maximum medical improvement; or (2) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

The Panel has previously held that term "disability," as used in §8-42-106, C.R.S. contemplates the "continuance" of a "temporary partial disability" ends when the claimant's attending physician releases the claimant to return to regular employment. *Nogueda v. Varsity Contractors*, W. C. No. 4-209-3 82 (ICAO, Jan. 21, 1998); *Ramirez v. Wal-Mart Stores, Inc.*, W.C. No. 4-689-381 (ICAO, Aug. 24, 2007) (setting aside an ALJ's order for erroneously excluding as one of the bases for the termination of TPD the release to return to regular employment). Additionally, WCRP 6-1(A)(2) provides that an insurer may terminate temporary disability benefits with a medical report from the authorized treating physician who has provided the primary care stating the claimant is able to return to regular employment. The rule does not distinguish between terminating TTD benefits and TPD benefits.

Once it is established that a claimant's attending physician has released her to full duty, the attending physician's opinion is conclusive, "unless the record contains conflicting opinions from attending physicians regarding a claimant's release to work. *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661, 662 (Colo. App. 1995); *Bestway Concrete v. Industrial Claim Appeals Office* ,984 P.2d 680, 685 (Colo. App. 1999). In light of an attending physician's opinion releasing a claimant to full duty, any evidence concerning a claimant's self-evaluation of his ability to perform his job [is] irrelevant and should be disregarded by the ALJ. *Archuletta*, *supra* at 377.

Here, there are no conflicting opinions from attending physicians regarding Claimant's release to work. As found, the attending physician Dr. Bird released Claimant to full duty work on October 10, 2024. Claimant's self-evaluation regarding her ability to perform her regular duty work is thus not relevant in the context of termination of her temporary disability benefits in this circumstance. Here, Dr. Bird's release of Claimant to full duty work without restrictions terminated Claimant's temporary disability benefits.

Alternatively, even if Dr. Bird's release of Claimant to regular employment is not dispositive with respect to the termination of TPD benefits, the preponderant evidence does not establish Claimant is otherwise entitled to temporary disability benefits subsequent to October 10, 2024. Claimant has continued to report pain and a perceived inability to resume her regular work in a largely sedentary position, despite continuing to work a more physically demanding position in other employment since sustaining the work injury. Dr. Bird evaluated Claimant on multiple occasions subsequent to October

10, 2024 and continued to maintain Claimant's release to regular employment. No evidence was offered demonstrating Dr. Bird or any other provider has placed Claimant back on work restrictions. Although, with respect to entitlement to temporary disability benefits, evidence of work restrictions is not required and a claimant is not required to prove both medical incapacity and impairment of wage earning capacity, the ALJ considers Dr. Bird's opinion amongst the totality of the evidence regarding Claimant's ability to resume her regular employment. As found, the opinion of Dr. Bird, as supported by the medical records and other providers, more credible and persuasive than Claimant's testimony regarding her perceived inability to return to regular employment. As of October 10, 2024, Claimant was able to resume her regular employment. While Claimant may continue to experience some symptoms from the work injury, there is insufficient credible and persuasive evidence that, after October 10, 2024, Claimant was unable to resume her prior work and that her partial wage loss was due to a disability resulting from the work injury.

ORDER

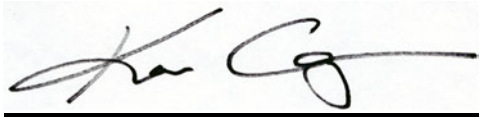
1. Respondent shall pay Claimant TPD benefits for the period September 8, 2024 through October 9, 2024.

2. Claimant's claim for temporary disability benefits from August 18, 2024 through September 7, 2024 and from October 10, 2024, ongoing is denied and dismissed.

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

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

DATED: June 16, 2025



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his low back on October 9, 2024.

II. If Claimant established that he suffered a compensable low back injury, whether he also established, by a preponderance of the evidence, that he is entitled to receive reasonable, necessary and causally related medical benefits to cure and relieve him of the effects of this industrial injury.

III. If Claimant established that he is entitled to reasonable, necessary and related medical benefits, whether he also established that the right to select his authorized treating physician passed to him and whether Dr. Miguel Castrejon is his authorized provider.

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

V. If Claimant established that he suffered a compensable low back injury, whether he also established, by a preponderance of the evidence, that he is entitled to temporary total disability benefits beginning October 10, 2024, and ongoing.

VII. Whether Claimant established, by a preponderance of the evidence, that Respondent-Employer is subject to penalties for failure to admit or deny liability for Claimant's asserted injuries pursuant to C.R.S. § 8-43-203 and WCRP, Rule 5-2.

Based on the evidence presented at hearing, the ALJ concludes as follows:

Compensability

A. A "compensable injury" is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

B. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of

employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Conversely, the "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work-related functions and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of his employment and during an activity related to Claimant's job duties as a delivery driver for Employer, namely unloading PVC pipe from the trailer of his truck. While the evidence presented supports a conclusion that Claimant's alleged injuries occurred in the course of his employment, Claimant must also establish that his alleged injuries arose out of that employment before the claim can be found compensable.

C. The term "arises out of" refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* 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. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of and in course of employment). Rather, it is the Claimant's burden to prove, by a preponderance of the evidence, that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

D. In this case, Respondents contend that Claimant failed to establish that requisite causal relationship. It is well established that an incident which merely elicits pain symptoms without a causal connection to the industrial activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989); *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008). The cause of Claimant's symptoms and his need for treatment following the October 9, 2024, incident in this case is complicated by the fact that he had suffered a previous industrial injury to his lumbar spine injury resulting in a multi-level (L4-S1) fusion, which triggered his need for injection treatment in 2020. Accordingly, the question here is whether Claimant's symptoms and need for low back treatment following the October 9, 2024, incident arose out of, i.e. was caused by unloading the aforementioned PVC pipe or what Respondents contend are the progressive effects of his prior injury and spinal fusion. Relying principally on the opinions of Dr. Chen, who performed a records review on

February 5, 2025 (RHE H), Respondents maintain that Claimant's symptoms and need for treatment following the October 9, 2024, onset of pain are related to the natural progression of an underlying degenerative condition caused by his spinal fusion. Indeed, Respondents note that, "when a fusion is performed on the lumbar spine, the levels above and below naturally start to weaken", which leads to recurrent injuries and complaints of pain. (citing the opinion of Dr. Chen).

E. While the ALJ is persuaded that Claimant may have suffered a prior injury leading to a multilevel spinal fusion causing degenerative change in the lumbar spine, the presence of a pre-existing condition "does not disqualify a claimant from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981).

F. While pain may represent a symptom from the aggravation of a pre-existing condition, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated a pre-existing condition. Rather, the occurrence of symptoms at work may represent, as noted by Respondents, the natural progression of a pre-existing condition that is unrelated to Claimant's employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005). Nonetheless, pain is a typical symptom from the aggravation of a pre-existing condition and a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). In this case, the totality of the evidence presented supports a conclusion that the onset of symptoms and disability Claimant experienced on October 9, 2024, more probably than not, arose out of an industrially based aggravation of his underlying degenerative disc disease (caused by his prior fusion) rather than the natural progression of this underlying condition. Because the ALJ is convinced that Claimant's disability and need for treatment occurred within the time and place limits of his employment and "arose out of" his work duties on October 9, 2024, the ALJ is persuaded that Claimant has established the compensable nature of his asserted October 9, 2024, low back injury.

Claimant's Entitlement to Medical Benefits and Right of Selection

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

as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball, supra.* As noted above, Claimant has proven that he suffered a compensable aggravation of his pre-existing low back condition. Moreover, the evidence presented persuades the ALJ that the treatment Claimant has received through the Broadwater Clinic and the UCHealth system was reasonable, necessary and otherwise related to his compensable injuries. Indeed, the aforementioned care was necessary to assess and treat, i.e. relieve Claimant from the acute effects of his injury. Consequently, Respondents are liable for the medical treatment rendered by the above referenced providers.

Authorized Treating Provider and Right of Selection:

H. Under § 8-43-404(5)(a)(I)(A), C.R.S., the employer has the right in the first instance to designate the authorized provider to treat the claimant's compensable condition(s). The rationale for this principle is that the respondents may ultimately be liable for the claimant's medical bills and, therefore, have an interest in knowing what treatment is being provided. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005). Nonetheless, the statute implicitly contemplates that respondents will designate a physician who is willing to provide treatment without regard to non-medical issues, such as the prospects for payment in the event the claim is ultimately denied. *Lutz v. Industrial Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Scoggins v. Air Serv,* W. C. No. 4-642757- (ICAO, Mar 31, 2006). Thus, if the physician selected by the respondent refuses to treat the claimant for non-medical reasons, and the respondents fail to appoint a new treating physician, the right of selection passes to the claimant, and the physician selected by the claimant then becomes his/her authorized provider. *Ruybal v. University Health Sciences Center, supra; Teledyne Water Pic v. Industrial Claim Appeals Office, supra; Buhrmann v. University of Colorado Health Sciences Center,* W.C. No. 4-253-689 (Nov. 4, 1996); *Ragan v Dominion Services, Inc.,* W.C. No. 4-127-475 (Sept. 3, 1993).

I. Whether an ATP refused to treat a claimant for non-medical reasons, whether the insurer received notice of the refusal to treat and whether the insurer "forthwith" designated a physician who was willing to treat the claimant are questions of fact for resolution by the ALJ. *Garrett v. McNelly Construction Company, Inc.*, W.C. No. 4-734-158 (ICAP, Sept. 3, 2008); *see Ruybal*, 768 P.2d at 1260. Here, the record evidence supports a finding/conclusion that Claimant was referred to and began treatment with UCHealth (Dr. Smithart) at the direction of Insurer on October 14, 2024, and that Dr. Smithart subsequently closed Claimant's case for non-medical reasons on

November 13, 2024. (CHE 4, p. 36). Although the evidence presented supports a conclusion that the designated provider (UCHealth/Dr. Smithart) refused to treat Claimant for non-medical reasons, Claimant failed to present persuasive evidence that Respondents were notified of the refusal to treat as required by C.R.S. § 8-43-404(10)(a). Because the evidence presented supports a conclusion that neither the Insurer nor Employer were notified of the refusal to treat as required by statute, neither was given the opportunity to designate a new physician to attend to Claimant's low back injuries as provided for under C.R.S. § 8-43-404(10)(b). Based upon the evidence presented, the ALJ concludes that the right of selection did not pass to Claimant after he was advised that his case was closed at UCHealth. Thus, Dr. Castrejon is not authorized to treat Claimant.

Claimant's Average Weekly Wage and Concurrent Employment

J. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993)[1]; *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo. App. 1997).

K. Sections 8-42-102(3) and (5)(b), C.R.S. (2013), give the ALJ discretion to calculate an AWW that will fairly reflect a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra*; *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008). It is well settled that if the specified method of computing a claimant's AWW will not render a fair computation of wages for "any reason," the ALJ has discretionary authority under, § 8-42-102(3) C.R.S. 2020, to use an alternative method to determine AWW. *Campbell v. IBM Corp., supra*.

L. The best evidence of Claimant's actual wage loss and therefore a fair approximation of his diminished earning capacity at the time of his industrial injury comes from the wage records admitted into evidence. In this case, the ALJ finds and concludes that the fairest way to establish Claimant's average weekly wage would be to utilize the 26-week, i.e. the 6-month earnings history extending from April 14, 2024, through October 12, 2024. However, because Claimant did not work the week of June 9, 2024, through June 15, 2024, the AWW calculation is based upon a 25-week period rather than the full 26 weeks as this is a true reflection of the wages Claimant earned during this 26-week earning history. Based upon the wage records, the ALJ finds that Claimant's average weekly wage, based upon earnings alone, is $1,414.42.

Claimant's Entitlement to Temporary Disability Benefits

M. To receive temporary disability benefits, Claimant must prove that his injuries caused a disability lasting more than three work shifts, that he left work as a

[1] The claimant in Campbell suffered three periods of temporary disability and for each subsequent period was earning a higher average weekly wage. The question resolved was whether Ms. Campbell was entitled to temporary disability benefits based on the higher AWW she was earning during each successive period of temporary disability. The Court held that it would be unjust to calculate her disability benefits in 1986 and 1989 on her substantially lower earnings she was making in 1979.

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); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1), C.R.S. 2001; *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM*, the term "disability" refers to the claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability to effectively and properly perform his/her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). 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).

N. In this case, the evidence presented supports a conclusion that at the time Claimant was released from care at UCHealth, Dr. Smithart had imposed work restrictions of no commercial driving and sedentary only work duties, which allowed Claimant to "alter between sitting and standing as needed for comfort". (CHE 4, p. 36). There is a lack of persuasive evidence to support a conclusion that Employer offered Claimant modified duty in compliance with the aforementioned restrictions and the wage records corroborate Claimant's testimony that he had no earned income after October 9, 2024. Consequently, the ALJ is convinced that Claimant has proven that he was "disabled" within the meaning of C.R.S. § 8-42-105 and entitled to TTD benefits beginning October 10, 2024. See *Culver v. Ace Electric*, supra; *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO, June 11, 1999). TTD benefits shall continue until continue until one of the terminating events enumerated in C.R.S. § 8-42-105(3). Here, there had been no terminating event as of the time of this hearing. Consequently, Respondents shall pay TTD benefits, pursuant to C.R.S. § 8-42-105, at the rate of sixty-six and two-thirds percent of Claimant's determined AWW beginning October 10, 2024, and continuing until such time that these benefits can be terminated according to statute. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

Penalties for Failure to Admit or Deny Liability

O. Pursuant to C.R.S. § 8-43-101(1)(a), C.R.S. every employer is required to report lost time injuries to the Division of Workers' Compensation (Division) within ten days after notice or knowledge of the injury. W.C.R.P. 5-2(C) provides that a position statement is due within 20 days after the First Report of Injury should have been filed with the Division. W.C.R.P. 5-2(B)(2)(a) provides that a First Report of Injury must be filed within ten days of an employer receiving notice or knowledge of injury that has

resulted in lost time from work for the injured employee in excess of three shifts or calendar days.

P. W.C.R.P. 5-2(D) provides that the insurer shall state whether liability is admitted or contested within 20 days after the date the Division mails to the insurer a Worker's Claim for Compensation. Similarly, C.R.S. § 8-43-203(1)(a) provides that "employer . . . shall notify in writing the division and the injured employee . . . within twenty days after a report is, or should have been, filed with the division pursuant to § 8-43-101, whether liability is admitted or contested . . ." If such notice is not timely filed, the employer may be penalized up to one day's compensation for each day's failure to so notify, not to exceed the aggregate of 365 days' compensation. See C.R.S. § 8-43-203(2)(a). Fifty percent of any such penalty shall be paid to the Claimant. *Id.*

Q. Notice of the Employer does not constitute notice to the Insurer. Here, it cannot be established that Insurer had notice of Claimant's lost time injury until October 19, 2024. Accordingly, Insurer was required to provide a liability position concerning the claim within 20 days of October 19, 2024, or by November 8, 2024. As presented, the evidence supports that a position was not stated until November 27, 2024, when Respondents filed the Notice of Contest. Accordingly, the ALJ agrees with Claimant that Respondent's are subject to penalties of up to one day's compensation for each day's failure to admit or deny liability in this case. Insurer provided no justification for the late filing of their position concerning liability. Instead, Respondents simply argue that "Claimant failed to suffer any harm and the few day delay in filing the Notice of Contest was not unreasonable". Accordingly, Respondents assert that there is "no basis" to assess penalties for the failure to timely take a position regarding liability in this case. The ALJ is not persuaded. Based upon the evidence presented, the ALJ imposes a penalty of one day's compensation for each day (19 days in total) Respondents failed to timely admit or deny liability between November 8, 2024, through November 26, 2024. Per statute, 50% of this penalty shall be payable to Claimant. Respondents shall pay a penalty of $2,559.43, 50% of which shall be paid to Claimant. ($1,414.42 (AWW) ÷ 7 = 202.06 (daily wage rate) × 2/3 = $134.71 (daily compensation rate) × 19 days = $2,559.43 ÷ 2 = $1,279.71 payable to Claimant).

IT IS THEREFORE ORDERED:

1. Claimant has established, by a preponderance of the evidence, that he suffered a work-related injury to his low back in the form of a compensable aggravation of a pre-existing condition on October 9, 2024.

2. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of his low back injury as provided by the providers at Broadwater and UCHealth Clinics (Dr. Smithart) well as their referrals.

3. Claimant has failed to establish that the right of selection to designate the authorized treating physician (ATP) to cure and relieve him from the ongoing effects of his work-related injury passed to him. Accordingly, the request to treat with Dr. Miguel Castrejon is denied and dismissed.

4. Claimant's AWW is determined to be $1414.42 with a corresponding TTD rate of $942.95.

5. Respondents shall pay TTD benefits, pursuant to C.R.S. § 8-42-105, commencing October 10, 2024, and ongoing until such benefits can be terminated in accordance with statute.

6. Respondents shall pay a penalty totaling $2,559.43 for their failure to timely admit or deny liability which represents one day of compensation for each day Respondents failed to take a position regarding liability. Fifty percent or $1,279.71 of this penalty shall be paid to Claimant. ($1,414.42 (AWW) ÷ 7 = 202.06 (daily wage rate) × 2/3 = $134.71 (daily compensation rate) × 19 days = $2,559.43 ÷ 2 = $1,279.71 payable to Claimant). The remaining fifty percent of the penalty shall be sent to the Division of Workers' Compensation Revenue Assessment Unit, 633 17th Street, Suite 400, Denver, CO 80202.

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

8. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

Dated: June 16, 2025

/s/ Richard M. Lamphere

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

This decision is final and not subject to appeal unless a full order is requested. The request shall be made at the Office of Administrative Courts, 2864 S. Circle Drive, Suite 810, Colorado Springs, CO 80906 within ten working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

If a party makes a request for a full order, both parties shall submit a proposed full order containing specific findings of fact and conclusions of law within five working days from the date of the request. The proposed full order must be submitted by e-mail in Word or Rich Text format to OAC-CSP@state.co.us. The proposed order shall also be submitted to opposing counsel and unrepresented parties by e-mail, facsimile, or same day or next day delivery.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained a compensable injury to her low back on March 2, 2023.

II. If Claimant established that she suffered a compensable low back injury, whether she also established, by a preponderance of the evidence, that she is entitled to receive reasonable, necessary and causally related medical benefits to cure and relieve her of the effects of that injury.

III. If Claimant established that she is entitled to reasonable, necessary and related medical benefits, whether she also established that the right to select the authorized treating physician passed to her.

IV. If Claimant established that she suffered a compensable injury to her low back, what was her Average Weekly Wage (AWW) at the time of that injury?

V. If Claimant established that she suffered a compensable low back injury,
whether she also established, by a preponderance of the evidence, that she is entitled to temporary total disability benefits beginning November 16, 2023, through April 2, 2025.

VI. Whether Respondents' established by a preponderance of the evidence that Claimant is responsible for the separation of her employment and her subsequent wage loss beginning November 16, 2023.

Based on the evidence presented at hearing, the ALJ concludes as follows:

Compensability

A. A "compensable injury" is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an "injury" arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(l)(b), C.R.S.*

B. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The

latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). Here, there is little question that Claimant's alleged injury occurred within the time and place limits of her employment and during an activity related to Claimant's job duties as a Certified Nursing Assistant (CNA) for Employer, namely assisting with the transfer of a patient in the restroom. While the evidence presented supports a conclusion that Claimant's alleged injuries occurred in the course of her employment, she must also establish that her alleged injuries arose out of that employment before the claim can be found compensable.

C. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work-related functions and be sufficiently related thereto so as to be considered part of the employee's service to the employer. Horodyskyj v. Karanian, 32 P.3d 470, 475 (Colo. 2001); *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* In this regard, there is no presumption that an injury which occurs in the course of a worker's employment also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (mere fact that the decedent fell to his death on the employer's premises did not give rise to the presumption that the fall arose out of decedent's employment). Rather, it is the Claimant's burden to prove, by a preponderance of the evidence, that there is a direct causal relationship between her employment duties as a CNA on March 2, 2023, and her alleged low back injury. § 8-43-201, C.R.S. 2024; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

D. In this case, Respondents contend that Claimant failed to establish the requisite causal relationship to prove that her low back symptoms and need for low back treatment are proximately related to the March 2, 2023, incident involving the transfer of a patient in the bathroom. It is well established that an incident which merely elicits pain symptoms without a causal connection to work activities does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989); *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008). Here, the cause of Claimant's symptoms and her need for treatment following the March 2, 2023, incident is complicated by the fact that Claimant suffers from significant degenerative disc and joint disease in her lumbar spine. Accordingly, the question in this case is whether Claimant's symptoms and need for low back treatment, including spinal surgery, arose out of the March 2, 2023, incident or what Respondents contend is the progressive effects of significant pre-existing

degenerative disc and joint disease, including spondylosis and spondylolisthesis, in the lumbar spine. Relying principally on the opinions of Dr. Larson, who performed both an Independent Medical Examination (IME) and a records review, Respondents maintain that Claimant's symptoms and need for treatment, following her March 2, 2023, onset of pain, are related to the natural progression of an underlying degenerative condition, which by imaging (MRI/x-ray) has resulted in facet disease, spondylosis and spondylolisthesis in the lumbar spine.

E. While the ALJ is persuaded that Claimant suffered from multilevel degenerative change, spondylosis and spondylolisthesis in the lumbar spine prior to the March 2, 2023, incident, the presence of a pre-existing condition "does not disqualify her from receiving workers compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981).

F. Pain is a typical symptom from the aggravation of a pre-existing condition and a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). As noted, the fact that Claimant may have experienced an onset of pain while performing job duties does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated a pre-existing condition. Rather, as Dr. Larson indicates the occurrence of symptoms at work may represent the natural progression of a pre-existing condition that is unrelated to Claimant's employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (August 18, 2005).

G. In this case, the evidence presented supports a conclusion that Claimant's need for low back treatment, including the surgery performed by Dr. Bess was reasonable and per imaging (MRI/x-ray), objectively necessary. Nonetheless, the ALJ is convinced, based on the totality of the evidence presented, that Claimant's back and leg pain, which prompted the need for treatment is not causally related to Claimant's March 2, 2023, work duties in assisting a resident in using the restroom. As explained by a Panel of the Industrial Claims Appeals Office in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, October 27, 2008), a coincidental correlation between a claimant's work and his/her symptoms does not mean there is a causal connection between a claimant's symptoms (injury) and his/her work. In this case, the ALJ credits the opinions and testimony of Dr. Larson to find and conclude that Claimant's symptoms are probably related to the natural progression of her underlying degenerative disc and joint disease rather than the effects of any acute injury to the low back on March 2, 2023. The contrary testimony of Claimant and the

opinions of Dr. Rook have been considered and found and concluded to be unpersuasive. Because Claimant failed to establish that she suffered a compensable low back injury that resulted directly from her employment related duties on March 2, 2023, her claim for benefits must be denied and dismissed and her remaining claims need not be addressed.

Dated: June 20, 2025

/s/ Richard M. Lamphere

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

This decision is final and not subject to appeal unless a full order is requested. The request shall be made at the Office of Administrative Courts, 2864 S. Circle Drive, Suite 810, Colorado Springs, CO 80906 within ten working days of the date of service of this Summary Order. Section 8-43-215 (1), C.R.S. Such a Request is a prerequisite to review under Section 8-43-301, C.R.S.

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-271-730-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the shoulder surgery recommended by Dr. Thon is reasonable, necessary, and causally related to the industrial injury.

FINDINGS OF FACT

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

1. This case involves an admitted claim for an April 25, 2024, right shoulder injury.
2. Claimant worked for Employer delivering bread. He has worked for Employer since November 1989, approximately 35 years as of the date of injury.
3. Claimant's job duties involved assembling stacks of bread for each delivery stop, loading individual loaves into baskets, stacking approximately ten baskets onto a four-wheel dolly, moving the cart off the truck at delivery locations, stocking store shelves with the bread, returning empty baskets and the dolly back to the truck, and unloading the dollies at the depot. The position required frequent lifting of bread baskets weighing approximately 10 to 15 pounds and repetitive lifting and reaching up to about forehead level - when stacking the top basket onto the dolly.

<u>Prior Shoulder Surgery</u>

4. Prior to his right shoulder injury on April 25, 2024, Claimant underwent right rotator cuff repair surgery in 1995, approximately 29 years earlier.

Asymptomatic Period

5. Claimant credibly testified that, before April 25, 2024, he experienced no problems with his right shoulder, no difficulty performing his job duties, no limitation in lifting his right arm, and no difficulty sleeping on his right side. For the approximately 29-year period between his 1995 shoulder surgery and the April 25, 2024, injury, Claimant remained asymptomatic in his right shoulder. There was no credible evidence, such as prior medical records or other documentation, disputing Claimant's testimony that he was symptom-free during this period. In fact, medical documentation from a Department of Transportation (DOT) physical examination conducted in December 2023 - approximately three months before the work injury - did not reflect any complaints of shoulder pain or impairment. The examining physician documented normal extremities and joints, and Claimant was cleared for work without any shoulder-related restrictions or limitations. Moreover, DOT examinations in 2019, 2020, and 2021 did not document any ongoing shoulder problems. Thus, Claimant's testimony was corroborated by the pre-injury DOT examinations.

April 25, 2024, Work Incident

6. On April 25, 2024, at approximately 1:30 a.m., while performing his regular work duties, Claimant was stacking bread baskets on the four-wheeled dolly. He was adding baskets to a stack that was already seven baskets high, working to create a stack of ten baskets total. While lifting a basket of bread weighing 10-15 pounds to approximately forehead level Claimant experienced immediate onset of severe sharp pain in the back and top of his shoulder accompanied by a decrease in range of motion of his shoulder.

7. Claimant reported the injury to his supervisor, Chelsea Isaacs, approximately 20-30 minutes after it occurred.

8. The Employer's first report of injury documented that Claimant was "lifting and moving a tray of bread from a stack of seven high to a stack of 10 high" while "facing towards the work." Claimant credibly confirmed this was an accurate description of how the injury occurred.

9. Claimant was directed not to perform deliveries and to seek medical attention at Concentra at that time. Since Concentra was not open at 2:00 a.m., Claimant waited in his car until the facility opened at 7:00 or 8:00 a.m.

Medical Treatment and Findings

10. On April 25, 2024, the same day as the injury, Claimant was evaluated by Nancy Strain, D.O. Her examination revealed positive rotator cuff tests, such as a positive painful arc test, and a positive drop arm test. Claimant also demonstrated very limited range of motion in all planes. He was also unable to lift his arm up during the examination. Thus, she concluded he had internal derangement of his right shoulder.

11. Based on her assessment, Dr. Strain ordered an MRI and referred Claimant to physical therapy on the same day. The physical therapist found that every movement attempted was unsuccessful and very uncomfortable.

12. On April 26, 2024, Claimant was evaluated by Nurse Practitioner Deana Halat. Based on her assessment, she did a care conference with the physical therapist. The physical therapist and NP Halat both agreed to place physical therapy on hold due to examination findings consistent with a rotator cuff tear, determining that physical therapy would not improve Claimant's condition.

13. On May 21, 2024, Claimant underwent an MRI. The MRI revealed:

    - Complete tears of both the supraspinatus and infraspinatus tendons.
    - Grade 4 fatty atrophy in both muscles.
    - Joint effusion with synovitis.
    - Moderate to severe degenerative changes in the glenohumeral joint.
    - Decentered humeral head.
    - Moderate degenerative changes in the acromioclavicular joint.

14. Based on the physical exam findings, Claimant's symptoms, and the results of the MRI, Claimant was referred to an orthopedic surgeon, Stephen, Thon, M.D.

15. On May 23, 2024, Claimant was evaluated by Dr. Thon. Dr. Thon noted in his report that Claimant was injured while lifting heavy objects in the course of his employment and felt a pop in his right shoulder. He also noted that following the incident, Claimant experienced significantly limited range of motion, pain with active and passive range of motion, and limited strength.

16. Dr. Thon's physical examination revealed passive and active range of motion limited secondary to pain, significant weakness and loss of strength of rotator cuff testing, and 4/5 strength to supraspinatus, infraspinatus, and teres minor. Positive lag signs were also noted with infraspinatus and teres minor, along with positive weakness with all rotator cuff testing. Positive findings were documented for Jobe, champagne, external rotation lag sign, Hornblower's, painful bear-hug, and painful belly press tests.

17. He added that the MRI of the right shoulder demonstrated:

    - A massive rotator cuff tear involving supraspinatus, infraspinatus, and teres minor.
    - Grade 4 atrophy of the supraspinatus and part of the infraspinatus, with retraction to the level of the glenoid measuring 4+ cm.
    - A high-riding humeral head with grade 4 glenohumeral arthritis changes was also observed.

18. Based on his assessment, he provided the following diagnoses:

    - Massive rotator cuff tear with grade 4 atrophy, acute.
    - Bicipital tendinitis.
    - Rotator cuff arthropathy with end-stage degenerative joint disease.

19. Dr. Thon also rendered an opinion on the cause of Claimant's shoulder condition. After reviewing the claimant's history, medical records, and examination findings, he concluded that Claimant sustained an injury to the right shoulder arising out of the work incident on April 25, 2024. He concluded Claimant sustained an acute tear of his rotator cuff likely involving the infraspinatus and teres minor, as shown by the significant lack of external rotation found on examination.

20. He concluded that nonoperative treatments, including possible injections and physical therapy, would likely have very limited effect due to the severity of the injury and disease. Thus, he recommended a reverse total shoulder arthroplasty to address both the arthritis and rotator cuff tear.

21. As of the time of hearing, Claimant continued to experience pain in his right shoulder, particularly when performing certain activities. He cannot lift his right arm over shoulder level, has difficulty brushing his hair (requiring use of his left arm to assist), and experiences sharp pain during cold weather. Moreover, he has not returned to work because in his opinion there is nothing he can do in his present condition.

22. Before the April 25, 2024, work injury, Claimant exhibited no symptoms related to his right shoulder, had no functional limitations, and was able to perform all aspects of his job without any modifications. As a result, he was not treating for any shoulder problems before his work injury – and no treatment had been recommended. Immediately after the injury, Claimant developed right shoulder pain, decreased range of motion, and functional limitations, which have persisted since the date of injury. As a result, he has been unable to perform his regular job duties since he was injured. Moreover, shortly after the work accident, Dr. Thon recommended right shoulder surgery to alleviate Claimant's pain, restore range of motion, and improve function- the problems that developed immediately after the work injury.

Expert Medical Reports and Testimony

Dr. Mark Failinger

23. Respondents had a records review performed by Dr. Mark Failinger to determine whether the shoulder surgery is reasonable, necessary, and related to Claimant's work injury. Dr. Failinger issued three written reports and also testified at hearing.

24. Dr. Failinger prepared an initial record review dated June 3, 2024, a supplemental report dated July 24, 2024, and an addendum report dated March 25, 2025. He also testified at hearing. Moreover, his hearing testimony was consistent with his reports.

25. Dr. Failinger is a board-certified orthopedic surgeon with subspecialty training in shoulders and knees, having performed approximately 7,000-8,000 shoulder surgeries and treated 30,000-40,000 patients with rotator cuff tears over his career.

26. Dr. Failinger concluded that while the recommended reverse total shoulder arthroplasty is reasonable and necessary to treat the severe preexisting shoulder pathology, the need for surgery is not causally related to the April 25, 2024, work incident. He maintained that lifting a 10–15-pound basket would not reasonably cause new pathology or injury that would cause the need for surgery.

27. Dr. Failinger indicated that there are several important factors that are relevant in this case. Those factors are:

- Grade 4 fatty atrophy, demonstrated on the MRI, takes years to develop and indicates complete tendon detachment for an extended period.
- Most patients with rotator cuff arthropathy can still move their shoulders through compensation by other muscles, particularly the deltoid.
- The degenerative changes seen on the MRI were chronic and longstanding.
- Joint effusion is commonly present in cases of rotator cuff arthropathy due to cartilage breakdown.
- Patients with severe end-stage pathology can develop symptoms at any time with or without any injury or an incident.

28. Dr. Failinger, however, acknowledged in his reports and confirmed at hearing that Claimant's symptoms began at work on April 25, 2024, and that there were no records indicating Claimant was seeking treatment for shoulder problems after his prior surgery and before the incident. In his March 25, 2025, addendum report, he specifically noted that multiple employment clearance examinations from 2019, 2020, 2021, and 2023 showed "no shoulder complaints" and "no shoulder pathology."

29. Dr. Failinger credibly indicated that despite the severe underlying pathology, patients with Claimant's preexisting condition can often perform activities at shoulder level or even slightly above, particularly with lighter weights (15 pounds), due to deltoid muscle compensation. Thus, he provided a medically sound and plausible explanation for how Claimant could perform his job duties for 30 years despite underlying degenerative changes.

30. Dr. Failinger also acknowledged in his reports and at hearing that the recommended reverse total shoulder arthroplasty is reasonable and necessary treatment for Claimant's condition, but just that the need for surgery is not related to the industrial incident/injury. In essence, he concluded that despite the temporal relationship, Claimant's symptoms and disability merely occurred while Claimant was at work but were not caused by work.

Dr. Sander Orent

31. Dr. Orent performed an independent medical examination on behalf of Claimant and issued a report dated October 23, 2024. He also testified at hearing and his testimony was consistent with his report.

32. Dr. Orent is a physician specializing in occupational and environmental medicine and internal medicine, board certified in both specialties. While he acknowledged his opinions were "non-orthopedic" and that Dr. Failinger possessed greater subspecialty expertise in shoulder anatomy and rotator cuff testing procedures, Dr. Orent's occupational medicine training provides relevant expertise for analyzing work-relatedness and causation.

33. Dr. Orent noted that Claimant had been doing repetitive work for 34 years and "on the particular day, he had already done 20 lifts if not more. It was an acute event with pop where the cuff actually ruptured." Dr. Orent admitted there were "pre-existing issues in this patient's right shoulder, but it should be noted he was continuing to function at the time of this event, completely asymptomatic requiring no treatment for almost 28 years."

34. Dr. Orent concluded that Claimant suffered a work-related aggravation of his preexisting shoulder condition on April 25, 2024, and that the recommended reverse total shoulder arthroplasty is reasonable and necessary to treat Claimant from the work aggravation-injury.

35. Dr. Orent stated several factors in his report and testimony that he used to support his causation opinion:

- Claimant was “completely asymptomatic” and “continuing to function” prior to April 25, 2024.
- There was “no doubt” that there was "a significant event on the job.”
- The MRI showed "joint effusion and synovitis that suggested an acute injury."
- Claimant’s "history is quite compelling and the fact that he was doing so well prior to this is also compelling."

36. While Dr. Failinger demonstrated superior technical expertise in shoulder anatomy and rotator cuff pathophysiology, Dr. Orent's opinion based on the temporal relationship between the work incident and onset of symptoms is credible and persuasive regarding causation and the need for surgery.

Credibility Determinations

37. Claimant’s testimony is found to be credible based on the following factors:

- His testimony regarding the mechanism of injury is consistent with the Employer’s first report of injury completed contemporaneously with the incident.
- His description of the immediate onset of symptoms is consistent with his timely reporting the injury to his supervisor within 20-30 minutes of the incident.

- His testimony regarding the lack of prior shoulder problems is consistent with the prior DOT examinations, especially the December 2023 DOT examination records showing normal extremities and joints.
- His testimony regarding functional limitations since the injury is consistent with medical examination findings of numerous medical providers.
- His testimony regarding the work tasks and mechanism of injury is corroborated by the demonstrative exhibit showing similar breadbasket stacking operations onto a 4-wheel dolly.
- The medical records contain no credible evidence contradicting Claimant’s testimony that he was asymptomatic and fully functional before the April 25, 2024, work injury.

38. Dr. Failinger demonstrated extensive knowledge and expertise regarding shoulder anatomy, rotator cuff pathophysiology, and the potential mechanisms of shoulder injuries based on his orthopedic training, subspecialty, and experience.

39. While Dr. Orent's technical understanding of shoulder pathology was not as extensive as Dr. Failinger's orthopedic subspecialty expertise, his occupational medicine background and analysis of the immediate onset of symptoms and disability following the work incident, combined with Claimant's prior asymptomatic function, was credible and persuasive regarding causation.

40. Most importantly, both experts acknowledged Claimant’s symptoms began acutely at work on April 25, 2024, and that Claimant was previously asymptomatic and functional for approximately 30 years before the lifting incident at work.

41. In the end, even Dr. Failinger’s own analysis regarding compensation mechanisms and his acknowledgment that symptoms can develop at any time in patients with severe pathology, combined with the temporal relationship to work activities documented by both experts and the absence of other precipitating causes, supports rather than contradicts a finding of a work-related aggravation that caused the need for the shoulder surgery recommended by Dr. Thon.

42. Thus, the ALJ finds that the April 25, 2024, work accident triggered, and proximately caused, the need for the shoulder surgery recommended by Dr. Thon.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See*

Burnham v. Grant, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has proven by a preponderance of the evidence that the shoulder surgery recommended by Dr. Thon is reasonable, necessary, and causally related to the industrial injury.

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve Claimant from the effects of the industrial injury. *See Snyder v. Industrial Claim Appeals Off.*, 942 P.2d 1337 (Colo. App. 1997). It is well established, however, that a general admission of liability for medical benefits does not render the respondents liable for all subsequent treatment rendered to Claimant. To the contrary, Respondents retain the right to dispute liability for specific medical treatment on grounds that the treatment is not reasonably necessary to cure or relieve the effects of the industrial injury, i.e., not related to the industrial injury. *See Snyder v. Indus. Claim Appeals Off., supra; Williams v. Industrial Comm'n*, 723 P.2d 749 (Colo. App. 1986). This principle recognizes that, even though an admission is filed, Claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. *See Snyder v. Industrial Claim Appeals Off., supra*. Thus, where Claimant's entitlement to benefits is disputed, Claimant has the burden to prove a causal relationship between a work-related injury or disease and the condition for which benefits are sought. *Id*.

Moreover, a preexisting condition does not disqualify a claim for medical treatment if the injury aggravates, accelerates, or combines with the preexisting disease or infirmity to produce the need for the medical treatment at issue. *See H & H Warehouse v. Vicory,*

805 P.2d 1167 (Colo. App. 1990). In addition, the ICAO has noted that pain is "a typical symptom from the aggravation of a pre-existing condition" and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of, or natural progression of, a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Breeds v. North Suburban Medical Ctr.,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Off.,* 12 P.3d 844 (Colo. App. 2000).

In *Rodriguez v. Hertz Corp.*, the Industrial Claim Appeals Office explained:

> Pain is a typical symptom from the aggravation of a preexisting condition. The claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. See *Merriman v. Indus. Comm'n*, 120 Colo. 400, 210 P.2d 448 (1949). An industrial aggravation is the 'proximate' cause of medical treatment if it is the 'necessary precondition or trigger' of the need for medical treatment. *Subsequent Inj. Fund v. State Comp. Ins. Auth.*, 768 P.2d 751 (Colo. App. 1988). In contrast, the claimant suffers a 'worsening' of a preexisting condition if the need for treatment is the natural and proximate consequence of a prior industrial injury, without any contribution from a separate, intervening

causative factor. See *Larson's Workers' Compensation Law* § 131.03(1)(b) (2000).

Rodriguez v. Hertz Corp., WC 3-998-279, at 7 (Colo. Indus. Claim Appeals Office Feb. 16, 2001).

Lastly, the ALJ is mindful of the logical fallacy of mistaking temporal proximity for a causal relationship and that correlation is not causation. *See Shaffstall v. Champion Technologies*, W.C. No. 4-820-016 (March 2, 2011). Thus, the ALJ recognizes that while temporal sequence alone might be insufficient to establish causation, it may constitute relevant and persuasive evidence when considered alongside other factors in a comprehensive causal analysis.

~~In this case, Claimant did have preexisting degenerative shoulder pathology. However, and most importantly, he was asymptomatic and fully functional for approximately 30 years following his 1995 shoulder surgery. The work activities on April 25, 2024, involving lifting bread baskets while stacking from seven high to ten high, significantly aggravated his preexisting shoulder condition and caused his pain, disability, and proximately caused the need for the surgery recommended by Dr. Thon.~~

Claimant's credible testimony, as well as the medical records, established over almost 30 years of asymptomatic work without shoulder problems and the immediate onset of severe pain during the stacking activity as well as an immediate decrease in Claimant's shoulder range of motion. Again, Claimant's testimony is corroborated by contemporaneous medical records, the Employer's first report of injury, and the absence of prior medical records indicating shoulder complaints or treatment after his prior surgery.

Both experts also acknowledged the critical temporal relationship between his work activities and the onset of his symptoms. Dr. Orent, with record support, found Claimant was asymptomatic for almost 30 years before the incident. Even Dr. Failinger, despite his ultimate causation opinion, acknowledged Claimant's symptoms began at work on April 25, 2024, and confirmed through comprehensive record review that employment examinations from 2019 to 2023 did not demonstrate any shoulder problems in the form of pain, disability, or need for medical treatment.

Dr. Failinger's superior technical expertise correctly established the chronic nature of the underlying degenerative changes. However, his own testimony supports rather than contradicts Claimant suffered an aggravation of his preexisting shoulder condition and that aggravation proximately caused the need for surgery. His explanation that patients with severe rotator cuff pathology can remain functional through compensation mechanisms provides the medical foundation for understanding Claimant's ability to perform his job-asymptomatically. His acknowledgment that symptoms can occur at any time must be viewed within the specific temporal relationship to Claimant's work activities and absence of any other reasonably precipitating cause based on the facts of this case.

Dr. Failinger also acknowledged that the reverse total shoulder arthroplasty recommended by Dr. Thon is reasonable and necessary treatment for Claimant's current shoulder condition–which includes current pain and dysfunction. This medical necessity, combined with immediate symptom onset following work activities and absence of prior symptoms for almost 30 years, helps establish the causal relationship between work activities and need for the surgery.

Respondents contend that Claimant's need for a reverse total shoulder arthroplasty stems solely from preexisting degenerative conditions—chronic rotator cuff tears and arthritis - and that the April 25, 2024, work incident merely caused a transient flare in symptoms that have since resolved. The ALJ, however, does not find this argument persuasive.

First, the credible evidence does not support the notion that Claimant's symptoms returned to baseline following the work injury. Claimant credibly testified that, and the medical records demonstrate that before the work incident, he had no shoulder pain or functional limitations that prevented him from performing his job duties. In contrast, since April 25, 2024, he has continued to experience persistent pain, restricted range of motion, and limited function. These ongoing deficits are inconsistent with Respondents' characterization of a temporary flare.

The ALJ further rejects the inference that Claimant must have returned to baseline simply because a significant amount of time has passed between the surgery recommendation and the hearing, during which Claimant has not undergone additional

medical treatment. The absence of interim treatment does not prove resolution of symptoms. In fact, Claimant credibly testified that he still experiences pain when performing certain activities, that he can use his right shoulder for some tasks only with discomfort, and that he must often use his left arm to assist his right. He also credibly testified that he has not returned to work because he does not believe he can perform his job duties in his current physical condition. These facts weigh against a finding of resolution or return to baseline.

In addition, the medical evidence, including Dr. Orent's opinion, credibly supports that the work injury either caused an acute tear or significantly aggravated an otherwise asymptomatic condition, triggering new and disabling symptoms that had not existed previously and for which medical treatment has been recommended to relieve. Contrary to Respondents' assertion, the fact that Claimant had preexisting pathology that predated the injury does not sever the causal link between the work incident and the need for surgery.

Moreover, the suggestion that Claimant's physicians would have recommended the same treatment regardless of the injury lacks credible and persuasive evidentiary support. Such a suggestion is speculative and contradicted by the timing and clinical progression of Claimant's symptoms. Before the incident, Claimant was not receiving treatment for his shoulder and no medical treatment, let alone surgery, had been contemplated because Claimant was asymptomatic. It was only after the work incident and the ensuing symptoms that surgical intervention was deemed appropriate.

Furthermore, while Dr. Failinger's analysis demonstrates superior technical expertise regarding shoulder anatomy, his opinion fails to persuasively address whether the work injury aggravated Claimant's asymptomatic preexisting condition. Dr. Failinger relies heavily on MRI findings showing chronic degenerative changes to support his conclusion that no work-related injury occurred. However, this approach presumes that an MRI can detect and differentiate any acute aggravation that might have occurred in Claimant's shoulder versus long standing degeneration. This presumption is problematic because something must have physiologically changed to cause Claimant's immediate onset of pain and dysfunction on April 25, 2024. While an MRI has the ability to identify

chronic pathology, the record does not establish that an MRI can identify and distinguish between all chronic versus all acute conditions. For example, it was not established that an MRI can differentiate chronic versus acute inflammatory changes, chronic versus acute minor tissue disruption, or chronic versus acute physiological alterations that could trigger the transition from an asymptomatic to symptomatic state. Thus, the MRI cannot be said to be the definitive test for determining whether or not Claimant suffered an acute injury or aggravation of a preexisting condition.

On the other hand, Dr. Orent's core medical opinion was supported by the sequence of events, Claimant's credible symptom history, and the clear change in functional status immediately following the work event. Thus, Dr. Orent offered a credible explanation, grounded in the medical record and clinical progression, that the mechanism of lifting a basket of bread could plausibly - and in his opinion, did - cause an acute tear or significant aggravation that led to the current pain and functional deficits and need for the surgery recommended by Dr. Thon. Thus, the ALJ finds his opinion to be credible and persuasive.

Respondents also argue that by his underlying condition eliciting pain at work, Claimant's significant degenerative shoulder condition was merely revealed, and not aggravated, by the April 25, 2024, incident. This argument, however, is not persuasive. The ALJ finds that it was not the underlying condition that elicited pain while Claimant was at work, rather it was the act of lifting at work on April 25 that triggered the onset of pain and dysfunction, which has not abated, and for which surgery has been recommended. The fact that subsequent imaging revealed preexisting pathology does not mean that the injury was limited to "revealing" an asymptomatic condition. To the contrary, the work activity caused a significant aggravation that caused persistent symptoms and functional limitations, ultimately prompting a recommendation for surgical repair to relieve Claimant from the effects of his work injury.

Moreover, Respondents' argument that Claimant has work restrictions merely because he is in the system appears speculative and unsupported by credible evidence. The evidence supports a finding that his restrictions are based on Claimant's clinical

findings and his symptoms. These restrictions, together with the recommended surgery, reflect a continuing and significant functional deficit that did not exist before the injury.

Lastly, Respondents contend that Claimant's providers have not "bothered" to provide conservative treatment for over a year misconstrues the medical evidence and clinical reasoning. The absence of ongoing conservative treatment since shortly after the injury reflects the medical judgment of Dr. Thon regarding the futility of such measures given the severity of Claimant's condition, rather than any failure to properly evaluate treatment options or neglect by providers. As a result, Dr. Thon's determination that nonoperative treatments would have very limited effect was based on objective clinical findings and the extent of the pathology revealed by imaging, not on any arbitrary decision to forego appropriate care.

Respondents have admitted Claimant sustained a compensable injury on April 25, 2024. Thus, the issue is whether the reverse total shoulder arthroplasty recommended by Dr. Thon is reasonably necessary and causally related to the admitted injury. The ALJ finds and concludes that the credible and persuasive evidence establishes Claimant had no history of right shoulder symptoms, functional limitations that inhibited his ability to perform his job, or need for treatment in the nearly 30 years following his prior surgery. He was able to fully perform all aspects of his job without difficulty. On April 25, 2024, while performing a routine work task, Claimant experienced the immediate onset of sharp pain and loss of range of motion in his right shoulder. Those symptoms have persisted, and Dr. Thon has concluded that surgery is necessary to restore function and relieve ongoing pain caused by the work accident. Both medical experts acknowledged the temporal relationship between the work incident and symptom onset, Claimant's prior asymptomatic status for nearly three decades, and that the surgery is reasonable and necessary. While the underlying pathology was preexisting, the ALJ finds and concludes that the work incident changed an asymptomatic condition into a painful, functionally limiting condition requiring surgical intervention.

Accordingly, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the April 25, 2024, work accident aggravated Claimant's underlying shoulder condition and proximately caused the current symptoms

and resulting need for surgery. The ALJ further finds and concludes that Claimant has proven by a preponderance of the evidence that the reverse total shoulder arthroplasty recommended by Dr. Thon is reasonable and necessary to treat Claimant from the effects of his industrial injury and is thereby related to the industrial injury.

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

1. Respondents shall pay for the shoulder surgery recommended by Dr. Thon.

2. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: June 24, 2025

/s/ Glen Goldman

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

ISSUES

1. Whether Respondents proved by clear and convincing evidence that DIME physician Dr. Shea erred in his determination regarding Claimant's permanent impairment;

2. Whether Respondents proved by clear and convincing evidence that DIME physician Dr. Shea erred in his determination regarding Claimant's date of maximum medical improvement (MMI);

3. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits;

4. Whether Respondents proved by a preponderance of the evidence that Claimant is responsible for his own termination and that temporary disability benefits should be terminated as of the date Claimant's employment was terminated;

5. Whether and in what amount Claimant is entitled to a disfigurement award.

FINDINGS OF FACT

1. On October 2, 2021, Claimant was working as an oil rig worker for Respondent-Employer. Part of his job duties included manual labor as well as connecting drilling pipes with large pipe wrenches. While another employee was operating heavy iron or steel tongs, a piece of the tongs weighing roughly eight pounds broke off, flew through the air, and struck Claimant in his right thigh and then his left thigh, knocking him to the ground. Due to Claimant having a set of keys in his right pocket, the projectile did not penetrate Claimant's right leg. However, the impact caused two deep puncture wounds in Claimant's left thigh reaching to the subcutaneous fat but not penetrating the muscles. Claimant had begun his shift that day at 7:00 A.M. and the injury occurred at 1:00 P.M.

2. Claimant drove himself to the emergency room at Lincoln Health where his wounds were cleaned and sutured. X-rays showed no fractures of Claimant's thigh. The attending physician, Dr. Michael Sullivan, provided Claimant with temporary work restrictions of no lifting more than ten pounds for the next five days. Claimant was discharged with antibiotics and Percocet.

3. Claimant returned to Dr. Sullivan on October 9, 2021, with continued complaints of bilateral thigh pain and reporting that he had run out of Percocet. Dr. Sullivan observed that Claimant had significant ecchymosis over both thighs. Dr. Sullivan

prescribed Claimant additional Percocet and kept him off work for the next two weeks. Dr. Sullivan also prescribed Claimant ibuprofen and Flexeril with a recommendation that Claimant transition to those.

4. On October 11, 2021, Claimant saw Dr. Christina Pavelko at Colorado Plains Medical Group reporting fatigue concerns that his wounds might be infected. Dr. Pavelko prescribed Claimant Percocet and antibiotics.

5. Claimant returned to Dr. Sullivan at Lincoln Health on October 20, 2021, on crutches reporting difficulty ambulating. Claimant's wounds were observed to have healed well and his sutures were removed. Dr. Sullivan expressed some perplexity as to why Claimant had not returned to normal function by this point.

6. On November 10, 2021, Claimant saw Dr. Pavelko regarding some chronic issues, including urinary symptoms, as well as complaints of low back pain and pelvic pain extending down into the testicles.

7. Claimant saw Amanda Judd, NP, at Peak Vista Community Health on November 19, 2021. He complained of a tight neck and tingling and numbness of his right thigh, arms, and left leg. A left knee X-ray was performed. NP Judd prescribed physical therapy, ibuprofen, and diclofenac. Claimant was given temporary work restrictions of no work.

8. On December 16, 2021, Claimant saw Amanda Judd, NP, at Health Center at Limon. Claimant reported having continued pain and locking of his left knee on extension along with tingling in his leg. Claimant underwent a left knee X-ray which did not reveal any left knee injury.

9. Claimant followed up with NP Judd on January 13, 2022, with continued complaints of significant pain in his left thigh and knee and requesting an MRI.

10. Claimant underwent the left knee MRI on January 27, 2022. The MRI was negative for any acute meniscal or ligamentous injuries. An MRI was also performed on Claimant's left thigh, hip, and femur, which showed only some evidence of scarring and low-grade inflammation in the location of the injuries.

11. On February 16, 2022, Claimant returned to NP Judd with complaints of pain when exercising as he continued with physical therapy. Claimant also complained that his gabapentin caused him more pain and that he wished for oral pain medications rather than topical diclofenac. Claimant was referred to pain management, orthopedics, and physical therapy. His medications were continued as gabapentin and topical diclofenac. His temporary work restrictions were not modified.

12. At a physical therapy appointment on March 30, 2022, Claimant complained of cervical pain, left lumbosacral pain, bilateral knee pain, and quadriceps pain. He was seen for treatment of the cervical and lumbar spine, including treatment of the

left sacroiliac joint for posterior rotation of the innominate including manual manipulation. He was treated with cervical traction. The therapist noted his neck and back would be treated on separate appointments from his knees and thighs to keep his therapy on course.

13. On March 31, 2022, Claimant saw Dr. Nicholas Stockwell at Banner Health in Sterling. Claimant complained of some right leg weakness as well as difficulty putting full weight on his left leg without feeling as though his knee were giving way. Dr. Stockwell explained to Claimant that the MRIs did not reveal any structural deficits in Claimant's left thigh or knee, though there was some patellofemoral arthritis that Dr. Stockwell felt was unrelated to the injury. Dr. Stockwell offered corticosteroid injections for Claimant's knee, which Claimant declined. Claimant requested additional narcotics prescriptions, but Dr. Stockwell felt that pain management would be more appropriate given the nature of Claimant's now chronic pain. His temporary work restrictions were not modified.

14. On April 29, 2022, Claimant saw Christina Abbott, NP, at Colorado Pain Care. Claimant reported pain in his bilateral thighs and knees. Claimant described the injury as occurring when the equipment struck his thighs and caused Claimant to fall backwards landing on his left low back. NP Abbott noted that MRIs of the neck, left hip, and left shoulder were currently pending. His temporary work restrictions were not modified.

15. On June 15, 2022, Dr. Luke examined Claimant to take over care and recommended work restrictions of no lifting, pushing, pulling, carrying over 25 pounds. These restrictions were not as severe as the restrictions assigned by the ER prior to Claimant's termination for cause.

16. On June 24, 2022, Claimant underwent MRIs of both knees, his cervical spine, and his lumbar spine. The left knee MRI showed: mild patellofemoral chondromalacia involving the apex and lateral head of the patella; superficial erosions of the articular cartilage in the medical femoral condyle; intact ACL, PCL, MCL and lateral collateral ligament complex; and intact medial and lateral menisci. The MRI of right knee showed small joint effusion, grade I chondromalacia of the patella all ligaments intact and no meniscal tear. The cervical spine MRI showed: no cord signal abnormality; severe left foraminal narrowing at C5-C6 and C6-C7; moderately severe right foraminal narrowing C6-C7; and moderate right foraminal narrowing C5-C6. The MRI of lumbar spine showed: minimal endplate edema adjacent to possible tiny acute small Schmorl's nodes at the anterior superior endplate of L4-L5, which the interpreting physician suspected to be pain generators; no focal disc protrusion, central canal or foraminal narrowing; and a normal appearing conus medullaris.

17. On October 5, 2022, Dr. Carlos Cebrian performed an independent medical examination (IME) at Respondents' request. Dr. Cebrian examined Claimant, took his history, and reviewed Claimant's medical records. Dr. Cebrian noted that

several conditions predated Claimant's work injury as documented in the records, including urinary flow abnormalities, ADHD, psoriasis, long-term opioid use, chronic pain disorder, and musculoskeletal issues like cervical and lumbar spine pain, and left shoulder pain. Dr. Cebrian opined that the bilateral thigh contusions and two lacerations on the left thigh were the only injuries directly related to the work injury. He noted that the left thigh injury resulted in quadriceps atrophy, which led to patellar tracking issues and patellofemoral syndrome in the left knee. Though, he noted that diagnostic testing revealed no underlying quadriceps pathology such as tears or hematomas, attributing the atrophy to disuse and prolonged crutch use. Dr. Cebrian opined that the pain expansion to other areas like the lumbar spine, pelvis, neck, and shoulder was unrelated to the work injury, as the symptoms developed later and were inconsistent with the mechanism of injury. Dr. Cebrian felt that Claimant's pain complaints were disproportionate to the objective findings on the MRIs of the left thigh and knee and that Claimant's oxycodone dosage was inappropriate. Ultimately, Dr. Cebrian opined that Claimant reached MMI as of May 23, 2022, as no further treatment was reasonably necessary after that point, aside from a home exercise program. Dr. Cebrian assessed Claimant with no permanent impairment.

18. On October 26, 2022, Claimant saw Dr. Luke at Workwell. Dr. Luke documented that Claimant had developed posterior and right lateral neck pain, bilateral knee pain, low back pain, and bilateral upper leg weakness since the injury. Dr. Luke noted that the MRIs showed only minor abnormalities in the cervical and lumbar spines and chondromalacia in the knees. Dr. Luke recommended massage therapy and continued home exercises, as well as a urology referral due to Claimant's complaints of foamy and frequent urination. Dr. Luke felt that Claimant had reached MMI as of that date. He referred Claimant for a functional capacity evaluation.

19. Claimant underwent an IME with Dr. Sander Orent on November 1, 2022. Dr. Orent reviewed Claimant's medical records and took Claimant's subjective history. Dr. Orent opined that Claimant was not at MMI and still required a repeat cervical and lumbar MRIs and EMGs to rule out a cervical and lumbar disc herniation and nerve compression causing Claimant's upper and lower extremity symptoms. Regarding Claimant's left knee, Dr. Orent felt that Claimant required an orthopedic consultation to consider the possibility of viscosupplementation or cortisone injections to address Claimant's chondromalacia, as well as the possibility for a need for arthroscopic surgery to smooth out the cartilage underneath the patella. Dr. Orent also recommended that Claimant obtain a pain management and urology consultations.

20. Claimant presented to Dr. Gregory Reichhardt at Rehabilitation Associates of Colorado, P.C., on November 28, 2022. Claimant reported that at the time of the accident he lost consciousness briefly, resulting in significant neck, back, and leg pain, as well as bilateral knee injuries. Claimant complained of neck pain radiating to the left arm, low back pain, and bilateral leg pain, as well as bowel and bladder

urgency, and left leg weakness and pain. Dr. Reichhardt reviewed Claimant's prior imaging as well. Dr. Reichhardt noted that Claimant's treatment history included forty sessions of physical therapy and referrals to various specialists. His physical exam revealed decreased range of motion in his left knee and lumbar spine, gait abnormalities, and tenderness in affected areas. Dr. Reichhardt felt that there was no clear etiology for Claimant's leg symptoms based on imaging. Dr. Reichhardt also noted that Claimant suffered from multiple non-work-related conditions, including depression, shortness of breath, abdominal pain, and sleep apnea. Dr. Reichhardt recommended further diagnostic testing, including electrodiagnostic evaluation and a thoracic MRI, along with psychological support and community resources for his financial and healthcare needs.

21. Claimant returned to Dr. Luke on December 16, 2022. Dr. Luke reviewed the results of a functional capacity evaluation and assigned Claimant permanent work restrictions of no lifting, pushing, pulling, or carrying over twenty-five pounds. Dr. Luke felt that Claimant had no permanent medical impairment. He did recommend maintenance medical care going forward, including pain management.

22. On December 21, 2022, Claimant saw Dr. Reichhardt. Dr. Reichhardt reviewed the IME report of Dr. Cebrian. Dr. Reichhardt performed an EMG of Claimant's lower extremities. The EMG results were normal. Claimant also underwent a thoracic spine MRI that same date, which showed multilevel thoracic disc disease with small central protrusions but no stenosis. The Court finds that these diagnostic tests had a reasonable prospect of defining Claimant's condition and suggesting further treatment insofar as they were reasonably necessary to rule out a thoracic spine pathology as the source of Claimant's back and left leg pain.

23. The Court finds that from Claimant's date of injury through his date of MMI, Claimant did not suffer a worsening of condition so as to reestablish the connection between his work injury and his wage loss notwithstanding his responsibility for termination. Claimant's temporary work restrictions were not increased nor is there credible evidence that Claimant's subjective reports of function meaningfully changed during that time period.

24. Respondents filed a Final Admission of Liability (FAL) on January 31, 2023, admitting for no permanent impairment or permanent disability benefits. Claimant challenged the FAL and requested a DIME.

25. Claimant was seen on March 20, 2023, at Colorado Pain Center with a primary complaint of constant and aching lumbar pain with intermittent sharpness. The attending clinician addressed Claimant's opioid use and recommended NSAID usage instead.

26. On June 1, 2023, Claimant underwent a Division independent medical examination (DIME) with Dr. Brian Shea. Dr. Shea reviewed Claimant's medical history and took Claimant's subjective history. Dr. Shea noted that the records described

Claimant getting knocked to the ground and possibly losing consciousness for several seconds.

27. Dr. Shea felt that Claimant had reached MMI as of December 21, 2022, reasoning that Claimant reached MMI only once the thoracic MRI and the EMG of the lower extremity were completed. He noted that this MMI date differed from Dr. Luke's determined date of MMI.

28. Dr. Shea assigned Claimant a 15% whole-person permanent impairment for the low back, 10% of which was for loss of range of motion, and 5% of which was for specific disorders under Table 53, section 2b. Dr. Shea also assigned a 21% left lower extremity impairment based on 11% for loss of range of motion of the left knee and 10% for chondromalacia pursuant to Table 40, Section 5.

29. Dr. Shea's rationale for assigning impairment ratings for the left lower extremity and the low back, but not other body parts was as follows:

> No impairment was given to the right knee, left or right hip joint area, pelvicsacroiliac or thoracic spine. The workplace injury is well documented that a heavy metal piece flying at high speed hit the claimant in the mid thighs of both legs. After being struck, he fell onto his left back. The left thigh injury can be related to the left knee chondromalacia and falling onto his left side can be linked to a low back strain that has never resolved. All other areas cannot be directly linked to this accident or have normal ranges of motion at this time.

30. On September 22, 2023, Dr. Cebrian issued a supplemental IME report. In his report, he criticized the assignment of an impairment rating for the lumbar spine. He felt that none of the providers provided any explanation for the delay between Claimant's injury and his onset of low back complaints. He felt it was unreasonable that the providers accepted Claimant's "subjective report that it was related." Dr. Cebrian also noted the unremarkable diagnostic testing of Claimant's lumbar spine.

31. Dr. Cebrian also felt that the left knee impairment rating assigned by Dr. Shea was inappropriate. Dr. Cebrian pointed out that there had been documented prior instances where Claimant exhibited normal ranges of motion. Dr. Cebrian opined that Dr. Shea should have provided some explanation as to why he chose to assign an impairment rating for abnormal ranges of motion that were inconsistent with prior documented normal ranges of motion, and that Dr. Shea could have attempted to reconcile the disparity by retesting Claimant's ranges of motion on a different day. Dr. Cebrian cited section 1.2 of the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised), which reads in pertinent part:

> *If the current findings are consistent with the results of previous clinical evaluations, they may be compared with the appropriate tables of the*

Guides to determine the percentage of impairment If the findings of the impairment evaluation are not consistent with those in the record, the step of determining the percentage of impairment is meaningless and should not be carried out until communication between the involved physicians or further clinical investigation resolves the disparity.

32. Last, regarding the date of MMI, Dr. Cebrian opined that Claimant had been at MMI since May 23, 2022, reasoning that Claimant's conditions had been stable for several months by that time and "the performance of unremarkable objective testing for non-claim related conditions does not affect the date of MMI."

33. On January 9, 2024, Dr. Orent performed a repeat IME with Claimant and issued a report. Claimant continued to complain of back pain radiating down his left leg into his foot. Claimant also continued to complain of urinary problems. Dr. Orent noted that Claimant had a marked restriction in his range of motion of his cervical spine. Dr. Orent expressed confusion as to why Dr. Shea did not give Claimant an impairment rating for the cervical spine given that Claimant never had any issues with his cervical spine prior to the injury. Ultimately, Dr. Orent opined that Claimant was not at MMI and that Claimant required treatment under the claim for his urological symptoms. Dr. Orent also felt that Dr. Shea should have given Claimant a cervical spine impairment rating at the DIME.

34. On February 29, 2024, Dr. Cebrian issued another supplemental IME report. Dr. Cebrian addressed and criticized Dr. Orent's diagnosis of Claimant with a neurogenic bladder. He also expressed that Claimant did not have a cervical spine impairment and that Claimant's "ongoing elevated subjective complaints" were not consistent with the original mechanism of injury.

35. Respondents called Dr. Cebrian to testify at hearing. Dr. Cebrian testified consistently with his reports. Regarding Claimant's lumbar complaints, Dr. Cebrian testified that the initial emergency room records did not document a fall or any lumbar complaints, which led Dr. Cebrian to feel that Claimant's lumbar complaints were not related to the work injury. Dr. Cebrian also expressed some concern about Claimant's reliance on opioid medications to manage pain and opined that Claimant's pain complaints were disproportionate to the objective findings from diagnostic imaging. Based on this, Dr. Cebrian felt that Claimant had reached MMI as of May 23, 2022, with no permanent impairment related to Claimant's thighs or left knee.

36. The Court finds Dr. Cebrian's testimony to be credible, even if not persuasive.

37. Respondents also called Blaine Gabel to testify. Mr. Gabel testified that he was the vice president of Respondent-Employer at the time of Claimant's injury, and that his duties included overseeing safety protocols and investigating injuries. Mr. Gabel investigated Claimant's injury and noted that the full set of tongs weighed

between 1200 and 1500 pounds, though the steel piece that had broken off weighed less than eight pounds.

38. Mr. Gabel testified that he was notified via text message by Claimant regarding the injury and expressed concern that Claimant drove himself to the emergency room, which violated company policy. He testified that subsequent communications with Claimant via text message were spotty at best and that Claimant would not return Mr. Gabel's voice messages. Mr. Gabel testified that he was able to eventually get Claimant on the phone the following Tuesday, October 5, 2021, at 5:45 A.M. by calling a coworker that was with Claimant and having him put Claimant on the phone. As Mr. Gabel requested that Claimant return some items, including a statement about the injury, tensions escalated and Claimant threatened to kill Mr. Gabel. At that point, Mr. Gabel terminated Claimant's employment over the phone and told Claimant to vacate the hotel room that Respondent-Employer had provided him. Mr. Gabel testified that Respondent-Employer never offered Claimant any modified duty work.

39. The Court finds Mr. Gabel's testimony to be credible.

40. Claimant testified at hearing as well on his own behalf. Claimant described the mechanism of injury as the piece of tong breaking off and shooting as if out of a cannon and striking him from approximately twenty-five feet away. The piece of iron first struck his right leg, where his house key in his pocket absorbed some of the impact, then struck his left leg, causing two deep lacerations in his left thigh. Claimant described the immediate aftermath as feeling numb in his legs and being unable to stand. After regaining sensation, he crawled but could not move effectively due to the intense pain. He testified that he also briefly lost consciousness.

41. Claimant testified that at the time of the accident, no one at the worksite offered him assistance to go to the hospital, so he drove himself to Hugo Hospital in his underwear, as no ambulance was called. He testified that Dr. Sullivan treated his left leg lacerations, stitching the wounds but, according to Claimant, not addressing his right leg, back, or other injuries he mentioned. Claimant also felt that his follow-up care was minimal, with no MRI or other imaging initially performed.

42. In his testimony, Claimant described attempts to get treatment for ongoing pain in his legs, neck, back, and shoulders. He testified that the initial focus was just on his left thigh, despite him complaining of pain in other locations, as the emergency room staff were focused on treating the most obvious and severe injury.

43. Claimant testified that he reported his full range of injuries when he saw Amanda Judd for the first time in November 2021. However, Claimant testified that Judd told him that he could be treated for only one body part at a time.

44. Claimant testified regarding his communications with Mr. Gabel as well. Claimant testified that his first communication with Mr. Gabel was on the date of injury when he sent Mr. Gabel a photo of his injury. Claimant preferred to keep communications via text message for documentation purposes.

45. Claimant also testified about his subsequent employment. Claimant testified that he worked for Village Inn but was fired due to being unable to perform the duties of the job. He testified that he also worked for Ice Lanes but that he was fired due to being unable to fulfil the duties of that job as well, as it involved a lot of walking. The Court finds, based on the pay stub records, that Claimant worked for Ice Lanes for several weeks in March 2022, for Village Inn for several months from April through July 2022, for Best Western for half of July 2022, and for Dewey's Bar for several weeks in February 2023.

46. The Court finds Claimant's testimony credible. However, to the extent that his testimony conflicts with that of Mr. Gabel, the Court finds Mr. Gabel's testimony more credible.

47. Claimant also called Dr. Orent to testify in his case. Dr. Orent testified consistently with his reports. Additionally, he opined that the long-term effects of Claimant's injury included leg weakness and the possibility of a herniated disc in Claimant's lumbar spine, which he felt might explain a foot drop that Claimant developed. He recommended further diagnostic testing, such as an EMG, to assess the extent of the nerve damage and clarify the cause of the weakness.

48. Regarding the initial documentation of Claimant's injuries in the emergency room, Dr. Orent testified that it appeared that the emergency room physicians tend to focus on the most apparent and serious injuries at the time of the treatment. Dr. Orent also testified that he believed the chondromalacia patella was most likely related to the work injury. He explained:

> *When he got whacked like that, it probably took the patella and impacted it into the tibia and the fibula . . . . If that cap of cartilage becomes damaged, fissured, cracked, then -- and starts to soften, we call that chondromalacia patella. . . . [I]n my opinion, this was a traumatic injury to the patella that induced this chondromalacia type of abnormalities.*

49. The Court finds Dr. Orent's testimony credible and persuasive.

50. To the extent that Dr. Cebrian opines that impairments for Claimant's low back and left knee would not be related to the October 2, 2021 injury, the Court is not persuaded. Claimant credibly testified that when he was struck by the projectile, he was knocked to the ground, landing on his left low back. And, although Dr. Cebrian correctly points out that the medical records for the first several weeks after the injury did not document a low back injury or left knee complaints specifically, Claimant has put forth a probable explanation. That is, the initial focus

was just on his left thigh, despite him complaining of pain in other locations, as the emergency room staff were focused on treating the most obvious and severe injury. This was supported by Dr. Orent's testimony as well. The Court finds that Claimant likely did complain of low back and left knee problems early on, but those complaints were not documented in the medical records initially and likely masked by Claimant's more immediate problems involving his left leg puncture wounds.

51. Additionally, regarding Dr. Cebrian's critique of Dr. Shea's assignment of impairment ratings for the left knee because there had been prior instances documenting normal range of motion for the left knee, the Court is not persuaded. While Dr. Cebrian is correct that there were documented instances of clinicians noting normal range of motion or the left knee, there were also documented instances of clinicians noting limited range of motion, including Dr. Reichhardt's November 28, 2022 examination of Claimant. Furthermore, there is no credible evidence that any of the documented ranges of motion on physical examination prior to the DIME were performed with a goniometer or other accurate measuring device in accordance with the *AMA Guides*. Therefore, because there was documented examinations prior to the DIME demonstrating both full and limited ranges of motion in the left knee, the Court finds that Dr. Shea did not err in not conducting further testing to resolve the apparent discrepancy.

52. Therefore, the Court finds that Respondents failed to prove by clear and convincing evidence that Dr. Shea erred in assigning Claimant permanent impairments for the lumbar spine and the left knee.

53. The Court finds that Respondents have not overcome DIME Dr. Shea's opinion by clear and convincing evidence regarding the date of MMI. Claimant was originally placed at MMI as of October 26, 2022. However, Dr. Reichhardt reasonably recommended further imaging and electrodiagnostic testing to rule out a thoracic spine pathology as the source of Claimant's back and left leg symptoms. The results of the diagnostic tests ultimately ruled out a thoracic spine pathology as the source of Claimant's symptoms. However, the tests had a reasonable prospect of defining Claimant's condition and his recommended course of treatment. Therefore, Dr. Shea's decision to determine that Claimant did not reach MMI until December 21, 2022, when Claimant completed the diagnostic tests, was well justified.

54. Regarding Claimant's termination, the Court finds that Claimant was responsible for his own termination. Claimant's initial refusal to speak with Mr. Gabel except by text message, Claimant's verbal threats toward Mr. Gabel, and Claimant's unreasonable refusal to vacate the hotel room for several days despite Respondent-Employer's request establish that Claimant was at fault for his termination.

55. The Court finds that Claimant missed no more than two and a half working days due to his injury prior to being fired on the morning of Tuesday, October 5, 2021.

That is, Claimant's injury occurred at 1:00 P.M. on Saturday, October 2, 2021. Assuming that Claimant would have continued to work the remainder of his shift on October 2, 2021, but for his injury, and assuming that Sunday and Monday were working days that Claimant missed due to his injury, Claimant would have missed only those working days prior to his termination as he was terminated at around 5:45 A.M. on Tuesday October 5, 2021, which was prior to the starting time of Claimant's shift as indicated on the Employer's First Report of Injury. Therefore, the Court finds that Claimant failed to prove by a preponderance of the evidence that he suffered a disability-related wage loss lasting more than three working days.

56. Furthermore, the Court finds that Claimant failed to prove that he suffered a worsening of condition so as to reestablish the connection between his work injury and his wage loss notwithstanding his responsibility for termination.

57. At hearing, Claimant presented permanent disfigurements on his left leg resulting from the injury. Claimant showed a left leg scar on his quadriceps, three inches by one-half inch with discoloration. He also showed a second disfigurement on the more lateral portion of his leg is an area where there is no muscle and the skin can be pushed down to his bone. Claimant had less muscle definition on his left leg than his right. When Claimant bends over, he bends over to the right due to weakness in his left quadriceps muscles. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. The Court finds that $1,549.00 would fairly compensate Claimant for his disfigurements given their severity and the degree to which they are visible to the public.

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 as to Impairment and MMI

A party seeking to challenge a DIME physician's opinions regarding MMI or permanent impairment bears the burden of overcoming the DIME decision by clear and convincing evidence. *Braun v. Vista Mesa*, W.C. No. 4-637-254 (April 15, 2010). Thus, Respondents must prove that it is "highly probable" that Dr. Shea erred with regard to his determination of Claimant's date of MMI and impairment rating. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo.App.1995). The DIME physician's opinions regarding the causal relationship between the admitted injury and the body part or condition addressed as part of the analysis of MMI or permanent impairment is also afforded special weight and may be overcome only by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 189 (Colo.App.2002)(A DIME physician's determinations concerning causation are binding unless overcome by clear and convincing evidence.).

In *Villela v. Excel Corp.*, W.C. No 4-400-281 (2001), a claimant was placed at MMI by his authorized treating physician, but a DIME determined that the claimant was not at MMI because, in part, the DIME physician "observed other upper extremity symptoms which, in his opinion, warranted additional diagnostic consideration so as to rule out a brachial plexus injury or sympathetic reflex dystrophy resulting from the industrial injury." *Id*. The respondents in that case challenged the MMI determination on the basis that there was no "objective evidence" to support the DIME physician's opinion that the claimant's "constellation of symptoms" was related to the industrial injury. The ALJ upheld the DIME's opinion and the respondents appealed. On appeal, the ICAO panel upheld the ALJ's finding, noting that, "even if it is ultimately determined that some or most of the claimant's current symptoms are not caused by the industrial injury, such a determination

would not nullify the DIME physician's opinion that, in August 1998, the claimant had not reached MMI. This is true because the DIME physician decided that an additional referral was necessary to determine the full range of pathology resulting from the industrial injury, and to prescribe treatment if necessary." *Id*.

As found above, the Court concludes that Respondents failed to prove by clear and convincing evidence that Dr. Shea erred in assigning Claimant permanent impairments for the lumbar spine and the left knee. While Dr. Cebrian is correct that there were documented instances of clinicians noting normal range of motion or the left knee, there were also documented instances of clinicians noting limited range of motion, including Dr. Reichhardt's November 28, 2022 examination of Claimant. Furthermore, there is no credible evidence that any of the documented ranges of motion on physical examination prior to the DIME were performed with a goniometer or other accurate measuring device in accordance with the *AMA Guides*. Therefore, because there was documented examinations prior to the DIME demonstrating both full and limited ranges of motion in the left knee, Dr. Shea did not err in not conducting further testing to resolve the apparent discrepancy.

As found above, the Court concludes that Respondents have not overcome DIME Dr. Shea's opinion by clear and convincing evidence regarding the date of MMI. Claimant was originally placed at MMI as of October 26, 2022. However, Dr. Reichhardt reasonably recommended further imaging and electrodiagnostic testing to rule out a thoracic spine pathology as the source of Claimant's back and left leg symptoms. The results of the diagnostic tests ultimately ruled out a thoracic spine pathology as the source of Claimant's symptoms. However, the tests had a reasonable prospect of defining Claimant's condition and his recommended course of treatment. Therefore, Dr. Shea's decision to determine that Claimant did not reach MMI until December 21, 2022, when Claimant completed the diagnostic tests, was well justified.

TTD Benefits and Responsible for Termination

Temporary total disability benefits are designed to compensate an injured worker for wage loss while employee is recovering from work-related injury. *Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson,* 938 P.2d 504 (Colo. 1997). Claimant bears the burden of establishing three conditions before qualifying for TTD benefits: (1) that the industrial injury caused the disability; (2) that Claimant left work because of the injury; and (3) that the disability is total and last more than three working days. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo.App.1997).

Respondents assert the responsible-for-termination defense to TTD. "[I]n cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S. That is, where a claimant is responsible for termination, that portion of the wage loss attributable to the termination may not be the basis for temporary disability benefits, whereas any wage loss which the claimant would have sustained as a result of the injury regardless of the termination would be the basis

for ongoing temporary disability benefits. *Lucero v. City of Durango*, W.C. No. 5-195-588 (Mar. 21, 2024).

However, a claimant who is responsible for the termination of regular employment is not entitled to temporary disability benefits absent a worsening of condition reestablishing the causal connection between the injury and the wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004).

As found above, Claimant was responsible for his termination. Also, as found above, Claimant was taken off work by the emergency room physician and his work restrictions only loosened until he was placed at MMI. There was no worsening of condition so as to reestablish the causal relationship between Claimant's work injury and his wage loss. Therefore, Respondents have proved by a preponderance of the evidence that Claimant's TTD was to be terminated upon his date of termination and Claimant has failed to prove by a preponderance of the evidence that TTD was to be restarted based on a worsening of condition reestablishing the causal connection between the work injury and the wage loss.

Disfigurement

A claimant who suffers a permanent disfigurement is entitled to a monetary award under the statute. Section 8-42-108, C.R.S. A disfigurement, for workers' compensation purposes, is an observable impairment of natural appearance of person. *Arkin v. Industrial Com'n of Colo.*, 358 P.2d 879 (Colo. 1961).

As found, Claimant showed a left leg scar on his quadriceps, three inches by one-half inch with discoloration. He also showed a second disfigurement on the more lateral portion of his leg is an area where there is no muscle and the skin can be pushed down to his bone. Claimant had less muscle definition on his left leg than his right. When Claimant bends over, he bends over to the right due to weakness in his left quadriceps muscles. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. The Court finds and concludes that $1,549.00 would fairly compensate Claimant for his disfigurements given their severity and the degree to which they are visible to the public.

ORDER

It is therefore ordered that:

1. Respondents have not proved by clear and convincing evidence that DIME physician Dr. Shea erred in his determinations regarding impairment or MMI.
2. Respondents have proved by a preponderance of the evidence that Claimant was responsible for his termination on October 5, 2021.
3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to TTD benefits notwithstanding his October 5, 2021 termination.
4. Claimant is entitled to disfigurement benefits in the amount of $1,549.00.
5. All matters not determined herein are reserved for future determination.

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

DATED: June 24, 2025.

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-249-365-001

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of David Yamamoto, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) for both his visual and psychological conditions sustained on August 22, 2023 while working for Employer.

FINDINGS OF FACT

1. Claimant worked as a laborer for Employer. On August 22, 2023 he was performing duties on a scaffolding while using a hammer. However, he slipped and the claw of the hammer struck his left eye. Claimant was transported to the emergency room for treatment.

2. During his initial evaluation with Banner Health in Fort Collins, Colorado Claimant was diagnosed with a rupture of the globe of his left eye following blunt trauma. He then presented to Swedish Medical Center where he received treatment from August 23-24, 2023. Claimant underwent an open globe repair and was told he would no longer have vision in his left eye.

3. Michael Solomon, D.O. had performed an open globe repair of Claimant's left eye and noted that Claimant would no longer have vision in the eye. On September 14, 2023 he released Claimant back to work with protective eyewear and instructed Claimant to follow-up as needed. Dr. Solomon did not provide any additional restrictions or referrals for additional treatment.

4. On November 21, 2023 Claimant visited Ophthalmologist Lauren Zimski, M.D. for an Independent Medical Examination (IME). Dr. Zimski noted that she discussed enucleation or removal of the eyeball with Claimant after his surgery. Claimant had reported discomfort and depression. She remarked that he "cosmetically does not look right." She explained to Claimant that enucleation "would improve his pain and give him a more cosmetically desirable result." Dr. Zimski commented that Claimant was depressed from the injury and felt he would benefit from treatment. Nevertheless, Dr. Zimski determined that Claimant had reached Maximum Medical Improvement (MMI) on September 14, 2023 and suffered a 24% whole person impairment of the visual system. She summarized under the maintenance care section of her report that Claimant was interested in enucleation and fitting for a prosthetic eye. Claimant's symptoms would improve with enucleation and a prosthetic eye. Dr. Zimski recommended consultation with an oculoplastic surgeon and treatment with a primary care provider for his depression.

5. On December 18, 2023 Respondents filed a Final Admission of Liability (FAL). Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME).

6. On March 4, 2024 Claimant had undergone an examination with Chester Roe, M.D. Dr. Roe noted that Claimant complained of sensitivity to sunlight. Claimant also reported depression, anxiousness and worry. Dr. Roe maintained that no treatment would be expected to restore vision but agreed that Claimant may require enucleation. He agreed with the 24% whole person visual impairment assigned by Dr. Zimski but added 6% for a cosmetic deformity. Combining the ratings yields a 29% whole person impairment. Dr. Roe reasoned that Claimant had reached MMI by the date of his evaluation. However, he later noted that it would be reasonable to consider Claimant had not reached MMI until after the enucleation and subsequent healing.

7. On August 27, 2024 Claimant underwent a psychiatric impairment with Dr. Dworetsky. Claimant reported that his left eye stings. He also mentioned sadness and anxiety about his condition and ability to work. Claimant expressed a desire to obtain a prosthetic eye. He noted difficulty multitasking, and an impaired memory as a result of the loss of his eye. Dr. Dworetsky diagnosed Claimant with Major Depressive Disorder and assigned a provisional 4% impairment rating due to social functioning and adaptation to stress. He determined that Claimant had not reached MMI and required treatment with a Spanish speaking psychotherapist.

8. On December 3, 2024 Claimant underwent a DIME with David Yamamoto, M.D. Dr. Yamamoto evaluated Claimant for both visual and psychological impairments. After reviewing medical records and conducting a physical examination, Dr. Yamamoto concluded that Claimant had not reached MMI for either his visual or psychiatric conditions. Claimant requires a left eye globe replacement and implantation of a prosthetic. He further requires psychological counseling and prescription medications from a psychiatrist. Dr. Yamamoto determined that Claimant sustained a 24% whole person permanent impairment for the total loss of vision. He also agreed with Dr. Roe that Claimant had suffered an additional 6% whole person permanent impairment for a cosmetic deformity. The ratings combined for a total 29% whole person impairment. Finally, Dr. Yamamoto diagnosed Claimant with depression secondary to his work-related injury. He agreed with Dr. Dworetsky's opinion that Claimant has a 4% provisional psychological impairment. Dr. Yamamoto thus summarized that Claimant suffered a combined 32% whole person impairment rating.

9. On April 15, 2025 Claimant underwent an IME with Ronald E. Wise, M.D. Dr. Wise noted that Claimant had undergone a globe rupture repair of his left eye after he was struck in the eye by a claw hammer when he slipped at work. Claimant had no vision or light perception and reported ongoing pain in his left eye. Dr. Wise agreed with Dr. Yamamoto and Dr. Roe that Claimant sustained a 29% whole permanent impairment to his left eye. The rating consisted of 24% for the visual component, and 6% for the cosmetic defect. Dr. Wise determined Claimant reached MMI on February 22, 2024. He noted that consideration might be given to enucleation or evisceration of the left eye.

However, the procedure could be performed under maintenance care. Dr. Wise further mentioned lifelong monitoring of Claimant's right eye condition.

10. On May 20, 2025 the parties conducted the pre-hearing evidentiary deposition of Dr. Yamamoto. Dr. Yamamoto testified that Claimant has not reached MMI because he has not visited an ocularist to receive an artificial eye and requires treatment for his depression. He explained that enucleation involves surgical removal of the existing eye, implantation of a prosthetic, and connection of the existing muscles to the prosthetic. The implant would not only improve Claimant's appearance but would also decrease his pain. Notably, Claimant had remarked that he experienced pain in the left eye and temple area during the DIME. Dr. Yamamoto commented that his provisional impairment rating was consistent with the rating of Dr. Roe. He was unclear about why Dr. Wise chose February 24, 2024 as the date of MMI.

11. Dr. Yamamoto explained that Claimant continues to suffer from depression. Notably, Claimant has not received any treatment for depression and has not reached MMI. Consistent with Dr. Dworetsky's opinion, Claimant requires a Spanish speaking psychologist and possibly a psychiatrist for anti-depressant medications. Dr. Yamamoto maintained that treatment for depression will help Claimant cope and adjust following a major loss. The treatment would also improve his function. Dr. Yamamoto summarized that Claimant has not reached MMI for his psychological condition. Treatment would improve his function and potentially reduce his permanent impairment. Dr. Yamamoto noted that undergoing the enucleation would also benefit Claimant's psychological condition.

12. Dr. Wise testified at the hearing in this matter. He defined "MMI" as a point of stability where the patient is unlikely to improve. Dr. Wise commented that enucleation involves removal of the eye and implantation of an orbital prosthesis. The procedure is recommended for a blind, painful eye as well as for cosmetic purposes. Dr. Wise remarked that Claimant is a candidate for the procedure, but it can be performed as maintenance care. Recovery following the surgery would last approximately one month and Claimant would be restricted to light duty during the period. He noted that Claimant "did not report he was in pain" but he wanted the procedure for cosmetic purposes. Dr. Wise acknowledged that devastating eye injuries such as Claimant's can have a psychological effect. However, besides acknowledging that losing an eye can have a psychological impact, Dr. Wise did not offer any other opinions regarding Claimant's psychological condition.

13. Claimant testified that he continues to experience pain in his left eye and the surrounding area near his left temple. He commented that he wants to proceed with the enucleation and prosthesis. Claimant believes the procedure will reduce his pain and help with depression. He detailed that his depression consists of sadness, loneliness, anger, and avoiding social interactions. It is also affecting his return to work.

14. Respondents have failed to produce clear and convincing evidence to overcome Dr. Yamamoto's DIME opinion that Claimant has not reached MMI for both the visual and psychological injuries he sustained because of his August 22, 2023 work

accident. Dr. Yamamoto explained that Claimant requires a left eye globe replacement and implantation of a prosthetic. He further requires psychological counseling and prescription medications from a psychiatrist. Dr. Yamamoto determined that Claimant sustained a 24% whole person permanent impairment for his complete loss of left eye vision. He also assigned an additional 6% whole person permanent impairment for a cosmetic deformity. The ratings combined for a total 29% whole person impairment. Finally, Dr. Yamamoto diagnosed Claimant with depression secondary to his work-related injury. He agreed with Dr. Dworetsky's opinion that Claimant has a 4% provisional psychological impairment. Dr. Yamamoto thus summarized that Claimant suffered a combined 32% whole person impairment rating.

15. Claimant credibly testified and reported to physicians that he suffers ongoing pain associated with his left eye condition. His appearance and lack of vision underlies his depression. Claimant noted that the total loss of vision in his left eye gives him a range of depressive symptoms including sadness, anger, loneliness, impaired social functioning, and difficulty adapting. Claimant wishes to proceed with the recommended enucleation and prosthetic procedure.

16. In addition to Claimant's credible testimony, numerous persuasive medical opinions support Dr. Yamamoto's DIME determination that Claimant has not reached MMI for his August 22, 2023 industrial injuries. Initially, although Dr. Zimski maintained Claimant had reached MMI, she noted that he continues to experience pain and enucleation could reduce his symptoms. She commented that "enucleation would improve his pain and give him a more cosmetically desirable result. He also feels depressed due to the injury and would benefit from treatment of his depression." Furthermore, Dr. Roe noted Claimant's ongoing symptoms and explained it would be reasonable to consider Claimant not at MMI pending enucleation, healing, and placement of a prosthetic. Finally, Dr. Dworetsky diagnosed Claimant with Major Depressive Disorder and assigned a provisional 4% impairment rating due to social functioning and adaptation to stress. He determined that Claimant had not reached MMI and requires treatment with a Spanish speaking psychotherapist. The preceding remarks support Dr. Yamamoto's DIME determination that Claimant has not reached MMI for his August 22, 2023 work injuries.

17. In contrast, Dr. Wise explained that enucleation involves removal of the eye and implantation of an orbital prosthesis. The procedure is recommended for a blind, painful eye as well as for cosmetic purposes. Dr. Wise remarked that Claimant is a candidate for the procedure, but it can be performed as maintenance care. Recovery time following the surgery would last approximately one month and Claimant would be restricted to light duty during the period. He noted that Claimant "did not report he was in pain" but wanted the procedure for cosmetic purposes.

18. Despite Dr. Wise's opinion, Respondents have failed to demonstrate that it is highly probable that Dr. Yamamoto's determination that Claimant has not reached MMI was incorrect. Dr. Yamamoto's finding that Claimant needs surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. Although Dr. Wise was critical of Dr. Yamamoto's determination that

Claimant had not reached MMI because enucleation could be performed as maintenance care, his comments constitute a mere difference of opinion. Furthermore, Claimant must be at MMI for all conditions, and Respondents produced scant evidence that he is at MMI for his psychological symptoms. Respondents have thus failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Yamamoto's determination is clearly erroneous. Accordingly, Claimant has not reached MMI for his August 22, 2023 industrial injuries.

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

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Indus. Claim Appeals Off.,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical

deviation in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S. *See Yeutter v. Indus. Claim Appeals Off.*, 487 P.3d 1007, 1012 (Colo. App. 2019). The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Off.*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on causation is also entitled to presumptive weight. *Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998).

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

8. "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). A finding of MMI reflects the physician's determination that no treatment is expected to improve any of the compensable components of the injury. *See Egan v. Indus. Claim Appeals Off.*, 971 P.2d 664 (Colo. App. 1998). Determining MMI requires a physician to ascertain the cause of the claimant's condition in order to decide whether the claimant warrants additional treatment for any work-related condition. Therefore, "the issues of whether all work-related conditions are stable and do not require additional treatment are an inherent part of the DIME process…" *Ayala v. Conagra Beef Co.*, W.C. No. 4-579-880 (ICAO, July 22, 2004).

9. As found, Respondents have failed to produce clear and convincing evidence to overcome Dr. Yamamoto's DIME opinion that Claimant has not reached MMI for both the visual and psychological injuries he sustained because of his August 22, 2023

work accident. Dr. Yamamoto explained that Claimant requires a left eye globe replacement and implantation of a prosthetic. He further requires psychological counseling and prescription medications from a psychiatrist. Dr. Yamamoto determined that Claimant sustained a 24% whole person permanent impairment for his complete loss of left eye vision. He also assigned an additional 6% whole person permanent impairment for a cosmetic deformity. The ratings combined for a total 29% whole person impairment. Finally, Dr. Yamamoto diagnosed Claimant with depression secondary to his work-related injury. He agreed with Dr. Dworetsky's opinion that Claimant has a 4% provisional psychological impairment. Dr. Yamamoto thus summarized that Claimant suffered a combined 32% whole person impairment rating.

10. As found, Claimant credibly testified and reported to physicians that he suffers ongoing pain associated with his left eye condition. His appearance and lack of vision underlies his depression. Claimant noted that the total loss of vision in his left eye gives him a range of depressive symptoms including sadness, anger, loneliness, impaired social functioning, and difficulty adapting. Claimant wishes to proceed with the recommended enucleation and prosthetic procedure.

11. As found, in addition to Claimant's credible testimony, numerous persuasive medical opinions support Dr. Yamamoto's DIME determination that Claimant has not reached MMI for his August 22, 2023 industrial injuries. Initially, although Dr. Zimski maintained Claimant had reached MMI, she noted that he continues to experience pain and enucleation could reduce his symptoms. She commented that "enucleation would improve his pain and give him a more cosmetically desirable result. He also feels depressed due to the injury and would benefit from treatment of his depression." Furthermore, Dr. Roe noted Claimant's ongoing symptoms and explained it would be reasonable to consider Claimant not at MMI pending enucleation, healing, and placement of a prosthetic. Finally, Dr. Dworetsky diagnosed Claimant with Major Depressive Disorder and assigned a provisional 4% impairment rating due to social functioning and adaptation to stress. He determined that Claimant had not reached MMI and requires treatment with a Spanish speaking psychotherapist. The preceding remarks support Dr. Yamamoto's DIME determination that Claimant has not reached MMI for his August 22, 2023 work injuries.

12. As found, in contrast, Dr. Wise explained that enucleation involves removal of the eye and implantation of an orbital prosthesis. The procedure is recommended for a blind, painful eye as well as for cosmetic purposes. Dr. Wise remarked that Claimant is a candidate for the procedure, but it can be performed as maintenance care. Recovery time following the surgery would last approximately one month and Claimant would be restricted to light duty during the period. He noted that Claimant "did not report he was in pain" but wanted the procedure for cosmetic purposes.

13. As found, despite Dr. Wise's opinion, Respondents have failed to demonstrate that it is highly probable that Dr. Yamamoto's determination that Claimant has not reached MMI was incorrect. Dr. Yamamoto's finding that Claimant needs surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. Although Dr. Wise was critical of Dr. Yamamoto's determination that Claimant had not reached MMI because enucleation could be

performed as maintenance care, his comments constitute a mere difference of opinion. Furthermore, Claimant must be at MMI for all conditions, and Respondents produced scant evidence that he is at MMI for his psychological symptoms. Respondents have thus failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Yamamoto's determination is clearly erroneous. Accordingly, Claimant has not reached MMI for his August 22, 2023 industrial injuries.

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. Yamamoto that Claimant has not reached MMI for his August 22, 2023 industrial injuries.

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

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

DATED: June 25, 2025.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-110-840-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that the October 26, 2023 final admission of liability (FAL) filed by Respondents is invalid.

Procedural History

Following the February 8, 2024 hearing, the record was left open to permit the deposition of Kevin Ladin, M.D., one of Claimant's treating providers. That deposition was not performed. Subsequently, Respondents filed a motion to stay the present case, indicating Respondents would be filing an application for hearing alleging that Claimant's claim was fraudulent. The ALJ granted the motion. Respondents filed an Application for Hearing in September 2024. Later, Respondents withdrew the application for hearing and dismissed the fraud issue with prejudice. On May 14, 2025, Claimant filed an unopposed motion to submit position statements. The ALJ granted the motion, setting the date for position statements as June 6, 2025.

FINDINGS OF FACT

1. Claimant sustained an admitted left-sided inguinal hernia arising out of the course of his employment with Employer on June 17, 2019.

2. On June 25, 2019, Claimant underwent hernia repair surgery performed by Brad Baldwin, M.D. After the surgery, Claimant was under the care of his authorized treating physician (ATP) Gregory Reicks, D.O., at Foresight Family Physicians in Grand Junction, Colorado. (Ex. 7)

3. Over the course of the next year, Claimant reported ongoing pain in his lower left quadrant and groin. A CT scan on December 5, 2019 was negative and offered no explanation for Claimant's pain. (Ex. A13) After Claimant reported concerns about becoming irritable, angry, and sleep problems, Dr. Reicks referred Claimant for counseling with Bradley Flinn, LPC. (Ex. A14) Mr. Flinn saw Claimant multiple times over the following two years and diagnosed Claimant with adjustment disorder. (Ex. A23)

4. In March 2020, Claimant had a telehealth consultation with Matthew Langston, M.D., at Grand Valley Interventional Pain Clinic on referral from Dr. Baldwin. Dr. Langston opined that Claimant's symptoms were consistent with left-sided ilioinguinal neuralgia and that a left ilioinguinal nerve block may be appropriate, pending a physical examination. (Ex. A29)

5. In April 2020, Respondents sent Claimant for an independent medical examination (IME) with Tashof Bernton, D.O. In his report of May 27, 2020, Dr. Bernton opined that Claimant's hernia was work-related, and that he was experiencing neuropathic post-herniorrhaphy pain which is a common complication of hernia surgery. Dr. Bernton also

attributed this condition to Claimant's work injury. He further opined that Claimant's treatment to date was reasonable, necessary, and related to his work injury. He found that Claimant was not at maximum medical improvement (MMI) and that future treatment including a nerve block and oral antineuritic medications would be reasonable and necessary. (A35)

6. Claimant saw Dr. Langston on June 19, 2020 for a physical examination, after which Dr. Langston opined that Claimant's symptoms were consistent with left-sided genitofemoral neuralgia and recommended a nerve block. (Ex. 11) On July 10, 2020, Dr. Langston performed a left-sided genitofemoral nerve block. (Ex. A41) In follow-up visits, Claimant reported no relief from the nerve block. (Ex. 11) Dr. Langston then performed a left-sided ilioinguinal nerve block on August 7, 2020, which also provided no benefit. (Ex. A47 & A49)

7. Claimant continued to report ongoing groin pain, leading him to consult with general surgeon and hernia specialist, Edward Medina, M.D. Dr. Medina offered various treatment options, including surgery to remove the mesh implanted during the initial surgery, and a nerve stimulator. (Ex. A56) Claimant elected to pursue the hernia mesh removal surgery before considering a nerve stimulator. (Ex. A63) Dr. Medina performed the mesh removal surgery on January 14, 2021. (Ex. 15)

8. After the January 14, 2021 mesh removal surgery, Claimant continued to report pain and discomfort without significant improvement. In August 2021, Dr. Medina referred Claimant to Giancarlo Checa, M.D., a pain specialist. Claimant saw Dr. Checa on September 7, 2021, reporting ongoing groin and abdominal pain, bloody stools, and mental health concerns. (Ex. A80)

9. In July or August 2021, Dr. Reicks left Foresight Family Medicine and joined SCL Health. On September 10, 2021, Dr. Reicks discussed with Claimant a nerve stimulator trial. Claimant elected to wait on the nerve stimulator trial and let more time pass. (Dr. Reicks later noted that Dr. Medina recommended waiting at least a year after mesh removal surgery for a nerve stimulator. (Ex. A88)) Dr. Reicks also opined that the blood in Claimant's stool was caused by Claimant's post-operative medications and thus related to his work injury. (Ex. 14). After a gastrointestinal consult, Dr. Reicks indicated that the bloody stool condition was not related to Claimant's work injury. (Ex. A93).

10. In March 2022, Claimant relocated from Colorado to Arizona. Initially, Claimant continued to see Dr. Reicks through telemedicine visits at SCL, but ultimately began seeing Kevin Ladin, M.D., at Comprehensive Pain Specialists in Surprise, Arizona in June 2022, and Dr. Ladin assumed the role of ATP.[1] In the course of his treatment, Dr. Ladin referred Claimant to John Walker, Psy.D., for ongoing adjustment disorder issues. Claimant continued to see Dr. Ladin and Mr. Walker over the following year. Dr. Ladin also referred Claimant for a GI consult with Wahid Wassef, M.D. After examining

[1] Dr. Ladin's records indicate Claimant was referred by Dr. Medina.

Claimant, Dr. Wassef opined that Claimant's rectal bleeding issues were unrelated to his work injury. (Ex. A110 & A112B).

11. In March 2023, Respondents engaged John Raschbacher, M.D., to perform a record review. Based on his review, Dr. Raschbacher concluded that Claimant reached MMI on March 1, 2021, approximately six weeks after the January 14, 2021 surgery without permanent impairment or need for further medical care. (Ex. A122)

12. On April 28, 2023, Respondents counsel sent a letter to Dr. Ladin asking if he agreed with Dr. Raschbacher's MMI determination. Dr. Ladin responded on May 4, 2023. In response to the question "Do you agree with Dr. Raschbacher that [Claimant] is at MMI for his work-related hernia and repair?" Dr. Ladin checked "Yes." In response to the question, "Do you agree with Dr. Raschbacher that [Claimant] was at MMI as of March 1, 2021? If you do not agree to that date, what date do you assign for MMI?," Dr. Ladin indicated that the date of MMI was "Unknown." The letter also asked Dr. Ladin "If you do not agree [Claimant] is at MMI please state the reasons why not, your treatment plan to obtain MMI with time benchmarks, and an anticipated date of MMI," Dr. Ladin responded: "[Claimant] will require lifelong supportive care for pain management and counseling." (Ex. A125)

13. On May 22, 2023, Respondents sent Claimant a letter entitled "Demand Appointment" indicating Respondents scheduled an impairment rating with Dr. Raschbacher for June 15, 2023. (Ex. A127)

14. On May 26, 2023, Respondents' counsel emailed Claimant stating, in part:

> Because Dr. Ladin opined that you are at maximum medical improvement (MMI), pursuant to §8-42-107, CRS the assignment of a permanent impairment (IR) rating, if any, is required. As you no longer reside in Colorado, per statute the adjuster and [Employer] are required to bring you back to Colorado for the IR rating. Thus, a Demand Appointment has been set for you with John Raschbacher, MD to assign an IR, if any. …
>
> The Demand Appointment per §8-42-107, CRS is mandatory for the adjuster and [Employer] to set, and for you to attend. Be advised should you not attend the Demand Appointment, then per §8-42-107, CRS your temporary disability checks may be suspended and permanent disability payments, if any, withheld until compliance with the Demand Appointment.
>
> I understand that this may be a confusing and frustrating time and process. Please note though the adjuster and [Employer] are required to follow this process by statute, or face penalties, just as statute requires your compliance or face suspension of benefits. It is best for both sides to allow the process to be completed, and then on completion your [sic] and [Employer] can explore the next steps and options. (Ex. 20)

15. On June 1, 2023, Dr. Ladin saw Claimant for a follow up appointment. In his report, Dr. Ladin addressed Dr. Raschbacher's MMI determination, as follows:

> A recent independent record review was conducted by a physician in Colorado. This individual reportedly determined that [Claimant] was at maximum medical improvement just three months after his triple neurectomy and mesh removal was completed. This was during a time that he was highly symptomatic, was being treated for his symptoms, and was still being maintained on work restrictions. Furthermore, the physician recently conducting the record review also reportedly opined that [Claimant] was capable of returning to full work activity as of three months after the procedure was completed. Quite frankly, this is [absurd].[2] There is no way that any of his treating practitioners would have agreed with this assessment. … I strongly disagree with the assessment of the physician conducting the recent record review that [Claimant] was at maximum medical improvement three months postoperative. … This assessment is in direct conflict with the opinions of not only myself, but other physicians hired by the industrial carrier to render opinions previously." (Ex. 17)

16. On June 7, 2023, Claimant sent an email to Respondents' counsel in which he informed him that "Dr. Ladin does not agree with MMI that your doctor has put me at, he is very clear about that. Please see his Dr. Notes. Please let me know what else you need from me to get an honest MMI." (Ex. 20) No credible evidence was admitted demonstrating that Respondents took any action with respect to Claimant's assertion that Dr. Ladin did not agree with the date of MMI, or made any further inquiry to Dr. Ladin regarding the issue.

17. Respondents provided Claimant with a plane ticket from Arizona to Colorado for the June 15, 2023 appointment with Dr. Raschbacher. (Ex. A128) Claimant did not take the flight, and did not appear for the June 15, 2023 appointment. (Ex. A129) Claimant emailed Respondents' counsel on June 15, 2023, indicating that he was unable to make the flight to Colorado due to a family emergency at home. Claimant testified at hearing that his wife had threatened self-harm, and that Claimant could not leave his two children at home during this time. Claimant's testimony on this issue was credible.

18. On June 20, 2023, Dr. Raschbacher issued a report reiterating his previously expressed opinion that Claimant reached MMI in March 2021. Dr. Raschbacher opined that Claimant had no permanent impairment. In doing so, he indicated that under Table 6, page 196 of the AMA Guides to the Evaluation of Permanent Impairment, 3rd Ed., revised, to qualify for impairment for a hernia, there must be a "palpable defect and a slight protrusion, or occasional mild discomfort." Without examining Claimant, Dr. Raschbacher concluded "There is no defect. There is no protrusion.," and assigned Claimant a 0% permanent impairment rating. He further opined that no further medical treatment was reasonable or necessary. (Ex. A130)

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[2] Dr. Ladin's June 1, 2023 record states "Quite frankly, this is observed." The ALJ infers that this was a transcription error as the use of the term "observed" does not fit the context of Dr. Ladin's opinion on this issue.

19. On June 21, 2023, Dr. Ladin's office sent a request to Insurer seeking authorization for a follow-up appointment with him on June 29, 2023. (Ex. 17)

20. On June 28, 2023, Respondents' counsel emailed Dr. Ladin indicating his authorization request was denied, and that Claimant had been placed at MMI due to Dr. Raschbacher's May 17, 2023 report, and Dr. Ladin's May 4, 2023 response to counsel's April 28, 2023 letter. (Ex. 17)

21. On June 29, 2023, Claimant saw Dr. Ladin for a follow-up appointment. In his report of that date, Dr. Ladin indicated that a trial spinal cord stimulator would be a reasonable treatment option. (Ex. 17)

22. On August 23, 2023, Dr. Ladin saw Claimant. In his report of that date, he again addressed the issue of MMI, stating:

> [Claimant] returns today for follow-up. He brings in with him today a letter from his attorney that summarizes his relevant history and the circumstances under which he would be considered at MMI in accordance with Colorado law. As a physician in Arizona, I am not well versed on Colorado statute regarding Worker's Compensation. However, it appears that by my previous statement that he was "most likely at MMI" this resulted in the industrial carrier closing his case. This was not my intent. In Arizona, we have something called supportive care which apparently is not available in Colorado under which patients can continue receiving necessary care to maintain their condition. In my opinion, [Claimant] is not at MMI at this time. The reason for this is that I believe he could benefit from further treatment including a trial of spinal cord stimulation. I consider this to be reasonable and necessary care that is related to his June 15, 2019 work injury. I also believe that it is reasonably expected to improve his condition as it relates to the injury. (Ex. 17, p. 304)

Dr. Ladin further stated:

> As noted above, the patient is felt to be an appropriate candidate for a trial of spinal cord stimulation. For this reason, he is not at MMI. Spinal cord stimulation has the potential to significantly improve his condition and more effectively manage his pain. It is therefore felt to be medically reasonable and necessary. We will submit a request for authorization for the trial. [Claimant] informs me that his treating mental health specialist is willing to provide psychological clearance. (Ex. 17, p. 306)

23. Based on the statements in his reports, the ALJ infers that Dr. Ladin is not level II accredited under the Division's accreditation program.

24. On September 6, 2023, Dr. Ladin submitted a request for authorization for a spinal cord stimulator to Insurer. (Ex. 18, p. 307)

25. On September 18, 2023, Respondents' counsel sent Dr. Ladin a letter denying authorization, because the treatment "May not be reasonable, necessary, or related pursuant to Dr. Raschbacher's March 17, 2023 report; and [Claimant] has been placed at MMI and is pending a permanent impairment evaluation." (Ex. 6, p. 51)

26. On October 26, 2023, Respondents filed an FAL based on Dr. Raschbacher's opinions. Respondents asserted that Claimant reached MMI on March 1, 2021, with no permanent impairment. Respondents stated in the FAL that "Dr. Reicks (ATP in Colorado) unable to do IR." Respondents further asserted that Claimant's failure to appear for his appointment with Dr. Raschbacher on June 15, 2023 resulted in Claimant being entitled to no PPD benefits under § 8-42-107(8)(b.5)(I)(B), C.R.S.

27. No credible evidence was admitted at hearing demonstrating that Dr. Reicks was unable to perform an impairment rating of Claimant, or that Respondents contacted or attempted to contact Dr. Reicks to determine whether he was willing or able to perform an impairment rating. The only evidence in the record that addresses Dr. Reicks' availability to see or treat Claimant is a February 7, 2022 email from Kristie Henderson, RN, a "Telephone Nurse Case Manager" for Genex to Respondent's counsel. In the email, Ms. Henderson stated, in part:

> I was advised that Dr. Reicks is no longer apart [sic] of Foresight Health. He is now with SCL Health. Apparently, SCL Health does not handle work comp at Dr. Reicks['] current location, however, they have allowed him to keep his few work comp patients until they are released from care. (Ex. A93B)

28. No credible evidence was admitted at hearing explaining Ms. Henderson's role in Claimant's care or the basis of her purported knowledge regarding Dr. Reicks' practice.

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).

Validity of the October 23, 2026 Final Admission of Liability

The issue before the ALJ is whether the October 26, 2023 FAL is valid; specifically, whether section 8-42-107(8)(b.5), C.R.S., permitted Respondents to use Dr. Raschbacher's impairment rating as the basis for the FAL.

Respondents contend that Dr. Ladin, who is not level II accredited, placed Claimant at MMI effective March 1, 2021, that Dr. Raschbacher's impairment rating was proper under statute, and it was appropriate for Respondents to base the FAL on Dr. Raschbacher's rating. Respondents also contend that Claimant's failure to attend the June 15, 2023 appointment with Dr. Raschbacher results in a forfeiture of any permanent partial disability benefits.

Claimant contends that the process for assigning an impairment rating under § 8-42-107(8)(b.5) is inapplicable because Dr. Ladin did not place Claimant at MMI. Alternatively, if Dr. Ladin did place Claimant at MMI, Claimant contends Respondents erred by failing to request that Dr. Reicks (who treated Claimant in Colorado) determine Claimant's impairment rating.

For the reasons set forth below, the ALJ finds and concludes that Dr. Ladin did not place Claimant at MMI, and that the procedures for determining Claimant's impairment rating under § 8-42-107(8)(b.5) were not applicable. Thus, no basis existed for the filing of the October 26, 2023 FAL, rendering it invalid.

Under § 8-42-107.2(2)(b), respondents have 30 days from the mailing of the ATP's MMI and impairment rating determination to request a division independent medical examination (DIME). Otherwise, respondents are required to file a final admission of liability. WCRP 5-5(E). Section 8-42-107 (8)(b.5) sets forth the procedure for determining an injured worker's impairment rating when, as here, the primary ATP is not level II accredited. Under § 8-42-107(8)(b.5)(I)(A), where a Claimant is not a Colorado resident

upon reaching MMI, the non-accredited physician is required to perform the tests necessary for the assignment of a permanent impairment rating, and transmit those results to the insurer within twenty days after the MMI date.

If the non-accredited physician fails to do so or the claimant elects not to have the physician conduct the required testing, respondents are required to arrange and pay for the claimant to return to Colorado for examination, testing, and rating. § 8-42-107(8)(b.5)(I)(B). If the claimant refuses to return to Colorado for examination, no PPD benefits shall be rewarded. *Id.*

On the other hand, if the non-accredited physician performs the necessary testing and transmits the testing results within 20 days as required by § 8-42-107 (8)(b.5)(I)(A), respondents have two options for converting the testing data to an impairment rating. If an authorized level II accredited physician treated the injured worker, the respondents must first ask that physician to determine the impairment rating based on the tests performed by the non-accredited physician. Otherwise, respondents must appoint a different level II accredited physician to determine the impairment rating based on the testing data provided. § 8-42-107(8)(b.5)(I)(C). Once the process is complete, if any party disputes the impairment rating, the parties may proceed with a DIME examination. § 8-42-107(8)(b.5)(I)(D).

The threshold requirement for the application of § 8-42-107(8)(b.5), is the ATP's determination that the claimant has reached MMI. Typically, a dispute involving MMI requires the party disputing the MMI determination to request a DIME. *See* § 8-42-107.2(2)(b). However, where an ATP issues conflicting statements concerning MMI, "it is for the ALJ to resolve the conflict, and the ALJ may do so without requiring the claimant to obtain [a DIME]." *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996); *see also Taylor v. The Home Depot*, W.C. No. 5-164-836-002 (ICAO Jan. 6, 2023); .

On May 4, 2023, Dr. Ladin offered an MMI opinion which could be interpreted as placing Claimant at MMI, however, that report was ambiguous and incomplete. Specifically, while Dr. Ladin indicated that he agreed with Dr. Raschbacher's that Claimant had reached MMI for his hernia and surgery, he also indicated that the date of MMI was "unknown." Nonetheless Respondents unilaterally elected to use the March 21, 2021 date posited by Dr. Raschbacher as the MMI date in the FAL, and based its asserted $118,718.75 overpayment claim on that MMI date. Dr. Ladin also indicated that Claimant required additional care, which is inconsistent with an MMI determination. In later reports on June 1, 2023, and August 23, 2023, Dr. Ladin unambiguously stated that Claimant had not reached MMI, and that a trial spinal cord stimulator offered a reasonable probability of improving Claimant's condition. Dr. Ladin also indicated that his May 4, 2023 response to Counsel's letter was not intended to express that Claimant had reached MMI. Both of these reports were issued more than two months before Respondents filed the FAL. Taking the evidence in its totality, the ALJ finds and concludes that Dr. Ladin did not place Claimant at MMI effective March 21, 2021, or any other date.

Because Dr. Ladin did not place Claimant at MMI, the procedures for ascertaining an impairment rating under § 8-42-107(8)(b.5), C.R.S., were not applicable. Accordingly, Respondents had no legal basis for requiring Claimant to attend an appointment with Dr. Raschbacher, nor could Respondents select Dr. Raschbacher as the rating physician

under § 8-42-107(8)(b.5)(I)(B), and could not rely on his MMI opinion and impairment rating as the basis for the FAL. Because the October 26, 2023 FAL was not based on an MMI determination from Claimant's ATP, it was improperly filed, and invalid. *See e.g.*, *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Flake v. JE Dunn Construction Co.*, W.C. No. 4-997-403-03 (ICAO Sep. 19, 2017).

Because § 8-42-107(8)(b.5)(I)(B) was inapplicable, the parties remaining contentions regarding application of this statute (*i.e.*, whether Respondents were required to request that Dr. Reicks perform the impairment rating, and whether Claimant's failure to attend the June 15, 2023 appointment with Dr. Raschbacher resulted in a forfeiture of PPD benefits) are moot.

ORDER

It is therefore ordered that:

1. The October 26, 2023 Final Admission of Liability was invalid.

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

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

DATED: June 25, 2025

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

ISSUES

Has Claimant demonstrated, by a preponderance of the evidence, that the right wrist revision surgery recommended by Dr. James Rose constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted July 15, 2023 work injury?

STIPULATION

At the hearing, the parties stipulated that Claimant's average weekly wage (AWW} is $975.38.

The parties also stipulated that Claimant is entitled to temporary total disability (TTD) benefits beginning September 25, 2024 and ongoing until terminated by law.

FINDINGS OF FACT

1. This matter involves an admitted work injury to Claimant's right upper extremity. Specifically, Respondents have admitted liability for a July 15, 2023 injury involving Claimant's right wrist and elbow.

2. Following the injury, Claimant was diagnosed with lateral epicondylitis of the right elbow and underwent conservative treatment. Claimant continued to experience symptoms in her right upper extremity, including into her hand and wrist. Subsequently Claimant was diagnosed with De Quervain's tenosynovitis and referred for an orthopedic evaluation.

3. On October 5, 2023, Claimant was seen at Grand Valley Orthopedics by Patricia Perkins, NP. At that time, NP Perkins administered a steroid injection at the first dorsal compartment of Claimant's right wrist.

4. On December 28, 2023, Claimant returned to Grand Valley Orthopedics and was again seen by NP Patricia Maxam (nee Perkins). Claimant reported two months of relief from the prior injection. Claimant reported that her current symptoms included pain, swelling, and weakness in her right hand, right wrist pain with thumb movement, and pain in the right lateral epicondyle. On that date, PA Maxam administered an injection to the first dorsal compartment. In addition, Claimant was referred to occupational therapy.

5. Claimant returned to PA Maxam on February 22, 2024 and reported that the most recent injection provided two and one-half weeks of relief. At that time surgical options were discussed, including a right first dorsal compartment release.

6. On March 29, 2024, Dr. James Rose performed a right first dorsal compartment release.

7. On May 24, 2024, Respondents filed a General Admission of Liability for the July 15, 2023 work injury.

8. After some initial improvement in her symptoms, in August 2024, Claimant reported that most activities caused an increase in her symptoms. As a result, Claimant was referred back to Dr. Rose.

9. On August 22, 2024, Claimant was seen by Dr. Rose. At that time, Dr. Rose noted that Claimant was recovering well from the level of the compartment release. However, he noted that Claimant was reporting pain that was "more centrally dorsally and at the radial volar wrist". Dr. Rose noted that there was no instability at the release site, but he was unable to rule out subtle volar instability. At that time, Dr. Rose ordered magnetic resonance imaging (MRI) of Claimant's right wrist.

10. On September 6, 2024, the recommended right wrist MRI was performed. The MRI showed "soft tissue and periscapular edema along the radial margin of the wrist extending dorsally adjacent to the scaphoid." The radiologist, Dr. John Leever opined that these results indicated a capsular injury and possible strain of the collateral ligament.

11. On September 12, 2024, Claimant returned to Dr. Rose. On examination, Dr. Rose noted that Claimant had minimal tenderness at the surgical incision. He also noted "some diffuse tenderness over the volar and dorsal central wrist". He found no frank instability at the first dorsal compartment, but noted that pain was elicited with "provocative maneuvers at the volar aspect of the distal first dorsal compartment egress". Dr. Rose also found tenderness over the entrance of the posterior interosseous nerve.

12. In that same medical report, Dr. Rose noted that the MRI showed soft tissue edema at the radial wrist. Dr. Rose noted that this was the appropriate location to indicate chronic instability at the APL egress. Dr. Rose recommended revision surgery that would include split brachioradialis buttress to address the instability. He also noted that posterior interosseous neurectomy of the dorsal wrist would also be considered.

13. At the request of Respondents, Dr. Timothy O'Brien performed a review of Claimant's medical records. In a report dated September 23, 2024, Dr. O'Brien opined that Claimant sustained only minor strains/sprains of her wrist and elbow. Dr. O'Brien further opined that injuries of this nature should be self-limited and self-healing. Also in his report, Dr. O'Brien recommended denial of the surgery recommended by Dr. Rose. In support of this recommendation, Dr. O'Brien noted that the recommended surgery is considered experimental. Dr. O'Brien also stated that revision surgeries generally are not as successful as the initial surgery. In addition, Dr. O'Brien noted that Claimant

"continues to manifest symptoms that are nonorganically based". Dr. O'Brien opined that these nonorganic symptoms are related to "secondary gain".

14. Relying on Dr. O'Brien's opinions, Respondents denied authorization for the recommended revision surgery.

15. Subsequently, Dr. Rose authored an appeal [1] letter requesting that Insurer reconsider denial of the surgery.

16. On October 2, 2024, Dr. O'Brien issued a supplement to his initial report. Dr. O'Brien's supplemental report is primarily in response to Dr. Rose's appeal letter. In his October 2, 2024 report, Dr. O'Brien reiterated why he believes the recommended revision surgery should be denied.

17. Dr. Rose testified at the hearing. Dr. Rose testified regarding Claimant's medical treatment leading up to and following the March 2024 surgery. Dr. Rose further testified the following the surgery Claimant initially did well in her recovery. However, Claimant continued to report pain symptoms. As a result, Dr. Rose recommended the right wrist MRI. Dr. Rose explained that the findings on MRI were "subtle" but did confirm that there was an issue with Claimant's wrist. Specifically, that there was abnormal fluid adjacent to the where the tendon exits the sheath. Based upon these MRI findings, and his findings on exam, Dr. Rose determined that there was evidence of instability in Claimant's wrist. Dr. Rose further explained that the condition of Claimant's right wrist is a known complication of the dorsal compartment release procedure he performed in March 2024. Dr. Rose testified that he had recommended the stabilization procedure to address this complication.

18. Dr. Rose disagrees with Dr. O'Brien's description of the proposed surgery as "experimental". Dr. Rose testified that although the procedure is not common, he has performed this specific procedure and those patients have all experienced reduced wrist pain.

19. The ALJ takes administrative notice of the Colorado Medical Treatment Guidelines regarding cumulative trauma. Specifically, WCRP Rule 17 (2) (g) identifies "volar subluxation of tendon" to be a known complication of treating De Quervain's tenosynovitis with a first extensor compartment release.

20. The ALJ credits the medical records and the opinions and testimony of Dr. Rose over the contrary opinions of Dr. O'Brien. The ALJ specifically credits the Colorado Medical Treatment guidelines and Dr. Rose's testimony that Claimant's current issues are a known complication of the prior surgery. The ALJ also finds that the recommended revision surgery is necessary to address the complication that arose from the prior surgery. As the prior surgery was reasonable, necessary, and related to the work injury, the now needed revision surgery is likewise related. Therefore, the ALJ

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[1] Neither party offered Dr. Rose's appeal letter into evidence. Rather, the ALJ has what appear to be portions of that letter that are included in Dr. O'Brien's October 2, 2024 supplemental report.

finds that Claimant has demonstrated that it is more likely than not that the right wrist revision surgery recommended by Dr. Rose is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted work injury.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, Claimant has demonstrated, by a preponderance of the evidence, that the right wrist revision surgery recommended by Dr. James Rose constitutes reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted July 15, 2023 work injury. As found, the revision surgery is necessary to address the complication that arose from the prior surgery. As the prior surgery was reasonable, necessary, and related to the work injury, the now needed revision surgery is likewise related. As found, the medical records and the opinions of Dr. Rose are credible and persuasive on this issue.

6. In addition, the ALJ accepts and approves the stipulations of the parties regarding AWW and TTD.

ORDER

It is therefore ordered:

1. Respondents shall pay for the right wrist revision surgery recommended by Dr. Rose, subject to the Colorado Medical Fee Schedule.

2. Claimant's average weekly wage (AWW) is $975.38.

3. Respondents shall pay Claimant temporary total disability (TTD) benefits beginning September 25, 2024 and ongoing until terminated by law.

Dated June 26, 2025.

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 also recommended that you provide a courtesy copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she is entitled to payment of additional Permanent Partial Disability (PPD) benefits.

II. Whether Respondents are subject to penalties for improper payment of PPD benefits.

III. Whether Claimant established, by a preponderance of the evidence, that she is entitled to reimbursement in the amount of $1,400.00 for her payment of the Division Independent Medical Examination fee.

IV. Whether Claimant established, by a preponderance of the evidence, that she is entitled to the reopening of her workers' compensation claim.

FINDINGS OF FACT

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

1. Claimant works as a medical assistant for Employer. As part of her employment duties, Claimant is responsible for answering the triage phone and retrieving documents from the fax machine. On July 13, 2022, Claimant tripped and fell after her foot got caught up in phone cords under her desk when she got up to go to the fax machine. Claimant fell forward, landing on her right side, sustaining injuries to her right shoulder, hip and knee. Liability for Claimant's injuries was admitted, and she began treatment with Dr. Kathryn Bird as her authorized treating physician (ATP). (RHE C).

2. Despite conservative care to include physical therapy, Claimant's right shoulder and knee symptoms persisted prompting Dr. Bird to request imaging (x-ray and MRI) and refer Claimant for an orthopedic evaluation for her shoulder. (RHE C, pp. 28-29).

3. Claimant underwent an arthroscopic right shoulder rotator cuff repair surgery as performed by Dr. Craig Davis on March 24, 2023. (RHE C, p. 30). Unfortunately, Claimant remained symptomatic following surgery. Consequently, she sought a second opinion from Dr. James Johnson at Panorama Orthopedics and Spine Center on December 6, 2023. (RHE C, p. 31). Dr. Johnson felt that the majority of Claimant's symptoms were coming from her cervical spine. *Id*. Dr. Johnson administered a cortisone injection into the subacromial space and biceps tendon and

referred Claimant for specific physical therapy to include dry needling and deep tissue massage directed to the cervical spine. *Id.* at 32.

4. On March 12, 2024, Dr. Bird noted: "[Claimant] is at functional goal ready for discharge". She assessed Claimant with a "[t]raumatic tear of the supraspinatus" tendon noting further that Claimant was "status post shoulder surgery". (RHE B, p. 13; RHE C, p. 32). Dr. Bird also noted that Claimant had a "pre-existing right hip issue"[1] and was scheduled to undergo a hip injection with Dr. Kawasaki, which she opined could be done as maintenance care. (RHE B, pp. 13-14). Dr. Bird placed Claimant at maximum medical improvement (MMI) with 12% upper extremity impairment for the range of motion loss in the right shoulder at this appointment. *Id*. No impairment was given for the right hip.

5. On April 15, 2024, Respondents filed a Final Admission of Liability (FAL) in conformity with Dr. Birds March 12, 2024, opinions regarding MMI, maintenance care and impairment. (RHE B, p. 6). The value of Claimant's 12% scheduled upper extremity impairment was calculated to equal $9,626.57 ($385.68 x 208 wks. x 12% = $9,626.57). Respondents admitted to this permanent partial disability (PPD) value, noting further that PPD would be paid out at a rate of $385.68 per week over a 25-week period beginning March 14, 2025, and continuing through September 5, 2024. *Id.* However, Respondents began paying $771.36 in PPD benefits beginning March 22, 2024 (prior to the filing of the FAL) and continuing through August 15, 2024, for eleven payments. By August 15, 2024, Respondents had paid Claimant a total of $8,484.96 in PPD payments. (RHE A, p. 4). On August 16, 2024, Respondents paid an additional lump sum PPD payment of $1,141.61. *Id.* Thus, by August 16, 2024, Respondents had paid a total of $9,626.57 in PPD benefits in conformity with the FAL dated April 15, 2024. *Id.*

6. Claimant would object to the April 15, 2024, FAL and request a Division Independent Medical Examination (DIME). However, prior to the DIME setting, Claimant would file an Application for Indigent Determination (IME). (RHE E, 059). On April 18, 2024, ALJ Glen B. Goldman found that Claimant's monthly household income was $12,820, which exceeded the gross monthly income guideline for a household of two members. Accordingly, ALJ Goldman determined that Claimant was not indigent pursuant to WCRP 11-12 and 11-13. *Id*. Accordingly, Claimant paid for the cost, i.e. $1,400.00 to proceed with her requested DIME.

7. Dr. David Frank was selected to perform the DIME, and he evaluated Claimant on November 11, 2024. (RHE D, pp. 43-57). Dr. Frank opined that Claimant reached MMI on November 11, 2024, with 10% right upper extremity (shoulder) impairment. *Id*. at 54. He also assigned 6% right lower extremity impairment for the right hip and 4% lower extremity impairment for the right knee for a total lower extremity impairment of 10%. *Id*.

[1] An April 5, 2024, report of Dr. Robert Kawasaki notes that Claimant had a labral tear to the right hip predating her July 13, 2022, trip and fall. She had undergone an injection directed to this hip and was "doing well with the right hip until her fall. After the fall she had ongoing hip pain. (RHE C, p. 32).

8. On November 26, 2024, Respondents filed a second FAL accepting Dr. Frank's DIME opinions regarding impairment. (RHE C). Accordingly, Respondents admitted to $8,022.14 in PPD for the 10 percent impairment rating for the upper right extremity and $8,022.14 in PPD for the 10 percent impairment rating assigned to the lower right extremity or $16,044.28 in PPD in total. *Id*. at 19.

9. As found, Respondents had already paid Claimant $9,626.57 in PPD benefits by the time they filed the November 26, 2024, FAL. (See generally, RHE A, p. 4). Consequently, Respondents owed Claimant an additional $6,417.71 in PPD benefits as of November 26, 2024. ($16,044.28 - $9,626.57 = $6,417.71). Regarding this additional PPD, Respondents paid Claimant $1,157.04 on November 27, 2024; $771.36 on December 6, 2024; $771.36 on December 23, 2024; $771.36 on January 6, 2025; and $2,946.59 on January 17, 2025. (RHE A, p. 4). As such, after filing the second FAL and by January 13, 2025, Respondents had paid Claimant additional PPD totaling $6,417.71.

10. At hearing, Claimant testified that, out of the total $16,044.28 admitted to on the November 26, 2024, FAL, she was paid $6,417.71 and that she believes Respondents still owe her additional PPD benefits. As the ALJ understands, Claimant believes she is entitled to the full value of the PPD benefits she is entitled to based upon Dr. Franks impairment rating opinions. In essence, Claimant contends that she is entitled to the $9,626.57 in PPD admitted to as part of the April 15, 2024, FAL in addition to the $16,044.28 admitted to as part of the November 26, 2024, FAL, or a total of $25,670.85 in PPD benefits. Per the DIME report of Dr. Frank, Respondents have admitted to total PPD benefits in the amount of $16,044.28 and, to date, have paid Claimant a total of $16,044.28 for the same. (RHE C; *see also* Ex. A). Based upon the evidence presented, the ALJ is persuaded that Respondents have paid the value of the PPD benefits to which Claimant is entitled per the DIME report of Dr. Frank and the previous PPD payments she was paid for the impairment assigned by Dr. Bird. Contrary to Claimant's belief, she is not entitled to collect the full value of the 12% right upper extremity impairment assigned by Dr. Bird and the 10% right upper extremity impairment assigned by Dr. Frank as this impairment was assigned to the same body part and full payment for both ratings for this single body part would constitute double dipping.

11. Claimant further testified that, because she had not been paid the full $9,626.57 plus the $8,022.14 for Dr. Franks 10% upper extremity rating, penalties should be imposed against Respondents. Based upon the evidence presented, the ALJ is not convinced that Claimant is entitled to penalties.

12. Claimant testified it was her understanding that she needed to reopen her claim to recoup the PPD she thought Respondents owed, based on a phone call she had with an unidentified individual at the Division of Workers' Compensation. According to Claimant her condition has not improved over time, and she remains symptomatic. As presented, the evidence fails to persuade the ALJ that Claimant's condition has worsened.

13. Claimant testified that she is seeking reimbursement in the amount of $1,400.00 for the fee she paid in association with her requested DIME. According to Claimant, she was forced to pay for the DIME "out of pocket" because Dr. Bird's impairment rating did not include impairment for her right hip or knee.

CONCLUSIONS OF LAW

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

Generally

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

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

Claimant's Entitlement to Additional Permanent Partial Disability

C. A claimant bears the burden to prove their entitlement to benefits by a preponderance of the evidence. Colo. Rev. Stat. § 8-43-201(1) (2024); *Yuetter v. Indus. Claim Appeals Office*, 487 P.3d 1007, 1012 (Colo. App. 2019). Here, Claimant argues that Respondents admitted to a total of $25,670.85 in PPD benefits and that she is, accordingly, still owed $9,626.57. Claimant believes she is entitled to the PPD based on the 12% impairment rating issued to Dr. Bird for the upper right extremity *in addition* to the 10 percent impairment rating issued by the DIME physician, Dr. Frank. Claimant is mistaken. The respective 10% and 12% impairment ratings were assigned to the right upper extremity, and Respondents have paid $9,626.57 for that impairment. Because the right upper extremity impairment involves the same body part and Respondents

have paid the full value of the 12% impairment assigned by Dr. Bird, Claimant is not entitled to additional PPD for the 10% impairment assigned by Dr. Frank pursuant to his DIME. Permitting Claimant to recover PPD benefits based on both impairment ratings for the same body part would amount to impermissible impairment double dipping. In this case, the evidence presented supports a conclusion that Respondents have admitted to total PPD benefits in the amount of $16,044.28, per the DIME and, to date, have paid Claimant a total of $16,044.28 for the same. Consequently, Claimant has not shown by a preponderance of the evidence that she is owed additional PPD benefits.

Claimant's Entitlement to Penalties for Respondents Failure to Properly Pay PPD Benefits

D. Under the Workers' Compensation Act, penalties can be imposed against parties for a variety of infractions. Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The failure to state the grounds for penalties with specificity may result in dismissal of the penalty claims. *In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015).

E. The purposes of the specificity requirement are to both: (1) provide notice of the basis of the alleged violation so the putative violator can have an opportunity to cure the violation and (2) provide notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense. *See Major Medical Insurance Fund v. Industrial Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Davis v. K Mart,* WC 4-493-641 (ICAO, Apr. 28, 2004). The notice aspect of the specificity requirement is designed to protect the fundamental due process rights of the alleged violator to be "apprised of the evidence to be considered and afforded a reasonable opportunity to present evidence and argument in support of" its position. *In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015). Nevertheless, the statute does not prescribe a precise form for pleading penalties and an ALJ may consider the circumstances of the individual case to ascertain whether the application for hearing was sufficiently precise to satisfy the statute. *See Davis v. K Mart*, WC 4-493-641 (ICAO Apr. 28, 2004). In this case, the "Penalties" section of Claimant's Application for Hearing states, "Permanent Partial Disability benefits not paid correctly." Respondents' Response to Claimant's Application alleges "Claimant filed to properly and specifically plead penalty allegation." Based upon the evidence presented, the ALJ finds and concludes that Claimant failed to plead a violation of any statute, rule or order sufficiently to place Respondents on notice of the legal and factual bases of the claim for penalties so that Respondents could prepare its defense. Accordingly, the Claimant for penalties is denied and dismissed. Even if Claimant had plead the penalty allegation with specificity, the evidence presented persuades the ALJ that Respondents properly paid for all PPD benefits due and owing in this case. As such, Claimant has failed to establish that Respondents committed an infraction warranting the imposition of penalties. Thus, any claim for penalties, even if plead with specificity, must be denied and dismissed.

Claimant's Entitlement to Reimbursement of the $1,400.00 DIME Fee

F. The Workers' Compensation Act allows a party who disputes the impairment rating of the authorized treating physician to request a Division IME. C.R.S. § 8-42-107.2. The moving party is typically responsible for paying the cost of the DIME, except under circumstances, such as indigency. C.R.S. § 8-42-107.2(5)(a)(II) (2024). A claimant can be deemed indigent by an ALJ by filing an Application for Indigent Determination (DIME) form. WCRP 11-11. "If there is dispute regarding indigency…a party may request a prehearing conference with the division to resolve the dispute." C.R.S. § 8-42-107.2(5)(a)(III). Where a claimant is determined to be indigent, the insurer advances the cost of the DIME on the claimant's behalf and is permitted to offset this cost against future indemnity benefits owed to the claimant. WCRP 11-11(F).

G. Here, Claimant contends that, because Dr. Bird did not assign an impairment rating to the lower right extremity, i.e. her hip and knee, that she had to request a "second DIME". Accordingly, Claimant asserts that she is entitled to a reimbursement for the Division IME. Again, Claimant is mistaken. The purpose of the DIME is to allow a party who is dissatisfied with the opinions of the ATP regarding maximum medical improvement (MMI) and/or impairment to dispute those determinations. In this case, Dr. Bird did not issue an impairment rating for the lower right extremity, even considering her documentation of Claimant's hip and knee injuries. Claimant disagreed with Dr. Bird's determination regarding impairment and requested a DIME, allowing her to gain a rating for the lower right extremity. Although Claimant attempted to be deemed indigent to avoid advancing the cost of the DIME, she was not successful and did not appeal the ALJ's determination. Accordingly, Claimant was properly assessed the cost to proceed with the DIME she requested. Even if Claimant had been determined to be indigent, the Insurer would have been able to recuperate the DIME fee by offsetting the cost against Claimant's indemnity benefits. Claimant provides no authority for her reimbursement request and the ALJ is not aware of any provision permitting a claimant, under the circumstances presented in this case, to be reimbursed for a DIME that he/she requested. Based upon the evidence presented, Claimant has failed to establish that she is entitled to reimbursement for her payment for the DIME she requested.

Claimant's Entitlement to Reopening of Her Claim

H. Pursuant to C.R.S. § 8-43-303(1), at any time within six years after the date of injury a claim can be reopened on the grounds of fraud, overpayment, error, mistake, or change in condition. The party attempting to reopen an issue or claim bears the burden of proof as to any issues sought to be reopened. C.R.S. § 8-43-303(4). In this case, Claimant understood that she had to reopen her claim to receive the PPD benefits she believed were still owed. Respondents contend that Claimant has not provided them with a copy of her request to reopen. Importantly, Claimant has not alleged, nor produced any evidence regarding fraud, overpayment, error, or mistake, and outside her assertion that she remains symptomatic has provided no persuasive evidence establishing that she has suffered a change in her condition. In other words, Claimant has not provided a basis upon which this ALJ can reopen her claim nor taken

the proper procedural steps to do so. Accordingly, any request to reopen the claim, to the extend that such a claim has been made, is denied and dismissed.

ORDER

It is therefore ordered that:

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

2. Claimant's claim for penalties is denied and dismissed.

3. Claimant's request for reimbursement of the DIME fee in the amount of $1,400.00 is denied and dismissed.

4. Claimant's request to reopen her claim, to the extent made, is denied and dismissed.

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

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

DATED: June 30, 2025

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts